

Carter v. San Francisco Unified School Dist.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CLAUDIA CARTER,

A117422

Plaintiff and Appellant,

(San Francisco County

v.

Super. Ct. No. CGC-05-445945)

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT et al.,

Defendants and Respondents.

This is an appeal in a case involving claims of race and disability discrimination, defamation and invasion of privacy, among others. Appellant Claudia Carter sued her employer, the San Francisco Unified School District, and Julianne Wurm, an instructional reform facilitator at Fairmount Elementary School where Carter had taught for over 15 years (collectively, respondents), after she was placed in a remedial program designed to improve teaching skills. The trial court entered judgment in favor of respondents after granting their motions for summary adjudication and for summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Allegations.

In late 2005, Carter filed a complaint, twice amended, asserting causes of action against the San Francisco Unified School District (the District) for race discrimination, disability discrimination, age discrimination, harassment, failure to prevent harassment, failure to accommodate a disability, retaliation and violation of due process. In 2006, Carter filed a third amended and supplemental complaint adding respondent Wurm as a defendant and adding causes of action against all defendants for defamation and invasion of privacy.[\[1\]](#)

A. The December 11 Meeting.

Carter's complaints stemmed from events surrounding her placement in a remedial program for teachers, the Peer Assistance and Review program (PAR), which followed soon after she had an emotional outburst at a meeting with several colleagues. Specifically, on December 11, 2003, Carter was summoned to an unscheduled meeting at Fairmount Elementary School (Fairmount) with Principal Karling Aguilera-Fort, respondent Wurm, and union representative Nancy Lucero (December 11 meeting). According to Principal Aguilera-Fort, the meeting was called to discuss the progress of Carter's class during her recent absence for a school-related injury. At the meeting, Carter became very upset because she was concerned, based on the presence of Lucero, that Principal Aguilera-Fort intended to discipline her. Carter, among other things, raised her voice in anger, began to cry, and placed her hand on her chest as if in physical distress. Principal Aguilera-Fort, concerned that Carter may have been suffering a heart attack, asked Wurm to call 911. When the police arrived, however, they found that Carter had calmed down, and so declined to hold her or to take her in for psychological evaluation. A short time later, Carter voluntarily left school for the day.

Following Carter's outburst, Principal Aguilera-Fort asked respondent Wurm to prepare an incident report describing what happened at the December 11 meeting, which Wurm prepared and then sent to the Districts assistant superintendent. Principal Aguilera-Fort also called a staff meeting to quell rumors that had begun circulating about Carter's outburst. At that meeting, Principal Aguilera-Fort advised that the events of the December 11 meeting were private and, thus, should not be discussed among staff members.

On December 12, 2003, respondent Wurm drafted a letter to the Union Building Committee (UBC). The UBC represents the teachers union, the United Educators of San Francisco, at Fairmount and serves as liaison between the schools faculty and administration. Wurm's letter, signed anonymously by eight members of Fairmount's staff, provided Wurm's description of what occurred at the December 11 meeting, and asked for help in addressing the situation in a manner protective of the school's best interests:[\[2\]](#)

We write this now to express alarm and concern regarding a member of the staff at Fairmount Elementary School, Claudia Carter. Ms. Carter returned to school on Thursday, December 11, 2003 after an absence. In a meeting with the school principal, UCB representative and instructional reform facilitator, Ms. Carter had a type of what can only be called breakdown [sic]; crying, shrieking, pounding her hands on the table all the while yelling that the other individuals in the room were evil and asking how can you

sleep at night? based on the fact that they were so evil. It was a very scary and unprofessional outburst in response to a meeting that had not even begun.

Due to the severity of the breakdown, the staff called 911 to the school site in the event it continued to escalate and out of concern for the welfare of Ms. Carter. Officers Jennifer Marino and Michael Walsh responded to the call.

Ms. Carter left the campus vowing to never return, yet she returned smiling and complacent one hour later, speaking negatively about the principal with staff and parents alike.

As a result, there are staff members who are worried about the stability of this teacher and the safety of the children as well as their own safety in relation to future outbursts. It seems as though a point of no return was crossed emotionally and psychologically on December 11, 2003 and the staff members worry about the possibility of this individual returning to school. It is disturbing to imagine an outburst of this nature happening in front of children or directed towards students.

Therefore, we are asking for assistance from the UBC in managing this problem in a way that keeps the best interests of the students and other staff members in mind. It is not fair to put a large number of individuals at risk solely for the rights of one individual. There must be concern for the greater good of the students and of the school.

Respectfully,

8 members of Fairmount Staff.

On December 19, 2003, Principal Aguilera-Fort gave Carter a notice of unprofessional conduct based on what occurred at the December 11 meeting. Also in December 2003, the UBC held its regularly-scheduled meeting, at which it discussed Carters conduct at the December 11 meeting, as well as her professional abilities in general. Following the

meeting, which respondent Wurm participated in, the UBC decided to recommend Carter for the PAR program.

