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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FU WANG, Plaintiff and Appellant, v. KING DREW MEDICAL CENTER et al., Defendants and Respondents.	B199591 (Los Angeles County Super. Ct. No. BC337225)

APPEAL from a judgment of the Superior Court of Los Angeles County. Helen I. Bendix, Judge. Affirmed.

Law Offices of Rachel H. Lew, Rachel H. Lew and April R. Blackman for Plaintiff and Appellant.

Littler Mendelson, Jaffe D. Dickerson, Tanja L. Darrow, and Shannon R. Boyce for Defendant and Respondent Charles R. Drew University of Medicine and Science.

Law Offices of David J. Weiss, David J. Weiss, and Peter Bollinger; Greines, Martin, Stein & Richland, Martin Stein and Alison M. Turner, for Defendant and Respondent County of Los Angeles.

After 13 days of trial, a jury returned a special verdict with all findings adverse to Fu Wang, and in favor of Charles R. Drew University of Medicine (University) and the County of Los Angeles (County; collectively defendants), on Wang's claims of discrimination based on national origin, race, age, or disability, wrongful termination, and retaliation. Wang appeals, arguing the trial court erred in denying his motion for a new trial, in which he asserted that insufficient evidence supported the jury's verdict, and that the special verdict was inconsistent. Wang also challenges the trial court's order summarily adjudicating his contract claims. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Before moving to the United States, Wang practiced medicine in Taiwan for over 20 years, specializing in obstetrics and gynecology (OB/GYN), and, in particular, infertility research. Wang is also an inventor and researcher, has numerous publications, and holds several patents. However, when Wang immigrated to the United States, he was unable to practice medicine in California without a license from the California Medical Board. The Medical Board requires that graduates of foreign medical schools participate in an internship and residency program in order to receive a California medical license. Wang also could not practice as an obstetrician/gynecologist without first completing an OB/GYN residency.

In 2000, Wang volunteered as a research associate at the University's affiliated hospital, King Drew Medical Center (KDMC), which the County owned and operated. While volunteering, Wang decided to apply to the University's OB/GYN residency program at KDMC. Before applying, Wang discussed his plans with the chairman of the OB/GYN department, Teiichiro Fukushima. Fukushima was impressed with Wang's credentials, but during the conversation he advised Wang to apply to other residency programs in addition to KDMC. Fukushima told Wang that KDMC was "traditionally a minority hospital," and the department "put emphasis on that." However, he also suggested that Wang would have a better chance of being accepted for residency at a larger, more research-oriented hospital, given Wang's research background, and because

larger institutions often have more resident slots available. KDMC generally received 80 to 120 applications each year for only four OB/GYN residency positions.

In September or October 2000, Wang applied to 15 residency programs, including KDMC, through a national "match" system that allows potential residents across the country to apply for several programs simultaneously. Wang did not match with any of the programs he selected. Disappointed, Wang contacted the office of United States Congresswoman Juanita Millender-McDonald for help. Millender-McDonald's office intervened on his behalf, causing the University to create an uncompensated internship for Wang for the 2001-2002 residency year. At the time, Wang was the only Chinese intern or resident, and he was older than any other intern or resident at KDMC.

Although the internship was uncompensated, the OB/GYN department believed that Wang would receive "credit" for the year of work and could use the internship to meet the requirements for a medical license. However, at the end of the 2001-2002 residency year, Wang and the OB/GYN department discovered that under Medical Board rules, only compensated internships—or "categorical positions"—count toward the licensing requirements. They also learned that Wang would need two years in a categorical position to be eligible for a license. Although the University had originally expected that Wang would complete the one-year noncompensated internship and then secure his medical license, the Medical Board rules made this impossible. Wang had essentially worked all year for nothing. Given this unexpected turn of events, the department felt obligated to help Wang. Fukushima and Rosetta Hassan, the OB/GYN department's residency director, found a way to open a first-year categorical residency position for Wang beginning in July 2002.

Thus, Wang became a "categorical" resident, and was subject to the program's requirements. In accordance with the guidelines of the Accreditation Council for Graduate Medical Education (ACGME), the accrediting body for residency programs nationwide, the OB/GYN department continually evaluated Wang's performance. Under ACGME standards, the department was required to monitor Wang's progress in six "core competency" areas, one of which was interpersonal communication skills.

During his first year as a categorical resident—from July 2002 to June 2003—Wang received generally positive evaluations, but several evaluators noted that Wang needed to improve his communication and English language skills. Despite this weakness, the department promoted Wang to the second year of residency.

