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Court of Appeal, Fifth District, California.

Mara MURILLO, Plaintiff and Appellant,

v.

ABM INDUSTRIES INCORPORATED,

et al., Defendants and Respondents.

F070023

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Filed 12/6/2017

APPEAL from a judgment and a postjudgment order of the Superior Court of Fresno County. [Kristi Culver Kapetan](#), Judge. (Super. Ct. No. 11CECG04428)

Attorneys and Law Firms

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Hatmaker Law Group and [Susan K. Hatmaker](#) for Defendant and Respondent Adalberto Rodriguez.

OPINION

[GOMES](#), Acting P.J.

*1 Mara Murillo brought suit against ABM Industries Incorporated and its subsidiary, ABM Janitorial Services, Northern California (ABM) and Adalberto Rodriguez, who was a supervisor of ABM's janitorial business in Fresno (collectively defendants). Murillo, an ABM employee, alleged that Rodriguez sexually harassed her while the two were performing janitorial work at Pelco's offices. Specifically, Murillo alleged that on or about August 4,

2009,¹ Rodriguez made unwanted sexual advances toward her, which she told him were unwelcome, and on or about August 7, Rodriguez “entered a bathroom where [she] was working, locked the door behind him, pinned [her], forcefully removed [her] pants and groped her body, including but not limited to [her] genitalia and breasts[,]” and also “forcefully kissed [her] and attempted to sexually penetrate [her] against her will.”

¹ Unless otherwise stated, all subsequent references to dates are to dates in 2009.

The case proceeded to a bench trial on the following causes of action: (1) sexual harassment in violation of the Fair Employment and Housing Act (FEHA) (*Gov. Code, §§ 12900 et seq.*) against all defendants; (2) hostile work environment sexual harassment in violation of FEHA, against all defendants; (3) failure to prevent discrimination and harassment, against ABM; (4) sexual battery, against all defendants; and (5) gender violence (*Civ. Code, § 52.4*), against Rodriguez. The trial was bifurcated, with the trial court deciding first whether any actionable sexual harassment occurred.

After nine days of testimony, the trial court granted defendants' motion for judgment under *Code of Civil Procedure section 631.8*. The trial court found that Murillo was not credible and rejected her testimony in its entirety, and therefore determined she failed to satisfy her burden of proving she was sexually harassed. The trial court entered judgment in defendants' favor and awarded defendants their costs of suit.

On appeal, Murillo contends the trial court: (1) erred in ruling that evidence that Rodriguez sexually harassed women other than Murillo was not admissible unless Murillo observed or knew of the harassment; (2) abused its discretion by arbitrarily disregarding expert testimony on *rape trauma syndrome*; (3) erred in relying on video footage that ABM failed to preserve; and (4) erred in awarding costs to defendants. As defendants concede they are not entitled to costs, we agree that the cost award must be reversed. However, we find no merit to Murillo's other contentions. Accordingly, we reverse the cost award but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Motions in Limine

A. Murillo's Motion to Exclude the Video Clips

The trial court first heard motions in limine. As relevant here, Murillo filed a motion to exclude any testimony or evidence referencing two video surveillance clips that defendants produced in discovery. Murillo explained that during ABM's investigation of her claim that Rodriguez sexually assaulted her in a restroom at work, ABM's investigator, Veletta Johnson, viewed surveillance footage taken from surveillance cameras in the hallways near the restroom from the period surrounding the attack, August 4 to 11. Murillo argued the court should exclude any testimony or evidence regarding the two video clips taken two hours before the attack because (1) defendants failed to preserve and produce the remaining relevant footage, and (2) the clips were prejudicial, misleading, irrelevant and speculative.

*2 The trial court denied the motion. The trial court noted that it did not appear Murillo had requested discovery sanctions and determined the video clips were admissible. The trial court, however, was not convinced the clips would be probative if they were from two hours before the incident.

B. Defendants' Motion to Bifurcate

Defendants brought a motion to bifurcate trial on Murillo's sexual harassment, hostile work environment sexual harassment, sexual battery, and gender violence claims from her claim for failure to prevent harassment. Defendants argued the issue of liability on Murillo's harassment claims should be determined first, as Murillo was required to demonstrate she was subject to actionable harassment before she could maintain a claim for failure to prevent it. Defendants asserted bifurcation was in the interest of judicial economy because they believed Murillo intended to introduce (1) evidence of alleged sexual harassment of others by Rodriguez which Murillo did not witness and which was not relevant to her claims against him; and (2) evidence pertaining to harassment claims by ABM employees against individuals other than Rodriguez that were part of a federal court case the Equal Employment Opportunity Commission (EEOC) brought against ABM. Defendants claimed these other

allegations would result in a series of mini-trials, as the EEOC case involved 21 different ABM employees.

At oral argument on the motion, Murillo's attorney asserted he did not intend to put on 21 mini-trials, and argued the other harassment claims were interrelated with Murillo's claims, as the EEOC case involved Rodriguez's alleged attack of Murillo. After further argument, the trial court initially denied the motion as unnecessary, since there was no jury, but agreed it would determine whether the harassment of Murillo actually occurred before deciding whether the investigation was adequate.

C. Defendant's Motion to Exclude "Me-Too" Evidence

The trial court subsequently considered defendants' motion in limine number four, by which defendants sought to exclude "me too" evidence, namely allegations of sexual harassment against Rodriguez by anyone other than Murillo. Defendants argued such evidence was not relevant, constituted prohibited character evidence, and was unduly prejudicial. Specifically, defendants sought to exclude the testimony of: (1) former ABM employee Maria Quintero that Rodriguez made unwelcome comments of a sexual nature to her, he harassed her daughter (who also worked for ABM) by touching her daughter's hair and buttocks, and Murillo told her Rodriguez had sexually harassed her; (2) Quintero's daughter, Edith Martinez, that Rodriguez touched her hair, back and buttocks; (3) former ABM employee Teresa Sanchez, that Rodriguez entered a restroom in which she was working, turned out the lights, and touched her leg, butt and "middle area"; and (4) ABM employee Pedro Pacheco, who heard "rumors" from two female ABM employees that Rodriguez had made unwelcome sexual advances towards them.

In their written motion, defendants argued this evidence was not relevant to Murillo's claims and was inadmissible character evidence under [Evidence Code section 1101, subdivision \(a\)](#).² They believed Murillo would argue the evidence was admissible under [section 1101, subdivision \(b\)](#), as relevant to prove such facts as motive, opportunity or intent, and cited two cases which found such "me too" evidence admissible under that subdivision, [Pantoja v. Anton \(2011\) 198 Cal.App.4th 87 \(Pantoja\)](#), and [Johnson v. United Cerebral Palsy/Spastic Children's Foundation \(2009\) 173 Cal.App.4th 740 \(Johnson\)](#). Defendants asserted those cases were distinguishable on their facts and the evidence should be

excluded on the basis of relevance and undue prejudice under section 352.

2 Undesignated statutory references are to the Evidence Code.

*3 In Murillo's written opposition to the motion, she argued the "me-too" evidence was relevant to three issues in the case: (1) failure to prevent harassment or discrimination; (2) hostile work environment harassment; and (3) punitive damages. Murillo argued the evidence was relevant to her hostile work environment claim because an employee may use evidence of harassment towards others to prove a hostile work environment, and to prove ABM's liability for Rodriguez's conduct, she was required to show either that he was her supervisor or ABM management knew or should have known of his conduct, yet failed to take corrective action. Murillo did not argue that the evidence was admissible under [section 1101, subdivision \(b\)](#).

In oral argument on the motion, the trial court stated its tentative ruling was to deny the motion because of the failure to prevent and hostile work environment claims, except as to Pacheco's testimony about rumors. Rodriguez's attorney argued the evidence was per se inadmissible as character or propensity evidence under [section 1101, subdivision \(a\)](#); it was not relevant for any other reason, such as intent, motive or anything else under [section 1101, subdivision \(b\)](#); and the court did not need to hear from these witnesses to determine whether the incident between Murillo and Rodriguez actually occurred.

Murillo's attorney asserted the evidence was relevant to ABM's advanced knowledge as to other complaints that were similar to Murillo's claim against Rodriguez, and was integral to her hostile work environment claim. ABM's attorney responded that the facts would not support any element of the hostile work environment claim because under one of the cases Murillo cited in her written opposition, "me too" evidence is admissible only if Murillo personally witnessed the harassment of others, and the CACI jury instruction Murillo also cited, [CACI No. 2521A](#), does not include the harassment of others as an element. ABM's attorney further stated that with respect to the failure to prevent claim, Murillo must first prove there was harassment before she was entitled to present evidence of other cases.

