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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KATHERINE EIDSON, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Appellant.	A158666 (Alameda County Super. Ct. No. RG17856649)

Appellant Katherine Eidson, a longtime electrician for Lawrence Berkeley National Laboratory (the Lab), complained about alleged gender discrimination. As part of an ensuing investigation, the Lab learned that Eidson's job required her to climb ladders in violation of permanent medical restrictions adopted years earlier after Eidson suffered a head injury. Eidson was offered a new position that paid more and did not require her to climb ladders, and she accepted it "under protest." She then sued for discrimination based on both gender and disability. The jury rejected her gender-based claims, a determination that Eidson does not challenge. Although the jury found in Eidson's favor on her disability-based claims and a retaliation claim, the trial court issued post-trial rulings setting aside the jury's verdict. Eidson challenges these rulings on appeal. We affirm. Eidson failed to present substantial evidence that she could perform all of the

essential duties of her former job given her medical restrictions, that the Lab lacked a legitimate reason to transfer her to the new position, that the transfer was a pretext for discrimination, or that the transfer was retaliatory.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Eidson trained to become an electrician in the 1980s. In the summer of 2001 she began working as a contractor for the Lab, which is managed by respondent Regents of the University of California (Regents). The Lab is a 200-acre site in the Berkeley Hills. After three or four months, Eidson applied for and was offered a permanent position as a career electrician at the Lab. She became a permanent Lab employee in November 2001 and was assigned to "MRO," the maintenance, repair, and operation group. She worked with the fire alarm electrician crew.

In November 2006, Eidson fell off a ladder at work while rewiring a switch. She hit her head against a concrete wall, causing a major head injury. After the accident, Eidson suffered dizziness, vertigo, and short-term memory loss; struggled to maintain balance; and could not drive. She was out on medical leave for just over a year—until December 2007–to recover.

A return-to-work coordinator/accommodations specialist worked closely with Eidson and Eidson's treating physician to determine whether she needed work accommodations. As of November 2007, Eidson was restricted from working at heights, climbing, and working in low-level illumination, and she was to be reassessed in 90 days. She was cleared to work for four hours each day and was to be provided clerical work if available. Eidson was eager to return to work but disappointed that she could not return to her previous electrician job since that involved climbing ladders, which she understood she could not do at that time. She was still experiencing vertigo and dizziness,

and she was concerned about whether she would improve. Eidson returned to work on the fire alarm crew, but instead of working in the field she worked mostly in an office.

The Lab continued to reassess what types of accommodations and work restrictions were appropriate for Eidson. Over time, she was gradually cleared to work more hours each day. In September 2008, Eidson was able to work six hours each day, but she still was not permitted to climb. The following month, she was to continue to work five to six hours per day, but still not climb or work at heights. By March 2009, Eidson was permitted to work up to seven hours a day for the following two months, but she still was not permitted to work at heights. For the period May 12 through August 11, 2009, Eidson was cleared to work five to eight hours each day, but she was not allowed to work at unprotected heights. In February 2010, Eidson's doctor told her she was not to work with ladders.

Eidson was involved in assessing her recovery and determining appropriate job duties. In May 2010 the accommodations specialist was wondering if the Lab should consider adopting permanent accommodations, and she emailed Eidson and asked if her doctor had indicated whether further recovery was likely. Eidson responded that she was "a happy electrician and a good worker for" the Lab but that "at this time it appears that ladders can't be in my future."

In fall 2010 Eidson became a "fire alarm crew lead." A "lead" is different from a supervisor, and Eidson continued to be supervised by the head of the fire alarm crew. Her role was to ensure that electricians had the proper tools and were following safety requirements, and she also monitored their work hours.