However, the department's concerns about Wang's communication persisted, particularly because Wang's responsibilities would significantly increase in the second and third resident years. For example, as a second and third-year resident, Wang would supervise junior interns and residents, talk with patients, obtain informed patient consents, explain the risks and benefits of procedures, and manage high-risk obstetric patients. In July 2003, Fukushima and Wang talked about the problems with Wang's communication and language skills, and his options going forward. Fukushima suggested that Wang could secure his general medical license after finishing the second year of residency and he therefore did not need to complete the program to pursue his career. Fukushima told Wang that if he decided in advance that he would leave the residency program after finishing the second year, Fukushima would advise the faculty that they need not be concerned about Wang's communication skills because he did not intend to become a senior resident. Fukushima also indicated the University might be able to offer Wang a paid research position. Based on their conversation, Fukushima drafted a letter for Wang's signature, stating that Wang would discontinue his residency after completing the second year. Although Wang signed the letter on July 15, 2003, he rescinded it the following day.[1]

Since Wang intended to continue in the program, the department asked him to take a standardized Test of Spoken English (TSE) in order to assess his level of English language proficiency. At trial, Fukushima testified that he wanted to determine Wang's level of proficiency in an "unbiased way." By letter dated July 24, 2003, Fukushima

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[1] Wang testified at trial that Fukushima said Wang would be fired if he did not sign the letter. Fukushima denied that he attempted to coerce Wang into signing the letter, or that he suggested Wang would be fired if he did not sign.

informed Wang that he was required to take the test on September 13, 2003, and that he would be relieved from any responsibilities on that day. The letter further indicated the OB/GYN department would reimburse him for the testing fee. The letter warned that Wang's failure to comply would reflect unfavorably on his evaluation and could lead to disciplinary action for insubordination. Wang refused to take the test because he felt the department was harassing him by making the demand. He also noted that the test was not pass/fail, and concluded that it would not provide an objective measure of his proficiency in English.

On July 25, 2003, the day after he received the letter directing him to take the TSE, Wang was depressed, felt physically ill, hallucinated that people were chasing him, and he attempted suicide. He later checked himself into an inpatient psychiatric facility. Wang was diagnosed with a major depressive disorder with psychotic features, and he took a medical leave of absence from the residency program until October 2003.

Following Wang's return, the department tried to be "gentle" with him, but several department members remained concerned about his ability to function as a senior resident because of his communication skills. Under guidelines negotiated by the Joint Committee for Interns and Residents—a union for medical residents—and the residency programs at the County hospitals, a program that is considering discharging a resident must notify the resident of possible termination by November 15 of the year prior to the end of the residency year. Thus, on or around November 15, 2003, Hassan sent Wang a notice of nonrenewal of contract. The letter informed Wang that the residency program would continue to monitor his progress throughout the year. According to Fukushima and Hassan, the department had not decided to discharge Wang, but because it was a future possibility they were required to send the notice. The department suggested that Wang take classes to improve his English, at the department's expense, but Wang rejected the suggestion.

In January and February 2004, Wang completed a rotation at Riverside County Hospital, under the supervision of Kevin Vucinich, the chairman of the hospital's OB/GYN department. Although Vucinich found Wang extremely intelligent, hard

working, and eager to please, he had concerns about Wang's surgical and communication skills. In a written evaluation, Vucinich indicated that he had serious concerns about Wang's ability to speak and be understood in English, and he believed Wang and his patients would benefit if Wang took a formalized English language course. At trial, Vucinich testified that on at least one occasion it appeared that Wang did not understand Vucinich's instructions for a patient, and as a result, did not carry out the patient management plan. On several other occasions, Vucinich met with patients after they had met with Wang, only to learn that the patients did not understand what Wang had said to them. Vucinich's criticisms caused the OB/GYN department even greater concern about Wang's communication and language skills.

In February 2004, Wang filed a complaint with the Department of Fair Employment and Housing (DFEH). According to Fukushima, the department members tried to treat Wang in a very "mild" way after receiving the complaint, but at the same time felt they had to conduct business. With respect to Wang's ongoing evaluations, the department "asked [evaluating doctors] to be objective, meaning that if [Wang] is good, say he is good, but if there is a deficiency to not simply gloss over it but to report it."

Despite Vucinich's evaluation and the department's continuing concerns about Wang's interpersonal and communication skills, by the end of the 2003-2004 residency year the department believed that Wang had shown some improvement. The department promoted Wang to third-year resident, but instructed him to take English classes to improve his language skills.

However, in July 2004, on the first day of the 2004-2005 residency year, Wang did not show up. He instead took a medical leave of absence. The health care provider certification submitted to the County in support of Wang's leave request indicated that his psychological and psycho-physiological symptoms rendered him totally disabled, and the duration of his incapacity was unknown.

Ten months later, the department had heard nothing from Wang. On May 3, 2005, near the end of the residency year, the University sent Wang a notice of proposed termination from the residency program. The letter informed Wang that the residency

program could not accommodate his need "for what appears to be additional, indeterminate leave," and further explained that because of his absence, Wang had not progressed in the program as designed to enable him to earn a degree after four years. The letter also stated that Wang's absence had "placed an undue hardship on the Program and [had] required the Program to make substantial, fundamental modifications to the Program and it[s] standards." According to Fukushima, the department had not decided to discharge Wang at that point, but the residency program was suffering because others had to do the work Wang would have done, and it was necessary to figure out how to proceed. The letter invited Wang to meet with department and University representatives to discuss what accommodations the University might be able to offer, or other alternatives Wang might propose.