The trial court agreed that Murillo would have to produce evidence of harassment before she could "open the whole can of worms as to the other case." Murillo's attorney then stated, "I'm happy to certainly abide by that, your Honor, but it affects witness scheduling." Murillo's attorney was concerned that they had "noticed some of the ABM people under 776" who they were going to call the next day. The trial court explained that "at this point" it agreed Murillo would have to "prove this instance before you can get into the EEOC and all the complaints against different supervisors and different employees," and to accomplish this, the trial had to be somewhat bifurcated, although it was okay if some of the evidence came in during the first part, "but to the extent you can, you would have to prove that something happened here or that she had knowledge of it, the other stuff for the hostile work environment claim because that's correct under the instruction." When ABM's attorney asked if defendants' motion in limine number four was granted, the trial court responded that it was deferred as they would "have to wait and see if you meet the first part."

The trial court then considered defendants' motion in limine number five to exclude allegations of sexual harassment that were alleged against other ABM supervisors. The trial court determined this evidence was only relevant to the hostile work environment claim if Murillo had knowledge of it, but it could be relevant to the failure to prevent claim. At that point, the trial court revisited defendants' first in limine motion and decided it made the most sense to bifurcate the trial, although it would allow leeway as to presentation of evidence, "but she is going to have to show that she had knowledge or experienced it herself before I allow it." In response to a question by Rodriguez's attorney, the trial court stated it would be out of order to "pull up someone" from before Murillo's employment at ABM before she ruled Murillo "experienced anything in this case." Murillo's attorney stated he understood.

D. ABM's Motion to Exclude Evidence of EEOC Case

*4 ABM moved to exclude evidence relating to a federal EEOC case in which it had previously been involved. The EEOC case, which involved 21 statewide plaintiffs, was the subject of multiple protective orders and resulted in a confidential settlement. ABM argued that because the EEOC case involved different plaintiffs with different factual issues, it was irrelevant or, if relevant, was more prejudicial

than probative. ABM asserted that only two of the class members had made allegations against Rodriguez, namely Quintero and Teresa Sanchez, and while ABM believed the evidence regarding them should be excluded, if the court disagreed, ABM asserted the evidence should be limited to their deposition testimony.

In addressing the motion, the trial court stated it thought this issue had been taken care of, as they had already discussed the order of proof. Murillo's attorney agreed, but was concerned about being able to bring on a rebuttal expert. The trial court agreed with ABM's attorney that all of the federal evidence was being moved to a later time if and when Murillo proved "this incident occurred."

II. The Trial

A. Murillo's Case-in-Chief

Murillo and her co-worker, Quintero, testified about the alleged incident. Murillo began work for ABM in 2009—at first she worked days at Pelco, but toward the end of July 2009, she was transferred to the night shift. She worked at Pelco on Tuesdays and Fridays.

Once Murillo saw Rodriguez grab the butt of a co-worker, "Maritza," while he was walking behind her. This was the only time she saw or heard Rodriguez do something of a sexual nature to someone else. On August 4, she had a conversation with Rodriguez while she was cleaning a restroom in Building 8.³ Rodriguez told her she was pretty and offered to help her with her work. After discussing their ages, Murillo got nervous and asked Rodriguez to leave. He did so.

³ The Pelco campus is comprised of a series of numbered buildings.

1. The Alleged Restroom Incident

Murillo had worked with Rodriguez on about five shifts before he allegedly sexually assaulted her in the women's restroom. Murillo testified on direct examination that when she started work that night, she asked Rodriguez to bring her a duster. Rodriguez agreed. Later, she had just finished using the restroom and was washing her hands when Rodriguez

yelled from outside the restroom "Mara, where are you?" and "Here's the duster." Murillo responded, "I'll be right out." Rodriguez came into the restroom, said "Chale, Mara, this dove won't get away alive[,]"⁴ and blocked the door. As Rodriguez approached her, Murillo "leaned towards the bathroom" and he started touching and kissing her. He touched her breasts over her clothes. Murillo "started wrestling" with Rodriguez to get him off of her. Eventually, Rodriguez tired, backed up, and said, "Chale, Mara, this dove is not getting away alive." Murillo ran into the handicapped stall. Rodriguez came into the stall and said "Chale, Mara. This dove is not getting away alive. Chale, Mara." He started touching her and wrestling with her; her pants went down to her knees when Rodriguez put "his hands inside[,]" and he inserted his fingers into her vagina. Rodriguez got tired from Murillo pushing him and backed up. He again said "Chale, Mara, this dove is not getting away alive." Murillo followed him out of the stall, pulled her pants up, and went to the sink and put water on her face.

⁴ The interpreter confirmed that "Chale" is a slang term for "No."

Sometime during the attack, she spit in Rodriguez's face and screamed, "Security. Maria, somebody come." Rodriguez responded that he knew where the cameras were. While the two were wrestling, Murillo called him "Cocino," or "dirty old man," and told him to "get away dirty old man, pig." Murillo did not know how long the incident lasted. She was not cleaning the restroom when Rodriguez entered and did not see a duster in his hands. When asked if she could tell the court the day of the incident, Murillo responded, "No, unfortunately. I just know it was the 9th in August. And I was confused all the time. I don't know. I couldn't tell." When asked what time it happened, Murillo answered about 9:40 p.m., because it was almost time for her break.

*⁵ When Murillo came out of the restroom she saw Quintero, who asked her what happened. Murillo, however, did not remember anything after that or how she felt. Murillo had not done her vacuuming, so Quintero vacuumed for her. Murillo remembered telling Quintero something about what had happened, but she did not remember what she said.

Quintero recalled the night in August 2009 when she heard Murillo screaming, but she did not remember the date. At around 9:45 p.m., Quintero was returning "the can for the mop

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Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

and for the bathroom” to a janitor closet next to the women's restroom when she heard Murillo screaming “[d]irty old man. Let me go. Let me go.” Quintero came out of the closet and “started walking to my place.” She saw Rodriguez quickly walking down the hallway, so she hid in an office that had two doors. Quintero then followed him through almost half the building; she was walking behind him, but he did not see her. At some point, Quintero “reacted” and went back. Murillo was on her knees with the vacuum “crying and crying.” Quintero took the vacuum and helped Murillo vacuum the room. After that, they took an early break in the Building 2 kitchen. “Don Chava and Dona Luz” were in the kitchen listening while Murillo, who was crying and in shock, told Quintero that Rodriguez pulled her pants down and “stuck his fingers.” After about an hour, Murillo and Quintero went to clean Building 1; they both worked until 2:30 a.m.

Rodriguez denied attacking Murillo or saying words to the effect “This little dove is not going to get away from me.” One day Murillo told him at the beginning of her shift that she needed a feather duster. He brought it to her in Building 6 later that night, gave it to her inside the restroom, and returned to Building 7. This was the only time Murillo asked him for a duster and the only time he was in the Building 6 restroom with Murillo.

2. An ABM Employee Notifies Pelco of Murillo's Claim

At about 3 p.m. on August 14, ABM lead porter Pedro Pacheco told Pelco facility supervisor Isaac Gonzalez that someone told him a co-worker had assaulted her, but she did not want anyone to know. Gonzalez encouraged Pacheco to have the individual talk to him or someone else. According to Gonzalez's contemporaneous notes of the conversation, Pacheco told him that Murillo was able to get away from Rodriguez and nothing happened, and that Murillo carried a knife after the incident.

3. The August 18 Incident

On August 18, Murillo was cleaning an office in Building 6 when Rodriguez came in and asked her what was “going on.” They started arguing. Murillo claimed that Rodriguez was cold to her and told her he had recorded her. When Quintero

approached, Rodriguez told Murillo to shut up. Quintero saw Rodriguez pull Murillo by her arm, but he let go when he saw Quintero. Quintero testified that Murillo would not tell her what was going on.

4. Murillo and Quintero Complain to ABM; ABM Meets with Rodriguez

On August 18, Murillo told ABM supervisor Allen Juarez what had happened in the restroom. While Murillo testified she did not go into detail, Juarez testified she told him that Rodriguez was bothering her by repeatedly asking her if she wanted to go out with him, even though she asked him to stop. Juarez told her to go to ABM's office.

Juarez made an appointment for Murillo and Rodriguez to meet with ABM branch manager Tony Bautista at 11 a.m. the following day. Juarez told Rodriguez that Murillo had a complaint against him and he needed to be at the appointment. Rodriguez appeared at the appointment, but Murillo did not, since Quintero had suggested they go to Pelco first. Rodriguez admitted hitting on Murillo and that they had made arrangements to see each other outside of work, but one did not show up.