On January 7, 2004, Principal Aguilera-Fort observed Carters classroom, and noted several deficiencies in her teaching skills. Specifically, Principal Aguilera-Fort noted Carter appeared deficient in designing and implementing effective lesson plans, in regularly assessing the progress of her students and then adjusting the lesson plans accordingly, and in effectively managing her classroom. On January 14, 2004, Principal Aguilera-Fort gave Carter a written performance evaluation indicating an unsatisfactory performance. The next day, January 15, 2004, Carter was placed in the PAR program.

B. The PAR Program.

Mandated by California law and jointly created by the District and the teachers union, the PAR program is designed to improve the quality of teaching in public school classrooms. The PAR program is overseen by a nine-member panel, four members of which are chosen by the Districts superintendent and five members of which are chosen by the union. One member chosen by the superintendent and one member chosen by the union serve as PAR panel co-chairpersons.

The PAR program offers additional support and coaching to both new and existing teachers. Relevant here, under the so-called Permanent Teacher Intervention Program, existing teachers receiving either one unsatisfactory summary performance evaluation or two or more consecutive needs improvement evaluations are considered for placement in PAR.[3] Alternatively, an existing teachers peers may recommend to the UBC that the teacher be placed in the PAR program if the peers believe the teacher would benefit from additional support in the classroom. The UBC representative then discusses the peer recommendation with the teachers principal, who then submits the recommendation to the PAR panel co-chairpersons for consideration. While an existing teachers peers may recommend PAR placement, only a referral by the PAR panel co-chairpersons followed by approval from the PAR panel results in the teachers admission into the program via the Permanent Teacher Intervention Program. Once admitted into the program, the teacher is generally expected to participate in it for a full academic year.

Under the collective bargaining agreement between the District and the teachers union, the PAR program is not deemed part of the teacher disciplinary or termination process.

The collective bargaining agreement specifically provides that the PAR program shall not deal with teachers employment issues. As such, the District may terminate or take disciplinary action against a teacher who has not participated in the PAR program and, alternatively, may place a teacher in the PAR program without taking disciplinary action or otherwise following disciplinary procedures. Additionally, teachers placed in the PAR program do not have their pay decreased, lose any job benefits, or have their teaching responsibilities changed or reduced. Teachers placed in the PAR program must, however, satisfy the six California Standards of the Teaching Profession (CSTP) by the end of their participation in the program.^[4] Those teachers who fail to do so may be given a 90-day notice of intent to terminate.

C. Carters Participation in the PAR Program.

In this case, once the UBC decided to recommend Carter for the PAR program, Fairmounts UBC representative, Cynthia Lasden, took the recommendation to Principal Aguilera-Fort. Principal Aguilera-Fort supported the recommendation based on his own observation of Carters classroom on January 7, 2004, on his observation of her conduct at the December 11 meeting, and on past observations of Carters teaching skills by other Fairmount staff members. As such, Principal Aguilera-Fort forwarded the recommendation to the PAR panel co-chairpersons, who placed Carter in the program as of January 15, 2004.

The PAR program assigned Terri Kessler as a PAR coach to help Carter improve her teaching skills. Kessler observed Carters classroom from January through June 2004, and identified several ways in which Carter could improve her teaching skills, including by adopting a more clear classroom structure and by taking advantage of more professional development opportunities. Carter, however, failed to follow Kesslers suggestions. As such, Kessler reported at the end of the 2003-2004 academic year that Carter failed to meet any of the six CSTP standards she was required to meet before leaving the PAR program.

For the 2004-2005 academic year, Carter, at her request, was assigned a new PAR coach, Eve Arbogast. Arbogast observed Carters classroom from August 2004 through January 2005 and, like Kessler, identified several ways in which Carter could improve her teaching skills. Ultimately, Arbogast reported that Carter had improved her teaching skills, yet still failed to meet all six CSTP standards. As such, on January 17, 2005, the District sent Carter a 90-day notice of intent to terminate due to unsatisfactory performance.

After receiving the 90-day notice of intent to terminate, Carter took medical leave for stress-related reasons. In March 2005, Carter was certified by her doctor as fit-for-duty for no more than 20 hours per week. Carter thus sought an accommodation from the District to return to work on a part-time basis for the remainder of the 2004-2005 academic year. No such part-time position was available.

In August 2005, Carter was again certified by her doctor as fit-for-duty for no more than 20 hours per week. On September 15, 2005, the District notified Carter that no part-time teaching position was available for the 2005-2006 academic year, and thus rejected her request. Carter thereafter remained on medical leave until her recent decision to retire.

II. Respondents Motions for Summary Judgment and Summary Adjudication.

On September 15, 2006, the District moved for summary judgment or, in the alternative, for summary adjudication, on the second amended complaint. After granting leave to file the third amended complaint, the trial court granted summary adjudication with respect to all causes of action raised in the second amended complaint. Specifically, the trial court rejected Carters causes of action for discrimination and retaliation after finding (1) that Carter failed to prove a prima facie case, (2) that the District had legitimate and nondiscriminatory reasons for its actions, and (3) that Carter failed to prove those reasons were pretextual. The trial court further found the activities forming the basis of Carters retaliation cause of action were insufficient as a matter of law to support such claim. With respect to Carters harassment cause of action, the trial court found she failed to prove the alleged harassment was sufficiently severe or pervasive to alter the conditions of her employment or to create a hostile work environment. With respect to Carters cause of action for failure to accommodate a disability, the trial court found the undisputed evidence proved the District was unable to accommodate Carter at the relevant time. And, finally, with respect to Carters due process cause of action, the trial court found she failed to first file a timely tort claim, as the law requires prior to raising such claim.

