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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ELIZABETH VAZQUEZ, Plaintiff and Appellant, v. THE CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES, Defendant and Respondent.	A100414 (Sonoma County Super. Ct. No. SCV221354)

Dr. Elizabeth Vazquez appeals from a judgment for the California Department of Developmental Services (the Department), following a grant of judgment notwithstanding the verdict (JNOV) on Vazquez's claim that her employer had retaliated against her as a "whistle-blower." Appellant contends the trial court should instead have granted her a new trial, based on what she construes as inconsistencies in the jury's verdict, and the trial court's exclusion of certain evidence regarding a non-party witness. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, appellant began working as a physician at the Sonoma Developmental Center (SDC). She later became the Public Health Officer and a member of the Reasonable Accommodation Committee (RAC). Appellant contends that she was forced out of her job after she "exposed unhealthy and illegal practices at SDC," opposed

administration attempts to intimidate RAC members, and reported the retaliation to which she was being subjected for "speaking out on behalf of patient safety and on behalf of injured workers."

Appellant testified that she had expressed her concerns on several occasions to Executive Director Tim Meeker, but her complaints were not promptly investigated. Specific acts of alleged retaliation included the hiring of a new physician to cover employee health, reduction of appellant's staff, and her reassignment while pregnant. Appellant also felt humiliated when Executive Director Meeker excused her from attending a meeting of supervisors, managers, and department heads to discuss concerns raised by a licensing group.

The Department's witnesses saw things differently. Dr. Victor Iacovoni, the SDC Medical Director, testified that he had not known of appellant's complaints to the SDC administration before he became Medical Director in August 1996, but that appellant had told him she was overworked and they had discussed hiring another doctor to take over some of her responsibilities.[1] Dr. Iacovoni also testified that a member of appellant's staff was one of several employees laid off for budgetary reasons. Nurse Dan Patten testified that he had been reassigned at his own request, and had not felt targeted for being friendly with appellant. Appellant herself testified that Dr. Iacovoni agreed to accommodate her pregnancy restrictions after receiving documentation of her medical condition, and appellant was not assigned to work with patients during that time. Appellant testified that Dr. Iacovoni had initially refused to grant reasonable pregnancy accommodations, and had disclosed her confidential medical information without her permission. Dr. Iacovoni testified, however, that he had already heard from others about

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[1] Dr. Daniel Jenkins, who had originally recruited appellant to work at SDC, testified that appellant had been very unhappy with aspects of her work in employee health. Dr. Iacovoni had also told Dr. Jenkins that appellant was unhappy with her employee health responsibilities. After Dr. Edward Gallagher was assigned to employee health, appellant "proctored" him and he and appellant covered for each other on their days off. Management did not support Dr. Gallaher's later proposal that his job duties be expanded to include public health, and appellant was not replaced as Public Health Officer until she took stress leave.

appellant's pregnancy, and had mentioned it only to Dr. Jenkins, who was responsible for coordinating physician assignments.

Appellant filed a formal complaint alleging harassment and retaliation by Dr. Iacovoni, as a result of which she contends she was subjected to additional acts of retaliation. Appellant also reported Dr. Iacovoni to the SDC Medical Credentials Committee, allegedly resulting in further retaliation, including a campaign to force appellant to quit her job.[2]

Appellant also claimed retaliation by Dr. Michael Lash, a member of the Medical Executive Committee, who disagreed with the way she handled an outbreak of gastroenteritis as Public Health Officer. Dr. Lash told a public health nurse that he thought the restrictions imposed by appellant were "bogus" and appellant had concocted an epidemic to give herself something to do. The restrictions were also controversial among other personnel. Other doctors had also expressed concern to Medical Director Jansen that appellant was avoiding patient care.