5. Murillo and Quintero Meet with Pelco

*6 On August 19, Gonzalez and his supervisor, Julie DeBenedetto, met with Murillo and Quintero at Pelco. According to Gonzalez, Murillo told them that Rodriguez tried to assault her in the west women's restroom in Building 6 on a Friday at 8 p.m. Before the incident, Murillo was cleaning the restroom. She said Rodriguez grabbed her and threw her on the countertop of the sink; her back hit the wall. Rodriguez then tried to force himself upon her; he put his hand under her sweater and tried to take off her pants and panties. During the attack, Rodriguez said words to the effect that “this little birdie will not escape from me.” Eventually Murillo was able to break free and run out of the restroom before Rodriguez. DeBenedetto encouraged Murillo and Quintero to talk to Tony Bautista and report the incident to the police. In Gonzalez's deposition, he testified that Murillo mentioned Rodriguez was unsuccessful in unzipping her pants. Quintero told him she saw Murillo come out of the restroom, followed by

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Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

Rodriguez a couple minutes later. After the meeting, Gonzalez and DeBenedetto called Bautista at ABM and reported the incident. They also asked security to confiscate Rodriguez's badge and keys, and prohibited him from returning to Pelco.

Murillo testified at trial that she could not remember exactly what she told Gonzalez, but she thought she said that Rodriguez put his hands inside her, pushed her back, and tried to kiss her. Quintero testified that Murillo told Gonzalez that Rodriguez "had forced her and that he had abused her[.]" and that Rodriguez was always harassing Quintero. Quintero denied telling Gonzalez that she saw Murillo come out of the restroom before Rodriguez. Quintero also denied ever asking any ABM employee to come into court and lie about Rodriguez; she had never heard Murillo ask any ABM employee to lie.

Murillo later reported the incident to the Fresno police; she told the officer "the events that happened." The officer said the matter would be transferred to the Clovis police.

Eventually Murillo met with Bautista and Juarez at ABM. According to Juarez, Murillo told them Rodriguez came into the restroom, pinned her against the sink, held her arms, unbuttoned her pants, and put his hand down them. Murillo struggled to get away and eventually escaped. She ran out of the restroom, screaming and crying.

6. The ABM Investigation

Pelco's director of security Hakim Eslami testified that Gonzalez asked him to check for any footage of Rodriguez and a female in the northwest hall of Building 6, from 9 to 10 p.m. on August 7. Eslami, who knew Rodriguez but not Murillo, did not see anything during that time period, so he looked both forward and backwards in time. Eslami located footage of Rodriguez with a woman, pulled the video, which consisted of two video clips, and put it on his computer. He did not export all the footage he viewed because if he did not see anything, he would be exporting blanks. He did not see anything unusual on the video he reviewed. Eslami believed Gonzalez only wanted video of Rodriguez with a woman on one day, so he only gave ABM the clips.

Gonzalez testified at his deposition that he viewed two video clips taken in Building 6 on August 7, each about 25 seconds long, which showed Murillo laughing at something Rodriguez said to her, and the two going in separate directions. Gonzalez noted the time stamp on the video was "7 something." Gonzalez did not request a copy of videos from the Building 6 cameras.

Eslami later received an email from Bautista asking for surveillance video for 7 p.m. on August 18, in the northwest and cubicle area. Eslami did not remember why Bautista was asking for that date, but if there was anything involving Rodriguez, it would have been on his computer.

ABM human resources manager Tom Cazale instructed ABM's human resources coordinator Veletta Johnson to conduct an investigation of Murillo's allegations. Johnson interviewed Rodriguez, who told her that on the day of the restroom incident, he went to Building 6 to unlock the doors at 6:20 p.m. and then left the building. He returned with the feather duster at around 7:30 p.m., which he left there. He returned to Building 6 at about 9:55 p.m. to lock the building.

Johnson reviewed with Eslami the videotape taken between August 7 and 18. Johnson asked for this time period because Murillo had given her two specific dates on which she interacted with Rodriguez—the 7th, when the alleged physical sexual assault occurred, and the 18th, when there was a confrontation between Murillo and Rodriguez. When they could not corroborate Murillo's timeframe, she asked Eslami for complete video from August 4 through 11 to see if the incident occurred on a different date. Johnson asked Eslami to send her all the video she viewed with him, from the 4th through the 18th. Johnson, however, did not receive all the footage. Instead, she received only the two video clips after her investigation was closed. Eslami, however, testified that Johnson did not ask him to preserve everything they looked at, but only the videos he had already exported.

*7 On August 27, Johnson emailed ABM's in-house counsel Michelle Cash about her investigation, which had raised several flags. In the email, Johnson stated that "[t]he complainant does have credibility and conflicting information (3 month temporary employee) still working Tuesdays and Fridays at the location." In an August 31 email from Johnson to ABM's Vice President of Human Resources Amado Hernandez, Johnson asked whether she should put Rodriguez

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Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

on a final written warning or terminate him based on his acknowledgement that he agreed to meet Murillo for a date after work and the “current EEOC issues.” Johnson noted that while Rodriguez entered the restroom where Murillo was working on the date indicated and a six-minute video clip showed Rodriguez enter and exit the restroom, there was nothing to indicate violence had occurred and there were credibility issues with the complainant and witnesses.

Hernandez testified that Johnson asked him to participate in a conference call with herself and Murillo to assist with translation, since Johnson did not speak Spanish. According to Hernandez, Johnson also wanted to brainstorm with him, as she was concerned about the investigation since she had received conflicting statements. Hernandez discussed with Johnson her concerns about the investigation.

Johnson and Hernandez interviewed Murillo on September 10. Hernandez participated via conference call from his Houston office, with Johnson and Murillo together in a California conference room. He spoke to Murillo in Spanish during the interview, first asking her to give a statement, and Murillo spoke to him in Spanish. Hernandez took notes of the interview. Murillo explained what happened, with Hernandez asking some clarifying questions.

Murillo told him the restroom incident occurred on Friday, August 7. Murillo had asked Rodriguez for a feather duster earlier in the evening. Rodriguez came to find her around 9 p.m. that day without the feather duster. Murillo was washing her hands when Rodriguez started to hug her at the sink. She pushed him away and spit in his face. Murillo ran into a stall and locked the door, but Rodriguez kicked the stall open. Rodriguez opened her pants and moved her panties aside. After that, Rodriguez abruptly stopped, turned and walked out. Murillo went to the sink and washed her hands and face. When she left the restroom, she ran into Quintero, who told Murillo she heard everything but she did not say anything because she was scared, and that Rodriguez had done the same thing to her.

Hernandez asked Murillo to explain why the videotape showed her and Rodriguez walking out at a normal pace and looking jovial, with smiles on their faces. Murillo became agitated and said he told her something funny, and she was not sure if they walked out at the same time—she thought Rodriguez left first. Murillo could not explain why the tape

showed that and the interview ended. After the interview, Hernandez told Johnson he was concerned that Murillo showed no emotion during the interview and he wanted to know if the stall was broken.

While Hernandez testified at trial that he was involved in the conference call in part to judge Murillo's credibility, he did not ever state in his deposition that was part of his role or that he debriefed Johnson. Hernandez confirmed he stated in his deposition that this was Cazale's investigation, not his, and he was not involved in it.

Quintero remembered being interviewed by Johnson; she told Johnson she did not see anything with respect to the restroom incident, although she heard something. She did not tell Johnson that she cleaned Building 6 around 8 p.m., as she started cleaning it at 6 p.m., and denied telling Johnson that she got scared and ran to the side of the building where she cleaned; instead, she walked toward where she cleaned, but she did not make it there. Quintero did not remember telling Johnson the incident occurred on a particular day.

7. Murillo's and Quintero's Differing Accounts

*8 Murillo admitted on cross-examination at trial that she previously told Johnson, the Fresno police officer, and Gonzalez the restroom incident occurred on August 7, which she confirmed was the only date Rodriguez brought a duster to her in the Building 6 restroom. Murillo did not remember what time Rodriguez brought her the duster, but in her deposition she testified it was about 9 p.m. She told Gonzalez, however, that the incident happened at 8 p.m. The day of the incident was the only time she was ever in the Building 6 restroom with Rodriguez. After the incident, she did not see Rodriguez again until she saw him on the day they argued in the cubicles, which was the same day she complained to Juarez—August 18. She did not remember crying after the restroom incident.

The first time Murillo told Quintero about the restroom incident was August 18. Murillo admitted she had also testified that she spoke with Quintero in the hallway immediately following the restroom incident and during their break on August 7, but she did not recall any details of what she told Quintero.

Murillo admitted she previously gave differing accounts of what she was doing when Rodriguez entered the restroom—she told Johnson she was washing her hands, Gonzalez that she was cleaning the restroom, and Pacheco that she was in a stall cleaning a toilet. And while she testified at trial that she spit on Rodriguez, at her deposition, she said she did not.

