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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANTHONY EARL WHITE, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B264675 Los Angeles County Super. Ct. No. BC486269

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Peter J. Mirich, Judge. Affirmed.

Appleton Law Group and Heather Appleton for Plaintiff and Appellant.

Vanderford & Ruiz, Rodolfo F. Ruiz and Melanie H. Rollins for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Anthony White worked as a custodian for Los Angeles World Airports (airport), a department of the City of Los Angeles (City). White was injured (off the job) in 2005 and took several medical leaves of absence to recover from his injury. When White returned to work in 2008, his prior position (day shift custodial supervisor) was not available and the airport placed him in an available position at the same level on the graveyard shift.[1] White did not like working the night shift and requested a transfer to the day shift as a reasonable accommodation for disabilities related to his 2005 injury. However, because White failed to provide the airport with any viable explanation why working the day shift rather than the night shift would impact his disability, the airport denied his reasonable accommodation request.

White resigned from his position in 2010 on the same day he began serving a sentence on two felony charges in Arizona. He subsequently filed the present lawsuit against the airport, the City, and others, in which he alleges a variety of disability-related employment claims under the Fair Employment and Housing Act (FEHA). The case was tried to a jury. The court granted the airport's nonsuit motion on several claims; the jury found in favor of the airport on White's remaining claims.

White's primary contention on appeal is that the trial court erred in denying his motion for new trial. He argues the evidence does not support either the jury's verdict or the court's nonsuit, and that juror misconduct infected the deliberative process. Due

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[1] We use the terms graveyard shift and night shift interchangeably.

to the numerous deficiencies in White's arguments on appeal, we conclude White failed to carry his burden to affirmatively demonstrate error with respect to the jury's verdicts. We also conclude the court did not err in granting the airport's nonsuit motion on White's retaliation claim. Finally, we find no error in the court's refusal to grant White's demand that the airport produce more than three dozen purported officers, directors and managing agents to testify at trial, or in the court's denial of White's post-trial motion for reasonable expenses, including attorney's fees, under Code of Civil Procedure section 2033.420. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

White worked for the airport[2] as a custodial supervisor on the day shift. Although White's work performance was generally good, White's supervisor, Ken Christ, issued two disciplinary write-ups to White in August and September of 2005: one for failing to report to his supervisor as required, and a second for accessing a restricted area of the airport. Shortly thereafter, White filed a workers' compensation claim, in which he complained of "headaches, neck and shoulder pain due to stressful work environment."

In November 2005, while off duty, White sustained several gunshot wounds to his left leg. White was briefly hospitalized

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[2] White named both the City of Los Angeles and the Los Angeles World Airports, a department of the City of Los Angeles, as defendants in this suit. We refer to them collectively as the "airport" except where a distinction between the defendants is pertinent. White also named several individuals as defendants but, as they are not parties to this appeal, we do not identify or discuss them in the interest of brevity.

and then took an approved six-month medical leave of absence. He returned to work in May 2006 and was assigned to perform light duty tasks in a warehouse. Although White was not working on a custodial crew in the terminals, as he had previously, he was still required to call his custodial supervisor, Christ, on a daily basis. White disagreed that he should have to report to Christ and, despite repeated warnings, refused to make the daily calls; Christ issued a disciplinary write-up to White in early August 2006. At about the same time, White filed a complaint with the airport's human resources department alleging Christ was harassing him due to his disability. The subsequent investigation concluded there was insufficient evidence to support White's discrimination claim.

At the end of August 2006, White took another medical leave of absence which lasted for approximately two years. According to one of White's physicians, White was suffering from "Post Traumatic Stress Disorder and Intractable Pain secondary to gunshot wound in 2005." In May 2008, during his leave, White was arrested in Arizona and was apparently charged with nine felony counts relating to identity theft and fraud.

On July 1, 2008, after a medical examination, White was approved to return to work with no restrictions. In order to work at the Los Angeles International Airport, White needed to obtain a security badge. He filled out the badge application on July 31, 2008, but did not disclose that he had been arrested in Arizona or that felony charges against him were pending.[3] Although the

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[3] The form, which reflects TSA mandated security standards, lists numerous criminal offenses (including crimes involving dishonesty, fraud, or misrepresentation) and asks the applicant to disclose any

badge application only requested information concerning convictions or verdicts, an airport employee charged with a "disqualifying offense," including fraud and theft, is required to notify the airport immediately of the pending charges. The airport did not become aware of White's criminal case until it received a report from the Federal Bureau of Investigation in connection with a routine background and fingerprint check. Pursuant to federal law, the airport issued White a short-term badge which needed to be renewed at three-month intervals until his criminal case was resolved.