Eidson was sent to a qualified medical examiner approved by the Division of Workers Compensation for the purpose of evaluating her level of disability. Eidson testified that she told the examiner that part of her job was climbing ladders. The examiner noted that Eidson still had problems with her inner ear and still experienced vertigo. The examiner concluded that Eidson should not work at exposed heights or with extremely heavy machinery with such a capacity that she could place herself or others at risk if she were to experience vertigo, and these became her permanent work restrictions. The examiner concluded that Eidson could continue working as a fire alarm crew leader. At this point (September 2010), Eidson was considered "permanent and stationary," a workers' compensation term meaning that her condition was not expected to change, either for the better or for the worse.

The accommodations specialist interpreted the examiner's conclusion that Eidson was not to work at exposed heights to mean that Eidson could not climb ladders. In the specialist's view, the fact that Eidson's doctor had reported that Eidson had "persistent vestibular dysfunction," meaning damage to her inner ear (which controls balance), precluded her from climbing ladders. The specialist did not seek clarification on the issue from the examining doctor.

According to Eidson, by 2010 the climbing-ladders restriction "was taken away. I could climb ladders, but I could not work off of them at that time." To Eidson, "climbing a ladder" means someone has three points of contact (i.e., the person is gripping the ladder). By contrast, "working off a ladder" means "hav[ing] to lift your hands to do your work and you no longer have the three points of contact," which she did not have to do as a supervisor. Eidson acknowledged on cross-examination that she was never

specifically told that she could climb ladders. Her interpretation of an "exposed height" was "a height where you could have harm come to you and—at which point they initiate fall protection gear." She also knew "that the laboratory doesn't let a person work at an uncontrolled height and that if you need to go to an uncontrolled height, you need to put on fall protection gear." She considered working on roofs to be working at an exposed height "only when you get within a certain number of feet from the edge of [a] building."

The accommodations specialist conveyed Eidson's permanent restrictions to management. In February 2011 the Lab gave Eidson a special job as a life safety specialist in an environmental health and safety classification that accommodated her medical restrictions. She was awarded a six percent raise. The job involved reviewing and revising standard operating procedures for fire alarm electricians to ensure compliance with the fire code. It was the accommodations specialist's understanding that the position did not require Eidson to climb ladders. The specialist had trouble, though, obtaining an official description of the position.

Within a few months, Eidson also took on supervisorial duties after the retirement of a coworker, but the description of her position was not changed to match the duties she was actually performing. At trial, Eidson's theory was that she should have been classified as a "technical supervisor" at this time, because she took on additional duties without being reclassified from her environmental health and safety classification. In any event, she welcomed the "opportunity for growth." She was on roofs "much less" after she became a supervisor. Eidson initially supervised fire-alarm electricians, and later she was assigned additional reports who performed other duties, for a total of 12 people she supervised.

At some point, Eidson learned that she was being paid less than the other supervisors in maintenance, repair, and operations. She also learned that they were being invited to training sessions that she was not being invited to attend. She was concerned that she "had been verbally given" a supervisor job but "remained in a completely separate classification from the other people who were doing the job."

In October 2011, Eidson asked for her position be defined. A human resources employee emailed a description of Eidson's "life safety systems specialist" position to Eidson, her supervisor, and the accommodations specialist. The official position description did not require climbing ladders or working at exposed heights. Eidson did not believe that the description was an accurate reflection of the work she was performing, because it did not encompass all of her supervisorial duties. Around this time, she worked on roofs "[q]uite a bit," meaning "quarterly, if not monthly." Larger buildings at the Lab tended to have stairwells that led to the roofs. A few buildings did not have stairways to the roofs, however, and Eidson accessed those roofs by climbing a ladder. Of the roofs Eidson was required to go onto to perform her job as supervisor, the "the minority" of them were accessed by ladders.

A new manager, Michael Jang, took over Eidson's group in December 2011. Eidson had worked with Jang before and had had a good working relationship with him, but their relationship changed after he became her supervisor. She testified at trial that he talked over her in meetings and excluded her from meetings with other supervisors. She also reported that Jang told her that others had a negative perception of her and that "[t]he guys don't like working for a woman."