On re-direct examination at trial, Murillo claimed the restroom incident could not have occurred on August 7, as the video clip from that day showed she was smiling at Rodriguez. She also claimed the attack did not occur on the day she followed Rodriguez with the feather duster; instead, it occurred a week later. When asked why she told numerous people the attack occurred on August 7, Murillo responded, “I was bad. My head was not okay. I was dazed and I just added—added things from that day of the police back. And in the offices when I went to speak to Allen ... we figured out from that day backwards, and we ended up with the 7th.” She could not tell the court with any certainty what day Rodriguez attacked her, because it could not have been August 7. Murillo said she was cleaning the restrooms the first time Rodriguez told her she was pretty, but she was not cleaning them on the day of the attack. She claimed this is what she told Pacheco, and that Gonzalez probably was confused on this point. When asked if Murillo's testimony was that the restroom incident occurred on August 14, Murillo responded, “I don't know[.]” and confirmed she did not know when the incident occurred.

Quintero's deposition testimony differed from her trial testimony:⁵ (1) at trial she said she was inside the janitor's closet when she heard Murillo scream, while at deposition, she testified she was going down the hall; (2) at trial, she said she did not hear anyone leave the restroom, while at deposition, she said she heard someone come out from the restroom; (3) at trial, she said she did not help Murillo take out the trash after the incident, but at deposition, she said she helped Murillo throw out the trash; (4) at trial, she said she was dropping off the mop, while at deposition she said she was picking up her bucket and mop when she heard Murillo scream; and (5) at trial, Quintero testified Murillo said her pants were pulled all the way down during the incident, but at deposition, Quintero said she did not remember Murillo saying this. At her deposition in this case, Quintero testified she was in the janitor's closet when she heard Murillo screaming “Dirty dog, disgraced dog.” Quintero said she hid

in the room when Rodriguez came out of the restroom; after that, Quintero “returned” and Murillo was there, in shock and crying. Murillo could not talk, and since it was their break time, they took their break. Murillo did not tell Quintero that Rodriguez spit on her during the incident.

5 Two deposition transcripts were used to impeach Quintero. One was a February 18, 2009 deposition of Quintero in the EEOC case, and the other a December 4, 2012 deposition in the present case.

8. Dr. Hy Malinek

*9 Dr. Hy Malinek, a clinical and forensic psychologist, testified as an expert for Murillo. He reviewed the complaint and Murillo's depositions in the case, as well as the police and defense expert's reports, and interviewed Murillo. In addition, he had Murillo complete both the Minnesota Multiphasic Personality Inventory and Millon Clinical Multiaxial Inventory.

Based on his review of the materials and his evaluation of Murillo, he believed she met the criteria for both depressive and anxiety disorder. He opined that after the August 2009 sexual assault, Murillo's complaints and behavior supported the presence of [post-traumatic stress disorder](#) (PTSD), the intensity of which subsequently diminished to the point that she no longer had it. Murillo, however, continued to suffer from an anxiety disorder with consistent vomiting and serious psychophysiological problems, and there was ample support for the presence of chronic depression. Dr. Malinek also found the attempted digital penetration played a role in establishing and maintaining Murillo's symptoms. In Dr. Malinek's professional experience, it was not uncommon for victims of sexual assault to tell inconsistent stories over time. In his opinion, Murillo was subjected to “extremely aggressive” questioning during her May 2013 deposition that was intimidating and would have an impact on how she responded.

B. The First Motion for Judgment

At the close of Murillo's case-in-chief, defendants filed a joint motion for judgment pursuant to [Code of Civil Procedure section 631.8](#). Defendants argued they were entitled to judgment because Murillo failed to carry her

2017 Fair Empl.Prac.Cas. (BNA) 435,974

burden of presenting credible evidence that Rodriguez sexually harassed her. They asserted Murillo's evidence with respect to the restroom incident was implausible and contradictory, Murillo fabricated her story of an attack in the Building 6 restroom, and the remaining incidents of harassment were not severe and pervasive enough to support a hostile work environment claim.

In her written opposition to the motion, Murillo asserted she produced credible evidence to support her claims. Murillo asserted the August 7 video did not disprove Murillo's claim and had little probative value, as the camera was incapable of showing anyone entering or exiting the restroom, and the evidence showed the incident happened close to 10 p.m. and possibly on a date other than August 7. Murillo urged the trial court, when assessing her credibility, to be mindful of the following: that ABM's goal in the investigation was to defend itself; critical evidence in the form of video and statements was gathered but either destroyed or not preserved; and it was Hernandez who reversed Johnson's initial conclusion that she was credible. Moreover, Dr. Malinek testified that inconsistencies in disclosure are expected of victims of sexual violence, and any inconsistencies in Murillo's story were minor or trivial in light of the trauma Murillo experienced. Murillo argued the trial court should exclude the August 7 video because defendants failed to preserve all of the video footage that Eslami and Johnson reviewed.

The trial court issued a written order denying the motion. The trial court disregarded the August 7 video as it had little, if any, probative value. The trial court found Murillo credible in her testimony, explaining that while there were some discrepancies in Murillo's descriptions of the restroom incident, her story generally had remained constant, many of the inconsistencies were likely a result of difficulties in translation, and because she had a limited education and was deposed over a five day period, there were plenty of opportunities for misstatements. The trial court noted that at times during Murillo's and Quintero's testimony, Rodriguez was smirking and nearly laughing at their statements, which conduct contributed to its finding that his testimony was not reliable. As to the issue of the date of the alleged incident, the trial court noted that Gonzalez's notes refer to Pacheco reporting the incident as occurring the Tuesday before August 14, which would be August 11, not August 7, and while Murillo adopted the August 7 date on numerous occasions, she testified she was not certain of the exact date, but knew

the August 7 video was taken prior to the restroom incident. Defendants, however, had not produced any evidence of Rodriguez's whereabouts on August 11.

C. The Defendants' Case

1. ABM Coworkers

*10 Defendants called a number of ABM employees to impeach Murillo's and Quintero's testimony. Martza Jasso, who worked at Pelco on the same days as Murillo and was the only crew member with the first name Martza, denied that Rodriguez ever touched her inappropriately, or that she ever told Murillo that Rodriguez acted inappropriately toward her.

Maria Ortiz,⁶ who worked for ABM at Pelco during the summer of 2009 and knew Quintero, but not Murillo, denied that Quintero ever complained to her that Rodriguez treated her in a sexually inappropriate way. Maria also denied that Rodriguez behaved inappropriately toward her or that she ever told Quintero that he had.

⁶ Because two witnesses share the surname Ortiz, we will refer to Maria Ortiz as Maria and Isis Ortiz as Isis to avoid confusion. No disrespect is intended.

According to Maria, she received five or six telephone calls from Quintero and Murillo in August 2009. The first call was from Quintero, who told her that Rodriguez had abused or touched a coworker and asked her to be a witness. Maria told Quintero that Rodriguez had not touched her. Quintero called several other times and asked her if she could say that Rodriguez had touched her, but Maria refused. Maria also received a call from a woman who identified herself as Murillo, who asked her to call Murillo's attorney because Rodriguez had tried to abuse Murillo and Maria had to speak up. Maria refused since Rodriguez had not done anything to her. Maria received three or four more calls from Murillo, which were along the same lines as the first call. Maria told the women to stop bothering her. Maria denied ever calling Murillo herself.

Johnson interviewed Maria and asked if Rodriguez had abused her, as Quintero said he had. Rodriguez, however, had never abused her. Maria told Johnson about the phone calls from Quintero and Murillo, and asked Johnson to have them stop calling her.

Luz Reyes and Salvador Barrera, who co-workers called Chava, both worked for ABM at Pelco. They denied being in the kitchen in Building 2 and overhearing Murillo tell Quintero that Rodriguez pulled down Murillo's pants. Both Reyes and Barrera had on occasion seen Murillo and Quintero in Building 2 when Murillo and Quintero were taking their break, and neither had seen Murillo upset while talking to Quintero.

Murillo's aunt, Isis, who also worked for ABM at Pelco, testified that in August 2009, Murillo told her Rodriguez tried to rape her and asked if Isis had ever been harassed by anyone at ABM. Isis answered no. Murillo responded that she was sure Isis had been harassed, and if Isis would say that she had been harassed by someone at ABM, they could get \$2 million if they filed a lawsuit. Isis told Murillo she was not willing to say things that had never happened.

2. Kristina Hershberger

Clovis Police Corporal Kristina Hershberger, who investigated Murillo's sexual battery claim, testified that she did not find Murillo's allegations were substantiated, although she sent the matter to the District Attorney's office for their review. The District Attorney's office felt there was insufficient evidence to proceed and no charges were initiated.

When Murillo reported the incident to Fresno police on August 19, she told the officer the assault occurred on Friday, August 7, at approximately 9 p.m. Murillo told the officer that on that day, she was having a sneezing fit, so she went into the restroom to blow her nose. Rodriguez walked into the restroom and told her, "Here is your duster." Murillo said that Quintero was outside the restroom and heard the disturbance, and Quintero had been sexually assaulted by Rodriguez, as had her daughter and other women.

