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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EVELYN OSEGHALE,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendant and Respondent.

F068768

(Super. Ct. No. S-1500-CV-277956)

OPINION

APPEAL from judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

The Myers Law Group, David P. Myers and Ann Hendrix for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, Celine M. Copper and Melissa F. Day, Deputy Attorneys General, for Defendant and Respondent.

Plaintiff Evelyn Oseghale challenges a summary judgment granted to the California Department of Corrections and Rehabilitation (CDCR) on her causes of action for race discrimination, failure to prevent discrimination, and retaliation related to the ending of her employment as a licensed vocational nurse (LVN).

As to the race discrimination claim, about half of the reasons relied upon by CDCR for ending plaintiff's employment are undisputed and the other half are subject to genuine factual disputes. Under the rules set forth in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 (*Guz*), plaintiff must do more than show that some of the employer's reasons might be dishonest—she must present “further evidence that the true reason was discriminatory.” (*Id.* at p. 361.) The testimony of plaintiff and another black nurse about their *belief* they were discriminated against *because of race* is insufficient to create a triable issue of fact that the motive underlying CDCR's actions might have been racial. Also, plaintiff's assertion that she was singled out for adverse treatment when nonblacks were not disciplined is not supported with evidence showing how nonblacks who committed the same errors were or were not disciplined. Thus, the summary adjudication of plaintiff's causes of action for race discrimination and the failure to prevent discrimination was proper.

As to the retaliation claim, plaintiff has that shown her complaint in late May 2011 about discrimination and a hostile work environment was closely followed by negative treatment and evaluations. Because a trier of fact reasonably can infer retaliatory motive from the close proximity in time of an adverse action following an employee's complaint, plaintiff has presented sufficient evidence to create a triable issue of fact regarding whether the motive for her negative treatment and subsequent discharge was retaliatory.

We therefore reverse the judgment and remand for further proceedings only on the retaliation cause of action.

FACTS

Plaintiff is an African American female of Nigerian origin licensed as an LVN.

Plaintiff's employment history includes working as an LVN at Sierra Vista Rehabilitation Center from August 2006 until November 2007. Plaintiff was terminated from that position effective November 6, 2007, based on a determination that she had committed elder abuse in connection with an incident where she allegedly rubbed the feces of a mentally ill patient onto his face and mouth. She was charged with elder abuse under Penal Code section 368, subdivision (c) and battery under Penal Code section 242, subdivision (c). In 2009, plaintiff accepted a plea bargain and pled no contest to disturbing the peace. She was placed on probation and ordered to take anger management classes.

Subsequently, plaintiff worked as an LVN at the California Rehabilitation Center, located in the City of Norco in Riverside County, California.

In December 2010, plaintiff applied for a LVN position at the Wasco State Prison (WSP) in Kern County. She received positive letters of recommendation from two employees at the Norco facility classified as Supervising Registered Nurse (SRN) II. One letter ranked plaintiff "as one of the best [LVN's] we have ever had" and highly recommended her for employment without reservation. The other letter also recommended her with no reservation and stated it "is an honor to supervise Ms. Oseghale as she makes your job as a supervisor so much easier."

Plaintiff was interviewed for the LVN position at WSP by SRN II Terry Smith (African American) and SRN III Ernesto Leal (Latino). During the interview, plaintiff lied to them about her conviction for disturbing the peace, saying it related to her neighbor's disagreement with a loud house party she threw. She did not disclose that the conviction related to allegations of patient abuse.

The interviewers advised Deborah Bradford¹ that plaintiff presented well and explained the circumstances of her conviction. Based on this advice, Bradford recommended that WSP hire plaintiff.

On March 14, 2011, plaintiff began her probationary period and was assigned to Yard B as a third watch medication nurse.

Plaintiff contends that, around May 2011, a petition stating too many blacks were being hired at WSP was circulating for signatures. However, plaintiff never saw a petition and does not know whether it actually existed. SRN II Keidaw Kobbah, a black female who worked at WSP until October 2011, stated that she gave a note from LVN Ramirez to CNE Bradford. The note stated Ramirez had been approached by another LVN about signing a memo that would be sent to Sacramento saying there were too many blacks being hired at WSP.

CDCR contends that, in mid-May 2011, CNE Bradford came to the conclusion that she would recommend plaintiff be rejected during her probation.² CDCR's evidence, however, does not establish that Bradford's conclusion was reached in mid-May 2011; instead, it shows Bradford eventually determined plaintiff should be rejected on probation and made this recommendation to the Chief Medical Executive.

During the last week of May 2011, incidents occurred that CDCR contends show plaintiff was not fit for her job. Those incidents involve allegations that plaintiff signed

¹ Bradford is an African American registered nurse who became the Director of Nursing at WSP in 2007. In June 2011, about midway through plaintiff's period of employment at WSP, Bradford was promoted to Chief Nurse Executive (CNE) at WSP.

² The assertion is set forth as undisputed material fact (UMF) No. 52 in CDCR's separate statement of undisputed facts in support of its motion for summary judgment. CDCR made this assertion to show plaintiff's complaints about discrimination, which began in late May 2011, could not be causally connected to the decision to end plaintiff's employment and to rely on the "same actor" doctrine.

Medication Administrative Records (MAR) before the medication was given to the inmate, failed to give an inmate Keyhea medication³ as instructed, and failed to give medication to another inmate. These incidents are described in parts III.D.1 through III.D.4, *post*.

After these incidents, plaintiff submitted two handwritten memoranda to Bradford, then Director of Nursing, complaining that SRN II Larson was discriminating against her and harassing her. One was dated May 29, 2011. Bradford informed Larson that plaintiff had complained about her.

After plaintiff's complaint, additional incidents involving plaintiff occurred. These incidents in June and the first half of July 2011 are described in parts III.D.5 through III.D.12, *post*.

On July 15, 2011, plaintiff used preprinted form "CDCR 693 (REV. 06/10)" to file a discrimination complaint (EEO complaint) against SRN II's Larson, Ybarra and Chan and LVN Passion. In the complaint, plaintiff marked boxes alleging discrimination based on national origin (Nigerian or African), harassment, and hostile work environment. Equal Employment Opportunities (EEO) Officer Gerard Brochu reviewed the complaint, spoke with plaintiff about it but asked her no questions, and interviewed no one else. He determined plaintiff's complaint did not present a prima facie case of race or national origin discrimination, but did not consider the boxes plaintiff checked asserting she was being discriminated against because of her race or national origin. Officer Brochu did not send plaintiff's complaint to the Office of Civil Rights for investigation.

³ Keyhea is the name CDCR personnel use for antipsychotic drugs. The name is derived from *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526, which recognized the right of prisoners to refuse psychotropic medication absent a judicial finding of incompetency. (See *In re Qawi* (2004) 32 Cal.4th 1, 18-19.)

Plaintiff's EEO complaint, despite being marked "confidential," was placed in her supervisory file, which is not confidential and could be accessed by the supervisors mentioned in the complaint.

After plaintiff submitted the July 15, 2011, EEO complaint, further events occurred that CDCR contends show plaintiff was not fit for the position and plaintiff contends are instances of discrimination and retaliation. These events are described in parts III.D.13 through III.D.20, *post*.

On October 18, 2011, plaintiff filed a second EEO complaint against SRN II's Larson and Ybarra. The complaint was assigned to P. Brockett, EEO Counselor and Correctional Lieutenant, who found there was a prima facie case against Larson and Ybarra. The complaint was referred to the Office of Civil Rights for investigation. That office rejected the second complaint.

On November 10, 2011, plaintiff was "rejected during probation" and her employment at WSP ended.

PROCEEDINGS

In May 2012, plaintiff filed a complaint against CDCR alleging four causes of action under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.): (1) retaliation for complaining about discrimination and harassment in the workplace; (2) failure to prevent discrimination and harassment; (3) race discrimination; and (4) sexual harassment.