Eidson asked Jang several times about having her classification changed, but, according to Eidson, he told her that "it's not important what

the classification is, it's the work you do." Eidson disagreed because she considered her classification important for purposes of seniority. When Eidson asked about her pay, Jang would tell her, "Well, it's legacy, it's from the old days, one of them [the other supervisors] was that high because of legacy, you'll never—you'll never be able to go there."

In 2012 Eidson looked up the public salary information for Lab employees that had taken effect the previous October to compare her salary to her those of her colleagues. She learned she "was at the bottom of the list" for pay. Later that year, in the fall, Jang told Eidson she was no longer the fire alarm supervisor because upper management was "reprioritizing." Instead, she would continue to supervise the electricians but not fire-alarm electricians. According to Eidson, Jang continued to compare her unfavorably to male colleagues and told her that "women do not have any business down in the maintenance department."

A new interim, acting director of facilities joined the Lab in December 2013. That same month, Eidson complained to the facilities director about her treatment. She filed a formal grievance with the Lab the following month, in January 2014. Eidson wanted her job classification changed to reflect her job duties, and she wanted to receive pay equity so that she was paid commensurate with the men. She also raised the issue of whether Jang was treating her differently based on her sex and had made discriminatory comments to her. The facilities director began an investigation. The human resources department also brought in an outside investigator.

Apparently as part of the investigation, the Lab learned that Eidson's job duties had "morphed over time" and did not fully conform to the medical restrictions, which had not changed since 2010 (no exposed heights or heavy

machinery). In January 2014, the accommodations specialist provided these restrictions to the Lab's labor-and-employee relations unit. Staff was "confused" and wondered "what's going on" because Eidson's then-current duties did not "seem to connect to the original position description where she was brought back as a life safety specialist." Wanting to keep Eidson safe, the manager was "very concerned that [the Lab was] violating her medical restrictions." In an email exchange about the confusion, a labor-relations consultant said, "I have heart palpitations at this time. OMG," and the labor manager said she did, too, because they "were very concerned for Ms. Eidson and for the division and very worried that we may have been violating her medical restrictions."

Around this time, the facilities director learned that Eidson was accessing some rooftops that required her to climb ladders. The director told Eidson that she could no longer climb ladders without a doctor's authorization. The Lab's labor manager told Eidson that because of her medical restrictions she could not work as a technical supervisor overseeing people who work at exposed heights. Eidson repeatedly told the manager that she had no medical restrictions, but she did not provide a doctor's authorization to climb ladders. She acknowledged at trial that Lab electricians need to be able to climb ladders.

As for the investigation into Eidson's discrimination allegations, the outside investigator reported in March 2014 that he was having difficulty reaching a conclusion because there were no corroborating witnesses to Eidson's version of events. He reported that as a result, his investigation was inconclusive. The investigator did say that the Lab should look into whether Eidson was properly classified and whether her pay was appropriate because Eidson's position description did not appear to match the work she was

actually doing. The Lab's human resources department conducted an analysis and concluded that there were no issues with Eidson's classification or pay. But the facilities director continued to investigate because Eidson had supervised eight tradespeople for about three years in order to fill what was supposed to be a short-term operational need.

By March or April 2014, the facilities director was concerned about keeping Eidson in her current position, because she seemed unhappy and was dissatisfied with having to report to Jang. The director described a "very high-stress [work] environment," and he was "very concerned about [Eidson] being unhappy in a situation that was critical to the laboratory" and where Eidson "didn't have much experience in . . . leading in that kind of an organizational environment." He believed that she would be more effective if she were to enjoy her work environment, and that this would be "a win-win for everybody." In early April, the director told Eidson that the results of the outside investigation were inconclusive, and that he was trying to secure a job for her in the "EH&S" (environment health and safety) department. Eidson said that was unacceptable because she wanted to stay in maintenance, repair, and operations; and she refused the position in the other department because she would lose her seniority and believed she would be more vulnerable to possible future layoffs. She was "quite willing" to remain in her current department and "could not see why" she could not do so.