Appellant testified that Executive Director Meeker failed to investigate appellant's suspicion that Dr. Lash was the author of an anonymous memo placed in every doctor's mailbox.[3] The memo congratulated the staff for allowing "a common benign pediatric illness" to be turned into "an epidemic," and wondered "if there is an ulterior motive for this medical disgrace." Appellant also testified that an SDC police officer warned her to "watch [her] back" with reference to Dr. Lash, and Dr. Jansen had warned her to avoid being alone with Lash. Appellant further reported that in January 1998, while on maternity leave, she had attended a staff meeting at Dr. Lash's request, where the ensuing discussion made her feel she had been "lured to that meeting on [a] pretext" "so that [she] would be threatened and intimidated so that [she] would not return at the end of [her]

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2 Dr. Iacovoni subsequently resigned. The new Medical Director, Dr. George Jansen, testified that on his first day of work at SDC, Executive Director Meeker told him: "Watch out for Dr. Vazquez. She'll get you, too. She's a Lady Macbeth." Meeker denied making the statement.

3 At the hearing pursuant to Evidence Code section 402, however, outside the presence of the jury, it emerged that appellant had also told a Department investigator that she suspected from the language used in the memo that a Dr. Conroy was involved.

maternity leave." Appellant later conceded, however, that the notice of the meeting was in the form of a memo addressed to all organized medical staff members, regarding the final draft of the new staff bylaws.

On April 4, 2000, appellant received a newspaper column in the mail. The column was entitled "When a joke is just a joke," and certain language had been underlined. Appellant became "very upset . . . went to see her psychologist, and never returned to work at SDC." No note or identification accompanied the column, although appellant concluded that Dr. Lash's handwriting was on the envelope.

Answering questions on the special verdict form provided by appellant's counsel, the jury repeatedly concluded that the Department had not retaliated against Vazquez for exercising her constitutional and statutory rights. The jury also found, however, that the Department had failed "to take immediate and appropriate action to investigate plaintiff's claims and remedy any such retaliation," awarding her $250,000.[4]

The trial court granted the Department's motion for JNOV under the authority of *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289 (*Trujillo*), which holds that an employer's failure to take all reasonable steps necessary to prevent discrimination and harassment will not support an award of damages "where there has

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4 The special verdict form was completed by the jury as follows: "QUESTION NO. 1: Did plaintiff exercise her right . . . under the California Constitution, Article I, section 2, to speak out on matters of public importance?" "YES" "QUESTION NO. 2: Did defendant retaliate against plaintiff because she spoke out about matters of public importance?" "NO" "QUESTION NO. 3: "Did plaintiff exercise her right under California Labor Code section 1102.5 to report to an appropriate government official what she had reasonable cause to believe was a violation of statute or regulation?" "YES" "QUESTION NO. 4: Did defendant retaliate against plaintiff because she reported to an appropriate government official what she had reasonable cause to believe was a violation of statute or regulation?" "NO" "QUESTION NO. 5: Did plaintiff exercise her right under the California Fair Employment & Housing Act to oppose what she in good faith believed to be a violation of the California Fair Employment & Housing Act?" "YES" "QUESTION NO. 6: Did defendant retaliate against plaintiff because she opposed what she believed in good faith to be a violation of the California Fair Employment & Housing Act?" "NO" "QUESTION NO. 7: Did plaintiff complain that she was being subjected to retaliation for her protected activities?" "YES" "QUESTION NO. 8: Did defendant fail to take immediate and appropriate action to investigate plaintiff's claims and remedy any such retaliation?" "YES" Because the jury had answered "yes" to one pair of questions, numbers 7 and 8, the jury proceeded to the following questions: "QUESTION NO. 9: "What amount of money, if any, do you award to Plaintiff to compensate her for any lost income she has suffered?" "NO AWARD" "QUESTION NO. 10: "What amount of money, if any, do you award to Plaintiff to compensate her for any physical, mental or emotional injuries she has suffered?" "$250,000"

been a specific factual finding that no such discrimination or harassment actually occurred at the plaintiffs's workplace." The trial court also denied appellant's motion for a new trial. This appeal followed.

