Filed 7/20/04 Vaughn v. Llama CA2/6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MICHELLE VAUGHN,

Plaintiff and Respondent,

v.

LIVINOV LALAMA,

Defendant and Appellant.

2d Civil No. B159600
(Super. Ct. Nos. CIV194895, 195632)
(Ventura County)

Doctor Livinov Lalama appeals the judgment, amended judgments, and post-trial orders entered in favor of plaintiff Michelle Vaughn. We will vacate the punitive damages award, and remand for a new trial limited to punitive damages only. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 781 [defendant ordinarily not entitled to complete retrial following reversal of punitive damages award].) The judgment is otherwise affirmed.

FACTS AND PROCEDURAL HISTORY

This action involves the sexual harassment of and retaliation against Michelle Vaughn, a nurse at St. John's Regional Medical Center ("St. John's"), by a member of the medical staff. On April 14, 2000, Vaughn sued Doctor Lalama, alleging causes of action for sexual harassment, retaliation, and the intentional infliction of emotional distress, among others. Prior to trial, Vaughn settled a sexual harassment lawsuit that she brought against the hospital.

In 1997, Vaughn, a married woman with four children, graduated from the University of Southern California with a degree in nursing. Vaughn found nursing "rewarding and gratifying" and was excited to begin her career at St. John's. Lalama, an internist and cardiologist, was a longstanding member of St. John's medical staff. He practiced medicine from his Oxnard office and rendered medical care to his patients when hospitalized at St. John's.

In 1997, Lalama met Vaughn at the hospital. He looked at her "in a suggestive way" and remarked, "You're new here, aren't you?" Vaughn was taken "off guard" and felt uncomfortable. At times thereafter, Lalama placed his arm around Vaughn and "squeeze[d]" her. He also brushed against her breasts and frequently touched her. Lalama stated to Vaughn that she "had a nice ass," "really nice breasts," and that he "wanted to fuck [her] up the ass." He also asked to touch her breasts. Vaughn felt uncomfortable and embarrassed, and repeatedly asked Lalama to "leave [her] alone."

Lalama behaved similarly toward other nurses. Kendra Saenz testified that Lalama "scann[ed]" her body and made comments concerning her weight and her sexual relationship with her husband. On another occasion, when Saenz bent over to pick something up, Lalama stated: "You better watch out, or you're going to get something you might like or you just might enjoy." Christina Joyner testified that she felt uncomfortable when Lalama commented upon her figure. Lalama's sexual comments sometimes occurred in the presence of hospital patients.

In 1997 and 1998, Vaughn complained to the supervising nurses regarding Lalama's misbehavior. On January 9, 1999, she filed a written grievance with the hospital human resources department. In the grievance, Vaughn complained of 16 months of "sexual and verbal harassment" by Lalama, including his statements concerning her body and his desire "to fuck" her.

After Vaughn filed the grievance, Lalama became hostile, gave her "menacing" looks, and threw "verbal tirades" when working with her. He stated that he would "ruin" her and "make [her] pay." In the presence of a patient, Lalama threw a chart and "ripped the phone receiver from the wall" when Vaughn explained the patient's

condition. On another occasion, Lalama stated to nurse Roma Brister that "he would ruin [Vaughn]" and that she "would never work anywhere."

The medical staff by-laws of St. John's provide that physicians practicing within the hospital are responsible for directing and instructing the nursing staff. Physicians do not have the authority to discipline or dismiss nurses, but their criticisms "could have an impact" upon a nurse's employment. Nurse Brister stated that "[a physician] could initiate circumstances that would lead to [a nurse] being fired."

On March 16, 1999, Vaughn followed the oral orders of a medical staff physician and fed yogurt to a stroke patient, Mr. O'Hara. When the patient died, Lalama informed family members that Vaughn caused the patient's death. The family demanded a hospital investigation. St. John's reviewed the patient's medical care and determined that Vaughn provided appropriate care. The incident frightened Vaughn, however, and she feared that she might lose her nursing license.