The Lab ultimately offered Eidson a job in the commissioning department, which was a promotion that offered a higher pay range. Eidson accepted the job but did so "under protest" because she did not want to change positions. Her new position was not an electrician job. Instead, it involved reviewing documentation to ensure that newly constructed buildings

complied with codes, including the electrical code. The labor manager reported that Eidson was transferred because "we wanted to make sure that her medical accommodation was being adhered to correctly right away." But according to the facilities director, the move "had nothing to do with [Eidson's] ladder restriction," and instead was motivated by trying to find a job where Eidson would be successful. He thought she would be a good fit because Eidson "had a reputation [for] being very good with documentation." Eidson was unhappy in her new position because she did not feel challenged and she felt as if she had been sidelined.

Eidson's grievance with the Lab was denied. She appealed, but the appeal was also denied. The Lab did, however, agree to compensate Eidson $7,800 ($200 per month for a period between 2011 to 2014) because she had been performing additional responsibilities during that time frame. An arbitration was scheduled after Eidson filed another appeal, but Eidson decided on the scheduled day of the arbitration not to go forward because she became physically ill anticipating it.

In April 2017 Eidson initiated this lawsuit. She alleged discrimination based on sex; retaliation; failure to prevent harassment, discrimination, or retaliation; and disability discrimination, all in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). She also alleged a cause of action for discrimination in pay based on sex in violation of the California Equal Pay Act (Lab. Code, § 1197.5).

As of the time of trial in May 2019, Eidson was still employed by the Lab in the commissioning department. Since being transferred, Eidson had not applied for any other Lab position. She had received annual pay increases. She nonetheless continued to be unhappy in her position, and she

wanted to be "able to do a job that utilized [her] skills and [her] passion, a job that was [hers]." She did not, however, have a specific position in mind.

In closing argument, Eidson's counsel argued that the Lab's decision to transfer Eidson in 2014 amounted to gender discrimination and retaliation for complaining about gender discrimination. Counsel also argued that the Lab "moved her because of her medical restrictions. That's disability discrimination." Counsel argued that transferring Eidson because of medical restrictions that she denied having amounted to disability discrimination, because "[d]eciding that someone cannot perform a job because of assumptions about their disability is discrimination." Counsel also argued that employees of the Lab retaliated against Eidson "when they refused to listen to her explanation that she could climb on ladders and they denied her the opportunity to continue to work as a technical supervisor and grow in her career."

The jury found against Eidson on her gender-based claims, including her claim under the Equal Pay Act, but found in her favor on her disability-based claims. Jurors concluded that Eidson suffered an adverse employment action as the result of disability discrimination and retaliation. They also found that reasonable steps were not taken to prevent discrimination or retaliation. The jury awarded Eidson $325,000 in damages: $25,000 in lost past earnings, $100,000 in lost future earnings, $100,000 in lost retirement benefits, and $100,000 in noneconomic damages.

After judgment was entered on the jury verdict, the Regents filed both a motion for judgment notwithstanding the verdict (JNOV) and a motion for a new trial. The trial court granted both motions.

In its order granting the Regents' JNOV, the trial court concluded that Eidson's 2014 transfer was not an adverse employment action, because

Eidson had proffered no evidence that it was a demotion or that she received a reduction in pay or benefits. And in its order granting the motion for new trial, the court concluded that (1) Eidson could not recover economic damages because her damages expert testified only about gender discrimination in 2011 and not about the 2014 transfer, and (2) the transfer did not amount to an adverse employment action.

Eidson appealed from the judgment (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285, fn. 2 [order granting JNOV is not appealable, appeal is from the ensuing judgment]), and the Regents filed a cross-appeal from the original judgment (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910 [protective cross-appeal necessary because reversal of grant of new trial automatically reinstates original judgment]).