CDCR's answer contained a general denial and affirmative defenses. CDCR's mixed motive affirmative defense alleged that, to the extent any adverse employment action was motivated by both discriminatory and nondiscriminatory reasons, the legitimate nondiscriminatory reasons, standing alone, would have induced CDCR to make the same decision.

In April 2013, CDCR filed a motion for summary judgment with supporting papers.

In June 2013, plaintiff filed an opposition, a separate statement and supporting declarations.

One week before the hearing on the motion, CDCR filed a reply and a document setting forth 75 evidentiary objections to evidence relied upon by plaintiff in her opposition.

In July 2013, the trial court held a hearing on the motion for summary judgment and took the matter under submission. That same day, plaintiff filed a notice of errata that presented pages from depositions that had been referred to in her opposition but omitted from the papers she filed in support of her opposition. Five days later, CDCR filed an objection to the notice of errata on the ground it was untimely because it was filed after the matter was submitted at the end of oral argument.

In September 2013, the trial court issued a unsigned minute order (1) granting the motion for summary judgment, (2) ruling on each of the 75 evidentiary objections presented by CDCR, and (3) sustaining CDCR's objection to plaintiff's notice of errata that was filed after oral argument.

In October 2013, a signed written order granting the motion for summary judgment and a judgment in favor of CDCR were filed.

Subsequently, a notice of entry of the judgment, a notice of entry of the order granting summary judgment, and an order awarding \$9,394.70 in costs to CDCR were filed. Plaintiff appealed.

DISCUSSION

I. EVIDENTIARY OBJECTIONS MADE IN SUMMARY JUDGMENT PROCEEDINGS

A. Standard of Review

1. *Trial Court's Evidentiary Rulings*

The appropriate standard of review for a trial court's rulings on evidentiary objections presented in connection with a motion for summary judgment is unsettled. The uncertainty was created, in part, by the California Supreme Court's statement that "we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 (*Reid*).

Prior to *Reid*, the weight of authority held the abuse of discretion standard applied to review of a trial court's rulings on evidentiary objections in summary judgment proceedings. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014), ¶ 8:168, p. 8-141 through 8-142; e.g., *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

Since *Reid*, some decisions have acknowledged the appropriate standard of review has not been settled and, like the court in *Reid*, determined the outcome was not affected by whether a de novo or abuse of discretion standard was applied. (E.g., *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 144 [ruling excluding declaration that purportedly contradicted an admission in plaintiff's deposition was error under either standard of review]; *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114 [under any applicable standard of review, trial court erred in excluding evidence of custom and usage].)

Other decisions expressly apply the abuse of discretion standard when analyzing a trial court's ruling on evidentiary objections presented in summary judgment proceedings. (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 760 [trial court abused discretion by excluding statement that was admissible as a declaration against interest and by concluding another statement, offered to show the plaintiff was falsely accused, was hearsay]; *Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1199 [no abuse of discretion in overruling plaintiff's objections to lay witness opinions]; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 523 [trial court abused discretion in sustaining objections based on improper authentication of copies and hearsay].)

We too adopt the position that a trial court's rulings on evidentiary objections based on papers alone are reviewed for an abuse of discretion. The abuse of discretion standard, however, calls for varying levels of deference depending on the aspect of the trial court's ruling under review. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.)

For example, the abuse of discretion standard does not allow trial courts to choose an incorrect rule of law or to misapply the correct rule of law. Thus, if the admissibility of evidence requires the trial court to resolve a question of law, the resolution of that question is subject to independent review on appeal. (See *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at p. 712.) In contrast, where the applicable legal criteria for admissibility requires a trial court to consider and weigh multiple factors, the result of that weighing process⁴ will be upheld on appeal so long as the trial court did not exercise its discretion in an arbitrary, capricious or patently absurd manner that resulted in a

⁴ This weighing process is illustrated by the Evidence Code provision that grants courts the discretion to exclude evidence from a trial because "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

manifest miscarriage of justice. (See *People v. Jordan* (1986) 42 Cal.3d 308, 316; *Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1089 [abuse of discretion standard measures whether, given the established evidence, the trial court's decision falls within the permissible range of options set forth by the applicable legal criteria].)

B. Application of Standard of Review

Our review of a particular evidentiary ruling by the trial court will be set forth in the portion of this opinion where that evidence affects whether the parties have established their factual assertions.

II. MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

Appellate courts independently review an order granting summary judgment. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*); *Guz, supra*, 24 Cal.4th at p. 334.) In performing this independent review, appellate courts apply the same three-step analysis as the trial court. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.) First, the court identifies the issues framed by the pleadings. Second, the court determines whether the moving party has established facts justifying judgment in its favor. Finally, in most cases, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact. (*Id.* at p. 1602.)

Courts performing this independent review, consider the evidence in a light favorable to the nonmoving party, liberally construing that party's evidentiary submission while strictly scrutinizing the moving party's own showing and resolving any evidentiary doubts or ambiguities in the losing party's favor. (*Saelzler, supra*, 25 Cal.4th at pp. 768-769.)

Appellate courts do not consider evidence to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz, supra*, 24 Cal.4th at p. 334.)

B. Triable Issues of Material Fact

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) A moving party is entitled to judgment as a matter of law when it establishes by admissible evidence that the “action has no merit or that there is no defense” thereto. (Code Civ. Proc., § 437c, subd. (a).)

Generally, a defendant moving for summary judgment meets this burden by presenting evidence demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-850, 853-854 (*Aguilar*.) Once the defendant makes this showing, the burden shifts to the plaintiff to show a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra*, at p. 850.) There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*Aguilar, supra*, at p. 845.)

These basic principles governing summary judgment motions have been refined when the motion is pursued by an employer accused of employment discrimination or retaliation. The specific principles applied to an employer’s motion for summary judgment are set forth in part III.B., *post*.

III. RACE DISCRIMINATION

State and federal laws prohibit employers from discriminating against employees on the basis of race, sex, or ethnic origin. (Gov. Code, §§ 12940, subd. (a), 12941; 42 U.S.C. § 2000e et seq. [Title VII of the Civil Rights Act of 1964].) Here, plaintiff's fourth cause of action alleges she was discriminated against based on her race in violation of Government Code section 12940, subdivision (a).

A. Establishing a Discrimination Claim at Trial

The United States Supreme Court addressed how employment discrimination cases should be presented *at trial* by adopting a three-stage framework that involves a shifting burden. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804 (*McDonnell Douglas*); see, *Guz, supra*, 24 Cal.4th at pp. 354-355; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 111 (*Reeves*).) The three-stage framework “reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.” (*Guz, supra*, 24 Cal.4th at p. 354.)

The three-stage framework places the initial burden of proof on the employee to present a prima facie case of discrimination, the components of which vary depending upon the particular facts. (*Guz, supra*, 24 Cal.4th at pp. 354-355.) Generally, an employee's prima facie case requires evidence that (1) the plaintiff was a member of a protected class; (2) the plaintiff was performing competently in the position held; (3) the plaintiff suffered an adverse employment action, such as termination or demotion; and (4) some other circumstance suggesting discriminatory motive.⁵ (*Id.* at p. 355.)

⁵ A job applicant's prima facie case is different from the prima facie case of an existing employee. The job applicant establishes the second element by presenting

If an employee establishes a prima facie case at trial, a rebuttable presumption of discrimination arises. (*Guz, supra*, 24 Cal.4th at p. 355, citing *St. Mary’s Honor Center v. Hicks* (1993) 509 U.S. 502, 506.) In the second stage, the burden shifts to the employer to rebut the presumption by presenting a legitimate, nondiscriminatory reason for the challenged action. (*Guz, supra*, at p. 355-356.) “If the employer sustains this burden, the presumption of discrimination disappears.” (*Id.* at p. 356.)

