NO. 20-_____

In the Supreme Court of the United States

IN RE ARNO P. KUIGOUA

Petitioner.

On Petition for an Extraordinary Writ of Mandamus to the Court of Appeal of the State of California Second Appellate District, Division Five

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS

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QUESTION PRESENTED

Given that Petitioner has provided evidence supporting six claims of discrimination, retaliation and wrongful termination in violation of the Fair Employment Housing Act, Labor Code, Health and Safety Code, and Whistleblower Protection Act, and since it has been long held that evidence, upon motion for summary judgment, should be viewed in the light most favorable to the nonmovant,

THE QUESTION PRESENTED HERE IS:

Whether in a case like this one, where the petitioner was denied on appeal his motion to remand his civil suit for jury trial, claiming six counts of discrimination and retaliation, and where his appeal was denied on the grounds that relief was unavailable pursuant to California Code Civ. Proc., § 437 and Federal Rules of Civil Procedure Rule 56, is it error for the court to deny his appeal from summary judgment when the evidence, viewed in the light most favorable to him, indicates genuine issues of fact exist on each claim?

PARTIES TO THE PROCEEDINGS

Respondent and Party to Whom a Writ of Mandamus is Sought

- The Court is the Court of Appeal of the State of California Second Appellate District, Division Five.

Other Respondents

- California Corrections Health Care Services, a Division of the California Department of Corrections and Rehabilitation, a Governmental Entity
- Does 1 to 10, Inclusive (collectively defendants, respondents, and real parties in interest in the superior court, and in the court of appeal.)

LIST OF PROCEEDINGS

Supreme Court of California

Case No. S264647

Arno P. Kuigoua, v.
California Corrections Health Care Services

Date Application Denied: September 25, 2020

Court of Appeals of the State of California,
Second Appellate District, Division Five

B291984

Arno P. Kuigoua, *Plaintiff and Appellant, v.*
California Corrections Health Care Services et al.,
Defendants and Respondents.

Date of Final Opinion: August 14, 2020

Superior Court of the State of California

Case No. BC608602

Arno P. Kuigoua, *Plaintiff v.* California Corrections Health Care Services, a Division of the California Department of Corrections & Rehabilitation, a Governmental Entity and Does 1 to 10, Inclusive, *Defendants*.

Date of Judgment: May 31, 2018

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PETITION FOR WRIT OF MANDAMUS

Petitioner respectfully petitions for a writ of mandamus to the Court of Appeal of the State of California, Second Appellate District, Division Five. In the alternative, Petitioner respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California Second Appellate District, Division Five, or as a petition for a common law writ of certiorari to review the decision of the Court of Appeal of the State of California Second Appellate District, Division Five denying petitioner's appeal from summary judgment.

OPINIONS BELOW

The opinion below, in the court of first instance, is the May 31, 2018 judgment by the Superior Court of the State of California, County of Los Angeles, Central District granting a motion for summary judgment in favor of Defendant in the matter of *Arno P. Kuigoua v. California Corrections Health Care Services, a Division of the California Department of Corrections and Rehabilitation, a Governmental Entity and Does 1 to 10, Inclusive*, No. BC608602. On August 14, 2020, the Court of Appeal of the State of California Second Appellate District, Division Five issued an unpublished opinion denying Petitioner's appeal from summary judgment. *Kuigoua v. California Corrections*

Health Care Services (Cal. Ct. App., Aug. 14, 2020, No. B21984) 2020 WL 4744716; App., *infra* 1a-27a.

JURISDICTION AND RULE 20 STATEMENT

The Supreme Court of California denied an application for review on September 25, 2020. (App.1a). Thus, per Sup. Ct. R. 20, the Petitioner seeks relief in this Court as the court of last resort, having exhausted all appeals in the California state courts. As stated in Sup. Ct. R. 20, this Court has jurisdiction to issue a Writ of Mandamus to the California Appeals Court as authorized by the All Writs Act, 28 U.S.C. § 1651. The specific relief sought is a mandamus ordering this the appeals court to deem the motion for a new trial as timely filed. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. § 1651. In the alternative, the jurisdiction of this court is invoked under 28 U.S.C. § 2104.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651

The All Writs Act, 28 U.S.C. § 1651, states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2104

In the alternative this petition also involves 28 U.S.C. § 2104, which provides as follows:

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.

STATEMENT OF THE CASE

During the year 2010, Petitioner Arno P. Kuigoua ("Kuigoua"), an African-American male of Cameroonian descent, began working as a Registered Nurse with California Corrections Health Care Services, a Division of the California Department of Corrections and Rehabilitation ("CCHCS"). Approximately two years later, in 2012, Kuigoua was promoted to Supervisor Registered Nurse II. Kuigoua remained employed in that capacity until May 2015, when he was constructively discharged form work following a series of discriminatory and retaliatory actions from his supervisors. The below timeline, supported by evidence, was presented in extensive detail to the court of appeal. App., *infra*, 1a-27a.

