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Arbitrator

IN THE MATTER OF BINDING ARBITRATION

BETWEEN

JOSEPHINE DAVIS

Claimant,

and

ACCENTCARE HOME HEALTH OF
CALIFORNIA, INC. a California corporation;

ACCENTCARE HOME HEALTH, INC., a
Delaware corporation; and DOES 1-50

Respondents.

INTERIM AWARD OF ARBITRATOR

J.W. Case No.: A196416-24

Arbitration hearing Dates:
March 24, 25, 26, 27; May 12, 15; June 2 and
17, 2015

I, THE UNDERSIGNED ARBITRATOR, having been duly designated and sworn and
having duly heard the proofs and allegations of the parties, AWARD as follows:

I. INTRODUCTION

This action arises out of Claimant's termination from her six-year employment, and her
allegation that the termination was based on discrimination and harassment due to her race and
age, plus retaliation. She further asserts claims for failure to prevent discrimination and

1 harassment as well as CFRA (California Family Rights Act) Leave violations, interference and
2 retaliation, and wrongful termination in violation of public policy.

3 At the conclusion of the Arbitration hearing, a list was compiled with input from all
4 counsel, of all exhibits which had been admitted or not. The original ending date for the
5 Arbitration was March 27, 2015. The parties at that time required two (2) additional dates, thus
6 the hearings continued on May 12 and 15, 2015. Then the parties determined that one further
7 date was needed for Closing Arguments, which was set on Wednesday June 17, 2015. The
8 parties were informed at the close of the hearing on June 17 that the usual 30-day deadline for
9 the Award was not possible to meet, because of the Arbitrator's pre-existing scheduled
10 commitments for other matters and hearings, and the volume of material to review. The time
11 was extended at least through December 14, and is hereby submitted.

12 This proceeding is brought pursuant to a Comprehensive Agreement, Employment At-
13 Will and Mutual/Bilateral Arbitration, signed and dated June 20, 2007.

14 15 **II. WITNESSES**

16 Testimony was presented from fifteen (15) witnesses, including the following thirteen
17 (13) witnesses who were sworn and gave testimony in this action: Claimant **Ms. Josephine**
18 **Davis; Catherine Wyatt Tate; Araceli Sanchez; Edith Laguna; Raymond Griggs; Jeffrey**
19 **Franck; Lori Galvan; Charlene Hall; Tony Fields; Gabrielle Matthews; M'Liss Kane;**
20 **Cyndi Shute; Susan Bleecker, CPA;** Plus, two (2) witnesses whose testimony was presented
21 by video deposition: **Ericka Chavez and Gina Lebeouf.**

22 Claimant Josephine Davis is a 68-year-old African American woman. She was hired by
23 Sun Plus on July 24, 2006. Sun Plus was taken over by AccentCare soon after Claimant's hire
24 at which point Ms. Davis became an employee of AccentCare. Commencing September 12,

1 2007, Claimant Davis held the position of Administrator/Director of Patient Care Services
2 (DPCS) at the Lancaster branch office.

3 Lori Galvan worked for Respondent AccentCare from December 2006, when she was
4 hired as senior manager of human resources. Since 2011, Ms. Galvan held the position of
5 Director of Human Resources, her title at the time of Ms. Davis' investigations and termination.
6 She remained employed in this capacity with AccentCare until the end of March 2013 when she
7 was laid off. (RT III: 539-540)

8 Gina LeBeouf worked for AccentCare for approximately three (3) years until
9 approximately August 2013. At the time of Ms. Davis' investigations and termination, Ms.
10 LeBeouf held the position of Corporate Director of Human Resources. (LeBeouf Depo pp 13-
11 15; P.34:13-17)

12 Tony Fields has been employed with AccentCare approximately five (5) years, holding
13 the title of HR Director, HR Business Partner, which position he still held as of fall of 2012
14 when Ms. Davis's investigations were ongoing. (RT III: 651-652)

15 M'Liss Kane has worked at AccentCare for eight years. She has held the position as in-
16 house legal counsel and Vice President of Legal. Effective March 2015 she also assumed the
17 position of interim general counsel. (RT IV: 751-752)

18 Edith Laguna worked at AccentCare from August 26, 2006 to September 20, 2013,
19 when she was laid off due to reorganization. She was hired into the position of HR
20 Coordinator. In 2011 her title changed to HR Generalist with increased responsibilities. Her
21 direct supervisors included Lori Galvan, and then Tony Fields. (RT II:284-286)

22 Catherine Wyatt Tate worked for AccentCare May 21, 2008 to December 2012. She
23 was hired by Claimant Josephine Davis. She held multiple positions but ultimately and during
24 the time of Ms. Davis' investigations and termination, she was the HR Coordinator. (RT I:42-
25 44)

1 Raymond Griggs was hired in August, 2011 as the Director of Operations for
2 AccentCare's medical home care division of in California, and became Ms. Davis' direct
3 supervisor. He later became Regional Director of Operations. Mr. Griggs reported to Mr.
4 Franck.

5 Jeffrey Franck was Vice President of Operations for AccentCare for the personal care
6 side of AccentCare's Western Region. In the summer of 2011, he took over for Mr. Peterson as
7 Claimant's supervisor, and took over the medical home care division in California.

8 Araceli Sanchez started working for AccentCare as a receptionist in August 2010. In
9 2011 she was given the position of medical records coordinator, and assumed more duties in
10 approximately November 2012 as some employees left AccentCare. She left her employment
11 with AccentCare in April, 2013 due to stress of work. (RT I: 112-114)

12 Gabrielle "Gabby" Matthews worked for AccentCare from approximately October 2009
13 to December 2013, as a licensed vocational nurse (LVN) in the field, going to patients' homes.
14 (RT IV: 708-709).

15 Cyndi (Cynthia) Shute has been a Registered Nurse (RN) since 2001. She began
16 working for AccentCare in approximately 2011, performing home health visits working on the
17 personal care side, for approximately three months. She then changed positions to the home
18 health care side where she remained working as an RN but also held the title of Case Manager.
19 She spent the majority of her time in the field, visiting patients in their homes. She spent some
20 time in the Lancaster office. Josephine Davis was her direct supervisor. Ms. Shute was
21 terminated from AccentCare in February, 2013. (RT VI: 1129-1142; 1206)

22 Erika Chavez worked at AccentCare from July, 2010 to December 2012. Ms. Chavez
23 was hired as a receptionist answering phone calls and doing filing. Within two weeks, still in
24 July 2010, she was given the position of staffing coordinator with the additional duties of
25 scheduling for employees and patients and billing. In approximately September or October

1 2012 her title changed to field supervisor, which added responsibilities including going to
2 patients' homes, handling their paperwork for the registration process, and nurse recruitments.
3 Ms. Chavez left AccentCare because she no longer felt comfortable with the company due to all
4 the changes including getting new bosses, one of whom was Mr. Raymond Griggs. (Depo.
5 Excerpts, PP. 13-14)

6 Charlene Hall and Susan Bleecker, CPA are damages witnesses called by Claimant.
7

8 **III. BACKGROUND FACTS**

9 Claimant Josephine Davis began her nursing career in Massachusetts and came to
10 California in 1984. She received her nursing certificate and is a Registered Nurse (RN). Ms.
11 Davis is an African American woman, 68 years of age, and worked for the collective companies
12 Sun Plus Home Health and AccentCare from July 24, 2006 until her termination effective
13 November 30, 2012. While Claimant was a Case Manager at Sun Plus, it was purchased by
14 Respondent AccentCare Home Health of California, Inc., a subsidiary of AccentCare, Inc.
15 (hereafter referred to as AccentCare), which provides home healthcare services, including
16 medical home health care and personal care services. AccentCare is headquartered in Texas, and
17 has over 110 offices located in ten (10) states including California. AccentCare's medical
18 home care division in California had four (4) branch offices. Overseeing the clinical operations
19 of each office was a Director of Patient Care Services. Since 2007, Ms. Davis held the position
20 of Administrator, DPCS at AccentCare, under Edwin Peterson, Regional Administrator for
21 medical home care, as her supervisor. Ms. Davis oversaw office staff including Catherine Wyatt
22 Tate who was office manager and handled Human Resources (HR) and payroll; Erika Chavez,
23 staffing coordinator; and Araceli Sanchez who came in as receptionist and assumed billing
24 responsibilities when the clinical supervisor was laid off in late November 2011.
25

1 Claimant Davis' responsibilities in 2012 as Administrator/DPCS at the Lancaster
2 branch included patient safety, ensuring nurses' notes reflected everything done in the homes;
3 screening nurses' credentials; budget responsibility for the office; ensuring meeting all
4 California and Federal regulatory codes; hiring, firing and teaching of all staff. Ms. Davis
5 testified that she was responsible for the office's full compliance with the Department of Health
6 Service (DHS) regulations, plus all federal and state laws and regulations. (RT V: 933-947)

7 Ms. Davis testified she was a stickler for compliance. Ms. Davis' Registered Nursing
8 ("RN") license was used for the branch, and she was responsible for maintaining the branch in
9 compliance with regulations of the Department of Health Services ("DHS") and other agencies.
10 (RT V: 947) In 2012 the Lancaster office received a 95 per cent overall internal audit score,
11 which measures their meeting the standard of care and meeting a checklist of things every nurse
12 is expected to follow and check off. (Exhibit 45) She testified that the Lancaster office received
13 a 95 per cent overall score in February 2011 as well. (Ex. 54) Likewise there were "zero"
14 deficiencies issued, meaning their branch scored 100 per cent, during the recertification survey
15 which was completed August 25, 2011. (Ex. 140; RT V:955-956)

16 Claimant alleges that Mr. Peterson directed her to make the Lancaster branch office,
17 which she supervised and which operated under her RN license, "more professional", inasmuch
18 as the branch had compliance issues and was too "relaxed". Claimant Ms. Davis testified that
19 that when she was first hired, Mr. Ed Peterson and Susa Ariola, the then-HR Director, met with
20 her and said that there had been complaints about the condition of the office with fish tanks and
21 rats in a cage, looking more like a "living room" than a business office. The office was not
22 following AccentCare's business attire dress code, thus Claimant was directed to change the
23 environment and make the Lancaster office more professional, which she did. She also
24 improved efficiency by computerizing and generating more timely Medi-cal and Medicaid
25 reports. Ms. Davis testified that Mr. Peterson also raised some compliance issues with regard to

1 tardy transmittal of patient notes and time cards, and she improved compliance. (Davis
2 testimony RT V: 956-960)

3 Besides Ms. Davis, there were four (4) office staff in the Lancaster branch, including
4 Catherine Wyatt Tate (also known as Catherine Tate), the human resources coordinator, Erika
5 Sanchez, a field supervisor, Cyndi Shute, an RN case manager, and Araceli Sanchez, a medical
6 records clerk. Ms. Davis testified that Cyndi Shute had asked to transfer from home health to
7 home medical care because of issues she was having with the acting supervisor. (RT V:961-
8 962) There was another part-time RN in 2012, Ms. Bergen. There were also nurses who
9 served as field staff, and provided in-home services to customers of AccentCare. The field staff
10 primarily worked outside but would stop by the office to pick up paychecks and drop off
11 nursing notes.

12
13 A. **The Reorganization.** Mr. Peterson left AccentCare in summer of 2011. Mr.
14 Peterson was replaced by Jeffrey Franck, Vice President of Operations for the Western Region's
15 personal care side of AccentCare's business. He took over the medical home care division in
16 California, consisting of 35 to 40 branch offices including the Lancaster office where Ms. Davis
17 worked. In August, 2011, Raymond Griggs, Regional Director of Operations, was hired as the
18 director of operations for the medical home care division in California, at which time he became
19 Ms. Davis' direct supervisor, and Mr. Griggs reported to Mr. Franck. Mr. Griggs met with Ms.
20 Davis approximately three weeks after his start date. They went to lunch and reviewed the
21 office. He visited Lancaster approximately two to three more times. Mr. Griggs asked her what
22 she thought of and how she handled reorganizations. She responded that she had often been
23 involved in reorganizations, and been brought in to reorganize and provide new direction. She
24 thought initially they got along well at the time. (RT V: 966-967)

1 With the entry of Mr. Franck and Mr. Griggs, AccentCare began making plans to
2 reorganize the medical home care division. Organizational changes were proposed around the
3 same time. Per Mr. Franck, they were first discussed at the end of 2011, and began phasing in
4 the changes in early 2012. The reorganization affected the medical home care division
5 throughout California. (RT II:506) The Lancaster branch was the last one to undergo the
6 changes. (Franck testimony, RT II: 450)

7 Claimant Davis learned of the planned reorganization during a meeting via conference
8 call in December 2011 with Mr. Franck, Mr. Griggs and all of the other offices. (RT V: 967-
9 969) A document titled "Branch Structures & Roles 12/5/11" (Ex. 53) was presented to
10 everyone in advance of the meeting. During the December 2011 call, Mr. Franck stated that
11 everybody would have the opportunity to apply for a position, but until then, other than Human
12 Resources, they had no current job under the reorganization. Previously, everyone reported to
13 the administrator/DPCS, which was Claimant's position. Under the new structure, the office
14 staff and the DPCS would report to the general manager, a newly created position. Claimant
15 believed that it did not make sense for the DPCS who was a clinical person, to "not be on a par"
16 with the general manager, in part because the new general manager position was not required to
17 have any clinical background. (RT V:970)

18 Following the meeting, staff members were upset about losing the clinical supervisor
19 and the uncertainty of their own jobs in that they would have to reapply for positions, even their
20 own. (RT V: 969-972) During the conference call, Ms. Davis raised concerns about the general
21 manager position, (Ex. 152) and field supervisor position (Ex. 157), asking how the GM
22 position could oversee clinical compliance, and how the field supervisor position could train
23 and supervise skilled nursing staff, without any clinical background? During the December
24 call, Ms. Davis expressed her concern that these changes impacted patient's safety. (RT V:974-
25 977; Exs. 52, 53, 152, 157)

1 Ms. Davis first met Mr. Franck after the reorganization was announced in approximately
2 early September, 2012, shortly before her vacation, which commenced September 24. (RT V:
3 963) Mr. Franck estimated that they met in early October. (RT II:455) As discussed below,
4 based on the evidence and timetable, September seems the more plausible timing for this
5 meeting. Before their in-person meeting, Ms. Davis and Mr. Franck communicated via email
6 and telephone. Ms. Davis testified that she was told that the purpose of the September 2012
7 meeting with Mr. Franck was to "hear our concerns about the job descriptions." All of the
8 office staff participated in the meeting along with Mr. Franck and Ms. Galvan. Mr. Franck
9 testified that the purpose of his first visit to the Lancaster office was as a general branch visit
10 since he had not been out there, and "there had been some ongoing concerns elevated". He
11 went there with Lori Galvan and Raymond Griggs, and thought it was appropriate to meet the
12 staff and "see the temperature of the office". (RT II: 455)

13 Claimant said that after the September meeting, she continued to express her concerns
14 about the changes and their effects on patient safety, among other things. She did not feel that
15 Mr. Franck or Ms. Galvan listened to everything that was said by the staff in the meeting. It
16 took at least six (6) months to get the job descriptions; when they arrived, she believed that they
17 were noncompliant and put their patients at risk. Erika Chavez decided to take the field
18 supervisor position, but she lacked clinical experience. While they were awaiting a resolution
19 to their concerns about the lack of clinical experience for the two positions, Claimant told Ms.
20 Chavez to begin admitting at least nonclinical patients.