DISCUSSION

Appellant contends the trial court should not have granted JNOV for the Department because the jury's findings in her favor were supported by substantial evidence. As the *Trujillo* court pointed out, however: " ' " '[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings . . . .' [Citation.]" [Citation.]' [Citation.] With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. [Citation.] The verdict's correctness must be analyzed as a matter of law." (*Trujillo*, *supra*, 63 Cal.App.4th at p. 285.) Appellant's position is defeated by the jury's repeated and specific findings that she was not retaliated against for her protected activities.

Government Code section 12940, subdivision (k) [former subd. (i)], provides that it is an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[5] Damages cannot be awarded for failure to take such steps, however, unless the jury also concludes that discrimination or harassment actually took place. (*Trujillo*, *supra*, 63 Cal.App.4th at pp. 285, 288-289.) The *Trujillo* court concluded that, in the absence of discrimination or harassment, the Department of Fair Employment and Housing would have jurisdiction to remedy such procedural inadequacies. (*Id*. at p. 289.)

Appellant attempts to distinguish *Trujillo* on the ground that plaintiffs there did not challenge the jury's findings that there was no discrimination or harassment in their workplace. The *Trujillo* plaintiffs argued instead that section 12940, former subdivision (i), provides an independent basis for liability, an argument the court rejected. Appellant urges that she, by contrast, has challenged the jury's findings of no retaliation, contending

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5 Subsequent statutory references are to the Government Code unless otherwise indicated.

they are not supported by substantial evidence. Her analysis of the evidence presented in the trial court, however, is deficient. It conspicuously fails to discuss the substantial evidence that does, indeed, support those findings.

In her reply brief, appellant states that she disputes the Department's statement of facts, but "will not bother identifying all the misstatements and distortions contained therein, since the trial court and this Court are required to disregard conflicting evidence on [the Department's] behalf and must accept as true the evidence most favorable to [appellant]." Appellant takes the position that because the trial court granted the Department a judgment notwithstanding the verdict in appellant's favor, the issue to be considered is whether there was substantial evidence to support the jury's findings in appellant's favor. Those damages findings, however, were based on the erroneous structure of appellant's special verdict form, which effectively created a non-existent cause of action for violation of section 12940, subdivision (k), as discussed above. Thus, as to the jury's findings of no retaliation, the trial court is not required to accept the evidence allegedly supporting appellant's version of the facts. Instead, it is the Department's evidence in support of the jury's findings of no retaliation that is viewed in the most favorable light.

The jury was not required to accept appellant's interpretation of the motivation of other witnesses in opposition to their own testimony. Nor was the jury required to infer a causal link between appellant's engagement in protected activities and the alleged adverse employment actions of which she complained. The jury concluded to the contrary. We do not reweigh the evidence on appeal. The jury's repeated findings that there had been no retaliation were supported by substantial evidence as set out above, viewing the evidence in the light most favorable to the prevailing party. (See *Rosenbaum v. Security Pacific Corp.* (1996) 43 Cal.App.4th 1084, 1088-1089.)

Appellant also contends that the exclusion of evidence regarding Dr. Lash's drug use impaired her ability "to fully explain to the jury why she left SDC on April 4, 2000, never to return to work." After conducting an extended hearing pursuant to Evidence Code section 402, the trial court ruled that certain evidence concerning Dr. Lash's alleged

history of violent behavior while on drugs would not be presented to the jury because it was too remote in time and not relevant to appellant's claims.[6] The court did admit evidence relating to appellant's interactions with Dr. Lash, including testimony regarding the mailing of the newspaper editorial which allegedly prompted her departure on medical leave. The court also ruled admissible evidence regarding incidents in which appellant testified she observed Dr. Lash's hostility to patients' parents and an incident where a nurse allegedly told appellant Dr. Lash had yelled at her on the telephone. Appellant was also permitted to testify that Dr. Jansen had warned her not to be alone with Dr. Lash, and that an SDC police officer had told her to "watch [her] back" with reference to Dr. Lash. Thus, appellant was given a fair opportunity to make her case. The jury, however, was not convinced. And while appellant now claims she was "terrified" when she received the newspaper editorial, she testified that "it wasn't a threatening article. It was an offensive article." A nurse who had been with her confirmed this had been appellant's reaction at the time she received the missive. Appellant has failed to show that the trial court abused its discretion in its evidentiary rulings.[7] (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)

