

CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

DWIGHT D. GREEN,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Appellant.

E034568

(Super.Ct.No. RCV 60816)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ernest G. Williams, Judge. (Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed in part; reversed in part with directions.

Bill Lockyer, Attorney General, Jacob Appelsmith, Senior Assistant Attorney General, Elizabeth Hong, Supervising Deputy Attorney General, and Michelle Logan-Stern, Deputy Attorney General, for Defendant and Appellant.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication with the exception of sections 5, 6, 7, 8, and 9.

Pine & Pine, Norman Pine, Beverly Tillett Pine; Law Offices of David H. Greenberg and David H. Greenberg for Plaintiff and Appellant.

1. Introduction

Plaintiff Dwight D. Green worked for defendant, the State of California, as a stationary engineer at a correctional facility for over 12 years before he was placed on disability retirement. The jury found that, in failing to provide plaintiff with reasonable accommodation for his Hepatitis C, defendant discriminated against plaintiff in violation of the Fair Employment and Housing Act (the FEHA). (Gov. Code, § 12900 et seq.)¹ The jury awarded plaintiff \$597,088 in economic damages and \$2,000,000 in noneconomic damages, which the court reduced to \$1,800,000.

In challenging the jury's verdict, defendant raises the following claims: the jury's verdict was not supported by the evidence; the decision of the workers' compensation judge barred plaintiff's disability discrimination claim; the court abused its discretion in excluding evidence of the Workers' Compensation Appeals Board (the Appeals Board) proceeding and the testimony of Dr. Alvin Markovitz, the qualified medical examiner for the administrative proceeding; the court erred in instructing the jury on the elements of the prima facie case and the defenses; and the award of \$2,000,000 in noneconomic damages was excessive. In his cross-appeal, plaintiff claims the trial court exceeded its authority in reducing the noneconomic damages and abused its discretion in denying the

¹ All further statutory references will be to the Government Code unless otherwise stated.

requested amount of attorneys fees.

Defendant's challenges to the sufficiency of the evidence and the instructions require that we decide whether the trial court correctly placed upon defendant the burden of establishing that plaintiff was incapable of performing his essential functions with reasonable accommodations, as required under section 12940, subdivision (a). We conclude that it was defendant's burden to prove plaintiff's incapacity as an affirmative defense and not plaintiff's burden to prove his capacity to perform as part of his prima facie case. Based on this conclusion, there was substantial evidence to support the jury's finding of disability discrimination.

As to defendant's evidentiary claims, we conclude that the doctrine of collateral estoppel did not apply because the workers' compensation proceeding involved a disability discrimination claim under Labor Code section 132a, instead of a discrimination claim under the FEHA. The court, therefore, properly excluded evidence of the administrative proceeding and Dr. Markovitz's testimony. For the reasons provided below, we reject defendant's remaining claims.

In regards to plaintiff's cross-appeal, we agree that the trial court had no sua sponte authority to grant the motion for new trial on excessive damages. We disagree, however, with plaintiff's contention that the court abused its discretion in refusing to award \$498,300 in attorney fees.

We affirm the judgment, but reverse the trial court's ruling on the motion for new trial. The trial court must reinstate the judgment following the jury's verdict.

2. Factual and Procedural History

Plaintiff began working for the State of California in 1974 and specifically for the California Institute of Men (the Institute) as a stationary engineer in 1987.² A stationary engineer's duties included the maintenance and repair of boilers, air conditioners, refrigerators, and other equipment and mechanical systems. In performing these duties, the stationary engineer supervised and worked with a crew of inmates. The stationary engineer also conducted searches and assisted the guards in preventing injury and escape.

Plaintiff first discovered that he had Hepatitis C in 1990. Plaintiff presumably contracted the disease while working on the sewer pipes at the Institute. Despite his condition, plaintiff continued performing his duties as a stationary engineer.

Throughout his employment at the Institute, there were no prior complaints concerning plaintiff's work performance. Instead, plaintiff received letters of commendation. George Woods, who supervised plaintiff from 1994 to 1997, found plaintiff to be one of his best stationary engineers, capable of performing all of his required job duties.

In 1997, plaintiff's physician, Dr. James Wang, began to treat plaintiff with a drug called Interferon or Infergen, which is a specific type of Interferon. A single course of treatment required injections three times a week for a one-year period. As a result of the injections, plaintiff began to experience certain side effects, including fatigue, aches, and

² Plaintiff's precise classification was stationary engineer (correctional facility) or stationary engineer, CF.

stress or agitation. Because of these side effects, Dr. Wang wrote a letter to defendant requesting that plaintiff be placed on light duty until about June of 1997.

Based on Dr. Wang's letter, Woods accommodated plaintiff by allowing him to arrive late on the days that he received the Infergen injections. Woods at times assigned plaintiff to positions that did not require heavy labor, including the general shop. Even under normal circumstances, stationary engineers often used inmates to do most of the heavy labor. Woods observed that plaintiff was able to continue performing his duties.

In 1999, plaintiff injured his back at work on two separate occasions. After the first injury in June, plaintiff was assigned to light duty, as recommended by his doctor. Under defendant's policy, an employee may be given a light duty assignment for a maximum of 120 days, which included an initial period of 60 days with one 60-day extension. After plaintiff reinjured his back in November, the 120 days had expired and plaintiff was placed on disability leave.

At about the same time, plaintiff began a second course of Infergen injections to treat his Hepatitis C. The treatments began in April of 1999 and were scheduled to end in April of 2000. Dr. Wang wrote a second letter to defendant again recommending light duty based on the side effects from the Infergen injections.

On July 3, 2000, plaintiff returned to work with a letter from his back doctor clearing him for full duty. Aside from his physical therapy sessions for his back, plaintiff was at work performing his full duties. At the time, the return-to-work coordinator at the Institute, Kristi Hilliker, reviewed a doctor's report, which was prepared in 1997 for plaintiff's workers' compensation claim, that required that plaintiff be limited to a

minimum of physical activity.³ After Hilliker informed Associate Warden Sheila Tatum that plaintiff should not have been cleared for full duty, they decided to meet with plaintiff.

On the same day, July 17, 2000, plaintiff went to Hilliker's office because he felt fatigued because of his condition, which was aggravated by the heat of the day. Hilliker and plaintiff went to Tatum's office. Plaintiff complained of fatigue and asked to see his doctor. Based on plaintiff's work restrictions, Hilliker and Tatum decided that plaintiff was incapable of performing his duties. They discussed various options, but refused to allow plaintiff to return to his position as a stationary engineer. Plaintiff initially selected the option of disability retirement.

After the meeting, there was some communication between plaintiff and Hilliker concerning the options. In a letter dated October 2, 2000, Hilliker informed plaintiff that unless he obtained a letter from Dr. Markovitz clearing him for full duty, he could not return to his position as a stationary engineer. The letter also set forth other options, including vocational rehabilitation, medical leave, and disability retirement. Plaintiff did not respond to Hilliker's letter.

Instead, in November of 2000, plaintiff went back to the Institute and asked Hilliker if he could return to work. Hilliker denied his request based on the earlier

³ The 1997 report was not admitted into evidence and Dr. Markovitz also was not allowed to testify. In the report, Dr. Alvin Markovitz, specifically stated that plaintiff must be limited to light work with minimum physical activity.

findings of the workers' compensation judge.⁴ When plaintiff did not submit an application for disability retirement, Hilliker completed the application on plaintiff's behalf and Tatum signed the application.

Plaintiff filed a claim for disability discrimination with the Department of Fair Employment and Housing.

