Opinion issued September 2, 2021.

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00044-CV

OAKBEND MEDICAL CENTER, Appellant

V.

DAWN SIMONS, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Case No. 14-DCV-216064

MEMORANDUM OPINION[1]

---

[1] We issued our original opinion in this appeal on August 4, 2020. Appellee Dawn Simons filed a motion for rehearing and/or motion for en banc reconsideration. We grant the motion for rehearing, withdraw our August 4, 2020 opinion and judgment, and issue this opinion and judgment in their stead. We deny Simons' motion for en banc reconsideration as moot. *In re Wagner*, 560 S.W.3d 311, 312 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding [mand. denied]) ("Because

Appellant OakBend Medical Center ("OakBend") appeals the judgment rendered on a jury verdict in favor of appellee Dawn Simons ("Simons") on her claims brought under the Texas Whistleblower Act.[2] In four issues, OakBend contends Simons presented insufficient evidence to (1) satisfy (a) the objective and subjective prongs of the "good faith" standard for her first complaint and (b) the objective prong for her second complaint, (2) demonstrate OakBend knew about her second complaint to the Occupational Safety and Health Administration ("OSHA") before it suspended her and terminated her employment, (3) support the jury's award of emotional distress damages, and (4) support the jury's award of lost wages and benefits. We affirm.

Background

A. Factual History

OakBend, a municipal hospital authority, hired Simons to work as a staff nurse in its emergency room on June 27, 2011. At the time of her hire, Simons received orientation materials covering, among other things, the hospital's safety policies and the reporting of safety and security issues. OakBend promoted Simons to emergency room charge nurse approximately six months later.

---

we issue a new opinion in connection with the denial of rehearing, the motion for en banc reconsideration is rendered moot.").

[2] TEX. GOV'T CODE § 554.002.

In 2012, a patient attacked Simons at work, punching her in the jaw and breast. An emergency medical services crew and other hospital nurses came to her aid and eventually subdued the patient. A police report was filed, and the patient received a five-year sentence for assaulting medical personnel.

In December 2013, Simons learned of a "sentinel event" (the technical term for an unexpected death at the hospital) that occurred during the night shift involving one of her patients.[3] The on-duty security officer assigned to watch the patient asked a nurse to watch the patient while the officer unlocked the main hospital doors.[4] When the nurse left the patient unattended to respond to an emergency involving an infant, the patient left the hospital and was hit by a train.

On December 12, 2013, Simons filed a complaint with OSHA ("first complaint") stating that "nurses and staff are threatened and physically attacked by patients. There is not adequate security to protect employees." Simons believed that several of the security officers, one of whom she described as being in poor health and another as too old, were physically incapable of providing security to patients and staff. She testified that when she made her complaint, she felt that "we needed help" because the hospital was in an area with "a ton of drug use" and some patients

---

[3] At the time of the incident, Simons worked the day shift from 7:00 a.m. to 7:00 p.m.

[4] Simons testified that it was standard practice for the hospital to lock its main doors from 9:00 p.m. to 6:00 a.m.

"are difficult to deal with." Simons testified OakBend had only one security officer on duty for its four facilities, including its two main facilities which are about fifteen minutes away from one another, and that the on-duty officer may not be present at the location where he was needed. Following an investigation, OSHA determined that it could not substantiate Simons' complaint.

After Simons filed her complaint, her supervisor, Rhonda Abbe, told her that some members of the administration felt she was insubordinate and wanted her removed. At the time, Simons had received no negative counseling.

In a letter dated April 9, 2014, OakBend advised Simons that it would not reimburse her tuition for seeking a nurse practitioner license. Noting its current policy that "[t]he course must be of direct value to the department in which the employees' current position is held," OakBend stated that it "does not employ the position 'Advanced Registered Nurse Practitioner.'" Simons testified OakBend previously had reimbursed her tuition even though her prior tuition reimbursement application advised OakBend she was taking courses to attain a nurse practitioner license. Simons further testified that she worked alongside nurse practitioners in the emergency room at OakBend. On cross-examination, Simons admitted she did not have any personal knowledge over whether OakBend employed nurse practitioners.

On April 16, 2014, Simons filed a second complaint with OSHA ("second complaint"). She claimed that OakBend had denied her tuition reimbursement in

retaliation for her having filed her first complaint with OSHA about OakBend's inadequate security. A few days later, on April 23, 2014, Frank Arch ("Arch"), an investigator with the Texas Department of State Health Services ("DSHS"), arrived at OakBend to investigate an allegation that Simons had kicked a patient on April 4, 2014.

Simons learned that Eddie Jay Thatcher ("Thatcher"), a security officer at OakBend, had filed a complaint reporting he witnessed Simons kick a patient. The patient, who tested positive for several drugs, was asleep on a stretcher when Simons came into the room to wake him so that a psychiatric assessment nurse could evaluate him. According to Thatcher, Simons said, "I'm going to make him as uncomfortable as possible" and kicked the patient in the foot. Simons told Arch that she did not kick the patient but had only tapped his foot, and that he woke up screaming and cursing at her.

On April 23, 2014, as a result of his investigation, Arch advised OakBend that it had an "immediate jeopardy" situation,[5] further instructing OakBend to submit a plan to address how it intended to remove the threat. Later that same day, OakBend suspended Simons pending further investigation of the incident.

[5] Arch testified that "immediate jeopardy" means a threat has been made to a patient's safety or a potential threat to a patient's safety exists.