In the third stage, the burden shifts back to the employee to prove discrimination. (*Guz, supra*, 24 Cal.4th at p. 356; See *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*)). This last shift of the burden gives the employee “the opportunity to attack the employer’s proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive.” (*Guz, supra*, 24 Cal.4th at p. 356.) Evidence of dishonest reasons, when considered with the elements of the prima facie case, may permit a trier of fact to find bias on the part of the employer. (*Ibid.*)

B. Rules Specific to Summary Judgment in Employment Cases

Motions for summary judgment filed by employers in employment discrimination cases are subject to a unique set of rules adapted from the burden-shifting test established by the United States Supreme Court in *McDonnell Douglas, supra*, 411 U.S. 792.

The employer, as the moving party, has the initial burden to present admissible evidence showing either that (1) one or more elements of plaintiff’s prima facie case is lacking or (2) the adverse employment action was based upon legitimate, nondiscriminatory factors. (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003, citing *Guz, supra*, 24 Cal.4th at p. 357.)

evidence that he or she was qualified for the position sought and establishes the third element—adverse employment action—by presenting evidence of denial of an available job. (See *Guz, supra*, 24 Cal.4th at p 356.) These variants on the elements of a prima facie case of discrimination do not apply in the instant case because plaintiff was an employee, not a job applicant.

“[I]f nondiscriminatory, [the employer’s] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer’s proffered reasons supports their credibility ..., the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, ‘legitimate’ reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*.” (*Guz, supra*, 24 Cal.4th at p. 358, original italics.) Legitimate reasons include a failure to meet performance standards (*Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1149) and a loss of confidence in an employee (*Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, 352).

If the employer’s moving papers satisfy the initial burden, the burden shifts to the employee to “demonstrate a triable issue by producing substantial evidence that the employer’s stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.” (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038.) In other words, “an employer is entitled to summary judgment if, considering the employer’s innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer’s actual motive was discriminatory.” (*Guz, supra*, 24 Cal.4th at p. 361, fn. omitted.) It is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer’s witnesses or to speculate as to discriminatory motive. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004 (*Hersant*); *Wallis v. J.R. Simplot Co.* (1994) 26 F.3d 885, 890; *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 595-596.) Rather it is incumbent upon the employee to produce “substantial responsive evidence” demonstrating the existence of a material controversy as to pretext or discriminatory animus on the part of the employer.

(*University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, 1039; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)

C. Issues Regarding Discrimination

CDCR did not dispute that plaintiff belongs to a protected class and “further conceded for purposes of the motion only that [plaintiff] established a prima facie discrimination case.” CDCR contends it rejected plaintiff on probation for legitimate, nondiscriminatory reasons because she was an incompetent LVN.

CDCR’s approach is somewhat unusual. It concedes plaintiff established a prima facie case, which includes as its second element that she was performing competently in the position held (*Guz, supra*, 24 Cal.4th at p. 355), and then asserts the reason for her discharge was her incompetence. Nonetheless, we will discuss CDCR’s evidence that plaintiff was incompetent as an attempt to present legitimate reasons for the adverse action, rather than an attack on an element of her prima facie case.

D. Incidents of Plaintiff’s Incompetence Relied Upon by CDCR

1. *May 25, 2011—Failure to Follow Instructions*

CDCR’s UMF No. 26 asserts that on May 25, 2011, plaintiff was instructed by SRN II Larson to give Keyhea medications to an inmate and plaintiff failed to do so. Larson’s declaration stated that she told plaintiff to give Keyhea medication that had been missed on second watch and indicated the importance of ensuring the inmate received his medication that afternoon.

In response, plaintiff’s declaration states: “I did not refuse to give medication under a direct order from my supervisor on ... May 25, 2011 when the medication should have been given; and the MAR reflects that I was not given a write up for allegedly refusing to obey an order, but the other two LVN’s McClellan and Heinze were written up for failing to give a medication on the date in question.” Plaintiff attached a copy of the MAR to her declaration and stated it includes the May 24, 2011, shift in question and

shows that other LVN's worked that shift, did not sign for the medication, and were reprimanded.

As to topics not addressed in plaintiff's declaration, she did not state (1) she actually gave out the medication or (2) she received no instructions to give out the medication.

Our Conclusion: It is undisputed that plaintiff was instructed to give Keyhea medication to an inmate and plaintiff did not give that medication.

Analysis: The statement in plaintiff's declaration that she did not refuse to give medication "on ... May 25, 2011 when the medication should have been given" is qualified so that it does not directly address (1) the instructions given to plaintiff and (2) whether she complied with those instructions. Furthermore, the evidence shows that other LVN's failed to give the medications when scheduled, but the instructions to plaintiff were designed to correct the early omission. Accordingly, plaintiff's evidence does not create a triable issue over whether Larson told her to give the medication and whether plaintiff complied with the instruction.

2. *May 25, 2011—Presigned MAR*

CDCR's UMF No. 27 asserts that, also on May 25, 2011, plaintiff presigned a MAR for an inmate moved from her building to another building and an LVN had to cross out plaintiff's name and put her own because the medication had not been administered.

Plaintiff does not assert she never presigned the MAR, but contends that 10 percent of LVN's were presigning for medication and the SRN's knew it.

Our Conclusion: It is undisputed that plaintiff presigned a MAR.

Analysis: Plaintiff's position that many LVN's were not correctly documenting inmate medications amounts to a claim that she was being singled out for disparate treatment because of her race. This position does not challenge the fundamental fact that

plaintiff resigned a MAR on May 25, 2011. Therefore, that fact has been established for purposes of summary judgment.

Plaintiff's argument that she was singled out for negative evaluations and criticism will be addressed in part III.F.2, *post*.

3. *May 26, 2011—Failure to Give Medication*

CDCR's UMF No. 28 asserts that on or about May 26, 2011, plaintiff failed to ensure an inmate was given his Keyhea medication and, when SRN II Larson discussed the matter with plaintiff, she indicated the inmate failed to show.

Plaintiff disputes these assertions of fact, claiming (1) she was not at work for the shift in question, (2) SRN II Larson wrote up plaintiff for the mistake even though plaintiff was not at work, (3) Bradford knew Larson had written up plaintiff for a mistake that occurred when plaintiff was not at work, and (4) Larson was not disciplined for this action.

CDCR challenges plaintiff's attempt to dispute its assertion of fact on three grounds. First, CDCR objected to plaintiff's evidence as inadmissible. This ground fails because the trial court overruled CDCR's evidentiary objection No. 21.

Second, CDCR contends (1) the declaration and deposition testimony cited by plaintiff were not shown to relate to the facts in UMF No. 28 and (2) plaintiff failed to present timesheets showing she was not working on May 26, 2011.

Third, CDCR argues that, regardless of how the evidence cited by plaintiff is interpreted, "Plaintiff cannot establish motive by showing that Larson or Bradford's honest belief that Plaintiff was working on May 26, 2011, was wrong." This argument is off point insofar as CDCR offered the incident to show that plaintiff was an incompetent LVN.

Our Conclusion: There is a genuine dispute issue about whether plaintiff worked on May 26, 2011. It follows that there is a triable issue about (1) whether plaintiff failed

to give medication to an inmate on that date and (2) whether plaintiff told Larson the inmate failed to show. As a result, the events of May 26, 2011, cannot be relied upon by CDCR to establish, for purposes of summary judgment, that plaintiff was an incompetent LVN.