3. Isaac Gonzalez

*11 Pelco facilities supervisor Gonzalez testified that when he spoke to ABM employee Pacheco regarding Murillo's allegations on August 14, it was before the night shift janitors started their shift at 6 p.m. In that conversation, Pacheco reported a past incident between Murillo and Rodriguez that occurred in the Building 6 restroom on a Tuesday, and Murillo told Pacheco she was so scared of Rodriguez that she carried

a knife to work on a Friday, which was her next workday following the incident. Based on this, Gonzalez concluded that Murillo brought the knife to work on Friday, August 7 and the restroom incident occurred on Tuesday, August 4. Gonzalez spoke with Pacheco again on Monday, August 17, who said he spoke with Murillo that past Friday, after he spoke with Gonzalez.

When Gonzalez and DeBenedetto met with Murillo and Quintero on August 19, Murillo said the restroom incident occurred on a Friday at 8 p.m., which Gonzalez determined was Friday, August 7. Murillo also described an incident that occurred on a Tuesday in Building 8, which Gonzalez believed occurred on August 4. Neither Murillo nor Quintero stated at the meeting that Rodriguez had penetrated Murillo's vagina with his fingers.

Gonzalez admitted, however, that he did not "nail down" Pacheco on which Tuesday Murillo said the incident occurred, but Gonzalez knew he could only have meant one of two Tuesdays. Gonzalez agreed that Murillo occasionally worked a dayshift, which typically was from 7 a.m. to 3:30 p.m. Pacheco told him that Murillo said she carried the knife the Friday before August 14, although Gonzalez's typewritten notes of the conversation stated that Murillo mentioned to Pacheco "how scared she was and how the Friday when she came to work, she carried a knife to protect herself and was willing to use it if she had to[]." Neither Eslami nor Johnson asked Gonzalez to preserve the videotape between August 4 and 11, but Gonzalez said he did not have access to the security system.

4. Hakim Eslami

Pelco's director of security Hakim Eslami testified that according to Rodriguez's key card data sheet for August 7, Rodriguez entered the east employee entrance of Building 6 at 7:14 p.m., the engineering lobby entrance in Building 7 at 7:26 p.m., and did not return to Building 6 until 10:07 p.m., where he entered through the east employee entrance. There were seven surveillance cameras in Building 6. Eslami reviewed video footage from all seven cameras, as requested by Gonzalez. Eslami is certain that the first video clip he found showed Rodriguez and Murillo coming from the restroom area. When he examined the footage, both by himself and with Johnson, he did not see anything that caused him particular concern. Johnson never asked him to save the

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Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

videotape from August 4 through 11; if she had, he would have saved it.

5. Veletta Johnson

When ABM human resources coordinator Johnson reviewed the video footage from August 4 through 11 with Eslami, August 7 was the only date they observed Rodriguez and Murillo together. On that date, she saw Rodriguez go towards the restroom with a feather duster at 7:14 p.m., and enter the restroom two minutes later. At 7:22 p.m., Rodriguez and Murillo left the restroom together, with Murillo holding the feather duster, and went in different directions.

When Johnson interviewed Murillo on August 24, Murillo told her that Rodriguez came into the restroom to give her the feather duster. Murillo told her that Rodriguez touched her breasts, neck, and butt, and put his hands inside her underpants, but his fingers never went inside her private area—he only touched her on the outside. Murillo never said that she screamed, although Quintero told Johnson that Murillo was screaming “Adalberto, let me go.” Johnson asked Murillo whether anyone else might have gone through the same experience. Murillo told Johnson that Maria had experienced the same thing and could tell her about Rodriguez. At the end of the interview, when Johnson asked Murillo what she wanted to see happen, Murillo answered, “I want results.” Murillo did not say that Rodriguez placed her on the counter such that her back hit the mirror or hoisted her on the counter. According to Johnson's notes, Murillo told her she ran to the end stall and Rodriguez locked the door behind him. Murillo did not say that Rodriguez kicked in the door.

*12 When Johnson interviewed Quintero on August 24, Quintero told her that on August 7, she was in the janitor's closet putting stuff together to mop the floors when she heard Murillo screaming in the restroom, “Let me go, let me go.” Quintero ran to her work area where she cleaned because she was afraid. She did not remember the time, but it was before lunch. At lunch, Murillo told her that Rodriguez kissed and touched her, and unzipped her pants. Quintero did not say anything about seeing Rodriguez or that there was possible penetration.

Johnson also interviewed Rodriguez on August 24. Rodriguez said that he never touched Murillo or sexually harassed her.

He said they only had conversations and he asked her out on a date.

Johnson interviewed Maria on August 26. Maria told her she received a call from Quintero on Friday at 10 p.m., which would have been August 21, in which Quintero said Rodriguez had a problem with one of the workers and she knew Maria also had a problem with him. Maria told Quintero she never had a problem with Rodriguez and could not be a witness. Quintero told Maria that everyone knew Rodriguez had hugged and kissed her in the janitor's closet. Maria told Quintero she had not had any problems like that and to leave her alone. Maria then said that Murillo called her on Saturday, August 22, at 6 p.m., and explained what happened to her—that Rodriguez hugged her against her will, he had done that to two other women, and she was not going to stop until Rodriguez went to jail. Maria told Murillo she had no problems and did not want to get involved. Murillo called Maria again on August 26; Maria asked Johnson to have them stop calling her. Maria did not know Murillo and did not know why she was trying to get her to say things about Rodriguez.

In the August 27 email to Michelle Cash, Johnson stated that after investigating Murillo's claim, it was “just as confusing and conflicting as it was in the beginning.” Nothing corroborated the actual complaint of physical sexual harassment; the times were different from what Murillo had given her and there was no indication from the videos that any inappropriate behavior had occurred. Murillo's account kept changing, even in her interview with Hernandez. While Johnson wrote in the email that Murillo “does have credibility,” she meant that Murillo had credibility issues. Johnson listed the conflicting information she had uncovered.

After this email, Johnson spoke with her boss, Cazale, as she was not comfortable with the results of the investigation. Cazale, who did not speak Spanish, suggested she contact Hernandez to get his input. Hernandez agreed to interview Murillo, since he spoke fluent Spanish and was an expert in human resources. Johnson wanted to see if Hernandez could get any additional information to ensure she had not missed anything. When Johnson emailed Hernandez on August 31 to ask his advice on whether to warn or terminate Rodriguez based in part on “current EEOC issues[.]” Johnson was referring to an EEOC representative who showed up in the middle of her investigation and wanted

to interview employees. Johnson did not know what the EEOC investigation was about.

Johnson concluded the investigation in mid-September and letters were issued to Murillo and Rodriguez. She advised Murillo the investigation had been completed and based on the information gathered, ABM was unable to conclude physical sexual harassment had occurred, although ABM did conclude that Rodriguez had asked her out on a date and engaged in personal discussions, and appropriate action had been taken to ensure future harassment did not occur. Rodriguez was advised that while the claim of physical sexual harassment was inconclusive, he had engaged in inappropriate conduct and, as a result, he was removed from his position as foreperson and placed in a utility position. Rodriguez also was given a final written warning.

6. Murillo's Deposition Testimony

*13 Defendants' counsel played excerpts from Murillo's video depositions.⁷ In them, Murillo testified: (1) she told Johnson the incident occurred in the restroom of Building 6 on August 7; (2) she told Gonzalez that Rodriguez had a different look to him “[t]hat Friday,” meaning the Friday of the restroom incident; (3) there was no other occasion when Rodriguez brought her a duster other than the August 7 restroom incident; (4) Rodriguez brought her the duster at about 9 p.m.; (5) the only time she was in the Building 6 restroom with Rodriguez was the time she alleged she was assaulted; (6) when she walked out of the restroom, she went to get the vacuum, which was in the hallway around the corner from the restroom; (7) she did not complain to anyone during her break about what happened between herself and Rodriguez; (8) when she met Quintero outside the Building 6 restroom after the incident, Murillo's eyes were watery, but she was not crying or screaming; (9) she did not tell Quintero about the incident until a week or a week and a half later, on the day she was fighting with Rodriguez in the office; and (10) when Quintero first saw Murillo, Quintero did not tell her she had seen or heard anything that happened between Murillo and Rodriguez.

⁷ Excerpts were played from four sessions of Murillo's deposition, which took place on November 9, 2012, December 5, 2012, May 7, 2013, and August 1, 2013.

D. Murillo's Rebuttal Witnesses

1. Murillo

Murillo filled out timesheets for ABM, which showed the following: (1) on Tuesday, August 4, she started work at 6 p.m., took a break at 10 p.m., returned at 10:30 p.m., and finished work at 2:30 a.m.; (2) on Friday, August 7, she started at 2 p.m., went on a break at 6 p.m., returned at 6:30 p.m., and finished work at 10:30 p.m.; (3) on Tuesday, August 11, she started work at 6 p.m., took her break at 10 p.m., returned at 10:30 p.m., and finished at 2:30 a.m.; and (4) on Friday, August 14, she started work at 2 p.m., took her break at 6 p.m., returned to work at 6:30 p.m., and finished at 10:30 p.m. She worked at Pelco each of these days.