On May 27, 2014, OakBend notified Simons that a nursing peer review committee proceeding was scheduled for June 17, 2014, to review the April 4 incident. Simons did not participate or appear at the proceeding. Instead, she filed suit against OakBend on July 10, 2014, asserting a cause of action under the Texas Whistleblower Act.

On August 20, 2014, OakBend terminated Simons' employment. And on August 21, 2015, the United States Department of Labor advised Simons in writing that it had concluded its investigation of her second complaint finding no reasonable cause to believe OakBend had retaliated against her by denying her tuition reimbursement and ultimately terminating her employment.

B. Trial Proceedings

Trial began on May 1, 2018. After both sides rested, the trial court submitted the charge to the jury. The jury answered the questions on liability and damages in relevant part as follows:[6]

> **QUESTION NO. 1**
>
> Was Dawn Simons[']s December 2013 report to the Occupational Safety and Health Administration ("OSHA") that OakBend had inadequate security made in good faith and a cause of OakBend denying her request for tuition reimbursement?
>
> The report was a cause of the tuition reimbursement denial if it would not have occurred when it did but for the report's being made.

[6] The charge reflects that the jury's verdict was not unanimous.

Dawn Simons does not have to prove the report was the sole cause of the tuition reimbursement being denied.

"Good faith" means that (1) Dawn Simons believed that the conduct reported was a violation of the law and (2) her belief was reasonable in light of her training and experience. "Good faith" does not require that the allegations in the report need to be true.

Answer: Yes or No: Yes

QUESTION NO. 2

What sum of money, if paid now in cash, would fairly and reasonably compensate Dawn Simons for her damages, if any, that resulted from such conduct?

. . . .

a. Loss of tuition reimbursement.

Answer: $5,000.00

b. Compensatory damages in the past, which include [emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-economic losses].

Answer: $16,000.00

QUESTION NO. 3

Were the reports by Dawn Simons to OSHA that OakBend had inadequate security or that OakBend retaliated by revoking her tuition reimbursement made in good faith and a cause of OakBend suspending or terminating her employment?

The report was a cause of the suspension or termination if it would not have occurred when it did but for the report's being made. Dawn Simons does not have to prove the report was the sole cause of her suspension or her termination.

"Good faith" means that (1) Dawn Simons believed that the conduct reported was a violation of the law and (2) her belief was reasonable in light of her training and experience. "Good faith" does not require that the allegations in the report need to be true.

Answer: Yes or No: Yes

QUESTION NO. 4

What sum of money, if paid now in cash, would fairly and reasonably compensate Dawn Simons for her damages, if any, that resulted from such conduct?

. . . .

a. Lost wages during the period of suspension or termination.

Answer: $26,000.00

b. Lost employee benefits other than loss of earnings.

"Benefits" include [sick-leave pay, vacation pay, profit-sharing benefits, stock options, pension fund benefits, housing or transportation subsidies, bonuses, monetary losses incurred as a result of loss of health, life, dental, or similar coverage].

Answer: $8,000.00

OakBend filed a motion for judgment notwithstanding the verdict. The trial court denied the motion and entered a final judgment in favor of Simons.[7] This appeal followed.

[7] The trial court awarded Simons $35,000 in attorney's fees.

Discussion

In its first issue, OakBend contends Simons is not protected by the Texas Whistleblower Act because she presented no evidence that she acted in good faith in filing either of her complaints with OSHA. In its second issue, OakBend argues Simons offered no evidence that OakBend knew about her second complaint when it suspended Simons' employment and thus, her second complaint cannot satisfy the causal connection necessary for her retaliation claim. In its third and fourth issues, OakBend asserts Simons failed to present evidence to support the jury's award of emotional distress damages, lost wages, and benefits.

A. Standard of Review

In conducting a legal sufficiency review, we view the evidence in a light that tends to support the finding of the disputed facts and disregard all evidence and inferences to the contrary. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001). We must credit evidence favorable to the verdict if reasonable jurors could, disregard contrary evidence unless reasonable jurors could not, and reverse the jury's determination only if the evidence presented at trial would not enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

We may sustain a legal sufficiency, or no-evidence, point if the record reveals one of the following: (1) the complete absence of a vital fact; (2) the court is barred

by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence established conclusively the opposite of the vital fact. *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). If more than a scintilla of evidence exists, it is legally sufficient. *Lee Lewis Constr*., 70 S.W.3d at 782. More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Id*. at 782–83.

B. Texas Whistleblower Act

The Texas Whistleblower Act ("Act") provides that "[a] state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T CODE § 554.002(a). The Act is designed to enhance openness in government by protecting public employees from retaliation by their employers when they report violations of law in good faith and to secure lawful conduct on the part of those who direct and conduct the affairs of government. *Tex. Dep't of Crim. Justice v. McElyea*, 239 S.W.3d 842, 849 (Tex. App.—Austin 2007, pet. denied).

In *Wichita County v. Hart*, 917 S.W.2d 779 (Tex. 1996), the Texas Supreme Court held that, in the context of the Act, good faith is analyzed using both a subjective and an objective standard. *Id.* at 784. "'Good faith' means that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience." *Id*. The first element—the "honesty in fact" element—ensures that a public employee seeking a remedy under the Act believed she was reporting an actual violation of law. *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 320 (Tex. 2002) (citing *Hart*, 917 S.W.2d at 784–85). The second element ensures the reporting employee receives protection only if a reasonably prudent employee in similar circumstances would believe the reported conduct constituted a violation of law. *Id*. (citing *Hart*, 917 S.W.2d at 785).