21 Claimant sent an email the morning of November 8, 2012 to Ray Griggs, Lori Galvan,
22 Tony Fields, and Jeff Franck, with a copy to Steve Rodgers, the new COO of AccentCare.
23 Claimant's email states that the field supervisor job description "is totally unacceptable and
24 meets none of the recommendations discussed. Clinical should and cannot be reporting to an
25 (sic) non-clinical supervisor with no qualifications for anything but computer skills. This is

1 very disappointing after what was supposed to be a “meeting” to discuss what was (sic) the
2 concerns of the staff.” She included Mr. Rodgers in the email because upon his arrival he sent
3 an email inviting anyone with concerns to email him. (RT V: 1457) Ms. Davis’ email further
4 states, “Clinical should and cannot be reporting to an non-clinical (sic) supervisor...”

5 Mr. Franck responded that they appreciated and they “took into consideration” her
6 feedback and that from the other sites. He then wrote, “However, we are clearly still not on the
7 same page with regards to the operational oversight versus the clinical oversight, so we will
8 circle back with you once we discuss with Sara and ensure we are on the same page. It is
9 important that we have your buy-in and understanding so that this is not a distraction...” He
10 added, “We will keep working with you to get there.” (RT V:980-984; Ex. 18) Later, Claimant
11 Ms. Davis expressed appreciation for his response and desire to resolve the issue. She added,
12 “My concerns are the patient and my staff. I don’t mean to be difficult...I am not the only
13 DPCS in MHC that does not agree...I am just not afraid to make waves.” (Ex. 18)

14 Ms. Davis testified that she took Mr. Franck’s response to mean that he disagreed with
15 the office’s feedback and was “going to do it his way anyway.” (RT V:985) Under cross-
16 examination, Ms. Davis testified that it was not clear to her that a distinction was being made in
17 the statement by Mr. Franck about “operational oversight vs the clinical oversight”, because it
18 was not discussed in the meeting. She further testified that even reading Mr. Franck’s email,
19 she did not understand that a distinction was being made between operational and clinical
20 oversight. (RT VII: 1458-1460). Claimant acknowledged that Ms. Catherine Tate and Erika
21 Chavez’ positions did not include providing clinical advice, and their responsibilities were
22 administrative.

23 Mr. Franck testified that the employees were not reapplying for their positions, but the
24 employees were asked for the preference on “which of the newly stated, a little bit different
25 defined roles” they were interested in. (RT II:450-451)

1 Also in November, 2012, Claimant Ms. Davis reached out via email to Sara Castillo,
2 Chief Clinical Operations Officer and VP of Nursing, in Dallas, Texas. Ms. Castillo responded
3 on November 9, 2012 stating she had not seen the job description before, and asked for a couple
4 days to review and discuss with Human Resources and Mr. Franck. (Ex. 60)

5 Ms. Davis in her testimony acknowledged that the reorganization affected each of the
6 offices in a similar manner. (RT V: 1450)

7
8 **B. Claimant's Complaints:**

9 Ms. Davis asserts that after voicing her complaints about the company changes,
10 beginning in late 2011 and continuing through the first part of 2012, Mr. Griggs treated her
11 differently, would be "rude and very irritated", yelled at her, told her during meetings in the
12 presence of her peers, to "be quiet", chastising her and treating her in a demeaning manner,
13 "talking down...as if I needed to be reminded what my place was". He also referred to her as a
14 "Know-it-all", often enough that other administrators referred to her by that name. She said Mr.
15 Griggs called her that name 'Jokingly, supposedly' but she "didn't take it as a joke." She
16 stopped receiving some reports and her name was removed from the official Lancaster staffing
17 list, among other slights. (Davis testimony, RT V: 966; 981, 995-998 and above-referenced
18 exhibits)

19 Ms. Davis also received a performance evaluation with a low rating in some areas, and
20 rated down in others in June 2012. Under "financial", it stated she was "negative 240 per cent
21 to budget CC", which she said was not a fair assessment because she had not been shown
22 anything demonstrating the figures on the budgets sent to her. They stopped consistently
23 sending her the budgets. In the past, if there was a variance between her budgeted and actual
24 numbers, it would be provided to her and her counter-parts via the "HUR", Mr. Peterson's
25 internal spreadsheet, so that issues could be addressed. Since 2011 when Mr. Franck took over,

1 he never sent such information to her. When Mr. Griggs took over, she and others discussed
2 with him the financial reports that were to be given to them, to enable the branches to know the
3 financial picture, and identify any necessary improvement. Mr. Griggs sent two HUR reports,
4 and then developed his own format which was incomplete. They had to collect data from
5 outside information including MYSIS, but still lacked important parts of the budget including
6 what they were spending monthly. Then the meetings, and the reports on finances and the
7 budget stopped altogether. She did not receive further reports until late summer, possibly
8 August, 2012. Ms. Davis testified that upon their receipt, she looked everywhere to find the
9 sources for the negative number from her evaluation. Unable to find it, she called Mr. Griggs,
10 but he did not respond. (RT V: 999-10015)

11 Under cross-examination, Ms. Davis testified that she had spoken with other DPCS's in
12 California regarding their reviews for that year, but did not know what any of their reviews
13 were. Her deposition testimony was read from P.70, in which she acknowledged that Mr. Ray
14 Griggs told them that "all of us were only going to get a 1.6", meaning not just Lancaster, but
15 also Covina, San Diego and Pleasant Hill. As to that line review rating, she acknowledged she
16 did not feel she was being treated differently than the other administrator/DCPSs. (RT
17 VII:1463-1465)

18 Respondent acknowledges Claimant made occasional complaints, but asserts that they
19 focused on issues related to the reorganization, such as the new job descriptions, employee
20 evaluation forms and procedures, and being omitted from a distribution list on which she
21 previously was included. Respondent disputes that Claimant complained about protected
22 conduct.

23 Regarding the distribution list, Mr. Franck testified that they were changing from the old
24 structure to the new structure, and by adding a general manager role which was vacant in
25 Lancaster, Ms Davis temporarily dropped off the distribution of that report. Mr. Franck had

1 replied to an email sent by Claimant Davis wherein she asked why she was no longer receiving
2 the report. (Ex. 25, August 21, 2012 email) His response stated, "There isn't a column for
3 DPCS/Administrator...which is why you aren't listed. The same is true for the other MHC
4 office's....only those with a GM are listed." He testified further that they were essentially
5 trying to make all the business models fit into the one list, so the titles were "a bit off." It was a
6 branch listing where another employee, Stephanie, was trying to fit all the different business
7 models under the one list by title. It took them a couple of tries but it was corrected to include
8 Ms. Davis. (Ex. 25; RT II:507-509)

9 Mr. Franck also chastised Ms. Davis for copying Ms. Castillo and Ms. Kane on her
10 email. He said his only response was via email (Exhibit 25) where he responded to Ms. Davis's
11 email questioning her removal from the listing. He wrote, "This isn't a list that sara or m'liss
12 (sic) have any say on ? It is simply a branch listing that they are trying to utilize, and they only
13 have so many columns and so much flexibility to make all the business models fit through the
14 company. It isn't a reflection on you, or your role, or your importance, it is simply a branch
15 listing. Stephanie is doing the best she can to reflect it appropriately across the board."

16 Respondent AccentCare asserts that Claimant's complaints focused on her being upset
17 with the addition of a General Manager position, as it removed her sole control over day-to-day
18 operations of the office. Also, it could highlight her management shortcomings with regard to
19 growing the business and meeting the budget.

20 On August 27, 2012, Claimant Davis made an internal complaint to Human Resources
21 ("HR"). Ms. Davis testified that she did not trust the local Human Resources person, Lori
22 Galvan, based on feedback from two other administrator/DCPs, so she contacted Gina LeBeouf,
23 Corporate Director, Human Resources department in Dallas Texas. (Ex. 19; Ex. 96) Claimant
24 said that she emailed and called Ms. LeBeouf several times over approximately a two-week
25 period. Ms LeBeouf testified that she and Ms. Davis traded some calls back and forth. They

1 finally spoke on September 4, 2012. Gina LeBeouf prepared a written memorandum of their
2 telephone conversation that date. (Ex. 96; Davis Testimony, RT V: 1060-1061; LeBeouf
3 Depo.)

4 Before they connected, on August 29, 2012 Claimant Davis filed a complaint with the
5 EEOC alleging "Retaliation for questioning decisions" by her manager Mr. Griggs and that he
6 had limited her contacts with the legal department about "patient care". (Ex. 171, Intake
7 Questionnaire). A Notice of Charge of Discrimination dated September 10, 2012, citing Title
8 VII of the Civil Rights Act, was sent to Ms. Gia LeBouf, (sic) Human Resources at AccentCare,
9 in Dallas, Texas. (Ex. 97).

10 Claimant's intention in contacting Ms. LeBeouf was to get a "sit-down" with Jeff
11 (Franck) and Ray (Griggs), or some way to clear the air, because it was very tense between the
12 three of us and it was affecting me and my staff." (Davis Testimony, RT V: 1062) In their
13 conversation on September 4, 2012, Claimant Davis said that she told Ms. LeBeouf that she felt
14 like she was being harassed and retaliated against by being criticized for anything she did. Her
15 staff members were afraid since it took almost six months to get job descriptions. Ms. Davis
16 said that she also told Ms. LeBeouf about her concerns regarding what she felt were reorganized
17 clinical parts of compliance. She also raised what she felt was an unfair evaluation from Mr.
18 Griggs which they had never discussed. Ms. LeBeouf said that she would get back to Ms. Davis
19 with the name of an HR Representative who would meet with Claimant. (RT IV: 1061-1064)

20 Ms. LeBeouf's September 4, 2012 memorandum also documents receiving an earlier
21 email from Ms. Davis on August 27, 2012 "requesting a conference call" with regards to her
22 "concerns of 'retaliation' and 'harassment'...directed at me from my Supervisors." (The
23 August 27, 2012 email did not appear during the arbitration hearing.) Ms. LeBeouf's memo
24 recaps the conversation with Ms. Davis and her complaints, including difficulties for her and
25 her staff with the reorganizations, that certain reports were no longer being sent to her without

1 explanation by her manager, being "chastised" by Mr. Franck for sending an email about those
2 reports to Mr. Franck, copying Sara Castillo and M'Liss Kane, and that Ray Griggs yelled at her
3 for "informing Sara". The LeBeouf memo further cites Ms. Davis' complaint that employees in
4 Covina said they were instructed not to contact Ms. Davis without management's approval. Ms.
5 Davis felt she had no management support, citing not having met Mr. Franck after reporting to
6 him for over a year. She complained about receiving a lowered performance rating of 1.6
7 without explanation, despite her office being the only one with no deficiencies or overtime and
8 on budget.

9 Finally, Ms. Davis said, "as a minority female who has worked hard to get where I am, I
10 am not going to put up with it anymore." Ms. LeBeouf told Ms. Davis that they would look into
11 these concerns. (Ex. 96) Claimant said the reason she wrote that was because she felt she was
12 being treated differently and "had enough of that my whole life...having to fight tooth and nail
13 to get where I got." (RT IV: 1065)

14 Ms. LeBeouf testified that she had no independent recollection of the conversation with
15 Ms. Davis other than what was documented in her September 4 memo. She had no reason to
16 dispute the accuracy of her memo. She could not recall what she did with the memo, although
17 her normal practice would have been to contact Heidi Steele, Lori Galvan, or Tony Fields to
18 discuss and conduct an investigation if warranted. (LeBeouf deposition testimony, pp.31-37;
19 41-42).

20 Mr. Tony Fields, HR Director, testified that he received the September 4 memo from
21 Ms. LeBeouf within a few days afterward. (Fields testimony, RT III: 654-655) Mr. Fields asked
22 Gina LeBeouf why Claimant Ms. Davis had not gone to her local HR person Lori Galvan, and
23 Ms. LeBeouf responded that Ms. Davis was not comfortable with Ms. Galvan.