II.
DISCUSSION

Eidson argues that the trial court erred in granting the Lab's motion for JNOV on her discrimination claims because, contrary to the trial court's finding, her transfer to the commissioning department constituted an adverse employment action. In their cross-appeal, the Regents argue that the jury's verdict was not supported by substantial evidence. Both of these arguments require us to review the record for substantial evidence, and we affirm the judgment in the Regents' favor because no such evidence supports Eidson's disability-based claims. In light of this conclusion, we need not address whether the trial court erred in granting the Lab's motion for a new trial.

A. We Must Affirm a Trial Court's Order Granting JNOV if Substantial Evidence Does Not Support the Jury's Verdict.

"A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support."

(*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "The court may not weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses. The court must deny the motion if there is any substantial evidence to support the verdict. [Citations.] This court therefore may uphold the order granting judgment notwithstanding the verdict, and affirm the judgment based thereon only if, reviewing all the evidence in the light most favorable to [Eidson], resolving all conflicts, and drawing all inferences in her favor, and deferring to the implicit credibility determinations of the trial of fact, there was no substantial evidence to support the jury's verdict in her favor. 'If the evidence is conflicting or if several reasonable inferences may be drawn,' the court erred in granting the motion and we must reverse." (*Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 72–73.) " 'However, we may not defer to [the jury's verdict] entirely. "[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." ' " (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 339.)

B. Substantial Evidence Does Not Support the Jury's Verdict on Eidson's Disability-Based Claims.

1. Eidson's Disability Discrimination Cause of Action Fails Because Eidson Did Not Establish She Was Able To Perform the Essential Duties of Her Job Before Being Transferred.

FEHA prohibits an employer from discriminating against a person "in compensation or in terms, conditions, or privileges of employment" based on physical disability. (Gov. Code, § 12940, subd. (a).) But this proscription is limited where the employee, because of a physical disability, "is unable to

perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. (Gov. Code, § 12940, subd. (a)(1).) Thus, as the jury was instructed, in order to establish that the Regents wrongfully discriminated against her based on her disability, Eidson was required to prove that (1) the Regents was an employer, (2) Eidson was an employee of the Regents, (3) the Regents knew that Eidson had a disability that limited a major life activity, (4) Eidson was able to perform the essential job duties, (5) the Regents subjected Edison to an adverse employment action, (6) Eidson's disability was a substantial motivating reason for the Regents' conduct, (7) Eidson was harmed, and (8) the Regents' conduct was a substantial factor in causing Eidson's harm. (CACI No. 2540.)

The trial court concluded that, as a matter of law, Eidson failed to prove the fifth element—that she suffered an adverse employment action. Her claims for retaliation and failure to prevent discrimination likewise required her to prove that she suffered an adverse employment action. (CACI Nos. 2505 [adverse employment action element of retaliation cause of action], 2527 [retaliation or discrimination an element of cause of action for failure to prevent discrimination].)

We therefore begin by discussing the law on what constitutes an adverse employment action, even though we ultimately conclude that we need not decide whether the trial court's ruling on this point was correct because no substantial evidence supports a conclusion that the 2014 transfer was for illegitimate reasons. The term "adverse employment action" "has become a familiar shorthand expression referring to the kind, nature, or degree of adverse action against an employee that will support a cause of

action under a relevant provision of an employment discrimination statute." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1049 (*Yanowitz*).) "[A]lthough an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Id.* at p. 1052.) To recover under a theory of unlawful discrimination or retaliation, an employee "must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity. [Citation.] 'A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient.' [Citation.] ' "[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." [Citation.] If every minor change in working conditions or trivial action were a materially adverse action then any "action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." [Citation.]' [Citation.] The plaintiff must show the employer's retaliatory actions had a detrimental and substantial effect on the plaintiff's employment." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386 (*McRae*).) "[T]he phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against

employment discrimination." (*Yanowitz*, *supra*, at p. 1054.) An adverse employment action is not limited to a termination or demotion and instead covers "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Ibid.*)

There is no dispute that Eidson was subjectively unhappy about the 2014 transfer. Although she accepted the Lab's offer to the new position she did so "under protest," and she felt sidelined as a result of the move. But again, a change that is " 'not to the employee's liking is insufficient.' " (*McRae*, *supra*, 142 Cal.App.4th at p. 386; see also *Burlington N. & S. F. R. Co. v. White* (2006) 548 U.S. 53, 68–69 ["An objective standard is judicially administrable" and "avoids the uncertainties und unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual feelings"].)