Because White's position as day shift custodial supervisor was not available when he returned to work, the airport assigned him to an available custodial supervisor position on the graveyard shift. White requested a transfer to the day shift first on the basis of seniority and experience and later as a reasonable accommodation for his disability. During the early part of 2009, White met several times with Vickie Cartwright-Adams (Adams), a personnel analyst, and other managers and senior staff. The process focused on identifying White's disabilities and any resulting limitations related to performing his job. And although White submitted several doctors' notes indicating he would "benefit" from being transferred to the day shift, a transfer would help him "return to his normal sleep schedule", and his "stress-related illness … is exacerbated by his working the night shift," the notes did not identify any disability-related limitations or explain how a day shift, as opposed to a night shift, would affect White's disability and/or his ability to perform his job.

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convictions or verdicts finding the applicant not guilty by reason of insanity within the last 10 years.

Adams gave White forms designed to obtain his doctors' assistance in identifying his disabilities, any limitations, and the type of accommodation he needed. White never returned the forms. The airport did not grant White's transfer request.

While these discussions were ongoing, White filed a complaint with the City's Office of Discrimination Complaint Resolution (ODCR), asserting that the airport's failure to transfer him to a day shift position was the result of discrimination on the basis of his disability. The subsequent investigation concluded the airport had been engaging in the interactive process in an attempt to determine whether and what sort of reasonable accommodation might be appropriate, and further concluded there was insufficient evidence of discrimination. Around the same time White filed his complaint with the ODCR, he also filed a workers' compensation claim asserting he "sat in [a] bad chair and the back released and went backward jerking my neck, head, and shoulders."

At the beginning of September 2009, White received two discipline write-ups: one was due to White's use of improper forms to submit his annual employee evaluations, and the second was issued after White's supervisor found him sleeping during his shift. In October 2009, White filed a complaint with the California Department of Fair Employment and Housing claiming he had been discriminated against and harassed on the basis of sex, age, race/color, physical disability, and mental disability.

In November 2009, the airport discovered that the Arizona criminal court issued a bench warrant for White's arrest after he failed to appear at a hearing regarding his case. As a result of federally-mandated procedures, the airport could not renew

White's security badge due to the outstanding warrant. In late December 2009, White advised his supervisor that his badge application had been denied. Because White's security badge had expired and could not be renewed, White was placed on unpaid leave.

In April 2010, the airport advised White it was considering whether to terminate his employment because of illegal behavior or conduct in conflict with job duties, violation of the airport's rules, and unexcused, excessive or patterned absenteeism. Later that month, White entered a guilty plea on two felony counts (identity theft and forgery) in the Arizona criminal action, in exchange for dismissal of the remaining counts. His convictions and incarceration[4] notwithstanding, White sent an email to the airport on June 2, 2010, demanding immediate reinstatement to his position with back pay.

In June 2010, the Arizona criminal court sentenced White to a one and one-half year term of imprisonment for the fraud count followed by two years of probation for the forgery count. On the same day he was sentenced, White submitted his resignation to the airport stating as follows: "Since December 31, 2009, I was denied a security badge with [the airport]. Then not being allowed to work for a living at Department of Airport. Have cost me my home, car, and my lifely hood. 'My living.' " [*Sic*.]

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[4] It is unclear from the record exactly when White was taken into custody in Arizona. As of December 23, 2009, the court's bench warrant was still outstanding. On March 2, 2010, White's counsel filed a motion to release White from jail on his own recognizance. His sentence reflects 81 days of pre-sentence custody credit.

In June 2011, one year after his resignation, White filed a second complaint with the California Department of Fair Employment and Housing alleging he had been subjected to harassment, denial of transfer, denial of accommodation, retaliation and constructive discharge due to age, race, and disability. At White's request, the department immediately issued a right-to-sue letter rather than conducting an investigation.

White initiated the present action in June 2012. The operative complaint contains six causes of action: (1) discrimination based upon disabilities (Gov. Code, § 12940, subd. (a))[5]; (2) failure to accommodate disabilities (§ 12940, subd. (m)); (3) failure to engage in the interactive process (§ 12940, subd. (n)); (4) unlawful retaliation (§ 12940, subd. (h)); (5) harassment based upon disabilities (§ 12940, subd. (j)); and (6) failure to prevent discrimination and retaliation (§ 12940, subd. (k)).

A jury trial was held in January 2015. At the close of plaintiff's case, the court granted the airport's motion for nonsuit with respect to White's retaliation and harassment claims. The court also granted a partial nonsuit on plaintiff's failure to prevent discrimination or harassment claim, to the extent that claim was predicated upon the conduct identified in the retaliation and harassment claims. The jury found in favor of the airport on all of White's remaining claims.

White filed a motion for new trial arguing, as pertinent here, that the jury's verdicts were against the weight of the

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[5] All undesignated statutory references are to the Government Code.

evidence and the court's nonsuit on his retaliation claim improperly relied solely on the allegations contained in White's 2006 complaint. White also claimed two jurors committed misconduct: he alleged juror number 12, an employee of the City of Los Angeles, shared his independent knowledge about city policies during deliberations, and juror number 9 concealed during voir dire that he harbored animosity toward employees at his job who complained about working the graveyard shift. The court denied the motion.