Analysis: Having reviewed paragraphs 2 through 5 of plaintiff's declaration, the attached MAR's, and pages 284 and 285 of Bradford's deposition, we recognize they are not a model of clarity about what occurred on May 26, 2011. However, applicable law requires this court to consider the evidence in a light favorable to plaintiff, which entails (1) liberally construing her evidentiary submission, (2) strictly scrutinizing the moving party's own showing, and (3) resolving any evidentiary doubts or ambiguities in plaintiff's favor. (*Saelzler, supra*, 25 Cal.4th at pp. 768-769.) Thus, we must resolve in plaintiff's favor the ambiguity in Bradford's deposition testimony about when Larson attempted to write up plaintiff for conduct purportedly occurring on a day when plaintiff was not working. Thus, the day in question might have been May 26, 2011. Accordingly, we conclude the evidence presented creates a dispute of fact regarding whether plaintiff worked on May 26, 2011, and failed to give an inmate medication on that date.

4. *May 27, 2011—Presigned MAR Audit*

CDCR's UMF No. 29 asserts that on May 27, 2011, SRN II Larson audited all MAR's and confirmed that plaintiff presigned MAR's, which is against CDCR policy.

Plaintiff does not contend that she never presigned a MAR. Instead, she asserts (1) Larson had claimed plaintiff was the only LVN who presigned a MAR from 2010 through 2011, (2) at least 10 percent of the LVN's were presigning for medications, which supervising RN's knew, and (3) many LVN's were failing to document on their MAR's medications given to inmates. Furthermore, plaintiff's opening appellate brief

contends that presigning MAR's was an issue where she was singled out to receive discipline when many nonblack LVN's were doing the same thing.

Our Conclusion: Similar to our conclusion in part III.D.2, *ante*, it is undisputed that plaintiff presigned MAR's. Plaintiff's selective enforcement argument is addressed in part III.F.2, *post*.

We note that plaintiff's first complaint about discrimination and harassment occurred shortly after the foregoing events. One of the handwritten memoranda plaintiff submitted to CNE Bradford was dated May 29, 2011.

5. *June 1-3, 2011—Medication to Paroled Inmate*

CDCR's UMF No. 30 asserts that from June 1 through 3, 2011, plaintiff signed the MAR that reported she had given medication on each day to an inmate who had been paroled in May.

Plaintiff does not contend she did not sign or initial the boxes in the MAR for the days in question. Instead, she contends this is another instance of Larson's selective enforcement of policy and procedures against a black LVN.

Our Conclusion: It is undisputed that plaintiff signed the MAR to report given medication to an absent inmate.

6. *Duplicate Meal Tickets*

CDCR's UMF No. 31 asserts CNE Bradford discovered plaintiff repeatedly submitted duplicate requests for meal tickets, double-charging for covering the same suicide watch shifts in May 2011 and also discovered plaintiff had submitted a duplicate request for Adeoye. Bradford met with plaintiff on June 16, 2011, and advised plaintiff that her actions looked dishonest and she must ensure that she only requests her own meal tickets.

Plaintiff disputes the assertion that she submitted duplicate requests, but does not dispute meeting with Bradford about the issue.

First, plaintiff states there was no separate form or document used to request meal tickets. Instead, meal tickets were issued based on the sign out sheet used by the employees.

Second, plaintiff describes the following facts, which she believes explain how her actions were wrongly interpreted as duplicate requests. For one or two shifts when plaintiff was assigned to the suicide watch, there was no sign out sheet for her and the other employees assigned to suicide watch when they went to sign out. Normally, employees assigned to suicide watch all sign out on the same paper. The employees addressed the absent sign out sheet by getting a new form, all signing it and leaving it in the normal place. Plaintiff believes the regular sign out sheet must have been located and presented, which was then interpreted as the submission of duplicate requests for meal tickets.

Third, plaintiff states the meal tickets had a value of \$6.00, she was not at fault and was not disciplined for the purported duplicate requests, and she was not informed that it was an issue that could lead to discipline.

Lastly, plaintiff contends, without citation to the record, that the issue of duplicate requests for meal tickets was not raised in her termination and, thus, could not have been a reason for the termination of her employment.

Our Conclusion: There is a triable issue about whether plaintiff's conduct amounted to a submission of duplicate requests for meal tickets and whether plaintiff submitted a request on behalf of Adeoye. Therefore, the duplicate meal ticket incident does not establish, for purpose of summary judgment, that plaintiff acted in an incompetent manner.

7. *June 2, 2011—Failure to Sign for Narcotics*

CDCR's UMF No. 65 asserts that on June 2, 2011, while in Yard B, SNR II Berwyn Cadiz gave a verbal warning to plaintiff for failing to sign a narcotics form regarding an inmate and plaintiff understood she made a mistake.

Plaintiff does not dispute these facts, which were taken from her responses to special interrogatories. She contends she was under additional scrutiny by her peers and supervisors because of her African descent and "the department routinely had medication errors by all employees."

Our Conclusion: It is undisputed that plaintiff failed to sign for narcotics, was given a verbal warning, and understood she made a mistake. Plaintiff's claim she was singled out because of her race is addressed in part III.F.2, *post*.

8. *July 3, 2011—Presigned MAR*

CDCR's UMF No. 66 asserts that on July 3, 2011, LVN McClellan accused plaintiff of signing off on the MAR as giving medication when she had not given the medication.

Plaintiff admits signing the MAR before going to the inmate to give him the medication. She adds that the inmate was not there so she went back later and gave him the medication, so it was not a situation where the inmate never received the medication.

Our Conclusion: It is undisputed that plaintiff signed the MAR before she gave the medication to the inmate.

9. *July 4, 2011—Mishandled Medications*

CDCR's UMF No. 32 asserts that (1) on July 4, 2011, plaintiff mismanaged inmate transfer medications that should have been turned in and (2) after an audit by SRN II Larson, the medications were located but plaintiff was not in control of medications assigned to her.

These assertions are based on the following paragraph from Larson's declaration: "On or about July 4, 2011, [plaintiff] mismanaged inmate transfer medications that should have been turned in. All other LVN's were present and turned in their medication. After I conducted a medication audit I noticed that medication was missing. I determined that [plaintiff] had not turned hers in as all other LVN's medication was present and accounted for. Another LVN was sent to retrieve the medication."

Plaintiff disputes UMF No. 32, claiming Larson's own documentation shows that plaintiff had not mismanaged or lost control of medications.

Analysis: We have reviewed Larson's July 5, 2011, memo to file and it does not indicate that plaintiff ever had possession or control of the medications. (3 JA 634)! Also, the memo does not provide sufficient details to explain how the fact that LVN Dawson went to the clinic, obtained the medications (from whom is not clear) and returned to Larson with them constituted "mismanagement" of medications by plaintiff. Furthermore, the memo did not state plaintiff had a responsibility to deliver certain transfer medications from the clinic to Larson or specify a time for the delivery. Nevertheless, it is possible to infer from the description given in the memo that plaintiff was tardy in delivering transfer medications to Larson. We, however, cannot draw this inference because applicable law requires courts to strictly scrutinize the moving party's evidence and resolve any evidentiary doubts or ambiguities in favor of the nonmoving party. (*Saelzler, supra*, 25 Cal.4th at pp. 768-769.)

Our Conclusion: The evidence provided by CDCR lacks sufficient detail for this court to conclude plaintiff mismanaged the delivery of transfer medications or had and then lost control of the medications. Thus, this incident does not establish, for purpose of summary judgment, that plaintiff acted in an incompetent manner.

10. *July 7, 2011—ECR for Presigning a MAR*

CDCR's UMF No. 33 asserts (1) plaintiff received an Employee Counseling Record (ECR) issued by SRN II Ybarra for presigning a MAR on July 3, 2011; (2) the MAR reflected an inmate received his morning dose of penicillin; (3) the inmate later complained he had not received the medication; and (4) when asked by Ybarra, plaintiff responded that she was going to give the inmate the medication later.

Plaintiff does not dispute that the ECR was issued and received by her. Instead, she disputes the accuracy of the information in the ECR and asserts the inmate in question was in lockdown and, in those circumstances, LVN's normally sign the MAR for accounting and security purposes before they, accompanied by a custodial officer, take the medication to the inmate cells for administration.