In granting the Regents' JNOV, the trial court focused on the objective results of the transfer. It concluded that Eidson "proffered no evidence establishing that [the 2014 transfer] was a demotion, or that she received a reduction in pay or in benefits. She did not offer any evidence that she was denied promotional opportunities due to the transfer, and she in fact testified that she had the right to apply for any position or promotion she wanted, but simply elected not to do so." The court further observed that Eidson's new position came with a higher salary and greater earnings potential, she received six raises after being transferred, and her salary at the time of trial made her the fourth-highest paid employee in her classification. Thus, the court determined that the 2014 transfer, "giving all fair and reasonable inferences to be deduced from the evidence, did not as a matter of law, constitute an adverse employment action."

Eidson insists that her transfer amounted to an adverse employment action. She relies on several cases holding that "transfers to materially different jobs" may constitute adverse employment actions, even without a loss in pay or benefits. We acknowledge, as a general matter, that lateral transfers have in some instances been determined to have been adverse employment actions. (E.g., *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1385–1386, 1389–1390 [middle school where principal was transferred after reporting legal violations "presented [a] different world" from previous middle school because of different size, school populations, and schedule]; *Caraballo-Caraballo v. Correctional Admin.* (1st Cir. 2018) 892 F.3d 53, 61 [transfer may qualify as adverse employment action even without diminution in salary where transfer leaves employee with " 'significantly different responsibilities' "]; *Thompson v. City of Waco, Texas* (5th Cir. 2014) 764 F.3d 500, 503 [police detective alleged adverse employment actions after restrictions placed on his duties because " 'a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse–such as being less prestigious or less interesting or providing less room for advancement' "].)

But even assuming Eidson's 2014 transfer amounted to an adverse employment action, the trial court's ruling on the JNOV was nonetheless proper because the record lacks substantial evidence, and Eidson has proposed no coherent theory, that the transfer amounted to disability

discrimination.[1] "By its terms, [Government Code] section 12940 [of FEHA] makes it clear that drawing distinctions on the basis of physical . . . disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited *only if* the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation." (*Green v. State of California* (2007) 42 Cal.4th 254, 262 (*Green*).)

Even viewed in the light most favorable to the jury's verdict, the evidence overwhelmingly establishes that the 2014 transfer arose because of the medical restrictions that barred Eidson from working at exposed heights. Eidson repeatedly complains on appeal that her supervisorial duties were taken away from her as a result of her transfer. But the only evidence presented was that she could not supervise the people she had previously overseen without climbing ladders—something her medical restrictions prevented her from doing. The labor manager explained that facilities management "explained in detail what the fire alarm supervisor needed to do in order [to] be able to fully engage and see the work of the people [she was] supervising, and [Eidson] was precluded based on her medical restrictions." The manager further explained that "[b]eing in exposed heights was an essential physical function of the [technical supervisor] position because of

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[1] In general we do not review the reasons the trial court gave for its judgment or order because if it "is right upon any theory of law applicable to the case, it must be sustained, regardless of the considerations which may have moved the trial court to its conclusion. It is judicial action and not judicial reasoning which is the subject of review." (*El Centro Grain Co. v. Bank of Italy, etc.* (1932) 123 Cal.App. 564, 567.) Our focus in reviewing the grant of the JNOV as well as respondent's cross-appeal of the original judgment is whether Eidson's claims were supported by substantial evidence, not simply whether the 2014 transfer was an adverse employment action.

the type of tradespeople that she supervised. The fire alarms are located in ceilings and roofs."