In December of 2013, Kuigoua received a directive from supervisor Sharon McBride-Brooks ("McBride-

Brooks") directing him to approve a work schedule for one of his subordinates. Believing this directive to be an economically wasteful act in violation of state law, Kuigoua filed an internal complaint against McBride-Brooks with Warden John Soto and CEO Penny Shank. The response to his complaint was not an investigation into his complaint, but rather a series of discriminatory and retaliatory acts from his supervisors.

Shortly after the complaint was filed, Kuigoua's supervisor, Director of Nursing Zenaida Fernandez ("Fernandez") alleged Kuigoua failed to correctly change a nurse's shift. Approximately one month later, Fernandez accused Kuigoua of failing to perform duties that were never assigned to him. Then, on February 6, 2014, McBride-Brooks and Fernandez falsely accused Kuigoua of wrongdoing in denying bereavement leave to one of his subordinates when they themselves had directed him to deny the leave.

During a February 13, 2014 meeting, McBride-Brooks advised Kuigoua that he would never be promoted due to his rigid adherence to rules and regulations. A few days later, McBride-Brooks falsely accused Kuigoua of being insubordinate after he followed her directive to reassign a Licensed Vocational Nurse who had abandoned his post. This incident was investigated and ultimately concluded that Kuigoua had not been insubordinate but had indeed been following McBride-Brooks' directive.

The accusations continued as McBride-Brooks accused Kuigoua of committing wrongdoing on a day when he was not working, and falsely accused Kuigoua of not performing his duties regarding the medical leave of one of his subordinates.

On or around March 30, 2014, Kuigoua suffered disciplinary measures for having reported "care incidents", which had allegedly occurred in 2013. He was also accused of failing to document a medication error, even though he completed and submitted a timely medication error report with respect to the incident. Despite their refusal to properly investigate his defenses, he received a "Letter of Instruction" in his personnel file. CCCHS took disciplinary action against Kuigoua in instances in which CCHCS had taken no action with respect to other, female, employees under similar scenarios, including, but not limited to, incidents on March 28, April 29, 2013, January 27, March 11, September 30, and October 22, 2014.

Two weeks later, on April 13, 2014, Kuigoua sent a memorandum to Shank documenting the recurring discrimination, harassment, and retaliation. He also disclosed that his complaints and grievances were not properly investigated.

On May 1, 2014, Kuigoua received a message from McBride-Brooks that he interpreted as a directive to make false entries in patient medical records. He refused to make these entries and submitted a complaint, advising management that this directive violated the California law and CCHCS policy. This complaint was never investigated; however, Nair made a similar directive on December 29, 2014.

On July 22, 2014, Kuigoua was informed that his work hours would be reduced. This decision was made even though overtime opportunities were available for all staff at the time.

On July 23, 2014, Kuigoua received a memorandum from McBride-Brooks directing him to allow staff

to work more than 24 hours consecutively. Believing this directive to be unlawful, Kuigoua refused to comply, refused to schedule such shifts for subordinate nursing staff, and submitted another complaint to Soto, Shank, and EEO Officer Christina Ulstad. This complaint was not investigated. Instead, Wale Muyiwa Olukanmi, a CCHCS physician assistant, told Kuigoua that management would like to offer him additional work opportunities if, in exchange, he would stop submitting complaints and grievances. Olukanmi further indicated to Kuigoua that, if he would not accept this offer and would continue filing complaints and grievances, his employment could be terminated.

On July 30, 2014, Kuigoua submitted an online whistleblower complaint delineating McBride-Brooks' unlawful directives to allow staff to work more than sixteen consecutive hours in a 24-hour period and to falsify medical records. Following this complaint, on August 4, 2014, Nair called Kuigoua into her office, told him he "had no balls" and was "not man enough."

Between December 2014 and January 2015, Kuigoua was directed to work when it was not his "turn" in the staff rotation. He was also denied requested overtime work, had his work hours schedule in conflict with training activities, was assigned undesirable work, and was regularly assigned to sixteen-hour days as a part of his regular working schedule. As a result, he was denied training opportunities other supervisors received. During this time, Kuigoua was denied promotion on at least three occasions, where female nurses that Kuigoua had trained were promoted above him.

On January 5, 2015, another supervisor, Lavonne Pryor, encouraged Kuigoua to quit or to transfer rather than face additional mistreatment. She stated to

Kuigoua that he may win the battle but will lose the war. She further revealed that there was a coordinated effort within management to prohibit his reporting of misconduct and prevent him from applying to different promotional opportunities, with the goal of getting Kuigoua to resign.

Approximately one month later, on February 4, 2015, Kuigoua filed an EEOC complaint and a Worker's Compensation claim. After those claims were filed, Kuigoua was subjected to constructive discharge and unpaid wages and hours. CCHCS denied Kuigoua pay to which he was entitled on May 9 and 10, 2015, based on management's allegation that Kuigoua was "AWOL" from work. However, to be AWOL under CCHCS policy an employee must be absent without reason for five consecutive days. Kuigoua was never absent from work without reason, much less for five consecutive days.

