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By V. James DeSimone

Discovery in employment civil rights cases: Finding where the bodies are buried

"Is she dead yet?" Simultaneous feelings of excitement and disgust ran through me as I read this line while reviewing pages and pages of e-mail correspondence amongst employees of a major corporate defendant. This particular e-mail was sent from a co-worker of my client to his supervisor and was sent on the very same day that my client, a hard-working, dedicated young woman, was terminated in retaliation for speaking up about the preferential treatment provided to male employees in the workplace. The line clearly referred to my client's termination, and I was excited because it would provide critical inferential evidence that her male co-workers were favored by her boss. I was disgusted because of the callous indifference this young man showed to his co-worker who needed this job as much, if not more, than he did.

My excitement only grew as I began reading e-mail drafts of a memo the supervisor provided to my client just prior to her termination. When the first responsive documents were provided by defendants, it contained a well-written memo which was clearly designed to establish a paper trail justifying the termination. It was the type of document that, standing alone, would leave the reader with little doubt that my client was a horrible employee who deserved to be fired.

There was only one problem, the memo could scarcely have been said to be written by her supervisor. Indeed, in reviewing the e-mail which contained the first draft of the memo, it was apparent that he had trouble stringing two coherent sentences together and was struggling for a convincing reason to show that my client had done something wrong. As the e-mail trail went back and forth between supervisor and subordinate, the truth emerged; the memo was actually written by my client's male co-worker and bolstered our case that he was one of the men who received preferential treatment on the basis of his gender.

The fact that I received these documents in litigation is attributable to one reason only: I made a successful motion to compel early on in the case. Albeit, the motion was on a different issue; the defendant's counsel nonetheless realized that I would make good on my subsequent promise to file a motion to compel to obtain all e-mails concerning my client and that I would follow up with a Notice of Inspection to have an expert search defendant's computers for all e-mails pertaining to my client. It was not long after that the old adage of "be careful what you ask for," came true as I received several boxes containing thousands of pages of sometimes repetitive e-mail trails. However, those boxes might as well have contained buried treasure as I was able to cull together an extremely convincing case of gender discrimination by reviewing each incriminating e-mail which was hidden among countless innocuous e-mail exchanges.

Motion to compel

In order to successfully litigate an employment discrimination case, a plaintiff's attorney inevitably has to file a motion to compel. It is advisable to file a motion to compel early in the case so that you can utilize the evidence obtained in cross-examination of witnesses during deposition. Filing a successful motion to compel will also give you leverage in persuading opposing counsel to voluntarily produce documents even if he or she knows they will be harmful to their case.

It is critical to serve a Request for Production of Documents at the earliest opportunity. Pursuant to California Code Civil Procedure section 2011.020, plaintiff may serve a Request for Production of Documents ten days after the service of the Summons and Complaint on the defendant. The requests should be specifically tailored to your case and should always include requests for production of the personnel files, prior complaints, investigatory files and communications, including e-mails, on all topics which are in any way relevant to your case.

Once the defendant responds to the request, it is imperative to write a detailed meet and confer letter as soon as possible. The parties must meaningfully meet and confer prior to filing a motion to compel. Calendaring the 45-day deadline to file your motion to compel is also critical. (Code Civ. Proc., § 2031.310, subd. (c)). If opposing counsel indicates a willingness to meet and confer by providing supplemental responses and producing more documents, always obtain and confirm in writing a specific date for an extension of time on that deadline, so you have time to prepare the motion if necessary. This is true even if the defendant agrees to provide supplemental responses, which permits the 45-day deadline to begin anew. Otherwise, if the defendant fails to supplement all responses in issue, a mercurial judge may hold that you have blown the deadline even when the opposing party has breached an agreement to supplement a particular response.

However, there are times when opposing counsel will stonewall just prior to the deadline. All of a sudden telephone calls are not being returned, or if they are, it's a voice mail message left well after normal business hours. There are defense counsel who will make the calculated gamble that you will not file that motion to compel. When this occurs it's necessary to make them pay for that gamble by filing the motion to compel and requesting sanctions for their failure to meaningfully participate in the meet and confer process.

Of course, when you are up against a deadline, its hard to reinvent the wheel, let alone navigate the complex case law which is involved in some of the privileges asserted by defense counsel. Thus, this article addresses some of the common issues which arise in employment cases with citations to case law which should assist all of us in finding where the bodies are figuratively buried in our cases.