To prove a claim under the Act, a public employee must demonstrate that she reported a violation of law in good faith and that the employer's adverse employment action would not have occurred had the report not been made. *City of Hous. v. Levingston*, 221 S.W.3d 204, 226 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000)); *see also* TEX. GOV'T CODE §§ 554.002, 554.004. To meet the causation requirement, the employee need not show that her report of illegal conduct was the sole reason for the adverse employment action. *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 634

(Tex. 1995). Instead, she must present some evidence that "but for" her report, the adverse employment action would not have occurred when it did. *Id*. at 636; *see also Zimlich*, 29 S.W.3d at 68.

There is no requirement that an employee identify a specific law when making a report. *McElyea*, 239 S.W.3d at 850; *Llanes v. Corpus Christi Indep. Sch. Dist*., 64 S.W.3d 638, 642 (Tex. App.—Corpus Christi 2001, pet. denied). Nor does an employee need to establish an actual violation of law. *McElyea*, 239 S.W.3d at 850; *Llanes*, 64 S.W.3d at 642. But there must be some law prohibiting the complained-of conduct to give rise to a whistleblower claim. *See Mullins v. Dall. Indep. Sch. Dist*., 357 S.W.3d 182, 188 (Tex. App.—Dallas 2012, pet. denied). "In other words, 'to recover under the Act, an employee must have a good-faith belief that a law, which in fact exists, was violated.'" *City of Hous. v. Cotton*, 171 S.W.3d 541, 547 n.10 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (internal quotation omitted); *see also McElyea*, 239 S.W.3d at 850; *Llanes*, 64 S.W.3d at 642. "And the 'law' must be a state or federal statute, an ordinance, or a rule adopted under a statute or ordinance." *Mullins*, 357 S.W.3d at 188 (citing TEX. GOV'T CODE § 554.001(1)). "Other complaints and grievances, including alleged violations of an agency's internal procedures and policies, will not support a claim." *Coll. of the Mainland v. Meneke*, 420 S.W.3d 865, 870 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (quoting *Mullins*, 357 S.W.3d at 188); *see also Vela v. City of Hous.*, 186 S.W.3d

49, 53 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("Violation of the City's internal policies are not 'laws' under the Act.").

C. First OSHA Complaint

OakBend contends Simons did not make her first complaint to OSHA in good faith because she failed to present evidence to satisfy the subjective and objective elements of the "good faith" standard set forth in *Hart*.

1. Subjective Standard: Violation of Law

OakBend argues that Simons did not file her first complaint with OSHA regarding OakBend's alleged lack of security in good faith because she did not believe that OakBend had violated a law. OakBend argues that although Simons believed OakBend should have more and better security officers, she did not believe that OakBend's actions violated the law. In response, Simons asserts that she believed having only one security officer on duty for four facilities at OakBend violated the law, and that she properly reported the safety issue to OSHA, the entity that governs workplace safety.

OSHA's general duty clause provides, in pertinent part: "(a) Each employer—shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, there must be evidence that (1) the employer

failed to render its workplace free of a hazard, (2) the hazard was "recognized," and (3) the hazard caused or was likely to cause death or serious physical harm. *Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 320 (5th Cir. 1984). OSHA has applied the general duty clause to healthcare industry employers. *See Sec'y of Labor v. Integra Health Mgmt., Inc.*, 2019 O.S.H.D. (CCH) 33713, 2019 WL 1142920, at *14 (O.S.H.R.C. 2019) (concluding private social services company violated general duty clause by failing to address workplace violence hazard adequately).[8]

a. General Duty: Workplace Free of Hazard

Simons filed her first complaint with OSHA in December 2013, following an incident in 2012, where a patient attacked her. The jury heard evidence that the patient was housed in Room 5 where OakBend places patients who are suicidal, violent, or pose a threat to staff. Simons testified the patient came out of his room, walked aggressively toward her while swinging a telemetry box (used to monitor heart rate and rhythm), and punched her in the jaw and breast. Although an EMS

[8] "The National Institute for Occupational Safety and Health defines workplace violence as 'violent acts, including physical assaults and threats of assault, directed toward persons at work or on duty.'" OSHA Pub. 3826: Workplace Violence in Healthcare, at 1 (Dec. 2015) *available at* Workplace Violence in Healthcare: Understanding the Challenge (osha.gov).

crew tried to restrain the patient, it took several male nurses, with no assistance from security, to subdue him.

In her first complaint to OSHA, Simons stated, "Nurses and staff are threatened and physically attacked by patients. There is not adequate security to protect employees." At trial, Simons testified that she made the complaint because "I honestly felt we needed—we needed help" because "there is a ton of drug use in that area so some of the patients that we—we have are difficult to deal with." Simons testified that police officers brought patients under the influence of drugs to OakBend and that dealing with violent patients was "a common occurrence in the emergency room."