During this time, Kuigoua sought, and obtained, other employment at CalVet, another state agency. Kuigoua desired to continue his employment with both CCHCS while also being employed at CalVet, however once management learned of his new employment, they unilaterally terminated his employment on June 5, 2015. The purported reason for the termination was that CalHR forbids dual appointments. However, multiple employees within the California state system hold dual appointments, including individuals for whom Kuigoua had previously supervised. At no point prior to or upon termination was Kuigoua provided the opportunity to exercise his "Skelly" rights, such as the right to obtain a copy of materials on which the termination was based, or the opportunity to respond to an impartial reviewer prior to termination.

Kuigoua, therefore, filed suit in the Superior Court of the State of California, County of Los Angeles, Central District seeking damages for retaliation, gender-based discrimination, and wrongful termination, in violation of the Fair Employment and Housing Act, the Whistleblower Protection Act, and Labor and Health and Safety Codes. Following a period of discovery, CCHCS filed a motion for summary judgment as to all causes of action in the Superior Court. Kuigoua opposed the motion. The Superior Court accepted CCHCS' arguments and determined that no genuine issues of material fact existed as to the elements of Kuigoua's claims. Kuigoua opposed the motion for summary judgment and presented the foregoing evidence. Despite this evidence, supported by contemporaneous documentation and Kuigoua's deposition testimony, the superior court entered judgment in CCHCS' favor.

Kuigoua moved for a new trial. The court denied the motion, finding that despite it being timely filed, it was not timely served, as it was served by mail on the 15th day following the notice of entry of judgment, and thus would not have been received until at least the 16th day, one day late under California Code. Civ. Proc., § 658(a)

Kuigoua timely filed a Notice of Appeal to the Court of Appeal, Second Appellate District, Division Five, which affirmed the Superior Court's ruling on August 14, 2020. It is the court of appeal's California Code Civ. Proc., § 437 jurisprudence underlying this ruling that Kuigoua takes issue with in this present petition to the Supreme Court of the United States.

ARGUMENT

I. THE PETITIONER HAS AN INDISPUTABLE RIGHT TO RELIEF FROM THE DENIAL OF HIS APPEAL FROM SUMMARY JUDGMENT.

Petitioner provided evidence supporting six claims of discrimination, retaliation and wrongful termination in violation of the Fair Employment Housing Act, Labor Code, Health and Safety Code, and Whistleblower Protection Act. The evidence, when viewed in the light most favorable to him, the nonmovant, demonstrates genuine issues of fact exist on each cause of action.

A. The Court of Appeal Erred in Affirming Summary Judgment as to the First Cause of Action: Retaliation in Violation of the FEHA.

Most fundamentally, the court of appeal erred in affirming summary judgment in CCHCS' favor as to Kuigoua's first cause of action for retaliation in violation of the California Fair Employment and Housing Act (FEHA). Cal. Gov. Code, § 12900 et seq. Because genuine issues of material fact exist as to whether CCHCS' adverse employment actions against Kuigoua in retaliation for his complaints and grievances regarding policy and legal violations, Kuigoua is entitled to a jury determination of this claim.

Section 12940(h) makes it unlawful "[for] any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden against [the FEHA] . . . " Cal. Gov. Code § 12940(h). In order to establish a prima facie case of retaliation under the FEHA, a

Plaintiff must show 1) he engaged in a "protected activity," 2) the employer subjected the employee to an adverse employment action, and 3) a causal link existed between the protected activity and the employer's action. *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803, 814-15 (Cal. Ct. App. 1999); *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 476 (Cal. Ct. App. 1992) (adopting Title VII (Civil Rights Act of 1964), 42 U.S.C. § 2000e et seq.) burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973).

Once an employee establishes a prima facie case, the employer is required to offer a legitimate, non-retaliatory reason for the adverse employment action. *Morgan v. Regents of University of California* 88 Cal. App.4th 52, 68 (Cal. Ct. App. 2000). If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation "drops out of the picture," and the burden shifts back to the employee to prove intentional retaliation. *Id.* Where, as here, the defendant moves for summary judgment, the defendant bears the initial burden of negating the plaintiff's prima facie case. Code Civ. Proc., § 437c (p)(2).

Genuine issues of material fact exist as to whether Kuigoua engaged in a "protected activity". An employee engages in a "protected activity" when he opposes an employment practice made unlawful by the [FEHA]." *Chin et al.*, CAL PRACTICE GUIDE: EMPLOYMENT LITIGATION (The Rutter Group 2015) Vol. 1 ¶ 5:1506, p. 5(II)-8; *see Nealy v. City of Santa Monica*, 234 Cal.App.4th 359, 380 (Cal. Ct. App. 2015). In applying this principle, "an employee's conduct may constitute protected activity . . . not only when the

employee opposes conduct that ultimately is determined to be unlawfully discriminatory under the FEHA, but also when the employee opposes conduct that the employee reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1043, (Cal. Ct. App. 2005).