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Obtain the investigation

Most defense counsel will voluntarily turn over the employer's investigation into your client's complaint of discrimination or harassment because a company's investigation and appropriate corrective action is a defense to co-worker harassment and can limit your client's liability if the harasser is a supervisor. Nonetheless, there are times when defendants will try to hide documents which pertain to the investigation and, in those instances, you can be sure that something valuable is contained in those documents. Moreover, it is crucial to carefully review any documents you receive and rigorously depose all witnesses to make sure that the defense is not merely providing you with self-serving documents while concealing witness statements or other documentary evidence which can be helpful to your case.

Once you have met and conferred and relevant documents are not forthcoming, California law strongly supports compelling the production of all documents pertaining to the corporate defendant's investigations into allegations of discrimination and harassment. A common roadblock placed by defendants is to claim that the investigation was conducted by an attorney and, thus, protected by the attorney-client privilege. However, in *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 129 [68 Cal.Rptr.2d 844], the reviewing court stated "if defendants' answer or discovery responses indicate the possibility of a defense based on thorough investigation and appropriate corrective response, ... a finding of waiver [of the attorney-client privilege can] be made."

So long as your client complained of the harassment, the company is under an obligation to investigate and take appropriate corrective action based on the fact that California Government Code section 12940, subdivision (j)(1) states, in relevant part:

> (h)arassment of an employee, ... shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.

Accordingly, it's hard to imagine a scenario where the employer will not claim that it investigated and responded appropriately once a complaint is made.

In fact, "[t]he FEHA makes it a separate unlawful employment practice for an employer to 'fail to take all reasonable steps to prevent discrimination and harassment from occurring.'" (*State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040 [6 Cal.Rptr.3d 441, 449] [citing Government Code § 12940, subd. (k)].) Thus, all documents pertaining to the investigation of complaints of harassment and discrimination should be relevant to show whether the employer took reasonable steps to prevent discrimination and harassment, which necessarily will include a reasonable policy of investigation and taking corrective action in response to such complaints.

Similarly, while an employer is strictly liable for hostile environment sexual harassment by a supervisor, the employer can proffer the "avoidable consequences" defense to decrease damages if the employee failed to report the harassment. However, "it reduces those damages only if, taking into account of the employer's anti-harassment policies and procedures and its past record of acting on harassment complaints, the employee acted unreasonably in not sooner reporting the harassment to the employer." *State Dept. of Health Services, supra*, 31 Cal.4th at p. 1049.

Using this theory, you can not only obtain all documents pertaining to the investigation of your client's complaints, you can also compel the production of documents pertaining to the investigations of other complaints of harassment or discrimination. In *State Department of Health Services, supra*, 31 Cal.4th at pp. 1045-46, the California Supreme Court emphasized,

> [e]vidence potentially relevant to the avoidable consequences defense includes anything tending to show that the employer took effective steps 'to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints. . . . *'[I]f an employer has failed to investigate harassment complaints, [or] act on findings of harassment, or, worse still, [has] retaliated against complainants, future victims will have a strong argument that the policy and grievance procedure did not provide a 'reasonable avenue' for their complaints.* [Emphasis added]

When the decision of *State Department of Health Services* was issued, plaintiffs' employment attorneys across the state were relieved that the California Supreme Court departed from the federal rule which provides employers a complete affirmative defense to liability for supervisor harassment.[1] Instead, under California law, at most, an employer's affirmative defense can limit a plaintiff's damages. An unexpected additional advantage of that decision is that judges should permit wide-ranging discovery of the employer's past response to harassment complaints.

Depending on the fact pattern, you can also use the case of *Cotran v. Rollins Hudig Hall International* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900] to obtain the investigation into allegations that your client engaged in misconduct justifying termination. In *Cotran*, the California Supreme Court held:

> [w]e give operative meaning to the term 'good cause' in the context of implied employment contracts by defining it, ... , as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an *adequate investigation* that includes notice of the claimed misconduct and a chance for the employee to respond.

(*Id.* at 108 [Emphasis added].)

If an employer must show that it reasonably investigated any claim that your client did something wrong justifying termination or disciplinary action, then all documents pertaining to the investigation are relevant and any claim of privilege should be waived.

The perpetrator usually returns to the scene of the crime

In addition to seeking all documents pertaining to the investigation of complaints of harassment and discrimination based on the relevance to the company's anti-discrimination policies, it is also useful to demonstrate other reasons why

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these documents are relevant.