Our Conclusion: Plaintiff has not disputed that she received an ECR for presigning a MAR. Plaintiff's claim she was singled out because of her race is addressed in part III.F.2, *post*.

11. *July 14, 2011—Lack of Help*

CDCR's UMF No. 34 asserts that on July 14, 2011, due to an anticipated staff shortage, SRN II Ybarra redirected a registry LVN previously assigned to assist in plaintiff's area and that plaintiff behaved in a discourteous and unprofessional manner when she phoned Ybarra and stated Ybarra had no right to refuse and redirect plaintiff's help.

Plaintiff disputes this assertion of fact. In her version of events, she states she called other yards to learn why the LVN had been redirected and learned Yard H had three LVN's and was not busy. Then, she called Ybarra to discuss why the registry LVN had been redirected. Ybarra was angry with plaintiff for asking this question and told plaintiff she had no right to question Ybarra's authority. Then Ybarra hung up on plaintiff.

Our Conclusion: There is a triable issue regarding what occurred during the phone call between plaintiff and Ybarra and who was discourteous to whom. Therefore, the purported incident does not establish, for purpose of summary judgment, that plaintiff acted in an unprofessional or incompetent manner.

12. *Subsequent LOI*

CDCR's UMF No. 35 asserts that on August 3, 2011, SRN III (A) Mike Richey issued, and plaintiff received, a Letter of Instruction (LOI) regarding the July 14, 2011, phone call with Ybarra. The LOI, which was not included in the record, advised plaintiff that she was in violation of CDCR policy and that she should demonstrate professionalism at all times.

Plaintiff acknowledges that she received the LOI, but asserts the facts upon which it was based were not true.

Our Conclusion: There is no dispute that plaintiff received the LOI, but there is a dispute regarding the facts upon which the LOI was based. (See part III.D.11, *ante.*)

13. *July 24, 2011—Medications to Paroled Inmate*

CDCR's UMF No. 36 asserts that on July 24, 2011, plaintiff stayed in the pill room for her entire shift, reading a book and not performing her duties. Also, an audit of MAR's by SRN II's Larson and Ybarra revealed that on July 15, 16, and 21 through 24, 2011, plaintiff reported providing medication to an inmate paroled on July 4, 2011. The audit also discovered 30 signatures were missing from plaintiff's report of medications passed, including one injection.

Plaintiff disputes whether the inmate in question was, in fact, on parole. She states the inmate did not show for some of the dates and did show on July 21, 2011. She also states the initials on the MAR for some of the dates were not hers. Plaintiff also disputes the allegation about her reading a book and relaxing for the entire shift. She asserts

Larson and Ybarra did not witness her activity and Ybarra allegedly heard this from an unnamed custody officer and LVN.

Our Conclusion: There is a triable issue regarding what occurred on July 24, 2011, and when and if the inmate in question was on parole.

14. *July 27, 2011—Failure to Sign Post Orders*

CDCR's UMF Nos. 37 and 38 assert that on July 27, 2011, SRN III (A) Richey directed plaintiff to sign her post orders, which list the duties of the LVN assigned to a particular post. Plaintiff felt they were trying to "trap" her to a particular post when she expected to be moved to another unit and, after being told that post orders are required and standard protocol, plaintiff still refused to sign them.

Plaintiff does not dispute that she was directed to sign post orders, she refused to sign, and she believed her supervisors were trying to trap her to a particular post. Instead, plaintiff contends she had received orders from SRN III Leal to move to Yard A (which would have removed her from Larson's supervision) and, therefore, the post orders she was directed to sign were inconsistent with Leal's orders.

Plaintiff also submitted evidence in the form of a declaration by SRN II Kobbah. The declaration set forth Kobbah's belief about the motivation of SRN Medina and others, but does not state the basis for this belief. CDCR's objection No. 36 asserted hearsay, lack of foundation, lack of personal knowledge and inadmissible opinion. The trial court sustained the objection. We conclude the trial court correctly determined that Kobbah did not have personal knowledge of the motivation of the other persons and, thus, Kobbah's statements will not be considered by this court.

Our Conclusion: There is no dispute that plaintiff did not sign the post orders, but there is a factual dispute over whether plaintiff's refusal was justified under the circumstances.

15. *Subsequent LOI Regarding Post Orders*

CDCR's UMF No. 39 asserts that on August 3, 2011, plaintiff received an LOI issued by SRN III (A) Richey for refusing to sign her post orders, which violated a provision in CDCR's Operations Manual.

Plaintiff admits she did not sign the orders and asserts she told Richey she wanted to wait until SNR III Leal returned from vacation to sign the post orders. Leal had told plaintiff she was supposed to go to Yard A and, therefore, plaintiff did not want to sign post orders for Yard B.

Our Conclusion: There is no dispute that plaintiff received the LOI, but there is a factual dispute over whether her refusal was justified under the circumstances.

16. *August 7, 2011—Refusal of Larson's Direct Order*

CDCR's UMF No. 41 asserts that on August 7, 2011, SNR II Larson gave plaintiff a direct order to report to the medical clinic following medication pass and to perform her ancillary duties from that location unless otherwise advised. CDCR also asserts plaintiff told Larson she would not accept Larson's direct order and that Larson could just give her another LOI.

Plaintiff disputes these assertions and contends there is no evidence in the documentation of the event that Larson and plaintiff ever had a conversation. Plaintiff's declarations, however, do not address the events of August 7, 2011, do not deny a conversation took place, and do not offer a different version of the conversation.

Our Conclusion: Plaintiff's oblique challenge is insufficient to create a genuine dispute about whether she received and refused a direct order on August 7, 2011. Therefore, CDCR's assertions of facts, which are taken from Larson's declaration, have been established for purposes of the motion for summary judgment.

17. *August 7, 2011—Subsequent Refusal*

CDCR's UMF No. 42 asserts that (1) later on August 7, 2011, SRN II Ybarra began her rounds and discovered plaintiff was not in the medical clinic; (2) Ybarra located plaintiff in the pill room; (3) plaintiff told Ybarra she had not completed her work; (4) Ybarra reminded plaintiff she was under direct order to return to the medical clinic; (5) plaintiff stated she would not obey Larson's order unless plaintiff thought she was done with her work; (6) Ybarra told plaintiff to work in the medical clinic so she could respond to alarms; (7) plaintiff said no, that she would not obey the order until she felt the work was done; and (8) plaintiff took hold of the door, closing and locking it.

Plaintiff contends that CDCR failed to provide all the facts relevant to the incident. Among other things, plaintiff's version of events states that she was told she had to report to Yard B's clinic when she finished passing out her medications and, at that point, plaintiff left the meeting stating she did not feel comfortable being in the meeting alone. Plaintiff acknowledges that she did not report to the clinic, but passed out her medications and stayed in the building. Plaintiff also asserts that later in the evening Ybarra and another LVN came to the building and told her she had been given a direct order to report to the clinic, which she failed to do. Plaintiff asserts she told Ybarra that she was still doing her reports and refilling inmate's medications and, when she was done, she would report there.

Our Conclusion: It is undisputed that plaintiff was ordered to report to the clinic and she did not comply with the terms of the order. In contrast, there are disputes about the exact content of the statements exchanged between Ybarra and plaintiff, but the disputes about what was said do not involve the terms of the order and plaintiff's failure to comply.

18. *August 7, 2011—Refusal of Lt. Ledbetter Order*

CDCR's UMF No. 43 asserts that (1) on August 7, 2011, SRN II Ybarra returned to the pill room with Lieutenant George Ledbetter and gave plaintiff a direct order that she refused; (2) Ledbetter advised plaintiff that refusing a direct order could result in serious consequences; and (3) plaintiff again stated she would not go to the medical clinic until she thought her work was done and then closed the door on Ybarra and Ledbetter.