On March 1, 2007, the trial court entered judgment in favor of the District on all causes of action raised in the second amended complaint.

The District and respondent Wurm then moved for summary judgment on the third amended complaint. Respondents also filed evidentiary objections to the declaration and amended declaration of Carters attorney, which Carter relied upon in opposing the motion, on the ground that her attorney lacked personal knowledge of the matters set forth therein. On April 16, 2007, the trial court sustained respondents evidentiary objections, and granted their motion for summary judgment. In doing so, the trial court found: (1) with respect to the defamation cause of action against all respondents, Carter failed to prove that the alleged defamatory statements made orally and in the letter drafted by respondent Wurm to memorialize events occurring at the December 11 meeting contained false statements and not opinions, or to disprove that such statements were protected by privilege under California law; (2) with respect to the invasion of privacy cause of action against all respondents, Carter failed to prove respondents disclosed facts that were private and not matters of legitimate public concern, or to disprove that the alleged disclosures were protected by privilege under California law; and (3) with respect to the harassment cause of action against respondent Wurm, Carter failed to prove such alleged harassment consisting of two race-based remarks allegedly made by Wurm was sufficiently severe or pervasive to alter the conditions of her employment or to create a hostile work environment.

On April 30, 2007, Carter filed an amended notice of appeal of the trial courts orders with respect to the second and third amended complaints. Final judgment was thereafter entered in favor of respondents as to all causes of action. [\[5\]](#)

DISCUSSION

On appeal, Carter contends the trial courts grant of summary adjudication and, ultimately, of summary judgment as to all causes of action was erroneous because the alleged facts in the second and third amended complaints were sufficient to constitute (1) causes of action against the District for race and disability discrimination under the Fair Employment and Housing Act, Government Code section 12940 et seq. (FEHA), and (2) causes of action against both respondents for defamation and invasion of privacy. Carter does not appeal the trial courts ruling with respect to her causes of action for age discrimination, retaliation, harassment, reasonable accommodation, or violation of due process.

We review a trial courts grant of summary judgment de novo, considering all the evidence set forth by the parties in support of and in opposition to the motion except that to which objections have been made and sustained. We then determine whether there is a

triable issue as to any material fact. (Code Civ. Proc., 437c, subd. (c).) As such, we must determine whether respondents, as the parties prevailing on summary judgment, have with respect to each cause of action shown that one or more elements . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show . . . a triable issue of one or more material facts exists as to that cause of action or defense thereto. (Code Civ. Proc., 437c, subd. (p)(2).)

In performing our de novo review, we view the evidence in the light most favorable to plaintiff[] as the losing part[y]. [Citation.] In this case, we liberally construe plaintiff[s] evidentiary submissions and strictly scrutinize defendants own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff[s] favor. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; see also *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001 [*Hersant*].)

With these rules in mind, we address in turn each of Carters contentions in seeking reversal of the trial courts rulings.

I. The Race and Disability Discrimination Causes of Action against the District.

Carters causes of action against the District for race and disability discrimination arise under FEHA, which prohibits an employer, because of the race, . . . physical disability, mental disability, [or] medical condition, . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment. (Gov. Code, 12940, subd. (a).)

In considering discrimination cases brought under FEHA, California courts rely on a three step burden-shifting test known as the *McDonnell Douglas* test. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. [*Guz*].) Under this test, the plaintiff bears the initial burden of proving a prima facie case of discrimination. (*Guz, supra*, 24 Cal.4th at p. 354.) Such prima facie case is proved where: (1) the plaintiff was a member of a protected class, (2) she was qualified for the position she sought or was performing competently in the position she held, (3) she suffered an adverse employment action, and

(4) some other circumstance suggests a discriminatory motive. (*Id.* at p. 355; see also *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44; *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.)

If the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises and the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to raise[] a genuine issue of fact and to justify a judgment for the [employer], that its action was taken for a legitimate, nondiscriminatory reason. [Citations.] [] If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employers proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. (*Guz, supra*, 24 Cal.4th at pp. 355-356.) The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. (*Id.* at p. 356.)

Where the employer moves for summary judgment in a discrimination case, application of the *McDonnell Douglas* test differs somewhat. The employer must show either that the plaintiff cannot establish one or more elements of her prima facie case, or that one or more legitimate, nondiscriminatory reasons motivated its allegedly adverse employment action. (*Guz, supra*, 24 Cal.4th at p. 356; *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098; *Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [*Jones*].)