On cross-examination, Simons testified, "I did feel that there were some physical incapabilities of some of the security in order—they physically weren't capable of providing security." In particular, she testified that one of the officers "had had a stroke, he was a bad diabetic, and physically just was in bad health," and she felt that one of the officers "was too old and should retire." Simons further testified that given the patient population and the area in which the hospital was located, she believed the security officers should be armed. Simons stated that OakBend had only one security officer on duty for its four facilities, including its two main facilities which are about fifteen minutes away from one another, and that the on-duty officer may not be present at the location where he was needed. She

testified that she made her complaint to OSHA over what she believed was a safety violation because OSHA is the agency that sets and enforces standards of workplace safety. This testimony is some evidence that OakBend failed to render its workplace free from the hazard of workplace violence.

b. General Duty: Hazard is "Recognized"

Hazard recognition "may be shown by proof that 'a hazard . . . is recognized as such by the employer' or by 'general understanding in the [employer's] industry.'" *Otis Elevator Co.*, 21 O.S.H. Cas (BNA) 2204, at *4 (2007) (quotation omitted); *see Kelly Springfield Tire*, 729 F.2d at 321. "Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry." *Id.*

Workplace violence against healthcare employees by patients is a recognized hazard in the industry. OSHA Publication 3828: Workplace Violence Prevention and Related Goals states, "Workers in hospitals, nursing homes, and other healthcare settings face significant risks of workplace violence."[9] The publication also notes:

> Although OSHA has no specific standard on the prevention of workplace violence, an employer has a general duty to "furnish to each of his employees employment and a place of employment which are

[9] OSHA Pub. 3828: Workplace Violence Prevention and Related Goals, at 1 (Dec. 2015) *available at* Workplace Violence Prevention and Related Goals: The Big Picture (osha.gov).

> free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." This requirement comes from Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (OSH Act).

Id. OSHA Publication 3826 notes that, in 2013, eighty percent of serious violent incidents reported in healthcare settings were caused by interactions with patients. OSHA Pub. 3826, at 2. The publication specifically lists "inadequate security staff" as one of the common risk factors for workplace violence. *Id.* at 1.

The Joint Commission on accreditation for healthcare organizations, the nation's largest accreditation body, sets out several standards related to workplace violence in its accreditation manual and lists the accreditation requirements specific to workplace violence in different healthcare organizations, including hospitals. *See* OSHA Pub. 3828, at 3. In its publication, entitled "Improving Patient and Worker Safety: Opportunity for Synergy, Collaboration and Innovation," the Joint Commission also discusses violence in the health care setting. The publication states that "[t]he hospital setting presents an array of risks for violence impacting staff and patients," and notes, in particular, that "recognized high-impact areas include the emergency department" and "[n]urses are a primary target for violence."[10]

---

[10] https://www.jointcommission.org/-/media/tjc/documents/resources/patient-safety-topics/patient-safety/tjc-improvingpatientandworkersafety-monograph.pdf.

c. General Duty: Death or Serious Physical Harm

As noted, Simons filed her first OSHA complaint after a patient walked out of his room, approached Simons while swinging a telemetry box, and punched her in the jaw and breast. The patient who attacked her was in Room 5, reflecting he had been previously identified as potentially dangerous to himself or others. Although an EMS crew tried to restrain the patient, the male nurses, without assistance from security, subdued him. Simons testified that the hospital is located in an area with abundant drug and alcohol use and that some patients "are difficult to deal with." She also testified that police officers brought patients under the influence of drugs to OakBend and that dealing with violent patients was a "common occurrence" in the emergency room.[11] There is thus sufficient evidence showing that the workplace violence at issue caused or was likely to cause death or serious physical harm.

Viewing the evidence in a light that tends to support the jury's finding, we conclude that Simons presented more than a scintilla of evidence that she had a good-faith belief that the conduct she reported in her first complaint to OSHA was a violation of law.

---

[11] OSHA Publication 3826 notes that "[f]rom 2002 to 2013, incidents of serious workplace violence (those requiring days off for the injured worker to recuperate) were four times more common in healthcare than in private industry on average." OSHA Pub. 3828, at 1.

2. Objective Standard: Reasonableness of Belief

OakBend argues that Simons did not offer evidence that a nurse with her experience and training would believe OakBend had a legal obligation to provide adequate security. Simons responds that she presented legally sufficient evidence to enable the jury to determine that her belief that OakBend's inadequate safety measures violated the law was objectively reasonable in light of her training and experience.

In relation to training, Simons testified that she completed orientation at OakBend and initialed an Acknowledgment of Hospital Orientation form. The form included a section entitled "Safety and Security," which listed nine categories including "Safety Officer" and "Reporting Safety and Security Issues." Simons testified that, in initialing the section, she acknowledged that "we know that we have a safety officer, that in—every facility has a safety officer," and that OakBend's training and orientation emphasizes the importance of safety and security and reporting violations. She testified that the requirement that she report unsafe conditions, as set out in her Job Description/Performance Expectations packet, dovetailed with her duties as a nurse to care for patients, help their families, help the community, and ensure the safety of patients.

With regard to her experience, Simons asserts that two experiences in particular—being assaulted by a patient and the death of her patient who had been

left unattended—supported the jury's finding that her belief was reasonable. But Simons cannot rely on these "experiences" to satisfy the objective standard. Rather, the relevant inquiry focuses on her years-long career as a nurse. That is, her relevant training and experience in the field. *See Hart*, 917 S.W.2d at 785–86 ("[O]nly if a reasonable person with the *same level of training and experience* would have made the report will the employee enjoy the relief the Whistleblower Act provides.") (emphasis added); *see also Levingston*, 221 S.W.3d at 219–21 (concluding that plaintiff's belief was reasonable in light of his training and experience as senior veterinarian in City's Bureau of Animal Regulation and Care ("BARC") with more than forty years' experience as licensed veterinarian, where he testified that "[i]t's against the law to treat the animals inhumanely," he had opportunity "to investigate animal abuse with a team from BARC," and his reports to BARC's Division Manager concerned violation of certain provisions of Houston City Code, Texas Penal Code, and Texas Health and Safety Code). As concerns this relevant inquiry, Simons testified that she worked at several different emergency rooms and that violence initiated by patients toward emergency room staff is a common occurrence.