Kuigoua filed a memorandum on April 13, 2014, opposing conduct prohibited by the FEHA, to wit, discrimination based on national origin, race, and/or gender. In his memorandum, Kuigoua advised management that "[the] first step to tackling discrimination at the workplace is to believe in your fundamental right to equality and a life free of harassment," that Mc-Bride Brooks was "creating an intimidating, hostile or offensive work environment", that he would not "[shrug] off bigotry", and that he was "a victim of dishonesty, retaliation, discrimination . . . ". Kuigoua stated further that "I'm trying hard to find the reason behind the bigotry I am being subject to. I can come up with only two reasons: my national origin or nepotism." Finally, Kuigoua closed his memorandum imploring management to address the conduct detailed therein "with deeds by enforcing our civil rights laws and ensuring fairness."

Kuigoua submitted a complaint alleging national origin and other unspecified discrimination and bigotry and asked management to enforce civil rights laws. This clearly constitutes opposition to conduct prohibited under the FEHA, readily precluding summary judgment as to this element.

Next, following this complaint, on January 28, 2015, Kuigoua submitted a Discrimination Complaint

Form with the Department of Corrections and Rehabilitation alleging gender discrimination. This also clearly constitutes "protected activity" under the FEHA.

Genuine issues of material fact exist as to whether Kuigoua was subject to adverse employment action following the submission of his April 13, 2014 memorandum and the January 28, 2015 Discrimination Complaint. An employer's action constitutes an actionable adverse employment action if it materially affects the terms, conditions, or privileges of employment. *Yanowitz*, 36 Cal.4th at 1052. *McRae v. Department of Corrections and Rehabilitation*, 142 Cal.App.4th 377, 386 (Cal. Ct. App 2006). An adverse employment action may include any employment action that is "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." *Yanowitz*, 36 Cal.4th at 1053-54. Offensive remarks, social slights, and minor changes in working conditions that displease an employee do not rise to the level of an adverse employment action. *Id.* at 1054; *McRae*, 142 Cal.App.4th at 386. Rather, the Plaintiff must show the action "had a detrimental and substantial effect on the plaintiff's employment." *McRae*, 142 Cal.App.4th at 386.

Following Kuigoua's various complaints, he was repeatedly denied available overtime opportunities; was told his work hours would be reduced despite overtime being available to other staff at the same time; was mandated to work when it was not his "turn" was assigned undesirable work hours and work hours that conflicted with training activities; was regularly assigned to 16-hour days as part of his regular working schedule; was passed over for promotion opportunities

by less experienced female staff members whom he trained; and was not provided with an investigation, despite his submission of grievances.

Finally, Kuigoua was constructively and unilaterally terminated from employment for accepting an additional appointment, even though CalHR expressly allows for dual appointments and other employees have been permitted to hold dual appointments. These actions go far beyond "minor changes" in working conditions and raise genuine issues of material fact as to whether these actions constituted "a detrimental and substantial effect on the plaintiff's employment." *McRae*, 142 Cal.App.4th at 386.

Genuine issues of material fact exist as to the existence of a causal link between Kuigoua's complaints and the adverse employment actions he suffered. And that causal connection may be made by an inference derived from circumstantial evidence, such as the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the retaliation. *McKinney v. American Airlines, Inc.*, 641 F.Supp.2d 962, 976 (C.D. Cal. 2009); see also *Washington v. California City Correction Center*, 871 F.Supp.2d 1010, 1027 (E.D. Cal. 2012). Kuigoua has asserted the adverse actions he suffered were the result of his engagement in protected activity. This assertion is supported by the timing of the protected activity, followed shortly thereafter by the adverse employment actions, which then continued up until his termination. This assertion is supported further by the fact that CCHCS violated its own policies throughout these events, including by failing to investigate Kuigoua's complaints and

terminating him for holding dual appointments, despite CCHCS policies expressly allowing dual appointments.

Courts have routinely found the causal link established for summary judgment purposes when the proximity in time between a protected activity and the adverse employment action can allow a factfinder to infer retaliation. *Dawson v. Entek International,* 630 F.3d 928 (9th Cir. 2011). The shorter the time frame, the stronger the evidence of pretext. *Id.* Courts have also found pretext even when weeks had elapsed between the protected activity and the adverse employment action. *Id.*; see also *Thomas v. City of Beaverton,* 379 F.3d 802, 812 (9th Cir. 2004); *Miller v. Fairchild Indus., Inc.*, 494 U.S. 1056 (9th Cir. 1989); *Allen v. Iranon*, 283 F.3d 1070, 1078 (9th Cir. 2002).

In the instant case, the timing of the adverse employment actions and Kuigoua's various protected activities rase a genuine issue of material fact as to a causal link between the two. The adverse employment actions occurred beginning after the April 13, 2014 complaint and continued until his termination on June 5, 2015.

