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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NOE ABARCA, Plaintiff and Respondent, v. CITIZENS OF HUMANITY, LLC, Defendant and Appellant.	B283154 (Los Angeles County Super. Ct. No. BC521900)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Browne George Ross, Peter W. Ross, Benjamin D. Scheibe; Richards, Watson & Gershon and T. Peter Pierce for Defendant and Appellant.

Cox, Castle & Nicholson, Stanley W. Lamport; Levato Law and Ronald C. Cohen for California Business Properties Association, League of California Cities, California State Association of Counties, California Building Industry Association

and Stephen L. Poizner as Amici Curiae on behalf of Defendant and Appellant.

Kramer Holcomb Sheik, Daniel K. Kramer, Teresa A. Johnson; Michael Burgis & Associates, Michael Burgis, Zhenia Burgis; Esner, Chang & Boyer, Stuart B. Esner and Steffi A. Jose for Plaintiff and Respondent.

Citizens of Humanity, LLC (Citizens) appeals from a judgment after a jury verdict in favor of Noe Abarca (Abarca). Abarca sued Citizens after it terminated him, claiming disability discrimination, retaliation, wrongful termination, failure to make reasonable accommodations, and failure to engage in the interactive process. The jury awarded Abarca compensatory damages for lost earnings and mental suffering. The jury also awarded Abarca punitive damages. For the reasons below, we affirm the judgment.

BACKGROUND

I. The parties

Citizens designs, markets, and manufactures blue jeans and other apparel under the trademark "Citizens of Humanity." Citizens and its subsidiaries employ around 500 workers, designing, marketing, cutting, selling, embellishing, finishing, inspecting, warehousing, and shipping apparel. Its net worth is approximately $119 million.

Abarca worked in Citizens's quality control department, separating and inspecting boxes of jeans from February 2006 until his termination on August 28, 2012. He earned $8.25 per hour. Abarca's duties required him to lift boxes from pallets and load them onto carts for his coworkers, who also inspected the

jeans. The boxes varied in weight depending on their contents, but could weigh up to around 40 pounds. Abarca's direct supervisor, Augustina Manzano (Manzano), told him that, as the only male in the quality control department, she hired him to lift boxes.

II. Abarca's injury

After approximately four months with Citizens, Abarca started experiencing pain in his chest and clavicle area, which became more intense when lifting. Between 2011 and 2012, the pain worsened and in July of 2012, the pain became unbearable. Abarca informed Manzano about the pain. She instructed him to see a doctor and referred him to Citizens's then head of human resources, Alma Casas (Casas). Casas did not advise Abarca to fill out a workers' compensation claim form, so Abarca was not aware that he could file a claim for injury.

Abarca saw a doctor on July 24, 2012, who issued a work restriction that Abarca was "unable to lift heavy objects" and that "15 to 20 lbs is the most" he could lift. The certificate also said that Abarca could return to work only doing "light work" from July 24, 2012 through August 24, 2012. Abarca presented the certificate to Casas. The following 30 days while the work restriction was in effect, Manzano instructed Abarca to only lift the boxes he was going to inspect himself and not to lift more than 20 pounds. Citizens also brought in another male worker to help lift the boxes. After the work restriction expired on August 24, 2012, Abarca continued to inspect jeans and lift boxes, although he would remove some items to lighten the load.

III. The termination

Two business days after the restriction expired, Citizens terminated Abarca. On the day of his termination, Casas, who Citizens entrusted to oversee employee terminations, thanked Abarca for his work, but said his services were no longer needed. Abarca insisted that he could continue inspecting jeans, but Casas responded that Citizens could not accommodate him.

On the day of his termination, Casas instructed Abarca to complete a workers' compensation claim form which she did not explain and Abarca did not understand. This was the first workers' compensation claim form that Abarca filled out. Under the heading, "Date employer first knew of injury," Casas instructed Abarca to write, "August 28, 2012," that same day.

IV. Post-termination

The day after his termination, Abarca unsuccessfully sought unemployment benefits. He also applied for about five different jobs in factories in Los Angeles and informed the potential employers about the lifting restriction. Abarca did not receive any call backs. While at Citizens, Abarca earned approximately $400 to $600 per week, which included overtime. Abarca had been the sole income earner in his family and the only caretaker for his daughter. Abarca was worried about losing his house, becoming homeless and not being able to support his daughter. After his termination, Abarca relied on his state disability benefits and modest life savings for income. Once his savings dwindled and his disability benefits expired, Abarca began collecting and recycling bottles and cans in his neighborhood for additional cash.