Appellant also contends the trial court should have ordered a new trial because the jury rendered "inconsistent verdicts." In fact, the jury clearly and consistently found that appellant had not been subjected to retaliation for engaging in protected conduct. Its additional finding that the Department failed to promptly investigate her claims and

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6 The incident in question had occurred in 1977, and allegedly involved damage to a patient's lip and eardrum during a surgical procedure Dr. Lash performed while under the influence of cocaine. *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, on which appellant relies, is distinguishable. *Beyda* involved the relevance of the plaintiff's knowledge of other employees' experiences of sexual harassment similar to the conduct of which the plaintiff herself had complained. (*Id*. at p. 519.) The court here ruled that the 1977 incident was too remote and not sufficiently similar to planitiff's allegations to be probative. The court below also excluded evidence regarding Dr. Lash's August 1999 positive drug test for cocaine, concluding its probative value was minimal and its admission would be both unduly time consuming and potentially confusing to the jury.

7 Appellant also complains that defense counsel unfairly stated during argument that "nothing happened" between the distribution of the gastroenteritis memo and appellant's receipt of the newspaper editorial in the spring of 2000. She raised no objection in the trial court, however, nor has she shown prejudice from this comment.

remedy "any such retaliation" was not necessarily inconsistent, and does not constitute an independent finding of retaliation. Instead, the award of damages lacks a proper legal foundation because of the erroneous structure of the special verdict form prepared by appellant.

Moreover the case on which appellant relies, *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336 (*Shaw*), is inapposite. In *Shaw*, a wrongful termination case, "[a] separate verdict was rendered on each cause of action as to each defendant." (*Id*. at p. 1341, fn. 4.) The jury found for the employer on the breach of contract claim, but also awarded Shaw damages for breach of the implied covenant of good faith and fair dealing. (*Ibid*.) The appellate court concluded these inconsistent verdicts required a new trial.[8] (*Id*. at pp. 1344-1346.) In appellant's case, by contrast, the jury's findings are not in direct conflict. Furthermore, unlike the employer in *Shaw*, the Department here has not conceded that the jury's findings are inconsistent. (*Id*. at p. 1345.) Nor was the trial court required to grant a new trial on the ground that the jury had reached a compromise verdict because it was "clearly divided." (Contrast *id*. at p. 1346 [issue of liability sharply contested, with jury voting nine-to-three in favor of plaintiff, but awarding no damages despite testimony of employer's expert setting plaintiff's minimum loss at $200,000].)

The purpose of a motion for JNOV " 'is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases where the verdict rendered is without foundation.' [Citation.]" (*Sukoff v. Lemkin* (1988) 202 Cal.App.3d

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8 The *Shaw* court explained the inconsistency as follows: "The jury's finding that there was no breach of contract implies it believed Shaw was an at-will employee. The other possibility, that [the employer] had cause to dismiss Shaw, is refuted by the wrongful termination verdict; the determination that Shaw was fired as a whistleblower, and not for sexual harassment, necessarily means the jury felt that [the employer] did not have good cause to rid itself of Shaw. Yet the finding that [the employer] acted in bad faith implies the jury believed Shaw could only be dismissed for cause. The upshot is findings that are irreconcilable: that Shaw was an at-will employee and that he was not." (*Shaw*, *supra*, 83 Cal.App.4th at p. 1345.) The jury had also "found Shaw was wrongfully discharged but declined to award any damages." (*Id*. at p. 1341, fn. 4.) A new trial was also granted on the ground that there had been a compromise verdict on the wrongful termination claim. (*Id*. at p. 1346.)

740, 743; accord, *Trujillo*, *supra*, 63 Cal.App.4th at p. 284.) As in *Trujillo*, *supra*, JNOV was properly granted here.

DISPOSITION

The judgment is affirmed.

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Corrigan, J.

We concur:

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McGuiness, P.J.

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Parrilli, J.