In August, 1999, Vaughn again complained of Lalama's conduct to St. John's. She believed that his hostile behavior toward her jeopardized patient care. Vaughn stated that Lalama's behavior "went from sexual stuff to suggestive looks to disgusting comments to threats and menacing looks and screaming and yelling at me and putting patients in the middle . . . ."

In January, 2000, St. John suspended Lalama from hospital privileges for one week. After several days, however, he returned to the hospital, claiming that he could not find another physician to care for his patients.

On June 17, 2000, Vaughn left the hospital. She testified that she "didn't like going to work anymore and [she] was afraid to go to work." Vaughn's supervisors and coworkers described her as an excellent nurse who was respected by the medical staff. Vaughn moved to a rural county where she now practices nursing.

At the time of trial, Lalama continued to practice cardiology and treat patients at St. John's. He denied making sexual comments to Vaughn or to others, and denied behaving improperly. Lalama also stated that he and Vaughn had "a personality conflict" and he denied that he blamed her for the death of patient O'Hara.

By special verdict, the jury found that Lalama was "a supervisory employee" of St. John's and also Vaughn's "employer." It found that Lalama sexually harassed Vaughn, created a hostile work environment, caused her adverse employment action, and intentionally inflicted emotional distress. The jury awarded Vaughn $250,000 non-economic damages, $50,000 economic damages, and $1,000,000 punitive damages. It found that St. John's was 20 percent liable for Vaughn's damages.

The trial court denied Lalama's motion for a new trial and for judgment notwithstanding the verdict. It reduced Vaughn's compensatory damages to reflect the jury's apportionment of liability, as well as St. John's earlier settlement with Vaughn. The trial court awarded Vaughn her attorney's fees and stated in part: "It is clear that Dr. Lalama engaged in harassing and deeply disturbing activities for many years."

Lalama appeals and contends: 1) he cannot be personally liable under the California Fair Employment and Housing Act (FEHA [Gov. Code, § 12900 et seq]);[1] 2) the trial court erred by permitting evidence of misbehavior that occurred outside the one-year limitations period for intentional infliction of emotional distress; and 3) the award of punitive damages is excessive.

DISCUSSION

I.

Lalama argues that he cannot be personally liable for "unlawful employment practices" in violation of FEHA because he was neither Vaughn's employer, an agent of her employer, nor a supervisory employee of her employer. (Former § 12940, subds. (f) & (h); now § 12940, subd. (h) & (j)(1); *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1135 [FEHA applies only to "unlawful employment practices"].) He relies upon decisions concluding that supervisors or agents of the employer are not personally liable for *discrimination* claims under FEHA. (*Reno v. Baird* (1998) 18 Cal.4th 640, 643, 645, fn. 2 [FEHA does not permit individuals to sue and hold liable individuals for

[1] All further statutory references are to the Government Code unless otherwise stated.

discrimination claims; court expresses no opinion concerning harassment claims]; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 67-71 [the "agent" language of § 12926, subd. (d) not intended to expose individual employees to personal liability on *discrimination* claims]; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1328 ["agent" language imposes vicarious liability on employer and not personal liability on supervisor for failing to prevent sexual harassment of plaintiff].)

Former section 12940, subdivision (h)(3)(A), now section 12926, subdivision (d)), defines "employer" as including "any person acting as an agent of an employer, directly or indirectly." The trial court instructed concerning Lalama's personal liability as an agent of St. John's. There is ample evidence that Lalama acted as St. John's agent in directing and instructing nurses, including Vaughn, regarding patient care. St. John's medical staff by-laws provide that physicians practicing within the hospital are responsible for instructing the nursing staff. Nurses testified that physician criticisms of nursing staff could affect a nurse's employment status. Under these circumstances, Lalama factually was an agent of Vaughn's employer.