At oral argument, Eidson's counsel highlighted an argument made in her reply brief, that the foregoing testimony did not establish that climbing ladders was an essential function of Eidson's job because Eidson was taken off the fire protection group around October 2012. As a factual matter, it is somewhat ambiguous what her exact role was at the time of her transfer. She testified that she no longer worked with the fire alarm crew after October 2012. As of December 2013, though, she still had "direct reports," which were "[a]ll of the electricians." In the original grievance she filed with the Lab, she represented that she "ha[d] been dedicated to the fire alarm electrician crew since 2002." In any event, Eidson did not dispute at trial that she had used ladders before her transfer, and she insisted that her medical restrictions did not preclude her from doing so. In particular, she acknowledged that in general, electricians at the Lab needed to be able to climb ladders. And she apparently never argued that she should have been accommodated with an adjustment to her job duties that would have allowed her to avoid using ladders. When asked if Eidson told the labor manager that her restrictions did not interfere with her work, the labor manager testified, "No. She told me that *she didn't have any medical restrictions*." (Italics added.) Thus, her argument—which we reject—was that the way in which she used ladders was consistent with her medical restrictions.

On appeal, Eidson claims there was "no evidence to support" the notion that she could not climb ladders since her permanent work restrictions stated only that she could not work at "exposed heights" and did not mention ladders. This is akin to a lifeguard claiming that medical restrictions against working around large bodies of water did not apply to swimming pools.

Ladders, by their very nature, subject users to exposed heights. Multiple witnesses valiantly explained at trial this obvious point. When the accommodations specialist was asked why she understood a restriction on exposed heights to mean that Eidson could not climb ladders, the specialist testified that her "understanding of what the doctor noted in the permanent restrictions as far as not being able to be at exposed heights, my understanding was just that, . . . to get to an elevated position, I would imagine she'd have to climb a ladder, and that's not—that's exposed. That's an exposed height." When asked about her "belie[f]" that Eidson could not go on roofs because of the medical restriction against being at exposed heights, the labor manager testified, "Roofs are high up. She could not do the technical supervision of electricians that–fire alarm electricians where the work was up on ceilings and roofs."

Eidson quotes selectively from the report setting forth her permanent medical restrictions. True, the report stated that it was "reasonable . . . that [Eidson] continues to work in her current capacity as a fire alarm crew leader. She has already been performing this job and finds that she can satisfactorily fulfill the job duties." But the report continued, "It would currently, however, be inappropriate for her to return to work as an electrician in a capacity *where she has to work at exposed heights as she did in her prior position*." (Italics added.) It was eminently reasonable for the Lab to understand that Eidson could not use ladders since Eidson's injury arose from a fall from a ladder.

We reject Eidson's argument that the "restriction prevented her from *working off* ladders, not simply climbing them." To begin with, it is somewhat inconsistent to argue that the permanent restrictions did not specifically mention ladders but then insist that the restrictions included a

distinction about how ladders were to be used. The reference to "exposed heights" was broad enough to include *any* use of ladders. We likewise do not consider it significant that safety standards required Lab workers to wear "fall protection gear" when they were within a certain distance of the edge of a roof. Eidson claims this meant that "when she was at heights, she would never be 'exposed' due to the required fall-protection gear." This is a strained reading of her work restrictions that we cannot accept. The report regarding Eidson's final work restrictions referred to her "persistent vestibular deficits," and the restrictions were meant to protect her "were she to experience vertiginous symptoms." Neither the fact she had not suffered a second fall from a ladder or the possibility that protective gear might provide protection were she to experience vertigo constitutes evidence that the Lab discriminated against Eidson when it took steps to comply with her permanent restrictions.

Our analysis might be different had Eidson presented evidence that she had been cleared to climb ladders and work at exposed heights. (Cf. *Green*, *supra*, 42 Cal.4th at p. 260 [plaintiff's bears burden to show he or she is a qualified individual under FEHA].) But following the institution of her permanent medical restrictions, Eidson never provided any subsequent doctor's evaluation stating that she could climb ladders, that she no longer suffered vertigo, or that she no longer had any inner ear imbalance. (See *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 444 ["incumbent" on plaintiff "to produce clear and unambiguous doctor's orders" supporting plaintiff's position].)