Plaintiff contests CDCR's version of events by stating that Sergeant Herrera also was present and Ledbetter merely advised plaintiff that because she was a probationary employee, disciplinary action could be taken against her. Plaintiff also states that, after the conversation was concluded, she remained in the pill room to complete her work, she closed the door, but not "on them," and she returned to the clinic 10 minutes later.

Plaintiff further states that after the incident she talked with Sergeant Rivera and Lieutenant Hart, she was upset and crying, and she explained to them about her July 15, 2011, EEO complaint. Hart said they should have pulled plaintiff from the supervision of Larson and Ybarra. In her deposition, plaintiff testified that she was being harassed and retaliated against and that she did not feel comfortable.

Our Conclusion: It is undisputed that plaintiff was given a direct order and did not comply with the order.

19. *August 19, 2011—Snack Bar LOI*

CDCR's UMF No. 40 asserts that on August 19, 2011, plaintiff received an LOI from SRN II Larson because an audit of staff accountability showed plaintiff had left her work area on August 5, 2011, and went to the institutional snack bar in the administration building without notifying her supervisor and receiving permission.

Plaintiff disputes these assertions on the ground that she received permission from RN Anderson, the RN on duty, to go to the snack bar and get food for herself and for Anderson, who gave plaintiff money for the food. Plaintiff further asserts that when she

returned from the snack bar, Anderson was on the phone with Larson and stated to Larson that plaintiff had been there the whole time with Anderson and had just stepped away to the snack bar.

Evidentiary Objection: CDCR's evidentiary objection No. 13 relates to plaintiff's deposition testimony about (1) Anderson giving her permission to go to the snack bar and (2) the contents of the telephone conversation between Anderson and Larson. The grounds for the objection included hearsay, double hearsay, inadmissible opinion and speculation. The trial court sustained the objection.

First, plaintiff's testimony that Anderson "said yes, that she needed some food, too" when plaintiff asked if she could go get some food is not hearsay, speculation or inadmissible opinion. Where the very fact in controversy is whether certain things were said or done and not whether the matters stated were true or false, the words are admissible as original evidence and are not hearsay. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316; see *People v. Dell* (1991) 232 Cal.App.3d 248, 260-261 ["verbal acts" are outside the hearsay rule, not an exception to the hearsay rule].) Therefore, plaintiff's testimony that Anderson gave her permission orally is admissible as a verbal act.

Second, plaintiff's testimony that Anderson said Larson was on the telephone and asking where plaintiff was is hearsay because it is offered for the truth of the matter asserted—that is, that Larson was in fact the other party to Anderson's telephone conversation and that Larson asked where plaintiff was. Therefore, the ruling sustaining the objection to this testimony will be upheld.

Third, plaintiff's testimony about overhearing part of a telephone conversation involving LVN McClellan in which McClellan said "I don't like her" is not relevant to the assertions of fact made by CDCR in UMF No. 40—that is, plaintiff received an LOI from Larson for going to the snack bar without permission. (See Evid. Code, § 210

[definition of relevant evidence].) Therefore, the ruling sustaining the objection to this testimony will be upheld.

Our Conclusion: Based on the admissible evidence, it is undisputed that plaintiff received an LOI from Larson stating that plaintiff left her work area on August 5, 2011, to go to the snack bar in the administration building, but there is a genuine factual dispute over whether plaintiff received permission from the appropriate supervisor.

20. *September 2, 2011—Overtime Shift*

CDCR's UMF No. 44 asserts that on September 2, 2011, plaintiff received an LOI from SNR II Larson for refusing to work an overtime shift for which plaintiff signed up and for going home because she did not like the fact the work assignment had been changed.

Plaintiff admits she did not work the shift, but states she asked SRN II Chan, who was at the schedule board, if she could go home instead of working the overtime shift and was told (1) she could because it was voluntary and (2) she should write "cancelled" by her name. To explain her request to go home, plaintiff states she had just worked two days of double shifts (her last shifting ending at 10:00 p.m.) when SRN II Kobbah asked her to work a third day of double shifts starting at 6:00 a.m. the next morning. Plaintiff responded by asking to stay on the same suicide watch inmate and Kobbah agreed. When plaintiff arrived the next morning, the assignment had been changed to a post that, last time plaintiff had worked it, caused her to be two hours late for her regular shift beginning at 2:00 p.m.

Plaintiff also states that the LOI in question was issued by SRN II Ybarra (not SRN II Larson) and Ybarra was present in the trailer when Chan told plaintiff she could leave and Ybarra did not indicate there was any problem at the time.⁶

Our Conclusion: It is undisputed that plaintiff received the LOI and that she went home instead of working the overtime shift, but there is a genuine factual dispute about whether she had been authorized to go home or, alternatively, whether it was inappropriate for her to go home.

E. Summary of Facts that are Undisputed

The foregoing discussion demonstrates that CDCR has established some, but not all, of the facts it asserted to rebut plaintiff's prima facie case (and related presumption of discrimination) by showing it had a nondiscriminatory reason for ending plaintiff's employment. (See *Guz, supra*, 24 Cal.4th at pp. 355-356 [employer's burden to rebut presumption].) Therefore, we will summarize the facts CDCR has established are undisputed and then address whether those facts are sufficient to rebut plaintiff's prima facie case.

With respect to plaintiff handling of MAR's, she presigned a MAR on at least two occasions and received an ECR for the second of the two violations of policy. In early June, she completed a MAR for an absent inmate. As to distributing medication, in late May she was instructed to give medication to an inmate and did not comply with the instruction, and in early June she failed to sign for narcotics and was given a warning. Plaintiff acknowledges receiving two LOI's on August 5, 2011, but disputes the version of events stated in those documents. Also, on August 7, 2011, plaintiff was given direct orders three different times and did not comply with those orders.

⁶ Plaintiff's version of this incident is set forth in her declaration. CDCR's evidentiary objection Nos. 24 and 25 related to plaintiff's description of the incident. These objections were overruled by the trial court.

Therefore, CDCR has established eight incidents of inappropriate conduct by plaintiff and her receipt of a warning, three LOI's and one ECR. In contrast, plaintiff has shown triable issues of material fact exist regarding what actually happened in eight other events relied upon by CDCR as grounds justifying the end of her employment.

F. Analysis of Undisputed Facts and Triable Issues of Fact

The events actually established by CDCR's motion for summary judgment are sufficient to carry CDCR's initial burden to present admissible evidence showing the adverse employment action was based upon legitimate, nondiscriminatory factors. (See *Guz, supra*, 24 Cal.4th at pp. 356-357.)

Therefore, the burden shifts to plaintiff to "attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations]." (*Guz, supra*, 24 Cal.4th at p. 357.) The "[i]n an appropriate case" qualification in the prior sentence is explained by the follow statement:

"[E]ven after the plaintiff has presented prima facie evidence sufficient to establish an inference of prohibited discrimination in the absence of explanation, and has also presented evidence that the employer's innocent explanation is false, the employer is nonetheless necessarily entitled to judgment as a matter of law unless the plaintiff thereafter presents further evidence that the true reason was discriminatory." (*Id.* at p. 362, italics omitted.)

1. *Dishonest Reasons*

Plaintiff had established triable issues regarding (1) whether she actually worked on May 26, 2011, and thus was responsible for the failure to give medication to an inmate on that date; (2) whether her actions constituted duplicate requests for meal tickets; (3) whether she mishandled or lost control of medications on July 4, 2011; (4) whether she was discourteous in a July 14, 2011, telephone conversation with SRN II Ybarra; (5)

whether an inmate she reported she gave medication was on parole during July 2011; (6) whether she was justified in refusing to sign post orders on the ground those orders contradicted a previous order by SRN III Leal; (7) whether she obtained appropriate permission to go to the snack bar on August 5, 2011; and (8) whether she obtained authorization (or was otherwise permitted) to go home on the morning of September 2, 2011, rather than work an overtime shift.