Pursuant to general principles of agency law, an agent is "one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.) An agent "works not only *for*, but *in the place of*" his principal. (*Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 205-206.) "The distinguishing features of an agency . . . are its representative character and its derivative authority. . . . 'Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and *to exercise a degree of discretion* in effecting the purpose of the principal.'" (*Id.,* at p. 206.) Applying these common law principles here, Lalama was an agent of St. John's.

Our Supreme Court has held that the "agent" language of FEHA does not impose personal liability upon a supervisory employee for purposes of *discrimination* claims. (*Reno v. Baird, supra,* 18 Cal.4th 640, 643.) The Supreme Court expressly did not express an opinion "regarding individuals' liability for harassment." (*Id.,* at p. 645, fn. 2.) It noted that FEHA treats sexual harassment and discrimination differently, however,

because harassment is conduct not necessary to a supervisor's job performance. (*Ibid*.) "'[H]arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.'" (*Id.,* at pp. 645-646.) Under the circumstances, the "agent" language properly imposes personal liability upon Lalama for sexual harassment. (*Carrisales v. Department of Corrections, supra,* 21 Cal.4th 1132, 1137 [discrimination and harassment questions must be decided separately].)

We need not discuss whether Lalama was a "supervisory employee" or even an employee of St. John's. We also do not discuss Vaughn's contention that Lalama is personally liable for sexual harassment because FEHA prohibits "any . . . person" from committing harassment. (Former § 12940, subd. (h)(1), now subd. (j)(1); See, *Carrisales v. Department of Corrections, supra,* 21 Cal.4th 1132, 1135-1136.)

In any event, the jury found that Lalama intentionally inflicted emotional distress upon Vaughn. (*Carrisales v. Department of Corrections, supra,* 21 Cal.4th 1132, 1136 [plaintiff may bring tort action against defendant who is not covered by FEHA].) The jury did not apportion damages between the FEHA causes of action and the intentional infliction of emotional distress cause of action. The finding concerning infliction of emotional distress supports the judgment. (*Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 17 [where several counts or issues tried and general verdict rendered, judgment will be affirmed if any one supported by substantial evidence].)

II.

Lalama argues that the trial court erred by admitting evidence of misconduct occurring outside the statute of limitations for infliction of emotional distress. (Code Civ. Proc., § 340, subd. (3) [one-year limitations period for personal injuries (intentional infliction of emotional distress)]; now Code Civ. Proc., § 335.1 [two-year limitations period for personal injuries].) He points out that the sexual statements and batteries occurred outside the one-year limitations period. Lalama asserts that the error is prejudicial because a "reasonable chance" exists that the misconduct evidence affected the verdict. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [trial error

harmless unless there is a reasonable probability--"a reasonable chance"--that it affected verdict].)

The trial court did not err because the evidence is relevant to prove Lalama's intentional infliction of emotional distress. Evidence Code section 1101, subdivision (b), permits evidence of misconduct to prove "intent," "plan," or "absence of mistake or accident." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1162 [evidence of defendants sexual misconduct with other employees occurring before plaintiff's employment held admissible].) Vaughn testified that after she filed the first grievance in January 1999, Lalama "scream[ed] and yell[ed]" at her and "put[] patients in the middle." He refused to consult with her concerning patients. Vaughn believed that Lalama "tried to set [her] up" on several occasions so that the hospital would dismiss her for incompetence. In May 1999, when she attempted to speak with Lalama concerning a patient, he threw a chart. In August 1999, Vaughn lodged a second complaint and five months later, the hospital suspended Lalama. Vaughn testified that Lalama's angry behavior led to her resignation. Evidence of the sexual misconduct explains Lalama's motives and intent in mistreating Vaughn in 1999 and 2000, and in causing her to leave the hospital.

Moreover, as the trial court ruled, evidence of the misconduct relates to Lalama's liability for punitive damages. "Evidence of [Lalama's] past conduct, and that he had been warned or reprimanded as a result of that conduct, tended to prove that he . . . acted either with the intent to cause injury or with a willful and conscious disregard of [Vaughn's] rights." (*Weeks v. Baker & McKenzie, supra,* 63 Cal.App.4th 1128, 1163.)