Murillo claimed she told Johnson that Rodriguez “just put his fingers into the lips of my vagina.” Murillo testified “[h]e did not penetrate me all the way in,” he just “did this, on the lips[,]” and she told Johnson “he had penetrated into me” on the lips. Murillo may have told others something different, but it was now her “clear understanding” that he did not “go inside me, he just did this.” Murillo was gesturing with two fingers on her right hand and one finger on her left, with the index finger passing a quarter of an inch through the other two fingers.

Murillo denied that she told her aunt to complain about Rodriguez. Murillo claimed that Rodriguez had been insisting that her aunt go out with him, which Murillo told her aunt was harassment and she should speak up. She never told her aunt that the two of them could make \$2 million in a lawsuit. Murillo said that Maria called her first and told her what Rodriguez had done to her, that he had locked her in a room, lowered her pants, penetrated her with his penis, and took a picture that he showed to everyone.

Murillo admitted she also worked for ABM at Sierra Vista Mall. Her shift there was from 2 p.m. to 10:30 p.m. For a period of time, Murillo worked the morning shift at Pelco, which went from 7 a.m. to 3 p.m. When she moved to the night shift at Pelco, she worked the night shift on Tuesdays and Fridays, and the morning shift at Sierra Vista Mall the other three days. Murillo claimed the 2 p.m. to 10:30 p.m. shift listed for August 14 on her timecard was an actual shift at Pelco.

2. Quintero

Quintero knew Maria and had called her several times. Maria had given Quintero's number to a friend, whose name she could not remember, and the friend or the friend's boyfriend was calling Quintero. Maria did not answer the first calls, but when she did answer, Quintero asked her why she gave out her telephone number. Maria did not deny that she had given out the number and said she had also given out Quintero's address. This was the only phone conversation she had with Maria.

Quintero made the calls in August, but she could not remember the year, since so much time had passed. She called Maria from a cell phone, but she could not remember the phone number attached to that phone. Maria told Quintero while they were at work that Rodriguez had penetrated her with his penis. In Quintero's deposition, however, Quintero said Maria told her this when "she gave me a ride." She testified in another deposition that Maria told her Rodriguez touched her vagina, but they did not have intercourse.

3. Allen Juarez

*14 ABM supervisor Allen Juarez testified that employee timesheets are used for the employee to write down how many hours the employee worked during a pay period, which Juarez then verified as actual hours worked. Juarez supervised all shifts of the ABM janitors at Pelco; the day shift began at 7 a.m. and ended at 3:30 p.m., and the night shift began at 6 p.m. and ended at 2:30 a.m. There were no other shifts at Pelco, and there was never a shift that began at 2 p.m. Murillo reported her own hours on her timesheets and Juarez only reviewed them to determine whether she correctly reported the total hours worked. While Murillo reported on her timesheet that she started work at Pelco at 2 p.m. on August 14, Juarez said that could not have happened.

E. The Renewed Motion for Judgment

After the parties rested on the first phase, defendants filed a renewed motion for judgment pursuant to [Code of Civil Procedure section 631.8](#). They argued that Murillo and Quintero fabricated the sexual harassment claim, and based on the inconsistencies in their accounts and their lack of credibility, there was no substantial evidence from which a reasonable fact finder could infer sexual harassment occurred.

They asserted the only date the restroom incident could have occurred was on Friday, August 7, but there was no evidence any harassment occurred on that date. Defendants urged the trial court to grant the motion.

In her written opposition to the motion, Murillo argued she had produced sufficient evidence to show by a preponderance of the evidence that the assault in the restroom occurred, and nothing had changed since the trial court denied defendants' original motion. Murillo also moved to strike Johnson's and Eslami's testimony and evidence relating to what they purportedly saw on the Pelco surveillance videotape they viewed as an evidentiary sanction for failing to preserve, and willfully suppressing, the complete videotape for the time period from August 4 through August 11.

The trial court issued a written order granting defendants' renewed motion for judgment. The trial court explained that since the order denying their initial motion, defendants had presented persuasive evidence that Murillo was not credible. The trial court also found Quintero not credible. The trial court determined Murillo failed to satisfy her burden of establishing, by a preponderance of the evidence, that the restroom incident occurred. The trial court denied Murillo's motion to strike Johnson's and Eslami's testimony on the grounds that the motion was untimely and there was no evidence of willful suppression or that ABM had control of the Pelco video.

Murillo requested a statement of decision on what she claimed were 68 disputed issues. The trial court prepared its own statement of decision after Murillo objected to defendants' proposed statement. The trial court explained that resolution of the "credibility issue" and Murillo's failure to prove the restroom incident occurred negated the need for further trial, as the other conduct Murillo alleged Rodriguez engaged in (grabbing her arm and talking to her in the cubicle area) did not rise to the level of actionable harassment and Murillo's lack of credibility eliminated any possible harassment claim.

The trial court noted that the principal controverted issue was whether the alleged restroom incident occurred. Citing [CACI No. 107](#),⁸ the trial court exercised its option to disbelieve all of Murillo's testimony because it believed Murillo "deliberately testified untruthfully about something undeniably important, i.e., that the bathroom incident

occurred.” The trial court also applied this analysis to Quintero's testimony. The trial court explained that after it initially denied defendants' motion, defendants produced compelling evidence to demonstrate Murillo's and Quintero's untruthfulness, which included: (1) the ever changing date the alleged incident occurred; (2) the changing nature of what Murillo claimed occurred, e.g. was she hoisted on the countertop, did Rodriguez digitally penetrate her, was she crying for help or quiet, or did Rodriguez kick open the stall door; and (3) Murillo's and Quintero's “ever changing description of when in time and on what date the alleged incident occurred.”

8 CACI No. 107 provides, in pertinent part: “However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said.”

*15 The trial court did not find Quintero credible. It found her demeanor “strange” and her testimony inconsistent. At one point she heard screaming and went back to where she came from, then she stated she walked around in circles, she testified in deposition that she hid in a room and saw Murillo in shock, and at trial she testified she walked down a hallway and hid, and then followed Rodriguez. The trial court found it interesting that Eslami and Johnson testified they reviewed all the tapes during the only possible times frame, from August 4 to 14, and saw nothing to corroborate Quintero's stories regarding her behavior on any of the August dates.

The trial court explained that defendants produced “plenty” of evidence after its initial ruling that “essentially changed the court's mind.” This evidence included: (1) that Reyes denied ever speaking with Murillo or Quintero regarding anything that had to do with Rodriguez; (2) Maria stated she never told Quintero that Rodriguez harmed her and both Murillo and Quintero contacted her and urged her to say he had touched her; and (3) Isis testified Murillo urged her to complain about harassment at ABM, but Isis said she did not suffer any.

The trial court found that because Murillo was impeached in her own testimony and by other witnesses, the August 7 video was not relevant, and Murillo did not meet her burden of establishing the restroom incident happened on August 7, August 11, or any other day. The trial court found Isis Ortiz, Maria Ortiz, Martza Jasso and Luz Reyes were all credible.

The trial court declined Murillo's invitation to respond to the numerous questions she proposed.

As to the alleged failure to preserve evidence, the trial court determined there was no evidence that ABM ever possessed the video; instead, it was in the possession and under the control of non-party Pelco. Moreover, there was no evidence of deliberate destruction of the evidence. Finally, the trial court placed no relevance on the video footage, other than the fact that Johnson and Eslami “reviewed the footage and saw nothing amiss.”

With respect to Murillo's contention “me too” evidence was excluded erroneously, it appeared to the trial court that Murillo was urging its admission “for the improper purpose of bolstering her case,” which was precisely why such evidence was prejudicial and could not be admitted until Murillo established she actually suffered or witnessed the harassment herself. If she did not, whether others suffered harassment was “completely irrelevant and highly prejudicial,” as Murillo could only suffer from a hostile work environment if she was aware it was hostile. The trial court noted that Murillo was afforded the opportunity to present this evidence, yet failed to do so. Finally, the trial court stated that Dr. Malinek's testimony “did not factor into the court's credibility finding one way or another.”

Since Murillo failed to meet her burden of establishing the incident occurred, the trial court found she failed to satisfy her burden of proving defendants were liable, which precluded the need for any further trial.

Judgment subsequently was entered in defendants' favor. The trial court issued a post-judgment order awarding defendants their costs and fees. Murillo appealed from both the judgment and post-judgment order.