If plaintiff proves these incidents did not occur as described by Larson, Ybarra or Bradford, then she will have established that some dishonest reasons were used to justify ending her employment. Under *Guz*, these dishonest reasons provide a factual basis for the trier of fact to infer the prohibited bias, but summary judgment is still required unless plaintiff presents some evidence that the true reason was discriminatory.

2. *Further Evidence of Discrimination*

First, plaintiff contends the racial discrimination against her was part of the great racial tension occurring at WSP and supports this contention by referring to the circulation of a petition stating too many blacks were being hired was WSP. We conclude that the petition, which plaintiff never saw and did not present admissible evidence as to its existence, is not further evidence of discrimination that would satisfy the requirements of *Guz* and preclude summary judgment. Among other things, no evidence connects the petition to any of the supervisors who criticized plaintiff's performance of her job.

Second, plaintiff attempts to show racial discrimination by presenting evidence from SRN II Kobbah. Kobbah quit working at WSP and, in her exit interview with CNE Bradford and the chief medical executive, Kobbah stated that she was leaving because of racial prejudice. However, statements in Kobbah's declaration about being treated very badly and about racial discrimination against her and against plaintiff were based on Kobbah's beliefs and feelings, without identifying the facts that would indicate actions of

others was based on race. Therefore, Kobbah's declaration (even if admissible⁷) and Bradford's account of Kobbah's exit interview are not evidence that the true reason for the potentially dishonest accounts of plaintiff's performance was racial discrimination.

Third, plaintiff argues she can establish pretext with evidence that Larson and Ybarra singled her out for criticism. Plaintiff, however, has not presented evidence to show that other LVN's who had been warned about presigning MAR's *continued to presign MAR's*. Even if one interprets Ybarra's deposition testimony that an estimated 10 percent of LVN's would have been presigning MAR's as a reliable estimate, there is no evidence that any member of the 10 percent continued to presign (1) after the summer of 2011 meeting about presigning or (2) after receiving criticism for presigning a particular MAR. Similarly, plaintiff has not presented evidence showing other LVN's engaged in conduct for which she was criticized and received no criticism.

Fourth, plaintiff contends that where the stated reasons for discharge reflect subjective criticisms of the employee, courts are able to infer pretext. (See *Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1136 [subjective evaluations of employee are susceptible to abuse and more likely to mask pretext]; *Nanty v. Barrows Co.* (9th Cir. 1981) 660 F.2d 1327, 1334 [subjective job criteria provide convenient pretext for discriminatory practices, particularly where job skills are primarily mechanical or physical].) In this case, the eight reasons that CDCR has established as undisputed relate to objective criteria, such as presigning MAR's, failing to follow a direct order, failing to sign for drugs, and signing a MAR for an absent inmate. Therefore, we conclude that this

⁷ For example, Kobbah's statement that she experienced racial discrimination at WSP, witnessed racial prejudice towards plaintiff, and was told by plaintiff about racial prejudice plaintiff experienced is too general to establish the conduct underlying the claim of discrimination was motivated by racial prejudice.

is not a case in which pretext could be inferred by a trier of fact without “further evidence that the true reason was discriminatory.” (*Guz, supra*, 24 Cal.4th at p. 362.)

Fifth, plaintiff argues that the inadequate investigation of her complaints is evidence of both pretext and race discrimination. Plaintiff cites *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 (*Nazir*) for the proposition that an inadequate investigation supports a reasoned inference that the adverse employment action was a product of discriminatory animus. We conclude that in certain situations an inadequate investigation is evidence that the true reason for the adverse employment action was discriminatory or retaliatory, but not every inadequate investigation is evidence of discriminatory motive. The present case lacks the additional circumstances that justify inferring discriminatory animus based on an inadequate investigation.

In *Nazir*, the plaintiff was a Muslim of Pakistani origin who alleged his employment as an airline mechanic was terminated for discriminatory reasons. (*Nazir, supra*, 178 Cal.App.4th at p. 257.) The investigation in question involved a complaint by a female employee that plaintiff had made several inappropriate comments about females to her and grabbed her by the arm. (*Id.* at p. 276.) The airline’s investigations of the harassment complaint against the plaintiff found the allegations were true and his employment was terminated. (*Id.* at pp. 276-277.) The investigation was conducted by the plaintiff’s supervisor and a labor relations person. (*Id.* at p. 277.) The supervisor had been, from time to time, the subject of complaints by plaintiff that asserted the supervisor had failed to take action against employees who called him derogatory names⁸ and were disrespectful. The court, referring to the supervisor and the labor relations person, stated:

“These, then were the persons to lead the [airline’s] investigation, a person who at least inferentially had an axe to grind, assisted by someone who

⁸ Examples of the names are “sand nigger,” “rag head” and “camel jockey.” (*Nazir, supra*, 178 Cal.App.4th at p. 256.)

‘served’ him. Such an investigation can itself be evidence of pretext. As one Court of Appeal described it, such investigation could ‘exploit[] a disciplinary process predisposed to confirm all charges.’ (*Reeves, supra*, 121 Cal.App.4th at p. 120.) And confirm it did, in an ‘investigation’ that can hardly be called ‘thorough.’” (*Nazir, supra*, 178 Cal.App.4th at p. 277.)

Thus, the inference of discriminatory or retaliatory motive approved in *Nazir* was not based solely on an inadequate investigation. Instead, the inference was from an inadequate investigation conducted by an allegedly biased individual who was the subject of earlier complaints of discriminatory conduct by the employee being investigated.

In the present case, however, when an investigation of plaintiff’s complaints is conducted by persons who are not tainted by plaintiff’s earlier complaints, the inadequacy of the investigation is not a sufficient basis for inferring racial animus. There can be many reasons for an inadequate investigation and a further indicia of racial discrimination is needed.

In summary, we conclude that plaintiff has failed to present evidence from which a reasonable trier of fact could find that racial discrimination was the motive underlying the negative treatment of plaintiff by her supervisors.

IV. FAILURE TO PREVENT DISCRIMINATION

Plaintiff’s second cause of action alleges that CDCR violated Government Code section 12940, subdivision (k) by failing to take all reasonable steps necessary to prevent and investigate unlawful discrimination. (1 JA 9:15-17)

Because CDCR has established it is entitled to summary adjudication on plaintiff’s claim of racial discrimination, it logically follows that the discrimination element of plaintiff’s claim for failing to prevent discrimination cannot be established. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 [employer cannot be sued for failing to prevent discrimination that did not happen].) Therefore, CDCR is also entitled to summary adjudication of the claim that it failed to prevent discrimination.

V. RETALIATION

A. Basic Elements and Burdens

Plaintiff's first cause of action was brought under Government Code section 12940, subdivision (h), which prohibits retaliation against employees who resist or object to discrimination or harassment. The subdivision declares it is an unlawful employment practice for "any employer ... or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (*Ibid.*) This provision aids the enforcement of the FEHA and promotes communication and informal dispute resolution in the workplace. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 472 (*Miller*).)

Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in a protected activity, (2) the employer subsequently took adverse employment action against them, and (3) the protected activity and the employer's adverse action were causally connected. (*Miller, supra*, 36 Cal.4th at p. 472 [summary judgment for employer on retaliation claim reversed]; *Yanowitz, supra*, 36 Cal.4th at p. 1042 [summary judgment for employer on retaliation claim reversed].)

The burden-shifting for discrimination claims also is applied to retaliation claims. (*Yanowitz, supra*, 36 Cal.4th at p. 1042.) Therefore, once an employee establishes a prima facie case of retaliation, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. (*Ibid.*) "If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ""drops out of the picture,"" and the burden shifts back to the employee to prove intentional retaliation." (*Ibid.*)

In the context of an employer's motion for summary judgment, the three-stage burden shifting test for a retaliation claim is treated the same as a discrimination claim.