Plaintiff subsequently filed his complaint for damages in superior court alleging that defendant discriminated against him based on his disability and failed to accommodate his disability in violation of the FEHA. The jury returned a general verdict for plaintiff and awarded him \$597,088 in economic damages and \$2,000,000 in noneconomic damages.

Defendant moved for a new trial challenging the trial court's decision to exclude Dr. Markovitz's testimony. During the hearing on defendant's motion, the trial court noted that the evidence did not support the jury's award of \$2,000,000 in noneconomic damages. Thus, while the court rejected defendant's arguments, it nevertheless ruled that the motion would be granted unless plaintiff accepted a remittitur. Plaintiff filed a notice of acceptance.

⁴ The court also excluded evidence of the administrative proceedings before the workers' compensation judge. The record reveals two separate proceedings. In 1999, the workers' compensation judge found that plaintiff suffered a work-related injury. In 2003, the workers' compensation judge found that defendant's conduct did not amount to disability discrimination, as defined in Labor Code section 132a.

Defendant appealed from the court's judgment and plaintiff appealed from the court's conditional ruling granting defendant's motion for new trial.

3. Prima Facie Case Under the FEHA

Plaintiff alleged two separate causes of action under the FEHA: disability discrimination under section 12940, subdivision (a), and the failure to provide reasonable accommodation under section 12940, subdivision (m).

A. Disability Discrimination

In regards to plaintiff's cause of action for disability discrimination, the primary question is: does plaintiff have to prove that he has the capacity to perform his essential duties as an element of his prima facie case or does defendant have to establish that plaintiff cannot perform his duties with reasonable accommodation? Contrary to the decision in *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, we hold that the burden lies with defendant.

We begin our analysis with the language of the statute. Section 12940 provides, in part:

“It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

“(a) For an employer, because of the . . . physical disability, mental disability, medical condition . . . of any person, . . . to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

“(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.”

In *Brundage v. Hahn, supra*, 57 Cal.App.4th 228, the plaintiff alleged that her employer discriminated against her based on her mental disability as prohibited under the FEHA and the federal Americans with Disabilities Act (Disabilities Act). Based on the similarities between state and federal antidiscrimination laws, the court considered the plaintiff’s state and federal claims together and relied on federal authority in its analysis. (*Id.* at p. 235.) Applying the elements of a prima facie case of discrimination under the Disabilities Act, the court required that the plaintiff show that: “(1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability.” (*Id.* at p. 236, citing *Morisky v. Broward County* (11th Cir. 1996) 80 F.3d 445, 447.) The *Brundage* case turned on the first and third elements. The court had no occasion to discuss the second element and, as noted by the court, the precise nature of the prima facie case was not at issue. (*Brundage, supra*, at p. 236, fn. 1.)

Nevertheless, courts have used the same elements for the prima facie case in a disability discrimination claim under the FEHA. (See, e.g., *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 971; *Finegan v. County of Los Angeles* (2001)

91 Cal.App.4th 1, 7; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254; *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 480; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44; see also *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1058, fn. 11.) While some courts have recognized the *Brundage* court's reliance on federal authority (See *Finegan, supra*, at p. 7; *Jensen, supra*, at p. 254, fn. 3; *Quinn, supra*, at p. 480, citing *Pensing v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 719), none of them have questioned whether the elements are consistent with the state statute.

Despite wide acceptance of the *Brundage* elements, there remains great confusion as to what constitutes a prima facie case for a claim under section 12940, subdivision (a). Under BAJI No. 12.12, the plaintiff is not required to prove his ability to perform his essential duties. The Judicial Council of California Civil Jury Instructions, on the other hand, includes the capacity to perform as one of the essential elements for a disability discrimination claim under section 12940, subdivision (a). (CACI No. 2540 (January 2005 ed.)) The Directions for Use provide, however, that “there appears a divergence in authority on whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job.” (Directions for Use following CACI No. 2540, comparing *Brundage v. Hahn, supra*, 57 Cal.App.4th at p. 236 with *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360.) Although the Judicial Council refers to the *Bagatti* case, that case provides little guidance here because the plaintiff alleged a failure to accommodate and not discrimination.

In this case, the plaintiff relies on the following statement: “Under the FEHA, the burden is on the *employer* to prove that the employee could not perform the job’s essential functions, with or without reasonable accommodation.” (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2004) ¶ 9:2430, p. 9-143, citing 2 Cal.C.Reg. § 7293.8 and *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1519.) However, the same source, while acknowledging some disagreement, includes the ability-to-perform requirement as an element of the prima facie case for a “reasonable accommodation” claim. (Chin, *supra*, at ¶ 9.2346, p. 9-139.)

Another source seems to teeter back and forth from the Judicial Council instructions, which include the capacity to perform, and the general description of a disability discrimination claim in the Code of Regulations, which contains no such language. (2 Wilcox, Cal. Employment Law (1998) Substantive Requirements, § 41.32[2][c], p. 41-84.1, fn. 79, § 41.32[2][c], p. 41-86, & § 41.32[2][c], p. 41-88-41-89.)

This confusion began with *Brundage*. As mentioned above, *Brundage* involved a federal Disabilities Act claim and a FEHA claim. The court decided to rely on federal law because state and federal law contained similar provisions. (*Brundage, supra*, 57 Cal.App.4th at p. 235.)

But were the laws sufficiently similar to adopt the federal standard without modification? While one statute may have been fashioned after the other, the state statute appears to be broader in scope than its federal counterpart. On other subjects, courts have recognized that the state and federal provisions differ in significant respects. (See *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1024-1027

(definition of physical disability); *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 917, fn. 2 (qualifying employers); *Bagatti, supra*, 97 Cal.App.4th at p. 358 (protected individuals); *Jensen, supra*, 85 Cal.App.4th at p. 256, fn. 5 (definition of disability).)

While the *Bagatti* case involved only a reasonable accommodation claim under section 12940, subdivision (m), the court’s discussion of the federal statute and regulations is instructive. The court explained, “[t]he operative principle is that a federal regulation may be ‘useful’ to guide the construction of the FEHA *where the state statute or an interpretive state regulation are modeled on the ADA*. [Citation.] [¶] Here, however, the interpretive statement of the EEOC is based upon ADA provisions that differ in important material respects from the applicable FEHA provision. . . .” (*Bagatti, supra*, 97 Cal.App.4th at p. 358.) The *Bagatti* court noted that the federal regulations repeatedly referred to ““a qualified individual with a disability.”” (*Id.* at p. 359.) Section 12940, subdivision (m), refers only to “an applicant or employee.”

Similarly, section 12940, subdivision (a), applies to “any person.” Granted, in a disability discrimination claim, the distinction between federal and state law is not as clear. Yet the subtle difference is significant.

Under the Disabilities Act, the general rule provides: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” (42 U.S.C. § 12112(a).)

In contrast to the Disabilities Act’s use of the term “qualified individual,” the

general rule under the FEHA prohibits disability discrimination against “any person” without reference to employment qualifications. (§ 12940, subdivision (a).) The California Code of Regulations provides: “Disability discrimination is established by showing that an employment practice denies, in whole or in part, an employment benefit to an individual because he or she is an individual with a disability.” (Cal. Code Regs., tit. 2, § 7293.7.) Under the statute, the employee’s qualifications, or ability to perform his essential duties, is mentioned in subdivision (a)(1) and (2), possibly as an exception to the rule or a defense to a claim of discrimination. Accordingly, the administrative regulations include “inability to perform” in their list of potential defenses. (Cal. Code Regs., tit. 2, § 7293.8.) Generally, when an administrative agency is authorized to adopt regulations and standards to administer a statute, the courts give deference to the agency’s interpretation so long as it is reasonable and consistent with the statutory language. (See *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506, 1516.) According to these regulations, the Fair Employment and Housing Commission (the Commission) has placed the burden of proof on defendant.