Oftentimes it is helpful to remind the court just what is at stake in these types of cases. Pursuant to California Government Code section 12921:

> [t]he opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, marital status, sex, age, or sexual orientation is hereby recognized and *declared to be a civil right.* (Emphasis added.)

When a plaintiff files an employment discrimination suit:

> the charging party is a 'private attorney general' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself.

(*E.E.O.C. v. Dry Goods Corp.* (1981) 449 U.S. 590, 602 [101 S.Ct. 817, 824].)

In *Equal Employment Opportunity Commission v. Recruit U.S.A., Inc.* (9th Cir. 1991) 939 F.2d 746, 756, the court rejected a company's attempt to confine disclosure of employment records to those of the individuals named in the charge of discrimination. The court approved a Sixth Circuit decision in which it was noted that:

> the existence of patterns of racial discrimination in job classifications or hiring situations other than those of the complainants may well justify an inference that the practices complained of here were motivated by racial factors.

The Ninth Circuit, in *EEOC v. Recruit USA*, emphasized:

> The scope of relevancy, for purposes of the EEOC's investigatory powers, is quite broad. The Supreme Court noted that 'since the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on allegations against the employer.'

(*Id.* at p. 756.)

These federal decisions are persuasive authority in state court judges because:

> ...the court stated that "[t]he objectives of the FEHA and Title VII of the Federal Civil Rights Act (42 U.S.C., sec. 2000e et seq.) are identical and California courts have relied upon federal law to interpret analogous provisions of the state statute.

(*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 997-998 [6 Cal.Rptr.2d 184, 192].)[2]

If the court is convinced of the nobleness of your cause, the balancing test involved in any assertions of privacy rights of those involved in previous complaints tips strongly in the favor of the relevance of the information to your case. California courts have held that evidence of a discriminatory mind-set which is revealed by the employer's discriminatory treatment of others is admissible to demonstrate that an individual employee was discriminated against. (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 667 [8 Cal.Rptr2d 151, 168].)

In *Clark, supra*, a discharged professor alleged his denial of tenure was motivated by race discrimination even though the discriminatory comments were made by supervisory individuals who did not participate in the ultimate decision to deny tenure. The Second Appellate District held that such comments were admissible to prove that a race-based mindset existed within Claremont University. The court stated:

> an individual employment decision should not be treated as a 'watertight compartment, with discriminatory statements in the course of one decision somehow sealed off from (that is, irrelevant to) every other decision. In the real world ... human beings (including triers of fact) are not compelled to reason that way. If an employer discloses a ... race-based mindset, it is certainly a permissible inference that the mindset is not focused solely on the individual employee to whom or about whom the specific statement was made.

(*Ibid.*)

Evidence of an employer's conduct against other employees tending to demonstrate hostility towards a certain group is both relevant and admissible in an employment discrimination case. In *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1479, the court stated:

> ...[r]ecognizing that '[t]here will seldom be 'eyewitness' testimony as to the employers mental process,' the United States Supreme Court held that evidence of the employer's discriminatory attitude *in general* is relevant to prove race discrimination.

... The Eighth Circuit, ... likewise found that "evidence of prior acts of discrimination is relevant to an employer's motive in discharging a plaintiff. "

> The *Heyne's* Court also emphasized: that statistical evidence tending to show that ... [an employer] discriminated against Blacks in hiring and promotion, evidence of prior acts of discriminations against black customers, and evidence of a ... manager telling racist jokes ... were relevant to proving the employer's motivation behind discharging [the Plaintiff].

(*Heyne v. Caruso, supra,* 69 F.3d at 1480.) Similarly, in *EEOC v. Farmer Brothers Co.* (9th Cir. 1994) 65 FEP 857, 862, the Ninth Circuit held that evidence of sexual harassment of women is relevant to claims of gender-based employment discrimination.

While the admissibility of this evidence at trial is always going to be determined by the judge on a case-by-case basis, especially if your client is not the first victim of discrimination, having such evidence in your possession makes it much less likely that the defendants will want to risk going to trial on your case.

Can I get a witness?

Employers readily protect the privacy rights of their employees as a justification to shield their identity from discovery. In instances where you believe there were other complainants but are not sure of their identities, go back to the basics. California Code of Civil Procedure section 2017.010(a) states, in relevant part, that:

> Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter as well as the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property.