OakBend cites *Vela v. City of Houston*, 186 S.W.3d 49 (Tex. App.—Houston [1st Dist.] 2005, no pet.) in support of its argument that Simon's belief that it violated the law was not objectively reasonable. In that case, Vela, an electrician and electrical superintendent, appealed the trial court's order granting summary

judgment on his claim alleging a violation of the Texas Whistleblower Act. *Id*. at 51. Vela argued that summary judgment was improper because he reported what he believed in good faith to be violations of law, specifically, that an electrical subtractor's use of a metal clad cable, which Vela alleged was an inferior type of cable, was illegal because its use violated the building code, was a serious safety violation, and led to fraud upon the City. *Id.* After concluding that "Vela's belief that the use of the MC cable instead of a different type of cable is, at best, a report of a contract violation" and "there is no evidence that Vela reported a violation of law," this Court held that "[b]ecause Vela had been an Electrical Supervisor and Electrical Superintendent for the City of Houston for nearly 18 years . . . it was not reasonable for Vela to believe that he reported a violation of law prior to his adverse employment action." *Id*. at 53.

OakBend suggests that, like Vela, Simons had eighteen years' experience as a nurse and served in a supervisory role and, therefore, it was not reasonable for her to believe that she reported a violation of law. But unlike Vela, the nature of Simon's complaint was unrelated to her area of expertise and knowledge and therefore she cannot be held to a higher standard than a lay person in her understanding of the law related to safety and security. *See Hart*, 917 S.W.3d at 785 ("We believe that a workable, fair standard to determine if a report was made in 'good faith' must take into account differences in training and experience. A police officer, for example,

may have had far more exposure and experience in determining whether an action violates the law than a teacher or file clerk.").[12]

OakBend argues that while Simons claims she believed OakBend violated the law based on her employee orientation and job description, she fails to identify evidence that would have led a reasonable person with the same level of training and experience to believe that OakBend violated the law. To the contrary, Simons' testimony that (1) she worked as an emergency room nurse at several different facilities, (2) violence initiated by patients toward emergency room staff is a common occurrence, (3) OakBend's training and orientation emphasizes the importance of safety and security and reporting violations, and (4) these standards overlap with the duties of a nurse to ensure the safety of patients is some evidence

---

[12] OakBend's reliance on *Duvall v. Texas Department of Human Services* and *Texas Department of Criminal Justice v. Terrell* to support its position that Simons' belief OakBend violated the law was not objectively reasonable is equally unavailing. *See Duvall*, 82 S.W.3d 474, 482–83 (Tex. App.—Austin 2002, no pet.) (concluding former system analyst's alleged good faith belief that employer violated law by submitting inaccurate reports was not objectively reasonable where employee cited his "participation in the development of the programming inherent in the collection of the data, his educational background, and his years of employment in the MIS department" but introduced no evidence showing how his training and experience led him to believe violation of law occurred); *Terrell*, 18 S.W.3d 272, 276–77 (Tex. App.—Tyler 2000, pet, denied) (reversing judgment rendered on jury verdict in favor of former prison warden after concluding warden's reliance solely on rumor and innuendo in reporting allegations of illegal conduct by former Director of Texas Department of Criminal Justice–Institutional Division did not establish factual basis upon which factfinder could conclude that reasonable employee with same level of training and experience would have believed that facts as reported were violation of law).

that a reasonable person with the same level of training and experience would have believed that the facts as reported by Simons were a violation of law.

Viewing the evidence in a light that tends to support the jury's finding, we conclude that Simons presented more than a scintilla of evidence to enable the jury to determine that her belief that OakBend violated the law by providing inadequate safety measures was objectively reasonable in light of her training and experience. We overrule OakBend's first issue as it pertains to Simons' first complaint.

D. Second OSHA Complaint

OakBend also contends the evidence is legally insufficient to show that Simons' second complaint was objectively reasonable. This is so, it argues, because she offered no evidence to show that a reasonably prudent employee in similar circumstances would have believed that the facts as reported in her second complaint constituted a violation of law.[13]

---

[13] Federal law governing occupational health and safety includes an anti-retaliation provision: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." 29 U.S.C. § 660(c)(1). OakBend does not contend that Simons' second complaint—that OakBend retaliated against her for filing her first complaint by denying her request for tuition reimbursement—fails to allege a violation of law or meet the subjective standard of good faith. Rather, OakBend argues that while "Simons testified to her feelings, that is her subjective belief," she "offered no testimony or any other evidence to demonstrate that her opinion was objectively reasonable."

1. Objective Standard: Reasonableness of Belief

OakBend argues that several facts demonstrate that Simons' belief that OakBend denied her tuition reimbursement in retaliation for the filing of her first complaint was objectively unreasonable. It argues that it was OakBend's policy to reimburse tuition for programs that would benefit OakBend, and that Simons was aware of the policy. OakBend further argues that Simons admitted at trial that she had no personal knowledge over whether OakBend employed nurse practitioners.