In addition, White filed a motion under Code of Civil Procedure section 2033.420, seeking expenses, including attorney's fees, incurred to prove the truth of 16 matters not admitted by the airport in its response to White's requests for admission. The court denied that motion as well.

White then filed a motion for reconsideration of the court's ruling on his motion for new trial. This time, White alleged that three jurors (numbers 1, 2, and 3) discussed the substance of the case and prejudged the case prior to deliberations. He also reasserted his prior claim of misconduct regarding juror number 12. At the hearing on the motion for reconsideration, the court questioned four jurors (numbers 1, 2, and 3, as well as number 6, whose declaration set forth the claim of misconduct) about what transpired during the trial and subsequently concluded no misconduct had occurred.

White timely appeals.

CONTENTIONS

White contends the court erred in denying his motion for new trial. He also contends the court erred in refusing to order the airport to produce numerous witnesses to testify at trial and

further erred in denying his motion for expenses, including attorney's fees, under Code of Civil Procedure section 2033.420.

DISCUSSION

1. An appellant must affirmatively demonstrate both error and prejudice.

There are fundamental rules and principles of appellate practice which govern the types of issues and arguments that may be raised on appeal, the form in which such arguments should be made, and the manner in which the facts should be stated. As will become evident, the presentation of this case on appeal is inadequate in a number of ways. Therefore, we will set forth some of the fundamental principles that guide our consideration of the issues.

The most fundamental rule of appellate review is that the judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Failure to provide an adequate record requires that the issue be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *see Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.)

In addition, both parties must provide citations to the appellate record directing the court to the supporting evidence for each factual assertion contained in that party's briefs. When an opening brief fails to make appropriate references to the record in connection with points urged on appeal, the appellate court may

treat those points as waived or forfeited. (See, e.g., *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 779–801 [several contentions on appeal "forfeited" because appellant failed to provide a single record citation demonstrating it raised those contentions at trial].)

Further, a party who contends that a particular finding is not supported by substantial evidence is obligated to set forth in his or her brief *all* the material evidence on the point, not merely the party's own evidence. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1657–1659.) Facts must be presented in the light most favorable to the judgment (*id.* at pp. 1657–1658), and the burden on appellant to provide a fair summary of the evidence " ' "grows with the complexity of the record. [Citation.]" ' " (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739 (*Myers*); see Cal. Rules of Court, rule 8.204(a)(1)(C)[6] [briefs must support any reference to a matter in the record with a citation to the record]; rule 8.204(a)(2)(C) [appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record"].) The appellant waives a claim of lack of substantial evidence to support a finding by failing to set forth, discuss and analyze all the evidence on that point. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [error is deemed to be waived]; *Myers, supra*, 178 Cal.App.4th at p. 749.)

Finally, an appellant has the burden not only to show error but prejudice from that error. (Cal. Const., art. VI, § 13.) If an

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[6] All further rule citations are to the California Rules of Court.

appellant fails to satisfy that burden, his argument will be rejected on appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) "[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial. [Citations.]" (*Ibid*.)

With these principles in mind, we turn to the arguments advanced by White here.

2. White fails to establish error with respect to the trial court's denial of his motion for new trial on the basis of insufficient evidence.

White contends the court abused its discretion in denying his motion for new trial on his causes of action for disability discrimination, failure to accommodate disabilities, failure to engage in the interactive process, and failure to prevent discrimination and retaliation because the jury's verdicts on those claims are not supported by substantial evidence. We conclude White failed to carry his burden to demonstrate error.

2.1. Standard of Review

Code of Civil Procedure section 657 states: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision … , unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." A trial court has broad discretion in ruling on a new trial motion and the court's exercise of discretion is accorded

great deference on appeal. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871–872.) An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415 (*Rayii*).) "Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence … only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752; *Rayii, supra*, at p. 1416.)

2.2. The denial of a motion for new trial may be reviewed on appeal from the underlying judgment.

White's notice of appeal purports to appeal not only from the judgment but also from the court's orders denying his motion for new trial and his motion for reconsideration. The airport argues White's challenge to those orders is not cognizable because those orders are not directly appealable under Code of Civil Procedure section 904.1. Although the airport is technically correct, the challenged orders are reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18 [noting order denying motion for new trial motion is not separately appealable but may be reviewed on appeal from the underlying judgment]; Code Civ. Proc., § 906 [providing appellate court may review "on any appeal from a judgment, any order on motion for a new trial"].) We proceed accordingly.

2.3. White fails to establish error.

As noted, in reviewing the denial of a motion for new trial on the basis of insufficient evidence, "our power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Charles D. Warner & Sons, Inc. v. Seilon, Inc.* (1974) 37 Cal.App.3d 612, 617; *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.) Although White correctly states the standard of review, he does not integrate it into his analysis—a result that is not surprising, given that almost all of his legal arguments have been copied word-for-word from his motion for new trial. This approach is fatally flawed because it does not account for the critical distinction between the respective roles of the trial court and this court.