As a practical consequence of the Commission’s interpretation, a disabled plaintiff would have one less hurdle to contend with on his path to recovery. After the plaintiff shows that he was discriminated against because of his disability, if the defendant cannot establish an inability to perform or any other defense, the plaintiff would be entitled to relief.

While the Commission’s interpretation provides plaintiff with greater protection, we find it entirely consistent with the FEHA’s intent. The FEHA requires liberal

construction of its provisions to accomplish its purposes. (§ 12993, subd. (a); see also *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 919.) After amending the FEHA in 1992, the Legislature made clear that its provisions must be construed to provide disabled persons with the greatest protection available under either state or federal law. Specifically, the Legislature declared its intent “to strengthen California law in areas where it is weaker than the [Disabilities Act] and to retain California law when it provides more protection for individuals with disabilities than the [Disabilities Act].” (Stats. 1992, ch. 913, § 1, p. 4282; see also *Colmenares, supra*, 29 Cal.4th at p. 1026.) In 2000, the Legislature also declared: “Although the federal act provided a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional protections.” (§ 12926.1, subd. (a).)

The administrative agency, therefore, advances the FEHA purpose of affording plaintiffs greater protection by removing the burden of proving capacity to perform as an element of a prima facie case. As noted by the Ninth Circuit in *Ackerman v. Western Electric Co.* (1988) 860 F.2d 1514, the Commission specifically amended its regulations in 1987 to clarify that inability to perform was an affirmative defense for which defendant bears the burden of proof. (*Id.* at p. 1518.) “The only requirement remaining was that plaintiff show that she was handicapped and had been denied an employment benefit because of it. [Citation.] In explaining its reasons for the change, the Commission made it clear that it was simply acting to correct what it regarded as a misreading of its prior regulations.” (*Ibid.*)

Based on language in section 12940 and the administrative regulations, we

conclude that establishing a prima facie case requires proof of the following elements: (1) the plaintiff is a person with a disability or medical condition, and (2) the defendant made an adverse employment decision (3) because of plaintiff's disability or medical condition. As in other employment discrimination cases, if the plaintiff satisfies his initial burden of establishing a prima facie case of discrimination, the burden shifts to the employer to provide a legitimate nondiscriminatory reason for its employment decision. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 197, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.) In a disability discrimination case under the FEHA, the employer may show that its decision was based on plaintiff's inability to perform the essential functions of his position, even with reasonable accommodation. If the employer successfully makes this showing, the burden shifts back to the plaintiff, who then may prove by a preponderance of the evidence that defendant's reason is false and a mere pretext for discrimination. (See *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 676, citing *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253.)

The prima facie case for disability discrimination under section 12940, subdivision (a), therefore, does not require plaintiff to prove that he is a qualified individual. Rather, the burden is on defendant to establish that plaintiff is incapable of performing his essential duties with reasonable accommodation.

B. Reasonable Accommodation

Based on the parties' treatment of the two causes of action as a single claim, the initial question is whether a reasonable accommodation claim under section 12940,

subdivision (m), is a separate cause of action. The court in *Bagatti, supra*, 97 Cal.App.4th 344, held that it is.

As provided in section 12940, subdivision (m), “[i]t shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, . . . [¶] . . . [¶] [f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.”

In *Bagatti*, the plaintiff worked as a supervising accounting clerk for the Department of Rehabilitation. Although her job duties required mobility, the plaintiff had polio and was unable to walk long distances. She requested that her employer accommodate her with motorized transportation, but the employer refused. Plaintiff subsequently suffered a work-related injury and was unable to return to work. She sued her employer for failing to provide reasonable accommodation in violation of section 12940, subdivision (m).

The employer relied on the elements of a prima facie case for a reasonable accommodation claim under the Disabilities Act, which required that the plaintiff show that she was a qualified individual with a disability who suffered an adverse employment action because of her disability. (*Bagatti, supra*, 97 Cal.App.4th at p. 360.) The court in *Bagatti* found, however, that the provisions in the FEHA and the Disabilities Act are materially different. (*Id.* at p. 362.)

As discussed above, the *Bagatti* court observed that while the federal provision refers to the protected individual as “a qualified individual with a disability,” the state provision referred only to “an applicant or employee.” (*Bagatti, supra*, 97 Cal.App.4th at

p. 360.) To establish a prima facie case under the FEHA, the plaintiff therefore was not required to show that she was capable of performing her duties. (*Id.* at pp. 360 & 361, fn. 4; but see *Jensen, supra*, 85 Cal.App.4th at p. 256.)

As also observed by the court in *Bagatti*, another difference between the federal and state statutes was that section 12940, subdivision (m) does not require a discriminatory act. Under subdivision (m), a disabled employee's right to request reasonable accommodation is not contingent upon the employer's conduct. (*Id.* at p. 361.) The failure to provide an applicant or employee with reasonable accommodation in and of itself constitutes an unfair employment practice, for which the applicant or employee can bring suit under subdivision (m). (*Id.* at pp. 360-361; see also *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1656.)

To establish a prima facie case for a reasonable accommodation claim under section 12940, subdivision (m), the plaintiff must show that she had a disability and that the employer did not make reasonable accommodation for her known disability. (See *Bagatti, supra*, 97 Cal.App.4th at pp. 353-356.) As with a claim under section 12940, subdivision (a), if the case involved a hiring or firing decision, the employer may defend its decision based on the plaintiff's inability to perform his essential duties even with reasonable accommodation. (§ 12940, subd. (a)(1) & (2); *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828.) An employer, however, is not required to accommodate an applicant or employee if the accommodation would produce an undue hardship on the employer's operation. (§12940, subd. (m); *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947.)

As stated above, the plaintiff in this case alleged a cause of action for disability discrimination under section 12940, subdivision (a), and a separate cause of action for failing to provide reasonable accommodation under section 12940, subdivision (m). Despite this second and entirely distinct claim, the parties focused solely on the discrimination claim. Additionally, although the court instructed the jury on the second cause of action by giving BAJI No. 12.15, which is entitled, albeit inappropriately, “Disability Discrimination—Reasonable Accommodation . . . ,” the plaintiff did not discuss the elements of a reasonable accommodation claim in his closing argument to the jury. Under these circumstances, it is unlikely that the jury relied upon this alternative basis for recovery in reaching its verdict. In any event, as discussed in the following section, substantial evidence supported the jury’s verdict on the disability discrimination claim.

4. Sufficient Evidence of Disability Discrimination

Defendant claims that insufficient evidence supported the jury’s verdict. Defendant’s primary contention is that plaintiff failed to establish that he was capable of performing his essential duties as a stationary engineer. Based on our conclusion that inability to perform is an affirmative defense, we will address this contention and defendant’s other arguments in a manner consistent with the parties’ respective burdens of proof.

A. Standard of Review

In determining whether sufficient evidence supports a judgment, a reviewing court must consider the whole record in a light most favorable to the prevailing party and

resolve all evidentiary conflicts and draw all reasonable inferences in favor of the judgment. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203.) We defer to the jury's credibility determinations. (*Id.* at p. 1204.) A reviewing court does not substitute its judgment for that of the jury, but accepts the jury's findings if supported by substantial evidence. (*Id.* at pp. 1203-1204.)

In arriving at its verdict, the jury necessarily found that plaintiff satisfied his burden of establishing a prima facie case. The jury also found that defendant failed to prove that a legitimate, nondiscriminatory reason existed for its employment decision. We must accept these findings if supported by substantial evidence.