24 Upon his receipt of LeBouf's September 4 memo, Mr. Fields spoke with Lori Galvan
25 and Jeff Franck and informed them of his receipt of the memo containing Ms. Davis'

1 complaints. Ms. Galvan and Mr. Franck said that there was another investigation going on
2 against Ms. Davis. Lori Galvan and Jeff Franck assigned investigation of Ms. Davis'
3 complaints to Mr. Fields, "to make sure that Josephine had an impartial person listening to what
4 her concerns were." (RT III: 656-657)

5 Mr. Fields sent an email on September 13, 2012 to Ms. Davis asking her to "summarize
6 her concerns". In his email he listed four questions to Ms. Davis that he felt would be
7 "beneficial" if she could answer "in writing before we meet". He said this would benefit Ms.
8 Davis by giving her "ample time to recall and document all of the pertinent details", and would
9 give him "the opportunity to better understand your issues and concerns before we meet". (Ex.
10 19; Fields testimony, RT III:656-657)

11 Claimant acknowledged receipt of Mr. Fields' email (Ex. 19). However, she did not
12 respond to the questions, saying she was uncomfortable putting her personal information in an
13 email to which the company had access, and felt that it would be better discussed in person.
14 She assumed he was already aware of what she had told Ms. LeBeouf and Ms. LeBeouf's
15 responses. Claimant was busy with work, getting ready to go on vacation, and was concerned
16 about emailing private information that could be exposed on AccentCare's server to others. She
17 was aware of IT having access to employees' emails, and that emails from former employees
18 had been transferred to her, as well as to Ms. Tate. (Davis Testimony, RT V: 1069-1070; RT
19 VII: 1524-1526; 1543-1544) Ms. Davis said she contacted M'Liss Kane, AccentCare's in-
20 house legal counsel about Mr. Fields' request for a written statement and her concerns, and Ms.
21 Kane "felt it was okay for him to wait until we had the meeting." (RT V: 1070) Ms. Kane
22 testified that she did not believe she had seen Exhibit 19 before (the September 13, 2012 email
23 chain), and that she did not recall discussing Mr. Fields' request with Ms. Davis. (Kane
24 testimony, RT VII:1552)

1 Mr. Fields spoke with Ms. Davis on approximately October 13 or 14, 2012, a few days
2 after she had returned from her vacation. He did not recall if they met in person or by
3 telephone, but he thinks he walked next door to her. (Fields testimony, RT III:657) Claimant
4 Ms. Davis said they met in person in her office in Lancaster, (Davis testimony, RT V:1077).
5 Claimant testified that they met for approximately two, or two-and-a-half hours. They
6 discussed her treatment by Mr. Griggs and Mr. Franck, that she felt uncomfortable and their
7 expectations of her seemed different than they were for other DPCs and administrators, such
8 that she felt that she was treated differently than her peers. She felt "chopped at the knees"
9 when making suggestions or seeking to change things in order to "do my job". She testified that
10 she talked about more than the reorganization, including its impact on their ability to be
11 effective caretakers, "and that patient safety and my license was on the line with some of the
12 decisions" being made by Mr. Franck and Mr. Griggs plus some other things. (Davis, RT
13 V:1081-1083) She testified that Mr. Fields was taking notes during the entirety of their
14 meeting. He did not ask her for any witnesses. He did not say much, other than that he would
15 pass on the information to the people who needed it. He indicated he was collecting her
16 information because she did not want to have Ms. Galvan there. (Davis, RT V:1059-1060).

17 Mr. Fields testified that he took notes of their conversation, and that he turned them over
18 to Lori Galvan either the same or next day after meeting with Ms. Davis. When asked why he
19 turned his notes over to Ms. Galvan, Mr. Fields responded that "it was apparent...all of our
20 conversations centered around the reorganization...her dissatisfaction with it and her feeling
21 that she wasn't being heard appropriately, and she wasn't happy with the things that were going
22 on." (Fields testimony, RT III: 662-663) He further said that he explained this to Ms. Galvan
23 and said "someone needs to talk to Josephine and fully explain why the reorganization is
24 happening and what her role is." He gave his recommendation to Ms. Galvan that "no one
25 needed to follow up any further". (RT III: 663) Mr. Fields acknowledged reading in Ms.

1 LeBeouf's September 4 email (Ex. 96) that Ms. Davis had spoken with Gina LeBeouf about
2 harassment, retaliation and discrimination." Mr. Fields did not speak with Ms. LeBeouf about
3 any of those claims. He said that Ms. Davis handed him some documentation in the form of
4 emails, which he likewise turned over to Ms. Galvan in Human Resources along with his notes
5 of meeting with Ms. Davis. Mr. Fields last saw his notes and the emails from Ms. Davis when
6 he gave them to Lori Galvan. (RT III: 667) Those notes and emails have never materialized, and
7 no one from AccentCare knows what happened to them. (RT III:662-664) Claimant said that
8 she never heard again from Mr. Fields, or anyone about her complaints to HR. (RT V:1083)

9 Mr. Fields testified that he took no further action and did no further investigation. His
10 reason was he felt it was "apparent" that "all of our conversations centered around the
11 reorganization...her dissatisfaction with it and her feeling that she wasn't being heard
12 appropriately, and she wasn't happy with the things that were going on." (RT III: 662) He
13 concluded that Ms. Davis was "very unhappy with what was going on with the reorganization
14 and how it was happening". (RT 668) However he did not prepare any official conclusion. (RT
15 669) He testified that he explained "all that" to Lori Galvan and told her "somebody needs to
16 talk to Josephine and fully explain why the reorganization is happening and what her role is."
17 He also gave his recommendation to Lori Galvan that no further follow up was needed other
18 than that someone "needed to sit down with Josephine and make sure she fully understood the
19 reasons behind the reorganization, where her spot is on it and if she's got some ideas and
20 questions they need to be answered."

21 Mr. Fields was aware that Gina LeBeouf's September 4 email (Ex. 96) documented
22 communication with Ms. Davis about "harassment, retaliation, discrimination". He did not
23 speak about those terms with Ms. LeBeouf. (RT III:663) He did not ask Ms. Davis any
24 questions about retaliation, harassment or discrimination. After repeated questioning at the
25 hearing, Mr. Fields finally admitted that it would be important to ask more probing questions of

1 Ms. Davis if he “felt that (retaliation, harassment or discrimination) was the nature of her
2 complaint.” (RT III: 664) He was aware that Ms. Davis raised those issues as reflected in Ms.
3 LeBeouf’s email. He does not recall if he knew then that Ms. Davis had filed an EEOC
4 complaint. He did learn of Ms. Davis’ EEOC complaint at least before she was terminated. (RT
5 III: 664-667) Mr. Fields told Lori Galvan and Mr. Franck that he would not be doing anything
6 further, “I didn’t think there was anything more that I could do.” (RT III:667) He initially said
7 he did not tell Mr. Griggs, because Ms. Galvan said she would brief him. After his deposition
8 testimony was read, he acknowledged speaking with Mr. Griggs around the same time he spoke
9 with Mr. Franck, within a few days after meeting with Ms. Davis (RT 669-671) Mr. Griggs said
10 he would meet with Ms. Davis and “clear the air with her”. (RT 672) Mr. Fields is not aware if
11 Mr. Griggs did that. Mr. Fields’ deposition was further read wherein he stated that it was a
12 consideration that he might have a conversation between himself, Mr. Griggs and Ms. Davis, in
13 fact it was something he had planned to do, but soon afterward, “that’s when Josephine’s
14 employment, I believe, was being decided....I never had a chance to really organize that type of
15 meeting.” (RT 676).

16 Claimant’s counsel asked Mr. Fields if he had any concerns about conveying
17 information from Ms. Davis to Ms. Galvan, with his knowledge that Ms. Galvan was
18 conducting a separate investigation into Ms. Davis. He responded that the fact of the other
19 investigation into Ms. Davis did not sway his opinion, nor give him any concerns. (RT 674)

20 Mr. Jeffrey Franck testified that he received a copy of Exhibit 96, Gina LeBeouf’s
21 September 4, 2012 memo referencing Claimant’s internal complaint to the Texas Human
22 Resources, around or shortly after September 4, “maybe that day, maybe within a few days.”
23 (RT II: 493) Mr. Franck said that they did not open a formal investigation of Claimant’s
24 complaints. He said he understood that Exhibit 96 represented an internal complaint of
25

1 retaliation and harassment, and they “looked into” it, and “reviewed each of the issues.” He had
2 no details as to what was looked into or reviewed. (RT II:493-494)

3 Lori Galvan does not recall much of anything regarding the investigation itself, and does
4 not recall at all whether she had any conversation with Ms. LeBeouf or Mr. Fields, or with
5 anyone about a complaint made by Claimant Davis internally to Ms. LeBeouf or to the EEOC.
6 She does not recall if she spoke with anyone about a complaint made by Claimant Davis to Ms.
7 Lebeouf or the EEOC. Her office was next door to Mr. Fields’ office, but she does not
8 remember if he walked over to her to about Ms. Davis’ complaint. She did not recall what the
9 practice was with regard to handling of EEOC complaints, at which time her deposition
10 testimony was read, stating that there was a company practice whereby any EEOC complaint
11 filings from an employee in her region, would get routed to their general counsel, here Ms.
12 M’Liss Kane, who would then inform Ms. Galvan in HR. (RT III: 608-611) The company
13 practice in 2012 was that with any EEOC charge of discrimination, Ms. Galvan would work
14 with Ms. Kane. Ms. Kane as general counsel would make the decision whether or not to
15 conduct an investigation. (RT III: 611-612)

16 M’Liss Kane testified that she did not have any conversation with Mr. Fields, stating
17 further “As a matter of fact, I was unaware of it until yesterday.” (RT IV:776). Thus, until the
18 arbitration hearing, Ms. Kane was unaware that Mr. Fields met with Ms. Davis about her EEOC
19 complaint that was submitted to Gina LeBeouf, handed to Mr. Fields and finally passed on to
20 Lori Galvan.

21 The only “investigation” that was done by AccentCare into the complaint that Claimant
22 made to Ms. Gina LeBeouf, in Human Resources, was a phone call between Gina LeBeouf
23 leading to her preparation of Exhibit 96 on September 4, 2012, and a meeting between Tony
24 Fields and Ms. Davis that occurred approximately October 12 or 13, 2012. All notes, emails
25 and other documentation prepared by members of Human Resources, (except Exhibit 96) and

1 documents submitted by Ms. Davis for consideration in investigating her allegations, vanished
2 and have never been seen since October 13, 2012. Everyone admitted that nothing further was
3 ever done by anyone at AccentCare to look into or investigate Ms. Davis' complaints of
4 harassment or retaliation.

5 No investigation was conducted into the formal Complaint that Claimant filed with the
6 EEOC in August, and dated September 10, 2012. The EEOC in its September 10, 2012 Notice
7 of Charge to Respondent's Human Resources Department, indicated that they did not need any
8 formal response. Respondent likewise did not conduct its own internal investigation.

9
10 **C. Employee Complaints against Claimant:**

11 On September 12, 2012, an investigation commenced into allegations against Ms. Davis.
12 Ms. Lori Galvan in Human Resources said that it was initiated by a call from Catherine Wyatt
13 Tate. Ms. Tate denies this and said that she was contacted by Ms. Galvan seeking her help to set
14 up a meeting with the employees. (RT I:52-53). Ms. Galvan did however receive a complaint
15 call from Cyndi Shute about Claimant Davis on September 12, 2012 which Ms. Galvan
16 documented in her handwritten notes. (Ex.74) She interviewed Ms. Shute and contacted
17 Catherine Wyatt Tate to alert her and discussed speaking with all of the employees under Ms.
18 Davis. The next morning, September 13, 2012, Ms. Galvan initiated an investigation by sending
19 an email to the employees. The email was directed to Catherine Wyatt, Erika Chavez, Araceli
20 Sanchez and Cyndi Shute, seeking their "feedback regarding the work environment in Lancaster
21 HC office" and offering to meet and talk with them individually. (Ex. 73) Between September
22 12 and November 19, 2012, Ms. Galvan along with Edith Lagunas conducted the investigation
23 into the allegations brought forward from employees against Ms. Davis. Interviews were
24 memorialized in writing (Ms. Galvan's) and typed (Ms. Laguna's) (Exhibits 73-85). Ms. Galvan
25 met with all of the employees at Lancaster on September 27, 2012, while Ms. Davis was away

1 on her vacation. Until mid- November, 2012, Ms. Davis was not contacted nor interviewed.
2 However during that time period, Respondents solicited additional documentation from the
3 employees, which they provided. (Exhibits 86, and others). Ms. Davis was then called into a
4 meeting on November 19, 2012 at which time she was suspended. She was terminated effective
5 November 30.

6 Although some of Respondent's documents indicate and Lori Galvan testified that Ms.
7 Wyatt Tate initiated the complaint, the evidence leads to R.N. Cyndi Shute as the initial
8 complainant about Ms. Davis. The very first date documented in the investigation is September
9 12, 2012. The first documented communication is from Ms. Shute who, by Ms. Galvan's notes
10 and both of their testimony, called Ms. Galvan in Human Resources on September 12, 2012.
11 Ms. Galvan spoke with Ms. Shute and took notes of the conversation. Ms. Shute told her that
12 she had an "incredibly hard time with Josephine Davis", and that "All LVNs are complaining
13 about Jo" and they "feel very threatened". She also stated "Treats u like a child "STOP STOP";
14 hung up on an LVN, saying "dumbass"; "uses profanity"; is "inconsistent w/rules", "very toxic
15 atmosphere". Ms. Shute told Ms. Galvan that she "has been written up 3x in last year- never
16 written up before"; also that Ms. Davis said "I'm female over 65 & Black and I will get
17 anything I want" in an open forum; and shared personal information with other employees. (Ex.
18 74)

19 Ms. Galvan wrote other notes dated 9/13/12 titled "Pat Talbot-Lancaster" referencing
20 claims Ms. Davis "talked down" to her "in front of other employees"; didn't like the way she
21 charted; and she does not like going to the office because she (Ms. Davis) "presents herself very
22 harsh", "no kindness, no verbal praise or recognition"; "Just want Jo to be nice." (Ex. 75) as
23 well as Exhibits 76, 77, 78, 79, 80, 81 (Galvan handwritten notes). Other documents pertaining
24 to the investigation are identified and discussed later.