In evaluating whether a new trial should be granted for insufficient evidence, the trial court may "review conflicting evidence, weigh its sufficiency, consider credibility of witnesses and draw reasonable inferences from the evidence presented at trial." (*Valdez v. J.D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 512; accord, *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 (*Lane*); Code Civ. Proc., § 657, subd. (6).) But on appeal, we review an order denying a motion for a new trial for an abuse of discretion. One court of appeal explained that deference is accorded to the court's ruling on a motion for new trial because "[t]he trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of

a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials." (*Lane, supra*, 22 Cal.4th at p. 412.)

White's misunderstanding of the standard of review was evident from the outset of the appeal, inasmuch as he failed to provide an adequate record of the proceedings below. Our review of the denial of a motion for new trial typically requires consideration of the entire trial record. When White designated the appellate record, he expressly stated he planned to challenge the court's denial of his motion for new trial and also planned to argue the judgment is not supported by substantial evidence. Accordingly, in order to facilitate our review of those arguments, White should have designated the entire trial (all 13 days of the proceedings) for inclusion in the reporter's transcript. Instead, White designated two days of jury voir dire, two partial days of trial testimony, and one full day of trial testimony.

The designated proceedings provide an insufficient basis to review White's argument that the judgment is not supported by substantial evidence and, as we have said, the failure to provide an adequate record on appeal generally requires us to resolve the issues against the appellant. (See, e.g., *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 ["[A] record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed," internal quotes and brackets omitted].) Had the airport not augmented the record on appeal to include the transcripts from the balance of the trial, we would

have concluded appellant waived his challenge to the court's new trial ruling.

But the fact that we now have a complete record does not cure the remaining deficiencies in White's appeal. First, many of White's citations to the appellate record do not support the facts asserted in his briefs. In his opening brief, for example, White states that when he returned to work in May 2006, he was still required to use crutches to walk and wore a leg brace. But the portions of the record he cites—three pages of clerk's transcript and two pages of trial testimony, make no mention of crutches or a leg brace. In addition, White asserts that during the period of reassignment to the graveyard shift, he suffered from, among other things, Bell's Palsy. Again, the two pages of testimony cited do not include any mention of Bell's Palsy. And although White claims that his medical conditions were exacerbated by "working in the night air, the sounds of the airplanes," there is no mention of night air or the sounds of airplanes in the cited portion of the record.

Our rules of court require that any statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—must be supported by a citation to the record. (Rule 8.204(a)(1)(C).) The purpose of this requirement is to enable appellate justices and staff attorneys to locate relevant portions of the record expeditiously. (See *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745 ["We are a busy court which cannot be expected to search through a voluminous record to discover evidence on a point raised by [a party] when his brief makes no reference to the pages where the evidence on the point can be found in the record," brackets in original,

internal quotes omitted]; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 ["It is the duty of counsel to refer us to the portion of the record supporting his contentions on appeal … . It is neither practical nor appropriate for us to comb the record on [the appellant's] behalf," brackets in original, internal quotes omitted].) "The claimed existence of facts that are not supported by citations to pages in the appellate record, or not appropriately supported by citations, cannot be considered by this court." (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 816, fn. 5.)

Moreover, throughout his brief, White presents only the evidence favoring his position and seems to presume we should reverse the judgment if there is some evidence to support his version of the events at issue. This tactic displays a fundamental misunderstanding of our role as a reviewing court and is, as a result, sorely lacking in persuasive value.

By way of example, White challenges the jury's verdict on his claim that the airport failed to engage in the interactive process (§ 12940, subd. (n)) by arguing that although the airport began an interactive process, it did not do so in good faith.[7]

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[7] " 'The "interactive process" required by the FEHA is an informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively. …' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1013.) " 'Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith.' [Citation.]" (*Id.* at p. 1014.)

Specifically, White asserts the airport "focus[ed] solely on whether White had 'permanent restrictions' and refus[ed] to consider accommodating White absent a showing of 'permanent restrictions,' " followed by more than a dozen record citations.

White's analysis is deficient for a number of reasons. First, because White ignores the evidence favorable to the airport, we could treat the substantial evidence issues as forfeited or waived and simply presume the record contains evidence to sustain every finding of fact. (See *Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 571–572 [appellant ignored fundamental rule of appellate practice obligating him to fairly and completely summarize evidence supporting the judgment]; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 [issue forfeited where party did not fully and fairly discuss conflicting evidence].)