In addition to challenging the evidence supporting plaintiff's prima facie case, defendant also argues that reversal is required because substantial evidence supports its defenses. The question, however, is not whether there is substantial evidence to support a defense, but whether there is substantial evidence to support the jury's finding that defendant failed to establish a legitimate, nondiscriminatory reason for its decision. (See *California Teachers Assn. v. Governing Board* (1987) 195 Cal.App.3d 285, 295-298.) In other words, it is not enough for defendant to show that there was substantial evidence that plaintiff could not perform his essential duties. Evidence in the record that contradicts the jury's finding does not demand that we reverse the jury's verdict for lack of sufficient evidence. (See *People v. Valdez* (2004) 32 Cal.4th 73, 104.) Instead, if the record contains substantial evidence that plaintiff was capable of performing his duties, we must uphold the jury's finding.

B. Prima Facie Case

As mentioned above, plaintiff was required to prove that (1) he had a disability, (2) defendant made an adverse employment decision, and (3) defendant made the decision because of plaintiff's disability. In challenging only the third element, defendant argues that plaintiff failed to show that his disability was a motivating factor in defendant's decision to prevent him from returning to his position. Defendant attempts to draw a distinction between plaintiff's disability and the work restrictions for his disability. We find the distinction to be one without a difference.

Defendant's reliance on the *Jenson* case is inapposite. The *Jenson* court makes no distinction between an employee's disability and his work restrictions. (*Jensen, supra*, 85 Cal.App.4th at p. 256.) The court only discussed an employee's inability to perform. (*Ibid.*) A decision based on the plaintiff's inability to perform is not inconsistent with the finding that disability was a motivating factor. A claim that a plaintiff cannot perform his essential duties under section 12940, subdivision (a)(1) and (2), is in essence a claim that, while the decision was made because of the plaintiff's disability, the employer was entitled to treat the plaintiff differently because the plaintiff cannot perform the essential functions of his position. (See Cal. Code Regs., tit. 2, § 7293.8(b); see also *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160.) Reliance on plaintiff's inability to perform can be construed, therefore, as an admission that disability was a motivating factor for defendant's employment decision.

Furthermore, physical disability, by definition, is a condition that "limits a major life activity." (§ 12926, subd. (k)(1)(B).) Disability usually results in some limitation or

restriction. In an employment setting, the disability may be referred to in terms of the plaintiff's work restrictions. (See *Johns-Manville Products Corp. v. Workers' Comp. Bd.* (1978) 87 Cal.App.3d 740, 751 (discussing doctor's depiction of disability in terms of work restrictions—the doctor coincidentally was Dr. Alvin Markovitz.) Although disability refers to the condition and work restrictions refer to the results of that condition, we conclude that a decision based on work restrictions is the same for all practical purposes as a decision based on disability. To conclude otherwise would allow employers to assert that their decisions are never based on disability, but rather on the effects directly resulting from the employee's disability.

Substantial evidence in the record showed that plaintiff's disability or work restrictions were a motivating factor for defendant's decision. Both Hilliker and Tatum testified that they decided that plaintiff could not continue his employment as a stationary engineer because of his work restrictions. Tatum also testified that her decision was based on "the permanent condition that he could not [perform his job] and that was related to hepatitis C." The record provides sufficient evidence that defendant made an adverse employment decision because of plaintiff's disability.

C. Defenses

Defendant claims that its decision was compelled by a business necessity or a bona fide occupational qualification. In addition to these defenses, it is fair to characterize defendant's earlier argument concerning plaintiff's inability to perform as another reason for its employment decision. As we will discuss below, the business necessity defense does not apply in the context of a disability discrimination claim under

the FEHA. While the occupational qualification defense applies to such claims, defendant cannot establish that all disabled persons are incapable of performing the duties of a stationary engineer. In regards to plaintiff's capacity to perform, substantial evidence supports the jury's finding that plaintiff was capable of performing the essential duties of his position.

We briefly explain why defendant's reliance on the business necessity defense is misplaced. Derived from federal antidiscrimination law, the business necessity defense applies only to disparate impact cases, where the protected class is disproportionately and adversely affected by an employer's facially neutral employment practice. (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 983; *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 541.) The defense has no application in a disparate treatment case, where an employee is treated differently because of his disability or other classification. (*West, supra*, at p. 983; see also *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1181, fn. 4; *Morton v. United Parcel Services, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1260.) Because this case falls into the latter category, defendant has no basis—and provides none—for relying on the business necessity defense. (See *Gonzales v. State Personnel Bd.* (1995) 33 Cal.App.4th 422, 431 (claim without citation to legal authority is deemed to be waived).)

In addition to its claim of business necessity, defendant also relies on the bona fide occupational qualification defense. Section 12940 specifically provides that a discriminatory employment practice is unlawful “unless based upon a bona fide occupational qualification.” “The BFOQ defense, as required by the statute, when

applied to justify overt disparate treatment, has two components: First, the employer must demonstrate that the occupational qualification is ‘reasonably necessary to the normal operation of [the] particular business.’ Secondly, the employer must show that the categorical exclusion based on protected class characteristic is justified, i.e., that ‘all or substantially’ all of the persons with the subject class characteristic fail to satisfy the occupational qualification. [Citations.]” (*Johnson Controls, supra*, 218 Cal.App.3d at p. 540 [emphasis omitted]; see also BAJI No. 12.02 (January 2005 ed.)) Ordinarily, an employer asserts this defense to justify its categorical exclusion of all individuals having a particular class characteristic. This case, however, does not involve a categorical exclusion of all disabled persons.

Even if the defense applied under these facts, defendant must show that all or substantially all disabled persons are unable to perform the job duties of a stationary engineer safely and efficiently. (See *Sterling Transit Co., Inc. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 797 (rejecting argument to define the class in more precise terms, i.e., all persons with back problems).) Defendant neither made this assertion nor presented evidence to support it.

Instead, the crux of defendant’s argument both below and on appeal is that plaintiff, because of his physical restrictions resulting from his disability, was unable to perform the essential functions of his position as a stationary engineer. Defendant relies, therefore, on the defense set forth in section 12940, subdivision (a)(1). (See Cal. Code Regs., tit. 2, § 7293.8(b).) The term “essential functions” is defined as “the fundamental job duties of the employment position the individual with a disability holds or desires . . .

[and] does include the marginal functions of the position.” (§ 12926, subd. (f); Cal. Code Regs., tit. 2, § 7293.8(g).) The evidence that may be considered in determining whether a particular function is essential includes the following: the employer’s judgment as to the essential functions for the position; a written job description; the amount of time spent performing the function; and the consequences of not requiring the performance of the function. (§ 12926, subd. (f)(C); Cal. Code Regs., tit. 2, § 7293.8(g)(2).)

Based on the State Personnel Board’s written job description, a stationary engineer must be able “to perform a variety of skilled work in the operation, maintenance and repair of boiler, heating, air conditioning, ventilating, lighting, power, water, water treatment, and other mechanical systems normally found in a State correctional facility in the Department of Corrections or Department of Youth Authority; to maintain order and supervise the conduct of inmates, wards, residents, or patients and protect and maintain the safety of persons and property; may instruct or lead inmates, wards, patients, or resident workers; may instruct or lead other engineers; and do other related work.” The job description also provides that the position requires the following special physical characteristics: “sufficient strength, agility, and endurance to perform during stressful (physical, mental, and emotional) situations encountered on the job without compromising their health and well-being or that of their fellow employees or that of inmates.”