1 Edith Laguna's role in the investigation was to "sit in on the interviews as much as
2 possible and take notes, and then just generate a summary based off of Lori's notes and my
3 notes, if there were any." (RT II:290) She learned toward the end of her involvement that she
4 would be expected to write a memorandum with conclusions in it." (RT II:292) Ms. Laguna
5 was only in the Lancaster AccentCare office one time, for the interviews with witnesses. (RT
6 II:301) During the September 27, 2012 meeting, Ms. Laguna took "a few" notes, but because
7 she was sick, she mainly listened and Ms. Galvan "took a lot more of the notes." Ms. Laguna
8 does not know what happened to those notes from the investigation. The steps she "would have
9 taken care to put them in the personnel file, or the file that is an investigation file", but she does
10 not remember doing that. She last saw the notes the week that she wrote them. (RT II:291)
11 Ms. Laguna did however type up a summary of Lori Galvan's notes.

12 13 **D. EEOC Charges**

14 Claimant filed her first charge of retaliation with the EEOC on August 29, 2012 (Intake
15 Questionnaire Ex. 171). Her charge of discrimination was deemed filed September 10, 2012
16 (Notice of Charge of Discrimination, Ex. 97) This Notice is addressed to Ms. LeBeouf (typed
17 as "Gia LeBouf"), in Human Resources for AccentCare Home Health of CA, Inc., at a Texas
18 address. The Notice identifies Josephine F. Davis as the person who filed the Claim. It states
19 "This is a notice that a charge of employment discrimination has been filed against your
20 organization under...Title VII of the Civil Rights Act (Title VII)." It further indicates that no
21 action is required by you at this time." The box "Retaliation" is checked below, having occurred
22 on August 21, 2012 at the Lancaster, California location.

23 The EEOC Intake Questionnaire asks on the second page for the "reason (basis) for your
24 claim of employment discrimination". It explained that if race or another characteristic was the
25 basis, to check the respective box. Claimant Ms. Davis skipped the boxes for race, sex, age,

1 disability, national origin and religion, pregnancy, color, and other characteristics. She checked
2 only one (1) box: Retaliation. Under the form's explanation for when to check retaliation, it
3 states, "If you complained about discrimination, participated in someone else's complaint, or
4 filed a charge of discrimination, and a negative action was threatened or taken you should check
5 the box next to Retaliation." Claimant's explanation of what happened is that Mr. Griggs and
6 Mr. Franck informed her on August 21, 2012 that she did not have to notify the company
7 attorney of possible legal action or information about patient care. (She wrote "or info sue (sic)
8 to patient care"), and on August 23, 2012 that Mr. Griggs called and told her she "must clear all
9 my emails...through him prior to sending patient related info to our Legal Dept." The basis
10 for believing these actions were discriminatory was because "As the Administrator/Director of
11 Patient Care Services and an RN for my Branch, I am legally bound by Ca law to advocate for
12 the patients and inform Risk Mgt and the Legal Dept. of pending or imminent concerns
13 affecting my license of the license of the Company." She further stated that Mr. Griggs told her
14 the reason for the acts was that she "needed to clear my clinical decisions with him 1st and
15 display a "united" front before sharing important information. This has always been a
16 responsibility of my position and professional license to make "clinical" decisions concerning
17 patient care and keep management informed of decisions that may affect the company's overall
18 license."

19 Ms. Davis did identify one person, Susan Lapisto, R.N. who she felt was treated "worse"
20 than herself, having been "stripped of her Administrator title", after being told by Mr. Griggs
21 over the past 7 months, "not to share important information with upper management." Claimant
22 Davis also stated in response to question 16 that she had previously sought help from and
23 informed the "Chief Nursing Officer of AccentCare, Human Resources management of
24 AccentCare and the Ca attorney for AccentCare." Ms. Davis checked Box 2 below, stating "I
25

1 want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination
2 I described above.” (Ex. 171)

3 Claimant Ms. Davis filed her second Charge of Discrimination with the California
4 Department of Fair Employment & Housing (DFEH), presented to the EEOC, on October 11,
5 2012, alleging she had been “retaliated against for reporting that my manager failed to follow
6 appropriate Department of Health laws and regulations in regards to patient care.” (Ex. 63)
7 The complaint was referred to the DFEH by letter October 11, 2012, addressed to Ms. Gia (sic)
8 Lebouf, Human Resources, AccentCare Dallas, Texas. (Ex. 65).

9 Ms. Davis was suspended on November 19, 2012, and involuntarily terminated from her
10 employment on November 30, 2012 (Ex. 72). She filed later EEOC charges. The U.S. EEOC
11 issued notice of Claimant’s Charge of Discrimination under Title VII on November 29, 2012
12 (Ex. 64). Claimant’s second Charge of Discrimination was filed November 23, 2012 after she
13 was placed on suspension November 18, 2012. She alleged discrimination based on race and
14 age, citing the fact she is the only African American female and the only one over 65 years of
15 age. (Ex. 66). The DFEH issued a Right to Sue notice addressed to Ms. Lebouf on January 13,
16 2013. (Ex. 67). A Charge of Discrimination was filed with the EEOC on January 30, 2013 for
17 race and age discrimination. (Ex. 69). The EEOC issued a notice to Gia LeBouf (sic) at
18 AccentCare dated March 28, 2013. (Ex. 70) A Notice of Case Closure and Right to Sue was
19 issued by the DFEH on October 9, 2013. (Ex. (68). Respondent AccentCare submitted an
20 undated Response to Notice of Charge of Discrimination (Ex. 71)

21
22 **E. Claimant’s Suspension and Termination:**

23 Claimant was on a vacation from September 24 to October 7, and on medical leave of
24 absence from October 15, 2012 to October 24, 2012.
25

1 Ex. 102 is a memorandum dated November 14, 2012, prepared and sent by Edith
2 Laguna to M'Liss Kane, VP Legal Counsel regarding Josephine Davis. Ms. Laguna testified
3 that she was instructed by Lori Galvan to prepare it and given bullet points for its contents. (Ex.
4 115)

5 Sometime shortly before the suspension meeting, Ms. Davis was called into a meeting
6 with Mr. Griggs, Mr. Franck and Ms. Galvan. Mr. Franck testified that they all met with Ms.
7 Davis in advance of the November 19 suspension. He thought it happened from a few days to
8 approximately one week before the November 19 suspension meeting. An undated handwritten
9 outline of discussion points was prepared in advance of the meeting. (Ex. 103) The outline had
10 headings including "Staff perception", "Customer Service", "Clients", "Pay Withholding" and
11 "wrongful term issue". Mr. Franck testified that Ray Griggs took notes of that meeting and
12 emailed a summary of the meeting discussion on November 20, 2012. (Ex. 10) This date is one
13 day after the suspension meeting. Mr. Griggs does not remember preparing Exhibit 10, and no
14 one could confirm the date that the notes reflect for a meeting.

15 Ms. Davis gave responses to questions asked. Respondents did not check documents or
16 personnel records or do any further investigation, other than speaking with some of the
17 complainants. Respondents then documented that these complainants refuted Ms. Davis'
18 statements. No citation to what was said or done is memorialized anywhere as to the refuting
19 evidence.

20 Claimant Davis was next called into a meeting on November 19, 2012 with Ms. Galvan,
21 Mr. Griggs and Mr. Franck, at which time Ms. Davis was placed on suspension, called an
22 "administrative leave with pay until further notice pending further investigation". (Exhibit 14).
23 Ms. Davis was told her suspension duration was indefinite. Ms. Davis testified that she received
24 no documents on November 19, and did not receive the Notice of Corrective Action (dated
25 November 19) until the day she was terminated, November 30. (RT III:631)

IV. FINDINGS OF FACT & CONCLUSIONS OF LAW

We evaluate here whether or not Claimant was unlawfully terminated as she alleges, and if so, what the motivating reason was for her termination. Claimant bears the burden of presenting evidence to support her claims of: (a) discrimination or harassment due to her race and/or age; (b) retaliation for protected activity; (c) failure to prevent discrimination or harassment (which as a matter of law requires a finding that there was discrimination or harassment); (d) CFRA (California Family Rights Act) Leave violations, interference and retaliation, and (e) wrongful termination in violation of public policy. If Claimant meets her burden for any of her claims, then Respondent has the burden of presenting evidence to prove that it had lawful, good-faith business reasons for its termination of Claimant. If Respondent meets its burden, then Claimant must present evidence of pretext, Respondent's motivating reason for the termination is based upon a protected action or status.

The factual issues relating to such claims fall into these categories: (1) Evidence that reflects an animus or bias on the basis of Ms. Davis' race or age, i.e. that Ms. Davis' termination was substantially motivated by her race or age; (2) Evidence of complaints made relating to a protected status, action or public policy, and that such complaints were a substantial motivating reason for Respondent AccentCare's decision to terminate Claimant Davis' employment. For the claim of harassment, Claimant must basically show evidence of a hostile work environment via conduct that was severe or pervasive. For the CFRA violations she must show that there was an interference with or retaliation for exercising Ms. Davis' CFRA leave rights. These will be separately discussed below.

Preliminarily, it should be noted that one of the difficulties in this case was the limited documentation of critical meetings and discussions that took place or allegedly took place, both before and during the investigation, and leading up to Claimant's termination. Complicating things further was the lack of or inadequate recollection of key witnesses, such as Lori Galvan,

1 Gina LeBeouf and M'Liss Kane, the company's representatives from Human Resources and
2 Legal Counsel respectively, plus the "disappearance" of some of Ms. Galvan's notes, all of Mr.
3 Fields' notes and the documents that Ms. Davis gave to Ms. LeBeouf (her email to her for
4 example) and to Mr. Fields for investigation into her claims. These factors led to much
5 inconsistency among these critical witnesses as to what was said, or not said; done or not done;
6 or even if a meeting occurred and if so, when, as well as what was said at these critical
7 meetings. Unwinding all of this took considerable time to piece together and analyze, which is
8 essential in order to fully evaluate these claims and decide who should prevail. Ms. Davis'
9 documentation, at least with regard to her EEO-related complaints, is also scant. She had
10 opportunities to document her claims better, including in response to Mr. Fields' request for a
11 summary of her claims so he could better prepare for their meeting. Even if she did not want to
12 send personal information in an email to Mr. Fields, she had the opportunity to type or write
13 notes for the investigation to give him when they met. Granted, there was no "requirement" in
14 an EEO complaint that it be documented, but it could have helped, either in Respondent's
15 investigation of her claims, or here in this arbitration proceeding. Thus, we are left with
16 everyone's recollections of what transpired. Nonetheless, people are of course human, and act
17 within the mindset of the time, not focused on down the road in a later legal proceeding. These
18 issues are simply noted for the parties' and counsels understanding of some of the challenges in
19 this case. We now turn to evaluation of the separate claims.

20 Additionally, besides Claimant's complaints, there were complaints raised against her by
21 her subordinate employees. It was necessary for AccentCare to investigate these claims as well,
22 and as indicated below, it was necessary for AccentCare to take some form of action against
23 Claimant. These are among the issues discussed below.

24 Race and age. Claimant, an African-American woman in her 60's, is a member of a
25 protected class. She also happens to have been the only African American employee.

1 However, other than those facts, no evidence was presented to establish that Ms. Davis was
2 singled out because of her race or age. The reorganization that took place, as Mr. Franck
3 testified, affected all of the branches, not just Ms. Davis' branch in Lancaster. Likewise, Mr.
4 Franck testified that other Administrator/DPCS' besides Ms. Davis were affected similarly, and
5 Claimant did not present evidence to show that she was singled out. Even if she was singled out
6 with regard to the distribution list, it does not appear to rise to the level of an adverse
7 employment action.

8 Furthermore, as Respondent points out, Ms. Davis testified at her deposition that neither
9 Mr. Griggs nor Mr. Franck discriminated against her based on her race. She further testified
10 that she did not know if either of them discriminated against her based on her age. When asked
11 why she did not know about Mr. Franck, she responded "Because I had so little contact with
12 him other than emails or messages..." As for Mr. Griggs, she responded "Because his reaction
13 to me was often...the few times I did see him- when I talked to him on the phone was I
14 interfering with whatever he was doing." She further said that there was nothing that made her
15 feel his reaction was based specifically on her age. (Davis Depo, pp.34-35). Respondent
16 further cited to Ms. Davis' testimony about Mr. Fields' mindset. She acknowledged she never
17 told Mr. Fields that she felt she was being retaliated against or harassed because of her race or
18 age. (Davis Depo pp. 111-112)

19 In order to establish a claim of discrimination based on race or age, Claimant has the
20 burden of establishing that she fell into the protected category (here age and race), suffered an
21 adverse employment action (here suspension and termination), and that her age or race was a
22 substantial motivating reason for the termination. (Cal. Govt. Code Section 12940 (a); see also
23 CACI 2500 and 2570). Claimant is an African American who was in her 60's at the time she
24 was terminated. She did suffer an adverse employment action when she terminated, and
25 potentially when she was suspended from her employment. The missing element is the nexus

1 linking her race or age to the decision to terminate. Thus there does not appear to be sufficient
2 evidence of bias based upon Ms. Davis' race or age.