Second, by providing a string of record citations unaccompanied by discussion or analysis of the evidence, White fails to persuade us that the jury's verdicts or the court's ruling on the motion for new trial were wrong. "It is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence. [Citation.] This burden is a 'daunting' one. [Citation.] 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable,* and *show how and why it is insufficient.* [Citation.]' [Citation.] '[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has

shirked his responsibility in this respect.' [Citation.]" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409 (*Huong Que).*)

Third, and in any event, the evidence—when properly viewed in the light most favorable to the judgment—does not support White's assertion that the airport refused to consider any accommodation absent a showing of a "permanent restriction." During the discussions with White about his request for an accommodation, the airport focused mainly on whether White had *any* limitations due to his disability and, if so, how working during the day rather than at night might impact those limitations. Given that White said he could perform his job without *any* accommodation and the City's medical office cleared White to return to work without *any* restrictions, the airport's request for some additional information regarding his request for accommodation was not unreasonable. Plainly, these facts (unmentioned by White) do not support the assertion that the airport did not proceed in good faith during the interactive process.

White's discussion of his other causes of action is similarly infirm but we need not provide a close analysis here because his analysis is defective for yet another reason. White argues, as he did in the trial court, that "the only correct finding" on each cause of action was a verdict in his favor. But because White's discussion focuses myopically on only one *element* of each cause of action, he fails to establish that the *verdict* is not supported by substantial evidence.

For example, with respect to White's claim of disability discrimination, the special verdict form set forth seven questions:

- Did Defendant know that Plaintiff had physical and/or mental conditions which limited any major life activity, including working, walking and/or sleeping?
- Was Plaintiff able to perform the essential job duties with or without reasonable accommodation for his physical and/or mental conditions?
- Did Defendant commit an adverse employment action against Plaintiff?
- Were any of Plaintiff's physical and/or mental conditions a substantial motivating reason for any of Defendant's adverse employment actions against him?
- Were Defendant's stated reasons for each of the adverse employment actions also a substantial motivating reason for each of the adverse employment actions?
- Would Defendant have taken each of the alleged adverse employment actions anyway based on its stated reasons had Defendant not also been substantially motivated by discrimination?
- Were any of Defendant's adverse employment actions a substantial factor in causing harm to Plaintiff?

The jury answered the first two questions in the affirmative but then found the airport did not subject White to any adverse employment action. White argues he "indisputably proved" that he suffered an adverse employment action and on that basis concludes he was entitled to a judgment in his favor on this cause of action. But even if White is correct that no substantial evidence supports the jury's adverse employment

action finding, that fact is insufficient to establish the trial court abused its discretion in denying his motion for new trial. The trial court was required to consider *all* the evidence on the cause of action to determine if the *verdict* (not just one specific factual finding) was against the weight of the evidence. Accordingly, even if (as White urges) the airport subjected him to an adverse employment action, the trial court's ruling would not be an abuse of discretion if, for example, there was no evidence of a causal relationship between the adverse action and a discriminatory motive on the part of the airport. (See *Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923 ["In weighing and evaluating the evidence, the court is a trier-of-fact and is not bound by factual resolutions made by the jury"].)[8]

We have neither the resources nor the obligation to comb through the 23 volumes of appellate record to substantiate White's arguments for him. (See, e.g., *Huong Que, supra,* 150 Cal.App.4th at p. 409 ["If appellants mean to suggest that we must independently search the evidentiary record to determine its sufficiency, they are mistaken"].) Accordingly, and for all these reasons, we conclude White failed to demonstrate that the court erred in denying his motion for new trial on the basis of insufficient evidence.

3. White fails to establish error with respect to the trial court's denial of his motion for new trial on the basis of juror misconduct.

On appellate review of the denial of a motion for new trial on grounds of jury misconduct, "[w]e accept the trial court's

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[8] White took a similar approach with respect to the other three causes of action resolved by the jury.

credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) As White suggests, "[f]or a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361; Code Civ. Proc., § 661.) And to the extent the misconduct deprives a party of a fair trial, it is grounds for reversal. (Code Civ. Proc., § 657, subd. (1) [new trial may be granted based on "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial"].)

Here, White contends three jurors (numbers 1, 2, and 3) engaged in misconduct by discussing the substance of the case and forming opinions about the case prior to jury deliberations. In support of his argument, White cites to a declaration by juror number 6 which he submitted to the court in support of his motion for reconsideration of his motion for new trial. In the declaration, juror number 6 states she observed the three jurors (numbers 1, 2, and 3) together in the hallway on two or three occasions discussing the case prior to deliberations. She alleges she "heard Juror #1 say that Mr. White 'doesn't deserve to get anything' and that he was acting 'like he was entitled' or had a 'sense of entitlement.' " She also claimed she heard juror number 1 say White "was lying about the incident in Arizona and

not remembering being in prison so we can't believe everything else he said."[9]

In the course of his argument, however, White makes no mention of several critical facts. First, the three jurors accused of misconduct submitted declarations in support of the airport's opposition to White's motion for new trial in which they denied discussing the case prior to deliberations. Further, at the hearing on the motion, the court interviewed all four jurors (1, 2, 3, and 6) about the alleged misconduct. Juror number 6 was unable to recall any specific statements she overheard about the case and said, "So in the hallway it was mostly comments along the lines of Mr. White not being very credible because of what happened in Arizona and how he seemed to not remember being in prison or, you know, like what car he was driving during that time." The court then questioned jurors 1, 2, and 3 individually and under oath. Juror number 3 said she "never heard anything" about the case being discussed when she was in the hallway. Similarly, juror number 2 denied ever hearing any of the jurors discussing or evaluating the case in the hallway prior to deliberations. The court questioned juror number 1 in greater detail about comments she may have made in the hallway while talking with other jurors. She acknowledged she uses the word "entitlement" frequently in conversation and recalled specifically using that word during a conversation about her boss which took place in the hallway at some point during the trial. Further,