DISCUSSION

I. Exclusion of “Me-Too” Evidence

Murillo contends the trial court erred in denying her the opportunity to present “me-too” evidence, specifically the testimony of Sanchez that Rodriguez attacked her in a restroom and of other women who claimed Rodriguez sexually harassed and “threatened [them] with his signature

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Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

phrase: ‘This little dove will not escape alive.’ ” Murillo argues the trial court abused its discretion in excluding such evidence on the ground that Murillo must have personally witnessed or known about any harassment because the evidence was admissible under [section 1101, subdivision \(b\)](#) to prove motive or intent, or common plan or design. She asserts the trial court erroneously “disregarded the possibility” that the “me-too” evidence could be relevant for these other purposes.

*16 In support of her argument, Murillo relies heavily on our opinion in *Pantoja, supra*, 198 Cal.App.4th 87. In *Pantoja*, an employment discrimination case, we considered whether the trial court erred in not allowing the jury to hear “me too” evidence, i.e. evidence of the employer's alleged gender bias in the form of harassing activity against women employees other than the plaintiff, that occurred outside the plaintiff's presence and when the plaintiff was not employed there. The issue was whether the trial court properly excluded this evidence as propensity or character evidence under [section 1101, subdivision \(a\)](#), or whether it should have been admitted under [section 1101, subdivision \(b\)](#), as evidence of a discriminatory or biased intent or motive. (*Pantoja, supra*, 198 Cal.App.4th at p. 92.)

We concluded the evidence should have been admitted and the failure to do so was prejudicial. We explained that while [section 1101, subdivision \(a\)](#), bars evidence of sexual harassment of other employees, unknown to the plaintiff, if it is offered to prove a defendant's propensity to harass, the evidence may still be admissible under [section 1101, subdivision \(b\)](#) to show discriminatory motivation and intent. (*Pantoja, supra*, 198 Cal.App.4th at pp. 110–114.) We determined the “me too” evidence was admissible under [section 1101, subdivisions \(b\) and \(c\)](#), as it was relevant to: (1) prove the defendant's intent when he used profanity and touched employees; (2) rebut the defendant's claim that his frequent use of profanity was directed at situations, not people, and he had a policy of not tolerating harassment; and (3) evaluate the credibility of the defendant's and defense witnesses' assertions that, while the defendant yelled profanities in the office, he did not use the words the plaintiff claimed and did not direct profanities at her, and he did not have a discriminatory intent. (*Pantoja, supra*, 198 Cal.App.4th at pp. 116–118.)

Finally, we concluded the error was not harmless because there was a reasonable probability evidence of the defendant's gender bias toward others, which corroborated the plaintiff's evidence of gender bias, “would have tipped the balance in a credibility contest like this case.” (*Pantoja, supra*, 198 Cal.App.4th at p. 119, fn. omitted.) Moreover we advised that, in the event of retrial, both parties needed to be given the opportunity to present their evidence in an even-handed manner, as “[t]he court's decision that all evidence supporting a sexual harassment case must be limited to evidence of specific events that took place in the plaintiff's presence had the unfortunate result of skewing the evidence.” (*Id.* at pp. 120–122.) We cited the following examples of such skewing: (1) while the court allowed the defense to elicit evidence the defendant directed his obscene comments at situations rather than individuals, it did not allow the plaintiff to elicit evidence that the defendant also directed those words at people; and (2) the court excluded evidence of the plaintiff's feelings about things the defendant did to her and others, even though her subjective experience of a hostile environment was an element of her cause of action. (*Id.* at pp. 120–122.)

Murillo argues the trial court here took the same overly-restrictive position as the court in *Pantoja* by arbitrarily disregarding any possibility the me-too evidence could be admissible under [section 1101, subdivisions \(b\) and \(c\)](#). She asserts that had the me-too evidence been admitted, the trial court would have had additional grounds for believing her and disbelieving Rodriguez.

Defendants contend that Murillo has waived any argument that the me-too evidence was admissible to prove intent, motive, or common plan or design, as she failed to make the argument in the trial court. In the alternative, they contend that Murillo's arguments fail on the merits and any error was harmless.

*17 We need not decide whether Murillo waived her arguments, or whether her arguments are meritorious, because we agree with defendants that any error was harmless. Our state Constitution provides that “[n]o judgment shall be set aside ... in any cause, on the ground of ... the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage

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Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

of justice.” (Cal. Const., art. VI, § 13.) “ ‘A miscarriage of justice ... occurs ... when it appears reasonably probable that were it not for the error a result more favorable to the appellant could have been obtained.’ ... ‘Prejudice is not presumed and the burden is on the appellant to show its existence.’ ” (Winfred D. v. Michelin North America, Inc. (2008) 165 Cal.App.4th 1011, 1038; Code Civ. Proc., § 475; § 354.) A “ ‘probability’ in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.” (Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 800.)

Thus, it is Murillo's burden to show that it is reasonably probable she would have obtained a more favorable result had the me-too evidence been admitted. While Murillo makes a passing reference in her opening brief to the trial court's exclusion of me-too evidence as having “prejudicial consequences,” she does not explain how the admission of such evidence would have led the trial court to believe the restroom incident occurred. Instead, she argues the exclusion of this evidence had the effect of skewing the evidence, as the trial court allowed and relied on “suspect” defense evidence when it (1) rejected her spoliation objections and relied on “inherently reliable testimony of what the destroyed footage purportedly showed”; (2) refused to allow Murillo to ask Hernandez about what “current EEOC issues” ABM was facing in August 2009, which she asserted was relevant to impeach his credibility; (3) allowed Rodriguez to testify that Quintero did not like him because he complained to Juarez about her performance, yet refused to allow Quintero to testify that the “true reason” she did not like Rodriguez was because he repeatedly sexually harassed her and her daughter; (4) allowed witnesses to testify after their statements about Rodriguez were destroyed; and (5) precluded Sanchez's testimony about a similar attack by Rodriguez.

Defendants argue any error is harmless because the trial court rejected Murillo's and Quintero's testimony about the restroom incident due to their deliberately untruthful testimony. We agree. It is clear from the statement of decision that the trial court found compelling evidence to demonstrate that Murillo and Quintero were untruthful, including the ever changing date the alleged restroom incident occurred, the changing nature of what took place during the incident, and their changing description of the time and date of the incident. There is not a reasonable chance that had Sanchez testified Rodriguez attacked her in a restroom using the same words

about a “little dove” not escaping alive or Quintero testified she heard him use the same phrase, the trial court would have found Murillo and Quintero truthful. In the context of this case, that other women were subjected to harassment would not lend credence to Murillo's testimony about the restroom incident.

In her reply brief, Murillo asserts this case, like *Pantoja*, presents a “classic contest of credibility[.]” between herself and Rodriguez. The difference between this case and *Pantoja*, however, is that here the trial court disregarded Rodriguez's testimony entirely and instead focused on whether Murillo was truthful. The trial court did not, as Murillo asserts, “struggle[] to figure out who was telling the truth” between the two. While the trial court initially excused the inconsistencies in Murillo's account of what occurred in ruling on the original motion for judgment, the trial court ultimately rejected Murillo's and Quintero's testimony entirely after the defendants' case, which revealed that their testimony was inherently incredible due to the differing accounts they gave regarding the time, date and details of the incident, and the testimony of other ABM employees that impeached Murillo and Quintero, including (1) Reyes and Barrera, who testified they never overheard Quintero and Murillo have a conversation in the Building 2 kitchen about Rodriguez pulling down Murillo's pants; (2) Maria Ortiz, who stated she never told Quintero that Rodriguez had harmed her and said Murillo and Quintero contacted her and urged her to say that Rodriguez touched her; and (3) Isis Ortiz, who testified that Murillo urged her to complain about harassment at ABM that Isis said she did not experience.⁹

⁹ Contrary to Murillo's assertion that the trial court changed its mind regarding Murillo's credibility based only on the testimony of Reyes, Maria and Isis, the statement of decision reveals that the trial court also relied on defendants' evidence of inconsistencies in Murillo's and Quintero's accounts of the incident.

*18 Because the trial court found Murillo and Quintero inherently incredible in their accounts of the incident, there was not a reasonable chance that the trial court would find them credible based on evidence that others may have been harassed.¹⁰ Accordingly, any error in excluding the me-too evidence was harmless.

10 For the first time in her reply brief, Murillo argues that evidence of the EEOC investigation supports a finding of prejudice because it would have impeached the defense witnesses who claimed no harassment occurred, explained Hernandez's motive to lie about his role in the investigation, and shown the investigation of Murillo's complaint was an effort to suppress evidence and discredit Murillo. For the reasons discussed above, we fail to see how this evidence would have bolstered Murillo's credibility.