Although defendant presented evidence that plaintiff did not meet his job qualifications because of his light duty restrictions, the evidence failed to show that plaintiff was under these restrictions at the time of the meeting on July 17, 2000. When

plaintiff returned to work after taking disability leave because of his back injuries, his back doctor cleared him for full duty. Although Dr. Wang also recommended light duty, the restriction applied while plaintiff was receiving his Infergen treatments. In his letter, Dr. Wang informed defendant that “[o]ne course of the treatment lasts for one year” and that plaintiff received his “first shots in mid-April of 1999.” Dr. Wang confirmed that plaintiff’s treatment would have ended by April of 2000. By July of 2000, plaintiff was not under any current light duty restrictions.

Nevertheless, both Hilliker and Tatum testified that they found plaintiff incapable of performing his job functions because of his permanent disability and the physical restrictions associated with his disability. Even with permanent physical limitations, there was no evidence that plaintiff was incapable of performing his essential functions with reasonable accommodations. Defendant cannot rely on overgeneralizations or presumptions, but must provide individualized evidence based on plaintiff’s specific limitations. (See *San Diego Unified Port Dist. v. Gallagher* (1998) 62 Cal.App.4th 501, 506.) Hilliker admitted that she did not contact plaintiff’s supervisors or take any affirmative steps to investigate whether plaintiff was performing his duties.

Defendant argues that, because plaintiff’s disability only allowed him to take assignments that required a minimum of physical activity, there was no reasonable accommodation that would have enabled plaintiff to continue his work as a stationary engineer. In other words, defendant had no duty to provide reasonable accommodation because none existed.

Apparently, defendant’s argument did not carry great weight with the jury. It was

difficult to convince the jury that plaintiff could not work because of his disability when, in fact, he had been performing his duties as a stationary engineer with Hepatitis C since about 1990. Defendant produced no evidence to show that plaintiff's performance was deficient. In fact, the only evidence in the record was to the contrary. Plaintiff's former supervisor testified that plaintiff was able to perform all of his job functions. Plaintiff received letters of accommodation, including a letter in 1999 that acknowledged that plaintiff's service had never been less than satisfactory. When plaintiff returned to his job in July of 2000, he performed his full duties.

Upon his return, plaintiff worked about two weeks before the meeting with Hilliker and Tatum. During that time, he attended physical therapy for his back injuries. While on the job, plaintiff was assigned to his full duties in the culinary area. Plaintiff worked three eight-hour days during the second week. On the first day of the third week, plaintiff went to Hilliker's office and complained of fatigue because of the heat. At the time, the only accommodation plaintiff requested was to go and see his doctor. Although the parties disagree as to what transpired during this meeting, we must consider the evidence in the light most favorable to the judgment. According to plaintiff, Hilliker and Tatum refused to provide any accommodation and simply told him that he could "no longer work there" and that they would "retire [him]." While defendant could not prevent plaintiff from going to see his doctor on his own time, the record supports the jury's finding that they failed to provide plaintiff with any accommodation before deciding to place him on disability retirement.

The Department of Corrections operational manual specifically requires

reasonable accommodations. The manual provides: “All employees who incur disabling injuries or illnesses and wish to remain employed shall be provided with reasonable accommodations. This includes the necessary employee options to remain productive state employees. Alternative job placement will be provided wherever appropriate, and if transfer is necessary contacting respective hiring authorities, shall be the responsibility of the local reasonable accommodations coordinator.” Hilliker was the “reasonable accommodations coordinator” for the Institute. The manual also provides: “Employees who are unable to perform the essential functions of their current positions because of a disabling conditions [*sic*] should not be separate[d] from state service until all possible alternatives for retention have been explored.”

Defendant argues that they should not be held liable for failing to provide reasonable accommodation because plaintiff was uncooperative. When an employee informs his employer of his disability or desire for accommodation, the employer has a duty to initiate the informal, interactive process to identify a reasonable accommodation. (*Jensen, supra*, 85 Cal.App.4th at p. 261.) “[T]he interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees’ with the goal of ‘identify[ing] an accommodation that allows the employee to perform the job effectively.’ [Citation.]” (*Ibid.*; quoting *Barnett v. U.S. Air, Inc.* (2000) 228 F.3d 1105, 1114.)

Defendant specifically argues that plaintiff caused the breakdown of this interactive process by failing to respond to the October 2, 2000, letter. In this letter, defendant set forth several options, including the option of returning to work after

obtaining a full medical release from Dr. Markovitz, vocational rehabilitation, medical leave, and retirement. The first option provided the only choice that allowed plaintiff to continue his employment as a stationary engineer. The problem was that Dr. Markovitz was not plaintiff's treating physician. Also, because of plaintiff's disability, he may not have been able to obtain a full medical release from any doctor. Reasonable accommodation, however, is not for the healthy, but for those who are unable to perform their essential duties because of some physical disability or medical condition. An option that requires that plaintiff prove that he can perform his duties is not reasonable accommodation.

As indicated by his attempt to return to work in November of 2000, plaintiff wanted to continue working as a stationary engineer as he had been doing for about nine to 10 years after contracting Hepatitis C. There was no evidence to justify defendant's specific concerns that, because of his physical limitations, plaintiff would be incapable of repairing heavy machinery and taking on assignments that required inmate supervision. While defendant contends that it had no responsibility to reallocate plaintiff's essential duties to inmates or prison guards, the evidence shows that stationary engineers customarily delegated certain duties and that they rarely engaged in violent confrontations with inmates. Plaintiff's former supervisor testified that stationary engineers, in performing various repair projects with a crew of inmates, usually required the inmates to do most of the heavy labor. Even if this qualified as an accommodation—i.e., allowing plaintiff to assign the heavy labor to the inmates—such delegation of work may be reasonable where there is no evidence of undue hardship on defendant or other

employees, or in this case, the inmates.

Also, it is questionable whether plaintiff's essential duties of supervising and searching the inmates included the responsibility of physically taking down an inmate. Although plaintiff worked at a correctional facility, he was not employed as a security guard. Unlike security guards, stationary engineers did not carry batons or weapons. Also, the record indicates that situations requiring a takedown rarely occurred. Thus, based on the language of the statute, one may argue that performing a takedown was not essential, but rather a "marginal function" of plaintiff's position. (§ 12926, subd. (f); *Gallagher, supra*, 62 Cal.App.4th at p. 506.) Certainly, stationary engineers did not engage in this activity on any regular basis. And, if a problem was to occur, a stationary engineer's primary responsibility was to blow a whistle to alert the security guards. If plaintiff was working alone with the inmates in an isolated area, plaintiff might experience difficulty responding to a riot or other disturbance. But even a stationary engineer who is not disabled and has no physical limitations might find it difficult to secure immediate help, restore peace, or prevent injury. In any event, a reasonable fact finder could have concluded that plaintiff's ability to perform should not depend upon such remote possibilities.

The evidence in the record showed that Hilliker and Tatum decided that plaintiff could not perform the essential duties of a stationary engineer because plaintiff was restricted to a minimum of physical activity. Hilliker and Tatum, however, did not determine to what extent plaintiff's restrictions actually affected his work performance. They simply assumed that an employee with plaintiff's limitations would not be able to

fix boilers, climb stairs, and supervise inmates. The evidence in the record, however, showed that, despite his disability and physical limitations, plaintiff had been fixing boilers, climbing stairs, and supervising inmates since 1990. Based on the evidence in the record, the jury reasonably found plaintiff was capable of performing the essential functions of his position with reasonable accommodations.