If the employer meets this initial burden on summary judgment, the burden then shifts to the plaintiff to produce substantial evidence that the employers stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination. (*Hersant, supra*, 57 Cal.App.4th at p. 1005; see also *Jones, supra*, 152 Cal.App.4th at p. 1380.)

In meeting this burden, it is not sufficient for the plaintiff to show the employers asserted reason for the adverse employment action is false. [A] reason cannot be proved to be a pretext *for discrimination* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. (*St. Marys Honor Center v. Hicks* (1993) 509 U.S. 502, 515 [125 L.Ed.2d 407, 113 S.Ct. 2742].) If the plaintiff produces *no* evidence from which a reasonable fact finder could infer that the employers true reason was discriminatory, the employer is entitled to summary judgment. (*Caldwell v. Paramount Unified School Dist.* [(1995)] 41 Cal.App.4th [189,] 203.) (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003 [*Hicks*].)

Applying this standard, we now turn to the facts of this case, bearing in mind that, [b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant. (Citations.) (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1386.)

A. Carters Prima Facie Case of Discrimination.

With respect to her prima facie case for race discrimination, Carter offered evidence that she was the only African-American teacher at Fairmount, where she had taught third grade since 1990. Carter also offered evidence that she was subjected to disparate treatment by her supervisors and colleagues at Fairmont. Specifically, she offered evidence that: (1) Principal Aguilera-Fort ignored her during teacher meetings when she raised her hand and, at one such meeting, mistakenly assumed she was discussing only African-American parents when she made a general comment about parent involvement in school functions; (2) respondent Wurm, Fairmounts instructional reform facilitator, made race-based remarks to her, including telling her she should contact the National Association for the Advancement of Colored People (NAACP) if she had job-related concerns and could open a crack house should she lose her job; (3) Principal Aguilera-Fort asked a union representative to attend the December 11 meeting with Carter to discuss her class progress, an uncommon occurrence; (4) Principal Aguilera-Fort became alarmed and asked Wurm to call the police in response to an emotional outburst by Carter at the December 11 meeting; the police, however, found no basis to hold her; (5) following the December 11 meeting, in January 2004, Carter received her first unsatisfactory performance evaluation since she began teaching for the District in 1968, and was recommended by her peers for referral to the PAR program by the UBC; and (6) Carter was the first teacher at Fairmount to be referred to the PAR program by the UBC based on a recommendation from her peers.

With respect to her prima facie case for disability discrimination, Carter offered evidence, in addition to that set forth above, that (1) she suffered an emotional outburst, perceived as a mental disability, at the December 11 meeting; (2) that she was diagnosed by doctors as having depression and work-related stress following the December 11 meeting; (3) that the District perceived her as having a disability; and (4) that the District failed to address or to make any effort to accommodate such disability.

The trial court found Carter failed to establish a prima facie case for race or disability discrimination because Carter suffered no adverse employment action.[6] Under California law, an adverse employment action for purposes of FEHA is one that materially affects the terms, conditions, or privileges of employment. Or, otherwise stated, such action is one that is reasonably likely to adversely and materially affect an employees job performance or opportunity for advancement in his or her career. (*Yanowitz v. LOreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 [*Yanowitz*].)

In applying this standard, we must keep in mind that [w]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employers act or omission does not elevate that act or omission to the level of a materially adverse employment action. [Citation.] If every minor change in working conditions or trivial action were a materially adverse action then any action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. [Citation.] (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511 [91 Cal.Rptr.2d 770].) (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386 [*McRae*].)

Moreover, while the employee and the public have a significant interest in preventing discrimination or retaliation for engaging in protected activity, those are not the only interests at stake. The employer and the public have a legitimate interest in efficient, cost-effective, and high-quality work. Employers need to be able to manage employees without fear that routine employment decisions, or attempts at improving employee performance, will lead to litigation. Employees themselves have an interest in learning if their work habits are substandard, particularly if they wish to advance in their professions. (*McRae, supra*, 142 Cal.App.4th at p. 387.)

Here, the alleged adverse employment action was Carters placement in the PAR program. Carter claims PAR is a remedial program based on a teachers perceived unsatisfactory job performance that is set up to lead to termination. In seeking to prove the PAR program is adverse in nature, Carter points to evidence that, pursuant to the collective bargaining agreement between the District and the teachers union, the PAR panel is authorized to vote on whether or not to recommend termination for a teacher based on his or her performance in the PAR program. Consistent with that authority, Jolie Wineroth, PAR co-chairperson, warned Carter that she would receive a 90-day notice of intent to terminate if she failed to successfully complete the PAR program. And, on January 17, 2005, Carter in fact received such 90-day notice after the PAR panel voted to issue it based on her failure to successfully complete the program after participating in it for two academic semesters.

Carter also offers as evidence that the PAR program is adverse in nature that, while in the program, she was subject to intense scrutiny and class disruptions by PAR personnel who were observing her, and was subject to hostility from both PAR personnel and her other colleagues.

Finally, Carter offers evidence that (1) she was the first teacher at Fairmount to be referred to the PAR program by the UBC; (2) none of the six other teachers referred to the PAR program by his or her peers following Carters referral have successfully completed the PAR program[7]; (3) not more than 50 percent of tenured teachers have continued teaching after being placed in the PAR program; and (4) a teacher who refuses to participate in the PAR program may be subject to progressive discipline.