In support of its assertion, OakBend points to the trial testimony of Karen DeBouise, who testified that she is an emergency nurse practitioner employed by a physician group that contracts with OakBend, but that she is not employed by OakBend. OakBend also asserts that the evidence shows that Simons subsequently earned a much higher salary working for a different employer. Thus, it contends, a reasonable person with years of experience in nursing, like Simons, would never expect her employer to pay for her to achieve a degree that would cause her to leave her employment to obtain higher pay elsewhere.

Simons responds that she proffered more than a scintilla of evidence to enable the jury to conclude that her belief that OakBend retaliated against her by denying her tuition reimbursement was objectively reasonable. In support of her assertion, Simons points to evidence that her supervisor, Rhonda Abbe, told her that OakBend had "narrowed down" the first complaint to her, and that the administration wanted

to remove her for insubordination, even though she did not have a prior disciplinary history. Simons also points to the testimony of Clover Johnson ("Johnson"), her subsequent supervisor, that OakBend wanted to initiate a progressive termination of Simons, but that Johnson refused to do so because Simons was doing "a stellar job" and there was no basis for such disciplinary action.

Simons further relies on evidence showing that OakBend failed to follow its own tuition reimbursement policy. The policy required employees to send the approved original application for tuition reimbursement along with supporting documentation to the Human Resources Department no later than January 30 for the preceding fall semester. Human Resources was then required to "return an approved copy of the application to the employee within five (5) days of receipt." Simons asserts that she did not receive a response by February 5, 2014, and that she only received the letter revoking her tuition on April 9, 2014. Simons argues that OakBend's failure to adhere to its own tuition reimbursement policy enabled the jury to conclude that her belief was objectively reasonable.

Simons also points to her own testimony that OakBend used a number of nurse practitioners, approved her previous application for tuition reimbursement on which she stated that she sought to become a nurse practitioner, and she knew of other nurse practitioners whose tuition OakBend reimbursed. Finally, she asserts that the temporal proximity between the filing of her first complaint in December 2013 and

OakBend's revocation of her tuition reimbursement four months later also enabled the jury to determine that her belief that OakBend retaliated against her was objectionably reasonable.

We conclude that Simons presented more than a scintilla of evidence to enable the jury to conclude that her belief that OakBend retaliated against her by denying her tuition reimbursement was objectively reasonable. *See Hart*, 917 S.W.2d at 784. We overrule OakBend's first issue as it pertains to her second complaint. Having reached this conclusion, we consider OakBend's second issue, that is, whether Simons' second complaint may form the basis of her retaliation claim.

2. Knowledge of Second Complaint

OakBend contends that Simons' second complaint to OSHA cannot form the basis of her retaliation claim because she failed to present evidence that OakBend knew about her second complaint before it suspended her and terminated her employment. OakBend argues the evidence established that it suspended Simons following DSHS's investigation of the patient abuse allegation against her, and that it terminated her after she chose not to participate in OakBend's peer review conference.

To prevail on a whistleblower claim, a plaintiff must produce evidence that her report of a violation caused the adverse personnel action. *See Zimlich*, 29 S.W.3d at 67. While circumstantial evidence may be sufficient to establish a causal link

between the reporting of illegal conduct and an adverse employment action, such evidence must, at a minimum, show that the person who took the adverse employment action knew of the employee's report of illegal conduct. *Harris Cty. v. Vernagallo*, 181 S.W.3d 17, 25 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Stated differently, a "decision-maker could not fire an employee because of the employee's report of alleged illegal conduct if the decision-maker did not even know the employee made such a report." *Alief Indep. Sch. Dist. v. Perry*, 440 S.W.3d 228, 238 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

a. Suspension

Simons contends that she presented more than a scintilla of evidence to permit the jury to find that OakBend knew about her second complaint before it suspended her one week later. In support of her contention, Simons points to the testimony of her subsequent supervisor and fellow nurse Clover Johnson. Johnson testified that OakBend's administrator, Sue McCarty ("McCarty"), knew Simons filed the complaints with OSHA:

> Q: And if you look at the bottom [of Simons' suspension letter], you see employee comment. This is written by Ms. Simons: I am told that this is due to a recommendation of the surveyors here today who[] are conducting their own investigation. I would like it also known that I believe this is a part of a retaliation effort by administration related to OSHA complaint.
>
> Did she discuss that with you?
>
> A: Yes, she did.

Q: And what was your opinion?

A: My opinion was that this was possible. That that's what it was about. I do remember Sue McCarty telling me that she thought that Dawn was the one who made the complaint to OSHA.

Q: Do you remember when that occurred?

A: I remember that we were in the board room. I'm not sure of the date, but I do remember that we were in the board room, and we had surveyors—we had multiple surveyors at multiple times, so I can't say.

Q: That was before the suspension was enacted, correct?

A: That is correct.

From this testimony, the jury could have concluded only that OakBend knew Simons made *a* complaint to OSHA. OakBend acknowledges that it was aware of Simons' first complaint filed in December 2013 because OSHA conducted an onsite investigation of her complaint that same day. But there is nothing in the record showing that OSHA advised OakBend of Simons' second complaint filed on April 16, 2014, or that OakBend was aware of Simons' second complaint before it suspended her one week later. To conclude otherwise, the jury was required to speculate because the trial record does not reflect that OakBend knew of the second complaint. *See Vernagallo*, 181 S.W.3d at 27 ("To conclude, as the jury did, that Constable Freeman knew Vernagallo submitted the January 15th report requires speculation because the record does not divulge if he knew about it.").