(*Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 831 (*Batarse*)). Therefore, an employer pursuing summary judgment may attempt to show the employee is unable to establish a prima facie case of retaliation or, alternatively, may skip to the second stage and demonstrate the employer had a legitimate business reason, unrelated to retaliation, for taking the adverse employment action. (*Id.* at p. 832.)

When the employer has produced substantial evidence of a legitimate, nondiscriminatory or nonretaliatory reason for the adverse employment action, the plaintiff's opposition to the motion must make a showing of intentional retaliation. (*Batarse, supra*, 209 Cal.App.4th at p. 834.) The employee must offer evidence that (1) the employer's stated reason for the adverse employment action was untrue or pretextual, (2) the employer acted with a discriminatory animus, or (3) a combination of the two. (*Ibid.*) The employee's evidence cannot simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence, and thus infer that the employer did not act for the asserted nonretaliatory reasons. (*Ibid.*)

One type of evidence of retaliatory motive relates to the timing of relevant events. "Close proximity in time of an adverse action to an employee's resistance or opposition to unlawful conduct is often strong evidence of a retaliatory motive." [Citations]." (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1020 (*Scotch*)). Proximity also is evidence of a causal connection. (*Ibid.*)

B. Plaintiff's Prima Facie Showing

1. *Protected Activity*

The protected activity element of a retaliation claim includes a wide range of activity. (*Yanowitz, supra*, 36 Cal.4th at p. 1047, fn. 7.) An employee's opposition to

discrimination or harassment qualifies as protected activity if it is sufficient to “put an employer on notice as to what conduct it should investigate” (*Id.* at p. 1047.) The employee need not use specific legal terms or buzzwords and need not file a formal charge. (*Ibid.*) An employee has engaged in protected activity when he or she opposes conduct and reasonably believes that conduct to be discriminatory, even if a court ultimately determines the challenged conduct did not violate the FEHA. (*Id.* at pp. 1043, 1047.)

Here, plaintiff’s protected activity began in late May when she complained to CNE Bradford about discrimination and inappropriate sexual conduct in the workplace. Her protected activity also includes the submission of her first EEO complaint on July 15, 2011, and the submission of her second EEO complaint on October 18, 2011.

2. *Adverse Employment Action*

In *Yanowitz*, the California Supreme Court concluded the proper standard for defining adverse employment action was a materiality test—that is, whether under the totality of the circumstances the employer’s adverse action materially affected the terms and conditions of the employees. (*Yanowitz, supra*, 36 Cal.4th at p. 1036.) Furthermore, an employer’s alleged retaliatory responses may be considered collectively to determine whether the employee was subjected to an adverse employment action. (*Id.* at p. 1056; *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 210.)

Adverse employment action is not limited to termination of employment, demotion, reduction in salary, or transfer. It includes “adverse treatment that is reasonably likely to impair a reasonable employee’s job performance or prospects for advancement or promotion” (*Yanowitz, supra*, 36 Cal.4th at pp. 1054-1055.) Thus, written reprimands, an employer’s solicitation of negative comments by coworkers, and a one-day suspension constitute adverse employment actions. (*Wideman v. Wal-Mart Stores, Inc.* (11th Cir. 1998) 141 F.3d 1453, 1456.)

Based on the foregoing authority, we conclude that, for purposes of CDCR's motion for summary judgment, the adverse treatment of plaintiff includes the oral reprimands received from her supervisors, the LOI's and ECR, and the decision to end her employment. To the extent that CDCR's arguments suggest this court should adopt the view that the adverse employment action was limited to the termination of plaintiff's employment, we reject that suggestion as contrary to *Yanowitz*.

3. *Causal Link*

The causal link between engaging in protected activity and suffering adverse employment action can be proven when the timing of the latter closely follows the protected activity. (*Scotch, supra*, 173 Cal.App.4th p. 1020.) For example, in *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, the court stated gaps of three or eight months were relatively brief intervals that could support an inference of causation. (*Id.* at p. 468.)

In this case, some of the adverse treatment occurred before plaintiff complained to CNE Bradford in late May 2011. However, most of the other incidents occurred after her complaint to Bradford with some occurring after plaintiff submitted her first EEO complaint on July 15, 2011. Also, Bradford told SNR II Larson about the complaint plaintiff made in May 2011 and, therefore, the causal link is not broken by Larson being unaware of plaintiff's protected activity.

C. CDCR's Legitimate Reasons

As described in the discussion of plaintiff's race discrimination claim, CDCR has established eight incidents of inappropriate conduct by plaintiff that provide a legitimate reason for her termination. In contrast, plaintiff has shown triable issues of material fact exist regarding what actually happened in eight other events relied upon by CDCR as grounds justifying the end of her employment. As previously concluded, the events established by CDCR are sufficient to carry CDCR's burden to present admissible

evidence showing the adverse employment action was based upon legitimate factors. (See *Guz, supra*, 24 Cal.4th at pp. 356-357.) Thus, the burden shifts to plaintiff to show a retaliatory motive.

D. Plaintiff's Showing of Retaliation

Generally speaking, it is easier for a plaintiff to present evidence from which a retaliatory motive can be inferred than it is to present “further evidence that the true reason [for the employer’s action] was discriminatory” as required by *Guz, supra*, 24 Cal.4th at page 362. One reason it is easier to present evidence of a retaliatory motive, as compared to a discriminatory motive, is that a retaliatory motive may be inferred if adverse employment action occurs shortly after the plaintiff engages in protected activity. Therefore, it is not uncommon for a retaliation claim to survive an employer’s motion for summary judgment or adjudication when the discrimination claim is eliminated from the case. (E.g., *Yanowitz, supra*, 36 Cal.4th 1028 [reversed grant of summary judgment on employee’s retaliation claim]; *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283 [summary adjudication of sexual harassment claim affirmed and judgment notwithstanding the verdict on appellant’s retaliation claim reversed]; *Kelley v. The Conco Companies, supra*, 196 Cal.App.4th at p. 210 [summary adjudication of retaliation claim was improper, but summary adjudication of sex discrimination was upheld].)

Here, plaintiff contends that the retaliatory motive can be inferred from the close proximity in time of (1) instances of negative treatment to (2) her complaint to Bradford and her July 15, 2011, EEO complaint. (*Scotch, supra*, 173 Cal.App.4th at p. 1020 [close proximity of adverse action to an employee’s resistance or opposition to unlawful conduct is often strong evidence of a retaliatory motive].) Other evidence that supports the inference of a retaliatory motive consists of the negative treatment based on grounds that plaintiff contends are not accurate. This latter category of evidence refers to the reasons given by CDCR for its decision to end plaintiff’s employment that are subject to

factual disputes and are listed in under the heading “*Dishonest Reasons*” in part III.F.1, *ante*.

Based on the fact that plaintiff’s protected activity began in late May 2011, when she complained to CNE Bradford about discrimination and a hostile work environment and the number of instances of negative treatment (both disputed and undisputed) that followed within the next three months, a trier of fact reasonably could infer that there was a retaliatory motive for the negative treatment of plaintiff.

Therefore, retaliatory motive presents a triable issue of material fact and CDCR is not entitled to summary adjudication of that claim.

DISPOSITION

The judgment is reversed and the trial court’s underlying order is affirmed in part and reversed in part. To implement this disposition, the trial court is directed to vacate its order granting summary judgment and enter a new order granting CDCR summary adjudication on the second, third and fourth causes of action (failure to prevent discrimination, sexual harassment and race discrimination) and denying summary adjudication of plaintiff’s first cause of action for retaliation.

Plaintiff shall recover her costs on appeal.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Gomes, J.