On May 9, 2005, Wang responded by letter, indicating that he planned to return to work after his medical leave expired on June 24, 2005. However, as a condition of his return, he requested that the department "ensure [him] that any future harassment and discrimination against [him would] be promptly investigated and addressed," and that the department allow him to "work an alternative schedule where [he could] be supervised by someone other than" Fukushima. On June 2, 2005, Wang met with department and University representatives, including a University lawyer. At the meeting, Wang requested several accommodations he required to return to the program. Wang indicated that he could work no more than two to three hours each day; he wanted to work only five days per week; he could not be on call (i.e., working a straight 12- to 24-hour shift); he required periodic breaks; he could not be rushed; there could be no stress or emergencies; and he could not work under Fukushima's supervision. At the meeting, Wang also indicated that he still was not doing well and was taking multiple medications. When asked if he would be able to return to the program in July 2005, Wang responded that his situation was "really not good," and "[his] condition does not permit."

At the June 2 meeting, Wang gave the department a letter from his chiropractor, but indicated that three different doctors were also treating him. By letter dated June 7, 2005, Fukushima summarized the June 2 meeting, and asked Wang to provide

documentation from his doctors regarding his limitations, if any, on returning as a resident. Wang resisted providing documentation from his three doctors. On June 10, 2005, Fukushima again wrote to Wang, requesting documentation from his treating physicians, and offering that if one physician could provide the information, a note from that doctor would be sufficient. The next day, Wang responded to the department's request by letter, stating that he did not authorize the department to request documentation or records from his treating physicians, and indicating that he would respond to Fukushima's June 7 letter as soon as he was feeling better.

In the meantime, the department determined that it could not provide Wang the accommodations he requested. At trial, Fukushima—the chair of the OB/GYN department, an extremely experienced OB/GYN with a specialty in high-risk obstetrics, and a member of the OB/GYN department for over 29 years—explained the department's reasoning. Fukushima described OB/GYN as one of the most stressful medical specialties, and he opined that it is not possible to practice obstetrics in a stress-free environment. He also stated that being "on call" is a fundamental part of the residency program, and teaches the residents how to handle emergencies. Further, he testified emergencies are frequent but impossible to predict. He said surgical procedures can last four to six hours—well beyond the two- to three-hour limit Wang had requested. Fukushima testified that the accommodations Wang requested could put patients in danger, in that Wang might not be able to provide continuous care throughout a labor and delivery, could not handle medical emergencies, and would be unable to deal with the high-risk population that made up the majority of KDMC's OB/GYN patients. Moreover, because only Fukushima and one other doctor had specialized experience in high-risk obstetric cases, Fukushima supervised at least half, and later all, of the high-risk pregnancies that constituted the bulk of the hospital's cases. Thus, Fukushima would have to supervise Wang.

According to Fukushima, a residency, unlike a regular job, is a training program designed to make residents "competent and skillful in practicing the art of their specialty," and "time served" will not by itself satisfy the residency position

requirements. Fukushima indicated that the residency position, modified as Wang had requested, would not meet ACGME standards, and would not provide the requisite training the residency program is designed to provide. Therefore, on July 15, 2005, after Wang's medical leave had expired, the department sent Wang a letter explaining that the program could neither offer him his requested accommodations, nor accommodate an indeterminate leave. The University was thus releasing him from the residency program. The letter also invited Wang to reapply for the residency program if and when he was able to return without "fundamental or substantial modifications to the program or [its] standards[.]" Wang subsequently filed his lawsuit.

Summary Judgment and Trial

Both defendants filed motions for summary judgment or summary adjudication. The trial court granted the motions in part and summarily adjudicated Wang's claims for breach of contract, breach of the covenant of good faith and fair dealing, and age-based harassment. On November 28, 2006, the parties began a 13-day trial of Wang's remaining claims.

At trial, Wang testified that Fukushima repeatedly told him that KDMC was a "minority hospital," that selected "minority physicians," for the residency program, and because Wang was not a "minority," he should seek a residency at other institutions. Wang accused Fukushima of taking bribes and testified that he believed Fukushima was jealous of him. Wang further testified that in June 2004, Fukushima again pushed him to take the TSE, but Wang told Fukushima that he had a "tongue issue" and therefore: "You cannot request me to process in American. I cannot. It is very difficult for me."[2] Wang disagreed with Vucinich's criticisms, indicated that Vucinich's testimony at trial was untrue, and informed the jury that Fukushima had brainwashed Vucinich, even though Vucinich had testified that he had never discussed Wang with Fukushima.