In *Olympic Club v. Superior Court* (1991) 229 Cal.App.3d 358, 363-364 [282

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Cal.Rptr. 1, 8-9], the court held that names and addresses of witnesses to illegal race discrimination were discoverable. The court balanced the witnesses privacy interest with the interest of litigation and stated:

> this action is not ordinary civil litigation. The [Unruh] Act codifies fundamental principles of society. ... [There is a] strong public policy to eradicate racial discrimination.

Of course, FEHA's declaration that it is a *civil right* to be free from harassment or discrimination in the workplace is equally compelling. (*Ibid.*)

Employers must not be permitted to hide the identity of employees who may have relevant information about your client's claims. As the Court of Appeal emphasized in *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 76-77 [134 Cal.Rptr. 468, 475-476]:

> [t]he legitimate interest and purposes of discovery are generally amply protected by the requirement that an adverse party is entitled to the identity and location of all persons with knowledge of relevant facts.... Its basis is that persons who have relevant knowledge are not to be considered the witnesses of any particular party to the litigation. Ensuring the availability of all parties to the right to contact and to take depositions of these witnesses provides adequate safeguards against surprise of false testimony. Furthermore, knowledge of the identity of these possible witnesses permits investigation into the facts while encouraging diligence on the part of both attorneys.

(*Ibid.*)

Evidence of prior crimes is relevant to prove motive or some other fact

Defendants often contend that evidence of other "crimes" are not discoverable because pursuant to Evidence Code section 1101, "character" evidence is inadmissible. However, Evidence Code section 1101, subdivision (b) states:

> [n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.

Accordingly, if you can show relevance for some other reasons it matters not that there may also be an inference that the perpetrator happens to be a bad character.

The court in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1162 [74 Cal.Rptr.2d 510, 532] specifically rejected the argument that evidence regarding prior conduct of harassment with other employees is inadmissible based on Evidence Code section 1101, subdivision (a). It held that the evidence was properly "admitted, in part, to establish [defendant's] liability for punitive damages." (*Ibid.*) The court also emphasized that, "[e]vidence of past actions may be admitted to prove some fact such as motive, intent, plan, knowledge or absence of mistake or accident." (*Ibid.*)

The case of *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518 [76 Cal.Rptr.2d 547, 551] is often relied upon by defendants because of rigid rulings on admissibility made by the trial judge and upheld by the appellate court. However, the Court of Appeal recognized that where "the evidence . . . is relevant for another permissible purpose" it is admissible. In any event, a determination as to whether the evidence is admissible is not the standard as to whether the evidence should be produced. In a case where the civil rights of your client are at stake, the relevance to the plaintiff's case should outweigh any asserted privacy rights.

Make sure that the punishment fits the crime

It is often helpful to argue that the evidence you are seeking is relevant to prove punitive damages. Even if the judge does not rule on this basis, such an argument may cause the corporate defendant to consider its punitive damage exposure. Evidence of complaints of sexual harassment and discrimination made by other employees could establish that the employer had notice of a hostile work environment but failed to take adequate measures to ensure that the discrimination and harassment was remedied. Such evidence of notice and inaction would indicate that the employer authorized or ratified the conduct and thus would be directly relevant to plaintiffs' prayer for punitive damages. (Code Civ. Proc., § 3294, subd. (b).) An employer is liable for punitive damages if it hires or retains the harassing employee with knowledge of his unfitness or with conscious disregard for it, or if it ratifies the employee's conduct. (*Kelly Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 419 [27 Cal.Rptr.2d 457, 468].)

In *Bihun v. AT&T Information Systems* (1993) 13 Cal.App.4th 976 [16 Cal.Rptr. 2d 787] (overruled on other grounds in *Lakin v. Watkins Associated Industry* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 122].), the court held that evidence of a harasser's sexual misconduct with other female employees was relevant to show defendant had knowledge of the harasser's reputation and the complaints about his conduct with female employees but took no steps to investigate or remedy the unlawful conduct and, thus, was relevant to punitive damages.

In order to avoid punitive damage liability pursuant to California Civil Code section 3294's proscription of acting in "conscious disregard of the rights and safety of others," an employer must take reasonable steps to prevent an employee whose unlawful conduct was known from committing future acts of discrimination, harassment, and retaliation. (*Weeks v. Baker & McKenzie, supra*, 63 Cal.App.4th at p. 1157.) Simply put, the "employer may not employ or continue to employ the errant employee without taking action reasonably designed to protect the rights or safety of others." (*Id.* at pp. 1157-58.)