III.

Lalama argues that the award of $1 million punitive damages is excessive because it greatly exceeds his $209,000 net worth. He points out that the purpose of punitive damages is to deter the defendant, not destroy him. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 112 ["[W]ell-established rule that a punitive damages award is excessive if it is disproportionate to the defendant's ability to pay"].) Lalama relies upon well-settled authority concluding that punitive damages exceeding 10 percent of a defendant's net worth are excessive. (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001)

89 Cal.App.4th 577, 582 [collecting decisions]; *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1163 [10 percent cap generally recognized by courts]; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1593, 1596 [punitive damages award "must be tailored to the defendant's financial status"; award that represents 28% of doctor-defendant's net worth excessive].) He also relies upon decisions reversing punitive damage awards that constitute a significant amount of a defendant's annual income. (*Adams v. Murakami, supra,* 54 Cal.3d 105, 112-113 [discussing decisions].) Lalama asserts that a complete retrial is required to ensure him a fair trial. (*Torres v. Automobile Club of So. California, supra,* 15 Cal.4th 771, 776 [court may remand for retrial of limited issue unless denial of fair trial would result].)

During the punitive damages phase of trial, Lalama testified that his net worth was $209,000. He stated that his medical corporation's gross income ranged from $485,879 to $542,340 annually for the prior four years. From this gross income, he earned an annual salary ranging from $252,000 to $382,000. Lalama was then 56 years old and still practicing medicine. He testified that he owned real properties valued at $485,000 (encumbered by a $250,000 - $300,000 mortgage); $75,000 (medical office); and $450,000 (acre of land).

The purpose of punitive damages is to punish wrongdoers and deter the commission of wrongful acts. (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp, supra,* 89 Cal.App.4th 577, 581.) An award of punitive damages must not exceed that amount necessary to punish and deter. (*Ibid.*) In determining whether a punitive damages award is excessive, our Supreme Court requires consideration of defendant's reprehensibility, the actual harm to plaintiff, and the wealth of defendant. (*Id.,* at pp. 581-582.) Such determination, however, "is admittedly more art than science." (*Adams v. Murakami, supra,* 54 Cal.3d 105, 112.)

Here neither defendant's reprehensibility nor the harm to plaintiff is in question. The sole issue is whether the amount of damages exceeds defendant's ability to pay. (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp., supra,* 89 Cal.App.4th 577, 582 [various measure of defendant's ability to pay exist].) Measured by either

Lalama's self-appraisal of his net worth, or the evidence of his annual personal income, $1 million punitive damages are excessive. (*Id.,* at pp. 582-583 ["'[N]et worth' is too easily subject to manipulation to be the sole standard for measuring a defendant's ability to pay."].) The punitive damages awarded here equal or surpass Lalama's self-appraised value of his real properties. The damages are also nearly three times his historical annual salary. As a matter of law, the punitive damages awarded are excessive because they exceed Lalama's ability to pay.

Moreover, retrial on the limited issue of punitive damages would not deny Lalama a fair trial or due process of law. (*Torres v. Automobile Club of So. California, supra,* 15 Cal.4th 771, 776.) "[B]ecause there are adequate safeguards for ensuring that the jury in a limited retrial can maintain a reasonable relationship between actual and punitive damages, there ordinarily is no need for a complete retrial to guard against an excessive punitive damages award." (*Id.,* at p. 781.)

We vacate the punitive damages award and remand for a new trial limited to punitive damages. The judgment is otherwise affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Melinda A. Johnson, Judge

Superior Court County of Ventura

Horvitz & Levy, Andrea M. Gautherier, Nina E. Scholtz; Maranga & Morgenstern, Robert Morgenstern and Jonathan Birdt for Defendant and Appellant.

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