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[2] No party introduced any other evidence indicating that Wang informed defendants he had a tongue defect, or any evidence suggesting that defendants believed Wang's communication problems were due to a physical or mental impairment.

Wang also testified that he suspected his telephone was tapped and that his car had been followed.

The jury learned that a few months after his discharge, Wang worked with an acupuncturist where he earned between $15,000 and $17,000 per month on only a part-time schedule. However, because of his ongoing health and psychological problems he was not able to continue the work, even though it was a low stress environment. Wang's treating psychologist opined that Wang was significantly impaired and that he could never return to the KDMC residency program, and may never be able to participate in any other residency program. Wang's economic expert assessed his damages at over $180,000 in past lost wages, and over $2 million in future wages. Wang and his treating doctors also described his psychological and physical suffering during and after his time in the residency program.

The trial court gave two instructions at trial concerning Wang's credibility. The jury learned that in discovery Wang produced several evaluations that Vucinich purportedly authored, all of which gave Wang the highest possible performance ratings. But at trial, Vucinich testified that he never gave any resident the highest possible performance scores, and that he had not filled out or signed the forms in question. The jury was later instructed that Wang had produced the evaluations to defendants only shortly before trial, Vucinich denied preparing or signing the evaluations, and it was permitted to draw inferences adverse to Wang regarding whether the evaluations were genuine. The other instruction had to do with Wang's asserted tongue defect relevant to his discrimination claims. Shortly before a scheduled independent medical examination (IME), Wang went to Taiwan and had elective surgery without giving defendants enough advance notice to object. Wang subsequently refused to provide medical records of the surgery until after the IME took place. The court instructed the jury that it could decide that Wang's surgery in Taiwan altered physical evidence that would have been unfavorable to him. Defendants also presented expert testimony suggesting that Wang had never had the tongue defect he claimed during the litigation.

The jury also had the opportunity to make its own evaluation of Wang's communication skills and English language proficiency during his testimony. The record reflects that on numerous occasions, Wang appeared to not understand counsel, gave nonresponsive answers, and spoke in potentially unclear English.[3]

The parties jointly proposed a special verdict form requiring the jury to make findings on: Wang's claim that the University was a joint employer with the County; disability and national origin or race-based harassment claims; a failure to accommodate claim; two retaliation claims; and claims for wrongful termination based on race or national origin, disability, age, or in violation of public policy. On December 21, 2006, the jury returned the special verdict with all findings adverse to Wang. Wang moved for a new trial, arguing that insufficient evidence supported the jury's verdict, and that the jury's verdict was inconsistent. On May 29, 2007, the trial court denied Wang's motion. On May 30, 2007, Wang filed the instant appeal.

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[3] For example, in response to a question on whether the County human resources department ever told him why he had received health insurance cancellation forms, Wang repeated several times: "I'm very confusing." When describing his current health, Wang stated: "For example, in 2004 I tried to drive on the freeway, or when I try to read a book or watch TV for more than 10 or sometimes more than 15 minutes, I have lot of headache. I cannot concentrate. My mind just taken away automatically, but I try to take them back. I try to hold myself." On another occasion on direct examination, Wang and his counsel had the following colloquy: "Q Doctor, let me stop you. I want to move forward to a different issue. [¶] At some point in time after you returned did you go on medical leave again? [¶] A Yes. [¶] Q Tell the jury what happened. [¶] A What happened for the -- [¶] Q Yes. [¶] When did you go on medical leave again? [¶] A Why -- [¶] Q When? [¶] A When? It is July, July 2004." Wang also failed to heed the trial court's repeated admonitions not to continue answering a question after counsel objected or moved to strike.

DISCUSSION

I. The Motions for Summary Judgment/Summary Adjudication[4]

On appeal, Wang opted to proceed under California Rules of Court, rule 8.124(a), and submitted his own appendix instead of a clerk's transcript. Although Wang challenges the trial court's ruling on defendants' summary judgment motions, his appendix does not include the motions, his oppositions, any separate statements of fact, or the evidence that accompanied the motions. Instead, the appendix contains only the trial court's tentative ruling on one of the two motions. This record is entirely inadequate. Our task on appeal in reviewing orders granting summary adjudication or summary judgment is to independently review the evidence the parties offered on the motion to determine whether a triable issue of fact existed. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We strictly construe the moving party's papers and liberally construe those of the opposing party. (*Lazar v. Hertz* (1999) 69 Cal.App.4th 1494, 1506-1507.) This task is impossible if the appellant has not provided the evidence the parties offered or the parties' moving and opposition papers. "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.] Consequently, [appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

Wang argues that because his contentions concern legal arguments drawn from documents he has provided in the record on appeal, it was not necessary for him to include anything else in the record. Yet, Wang's inclusion of various trial exhibits in the appendix—without even indicating which, if any, were presented as evidence supporting or opposing the summary judgment motions—is not an adequate substitute for the

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4 The parties refer to defendants' motions as "summary judgment motions." However, it appears that defendants' motions were at least alternatively motions for summary adjudication, since they attacked specific individual claims, in addition to the entire action. (Code Civ. Proc., § 437c, subd. (f)(1).)

briefing, or the evidence the parties compiled and submitted to the trial court in connection with the motions. We must therefore resolve the issue against Wang.