Thus, a plaintiff is entitled to discover what corrective action, if any, was taken in response to your client's complaint and any past complaints to prove that the employer's ineffectual response entitles the plaintiff to receive punitive damages.

Oops, we lost the evidence

Even in this day of information technology, there are defendants who will claim to have lost critical evidence in a case. You will rarely find this out in response to your request for production

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of documents even though the Code of Civil Procedure requires it. When this happens, it can be helpful to bring it to the judge's attention by requesting issue sanctions. While they are rarely granted, it educates your trial judge about the case, and at the very least, the defendant will find out that the jury will be instructed what to do if it concludes that the employer willfully destroyed evidence.

If the documents should be contained in a personnel file and are not there, the defendants have, in fact, committed a crime. Government Code section 12946, a part of the Fair Employment and Housing Act, provides, in pertinent part:

> It shall be an unlawful practice for employers, labor organizations, and employment agencies subject to the provisions of this part to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of two years after the records and files are initially created or received, or for employers to *fail to retain personnel files of applicants or terminated employees for a minimum period of two years after the date of the employment action taken.* [Emphasis added].

Government Code section 12976 provides that willful violation of Section 12946 is a misdemeanor.

California Code of Civil Procedure section 2023.030, subdivision (b) states:

> The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.

The California Supreme Court in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 [74 Cal.Rptr.2d 248] has emphasized that "the intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation." The court held that:

> Destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023, as would such destruction in anticipation of a discovery request.

(*Id.* at p. 13.)

The court went on to explain:

> Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the cost of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence which may be less accessible, less persuasive, or both."

(*Id.* at p. 8.)

The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, *issue sanctions* ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the action, or granting a default judgment against the offending party.

(*Id.* at p. 12 [Emphasis added].)

It is very difficult to find out where the bodies are buried when the defendants have destroyed the evidence. However, the court has the power to establish issues in your client's favor which can be devastating to the defense. At the very least, the court should read to the jury California Jury Instruction CACI 204 (Revised October 2004). Willful Suppression of Evidence, states:

> You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.

In *Kuhns v. State of California* (1992) 8 Cal.App.4th 982 [10 Cal.Rptr.2d 773], the trial judge ordered a pretrial discovery issue sanction stating:

> for the purposes of this trial is deemed admitted: a dangerous condition existed on the site, that the State of California had previous knowledge of said dangerous condition. The State is precluded from presenting evidence on these issues.

(*Id.* at 991.)

The court issued the sanction because Defendant State of California failed to produce policy letters addressing the dangerous condition, which were shown to exist based on deposition testimony. Similarly, defendants will often point to how much evidence they have produced to distract the judge from the fact that they are concealing critical evidence.

In *Kuhns*, the Second District rejected the defendant's argument stating, "[t]he failure of discovery deprived respondents of the ability to show what appellant knew about the safe speed of the intersection and when appellant knew it." (*Id.* at p. 989.) Similarly, missing evidence of prior complaints could deprive plaintiff of the ability to prove what the employer knew about its employees propensity to harass and when it knew it.

Conclusion

The crime had been committed. My client was indeed dead or, at least, terminated from her employment. However, her case was alive and well and it was vigorous advocacy that resuscitated her. All it took was a Request for Production, a Motion to Compel and a presentation of the evidence, painstakingly extracted from boxes of documents, shown to a conference room full of attorneys and corporate representatives. It just goes to show that crime does pay, except here, it was the perpetrator who had to pay the victim!

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Endnotes

[1] While under Title VII, an employer is vicariously liable for the harassment of a supervisor, in cases where there is no tangible harm, the employer may raise an affirmative defense to liability or damages. *Burlington Indus. Inc. v. Ellerth*, (1998) 524 U.S. 742; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775.2.

However, there are times when FEHA contains a more expansive view of an employee's rights than the federal scheme. One such example is in the area of the affirmative defense to supervisory harassment discussed *infra*. Another example is for Statute of Limitations purposes on a wrongful termination case where the California Supreme Court held: "FEHA defines a 'discharge' as a discriminatory practice, a circumstance that distinguishes FEHA from the federal law's focus [citation omitted] on the *decision* to discriminate [emphasis in original]." *Romano v. Rockwell* (1996) 11 Cal.4th 479, 498.