In addition, causality is further supported by CCHCS' failures to investigate Kuigoua's complaints and grievances. A "lack of rigorous investigation is evidence suggesting defendants did not value the discovery of the truth so much as a way to clean up the mess uncovered when [the employee] made his complaint." *Mendoza v. Western Med. Ctr. Santa Ana*, 222 Cal.App.4th 1334, 1344-45 (Cal. Ct. App. 2014). An employer's intent to harass and discriminate may be inferred from the failure to make a timely good faith investigation. *Id.*

CCHCS did not conduct a proper investigation pursuant to its own policies, procedures, and training regarding Kuigoua's grievances and complaints. For instance, on July 25, 2014, Christina Ulstad sent an e-mail stating "upon initial review, the grievances fail to provide any evidence to support his allegations." However, Ulstad and Donald Ulstad admitted that, in fact, CCHCS conducted no "initial review" or any review of his grievances and did not timely respond to him or contact potential witnesses. Pursuant to *Mendoza*, this course of conduct suggests retaliatory intent.

Considering the relationship between Kuigoua's complaints and the adverse employment action taken against him, combined with the failure to investigate by CCHCS, genuine fact issues exist as to the existence of a causal link between Kuigoua's grievances and complaints and the adverse employment actions.

The court of appeals claims Kuigoua failed to make a prima facie case for retaliation because he did not specifically complain that the discrimination he experienced was gender related. *Kuigoua*, at 6; *See* App., *infra*, 13a-14a. This is a misapplication of the law. There is no requirement that a Plaintiff specifically identify the type of discrimination to which he is being subjected when complaining of disparate treatment. He is simply required to have a reasonable belief that he is opposing discriminatory conduct. *Yanowitz*, 36 Cal.4th at 1031.

Kuigoua was not required to use specific words to convey this belief to his or her employer. For example, in *Yanowitz*, the parties acknowledge that the Plaintiff never specifically accused her supervisor of discrimination. She did, however, complain to her supervisor that

a directive to fire an unattractive sales associate was "without adequate justification". The court concluded that the trier of fact could conclude that by making this statement, the Plaintiff adequately conveyed to her supervisor "that she considered the order to be discriminatory and put him on notice that he should reconsider the order because of its apparent discriminatory nature." *Id.* at 1048.

> The relevant question . . . is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.

Id. at 1047. See also *Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal.app.5th 1028, 1047 (Cal. Ct. App. 2016).

It is undisputed that Kuigoua complained about discrimination. Shank testified that he had complained of "retaliation, discrimination . . . " In addition, the "grievance complaints" that Kuigoua submitted in July 2014 relate to the general policy of overtime distribution and ask that this policy be "equally fair to all employees". This language is more than sufficient to convey Kuigoua's belief that his complaints were based upon discrimination.

Kuigoua made a prima facie case of discrimination and genuine issues of material fact exist as to CCHCS' nonretaliatory explanation for its acts and whether those explanations are pretextual. In a retaliation case, the *McDonnell Douglas* test "[requires] that (1) the plaintiff establish a prima facie case of retaliation,

(2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal termination. As set forth above, at the summary judgment stage, viewing the facts in the light most favorable to Kuigoua, he has established a prima facie case of retaliation. This showing raises a presumption of retaliation. *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 367 (Cal. Ct. App. 2000); *Reeves v. Safeway Stores, Inc.*, 121 Cal.4th 95, 104 (Cal. Ct. App. 2004). CCHCS provided nothing of substance in response to the majority of Kuigoua's asserted adverse employment actions to rebut the presumption beyond general denials.

CCHCS asserts that Kuigoua was not terminated but rather transferred to CalVet, and that, upon accepting employment with CalVet, Kuigoua could no longer maintain employment with CCHCS because policy forbade dual appointments under the circumstances. Genuine issues of fact exist as to the validity of this proffered non-retaliatory explanation and as to whether it is pretextual.

Policy Manual 350 sets forth CCHCS' policy with respect to dual appointments. This policy expressly allows an employee to hold dual positions or appointments and places an affirmative duty on the defendant to comply with certain regulations in deciding whether to accept or deny the dual appointments. Contrary to CCHCS' assertions, nothing in this policy would require Kuigoua to submit a request for approval to CCHCS prior to accepting an additional appointment with CalVet. Rather, approval is only required under limited circumstances, such as when the second appointment is within the same department.

Id. Additionally nothing in the policy precludes supervisors and managers from holding dual appointments and, in fact such dual appointments have occurred.

Further, even if there was a valid policy precluding dual appointments, because he had not yet started working at CalVet, the proper remedy would be to discuss that policy with Kuigoua and allow him the option of choosing which appointment he wished to continue. CCHCS did not provide Kuigoua with the courtesy of choice and instead, unilaterally transferred him to CalVet, thereby constructively terminating him from CCHCS.