II. The Motion for New Trial

A. Standard of Review

Wang's opening brief focuses solely on the trial court's denial of his motion for a new trial.[5] Although a motion denying a new trial is not directly appealable, it may be reviewed on appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.) An order denying a motion for a new trial "will not be disturbed on appeal unless it is manifest that said ruling was an abuse of discretion. [Citation.]" (*Locksely v. Ungureanu* (1986) 178 Cal.App.3d 457, 463 (*Locksely*); *Price v. Giles* (1987) 196 Cal.App.3d 1469, 1472.) "In reviewing the trial court's exercise of its discretion [in denying a motion for new trial based on insufficient evidence], this court, unlike the trial court, does not weigh the evidence; our power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the jury's verdict. [Citation.]" (*Locksely*, *supra*, 178 Cal.App.3d at p. 463.)

The substantial evidence test " 'is *not* the presence or absence of a substantial conflict in the evidence. Rather, it is simply whether there is substantial evidence in favor of the respondent.' " (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th

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[5] Defendants argue that Wang has forfeited his claims on appeal by failing to set forth all of the material evidence, and by failing to cite to the record. These contentions are not without merit. The factual recitations in Wang's opening brief repeatedly assert facts without including supporting record citations, and rarely cite to the reporter's transcript of testimony. Further, the argument section of the brief contains factual assertions that are almost all unsupported by record citations, even though it is not at all clear what specific evidence the brief is referencing. While we decline to conclude that Wang has forfeited all of his arguments on appeal, any allegations that are not supported by references to the record are deemed waived, as are Wang's arguments that are not supported by reasoned argument or citation to legal authority. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 827, fn. 1; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

333, 369.) " ' "We may not substitute our view of the correct findings for those of the trial court [or jury]; rather, we must accept any reasonable interpretation of the evidence which supports the [factfinder's] decision." ' [Citations.]" (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 816.) "[W]e examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference." (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 107.)

Wang assumes the burden shifting framework of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, is relevant on appeal. But once a discrimination case "is submitted to the jury, the construct of the shifting burdens 'drops from the case,' and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's [nondiscriminatory] reasons for the employment decision." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 204.) "Our required standard of review is simply to determine whether the jury had before it substantial evidence from which it reasonably could conclude the challenged employment actions" were not "motivated in substantial part" by Wang's national origin, race, disability, age, or his protected activities. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 375.)

B. Wang's Harassment Claims

The jury found that defendants did not harass Wang because he is Chinese, or because of a disability. Substantial evidence supports these findings.

The California Fair Employment and Housing Act (FEHA) prohibits harassment based on prohibited categories, including national origin, race, and disability. (Gov. Code, § 12940, subd. (j)(1).) Harassment may take the form of offensive or demeaning comments, threats, assault, physical interference with the subject's normal work or movement, offensive posters or drawings, or any number of other unwanted offensive behaviors. (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1).) Wang attempts to reargue the facts on appeal, claiming they show the defendants harassed him. However, the verdict demonstrates the jury believed defendants' nondiscriminatory explanations for their actions.

For example, Wang argues the evidence established that defendants harassed him by causing him to have to repeat the first year of his internship, but Fukushima testified that Wang had to repeat the first year of the residency program due to Medical Board rule changes that no one anticipated. Wang also claims defendants repeatedly criticized his language skills, but Fukushima, Hassan, and Vucinich testified Wang's communication skills limited his usefulness, and that although the department made numerous efforts to help him improve, Wang rejected them. The jury was also able to assess for themselves whether Wang's command of English was as weak as defendants claimed. In *Fragante v. City and County of Honolulu* (9th Cir. 1989) 888 F.2d 591, the court held that although national origin and accent are intertwined, an adverse employment decision may be predicated upon an individual's accent where it interferes materially with job performance. Such was the case here as the jury appropriately found.

Further, although Wang claims he was pressured into signing a resignation letter in November 2003, Fukushima testified he drafted the resignation letter for Wang in an effort to help him avoid having to struggle with his communication problems. Finally, though Wang says he was threatened with removal from the residency program because of his communication deficiencies, Fukushima and Hassan both described legitimate business-related reasons for the November 15, 2003 notice of nonrenewal of residency.