3 Retaliation: Claimant did formally complain by late August, 2012, both internally to
4 AccentCare's HR Department, and externally to the EEOC, about potentially protected conduct,
5 including patient care and safety, made in the context of undergoing a company-wide
6 reorganization. She also referenced her protected status as a "minority woman", and that she
7 felt she was being "harassed" and "retaliated against", in her complaint to AccentCare. As
8 stated above, Ms. Davis suffered an adverse employment action, termination from her
9 employment with AccentCare. While those facts alone do not win a case, they nonetheless raise
10 the specter of a claim, which triggered Respondent's obligation to investigate these allegations.

11 On the other hand, Ms. Davis' termination arose out of allegations of adverse workplace
12 treatment by Claimant against her subordinate employees. These employee allegations were
13 initiated by an employee, not a member of management. No apparent protected conduct or
14 status was raised in the employee's complaint, yet it was nonetheless prudent for Respondent to
15 investigate these allegations.

16 What happened from here is the pivotal part of the facts and the genesis of this lawsuit.
17 Respondent did initiate an investigation, (to which Claimant takes exception, addressed infra),
18 through which all of the office and some of the field employees supervised by Claimant were
19 interviewed, and they each made complaints about Ms. Davis and her management style and
20 actions. Some of the allegations were more serious than others, some were benign or trivial.
21 The complaints ranged from raising her voice, putting her hand out to say "stop" to one
22 employee, being "rude" and "demeaning", terminating an employee (nearly a year earlier,
23 discussed more infra) when that employee who was pregnant asked to be reassigned from a
24 home where patients smoked, and changing an employee's time card without authorization, to,
25 allegations that she had put patient files in a trash can, used some profanity among the staff, and

1 talked about “politics”. The only complaints against Davis which potentially rise to what could
2 be referred to as “protected activity”, came to light during the course of the investigation after it
3 was underway, not in the initial allegations.

4 There is a stark disparity in AccentCare’s handling of these employee complaints, which
5 initially did not reflect legally protected conduct or status, versus complaints brought by
6 Claimant, which at least on their surface raised allegations involving legally “protected
7 activity”. Claimant’s initial complaint to AccentCare in late August, 2012 cited “retaliation”
8 and “harassment”. Her EEOC complaint, which Respondents received shortly after September
9 10, 2012, only has the box for “retaliation” checked, although pro forma it is labeled a
10 complaint of “discrimination”.

11 No investigation was conducted into the formal Complaint that Claimant filed with the
12 EEOC in August, formally dated September 10, 2012. (Exhibits 171, 97). Ms. Kane noted in her
13 testimony, correctly, that the EEOC notices stated that that no written response was needed
14 from AccentCare. However, that does not excuse AccentCare from its required obligations
15 under FEHA and the EEOC Regulations to “promptly” investigate all complaints raising
16 potential EEO issues, which clearly include “retaliation” and “harassment”.

17 Respondents in their testimony acknowledge their not having asked Claimant questions
18 about her words “harassment” or “retaliation”, nor did they ask why she raised being a
19 “minority” woman. Further, no documentation exists of such questions being raised.
20 Additionally, Respondents presented no evidence that anyone associated with the investigation,
21 including Ms. Galvan, Ms. LeBeouf, Mr. Fields, and Mr. Franck, (and certainly not Ms. Kane)
22 even asked Ms. Davis about her complaints involving patient care and safety. Yet, Ms.
23 LeBeouf’s September 4, 2012 memo, Exhibit 96 certainly raises red flags about potential EEO
24 claims.

1 Ms. LeBeouf starts her memo by reference to Ms. Davis' August 27, 2012 email as
2 stating "I am requesting a conference call with you in regards to my concerns of "retaliation"
3 and "harassment" that I feel is being directed at me from my Supervisors." Noting is mentioned
4 as to what else, if anything, was contained in the August 27 email. The natural question raised
5 is: Where is that email? It certainly never surfaced during the arbitration hearing.

6 Ms. LeBeouf then summarizes her phone conversation with Ms. Davis. Nowhere in that
7 summary does she indicate she asked Ms. Davis to explain the "retaliation" or "harassment"
8 claim. More important, towards the bottom of Ms. LeBeouf's email, she added "Jo then made
9 this statement "as a minority female who has worked hard to get to where I am, I am not going
10 to put up with it anymore." The very next thing one might expect to see is that she asked about
11 that statement. Instead, Ms. LeBeouf simply "thanked Jo for her call and for letting us know her
12 concerns so that we can look into the situation." Thus, three (3) comments were made directly
13 implicating legally protected EEO issues, and none were explored in that phone call.

14 Additionally, buried in the recitation about Ms. Davis' complaints about treatment by Mr.
15 Franck and Mr. Griggs, was a statement about the managers being self-serving ("self-
16 servicing") and not caring "about the office, the employees, or the care of the patients." Ms.
17 LeBeouf's summary of their call does not include any direct statement by Ms. Davis about
18 "patient safety", but there is one reference to patient "care". Ms. Davis testified that she did
19 include concern about patient care and safety in her complaints. Again, we do not have Ms.
20 Davis' August 27, 2012 email sent to Ms. LeBeouf, and, that issue was never explored by Ms.
21 LeBeouf or Mr. Fields.

22 Next, Ms. Galvan, Mr. Franck and Mr. Griggs were involved. Ms. Galvan, it was
23 acknowledged by Ms. LeBeouf and Mr. Fields, was not trusted by Ms. Davis, which was the
24 reason Ms. Davis went to Ms. LeBeouf in the first place, hoping to have someone neutral
25 evaluate her claims. Ms. Davis clearly raised complaints against both Mr. Griggs and Mr.

1 Franck. These complaints were communicated to Ms. Galvan and Mr. Franck by Ms. LeBeouf
2 in Human Resources. Mr. Franck admitted verbally communicating Ms. Davis' complaints to
3 Ray Griggs.

4 Respondents then assigned Ms. Davis' complaints to Mr. Fields. Mr. Fields first asked
5 Ms. Davis to send her complaints in writing to him. (Ex. 19, September 13, 2012 email) She
6 demurred expressing concerns in doing so, as well as her time as she would soon be leaving on
7 vacation. They met in mid October, approximately Oct. 12 or 13, 2012, following her return
8 from vacation and before her medical leave. Mr. Fields took notes of his meeting with Ms.
9 Davis, turned over his notes to Ms. Galvan, and that is the last time anyone saw them. Ms.
10 Galvan has no memory of any notes being given to her. Mr. Fields summarily decided that Ms.
11 Davis' complaints reflected merely her misunderstanding of her role in the reorganization. He
12 made only the recommendation that Ms. Galvan and the others talk with Ms. Davis to give her
13 clarification about the reorganization. Ms. Davis testified throughout the proceedings that she
14 and the other Administrator/DPCSs were not given such clarification. She said she and the
15 others relied on the job descriptions that were handed out, from which she derived that
16 AccentCare was bringing in a new position which would not have clinical training or
17 experience, yet would be overseeing clinical employees and their care of patients. This act was
18 decried by Claimant in many emails and documents. Mr. Franck responded that they were not
19 yet "on the same page".

20 Nonetheless, Ms. Davis' EEO and EEO-appearing complaints ended there, with Mr.
21 Fields handing over his notes to Ms. Galvan, the person who Respondents acknowledged being
22 informed Claimant did not trust or feel comfortable with. The entire purpose, for which
23 Claimant sent her complaint outside, in fact to Human Resources in Texas, was to avoid it being
24 handled by Lori Galvan. No one from AccentCare took further steps to try and explore Ms.
25 Davis' complaints, to interview other witnesses (she identified two in the EEOC Intake

1 Questionnaire, Ms. Catherine Tate and Ms. Erika Chavez, both of whom were interviewed
2 about their and others' complaints against Claimant, but never asked about Ms. Davis'
3 allegations.)

4 However, complicating this further is the troubling manner in which these two matters
5 were handled and investigated, as well as the outcomes. On top of that, Claimant potentially
6 contributed to part of the challenges we address here, in that she refused the opportunity to put
7 her complaints in writing to the fact-finder, Tony Fields, when asked to do so. She cited to
8 security concerns with email, which does not appear to be truly justified. She did also cite to
9 being busy at work and preparing to leave on vacation. Mr. Fields' request was made on
10 September 13 (Ex. 19); Ms. Davis' vacation did not commence for another 11 days. Her
11 meeting took place approximately five to six days after her return. It can be understandable that
12 she did not have time as she was finishing up work before departure and catching up on her
13 return. Nonetheless, it was an opportunity to have documented the complaints that she wanted
14 considered.

15 Mr. Fields took notes of their two (2) to two-and-a-half (2-1/2) hour meeting. However,
16 he turned over all of his notes, along with emails provided by Ms. Davis to him, to Ms. Galvan,
17 never to be seen again. Ms. Galvan does not recall anything about notes, and thus we are left
18 with piecing together what each party recalls. Unfortunately, those versions are in
19 contradiction. Mr. Fields does acknowledge that he never asked Ms. Davis what she meant by
20 "harassment", or "retaliation", nor did he ask what she meant by saying as a "minority woman"
21 she wasn't going to put up with things any longer. He simply came to the conclusion that all of
22 Ms. Davis' complaints were simply about her dissatisfaction with the reorganization. He
23 disregarded the fact that she filed a complaint with the federal EEOC agency, as well as the
24 "triggering" words noted by Ms. LeBeouf in Exhibit 96 to have been stated by Ms. Davis.

1 The facts and issues will be laid out here and analyzed. First is the workplace
2 atmosphere. At the time of Ms. Davis' complaints were made against Mr. Griggs, and the
3 employees' complaints were made against Ms. Davis, everyone in the workplace was under a
4 lot of stress. The company was undergoing a reorganization, (as were many others in that time
5 frame of 2011 while coming out of the recession.) A reorganization in and of itself brings
6 uncertainty to everyone's personal employment situation. The Company's management team,
7 including Mr. Griggs and Mr. Franck, were focused on helping to maintain the business, and
8 seemingly less focused on the impact of these changes or their communication styles on their
9 staff. Ms. Davis testified, "Everyone is walking on pins and needles, waiting for the next call
10 from Ray... Catherine was very tense because she felt with the new organization...she was
11 losing 90 percent of her job duties...everybody was so tense now...Erika was stressed.... got a
12 little bit more aggravated knew she was under pressure." (RT V:1066-1067) Catherine
13 Wyatt Tate testified that she attributed the change in Ms. Davis' demeanor and her memory, to
14 stress. She further testified, "We were all on stress overload. I don't know if we were capable
15 of really helping one another at that point when it came to dealing with the stress. We all didn't
16 know if we were going to have jobs." (RT I:83)

17 Second, a number of complaints were made about Mr. Griggs, which were apparently
18 not investigated. Ms. Davis was not the only employee to experience difficulty with Raymond
19 Griggs. Erika Chavez made a statement as part of the complaints about Ms. Davis in the
20 investigation conducted by Lori Galvan. Ms. Chavez testified that she left AccentCare because
21 of Ray Griggs, and she had difficulties with him before Ms. Davis was terminated. He
22 communicated via email in a demeaning manner, to the point that Ms. Chavez told Ms. Galvan
23 she did not want to speak with him, and his communications to Ms. Chavez had to go through
24 Ms. Galvan via conference call or email. (Chavez Deposition). Ms. Chavez testified that Ms.
25 Galvan did not interview her about her complaints regarding Mr. Griggs, and she was not aware

1 of any investigation into Mr. Griggs or his behavior. (Chavez Depo, p.17). Others also cited
2 concerns about Mr. Griggs' conduct toward them. Ms. Davis in her internal complaint to Ms.
3 LeBeouf and the EEOC Complaints referenced treatment and conduct by Mr. Griggs. Thus it
4 was already a stressed workplace.

5 Third, against that backdrop, the evidence is also clear that Ms. Davis, who was in a
6 management position, was contributing to the stress of her employees. She was described, even
7 by those who supported her, as being "aggressive", yelling or raising her voice, belittling or
8 demeaning in her tone or comments. Some said she was intimidating, others used stronger
9 language. It was also clear from Ms. Davis' testimony that she was not aware or mindful of
10 how her treatment of employees was impacting them, or contributing to the stress in the
11 workplace.

12 Claimant was vocally expressing her concern about the organizational structure,
13 whereby clinical employees would be supervised by someone lacking clinical training or
14 background. Ms. Davis voiced her concern about this new structure, as did some employees.
15 Ms. Catherine Wyatt Tate described it as "some definite turbulence", starting around
16 Thanksgiving 2011. She testified that management above the Claimant wanted to change the
17 office, and she described it as "We're changing the job description. Here's the new job
18 descriptions. Now apply for it, and you may or may not have a job." (RT I: 51) Management
19 further did not want anyone's resume or credentials. This atmosphere "very much so"
20 contributed to the uncertainty within the Lancaster office. Ms. Tate also described employees
21 becoming worried, citing Erika Chavez as an example, who vacated her apartment and moved
22 back in with her parents because she "didn't want to take the chance of having to pay for it and
23 not have a job." All of the office employees had to and did reapply for jobs. (RT I pp 51-52.)