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[9] White also relies on juror number 6's conclusion that "it was clear to me they had made up their minds before deliberation and the deliberation process was not going to be influential in changing their minds." The court sustained the airport's objection to that statement and we do not consider it.

juror number 1 denied discussing the facts of the case with anyone prior to deliberations and said she deliberated fully and with an open mind. The court concluded no misconduct occurred and, further, that even if the misconduct described by juror number 6 occurred, it was not prejudicial.

It is evident that the court seriously examined White's complaint of juror misconduct and found the jurors' in-court statements about their conduct during the trial to be persuasive. We defer to the court's evaluation of the jurors' statements as well as its assessment of their credibility. (See *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 59 ["In determining whether misconduct occurred, we defer to the trial court's findings of historical fact and credibility determinations if they are supported by substantial evidence"].) We therefore find no error in the court's denial of White's motion for new trial on this basis.

White also asserts juror number 12 committed misconduct by sharing information about policies and procedures relating to a request for transfer based on his own experience as an employee of the City of Los Angeles. Again, White has replicated a portion of his motion for new trial in his opening brief. White addresses neither the contrary evidence submitted by the airport in its opposition to White's motion for new trial nor the court's rulings on the admissibility of the statements contained in the juror declarations submitted in support of and in opposition to the motion for new trial. For example, White does not acknowledge the airport submitted a declaration by juror number 12 in which he denied discussing his personal knowledge of the city's internal policies and procedures during deliberations. Further, although White cites to a declaration by juror number 7

which asserts juror number 12 made improper statements during deliberations, we note that the court sustained the airport's objections to those statements and therefore we do not consider that evidence.

The only other evidence White cites in support of his argument is a declaration by juror number 6 submitted in support of his request for reconsideration of the court's ruling on the motion for new trial. The court declined to reconsider its ruling regarding alleged misconduct by juror number 12 because it limited its analysis to newly discovered evidence of juror misconduct. Because the cited declaration by juror number 6 was not before the court in connection with the motion for new trial, we do not consider it in assessing the court's exercise of its discretion. We therefore reject White's assertion that juror number 12 committed misconduct as unsupported by any evidence.

In sum, we conclude the court did not abuse its discretion in denying White's motion for new trial.

4. Nonsuit on White's retaliation claim was proper.

4.1. Standard of review

"On appeal, we review a grant of nonsuit de novo. [Citation.]" (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1168 (*McNair*); accord *Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1412.) "In reviewing a grant of nonsuit, the appellate court evaluates the evidence in the light most favorable to the plaintiff. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 [(*Nally*)].) The judgment of nonsuit will be affirmed if a judgment for the defendant is required as a matter of law, after resolving

all presumptions, inferences and doubts in favor of the plaintiff. (*Ibid.*)" (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 669.)

"Reversal of a judgment of nonsuit is warranted if there is 'some substance to plaintiff's evidence upon which reasonable minds could differ … .' [Citation.]" (*McNair, supra,* 5 Cal.App.5th at pp. 1168–1169.) "A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.]" (*Nally*, *supra*, 47 Cal.3d at p. 291.) "Stated otherwise, to reverse the nonsuit, this court must find substantial evidence to support a verdict for appellant. (*O'Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729, 733.)" (*Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 685.)

4.2. There is no substantial evidence to support a judgment in White's favor on his retaliation claim.

FEHA makes it unlawful for any employer "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." (§ 12940, subd. (h).) To establish a prima facie case of retaliation, the plaintiff must show he or she engaged in a "protected activity," the employer subjected the employee to an adverse employment action, and a causal link existed between the protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

For purposes of making a prima facie case of retaliation, "the causal link element may be established by an inference

derived from circumstantial evidence." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388 (*McRae*).) Generally, a plaintiff can satisfy his or her initial burden "by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." (*Ibid.*) However, temporal proximity "only satisfies the plaintiff's initial burden." (*Ibid.*) " 'Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] 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. [Citation.]' " (*Ibid.,* quoting *Yanowitz, supra,* 36 Cal.4th at p. 1042.) "The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff 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 hence infer that the employer did not act for the [… asserted] non-discriminatory reasons." (*Id.,* at pp. 388–389, internal citations and quotation marks omitted.)