The District, in arguing no adverse employment action occurred in this case, points to evidence that, pursuant to the collective bargaining agreement between the District and the teachers union, the PAR program is not deemed part of the disciplinary process. Rather, the PAR program is mandatory for teachers receiving an unsatisfactory performance evaluation for the academic year, and is intended to help such teachers by providing additional support in order to improve their teaching skills. As such, Carters referral to the PAR program was intended to help her, not to discipline her, based on the unsatisfactory performance evaluation she received from Principal Aguilera-Fort in January 2004.

Further, the District notes, as a result of her referral, Carter received no reduction in pay, loss of benefits, or change or reduction in job responsibilities or status. In fact, Carter remained in her position until her recent decision to retire.

We agree, as the District points out, that [e]mployers need to be able to manage employees without fear that routine employment decisions, or attempts at improving employee performance, will lead to litigation. (*McRae, supra*, 142 Cal.App.4th at p. 387.) Moreover, actions reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable. (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) In applying these rules to our case, however, we must look beyond the mere language of the collective bargaining agreement. And when the evidence is considered as a whole, we conclude it is sufficient to raise a triable issue of fact regarding whether Carter suffered an adverse employment action. The Districts placement of Carter in the PAR program,

whether or not deemed disciplinary under the collective bargaining agreement, was more than a mere inconvenience or personally humiliating. (*Yanowitz, supra*, 36 Cal.4th at pp. 1054-1055; *McRae, supra*, 142 Cal.App.4th at p. 393.) Rather, such action threatened the advancement of her career. Indeed, the District admitted in written discovery that Carters failure to successfully meet the California Standards for the Teaching Profession, a prerequisite for successful completion of the PAR program, could result in serious consequences, including termination of her employment with Defendant. And those serious consequences in fact resulted Carter was sent a 90-day notice of intent to terminate based on her performance in the PAR program. Given such evidence, a trier of fact could find it reasonably likely that Carters placement in the PAR program materially and adversely affected the terms, conditions, or privileges of her employment.

We thus conclude that, for purposes of summary judgment, Carter met her burden to prove a prima facie case of discrimination. We thus proceed to the question of whether the District met its subsequent burden to prove legitimate, nondiscriminatory reasons supported its action.

B. The Districts Legitimate, Nondiscriminatory Reasons.

The trial court found that the District met its burden on summary judgment to prove it had legitimate, nondiscriminatory reasons for placing Carter in the PAR program. We agree.

As the Districts evidence demonstrates, the UBC decided to recommend Carter for the PAR program after considering reports from respondent Wurm and Principal Aguilera-Fort of her unprofessional conduct at the December 11 meeting. In addition, the UBC factored into its decision a concern that resources in the school that should have been distributed school-wide . . . were going into Ms. Carters classroom. In particular, Carter was frequently absent from school, resulting in Fairmounts on-site substitute teacher — who was supposed to be available to assist all teachers — being placed in Carters classroom.

Principal Aguilera-Fort supported the UBCs decision based on his own observation of Carters classroom on January 7, 2004. With respect to his classroom visit, Principal Aguilera-Fort noted in his January 14, 2004 written evaluation that, among other things, Carter appeared deficient in designing and implementing effective lesson plans, in

assessing the progress of her students and adjusting her lesson plans accordingly, and in effectively managing her classroom.

Moreover, several of Carters former and present supervisors and colleagues had reported similar deficiencies in her teaching performance. For example, Christine Hiroshima, the Districts assistant superintendent, observed Carters classroom several times during the 2001-2002, 2002-2003, and 2003-2004 academic years as part of the Students and Teachers Achieving Results (STAR) program at Fairmount.^[8] During those observations, Hiroshima found no evidence that Carter was providing effective instruction and little evidence that she was using the core curriculum materials appropriately. In addition, Hiroshima found that Carter failed to effectively engage her students.

Hazel Foster, Fairmounts principal during the 2002-2003 academic year, discussed her concerns with Hiroshima regarding Carters teaching performance several times. In a January 2003 letter to the Districts Human Resources Department, Foster, an African-American female, noted that, based on her observations, Carter provided limited instruction to her students, often sat with her back to the students, and often gave students worksheets to complete. Foster also noted that Carter was receiving more individual support than any other teacher at Fairmount, and had been absent several times recently for illnesses.

Loren Chasse spent time in Carters classroom between Fall 2001 and Spring 2004 as both a substitute teacher and as Fairmounts on-site support teacher under the STAR program. Chasse noted that Carter was not an effective teacher. Carter, he observed, was the only teacher at Fairmount who regularly failed to provide a lesson plan when she was absent from her classroom, and often provided students with photocopied pages from coloring books instead of actively engaging them in the learning curriculum when she was present.

Finally, respondent Wurm, as Fairmounts instructional reform facilitator assigned to provide additional support to teachers in need, observed Carters classroom several times during both Fosters and Aguilera-Forts tenures as principal. Wurm observed that very little time [was] allocated to instruction in [Carters] class, and that the students had a little bit too much freedom to bother and pester each other.