II. Expert Testimony

Murillo contends the trial court arbitrarily disregarded the testimony of her expert, Dr. Malinek, “based on an erroneous view that expert testimony about rape trauma was irrelevant,” and “discarded expert testimony without any basis whatsoever.” Murillo claims she was prejudiced because “Dr. Malinek's testimony about rape trauma, his PTSD diagnosis and the diagnosis of Anxiety Disorder by experts on both sides would have been helpful to the court in evaluating whether the ... inconsistencies, failures in memory and addition of details in Murillo's story rendered her testimony not credible.”

First, as defendants point out, while Murillo extensively discusses [rape trauma syndrome](#) and the literature supporting it in her opening brief, Murillo never attempted to have Dr. Malinek testify about [rape trauma syndrome](#) at trial.¹¹ In her reply brief, Murillo asserts her claim is that the trial court erred in preventing Dr. Malinek from testifying about the effects psychological trauma can have on the way victims report traumatic events. Specifically, Murillo cites to Dr. Malinek's testimony that in his professional experience it was not uncommon for victims of sexual assault to have inconsistent stories over time as to what happened and explained this was because no sexual assault report is exactly the same; people either do not remember details, are initially afraid to disclose what happened, or later add details; and the manner in which the report is elicited may lead to inconsistencies. At that point, ABM's attorney objected based on relevance, stating that while Dr. Malinek “was painting a nice dissertation of the literature generally,” he did not see how it applied to Murillo. Murillo's attorney offered to get more specific. The trial court sustained the

objection. Murillo's attorney then elicited evidence that, in Dr. Malinek's opinion, Murillo was subjected to extremely aggressive questions in her deposition that would have an impact on her responses.

11 Defendants also assert that Dr. Malinek was never designated or called to establish or rehabilitate Murillo's credibility. Murillo responds that she sought to call Dr. Malinek for this purpose and defendants' motion in limine number six is indicative of defendants' knowledge of this. Since that motion is not part of the appellate record, Murillo filed a motion to augment the record with it after the respondents' brief was filed. Defendants object to the motion, arguing the motion is untimely and Murillo fails to explain her lack of diligence and delay in seeking to augment the record. We deny the motion for lack of good cause shown.

*19 Murillo asserts the trial court erred in ruling that testimony on psychological trauma was irrelevant, as expert testimony is appropriate regarding the reactions of rape victims because it is not a subject within the common knowledge of jurors, citing *Delia S. v. Torres* (1982) 134 Cal.App.3d 471, 478. Dr. Malinek, however, did testify about general literature regarding sexual assault victims making late disclosures and his professional experience about them making inconsistent statements. In sustaining the relevance objection, however, the trial court ruled only that Dr. Malinek needed to explain how this applied to Murillo. While Murillo's attorney offered to get “more specific,” Dr. Malinek never opined that Murillo's alleged trauma was a reason why she provided inconsistent testimony; rather, Dr. Malinek suggested a defense lawyer's questioning during a deposition would have “an impact on how she'll respond” with no further elaboration or detail. The trial court did not err in sustaining the objection.

Murillo also contends the trial court arbitrarily disregarded Dr. Malinek's testimony in granting defendants' motion for judgment. We disagree with Murillo's characterization of the record, namely that the trial court *rejected* Dr. Malinek's testimony. Instead, we agree with defendants that the trial court did consider Dr. Malinek's testimony, but determined it “did not factor into the court's credibility finding one way or another.” In making this determination, the trial court did exactly what Murillo says it should have—it gave

[REDACTED]

Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

Dr. Malinek's "opinion the weight which it [found] that opinion deserve[d]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633), and concluded his opinion was not a factor in its credibility determination. Doing so was well within the trial court's discretion (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890), and there is nothing in the record to indicate the trial court acted arbitrarily. Thus, the trial court did not err with respect to Dr. Malinek's testimony.

III. Video Footage

Murillo argues the trial court erred when it denied her motion to strike the testimony of Johnson and Eslami as an evidentiary sanction for failing to preserve and willfully suppressing the complete videotape they viewed. She contends the motion was timely, since she preserved the issue by raising it in her motion in limine number four, and ABM knew the footage was relevant and should have been preserved for litigation, yet did nothing to ensure its preservation. She asserts that due to ABM's failure to preserve the video footage, she was entitled to an adverse inference pursuant to section 413, as well as an issue sanction pursuant to [Code of Civil Procedure section 2023.030, subdivision \(b\)](#), and the trial court abused its discretion in relying on Eslami's and Johnson's testimony "in making the prejudicial finding that the destroyed surveillance tapes contained nothing to corroborate Murillo's evidence."

We agree with the trial court that the motion was untimely regarding the exclusion of testimony and discovery sanctions. It is well established that a motion to strike evidence after the conclusion of testimony is untimely. (*SCI Cal. Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 564 [objection to expert testimony untimely when made more than a year after close of evidence]; *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 61 [failure to object and make motion to strike when testimony given results in failure to preserve point in trial court]; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 659–660 [objection to expert testimony untimely where made after expert finished testifying].) Murillo never objected to Johnson's and Eslami's testimony regarding their observations of the video surveillance recorded from August 4 through 18 on the grounds of spoliation of evidence, and never timely sought a discovery sanction on the grounds the video footage was

improperly destroyed. Indeed, Murillo had "no objection" when defendants moved the video clips into evidence.

*20 Murillo cites her counsel's closing arguments for the proposition that she raised the issue of striking Johnson's and Eslami's testimony. But by that point, their testimony had concluded. Murillo's counsel indicated only that Murillo would be filing a motion sometime in the future to strike any testimony and the video clips because there was no effort made to preserve the full video. It was not until after the conclusion of trial that Murillo filed her motion to strike Johnson's and Eslami's testimony.

Murillo acknowledges she did not object at the time of Johnson's and Eslami's testimony, but contends she preserved the issue by raising it in her motion in limine number four. That motion sought the exclusion of two 15-second video surveillance clips taken on August 7 around 7:22 p.m., as well as any references, opinions, testimony, or argument related to the two video clips, on the ground defendants failed to preserve the video from the same night from 9 to 9:30 p.m., when the alleged attack took place. Murillo also requested that defendants not be allowed to introduce the two video clips or testify about them until they laid a proper foundation.

The motion in limine, however, did not seek any evidentiary sanctions or request a discovery sanction under [Code of Civil Procedure section 2023.030](#). Indeed, in its ruling denying the motion, the trial court noted Murillo had not requested any kind of discovery sanction. Murillo asserts we should read the motion in limine more broadly to include any testimony whatsoever about video footage and therefore conclude that it encompassed the same body of evidence she sought to exclude in her later motion to strike. Section 353, however, provides that a judgment shall not be reversed by reason of the erroneous admission of evidence unless there appears of record a timely objection to, or motion to exclude or strike, the evidence, and "so stated as to make clear the specific ground of the objection or motion." Here, the motion in limine did not advise the trial court that Murillo was seeking to exclude all testimony about the entirety of the video footage that Johnson and Eslami reviewed. Having failed to timely object to their testimony, Murillo has waived any argument that their testimony should have been excluded or sanctions should have been imposed.

Murillo v. ABM Industries Incorporated, Not Reported in Cal.Rptr. (2017)

2017 Fair Empl.Prac.Cas. (BNA) 435,974

Murillo argues the trial court should have drawn an adverse inference from defendants' failure to produce the video footage. While Murillo cited section 413 in her motion to strike Johnson's and Eslami's testimony, which allows the trier of fact to draw adverse inferences from the evidence or facts in a case based on a party's suppression of evidence, she never informed the trial court what inference it should draw from the absent footage. Obviously the trial court declined to draw any negative inference; instead, it found there was no evidence ABM ever possessed the footage or it was deliberately destroyed, and placed no relevance on the video footage, other than that Johnson and Eslami reviewed the footage and saw nothing amiss.

On appeal, Murillo contends the trial court erred by failing to apply both section 412, which permits a trier of fact to distrust evidence where more persuasive evidence is available to a party, and section 413. The weight of any inferences to be drawn under those sections, however, are matters for the trial court and are only of concern to us when there is no substantial evidence to support the judgment. (*Moore v. Spremo* (1945) 72 Cal.App.2d 324, 328.) Murillo, however, does not challenge the sufficiency of the evidence and there is more than sufficient evidence to support the trial court's finding that Murillo failed to satisfy her burden of showing the restroom incident occurred.

IV. Costs

*21 Murillo argues the trial court erred in awarding costs to defendants. Defendants acknowledge that after the trial court awarded them costs, our Supreme Court held that the prevailing defendant in a FEHA action is not entitled to costs unless the action was objectively without foundation. (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 105.) In light of that case, defendants concede the cost award must be reversed, a concession we accept.

DISPOSITION

The award of costs to defendants is reversed. In all other respects, the judgment is affirmed. Each party is to bear its own costs.

WE CONCUR:

FRANSON, J.

PEÑA, J.

All Citations

Not Reported in Cal.Rptr., 2017 WL 6032590, 2017 Fair Empl.Prac.Cas. (BNA) 435,974