has proven that discrimination or retaliation contributed to the employer's decision, but the employer asserts that one or more other nondiscriminatory reasons also exist, the burden shifts to the employer to establish as an affirmative defense that it would have taken the same action(s) even absent any protected activity. (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402; *Martori Bros., supra*, 29 Cal.3d at pp. 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) The employer must establish the "but for" affirmative defense by a preponderance of the evidence. (*McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304.)[7]

In the proposed decision, the ALJ found that Zink failed to establish that her reassignment to a non-classroom tutoring position constituted an adverse action and, therefore, that Zink failed to establish a prima facie case with regard to that allegation. Conversely, the ALJ found that Zink did establish a prima facie case of retaliation based on her placement on administrative leave and transfer to the middle school, but the District proved its affirmative defense that it would have taken the same actions even in the absence of protected activity. Zink argues that the ALJ made several errors.[8] We address each in turn.

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[7] While a respondent is free to assert this affirmative defense in any case in which it claims it took adverse action for a reason other than protected activity, it is often appropriate to separately analyze the affirmative defense when the evidence reveals mixed motives. Ultimately, however, the interplay between the charging party's burden to establish nexus and the respondent's burden to prove an affirmative defense is less formulaic than it may appear from our usual articulation of the *Novato* standards. In some cases, there is no need to separately assess the employer's affirmative defense, if the charging party has already disproven the defense in the course of establishing nexus.

[8] There is no dispute that Zink engage in protected activity by: (1) filing an unfair practice charge on December 24, 2015; (2) filing grievances on February 15 and June 17, 2016; and (3) sending letters to the District on February 15, April 11, June 13, and June 17, 2016, objecting to her treatment. However, we note that in analyzing Zink's activities, the ALJ relied on a line of cases that we partially disavowed in *Walnut Valley Unified School District* (2016) PERB Decision No. 2495, pp. 17-19 (*Walnut Valley*). There is also no dispute that the District officials responsible for the adverse acts knew of the protected activity.

on administrative leave and transferred her to a middle school. Neither party excepted to these findings, so they are not before us. (PERB Regulation 32300, subd. (c);[10] *County of Santa Clara* (2018) PERB Decision No. 2613-M, p 7 (*Santa Clara*).) Although Zink argues that we should also find adverse action because she was assigned no duties at MMS, we need not reach this exception given that it would not impact the outcome of the case. (PERB Regulation 32300, subd. (c); *Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 12 (*LACCD*).) We also decline to reach this exception because Zink's job duties at MMS are the subject of a separate pending unfair practice charge, PERB Case No. LA-CE-6207-E.[11]

The ALJ took note of the District's timing and apparent procedural irregularities, and therefore found that there was sufficient evidence that the District was at least partially motivated by unlawful animus against Zink's protected activity. Neither party excepted to this finding, and it is therefore not before us. (PERB Regulation 32300, subd. (c).)

Zink takes issue with the ALJ's conclusion that the District would have taken the same adverse actions against her based solely on nondiscriminatory reasons. Like the ALJ, we find that the record is replete with evidence that the District would have taken these actions whether or not Zink had participated in protected activities. Beginning in November 2014, an active parent group led a sustained campaign to remove Zink from her position, making numerous

[10] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[11] Zink filed two other unfair practice charges claiming retaliation against the District. When the instant matter was heard, PERB Case No. LA-CE-6095-E was on appeal to the Board following dismissal by the Office of General Counsel (OGC). Thereafter, the Board upheld the dismissal of some allegations and remanded the remaining allegations in LA-CE-6095-E to the OGC for issuance of a complaint. (*San Diego Unified School District* (2017) PERB Decision No. 2538.) Thereafter, in September 2018, PERB Case No. LA-CE-6095-E and Case No. LA-CE-6207-E, which concerns Zink's job duties at Marshall Middle School, were consolidated for hearing. The consolidated matter is currently pending before an ALJ.