24 Lori Galvan testified that the first person to raise complaints about Ms. Davis to her was
25 Catherine Tate. Ms. Galvan could not recall the date, and had no notes documenting any call

1 from Ms. Tate initiating a complaint against Claimant Davis. The first date when a
2 communication is documented is September 12, when Ms. Davis documents in writing a call
3 from Cyndi Shute on September 12, 2012. (Ex. 74) The next in sequence is Ms. Galvan's email
4 dated the morning of September 13, 2012, where in she writes to all of the employees in the
5 Lancaster office, seeking their "feedback regarding the work environment in Lancaster HC
6 office". (Ex. 73) That same day she has handwritten notes dated September 13, 2102 of a
7 conversation with Pat Talbot. (Ex. 75). Furthermore, Catherine Tate stated that the first
8 communication with her about an investigation or allegations into Ms. Davis was by phone call
9 from Lori Galvan. (RT I: 52-53) Ms. Galvan had some questions before sending her
10 September 13 email (Exhibit 73). Ms. Tate testified that Exhibit 73 was a "follow-up to her
11 conversation" where Ms. Galvan "wanted to meet with everybody to talk to them about
12 Josephine Davis." (RT I:53-54) Ms. Galvan told Ms. Tate that she had "received a complaint
13 and that they were investigating." Ms. Galvan asked Ms. Tate to see if the employees would
14 talk to Ms. Galvan and to coordinate such a meeting. (RT I:54).

15 Ms. Tate also testified she was aware of earlier complaints about Ms. Davis by Cyndi
16 Shute and Erika Chavez. Ms. Shute felt that Ms. Davis was too hard on her, and Ms. Tate gave
17 her some suggestions. She observed that Ms. Shute would "get very defensive, kind of go
18 inward" whenever Ms. Davis would try to speak with her. She gave suggestions to Ms. Davis
19 as well regarding communicating with Ms. Shute. (RT I: 55-57)

20 Ms. Tate also testified that Ms. Galvan and Mr. Franck had asked her on the day of Ms.
21 Davis' suspension, to provide additional information and documentation. Ms. Tate sent an
22 email in response, labeled "Homework". (RT I:171-172; Ex. 86) Ms. Galvan did not remember
23 if she had asked for additional information and documentation from Ms. Tate. (RT III:591)

24 Respondent's investigation into allegations by employees against Ms. Davis commenced
25 on September 12, 2012, when Cyndi Shute called and spoke with Lori Galvan, Director of

1 Human Resources, relaying complaints against Claimant, Ms. Davis. Ms. Galvan documented
2 this call and Ms. Shute's complaints in Exhibit 74, Ms. Galvan's handwritten notes of that date.
3 On September 14, 2012 at 12:14 a.m., Ms. Shute sent a follow up email to Ms. Galvan at Ms.
4 Galvan's request. (Shute testimony RT VI, pages 1161-1164; Exhibit 114.) Ms. Shute's email,
5 stated that following her conversation with Ms. Galvan, she contacted four (4) LVNs and
6 included a variety of complaints of her own as well as purportedly of these LVNs. (Exhibit
7 114).

8 On the morning of September 13, 2012, after Ms. Shute first brought her complaints
9 about Ms. Davis to Ms. Galvan, Ms. Galvan contacted Catherine Wyatt Tate regarding an
10 investigation she was conducting into complaints brought against Josephine Davis. Ms. Wyatt
11 Tate testified that Ms. Galvan called her sometime before receipt of a later email from Ms.
12 Galvan dated September 13 at 10:01 a.m.. Ms. Tate confirmed that the email was a "follow up
13 to her phone call." (Tate testimony RT I: 54:18-23) Ms. Galvan told Ms. Tate that she wanted to
14 schedule a meeting with the employees, either when Claimant was absent, or off-site.

15 On September 27, 2012 Lori Galvan met with the Lancaster employees to discuss their
16 complaints against Ms. Davis.

17 Davis' Suspension and Termination: On November 14, 2012, Edith Laguna, HR
18 Generalist, wrote a memorandum to M'Liss Kane, VP Legal Counsel. Ms. Laguna testified
19 that she was directed by Lori Galvan to write this memo, and given a summary from Galvan's
20 notes of the points to be sure and include in the memo. (Ex. 102, Ex. 115; RT II:332-334) Ms.
21 Galvan's purpose for the memo was to formally share it with legal counsel. Mr. Jeff Franck
22 testified that he was aware that Ms. Edith Laguna was drafting a summary of their concerns. He
23 received a copy of this memo, Exhibit 102, before Ms. Davis' November 19, 2012 suspension.
24 He was aware that the memo would be sent to M'Liss Kane, AccentCare's Legal Counsel. His
25 understanding was that the purpose of the memo was to obtain legal counsel's input on the

1 termination. Ms. Kane gave her approval to do the termination and coordinated it through
2 Human Resources. (Exhibit 102; RT II:495-497) Mr. Franck agreed with the conclusions
3 stated in the November 14, 2012 memorandum. (RT II:498)

4 Ms. Kane on the other hand, testified that she did not find out about Ms. Davis'
5 termination until after November 30, 2012. She did not recall any discussions with Human
6 Resources or Mr. Jeff Franck regarding potential discipline or termination, before Ms. Davis'
7 termination. (RT IV:754-758). Ms. Kane testified at arbitration that terminations for cause for
8 someone at Ms. Davis' level would not generally go to her for review before the termination
9 was effected. Her deposition testimony was then read, in which she stated "Generally
10 terminations for cause would come to me for review, whether any EEOC claim were (sic)
11 pending or not, as opposed to just being told someone was terminated." The first time she was
12 involved was when she needed to respond to an EEOC complaint received in January 2013,
13 which was Ms. Davis' second EEOC complaint. (RT IV: 759-761) Per Ms. Kane's deposition
14 testimony read into the record at arbitration, because Mr. Franck was above her, she did not
15 question him about why Ms. Davis was terminated, plus it "was already done." (RT IV:762)
16 Ms. Kane does not recall having any conversations with Mr. Franck or with Ms. Lori Galvan
17 between the date of the September 4, 2012 memo and November 14th, the date of Ms. Edith
18 Laguna's November 14, 2012 memorandum. (RT IV:769) HR talked to her "all the time", but
19 Josephine Davis' name is one she probably would have remembered; thus she does not believe
20 Ms. Galvan raised Ms. Davis to her between those dates. Ms. Kane said she "must have"
21 received it, as it is addressed to her, but she has no personal recollection of seeing it before the
22 litigation. (RT IV:763)

23 Ms. Kane was aware of Ms. Davis' first EEOC complaint for discrimination earlier in
24 2012. Before November 14, 2012, she was unaware that any investigation was ongoing into
25 allegations against Ms. Davis. She stated that she had no concern about a perception of

1 retaliation by the November 14, 2012 memo succeeding Ms. Davis' September 2012 EEOC
2 charge, "because they were two totally different matters, one a charge of discrimination. The
3 other one was talking about hostile work environment." (RT IV: 768)

4 Ms. Davis was placed on suspension on November 19, 2012. Respondents prepared and
5 issued to Claimant a Notice of Corrective Action, which stated "effective today, November 19,
6 2012, you are being placed on administrative leave with pay until further notice pending further
7 investigation." This Notice begins with a paragraph stating "We believe that every individual
8 wants to know if satisfactory performance is not being given and/or if AccentCare's company
9 policies are being violated. Every employee is given an opportunity to correct continued
10 unsatisfactory performance. Violations of company policy and/or rules of conduct are handled
11 on a case-by-case basis. Company policy and conduct violations can result in termination of
12 employment, regardless of whether previous warnings have been issued. (Ex. 14) Below the
13 solid line on the form, it states, "Your conduct is not keeping (sic) with AccentCare's policies
14 for the following reasons": No reasons are given, in fact there is no writing. There is within the
15 form the following "THE FOLLOWING IMPROVEMENTS ARE REQUIRED
16 IMMEDIATELY": Nothing is written there. Below that it has a section "ACTION TAKEN";
17 No box was checked. Thus there were no reasons given for the action, no corrective action
18 taken, and no warning or notice of what needs to be corrected. Ms. Davis testified that she did
19 not receive the notice until her termination November 30. Her signature does not appear on this
20 notice.

21 The next thing to occur was the termination of Ms. Davis's employment on November
22 30, 2012. Respondents assert that there was good cause to terminate. Ms. Galvan testified that
23 there were "several" discussions between herself, Mr. Franck, Mr. Griggs and Ms. Kane, legal
24 counsel, regarding the decision to terminate Claimant Ms. Davis. (RT III:542) Edith Laguna
25

1 testified that she was instructed by Lori Galvan to prepare the November 14, 2012 memo, (Ex.
2 102) and in fact gave her a script to use in its drafting.

3 Jeffrey Franck testified that the November 14, 2012 memo (Ex. 102) was prepared in
4 order to elicit legal advice on the topic of Ms. Davis' potential termination. He also testified that
5 AccentCare's legal counsel M'Liss Kane had given approval for the termination. However,
6 Ms. Kane testified that no one told her anything about the termination until after it happened.
7 She does not recall receiving Edith Laguna's November 14, 2012 memo but figures she must
8 have because it is addressed to her. Termination of Ms. Davis was a group decision, and there
9 was input from each member of the group (Galvan, Griggs and Franck). They were all in
10 agreement and all came to one decision, to terminate. Lori Galvan does not recall documenting
11 any of those conversations. (RT III: 543-544)

12 Staff complaints against Mr. Griggs: Mr. Franck acknowledged that "some of the office
13 staff had concerns" and had made complaints against Mr. Griggs, which complaints were
14 documented in Ms. Galvan's notes. These complaints included that Mr. Griggs had "elevated
15 his voice" to employees, that he had yelled, was aggressive, he recalled Ms. Chavez said Mr.
16 Griggs accused her of Medi-cal fraud, that he was not interested in what any of the Lancaster
17 staff had to say, and he did not respond timely, among others. (RT II: 451-453; 500-501) Mr.
18 Franck's responsive action was to follow up with Ray Griggs personally, asking him what
19 happened, and discussed the employees' "perception". He expressly denied counseling Mr.
20 Griggs, or involving HR, stating "it wasn't a formal write-up or anything. I did talk to him
21 about the perception of the office staff and asked him to work on it." As for Ms. Chavez'
22 allegation of the Medi-cal fraud accusation, Mr. Franck stated, "We found that he had not
23 accused her of that. I think he was framing a situation where if we followed certain compliance
24 trends there was going to be a challenge to Medicaid. I don't think he accused her of that, is
25

1 what we determined.” He took no other steps to investigate Mr. Griggs, other than speaking to
2 him. (RT II:452-453; 500)

3 At her deposition, Ms. Galvan did not recall if she had a recommendation to terminate
4 Ms. Davis. At the arbitration hearing she testified that she did make such a recommendation.

5 Respondent’s Reasons for termination: Raymond Griggs identified the reason for Ms.
6 Davis’ termination as hostile work environment or perception of hostile work environment, and
7 financial performance. (Griggs’ testimony, RT I1: 440). Jeffrey Franck was the final decision-
8 maker on Claimant Josephine Davis’ termination. Mr. Franck identified three primary reasons
9 for her termination: (1) The primary (estimated 70-75 per cent) reason was hostile work
10 environment, and, to a lesser extent: (2) time card issues and (3) “the Raymor issue”. (RT II:
11 444-445)

12 Ms. Galvan testified in her deposition that that she did not know the reasons why Ms.
13 Davis was terminated. At the hearing, she testified that the termination was based on the
14 investigation. (RT III: 546)

15 Davis’ own EEO complaints and Investigation: Claimant Josephine Davis initiated her
16 own EEO complaints, first internally with AccentCare via an email to Gina LeBeouf on August
17 27, next with the EEOC on August 29, with notification to Respondent by September 10. Ms.
18 Lebeouf prepared a memo of Ms. Davis’ call on September 4, 2012. Everyone (Mr. Franck and
19 Ms. Galvan; Mr. Fields and later Mr. Griggs) was made aware of Ms. Davis’ complaints.

20 The first employee complaint arrived September 12, which was eight (8) days after Ms.
21 Davis’ complaints became known to Respondent, perhaps a few days less as to notice to Ms.
22 Galvan and Franck. Nonetheless every decision maker was aware of Ms. Davis’ complaints
23 about protected conduct, whether it was her claim of “harassment” or “retaliation” or
24 impairment to “patient care”. They were aware. They were also aware that she had bypassed
25

1 Ms. Galvan because she did not trust her or was not comfortable with her and did not want it
2 investigated by Ms. Galvan.

3 Her complaint, which had been assigned by Ms. Galvan to Mr. Fields so there was an
4 impartial investigation, was dismissed just about immediately. One meeting with Ms. Davis,
5 and Mr. Fields and Ms. Galvan felt there was nothing more that needed to be done. Were the
6 notes carelessly placed and lost? Or intentionally tossed? We will never know. It is troubling,
7 in fact incredulous, that nothing, not notes nor emails, could be found and no one has any
8 memory of what happened to them.

9 The treatment of others, including Mr. Griggs, as well as another manager, was
10 significantly different than the treatment of Claimant with regard to the complaints, those made
11 by her, and those made against her. The investigation was tainted from the start. Neither Ms.
12 Galvan, Ms. LeBeouf, Mr. Fields, Mr. Franck or anyone else produced any documentation of
13 questions asked of Ms. Davis that would have informed her of allegations against her to respond
14 to, nor did any of them ask Davis for any evidence she might have or be able to lead them to,
15 regarding such allegations. No one asked her if there were any witnesses they should interview.