White identifies three protected activities followed by what he contends are adverse employment actions: the verbal complaint of discrimination he made to Adams in February 2009, followed by the airport's purported "rejection" of his doctor's note and its denial of his transfer request; his April 2, 2009 complaint to the Office of Discrimination Complaint Resolution followed by the April 9, 2009 meeting in which the airport challenged his supplemental doctor's notes and again refused his request for accommodation; and his October 2009 complaint to the Department of Fair Employment and Housing followed by the airport's refusal to renew his security badge in December 2009. Assuming, without deciding, that the employer actions identified by White constitute adverse employment actions, we consider whether there is any evidence of a causal link between the airport's actions and White's complaints.

White relies exclusively on the temporal proximity between these events to establish a causal relationship between them. Proximity in time between an employee's protected activity and an adverse employment action satisfies the employee's prima facie burden in a retaliation case. (*McRae, supra,* 142 Cal.App.4th at p. 388.) It is not, however, sufficient to carry the day. If the employer offers a legitimate, nonretaliatory reason for its adverse action, temporal proximity does not, without more, establish that reason is pretextual. (*Ibid.*)

The trial evidence before the close of White's case established that the airport had a legitimate, nonretaliatory reason for its decision not to transfer White to the day shift. For example, the notes White submitted to support his transfer request did not, on their face, explain how working the day shift, as opposed to the night shift, would affect any disability-related

limitation. Instead, his doctors stated only that working on the day shift would reduce his stress and benefit his sleep schedule. Given that many employees working the graveyard shift might feel the same way, irrespective of disability, the airport acted reasonably when it asked White to provide some additional information about how a transfer to the day shift would accommodate a disability-related limitation. White never provided a response. Further, no day shift supervisor position was available at the pertinent time and the absence of a job opening was due primarily to a restructuring of the custodial department which impacted all employees in the department.

Although we view the evidence in the light most favorable to White on this issue, he is still required to establish that the airport's proffered nonretaliatory reason was pretextual. White does not address this issue on appeal and did not address it in his opposition to the airport's motion for nonsuit. Moreover, we see no evidence on the face of the record which would support an inference that the airport was motivated by retaliatory animus when it denied White's request to transfer to the day shift.

White also asserts the airport's refusal to renew his security badge in December 2009 must have been based upon a retaliatory motive because he "had not been convicted of any disqualifying crimes as of December 30, 2009, so there was no reason for [the airport] to deny renewal of his badge at that time." Prior to that time, the airport renewed White's security badge in three-month increments while it monitored White's criminal case. But, critically, the airport did not renew White's security badge in December 2009 because the Arizona criminal court issued a warrant for his arrest during the preceding three-month period. It is the airport's policy not to issue a

security badge to anyone who has an active warrant for their arrest due to security concerns. This evidence establishes a nonretaliatory motive on the part of the airport. Again, White fails to argue the airport's stated reason for its action was a pretext and we see no evidence in the record which would support such an inference.

In any event, even if we perceived some error in the court's ruling, a reversal of the court's nonsuit would be without practical effect at this point. By this opinion, we affirm the judgment against White on his claim of disability discrimination, including the jury's special finding that White did not suffer an adverse employment action. Given that White identified the same adverse employment actions in connection with his retaliation claim and his disability discrimination claim, principles of collateral estoppel would preclude him from relitigating that issue in any subsequent retrial. Our state's high court has made it clear that collateral estoppel precludes "a party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828, original italics; *In re Joshua J.* (1995) 39 Cal.App.4th 984, 993 ["Under collateral estoppel, the litigation and determination of an issue by final judgment is conclusive upon the parties or their privies in a subsequent suit on a different cause of action"].)

In short, in the absence of evidence that the airport's stated, nonretaliatory reasons for its actions were pretextual and designed to conceal a retaliatory motive, White's retaliation claim fails as a matter of law. Accordingly, the court did not err in granting the airport's motion for nonsuit on that claim.

5. White fails to establish error in the court's denial of his request that the airport produce more than three dozen purported officers, directors, and managing agents to testify at trial.

White contends the court erred by refusing to enforce his demand that the airport produce 38 purported corporate officers, directors and managing agents at trial. We disagree.

Code of Civil Procedure section 1987, subdivision (b), provides a means for a party to compel another party to produce at trial anyone who is "an officer, director, or managing agent" of the other party, upon 10 days notice and without a subpoena. Using this procedure, White demanded that the airport produce 39 potential witnesses at trial. The court denied the request as to all witnesses with the exception of Paula Adams, the Human Resources Director of the airport, because all but one of the other witnesses identified by White were midlevel management employees, not "officers, directors or managing agents" within the meaning of Code of Civil Procedure section 1987. And as to Gina Marie Lindsey, the Executive Director of the airport, the court concluded she had no involvement with and no unique knowledge of the facts of the case.

White contends the court abused its discretion by refusing to enforce his production demand. More particularly, he argues the airport failed to use the proper procedure to challenge his production demand, was required to produce employees whose title included the word "director" because those employees were necessarily "directors" within the meaning of Code of Civil Procedure section 1987, and was also required to produce any employees that investigated White's complaints because those employees "could" be managing agents of the airport. Further,

White urges that the airport "impliedly agreed to act as a liaison between White's counsel and its employees" because it failed to provide White with the employees' home addresses and telephone numbers.