5. Workers' Compensation Claims

The appellate record contains evidence of two workers' compensation claims, one addressing a claim of disability and the other a claim of discrimination, both of which were excluded at trial. In 1999, the workers' compensation judge found that plaintiff had a permanent disability based on a work-related injury. The judge's decision was based largely on the reports of Dr. Markovitz, who was retained specifically to examine plaintiff for purposes of his disability claim. In 2003, in a separate claim, the workers' compensation judge found that defendant did not discriminate against plaintiff because of his work-related injury as prohibited by Labor Code section 132a.

During the trial, defendant repeatedly argued that plaintiff was barred from raising an FEHA claim based on the 2003 findings and award. Defendant also sought to admit evidence of the 1999 decision to corroborate Hilliker's and Tatum's testimony that they relied on Dr. Markovitz's recommendations. The court rejected defendant's collateral estoppel argument on the ground that the workers' compensation judge applied a different standard for disability discrimination. The court also excluded evidence of the 1999 workers' compensation decision and Dr. Markovitz's testimony.

A. Collateral Estoppel

Defendant claims the trial court erred in failing to apply the doctrine of collateral estoppel to bar plaintiff's disability discrimination claim under the FEHA based on the administrative findings under Labor Code section 132a.

“A party may be collaterally estopped from relitigating a previously adjudicated issue if (1) the issue previously and necessarily adjudicated is identical with the issue sought to be relitigated; (2) the prior adjudication resulted in a final judgment; and (3) the party against whom collateral estoppel is invoked was a party to, or was in privity with a party to, the prior adjudication. [Citation.]” (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 566; citing *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.) A final decision by the Appeals Board is a final judgment that may have collateral estoppel effect in subsequent litigation. (*Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 798; *Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374.)

In this case, the only relevant question is whether the issue litigated in the workers' compensation proceeding was identical to the issue litigated in the current proceeding. Defendant argues that the workers' compensation judge resolved all the relevant issues, including the ultimate issue of whether defendant discriminated against plaintiff because of his disability. Defendant also argues that plaintiff's only remedy was to file a writ of administrative mandate to set aside the worker's compensation judge's decision. (See *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76 (holding that the plaintiff's lawsuit under the FEHA was barred because he failed to seek judicial review

of the administrative findings under FEHA).) Defendant’s arguments nevertheless depend on whether the issue determined by the prior ruling was identical to the issue involved in this case.

Plaintiff contends that the issue was not identical because “disability” under the FEHA is defined differently than “disability” under Labor Code section 132a. We agree, but add that a determination regarding disability discrimination under Labor Code section 132a is also not identical to a determination regarding discrimination under section 12940, subdivision (a).

In the Appeals Board proceeding, the judge found that defendant did not discriminate against plaintiff because his retirement resulted from his inability to perform his usual and customary duties. Labor Code section 132a prohibits employers from discriminating against an employee for engaging in one of the protected activities, including filing a claim for compensation or receiving a rating, award, or settlement. (§ 132a, subd. (1); see also *Department of Rehabilitation v. Workers’ Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1298; *Judson Steel Corp. v. Workers’ Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 666.) As interpreted by the California Supreme Court, the statute’s application is not limited to retaliation when employees pursue their rights under the workers’ compensation law, but also applies whenever an employer discriminates against an employee because of a work-related injury or disability. (*Judson Steel, supra*, at p. 668.)

As noted by the California Supreme Court in the *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1158, the term “disability” has a specific and different

meaning under the workers' compensation law than the term "disability" as used in the FEHA. Under the workers' compensation law, several provisions are devoted to defining what constitutes an injury and delineating what types of injury qualify for compensation under the Labor Code. (See, e.g., Lab. Code, §§ 3208, 3208.05, 3208.1, 3208.3, 3212.2, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.11, 3212.12.) If the injury is one causing disability, the employee is compensated based on the nature and extent of the disability. (See *Mihesuah v. Workers' Compensation Appeals Bd.* (1976) 55 Cal.App.3d 720, 726-727; 3 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed. 2004) Table 11, App. E-32, 49-54.) The FEHA also contains specific definitions for "physical disability," "mental disability," and "medical condition." (§ 12926, subds. (h), (i), & (k).)

In this case, this distinction is not particularly useful because it was undisputed that defendant's disability constituted a disability under both the workers' compensation law and the FEHA. The relevant distinction, for our purposes, is not the definition of disability, but what does or does not constitute discrimination based on disability under the two antidiscrimination laws. The court in *Moorpark* recognized that, "[b]ecause the standards for establishing disability discrimination may well be different under the FEHA than under section 132a, a decision in an employee's favor on a section 132a petition would not establish a FEHA violation." (*Moorpark, supra*, 18 Cal.4th at p. 1158.)

While both Labor Code section 132a and the FEHA prohibit disability discrimination, nothing in section 132a specifically requires an employer to provide an employee with reasonable accommodations. This may seem like an insignificant

distinction. But, in the present case, the lack of reasonable accommodations may be a significant factor in determining whether an employer's conduct constitutes discrimination.

Under Labor Code section 132, a judge may find that the employer did not discriminate against an employee because the employee's work-related disability prevented him from performing his usual and customary duties. Under the same facts, an employer's conduct may constitute discrimination under the FEHA if the employer failed to show that the employee was incapable of performing his essential duties with reasonable accommodation. While disparate treatment alone constitutes discrimination under Labor Code section 132, disparate treatment *and* the failure to provide reasonable accommodations constitutes discrimination under section 12940, subdivision (a). When the case turns on the question of whether the employer provided the employee with reasonable accommodations, a determination regarding discrimination in a workers' compensation proceeding is not identical to a determination of discrimination under the FEHA. The doctrine of collateral estoppel, therefore, does not apply.

This was the case here. While the workers' compensation judge found that defendant gave plaintiff "options," the judge referred specifically to the options letter. While one of the options, vocational rehabilitation, may constitute a suitable accommodation, defendant failed to show that plaintiff could not perform the essential duties of his current position with reasonable accommodation.

Furthermore, the workers' compensation judge's findings indicate that plaintiff was required to establish his ability to perform his duties. The judge's findings also

indicate that plaintiff was required to show that the circumstances had changed since Dr. Markovitz' report in 1997. As discussed above, however, in an FEHA case, the burden is on defendant to show that plaintiff was incapable of performing his duties. It is unclear whether, during the administrative proceeding, defendant offered any evidence, such as doctor's reports, testimony from plaintiff's supervisors, or any other relevant information, to show that plaintiff's disability prevented him from doing his job. Courts have held that the doctrine of collateral estoppel may not apply where the prior proceeding applied different burdens of proof. (See *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 563; *Gouvis Engineering v. Superior Court* (1995) 37 Cal.App.4th 642, 650-651.) The different burden of proof in this case provides further justification for allowing plaintiff to seek relief under the FEHA.

The FEHA effectively repeals other state antidiscrimination laws when such provisions provide less protection to individuals than under the FEHA. (§ 12993, subd. (a); see also *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1060, fn. 14; *Buckley v. Gallo Sales Co.* (N.D. Cal. 1996) 949 F.Supp. 737, 747.) Because Labor Code section 132a does not require reasonable accommodation, it provides less protection than the FEHA.

In the *Moorpark* decision, the California Supreme Court recognized that a plaintiff who had been discriminated against for a work-related injury was not limited to the remedy afforded under Labor Code section 132a. (*Moorpark, supra*, 18 Cal.4th at p. 1158.) Although that case did not address the effect of a prior determination under Labor Code section 132a on a subsequent claim under the FEHA, the court observed that the

FEHA was intended to supplement existing remedies and provide new or greater rights to seek redress for a legitimate claim of unlawful discrimination. (See *Moorpark, supra*, at p. 1157.) While an employee cannot obtain double recovery, the different antidiscrimination laws provide the employee with multiple, alternative remedies. (*Id.* at p. 1158.)