16 In stark contrast, not only were the employees who were interviewed asked about
17 witnesses, Ms. Shute was permitted to actually contact them herself, in advance of Ms. Galvan
18 or anyone else who might have been able to objectively interview and elicit statements from
19 them. One of the people Ms. Shute encouraged to complain was Gabby Matthews, who, it was
20 well known, "hated" Claimant Davis. (RT I: 59, Tate: "Frankly? She hated her.") Both Ms.
21 Shute and Ms. Matthews had been written up by Ms. Davis. Ms. Matthew's illegible charting
22 was even noted as a deficiency in the external audit of AccentCare. Ms. Shute had been written
23 up at least three times in the previous year for her charting deficiencies and other reasons. Yet
24 during the investigation, no one asked Ms. Tate, who handled human resources functions, to
25 find the personnel records for either of these two people. Ms. Galvan admitted she did not think

1 it was even relevant to check into their personnel information or to check out their credibility or
2 possible motive behind making complaints. (RT III:598) Learning of the disciplinary record of
3 Ms. Shute and Ms. Mathews, as well as the compliance deficiencies attributed to Ms. Matthews,
4 no effort was made to look into the genesis of such a strong statement. No personnel records of
5 Ms. Matthews were requested or reviewed. No one asked Ms. Davis about her write ups of
6 either of them, or the reasons, or for evidence that might possibly substantiate the write ups and
7 discipline. Had such information been even looked at or considered, it may have demonstrated
8 that AccentCare had two potentially disgruntled employees motivated to get rid of Ms. Davis.
9 These two employees certainly raised the most serious of the complaints against Ms. Davis.
10 Mr. Franck acknowledged that they only contacted the three customers identified by Cyndi
11 Shute, and did not contact nor elicit information about any others. (RG II: 488)

12 Also noteworthy is the disparity between the handling of one complaint from an
13 employee who is documented to have animosity toward Claimant, where no initial legally
14 protected action is alleged, versus the handling of Ms. Davis' complaints to HR raising legally
15 protected conduct, with knowledge that she also complained to a government agency, the
16 EEOC. The former led to Ms. Galvan seeking to interview all of the employees under Ms.
17 Davis, and the latter led to Mr. Fields having one interview with Ms. Davis, obtaining some
18 documentation from her, turning them over to Ms. Galvan, following which all of that evidence
19 disappeared. Moreover, no further investigation was conducted. Her complaints were merely
20 chalked up to her disappointment in the reorganization.

21 Similarly, employees' complaints against Mr. Griggs, separate and apart from Ms.
22 Davis, were handled by Mr. Franck having a "talk" with Mr. Griggs about the employees'
23 perceptions. No one sat down with Ms. Davis to talk about her employees' perceptions of her
24 until nearly two months later. Moreover, during that period of time, Ms. Galvan continued to
25 solicit information from employees, including reaching back for time cards as far back as March

1 2012, and documentation regarding Paula Raymor. The Raymor incident happened nearly a
2 year earlier and yes, it did give Ms. Tate concern. Ms. Tate had contacted Ms. Galvan and Ms.
3 Laguna about the situation. She testified that they failed to take any action when it occurred,
4 almost a year before this investigation. Thus, HR was clearly aware of the Raymor situation,
5 had an opportunity to evaluate

6 Ms. Tate further clarified many of the references attributed to her in Ms. Galvan's
7 September 27, 2012 notes, Exhibit 78. For example, Ms. Tate said the words "Jo is center of
8 universe" were Ms. Galvan's, not hers. The phrase "power issue" did not mean that Ms. Davis
9 had a power issue, rather it referenced what was going on in the office. Ms. Davis was the one
10 who held ultimate responsibility for maintaining compliance within her office, yet Mr. Griggs
11 was assigning those tasks to others, e.g. Erika Chavez, who were not qualified to oversee such
12 issues as she lacked nursing skills. (RT I: 78-82) She said she also explained to Ms. Galvan
13 about the pressure placed on Ms. Davis which she felt contributed to Ms. Davis' change in
14 attitude, and in her memory which she attributed to stress. Ms. Tate also said they were "all on
15 stress overload". (RT I: 82-83) As for the time card issues, she said that was in response to Ms.
16 Galvan asking her to bring all her concerns forward. Ms. Tate denied any knowledge of an
17 "anonymous letter"; she denied the reference to certain employees leaving because of Ms.
18 Davis.

19 Ms. Tate stated that Ms. Galvan had asked about Paula Raymor. (RT I:109) This was an
20 issue that had happened approximately a year earlier, and she did not understand why Ms.
21 Galvan was bringing the issue up. She said that in fact she did raise concerns back then, to
22 Edith Laguna and to Lori Galvan for advice. The situation had been handled. (RT 109-110).
23 Thus, Ms. Galvan was made aware of the situation with Ms. Raymor long before this
24 investigation commenced, and could have taken disciplinary action earlier if it was warranted.
25

1 However, it was not only made a focal point of the investigation here, it was one of the three (3)
2 reasons for Ms. Davis' termination.

3 The employees were asked to bring forward their complaints, and their complaints were
4 all taken at face value as warranting disciplinary action against Ms. Davis. Not just discipline,
5 but the ultimate one—termination.

6 Claimant Ms. Davis on August 27, 2012 called Gina LeBeouf in Corporate Human
7 Resources. (Exhibits 19, 96). Between August 27-29, 2012, Claimant Davis had also sent
8 written complaints to AccentCare, and to the EEOC, (which in turn sent notification to
9 AccentCare,) referencing "harassment" and "retaliation" against her as "a minority female".
10 (Exhibits 19, 96, 97) It was well known she was African American or Black. Yet, Ms. Davis'
11 allegations were dismissed by AccentCare (Tony Fields, Ms. Galvan, Mr. Franck) as not
12 worthy of investigation after one interview with her by Tony Fields of Human Resources,
13 because they appeared to arise out of the reorganization. Yet, in contrast, the employees'
14 complaints against Ms. Davis were labeled by AccentCare as a "hostile working environment",
15 without any protected category assigned to them. Furthermore, these employees talked about
16 the high level of stress that they and Ms. Davis experienced from the reorganization, the
17 changes in job descriptions and oversight, and the uncertainty about their job status, being told
18 to apply for the newly identified jobs. However AccentCare's leadership team did not draw any
19 "conclusion" that the reorganization played a role in Ms. Davis' actions or the employees' stress
20 levels. In fact Mr. Franck attributed most of the stress to Ms. Davis "messaging" her concerns
21 about the reorganization.

22 Further, the employees' complaints against Ms. Davis were actually investigated for two
23 full months, without anyone asking Ms. Davis for her side of the story, or asking her to respond
24 to the allegations or provide evidence that might corroborate, or exculpate her or mitigate the
25 issues. Respondent (through Mr. Franck and Mr. Griggs) assert that they did meet with Ms.

1 Davis. No one remembers the date, but it was either close to the November 19, 2012 date of
2 suspension (Galvan testimony) or a few days or a week beforehand (Franck testimony). This
3 meeting was the very first time that Ms. Davis was informed of any investigation against her,
4 and the first time she was asked any questions. Respondents admitted they did not give her
5 much in the way of specifics as to the employee allegations, other than for example talking or
6 sharing personal information, "acts of intimidation/hostile work environment", "sharing
7 negative feedback", being "rude", etc. She was asked specifically if she put her hand up to say
8 "stop" and they contend she denied doing so. The only documentation of what was discussed is
9 in Mr. Griggs' email dated November 20, 2012, which happens to be the day after Ms. Davis
10 was suspended. Respondents state that this was actually a recitation of what transpired in their
11 meeting about "perceptions" with Ms. Davis a day or a few days to a week before the
12 suspension. (Ex. 48, Griggs' November 20, 2012 email "Josephine Suspension....Notes".)
13 Respondents did however identify some of the clients who complained. They did not identify
14 that these were three clients selected by Ms. Cyndi Shute. They document responses by Ms.
15 Davis, such as regarding Ms. Post, that the "family was adamant about wanting OT hours" and
16 regarding Mr. Chang, that Ms. Davis had no contact after admission with his CM Sue Coleman,
17 and that all such communication would have been through Ms. Shute or Anne (AC CM's). (See
18 Ex. 48). Ms. Davis was asked if she had changed time cards, to which she said "yes". She said
19 that the incident of Ms. Shute's pay was an isolated incident. There is no evidence that
20 anything that Ms. Davis said in this meeting was investigated or checked into. In fact, there
21 would have been very little time to do so, given how close the meeting was to the suspension,
22 assuming it was not on the actual suspension day. Respondent's notes in Ex. 48 indicate at the
23 bottom of the second page "In speaking with the office staff (Erika, Catherine and Araceli) "it
24 was confirmed that Jo did have contact with the Chang CM...contradicting Jo statement."
25 Where is that contradicting evidence? There is no record of it other than one of the three

1 identified stating so. Furthermore they state "It was confirmed/validated that Jo knowingly
2 changes timecards". Again, where is that evidence? She admitted to the situation with Ms.
3 Shute and referenced CM timecards for Anne and Cindy. Yet, there is no explanation of what
4 Ms. Davis' explanation was for those changes.

5 This was simply an inadequate and unfair, biased investigation. It appears that the
6 decision to terminate her was made at the time Ms. Laguna was asked to prepare the November
7 14 memo, to seek legal approval for termination, which was before anyone had spoken with Ms.
8 Davis to get her side of things, or ask for witnesses or documents that might support her. No
9 one checked personnel records, no one told her any specific allegation brought forward by the
10 employees. Ms. Davis was taken completely by surprise without any prior notice of an
11 investigation about her. Her own investigation was aborted quite quickly and summarily.
12 There was no request of Ms. Davis to provide her own contradicting evidence.

13 The disparity between how these two complaints were handled gives consternation,
14 particularly when Ms. Davis' complaint, preceding any complaints made against her, on its face
15 raised issues protected by state and federal anti-discrimination, harassment and retaliation laws,
16 whereas the others raised no such protected activity or status as a basis. Ms. Davis' complaints
17 were dismissed as not warranting any investigation after a single meeting with Mr. Fields from
18 Human Resources. In sharp contrast, Ms. Shute's complaint, not tied to any protected category,
19 not using words like "harassment" or "retaliation" or "minority", did warrant a full
20 investigation, with Ms. Galvan calling on individuals, soliciting statements, having these
21 employees gather up evidence, and setting up a meeting with everyone fifteen (15) days after
22 receipt of Ms. Shute's complaint.

23 Ms. Shute's September 12, 2012 email which initiated the investigation lists as
24 complaints: "Incredibly hard time w/Jo Davis...LVNs are complaining...feel very
25 threatened...Treats u like a child "Stop!"...After LVN call, hung up & said "Dumbass"; uses

1 profanity; Inconsistent w/Rules; Very toxic atmosphere; Has been written up 3x in last year
2 (emphasis added); "I'm female over 65 & black and I will get anything I want"; "Personal info
3 shared w/other employees." That is the sum and total of what is contained in Ms. Shute's
4 statement written down by Lori Galvan on September 12, 2012. (Ex. 74) The bolded statement
5 "Has been written up 3x in last year", should have been a trigger to pull Ms. Shute's personnel
6 records to look at the write ups and try to verify if they were legitimate or not. If they were
7 legitimate, that likely could have raised the question at least whether the complaints were
8 motivated by the write-ups, perhaps as a way to get back at the supervisor. Based on Ms.
9 Galvan's notes and her testimony, it does not appear that there was any inquiry into Ms. Shute's
10 three write ups.

11 Ms. Davis sent an email to Ms. LeBeouf on August 27, 2012, as reflected in Ms.
12 LeBeouf's memorandum dated September 4. Apparently Ms. Davis' email of that date has also
13 disappeared

14 Additionally, at least two witnesses (Catherine Wyatt Tate and Araceli Sanchez)
15 testified to having issues with Mr. Griggs' rude and harsh treatment of them; one witness (Ms.
16 Tate) was also a percipient witness to Mr. Griggs' rude treatment toward Ms. Davis, whose
17 complaint with AccentCare and the EEOC (which was sent to AccentCare) was made
18 specifically about Mr. Griggs' treatment and actions. No investigation appears to have been
19 done into allegations against Mr. Griggs, either with regard to Ms. Davis' allegations or those
20 made by Ms. Tate and Ms. Sanchez.

21 Yet, not one witness was questioned about Ms. Davis' allegations. Not one witness was
22 solicited from her for an investigation. No facts or evidence were elicited from her to support
23 her allegations. No questions were asked of her as to why she felt they were racially motivated
24 or on what basis she felt her complaints qualified for EEO status. There was no further
25 communication with Ms. Davis about her EEOC complaint. There was no notification to her

1 that it was simply delivered by Mr. Fields to Ms. Galvan, with a recommendation and decision
2 to take no further action; Then even the notes taken by Mr. Fields, the lone "investigator" on
3 Ms. Davis' EEO allegations, once given to Ms. Galvan, "disappeared" along with many of Ms.
4 Galvan's notes and documentation on the investigation against Ms. Davis.

5 Respondent's Evidence supporting Termination: Certainly the complaints raised by the
6 employees justified an investigation, and justified some discipline of Ms. Davis. The evidence is
7 unrefuted that she had an unblemished record for several years. The types of complaints
8 registered were clearly management and leadership style issues, demeanor issues, and many
9 were similar to those registered against Mr. Griggs. Mr. Griggs was talked to and told about
10 perceptions. Ms. Davis was fired. Some of her actions involved time card issues, which were
11 at least as to past ones, resolved. Notably, Ms. Davis was not spoken to about any issue that
12 had been discussed, yet, Respondents kept asking the employees "how is she doing?" and as
13 Ms. Tate and others testified, Respondents were asking the employees if there were further
14 ongoing incidents that should be reported? How can Ms. Davis be judged on performance
15 issues of which she has never been made aware? Things might have been different had
16 Respondent counseled Claimant, put her on a Performance Improvement Plan, and upon later
17 re-assessment discovered she was not improving. However she was not given any chance at all.