It was for the jury to determine which interpretation of events it believed. Given Wang's questionable credibility, the jury could reasonably have discounted Wang's interpretation of defendants' actions he charged were harassment. The jury also reasonably could credit defendants' witnesses' testimony and determine that defendants had no control over the Medical Board rules; they had nondiscriminatory reasons to suggest that Wang not pursue the complete residency; and the department's criticisms of Wang were legitimate concerns, rather than unnecessary actions based on " 'meanness or bigotry' " related to Wang's national origin, race, or disability. (*Reno v. Baird* (1998) 18 Cal.4th 640, 646.)

C. Wang's Failure to Accommodate Claim

The jury also found that defendants were not liable for failing to accommodate Wang's disability.[6] Under FEHA, it is an unlawful employment practice for an employer to fail to provide a reasonable accommodation for an employee's known physical or mental disability, unless such accommodation would create an undue hardship for the employer's operation. (Gov. Code, § 12940, subd. (m).) Government Code section 12926, subdivision (s), defines undue hardship as "an action requiring significant difficulty or expense, when considered in light of the following factors: [¶] (1) The nature and cost of the accommodation needed. [¶] (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. [¶] (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. [¶] (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. [¶] (5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities."

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[6] Wang's opening brief on appeal addresses only a failure to accommodate claim based on Wang's mental or emotional illness, not his real or perceived tongue defect disability. This is consistent with Wang's theory at trial, in that he did not make arguments or introduce evidence suggesting that the jury should find defendants liable for failing to accommodate a real or perceived disability stemming from his claimed tongue defect. Wang does, however, raise this argument in his reply brief. But we do not consider points raised for the first time on reply. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Wang also argues for the first time in his reply brief that the evidence at trial supported a finding that defendants failed to engage in a good faith interactive process. This is a separate claim under FEHA that Wang did not raise at trial. (Gov. Code, § 12940, subd. (n); *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424-425.) For the reasons previously stated, we do not consider this argument.

The jury specifically found that defendants failed to provide Wang with a reasonable accommodation, but that Wang's proposed accommodations would have created an undue hardship for the residency program. Substantial evidence supported the jury's findings. Before terminating Wang, defendants accommodated him for nearly a year by allowing him to take a leave of absence. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 [reasonable accommodation can include a finite leave of absence].) When that leave became problematic due to its seemingly indefinite continuation, the University asked Wang to explain his limitations and what accommodations would allow him to return to the program. Defendants' witnesses and Wang were consistent in their description of the accommodations Wang requested to allow him to work despite his physical and mental limitations.

However, as described in detail above, Fukushima's testimony, as well as Hassan's, provided substantial evidence that Wang's requested accommodations were fundamentally incompatible with the residency program and what it was designed to achieve. Fukushima's testimony was evidence that providing Wang's requested accommodations would jeopardize patient care. Further, some of the accommodations were just not possible, such as giving Wang a different supervisor or providing a completely stress-free environment. (Cf. *Weiler v. Household Finance Corp.* (7th Cir. 1996) 101 F.3d 519, 526-527 [Americans with Disabilities Act (ADA) did not require employer to give employee a different supervisor as reasonable accommodation]; *Gonzagowski v. Widnall* (10th Cir. 1997) 115 F.3d 744, 747-748 [employer not required to accommodate employee by protecting him from stress and criticism].) Moreover, the jury could reasonably have found Fukushima's testimony credible due to his many years of experience as an OB/GYN specialist, his 29 years of experience at the KDMC OB/GYN department, and his knowledge of the requisites of the residency position, both as a former resident and as chairman of the OB/GYN department. This evidence provided a sufficient basis for the jury to conclude that Wang's requested accommodations would have created an undue hardship for defendants.

Wang contends that he was not stating that "he could never be placed in emergency situations or that he was ever willing to put patients at risk," and that he could have been accommodated "without difficulty and on a temporary basis until [he] could more fully participate in the program." Yet, Wang does not support his assertions with citations to the record, and the evidence he presented at trial was to the contrary. And, Fukushima testified that Wang did not communicate that he wanted the proposed accommodations on a temporary basis. We are not at liberty to reweigh the evidence or make our own credibility determinations.

D. Wang's Wrongful Termination Claims

The jury found that national origin, race, age, disability, and public policy[7] were not motivating reasons for defendants' decision to terminate Wang from the residency program. We agree with the trial court that the jury reasonably determined that Wang's communication weaknesses motivated defendants to terminate him, rather than a prohibited discriminatory factor. Defendants produced evidence of Wang's deficient communication and interpersonal skills, and his unwillingness to comply with the OB/GYN department's efforts to evaluate his language skills or help him improve his communication in English. Substantial evidence was also presented for the jury to conclude that the department's criticisms were not pretextual or discriminatory, but

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[7] We need not address in any detail Wang's argument that his wrongful termination claim was also based on public policies aside from those FEHA reflects. Wang's contentions that his termination violated public policies he describes as the public interest in appropriate medical education, "including education of foreign medical graduates," as well as "a public policy interest in ensuring an adequate number of trained physicians," are unsupported by any legal authority, including the constitutional or statutory basis for such asserted policies. Wang misstates California law when he contends that a claim of wrongful termination in violation of public policy need not be based on public policies grounded in statutory or constitutional provisions. (See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 79 [public policy giving rise to a wrongful termination action must be based in constitutional or statutory provisions].) Moreover, it appears that Wang has never identified these public policies before.

instead were legitimate concerns related to the requirements of the residency program, including the need to effectively communicate with patients and medical staff.