Noticeably absent from White's argument is any discussion of prejudice. As we have emphasized, it is not enough to show the trial court erred; the error must also be prejudicial. "A judgment cannot be set aside on the ground that the court erroneously excluded evidence unless the substance, purpose and relevance of the excluded evidence were made known to the court by an offer of proof or by other means." (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1113 (*Gordon*); *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1223 (*Karlsson*); Evid. Code, § 354.) "An offer of proof is a statement by counsel describing proposed evidence and what he or she intends to prove if such evidence is admitted." (*Gordon,* at p. 1113.) Moreover, a claim of erroneous exclusion of evidence requires the appellant to show that a different outcome was probable if the evidence had been admitted. (*Karlsson,* at p. 1223; Evid. Code, § 354.)

Here, even assuming White could establish that each of the witnesses fell within the scope of Code of Civil Procedure section 1987, he does not explain how the court's refusal to compel those witnesses to appear at trial affected his ability to present his case. He does not, for example, identify which witnesses he planned to call at trial, describe the testimony he would have elicited from those witnesses, or explain how that testimony would have impacted the jury's verdicts or the court's nonsuit. Further, White's briefing below does not contain an explanation or offer of proof which would allow us to evaluate his claim in this court. "One function of an offer [of proof] at trial is to provide a

reviewing court with the means of assessing prejudice from any error [citation], thus enabling a party challenging the judgment to meet its burden of affirmatively showing *reversible* error by an adequate record (citation). Nothing in this record properly shows, beyond surmise, what [the witnesses] would have said." (*Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 161–162; see also *Karlsson, supra,* 140 Cal.App.4th at p. 1223 [reference to excluded evidence only "in general terms" and without any analysis inadequate to show how a more favorable outcome was probable, thereby waiving issue].) In the absence of any consideration of the prejudicial impact of the court's ruling, we are left to speculate about the consequences. This we cannot do.

In short, by failing to address the issue of prejudice, White forfeited or waived his challenge on this issue.

6. White failed to establish any error in the court's denial of his motion for reasonable expenses, including attorney's fees.

Following the trial, White filed a motion under Code of Civil Procedure section 2033.420 seeking expenses, including attorney's fees, in the amount of $239,967. That section provides:

"(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

"(b) The court shall make this order unless it finds any of the following:

(1) An objection to the request was sustained or a response to it was waived under Section 2033.290.

(2) The admission sought was of no substantial importance.

(3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.

(4) There was other good reason for the failure to admit." (Civ. Proc. Code, § 2033.420.)

The determination of the absence of good reason for the denial, whether the requested admission was of substantial importance, and the amount of expenses to be awarded, if any, are all within the sound discretion of the trial court. (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 753.) " 'An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable. [Citation.]' [Citation.]" (*Ibid*.)

White contends the airport refused to admit facts asserted in 16 of his requests for admission and that he proved the facts contained in those 16 requests at trial. Apparently, White assumes that if he proved a fact at trial and the airport denied it during discovery, he is automatically entitled to an award of costs and fees. White fails to discuss the factors set forth in Code of Civil Procedure section 2033.420, subdivision (b), and also fails to analyze the trial court's ruling on his motion. We find this omission especially puzzling in light of the fact that the court issued a detailed, four-page single-spaced ruling addressing each

of White's requests for admission individually and analyzing both the airport's response and the resolution of the issues at trial.

For example, as to White's request for admission number 11, the court provided the following analysis:

"RFA #11: Admit that, as of July 2, 2008, YOU were aware Anthony White was disabled. Plaintiff's request for attorney fees [and] costs is denied. … [¶] The jury's finding in the Special Verdict that Plaintiff had a physical and/or mental condition(s) which limited any major life activity is insufficient to establish that Defendant was aware (as of July 2, 2008) that Plaintiff was disabled, or that Defendant was aware (as of July 2, 2008) that Plaintiff suffered from at least one disability. The Court notes evidence that Plaintiff advised [the airport] that he could perform his job and that upon reporting to work on July 1, 2008, the City of Los Angeles Medical Services Department found that Plaintiff did not have work restriction(s). The Court finds [the airport] had a reasonable ground to believe it would prevail on this issue." The court's analysis of each of the other requests for admission identified by White proceeds in a similarly diligent fashion, discussing the pertinent evidence and evaluating the airport's responses for reasonableness.

As we have noted, it is the appellant's burden to affirmatively establish error on the part of the trial court. White's failure to discuss the court's ruling and develop any argument addressed to the court's exercise of its discretion is fatal to his claim of error. We therefore affirm the court's ruling on this issue without further discussion.

DISPOSITION

The judgment and the post-trial order denying White's motion for reasonable expenses under Code of Civil Procedure section 2033.420 are affirmed. The airport shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

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