Simons argues that Johnson's testimony that McCarty told her about Simons' complaint while Arch was on the premises on April 23, 2014, and before OakBend suspended Simons, shows that OakBend was aware of the second complaint. This argument, however, ignores that both of Simons' complaints were filed before OakBend suspended her, and Johnson's testimony does not provide any information about the complaint to which McCarty was referring.

b. Termination

Simons also contends that she presented sufficient evidence to permit the jury to conclude that OakBend knew about her second complaint before it terminated her on August 20, 2014. In support of her contention, Simons directs us to a grievance letter she sent to OakBend where she stated that she filed a complaint with OSHA because of OakBend's denial of her tuition reimbursement. The May 13, 2014 letter was an exhibit to Simons' response to OakBend's plea to the jurisdiction and is part of the clerk's record, but it was not admitted at trial and, therefore, it was not evidence the jury could consider. Moreover, during her testimony, Simons had the opportunity to refresh her memory by reviewing the letter. On further examination, she confirmed that in her letter, she asked OakBend about returning to her position, lost wages, and tuition reimbursement, but she did not state that the letter included any reference to the second complaint to OSHA.

McCarty also testified that she did not know Simons filed a grievance.[14] *See Whitney v. El Paso Indep. Sch. Dist*., 545 S.W.3d 150, 159 (Tex. App.—El Paso 2017, no pet.) ("But at a minimum, [the plaintiff] had to demonstrate that the person who took the adverse employment action—the decision-maker—knew of her report of illegal conduct."); *Perry*, 440 S.W.3d at 238 (noting that decision-maker could not fire employee because of employee's report of alleged illegal conduct if decision-maker did not know employee made report); *Vernagallo*, 181 S.W.3d at (reversing trial court judgment where there was no evidence decision-maker was aware of report). Thus, we sustain OakBend's second issue.[15]

E. Damages

In its third and fourth issues, OakBend challenges the sufficiency of the evidence supporting the jury's award of damages to Simons.

---

[14] Similarly, no evidence was introduced showing that Cindy Johnson, whose name appears above "manager's signature" on the corrective action form suspending Simons and the personnel action request terminating her employment, knew about Simons' second complaint or her grievance letter.

[15] Simons contends that OakBend waived its sufficiency challenge because it failed to address the multiple ways liability could be established in Question No. 3. Question No. 3 asked: "Were the reports by Dawn Simons to OSHA that OakBend had inadequate security or that OakBend retaliated by revoking her tuition reimbursement made in good faith and a cause of OakBend suspending or terminating her employment?" While OakBend challenges the causation linking Simons' second complaint of retaliation to her subsequent suspension and termination, it does not challenge the causation linking her first complaint of inadequate security to the identified adverse employment actions. OakBend therefore waived any challenge to causation based on Simons' first report.

1. Emotional Distress Damages

OakBend contends that Simons presented insufficient evidence to support the jury's award of $16,000 in emotional distress damage, which the jury awarded in connection with Simons' first complaint. It argues that Simons' testimony that she experienced "a lot of strain" because she had to take out more student loans after OakBend denied her request for tuition reimbursement was insufficient to support an award of emotional distress damages.

After the jury answered "yes" to Question No. 1 asking whether Simons' first OSHA complaint was made in good faith and a cause of OakBend denying her request for tuition reimbursement, it answered Question No. 2, in part, as follows:

> What sum of money, if paid now in cash, would fairly and reasonably compensate Dawn Simons for her damages, if any, that resulted from such conduct?
>
> a. Loss of tuition reimbursement
>
> Answer: $5,000.00[16]
>
> b. Compensatory damages in the past, which include [emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-economic losses].
>
> Answer: $16,000.00

[16] OakBend does not challenge the jury's award of $5,000 to Simons for loss of tuition reimbursement.

Citing this Court's opinion in *City of Houston v. Levingston*, 221 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2006, no pet.), Simons argues that OakBend waived its appellate review of the jury's compensatory damage award because it failed to address all elements of the award. In *Levingston*, the jury awarded Levingston past and future compensatory damages in his action against the City brought under the Act.[17] 221 S.W.3d 204, 229–30 (Tex. App.—Houston [1st Dist.] 2006, no pet.). On appeal, the City argued that the evidence was legally insufficient to support any mental anguish damages to Levingston. *See id*. at 229. The jury charge instructions accompanying the damages question defined "compensatory damages" as including "pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary damages." *Id.* at 230. Noting that the City did not object to the broad-form submission of the damages issue or ask for separate damage findings, this Court stated:

> When damages issues are submitted in broad-form, it is difficult, if not impossible, to determine the amount that the jury awarded for each element of damages. As a result, to challenge a multi-element damage award on appeal successfully, a party must address all of the elements of damages and show that the evidence is insufficient to support the entire damage award. Thus, the failure to address all the elements of the damage award results in a waiver of the sufficiency challenge.

---

[17] In its final judgment, the trial court reduced the amount of past and future compensatory damages awarded to Levingston from $875,000 to $250,000, in accordance with the Act's statutory cap requirements. *City of Hous. v. Levingston*, 221 S.W.3d 204, 230 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Id. We concluded that because the City challenged only the legal sufficiency of the evidence to support an award of mental anguish damages and did not address the sufficiency of the evidence on the other elements of compensatory damages submitted in the jury question, the City had waived appellate review of its sufficiency challenge. *See id.*

The same is true here. OakBend did not object to the form of Question No. 2 or ask for separate damage findings for each element of compensatory damages. Because OakBend did not challenge the multi-element damage award on all elements of compensatory damages, it waived appellate review of its sufficiency challenge. We overrule its third issue.