Finally, genuine fact issues exist as to whether CCHCS' proffered explanation for termination was pretextual, as the termination violated CCHCS' own policies. It is well-established that an employer's deviation from its own policy or procedure is sufficient to create an inference that the "legitimate non-discriminatory reason" proffered by the employer is untrue. *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1220 (10th Cir. 2002) (holding that deviations from an employer's regular procedures established pretext); *Russell v. TG Mo. Corp.*, 340 F.3d 735, 746 (8th Cir. 2003); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Bass v. Bd. of County Comm'rs,* 256 F.3d 1095, 1108 (11th Cir. 2001); *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424 (7th Cir. 1992). Thus, a reasonable person viewing the evidence in the light most favorable to Kuigoua could find that CCHCS' stated reason for termination was untrue and that the real reason was retaliatory.

The court of appeal found that Kuigoua "failed to create a triable issue of fact for retaliation under FEHA because [he] did not present evidence that any

claimed retaliation resulted in an adverse employment action." *Kuigoua*, at 6; *See* App., *infra*, 23a. Both courts appear to fixate on the idea that this claim was one of gender discrimination, however Kuigoua submits that this is an improper, and needlessly pedantic, reading of the situation. Kuigoua presented abundant evidence to raise genuine issues of material fact as to the elements of a prima facie retaliation case. Numerous genuine issues of material fact preclude summary judgment based on CCHCS' proffered non-retaliatory explanation for adverse employment actions. Therefore, Kuigoua is entitled to a jury determination of his first cause of action, and the Appellate Court's rulings to the contrary should be reversed.

B. The Court of Appeal Erred in Affirming Summary Judgment as to the Second Cause of Action Gender Discrimination in Violation of the FEHA.

Genuine issues of material fact likewise preclude summary judgment as to Kuigoua's second cause of action for gender discrimination in violation of FEHA. As discussed above, Kuigoua suffered adverse employment actions, and genuine issues of material fact exist as to whether his gender was a substantial factor motivating these actions.

"Employment practices should treat all individuals equally, evaluating each on the basis of individual skills, knowledge and abilities and not on the basis of characteristics generally attributed to [protected groups]." Cal. Code Regs., tit. 2, § 7286.3. As in the case of retaliation claims, California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of

discrimination based on a theory of disparate treatment. *Guz*, 24 Cal.4th at 354-55. First, the plaintiff must prove a prima facie case of wrongful discrimination, then the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for the adverse treatment. *Id.* The burden then shifts back to the plaintiff to establish the stated reason is a mere pretext for discrimination. *Id.*

A plaintiff establishes a prima facie case of gender discrimination by showing that 1) he was within the protected class; 2) he was qualified for the position; 3) he was subject to an adverse employment action; and 4) the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. *Guz*, 24 Cal.4th at 355.

Kuigoua is a man in the nursing profession, a profession historically dominated by women. *Beck-Wilson v. Principi*, 441 F.3d 353, 356 (6th Cir. 2006). It is undisputed that Kuigoua was qualified for his position. He holds a Registered Nurse certification and has advanced through experience to a supervisory position. As discussed above, Kuigoua was subject to adverse employment actions.

The court of appeal agreed with CCHCS argument that Kuigoua did not specifically claim that he was subjected to gender discrimination until later in the process and that precludes a finding of gender discrimination. *Kuigoua*, at 6-8; *See* App., *infra*, 23a-25a. However, Kuigoua was subject to adverse employment actions that resulted from his first complaint onward. As previously discussed, plaintiffs are not required to "complain with the clarity and precision of lawyers". *Castro-Ramirez*, 2 Cal.App.5th at 1047.

Because there was no legitimate reason for the adverse actions against Kuigoua, and because he was subject to sexist remarks from his supervisor, genuine fact issues exist as to whether an inference of unlawful gender-based discrimination arises. Discriminatory remarks from a supervisor constitutes evidence of discrimination. *Reid v. Google*, 50 Cal.4th 512, 539-40; 545 (Cal. Ct. App. 2010). "Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury." *Id.* at 541. "The task of disambiguating ambiguous utterances is for trial, not for summary judgment." *Id.* at 545.

In this instance, the adverse actions against Kuigoua coincided with blatantly sexist remarks. On August 4, 2014, Nair called Kuigoua into her office and told him he "had no balls" and was "not man enough".

In the context of a profession dominated by women, comments such as these cannot be construed as anything other than discriminatory based upon Kuigoua's gender. Evidence of stereotypical views of gender and gender expression, such as these, may be considered as a triable issue of material fact that impermissible gender bias was a substantial motivating factor for termination. *Husman v. Toyota Motor Credit Corp.*, 12 Cal.App.5th 1168, 1191-92 (Cal. Ct. App. 2017). Additionally, Nair's statements were in violation of California Government Code § 3538 and California Government Code § 8547.3 which state that employees may not directly or indirectly use or attempt to use official authority to influence, intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any person for the purpose of interfering with whistle-blower laws.

Discriminatory intent is further shown by the preferential treatment that female staff received, and which Kuigoua was denied. As discussed above, Kuigoua was regularly subject to verbal abuse and false accusations, abuse and accusations his female co-workers did not experience; suffered punitive disciplinary measures under circumstances in which female staff suffered no consequences; was passed over for promotions in favor of female staff he had trained; was denied overtime opportunities provided to female staff; was given undesirable schedules that were not inflicted on women; and was ultimately unilaterally terminated without good cause.