Consistent with the FEHA's purpose, and because of the differences in the issues presented before the workers' compensation judge and the trial court in this case, we conclude that the prior administrative proceeding did not bar plaintiff's claim of disability discrimination under section 12940, subdivision (a).

B. Evidentiary Rulings

Defendant claims the trial court abused its discretion in excluding evidence of the workers' compensation proceeding and Dr. Markovitz's testimony.

The trial court found the evidence of plaintiff's work restrictions, including Dr. Markovitz's reports and the workers' compensation judge's findings and award, irrelevant because the workers' compensation law applied a different standard for determining disability. Also, although the court tentatively ruled Dr. Markovitz's testimony admissible, subject to an evidentiary hearing, the court ultimately excluded his testimony because defendant failed to designate him as an expert as required under Code of Civil Procedure section 2034.

As to Dr. Markovitz's testimony, both parties agree that the trial court should not have excluded the testimony based on the alleged discovery violation. In its motion for new trial, defendant argued that the court erroneously relied on this basis for excluding

Dr. Markovitz's testimony. The court clarified that its ruling also was based on the ground that the workers' compensation proceedings involved an entirely different issue.

The trial court enjoys broad discretion in determining the relevance of evidence. (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 519.) Relevant evidence is evidence that has any tendency in reason to prove any disputed, material fact. (Evid. Code, § 210; *Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900-901.) Even if the evidence is relevant, the evidence may be excluded if its probative value is substantially outweighed by the potential that its admission would create undue prejudice, such as confusing the issues at trial. (*Robinson v. Grossman* (1997) 57 Cal.App.4th 634.) A trial court's decision on the admissibility of evidence is reviewed for an abuse of discretion. (*Ripon, supra*, at p. 900.)

While the trial court's implicit reliance on the *Moorpark* decision was unwarranted, we nonetheless conclude that the court's ruling was not an abuse of discretion. The trial court relied on the differences in the definition of disability as discussed by the California Supreme Court in *Moorpark*. As aptly noted by the defendant's trial counsel, however, disability was not disputed in this case and the evidence of plaintiff's work restrictions was not being proffered to establish disability. Furthermore, the California Supreme Court did not establish a rule governing the admissibility of evidence from a prior workers' compensation proceeding. As with any other evidence, the initial determination of admissibility turns on its relevance. (See Evid. Code, § 351.)

The court refused to admit any evidence connected with the 1997 workers'

compensation case. The court's decision appears to be based on the fact that the administrative proceeding involved the question of *disability* for purposes of obtaining recovery under the workers' compensation law. The present case, on the other hand, involved an entirely different claim, namely, a claim of *disability discrimination* under the FEHA.

It was not unreasonable for the trial court to find the results from plaintiff's disability claim inadmissible in plaintiff's discrimination case. In 1997 and 1998, Dr. Markovitz examined plaintiff to determine the nature and extent of his disability for purposes of determining his entitlement to workers' compensation. Based on Dr. Markovitz's reports, the workers' compensation judge found that plaintiff had a permanent disability of 51 percent. As argued by plaintiff, in a case involving a claim of discrimination, a finding of 51 percent disability would not have been particularly relevant or useful. The workers' compensation judge's findings, therefore, were properly excluded.

Also, as noted by plaintiff, although Dr. Markovitz's reports were based on his examinations in 1997 and 1998, the discrimination claim arose out of facts that occurred in 2000. Plaintiff retained Dr. Markovitz as a qualified medical examiner for the sole purpose of determining the extent of his disability for the workers' compensation claim. Dr. Markovitz was not plaintiff's treating physician and had no knowledge of plaintiff's condition in 2000. Notably, Dr. Markovitz's examination occurred while plaintiff was still taking Infergen. Also Dr. Markovitz was not aware of plaintiff's specific duties and made no determination as to whether plaintiff was able to perform those duties. For these

reasons, we conclude the trial court did not abuse its discretion in excluding Dr. Markovitz's reports and testimony.

Even if the court erred in excluding Dr. Markovitz's testimony, the error does not require reversal. A judgment may not be reversed based on an erroneous evidentiary ruling unless the error resulted in a miscarriage of justice. (Evid. Code, § 353; *Huffman v. Interstate Brands Companies* (2004) 121 Cal.App.4th 679, 692.) Defendant claims that Dr. Markovitz's testimony was essential to its business necessity defense. As discussed above, however, the business necessity defense does not apply to a disparate treatment case.

In addition, the exclusion of Dr. Markovitz's testimony did not prevent defendant from presenting a defense. Hilliker testified that she relied on the work restrictions contained in Dr. Markovitz's medical report in making her decision that plaintiff was incapable of performing his duties. While defendant argues that Dr. Markovitz's testimony would have bolstered Hilliker's credibility, there is nothing in the record to cast doubt on Hilliker's testimony concerning Dr. Markovitz's report. It was undisputed that Dr. Markovitz prepared a report in 1997 that contained certain work restrictions. The questions were whether those work restrictions continued to apply in 2000, and, if so, whether Hilliker correctly concluded that the work restrictions prevented plaintiff from performing his job, and whether Hilliker could have accommodated plaintiff despite the restrictions. Dr. Markovitz's testimony would not have shed light on any of these relevant issues.

We conclude that the trial court did not abuse its discretion in excluding all the

evidence related to the earlier workers' compensation proceedings.

6. Jury Instructions

Defendant claims the trial court misdirected the jury on the elements of plaintiff's prima facie case and the defense.

A jury verdict may not be overturned on appeal for instructional error unless the appellant demonstrates that the error was prejudicial and resulted in a miscarriage of justice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213.) Instructional error is prejudicial when, after reviewing the entire cause, there is a reasonable probability that the instruction misled the jury and affected the outcome. (*Ibid.*)

A. BAJI No. 12.12

Defendant first claims the trial court erred in denying its request to give a modified version of BAJI No. 12.12, which provides the elements of a prima facie case for a disability discrimination claim under section 12940, subdivision (a). Defendant's modification was to include the element that plaintiff was a qualified individual. Because plaintiff had no obligation to show that he was a qualified individual or that he was capable of performing his essential functions to establish a prima facie case, as discussed above, the trial court properly rejected defendant's request.

B. Special Instruction

Defendant requested the following instruction: "To be liable for disability discrimination, an employer must have discriminated intentionally. Even conduct that is shown to have been unwise or incorrect cannot subject a defendant to liability unless the plaintiff also shows that the employer was motivated by a desire to discriminate on the

basis of physical disability.”

The trial court properly rejected the instruction. Although discriminatory intent is required to prevail on a disparate treatment claim, because plaintiffs often lack direct evidence of intent, the *McDonnell Douglas* three-part analysis provides a fair method of determining whether the employer’s conduct was intentional. (See *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148-149.) Under the three-part analysis, plaintiff must show that disability was a motivating factor in defendant’s decision. The trial court adequately instructed the jury on this requirement by reading BAJI Nos. 12.12 and 12.01.1. The special instruction could have been misinterpreted to impose upon plaintiff a greater burden than was required under *McDonnell Douglas*. While such language may be included in counsel’s argument, the court properly omitted the instruction from its charge to the jury. (See *Joyce v. Simi Valley Unified Sch. Dist.* (2003) 110 Cal.App.4th 292, 302.)

C. BAJI No. 12.14

In its final claim of instructional error, defendant argues that the trial court erred in failing to instruct the jury with BAJI No. 12.14 on the defense of inability to perform. Both parties requested the instruction and the court agreed to give it. But the court inadvertently omitted BAJI No. 12.14 when it read the instructions to the jury.