2. Lost Wages and Benefits

In its fourth issue, OakBend argues Simons presented insufficient evidence to support the jury's award of lost wages and benefits. After the jury answered "yes" to Question No. 3 asking whether "the reports by Dawn Simons to OSHA that OakBend had inadequate security or that OakBend retaliated by revoking her tuition reimbursement were made in good faith and a cause of OakBend suspending or terminating her employment,"[18] it answered Question No. 4, in part, as follows:

[18] OakBend did not object to the submission of Question No. 3 as worded in the trial court or challenge its submission on appeal.

What sum of money, if paid now in cash, would fairly and reasonably compensate Dawn Simons for her damages, if any, that resulted from such conduct?

a. Lost wages during the period of suspension or termination.

Answer: $26,000.00

b. Lost employee benefits other than loss of earnings.

"Benefits" include [sick-leave pay, vacation pay, profit-sharing benefits, stock options, pension fund benefits, housing or transportation subsidies, bonuses, monetary losses incurred as a result of loss of health, life, dental, or similar coverage].

Answer: $8,000.00

a. Lost Wages

OakBend suspended Simons indefinitely without pay on April 23, 2014 and terminated her employment on August 20, 2014. Simons obtained new full-time employment on December 23, 2014. The period between Simons' suspension and her new employment was eight months.

Plaintiff's Exhibit 7, which was admitted at trial, showed that Simons earned $78,689.59, or approximately $6,557 per month, in 2013. Based on these figures, Simons would have earned approximately $52,000 at OakBend during the eight-month period between her suspension and new employment.

Simons testified that between the end of May 2014 and December 23, 2014, when she began full-time employment, she worked part-time in the emergency rooms of Memorial Hermann Hospital in Sugarland and Gulf Coast Medical Center

in Wharton. She testified that she worked two to three twelve-hour shifts per week earning $34 per hour at Gulf Coast and $45 per hour at Memorial Hermann. In late December 2014, she began full-time employment as a nurse practitioner earning an annual salary of $110,000. She worked in that position until April 2015 when she began working for a cardiologist in Bay City, earning an annual salary of $137,000.

The correct measure of lost wages is "the amount of money the employee would have earned had [she] not been terminated, less" the wages she in fact earned after termination. *See Hertz Equip. Rental Corp. v. Barousse*, 365 S.W.3d 46, 57 (Tex. App.—Houston [1st. Dist.] 2011, pet. denied). "In determining future lost wages, a plaintiff is not required to prove an exact amount, only facts from which the fact-finder can determine the proper amount." *Id*. at 58. Based on the evidence presented at trial, Simons would have earned approximately $52,456 at OakBend had she not been suspended and terminated, and she earned between $24,480 at Gulf Coast ($34/hour x 24 hours/week x 30 weeks) and $32,400 at Memorial Hermann ($45/hour x 24 hours/week x 30 weeks) during the eight-month period between her suspension and her new full-time employment.[19] We hold that the evidence is

[19] These calculations take into consideration that Simons may have worked all of her hours at Gulf Coast or at Memorial Hermann Hospital and, therefore, reflect the range of damages supported by the evidence. *See Hertz Equip. Rental Corp. v. Barousse*, 365 S.W.3d 46, 57 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (noting factfinder has discretion to award damages within range of evidence presented at trial so long as rational basis exists for its calculation) (citing

sufficient to support the jury's award of lost wages to Simons in the amount of $26,000.

b. Lost Benefits

OakBend also argues that the evidence is insufficient to support the jury's award of $8,000 in lost benefits to Simons. Question No. 4(b) states that "'Benefits' include [sick-leave pay, vacation pay, profit-sharing benefits, stock options, pension fund benefits, housing or transportation subsidies, bonuses, monetary losses incurred as a result of loss of health, life, dental, or similar insurance coverage]." While OakBend argues there is a lack of evidence on the value of Simons' health insurance, it did not challenge any of the other elements of lost benefits. OakBend did not object to the form of Question No. 4 or request separate damage findings for each element of lost benefits. Having failed to do so, OakBend waived appellate review of its sufficiency challenge to the award of lost benefits. We overrule OakBend's fourth issue.

In summary, we conclude (1) there is sufficient evidence to support the jury's finding that Simons had a good faith belief that the conduct she reported in her first OSHA complaint was a violation of law and that her belief was objectively reasonable in light of her training and experience, (2) the evidence is legally

---

ExxonMobil Corp. v. Valence Operating Co., 174 S.W.3d 303, 316 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

insufficient to support a finding that OakBend knew about Simons' second OSHA complaint before it suspended her or terminated her employment and, thus, her second complaint could not form the basis of a retaliation claim under the Act,[20] (3) OakBend waived its appellate review of the jury's compensatory damage award because it failed to address all elements of the award, (4) the evidence is sufficient to support the jury's award of $26,000 in lost wages to Simons, and (5) OakBend waived review of its sufficiency challenge to the jury's award of lost benefits.

Conclusion

We affirm the trial court's judgment.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Hightower, Rivas-Molloy, and Farris.

[20] As noted above, OakBend did not challenge the causation linking her first complaint of inadequate security to the identified adverse employment actions and therefore waived any challenge to causation based on Simons' first report.