Indeed, Wang's counsel repeatedly argued that defendants terminated Wang because of his allegedly poor communication skills, only he asked the jury (and the court on the motion for new trial) to find that the criticisms were a pretext for discrimination. In support of the pretext argument, Wang contended that many of his performance evaluations were neutral or positive about his communication skills until he filed a DFEH complaint; no patients complained about him; and his English was fine. Yet, the evidence Wang offered in support of his contentions was not overwhelming or uncontested, and did not mandate a contrary result. The jury could reasonably have accepted that Wang's communication problems were the reason for his termination, while rejecting the argument that defendants' concerns about those problems masked discriminatory animus.

E. Retaliation Claims

The jury also rejected Wang's retaliation claims. Substantial evidence supports that decision; we address each claim in turn.

1. DFEH Complaint

FEHA prohibits an employer from taking an adverse action against an employee because he has engaged in statutorily protected activities, such as filing a DFEH complaint. (Gov. Code, § 12940, subd. (h).) Here, substantial evidence supported the jury's conclusion that defendants did not retaliate against Wang for filing a complaint with DFEH. As explained above, the evidence at trial supported a determination that Wang's well-documented communication problems motivated defendants' decision to discharge him. Further, testimonial and documentary evidence indicated that the department's concerns about Wang's communication skills were consistent throughout his time as an intern and resident, the department made express efforts to continue to be objective after learning of Wang's DFEH complaint , and well over a year passed between the filing of Wang's complaint and his termination. The jury therefore

reasonably could find that Wang's protected conduct was not a motivating reason for his termination.

2. California Family Rights Act (CFRA) Leave

CFRA, a portion of FEHA, makes it unlawful for an employer to take an adverse action against an employee because he has exercised his right under CFRA to take family or medical leave. (Gov. Code, § 12945.2, subd. (l)(1); Cal. Code Regs., tit. 2, § 7297.7; *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 260-261.) Here, the jury found that Wang's leave of absence was a motivating factor in the decision to terminate him from the residency program, but that defendants' conduct was not a substantial factor in causing him harm.[8] Wang asserts that sufficient evidence did not support the jury's finding, and further that the finding created an inconsistent verdict. We disagree.

Wang claimed that he suffered lost wages and emotional harm due to defendants' conduct. Yet, substantial evidence supported the jury's conclusion that defendants' retaliatory conduct in connection with his CFRA leave was not a substantial factor in causing him harm.[9] There was significant evidence that Wang lost wages because his health prevented him from working, not because defendants terminated him in retaliation for his CFRA-leave. Case law indicates this is an appropriate finding. For example, in *Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 1134 (*Davis*), the court held that in the context of a wrongful termination under the

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[8] The trial court instructed the jury in accord with the standardized jury instruction that a "substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It doesn't have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

[9] We interpret "harm" in this context as a reference to Wang's damages. (Cf. *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1386-1387 (*Dyer*) [although employer's termination of employee was unlawful in workers' compensation matter, "to warrant an award the employee must establish at least a prima facie case of lost wages and benefits caused by the discriminatory acts of the employer"].)

Education Code, " 'an employer is not liable for backpay during periods that an improperly discharged employee is unavailable for work due to a disability,' " provided that the disability is not the result of the employer's wrongful conduct. Likewise, in *Johnson v. Spencer Press of Maine, Inc.* (1st Cir. 2004) 364 F.3d 368, 383, the First Circuit noted that under Title VII of the Civil Rights Act of 1964 (42 U.S.C.S. § 2000e et seq.), "some courts have adopted a rule that if a plaintiff is unable to mitigate damages due to a disability not caused by the discriminatory employer, that disability cuts off back pay liability."

Here, Wang took medical leave because he was unable to work, and when he met with University representatives near the end of his leave he suggested that his condition would not allow him to return at the end of the leave period. Further, he could not return to the program without accommodations defendants were not required to offer because they created an undue hardship. After he was terminated, he was unable to sustain part-time, higher paying, low-stress work due to his health and his own psychiatrist opined that he would never be able to work as a resident again. Under CFRA's affirmative rights provisions, an employer is not required to reinstate an employee who cannot perform his job duties after the expiration of a protected medical leave. (*Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 519.)