Because there is no evidence, let alone substantial evidence, that Eidson's permanent medical restrictions allowed her to perform the essential job duties before her transfer, her disability discrimination cause of action

fails. (*Green*, *supra*, 42 Cal.4th at p. 262.) Furthermore, even assuming Eidson established a prima facie case of discrimination, she presented no substantial evidence to rebut the Lab's showing that it had a legitimate reason for transferring her. (See *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354 [FEHA age discrimination claims examined through a two-part burden-shifting analysis].) "Absent substantial responsive evidence . . . of the untruth of the employer's justification or a pretext, a [trial court] may summarily resolve the discrimination claim." (*Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156.)

2. Eidson's Retaliation Cause of Action Fails Because She Did Not Rebut the Lab's Showing of Nonretaliatory Reasons for the 2014 Transfer.

For similar reasons we likewise conclude that the record lacks substantial evidence to support the jury's retaliation verdict. As the jury was instructed, in order to prove her cause of action for retaliation, Eidson was required to establish that (1) she complained about discrimination with the Regents, (2) the Regents subjected Eidson to an adverse employment action, (3) her discrimination claim was "a substantial motivating reason" for the Regents' actions, (4) she was harmed, and (5) the Regents' actions were a substantial factor in causing Eidson harm. (CACI No. 2505.) We agree with the Regents that there was no evidence that Eidson's complaint of discrimination was "a substantial motivating reason" for offering Eidson a new position in the commissioning department.

"It is not enough that the plaintiff prove an employment decision has a substantial and detrimental effect on the terms and conditions of his or her employment. The employee also must show that the decision is linked to the employee's protected activity. For purposes of making a prima facie showing, the causal link element may be established by an inference derived from

circumstantial evidence. A plaintiff can satisfy his or her initial burden under the test 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." (*McRae*, *supra*, 142 Cal.App.4th at p. 388.) But such evidence satisfies only the plaintiff's initial burden, and the presumption of retaliation drops away if the employer offers a legitimate, nonretaliatory reason for the employment action. (*Ibid.*; see also *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112 [temporal proximity, without more, does not establish that employer's articulated nonretaliatory reason was pretextual].) Here, the Lab offered several reasons for the transfer: it would be a better work environment for Eidson, her skills would benefit the commissioning department, and, most importantly, the new position would accommodate her permanent medical restrictions.

On appeal, Eidson argues that "[t]here is no evidence that the Lab ever contemplated transferring [her] until she filed her discrimination complaint." This may be true, but it omits the key context that the investigation into Eidson's complaint led to decision makers learning that Eidson had been climbing ladders in violation of her permanent work restrictions. The Regents established at trial that the transfer was appropriate in light of Eidson's medical restrictions. There is thus no substantial evidence to support her cause of action for retaliation.

3. Eidson's Cause of Action for Failure To Prevent Discrimination Fails Because It Is Derivative of Her Other Claims.

In light of our conclusions that substantial evidence does not support Eidson's causes of action for disability discrimination or retaliation, her claim for failure to prevent disability discrimination must also fail. FEHA

prohibits an employer from failing to take all reasonable steps necessary to prevent discrimination. (Gov. Code, § 12940, subd. (k).) Underlying discrimination is a necessary element of a cause of action for failure to prevent discrimination. (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1315.) Where, as here, there is no underlying discrimination, a cause of action for failure to take reasonable steps necessary to prevent discrimination also fails. (*Id.* at pp. 1312, 1317.)

III.
DISPOSITION

Eidson's June 8, 2021 motion to augment the record is granted.

The October 15, 2019 judgment entered on all claims in favor of respondent is affirmed. The Regents shall recover costs on appeal.

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Humes, P.J.

WE CONCUR:

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Banke, J.

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Wiss, J. *

*Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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