Wurm acknowledged that she called the UBC following the December 11 meeting to discuss options, including PAR placement, for addressing Carters teaching performance. She recommended PAR placement to the UBC based not only on Carters conduct at the December 11 meeting, but also on the concerns she and other teachers had regarding Carters deficient teaching performance.

This evidence of Carters unsatisfactory teaching performance, we conclude, was sufficient under the *McDonnell Douglas* test to meet the Districts burden to prove it had legitimate, nondiscriminatory reasons for placing Carter in the PAR program. As such, we agree with the trial court that the burden shifted back to Carter to produce substantial evidence that the employers stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination. (*Hersant, supra*, 57 Cal.App.4th at p. 1005.) We thus proceed to the pretext issue.

C. Carters Evidence of Pretext.

The trial court found Carter failed to sufficiently rebut the Districts evidence of legitimate, nondiscriminatory reasons for placing her in the PAR program with evidence that such reasons were pretextual or involved discriminatory animus based on race or disability. We again agree.

In arguing the Districts stated reasons were pretextual, Carter claims that no contemporaneous documentation supported the alleged fact that she was placed in the PAR program for her unsatisfactory teaching performance, and that the District failed to follow all the procedures set forth in the collective bargaining agreement when placing her in the program. Carter further claims she had never received a negative performance evaluation in her teaching career until her emotional outburst at the December 11 meeting.

First, as we discussed at length above, there was more than sufficient evidence to show that Carter was placed in the PAR program based on her professional deficiencies, not based on her race or perceived mental disability. Such evidence included written and oral reports of her unsatisfactory performance before the December 11 meeting, including the January 2003 letter to the Districts Human Resources Department from Foster, who is

African-American and who observed Carter while acting as Fairmounts principal for the 2002-2003 academic year. The record also included evidence of oral reports made by Assistant Superintendent Hiroshima, who observed Carter as part of the STAR program during the 2001-2002, 2002-2003, and 2003-2004 academic years. Given this evidence, which Carter does not directly dispute, we conclude the fact that Carter received her first formal negative performance evaluation *after* the December 11 meeting was insufficient to permit a reasonable trier of fact to find the Districts proffered reasons for her PAR placement were false. (*Hersant, supra*, 57 Cal.App.4th at p. 1005; see also *Hicks, supra*, 160 Cal.App.4th at p. 1012 [evidence that plaintiff's employer never actually communicated his dissatisfaction with plaintiff's job performance to plaintiff personally standing alone as it does, . . . cannot rationally support the ultimate inference required to reach a jury, which is that plaintiff was not retained because he was White].)

Second, with respect to Carter's claim that the District failed to follow proper procedures when placing her in the PAR program, even if true, such fact is again insufficient.

Carter charges the District with the following procedural deficiencies: (1) her PAR placement was not based on sufficient documentation of her alleged teaching deficiencies; (2) she was not invited to participate in a conference with her evaluator and assigned peer coach before her placement; and (3) she did not participate in the program for an entire year before being sent the 90-day notice of intent to terminate.

The District responds that, consistent with the PAR procedures for the Permanent Teacher Intervention Program set forth in the collective bargaining agreement, Carter was referred to the program by the UBC upon the recommendation of her peers. Moreover, the UBC's referral was supported by Principal Aguilera-Fort based on his own observations of Carter's teaching, which were documented in a formal unsatisfactory performance evaluation Carter received on January 14, 2004. In response to the UBC's referral, the PAR co-chairpersons recommended and the PAR panel approved Carter's placement in the program based on her unsatisfactory performance evaluation, and on other complaints from colleagues and supervisors regarding her professional conduct. Carter was then twice invited to meet with the PAR co-chairpersons, at least after her placement, but Carter cancelled both meetings.^[9] Finally, Carter participated in the PAR program for two entire academic semesters the 2004 Spring and Fall semesters before she was sent the 90-day notice of intent to terminate based on her failure to successfully complete the program.

We agree with the District that, given this undisputed evidence that Carters PAR placement was based on legitimate, performance-related concerns and was at least generally consistent with PAR procedures, even if Carter could point to evidence the District failed to follow some particular procedure, such evidence would be insufficient to permit a finding of *discriminatory* intent or animus. As California courts have held: The plaintiff must do more than raise the inference that the employers asserted reason is false. [A] reason cannot be proved to be a pretext *for discrimination* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. [Citation.] (*Hicks, supra*, 160 Cal.App.4th at pp. 1003, 1008 [evidence that the employer failed to maintain all FCC-required documents on workplace diversity was insufficient to prove discriminatory intent or animus]; see also *Hersant, supra*, 57 Cal.App.4th at p. 1005 [with respect to pretext, plaintiff must prove such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employers proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence, [citation], and hence infer that the employer did not act for the [the asserted] non-discriminatory reasons. [Citations.] [Citations.]]) Carters showing in this regard is simply insufficient to meet such burden. Accordingly, we find no error in the trial courts summary adjudication of Carters discrimination causes of action. (*Guz, supra*, 24 Cal.4th at p. 361 [the employer is entitled to summary judgment if, considering the employers innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employers actual motive was discriminatory].)