Under these circumstances, a timely objection would have alerted the court to the mistake and afforded an opportunity to correct it. Indeed, it would be unfair to the court and plaintiff to allow defendant to take advantage of the error on appeal when it easily could have been corrected at trial. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23

Cal.3d 180, 184-185, fn. 1.) Because the court previously ruled to include BAJI No. 12.14, a single objection would have resolved the matter.

Although the court omitted BAJI No. 12.14, the court provided instructions on similar or related defenses, including the bona fide occupational qualification defense (BAJI No. 12.02) and the health and safety defense (BAJI No. 12.16). Both defenses also involve the employee's ability to perform his duties. In particular, the health and safety defense applies where the employee cannot perform the essential duties of his position in a manner that would not endanger the health and safety of others. (§ 12940, subd. (a)(1) & (2).)

The record shows that defendant relied on these two defenses. While this reliance may have been misplaced, at least in part, defendant apparently found no need to object to the missing instruction. It appears that defendant's trial attorney mistakenly assumed that the bona fide occupational qualification defense and the inability to perform defense were the same. She, in essence, argued the inability to perform defense under the "bona fide occupational qualification" label. While this may have caused some confusion for the jury, defendant should have objected to the omitted instruction and presented its case with a clearer understanding of its defenses.

7. Noneconomic Damages

Defendant claims that the jury award of \$2,000,000 in noneconomic damages was excessive and not supported by substantial evidence. As argued by plaintiff, defendant has waived this claim by failing to argue that the damages were excessive in a motion for new trial. (See *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918- 919; *Zaxis*

Wireless Comm. Inc. v. Motor Sound Corp. (2001) 89 Cal.App.4th 577, 581, fn. 3.) Such matters should be presented to the trial judge, who can best determine whether the jury was swayed by passion or prejudice. (*Zaxis Wireless, supra*, at p. 581, fn. 3.) Although the trial court reduced the award on its own motion, the court had no opportunity to address defendant's contentions. And defendant provides no authority to justify consideration of its contentions for the first time on appeal.

8. Remittitur

In his cross appeal, plaintiff raises two issues. The first issue is whether the trial court had jurisdiction to reduce the jury's award of \$2,000,000 in damages even though neither party challenged the award in a motion for new trial. As noted by plaintiff, this issue is properly before this court because a party may appeal from the trial court's conditional ruling on a motion for new trial. (See *Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 918, fn. 1, citing *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 341-345; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 821, fn. 15.) We conclude that the court lacked jurisdiction.

A trial court's power to grant a new trial is limited to the means and grounds provided by statute. (*Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc.* (1998) 65 Cal.App.4th 1131, 1135.) In a case tried by a jury, a party may challenge the award of damages as excessive or inadequate. (Code Civ. Proc., § 657, subd. (5).) If the party does not raise this ground, the court has no jurisdiction to review the jury's award and substitute its own judgment. The court does not have inherent or sua sponte authority to grant a new trial. (See *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899;

McCulloch v. Superior Court (1949) 91 Cal.App.2d 641, 644.)

In this case, defendant filed a motion for new trial under Code of Civil Procedure section 657, subdivisions (1) and (7), contending that plaintiff and the court erroneously relied on the discovery violation to exclude Dr. Markovitz's testimony. The trial court reconsidered its ruling and clarified that its decision also was based on the reasons given for excluding the evidence of the workers' compensation proceeding. The court therefore rejected defendant's grounds for new trial.

Although defendant did not raise any other grounds for new trial, the court discussed the lack of evidence for plaintiff's noneconomic damages. The court stated that, because the evidence "was sufficient to support an amount of \$200,000," as opposed to \$2,000,000, it decided to grant defendant's motion for new trial unless plaintiff "remits all non-economic damages in excess of \$200,000." Despite the parties' assumption, this language indicates that the trial court intended to reduce the damages *to* \$200,000 and not *by* \$200,000. Nevertheless, because defendant failed to challenge the amount of damages, the court had no jurisdiction to reconsider the amount the jury found to be appropriate based on the evidence presented by the parties.

The judgment, therefore, must be reversed and the case remanded to allow the court to reinstate the judgment following the jury's verdict. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 910.)

9. Attorney's Fees

The second issue in plaintiff's cross-appeal is whether the trial court abused its discretion in awarding \$184,800 in attorney fees and not \$498,300 as plaintiff requested.

Under section 12965, subdivision (b), the trial court may award the prevailing party its reasonable attorney fees and costs. In determining the amount, the court first calculates the lodestar figure by multiplying the number of hours by the reasonable hourly rate. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 445; citing *Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) Then the court may increase this base figure by applying a fee enhancement or multiplier. (*Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 426-427.) The court also may reduce the base figure by considering various factors, including the novelty and difficulty of the issues, the attorney's skill in litigating the case, the extent to which the attorney was unable to spend time on other cases, and the contingent nature of the fee. (*Vo, supra*, at p. 446.) The amount of attorney fees is another matter left to the court's sound discretion, and its decision will be upheld unless plaintiff can show an abuse of discretion. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134.) "The trial court is the best judge of the value of professional services rendered in its court, and while its judgment is subject to our review, we will not disturb that determination unless we are convinced that it is clearly wrong." (*Ibid.*)

Based on the amount awarded, the court apparently exercised its discretion not to apply a fee enhancement and to reduce the lodestar by subtracting from the hourly rate or the number of hours. Plaintiff's attorney, David H. Greenberg, billed a total of 374 hours at the rate of \$450 for himself and a total of 245 hours at the rate of \$330 for his associate, David A. Warshaw. Greenberg explained that his hourly rate was reasonable based on his skill and experience. Greenberg also explained that a fee enhancement was

appropriate because of the risk involved in litigating an employment discrimination case, the complexity of the issues, and the contingent nature of the fee.

In its opposition to plaintiff's motion for attorney fees, defendant argued that Greenberg's hourly fee was excessive in light of the median and average rates for attorneys with the same level of experience. Defendant noted that plaintiff provided no evidence to substantiate Warsaw's hourly rate. In challenging the number of hours reported, defendant also noted that plaintiff failed to provide timesheets or other documentation. In particular, defendant challenged the 80 hours Greenberg spent on discovery matters because Warsaw attended all hearings and depositions and signed all discovery documents. Defendant also argued that a fee enhancement was inappropriate because the factual and legal issues, as presented at trial, were not novel or difficult. The case was not vexatious or protracted. And the jury reached their verdict in about two hours.

In his reply brief, plaintiff failed to address some of defendant's specific contentions. Plaintiff reiterated that the amounts were reasonable and that the FEHA issues were complex.

Based on the parties' arguments, the court was well aware of the scope of its discretion and exercised that discretion reasonably in rejecting plaintiff's request for \$498,300. Based on the hourly rates charged by other disability rights advocates, the court could have found that both Greenberg's and Warsaw's rates were excessive. As argued by defendant, the court also could have found that plaintiff overestimated the number of hours. Plaintiff failed to provide any documentation with an itemized list with

which the court could confirm the number of hours. Additionally, after presiding over the trial, the court was in the best position to determine the level of complexity or contentiousness involved.

Plaintiff has failed to show that the court's decision was clearly wrong. Although the factors discussed by plaintiff justified an attorneys fees award, we cannot conclude that the court abused its discretion in reducing the amount of attorneys fees to \$184,800.

10. Disposition

We affirm the judgment, but reverse the court's ruling on the motion for new trial. The trial court is instructed to reinstate the judgment following the jury's verdict. Plaintiff shall recover his costs and attorneys' fees on appeal.

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/McKinster
J.