18 Complaints brought forward by employees: Erika Chavez in her deposition testified
19 about her complaints regarding Claimant Davis' manner of speaking to her. She also spoke
20 about complaints she had against Raymond Griggs, but she did not bring those complaints to
21 Ms. Davis, because of how Ms. Davis spoke to her and the nurses. She said Ms. Davis yelled at
22 some nurses and made one cry, (whose name she did not recall), because Cyndi Shute and
23 Gabby Matthews forgot to fully document records to include their title, or to put their title
24 behind the signature, or to input the patient's weight.

1 Erika Chavez testified that Ms. Davis yelled at her "a lot", "daily...throughout the day,
2 several times" (Chavez deposition p.24-25). She observed Ms. Davis yelling at others, plus
3 wrongly berating the nurse, even when it was proven to Ms. Davis that she was wrong. She
4 gave an example of a nurse who came by during Ms. Chavez' lunch break and dropped off her
5 notes and time card. Ms. Chavez returned from lunch and noticed that the nurse failed to
6 properly document. Ms. Chavez informed Ms. Davis, who then accused Ms. Chavez of not
7 having checked the documents correctly. She maintained this position even after Catherine
8 Wyatt Tate came in and told Ms. Davis that Erika "was not here" earlier, and reminded Ms.
9 Davis that in fact she had checked the notes and time card herself, not Ms. Chavez.
10 Nonetheless, Ms. Davis continued to blame Ms. Chavez, who said this "happened a lot".
11 (Chavez depo. pp 24-25) Claimant could get snippy and come across rude (e.g. Exhibit 28
12 (July 31, 2012 emails) and Exhibit 59 (June 12, 2012 emails). These are just some of the
13 claims which were more significant. Yes, clearly Ms. Davis needed counseling about her
14 leadership style. However, termination, given the one-sided investigation, was unwarranted.

15 Finally, credibility among the respondent's witnesses is called into question, given the
16 inconsistencies among them as to very significant factors such as whether legal counsel was
17 involved or not in a termination of a manager, whether and when the one and only meeting with
18 the accused took place, coupled with the questionable disappearance of critical notes and
19 documentary evidence submitted for the investigations. There was unexplored bias on the part
20 of the complainants who made the most significant complaints, yet had a disciplinary record
21 with the company, which well-known biases were not examined during the investigation. These
22 are further factors impacting the decisions made in this case.

23 Performance of Claimant's office: With regard to performance, Claimant's Lancaster
24 office had undergone a compliance audit on February 23, 2011. The office in Lancaster
25 received a total score for the Clinical component, of 146 out of a total of 153 points, thus

1 receiving a 95 per cent clinical rating, "Excellent status". (Ex. 54) In 2010 that office received
2 a clinical rating of 92 per cent. No evidence was presented that Claimant was underperforming
3 financially, or that her branch was more than other branches.

4 Additionally, most of the employees under Ms. Davis expressed to Ms. Galvan, and
5 testified at the hearing, that they did not want Ms. Davis to be fired. Even Cyndi Shute, the one
6 who instigated the investigation against Claimant, despite her strongly voiced complaints
7 against Claimant, such as Claimant intimidating her raising the tone of her voice, etc., said she
8 told Lori Galvan that she did not want Josephine (Davis) fired. She just "wanted them to talk to
9 her so that things could change". She "figured if they talked to her things would change and get
10 better." (Shute testimony, RT VI:1217) Catherine (Wyatt) Tate testified that Lori Galvan told
11 her that "whatever problems that came along, Lori was going to work with Mrs. Davis one on
12 one with her management style to try to make the office and things work a little better and
13 address our concern." (Tate, RT I: 86). Shute said she heard Claimant say at least once, "I am
14 black. I am female, and I am over 60, and it will go my way", "or something like that". (RT
15 VI:1218)

16 It is the finding of this Arbitrator that Claimant did not present sufficient evidence of
17 race or age discrimination. It is further the finding that Claimant did present sufficient evidence
18 establishing that her termination was motivated by retaliation for her filing of EEO complaints
19 as well as complaints involving patient care.

20 Claimant has met her burden of proving that more likely than not the motivation for her
21 termination was based on her filing of EEO complaints, internally and externally with the
22 EEOC, and/or her complaints made to members of management about her concerns for patient
23 safety and care. The reasons given for the termination appear to be pre textual, given that the
24 employees for the most part did not even want Claimant to be terminated, there are huge gaps of
25 information to be investigated in order to fully evaluate the accusations against Claimant, the

1 fact that the initiator of the complaints, Ms. Shute, was allowed by Human Resources to contact
2 client witnesses, leaving one to wonder to what degree she compromised their statements, and at
3 the very least, tainted the investigation; also given that no one in the investigative process even
4 looked into their motives or biases, or investigated their own statements about having received
5 multiple disciplinary actions. Furthermore as to one such employee, Ms. Matthews, evidence
6 was presented that her deficiencies found their way into the audit findings, which could have
7 been easily trackable, and if true, should have given some concern to a neutral investigator. All
8 decision makers were aware of Claimant's EEO complaints; they were aware that Claimant
9 specifically said she did not trust or did not want Ms. Galvan to investigate her claims. Yet, Ms.
10 Galvan led the investigation team in the allegations against her. Had Ms. Galvan demonstrated
11 fairness and due process to Claimant, this may have been something to be overlooked. But the
12 process was anything but fair. Add to all of this the unexplained and inexplicable loss or
13 destruction of Claimant's evidence and notes submitted for her investigation, and the absence of
14 concern over these missing documents, plus the fact that Claimant was terminated so soon after
15 the first and only meeting with her about the investigation. Of the additional reasons beyond the
16 employee complaints, the Raymor matter occurred almost a year earlier, and Human Resources,
17 specifically Ms. Galvan, were informed by Ms. Tate, and if they felt it was worthy of discipline,
18 then would have been the time to take action, not a year later in the context of a supposedly
19 separate investigation.

20 Additionally the evidence submitted indicated seemingly that Claimant's branch was
21 performing well, and other than an allegation, there was no detail or data provided to
22 demonstrate that Claimant's branch performed any worse than the other branches. Thus, there
23 seems to be no basis for two of the grounds, albeit of lesser weight according to the
24 Respondents' testimony.

1 As for the employees' complaints, with most of them saying they wanted Ms. Davis
2 "Spoken to", not terminated, and Mr. Fields even telling Ms. Galvan and Mr. Fields that Ms.
3 Davis needed to be "spoken" to, the ultimate discipline being exercised is not reasonable nor
4 supported by the evidence. What is clear however is that everyone was aware of Ms. Davis
5 making complaints, to HR in Texas and to the EEOC. She said in the November 8 email that
6 she is "not afraid to make waves". It is believed that these factors motivated the termination far
7 more than the employee complaints, bolstered by the lack of any effort to remediate or counsel
8 Claimant. Additionally, testimony indicated that the intent to terminate really happened by
9 November 14, when Ms. Laguna sent her memo to M'Liss Kane.

10 Claimant has also met her burden to establish that her termination was done in violation
11 of public policies. These include both the expression on behalf of patient safety, as well as
12 expressing concerns about being harassed, discriminated or retaliated against.

13 14 **V. AWARD**

15 In Accordance with the foregoing, the following award is made: Finding in favor of
16 Claimant on her claim of wrongful termination in violation of public policy, and for retaliation.
17 Finding against Claimant and in favor of Respondents on claims of discrimination, harassment
18 and failure to prevent discrimination or harassment, and CFRA violations.

19
20 Damages: Claimant testified that while she was at AccentCare, she had planned to
21 continue working full time until age 70. She said if she could physically work longer than that
22 she would do so. She also testified to financial stress over the past two years, having lost her
23 credit, doing a short-sale on their home, living paycheck to paycheck. She also testified to
24 having to sell or pawn personal items, and that she worried about having enough money for
25 food. However, under cross-examination, she acknowledged that she told Ms. Hall (one of her

1 witnesses) that she planned on working only three or four more years, which is in keeping with
2 her testimony of working until age 70. She had also testified that if her health did not hold up,
3 she would have planned to stop working earlier, between 2013 to 2015. (RT VII:1441)

4 She also testified that she suffered a number of medical conditions, which limit the type
5 of work she can perform including: Degenerative spinal stenosis; Rheumatoid arthritis;
6 Bilateral artificial knees; a stent in right coronary of heart; Glaucoma in left eye and cataracts in
7 both eyes, with surgery on the right due in 2015. She began to notice limitations on driving at
8 night after the surgery on her left cataract, when she returned from vacation, in Fall 2012.

9 P.1443: She would not have felt safe to drive at night, and when asked by Mr. Peterson to come
10 back to AccentCare, she informed him that she did not want to do any more long distance
11 driving. (RT VII: 1441-1444) She also testified that she was instructed by her physician and
12 the EDD to only look for part-time work.

13 CCI where she had been working could not accommodate her part-time request. She is
14 not physically able to work as a nurse in a hospital on the floors, even part-time. She feels she is
15 physically capable of handling home care as a Case Manager such as what she was hired to do
16 at Sun Plus and AccentCare, but on a part-time basis. (1444-1447). It is found that Ms. Davis
17 could have likely continued to work through at least part of 2015, during which period she also
18 needed some time off for surgeries and medical treatments.

19
20 Economic damages: Using the stipulated damages calculation, and factoring in her
21 testimony about her medical condition and restrictions on employment, plus the fact she had
22 some medical treatments during the relative periods of time, she is awarded the full back pay of
23 \$223,395 but no front pay.

1 Non-Economic Damages: Claimant also seeks and will be awarded emotional distress
2 damages. Claimant testified that she had been happy in her job, until she felt there was “total
3 turmoil in the office” which she said was keeping her “up at night”. She said that she stopped
4 eating from feeling depression, lost 25 pounds, and began seeing a psychiatrist. (Davis
5 testimony, RT V: 1065-1066) She also has assigned the financial distress of the loss of her
6 home to her termination. Respondent presented evidence that such financial issues, including
7 the Notice of Default and imminent foreclosure of her home, preceded the termination of her
8 employment.

9 Furthermore, Ms. Davis was suffering stress from the reorganization. It was concerning
10 to this Arbitrator that so many staff members would have complaints about her treatment of
11 them, even the two who were her supporters. It does not appear that Claimant was focused on
12 how she was treating employees or paying attention to their reactions. This may be a product of
13 the stress in the workplace, but those are stressors that are not compensable for these claims.
14 Thus, the existence of other stressors must be factored in assessing an amount. Nonetheless,
15 Claimant was terminated after what appeared to be a distinguished career in nursing and nurse
16 management, with the sudden loss of her job without a full opportunity to be heard and attempt
17 to cure behavior, and the resulting effects are compensable, following complaints of protected
18 conduct. Damages for motional distress are hereby awarded in the sum of \$250,000.

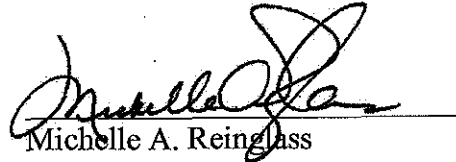
19
20 Interim Award: Claimant is awarded a total of \$ 473,395 consisting of \$223,395 in
21 economic damages and \$250,000 for non-economic compensatory damages.

22 23 **VI. ATTORNEYS' FEES AND COSTS**

24 Claimant is the prevailing party in this arbitration. She is entitled to attorneys' fees, costs
25 (including any cost of Arbitration borne by her) and expert witness fees pursuant to California

1 Government Code § 12965(b). Claimant shall submit an Application for Fees, which shall
2 include detailed time records of counsel, and a Cost Bill by **January 8, 2016**. Respondent may
3 submit objections, if any, to the Application for Fees and the Cost Bill by **January 18, 2016**. A
4 telephonic hearing on the Application for Fees and the Cost Bill is set for **Monday, January**
5 **25, 2016, at 9:30 a.m.** Judicate West will set up the call.

6
7
8 Date: December 31, 2015


Michelle A. Reinglass
Arbitrator

1
2 **PROOF OF SERVICE**

3 I am employed in the county of Orange, State of California. I am over the age of eighteen
4 and not a party to the within action, and my business address is: 1851 E. First Street, Suite 1600, Santa
Ana, CA 92705

5 On December 31, 2015, I served the following document: **AWARD OF ARBITRATOR** on the interested
6 parties in the matter of **JOSEPHINE DAVIS VS. ACCENTCARE HOME HEALTH OF
CALIFORNIA, INC., ET AL.** by placing a true and correct copy thereof enclosed in a sealed envelope
addressed as follows:

7 Laura Horton, Esq.
8 Flor C. Dery, Esq.
9 Horton Law Firm
9045 Corbin Avenue
Suite 260
10 Northridge, CA 91324
11 **EMail: laura@horton-law.com**
EMail: flor@horton-law.com

12 Robert J. Kane, Esq.
13 Peter L. Wucetich, Esq.
14 Stuart Kane LLP
620 Newport Center Drive
Suite 200
Newport Beach, CA 92660
15 **EMail: rkane@stuartkane.com**
EMail: pwucetich@stuartkane.com

16
17 X I am readily familiar with the business' practice for collection and processing of
18 correspondence and mailing with the United States Postal Service; such correspondence
would be deposited with the United States Postal Service the same day of deposit with
postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business.

19 X By Electronic Mail

20 X (State) I declare under penalty of perjury under the laws of the State of California that the
21 foregoing is true and correct.

22 — (Federal) I declare that I am employed in the office of a member of the bar of this court at
whose direction the service was made.

23 Executed on **December 31, 2015**, at Santa Ana, California.

24
25 
26 Rachelle Snow
Judicate West