II. The Defamation and Invasion of Privacy Causes of Action Against Respondents.

Carters defamation and invasion of privacy causes of action against all respondents are premised on: (1) the December 12, 2003 letter by respondent Wurm to the UBC describing what occurred at the December 11 meeting and seeking assistance in addressing it (the December 12 letter); and (2) Wurms subsequent statements to the UBC at its regularly scheduled meeting which repeated orally the substance of the December 12 letter.[10] The December 12 letter was circulated by Wurm to other Fairmount staff members and then signed anonymously by eight of the staff members, including Wurm. According to Carter, Wurms statements in the December 12 letter and repeated orally at the UBC meeting contained false statements of fact (defamation) and constituted a public disclosure of private facts (invasion of privacy).

The trial court found Carter failed to establish a *prima facie* case of defamation because the statements in the December 12 letter and repeated orally to the UBC were not false, but rather true statements or expressions of opinion. The trial court further found Carter failed to establish a *prima facie* case of invasion of privacy because Wurm did not disclose any private facts in the December 12 letter or at the UBC meeting.

Additionally, the trial court found that Wurms statements related to Carters competency to teach and care for her young students and, as such, were publications protected by the qualified privilege for matters of common interest set forth in Civil Code section 47, subdivision (c) (the common-interest privilege).[11] Accordingly, Wurms statements could form the basis of neither a defamation nor an invasion of privacy cause of action.

For the reasons set forth below, we agree with the trial courts conclusion that Carter failed to establish a prima facie case of defamation or invasion of privacy.

A. Defamation.

Defamation may be found in two forms libel or slander. Libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. (Civ. Code, 45.) Slander is a false and unprivileged publication, orally uttered . . . which [] [t]ends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires (Civ. Code, 46.)

There is, however, . . . no such thing as a false idea (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339 [41 L.Ed.2d 789, 805, 94 S.Ct. 2997]). A publication, [whether oral or in writing], must contain a false statement of *fact* to give rise to liability for defamation. (*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970 [18 Cal.Rptr.2d 83] (*Jensen*), quoting *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600 [131 Cal.Rptr. 641, 552 P.2d 425] (*Gregory*); see also *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309 [278 Cal.Rptr. 306].) Even if they are objectively unjustified or made in bad faith, publications which are statements of *opinion* rather than fact cannot form the basis for a libel action. (*Jensen, supra*, 14 Cal.App.4th at p. 971.) (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 578 [*Campanelli*]; see also *Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1051 [*Nygaard, Inc.*].)

Whether an alleged defamatory statement is a verifiable fact or opinion is a matter of law for the trial court. (*Campanelli, supra*, 44 Cal.App.4th at p. 578; *Baker v. Los Angeles*

Herald Examiner (1986) 42 Cal.3d 254, 260.) If, however, a reasonable person could construe the statement as fact or opinion, resolution of the matter should be left to the jury. (*Campanelli, supra*, 44 Cal.App.4th at p. 578.) Under a totality of the circumstances standard, the court must look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. [Citation.] (*Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].) (*Campanelli, supra*, 44 Cal.App.4th at p. 578.) Further, [i]n considering the totality of the circumstances, the court must factor into the equation the extent to which the public is legitimately concerned with the issue discussed, that is to say, whether the matter is one of public concern. (*Campanelli, supra*, at pp. 580-581.)

Truth is an absolute defense to any charge of defamation. (*Campanelli, supra*, 44 Cal.App.4th at p. 582.)

We agree with the trial court that respondent Wurms statements in the December 12 letter, which were repeated orally at the UBC meeting, were nonactionable true statements or opinions rather than actionable false statements. The December 12 letter and Wurms related oral statements reflected Wurms memory, based on her actual presence, of what occurred at the December 11 meeting. The letter also reflected her subjective opinions regarding the nature of Carters conduct, and her subjective feelings of concern that any further such conduct could endanger the well-being of Fairmounts students and staff members.

Carter devotes particular attention in her briefs to Wurms statements in the December 12 letter that Ms. Carter had a type of what can only be called breakdown [sic]; crying, shrieking, pounding her hands on the table all the while yelling that the other individuals in the room were evil and asking how can you sleep at night? based on the fact that they were so evil; and that [d]ue to the severity of the breakdown, the staff called 911 . . . in the event it continued to escalate and out of concern for the welfare of Ms. Carter. According to Carter, Wurm defamed her by present[ing] the statement that [Carter] had a breakdown as fact.

We conclude, however, that Wurms statements were not the type of verifiable false assertions sufficient to support a defamation claim. Rather, they were expressions of Wurms own judgment that Carters conduct was severe, unprofessional and possibly dangerous. (See *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 725-726 [statement that plaintiff was the worst teacher was not a factual

assertion capable of being proved true or false, but rather an expression of the speakers subjective judgment of anger or disgust].)