CCHCS' failure to investigate his grievances and complaints support an inference of discrimination, which, as discussed above, constitutes strong evidence of discriminatory intent. *See Mendoza*, 222 Cal.App.4th at 1344-45. Based on the facts in the summary judgment record, genuine issues of material fact exist as to whether an inference exists that he adverse actions against Kuigoua were motivated by discriminatory intent.

Having established a prima facie case, or at least genuine issues of material fact, CCHCS cannot rebut the presumption of discrimination. Genuine issues of material fact preclude accepting CCHCS' bald assertions of non-discriminatory or non-retaliatory motive at the summary judgment stage. Accordingly, Kuigoua is entitled to a jury determination of his claim of discrimination, and the court of appeal's ruling should be reversed.

C. The Court of Appeal Erred in Affirming Summary Judgment as to the Third Cause of Action: Failure to Prevent Discrimination and Retaliation.

Kuigoua made complaints regarding unlawful practices and gender discrimination in the workplace. Despite being on notice of Kuigoua's allegations, CCHCS failed to investigate and instead, ultimately terminated him. A hostile work environment claim can be sustained by either severe or pervasive harassment that "alters the conditions of employment and creates an abusive working environment. 2 Cal. Code Regs. §7287.6(b)(1).

> [Whether] an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance . . . [no] single factor is required.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

By failing to take any action in response to Kuigoua's repeated complaints and grievances, CCHCS is liable for failure to prevent discrimination and retaliation. Each of the genuine issues of material fact discussed above preclude summary judgment as to Kuigoua's third cause of action as well. Therefore, he was entitled to a jury determination of his third cause of action, and court of appeal's rulings to the contrary was error.

D. The Court of Appeal Erred in Granting Summary Judgment as to the Fourth Cause of Action: Retaliation in Violation of the Labor Code § 11102.5(b)-(c).

Labor Code § 11102.5 (b)-(c) prohibits retaliation for making reports of labor code violations. Kuigoua reported labor violations when McBride-Brooks authorized employees to work more than 24 consecutive hours. Because he believed this directive to be unlawful, he refused to comply and refused to schedule such shifts for subordinate nursing staff. Kuigoua was further advised expressly by a CCHCS medical physician assistant that he could be rewarded for agreeing to cease his reporting, or punished for persisting with them, including by termination. This is plainly sufficient to raise genuine issues of material fact as to whether Kuigoua suffered retaliation for reporting labor code violations.

Furthermore, even if it were accepted that Kuigoua misunderstood McBride-Brooks' directive, retaliation is nonetheless unlawful so long as Kuigoua reasonably and in good faith believed her directive authorized an unlawful act. *See, e.g.*, *Yanowitz*, 36 Cal.4th at 1043.

The court of appeal focused on the fact that McBride-Brooks' directive, while perhaps inartfully given, was not unlawful. *Kuigoua*, at 9; *See* App., *infra* 22a. However, this is not the issue at summary judgment. The issue at summary judgment is whether Kuigoua made the report or complaint reasonably, and in good faith. Therefore, genuine fact issues exist as to whether Kuigoua believed, reasonably and in good faith, that this directive was unlawful. Therefore,

he is entitled to a jury determination of his fourth cause of action, court of appeal's ruling should be reversed.

E. The Court of Appeal Erred in Granting Summary Judgment as to the Fifth Cause of Action: Violation of Health & Safety code § 1278.5.

Genuine issues of material fact preclude summary judgment as to Kuigoua's fifth cause of action for violations of the Health & Safety Code. This provides, in pertinent part, that no health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff; or any other health care worker of the health facility because that person has… presented a grievance, complaint or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity, or has initiated, participated or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff or governmental entity. Health & Safety Code § 1278.5.

Pursuant to Health & Safety Code § 1278.5 (b)(2), no entity that owns or operates a health facility, or which owns or operates any other health facility, shall discriminate or retaliate against any person because the person has taken any actions pursuant to the Code. It is intended to encourage medical staff and patients to notify governmental entities of "suspected unsafe patient care and conditions." Cal. Health

& Safety Code § 1278.5(a); *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1105 (9th Cir. 2008).

Genuine issues of material fact exist as to whether CCHCS violated Health & Safety Code § 1278.5 by terminating Kuigoua's employment in retaliation for the complaints he made to CCHCS about the quality of patient care and patient safety issues as well as his refusal to enter false information into medical records. On May 1, 2014, he submitted a complaint to management identifying several areas where CCHCS was adversely impacting the quality of care provided to its patients, including directives from McBride-Brooks to make false entries in patient medical records. He then filed an online whistleblower complaint on July 30, 2014, delineating her unlawful directives allowing staff to work more than 16 consecutive hours in a 24-hour period and to falsify medical records.