Moreover, the jury could reasonably conclude on the evidence that defendants' actions did not cause the psychological or physical problems that rendered Wang unable to work, or any emotional distress that he suffered after his termination. (*Davis*, *supra,* 152 Cal.App.4th at p. 1138.) Defendants' psychiatric expert opined that a brain disorder caused Wang's mental problems, not external circumstances, and he also testified that psychological tests suggested Wang was malingering. The jury could reasonably credit this testimony and determine that any emotional or psychological problems Wang suffered were attributable to factors unrelated to defendants' conduct.

In sum, substantial evidence supports the jury's reasonable finding that any retaliatory conduct on defendants' part was a trivial factor in causing Wang's damages when compared to his inability to work for reasons unrelated to any unlawful actions on

the part of defendants. (See *Davis*, *supra*, 152 Cal.App.4th at pp. 1133-1134, 1140; *Dyer*, *supra*, 22 Cal.App.4th at pp. 1385-1386.)

Further, contrary to Wang's assertion, the jury's conclusions on the CFRA claim were not inconsistent. We interpret a verdict " 'so as to uphold it and to give it the effect intended by the jury, as well as one consistent with the law and the evidence.' [Citation.]" (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1223.) Here, the special verdict form asked two separate questions—was CFRA-based retaliation a motivating factor in the decision to terminate Wang, and was such conduct a substantial factor in causing Wang's damages. The response to the first question did not compel a particular answer to the second. The jury could and did make findings on the two separate issues, based on substantial evidence, without being inconsistent.

F. Inconsistent Verdict

Wang separately contends that the special verdict was generally inconsistent. However, Wang's opening brief does not offer any argument to explain why the verdict is purportedly inconsistent, or any legal authorities to support his claim.[10] "It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and ' " 'all intendments and presumptions are indulged in favor of its correctness.' " [Citation.]' [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*).)

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[10] Wang also misrepresents the jury's actual findings. For example, he asserts that the "jury found Appellant had a disability, but that termination based on that disability was not wrongful." In fact, while the jury found that Wang had a disability, it also found that his disability was *not* a motivating factor in the decision to terminate him.

In his reply brief, Wang offers a longer laundry list of purported inconsistencies, but the list, bereft of legal authority, does little more than challenge the jury's findings based on insufficient evidence. In addition, without any argument, several of the alleged inconsistencies appear logically incoherent. For example, Wang alleges the jury's finding that defendants did not subject Wang to harassing conduct based on disability was inconsistent with the finding that defendants knew Wang had a disability. However, simply because defendants knew Wang had a disability does not inexorably lead to the conclusion that they harassed him. Wang's additional assertions on reply are both too late and insufficient as inconsistent verdict claims. (*Benach, supra*, 149 Cal.App.4th at p. 852, fn. 10.) We therefore do not consider Wang's general inconsistent verdict argument, other than above in part IIE.

G. Employer-Employee Instruction

Wang also contends that the trial court erred by failing to emphasize the element of control in its jury instruction on the employer-employee relationship, an instruction directed to the question of whether the University was also Wang's employer. Wang contends the jury instruction error is apparent because the jury concluded in question 1 of the special verdict that Wang did not prove that the University was his employer. We find any error was agreed to and non prejudicial.

"In order to overturn a jury verdict on the basis of instructional error, a defendant must show that the error was prejudicial and resulted in a miscarriage of justice. [Citation.] Instructional error is considered prejudicial only when it appears probable that an improper instruction misled the jury and affected its verdict. [Citation.]
A miscarriage of justice has occurred only if the appellate court, after an examination of the entire cause, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1520.)

We need not address the merits of Wang's claim of instructional error, first because Wang agreed to it only after substantial discussion about it, and second because it is clear that even if the instruction was faulty, any error did not affect the verdict.

Despite the jury's initial finding that Wang did not prove that the University was his employer, it made every subsequent special finding as to the County *and* the University. Wang argues that the jury was simply following instructions to find in favor of the University on all of Wang's claims after determining that it was not his employer. Yet, this explanation falls short since some of the jury's later findings implicated the University. For example, question 16 asked the jurors: "Did Fu Wang prove that Charles R. Drew University and/or the County of Los Angeles failed to provide a reasonable accommodation for his physical and mental condition?" The jury answered "yes" for both defendants. If the jurors were simply following the directive to find for the University against Wang on all issues, they would presumably have answered "no" for the University in response to question 16. Similarly, the jury found that both defendants terminated Wang's employment.

Because the jury made all findings for both defendants, and ultimately found no basis for liability or damages on the part of either defendant, any purported error in the employer-employee jury instruction was not prejudicial and did not result in a miscarriage of justice.

DISPOSITION

Wang has not demonstrated that the trial court abused its discretion in denying his motion for a new trial based on insufficiency of the evidence or inconsistencies in the special verdict, or that the trial court erred in granting summary adjudication of his contract-based claims. The judgment is affirmed. Defendants are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J. FLIER, J.