Moreover, Carter herself admits having an emotional outburst at the meeting, and that both Wurm and Principal Aguilera-Fort saw her stand up from the table and place her hand on her chest as if in physical distress. Carter further admits that Wurm thought Carter reached her mental breaking point on December 11, 2003. These admissions, as well as the undisputed fact that Wurm, at the suggestion of Principal Aguilera-Fort, called 911, is evidence that Wurm and others actually believed Carter was in need of medical or other professional assistance due to the severity of her outburst, regardless of whether such outburst amounted to an actual mental breakdown. (*Campanelli, supra*, 44 Cal.App.4th at p. 580 [When a parent states that he feels someone or something is making his son sick, the general public would not reasonably expect the parent to be making an observation which could be proven true or false in a medical sense.]; *Nygaard, Inc., supra*, 159 Cal.App.4th at p. 1050 [because a publication must contain a false statement of fact to give rise to a cause of action for defamation, statements of opinion, even if objectively unjustified or made in bad faith, cannot form the basis for a libel action].) As such, Wurms expressions regarding Carters condition at the meeting cannot be deemed false statements of verifiable fact.

In so concluding, we make note of the subject matter of Wurms allegedly defamatory statements: Carters fitness to teach in the public school system. This subject matter is undoubtedly one of public concern, given the importance of providing a safe and effective learning environment for our youth. As such, it provides further support for our conclusion that Wurms statements provide no basis for holding respondents liable for defamation. (*Campanelli, supra*, 44 Cal.App.4th at pp. 580-581 [[i]n considering the totality of the circumstances, the court must factor into the equation the extent to which the public is legitimately concerned with the issue discussed].)

B. Invasion of Privacy.

Carters invasion of privacy cause of action is premised on respondent Wurms alleged publication of private facts in the December 12 letter. To prevail on such claim, a plaintiff must prove (1) a public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to a reasonable person, and (4) which is not of legitimate public concern. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1440 [*Morrow*].)

In discussing the right of privacy as it relates to the public disclosure of private facts, Prosser states: Some limits of this branch of the right of privacy appear to be fairly well marked out. The disclosure of the private facts must be a public disclosure, and not a private one; there must be, in other words, publicity. (Prosser, Torts [4th ed.] 117, p. 810.) Except in cases of physical intrusion, the tort must be accompanied by publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few. [Citation.] *The gravamen of the tort is unwarranted publication of intimate details of plaintiff's private life.* [Citations.] The interest to be protected is individual freedom from the wrongful publicizing of private affairs and activities which are outside the realm of legitimate public concern. (See *Coverstone v. Davies* [(1952)] 38 Cal.2d [315,] 323; *Stryker v. Republic Pictures Corp.* (1951) 108 Cal.App.2d 191, 194 [238 P.2d 670].) (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 828 [emphasis added] [*Porten*]; see also *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 27.)

Here, respondents disclosures relating to Carters conduct at the December 11 meeting and her fitness to continue teaching were not communications of private facts to the public in general or to a large number of persons. Rather, they were communications of public facts relating to Carters professional capabilities to a relatively small group of persons certain Fairmount staff members and administrators in connection with the discharge of those persons professional duties to provide and ensure competent and effective teaching at Fairmount. As such, there was no unwarranted publication of intimate details of plaintiffs private life, the wrong to which the invasion of privacy tort is directed. (*Porten, supra*, 64 Cal.App.3d at p. 828.)

Moreover, as discussed above, Carters fitness to teach in the public school system is a matter of legitimate public concern. (*Everett v. California Teachers Assn.* (1962) 208 Cal.App.2d 291, 294 [In addition to the publics interest and concern in these matters, certificated public school employees and their associations have a legitimate interest in investigating and reporting on the conduct of an individual certificated employee.].) And, even if respondents disclosures regarding Carters fitness to teach could in some respect be deemed private, there has been no showing that those disclosures were intrusive in great proportion to their relevance. (*Morrow, supra*, 149 Cal.App.4th at p. 1440.) Rather, such disclosures were limited to a description of the events occurring at the December 11 meeting, and an explanation as to why those events caused concern among respondent Wurm and other Fairmount staff members regarding Carters ability to effectively instruct and care for the schools students. As such, respondents disclosures cannot support a cause of action for public disclosure of private facts.

DISPOSITION

The trial court properly granted summary judgment in favor of respondents. As such, the judgment is affirmed. Costs are awarded to respondent.

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Jenkins, J.

We concur:

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McGuinness, P. J.

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Siggins, J.

Carter's original complaint, filed October 21, 2005, named the City and County of San Francisco dba as the San Francisco Unified School District and Principal Karling Aguilera-Fort as defendants. On November 21, 2005, Carter filed an amended complaint naming as defendants the District, as an entity separate from the City and County of San Francisco, and Principal Aguilera-Fort. On March 14, 2006, the parties stipulated to the filing of a second amended complaint which named only the District, and not Principal Aguilera-Fort, as defendant. On October 19, 2006, after the District had filed a motion for summary judgment or, in the alternative, for summary adjudication, the tr