The court of appeal focused on whether Kuigoua filed a Government Tort Claim under Gov. Code, § 945.4. *Kuigoua*, at 10-11; *See* App., *infra*, 23a-25a. This is erroneous and egregious because Kuigoua raised his claim in a March 7, 2016, Whistleblower Retaliation Complaint with the State Personnel Board. SPB Case No.: 16-0341W. Because this claim was duly presented to a state administrative procedure, the purposes of the Government Tort Claims Act have been met and no provisions of the Act bar Kuigoua's claim on this point. *See Cornejo v. Lightbourne*, 220 Cal.App.4th 932, 941, (Cal. Ct. App. 2013). The Appellate Court attempts to distinguish *Cornejo* because it was addressing the Whistleblower Protection Act, Gov. Code § 8547, et seq., and not the Health & Safety Code. *Kuigoua*, at 11; *See* App., *infra*, 24a-25a. However, even

though the cases may address different Acts, the premise remains the same, that a claim made with the State Personnel Board may be considered to be the functional equivalent of a claim made under the Government Tort Claims Act. Therefore, court of appeal erred in disposing of Kuigoua's fifth cause of action for failure to file a Government Tort Claim.

F. The Court of Appeal Erred in Granting Summary Judgment as to the Sixth Cause of Action: Violation of California Whistleblower Protection Act.

On March 7, 2016, Kuigoua filed a written Whistleblower Retaliation Complaint with the State Personnel Board (SPB). SPB Case No.: 16-0341W. In his complaint, he alleged that he had been retaliated against for reporting, among other things, complaints of patient care and safety. On April 11, 2016, the SPB dismissed the complaint. Having exhausted his administrative remedies, Kuigoua then included in his First Amended Complaint a claim for violation of the Whistleblower Protection Act. Government Code §§ 8547.3(c) and 8547.8(c).

As discussed above, Kuigoua reported numerous instances of improper directives from supervisors that could compromise patient care. When CCHCS failed to investigate, Kuigoua filed an online whistleblower complaint on July 30, 2014, alleging that McBride-Brooks issued an unlawful directive to allow staff to work more than 16 consecutive hours in a 24-hour period and to falsify medical records. Following this complaint, on August 4, 2014, Nair called him into her office, told him he "had no balls" and was "not man enough".

Next, Kuigoua was terminated from his employment. As discussed above, genuine issues of material fact exist as to whether Kuigoua was terminated or, as CCHCS claims, merely transferred agencies. Kuigoua had no desire or intent to transfer, but rather desired to hold dual appointments, which is expressly allowed by applicable policy. Even if, arguably, policy existed that disallowed Kuigoua to hold dual appointments, because he had not yet started working for CalVet, the proper course of action by CCHCS would have been to give him the choice to either remain with CCHCS or transfer to CalVet. However, CCHCS did not provide him with that option, but unilaterally transferred him without his knowledge or agreement.

Kuigoua asserts that this unilateral transfer was a retaliatory action in response to his Whistleblower complaint. Because there are genuine issues of material fact as to whether Kuigoua was terminated or merely transferred, and whether this termination (or transfer) was done based on a legitimate non-retaliatory reason, summary judgment as to the sixth cause of action is improper. Kuigoua is entitled to a jury determination of this cause of action and the court of appeal erred in ruling otherwise.

II. NO OTHER ADEQUATE MEANS TO ATTAIN RELIEF FROM A FUNDAMENTALLY IMPROPER JUDGMENT.

Mandamus is warranted to correct the state court of appeal's egregious errors because Kuigoua has no other adequate means to obtain relief from the court of appeals refusal to remand for trial by jury. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (citation omitted).

III. MANDAMUS RELIEF IS APPROPRIATE UNDER THE CIRCUMSTANCES.

For the reasons discussed above, mandamus relief is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. The writ of mandamus is among "the most potent weapons in the judicial arsenal." *Will v. United States*, 389 U.S. 90, 107 (1967). Congress consolidated the various federal courts' mandamus powers under the All Writs Act of 948, 28 U.S.C. § 1651. Federal courts have traditionally issued the writ only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion'" will justify the writ. *Cheney*, 542 U.S. at 380 (citations and quotations omitted). For a court to grant the writ, three requirements must be satisfied: (1) the petitioner must have no other adequate means to attain the desired relief; (2) the petitioner must show that the right to the relief is clear and indisputable; and (3) exercising its discretion, the issuing court must decide that the remedy is appropriate under the circumstances. *Id.* at 380-81. Together, these safeguards ensure that the writ does not substitute for the regular appeals process. *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Such standards are met here. Kuigoua submits the court of appeal committed an egregious error under these facts.

CONCLUSION

For the foregoing reasons, Kuigoua respectfully requests this Court to issue a writ of mandamus directing the court of appeal to reverse the summary judgment and remand to superior court for a jury trial. Alternatively, the Court should construe this as a petition for a writ of certiorari seeking review of the court of appeals' August 14, 2020, decision. (App., *infra* 1a-27a).

Respectfully submitted,

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