Around a month after the termination, Abarca consulted with an orthopedic surgeon, Daniel Silver, due to sharp pain in the back of his neck, shoulders, arm, and chest. Dr. Silver noted that Abarca complained of "anxiety, depression, insomnia and nervousness, resulting from work related trauma." Abarca submitted another claim for state disability benefits which was supplemented by Dr. Silver's certification that Abarca was unable to perform his "regular or customary work" because of the disabling conditions in his neck and shoulders. (Full capitalization omitted.) Abarca qualified for state disability benefits of $285 per week from October 2012 through October 2013.

In November 2012, Dr. Silver diagnosed Abarca with degenerative disc disease, insomnia, anxiety and depression, among other things. Dr. Silver's determination was based on the "overall picture" of Abarca's condition, including his psychological symptoms and physical injuries. He also concluded that Abarca had been "temporarily totally disabled" from the date of his termination on August 28, 2012, meaning that he was unable to return to his usual and customary job duties of lifting in excess of 20 pounds on a continuous basis. Dr. Silver referred Abarca to a psychologist, who diagnosed Abarca with major depressive disorder and concluded that the predominant cause of his psychiatric injury stemmed from his physical injuries and his termination.

After Abarca's termination and after he made a claim against Citizens, Citizens's general counsel and managing director, Gary Freedman (Freedman), investigated Abarca's claims. Freedman spoke with Casas and Manzano and was satisfied with how the matter was handled and approved of

Abarca's termination. At the time of Abarca's termination, Freedman was Citizens's chief operating officer and attorney of record in this case.

V. Procedural history

On September 20, 2013, Abarca sued Citizens for: retaliation, disability discrimination, failure to engage in the interactive process, failure to provide reasonable accommodation, failure to prevent/remedy discrimination and retaliation under the Fair Employment and Housing Act (FEHA), and wrongful termination in violation of public policy.

Before trial, Citizens moved to exclude evidence of any lost wages. Citizens argued that Abarca was judicially estopped from claiming lost wages because he took a contrary position in his successful claim for state disability benefits, where he represented that he was "temporarily totally disabled." The trial court denied the motion, but noted that "the apparent contradiction bears explanation at trial."

In turn, Abarca moved to exclude a prior domestic violence conviction from 1990 or 1991, on the grounds that his prior conviction was too remote in time, lacked probative value, was highly prejudicial and would confuse and mislead the jury. Citizens argued that the evidence was relevant to show Abarca's negative attitude towards women and went to his credibility. Also, Citizens wanted to attack the conclusions of Abarca's mental health providers, who relied on Abarca's representation that he had not been convicted of a crime to conclude he was not

malingering. The trial court granted the motion, excluding the evidence of the prior conviction.[1]

VI. The jury's verdict

The jury returned a special verdict in favor of Abarca on his causes of action for disability discrimination, retaliation, failure to prevent discrimination or discrimination, and wrongful termination, but found that Citizens had provided reasonable accommodations and engaged in the interactive process. The jury found that Manzano, Casas, and Manzano's supervisor, Susanna Mendoza (Mendoza), engaged in actionable conduct, which was malicious, oppressive, or fraudulent. The jury also found that Casas and Freedman were Citizens's managing agents and that they approved of or ratified the conduct.

The jury awarded Abarca a total of $100,000 in compensatory damages: $35,000 for past lost earnings; $20,000 in other past economic loss; $45,000 in past non-economic losses including mental suffering; and nothing for future non-economic losses. The jury also awarded Abarca $550,000 in punitive damages. Citizens moved for a new trial and for judgment notwithstanding the verdict, arguing that it was entitled to judgment under the doctrine of judicial estoppel; the award of punitive damages could not stand because no managing agent of Citizens was aware of or approved any malicious, fraudulent or oppressive conduct; the punitive damages claim was based on a privileged document; and the trial court refused to allow Freedman to testify as to his state of mind concerning malicious,

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[1] The record does not include a settled or agreed statement of the unreported hearing on Abarca's motion in limine to exclude evidence of his domestic violence conviction.

fraudulent or oppressive conduct. The trial court denied Citizens's motions, but struck the $20,000 award for past other economic damages.

DISCUSSION

Citizens raises eight contentions on appeal: (1) the trial court erred in not finding Abarca's claims barred by judicial estoppel; (2) the punitive damage award violates due process; (3) the punitive damage award must be reversed because no officer, director, or managing agent of Citizens engaged in, authorized, or ratified the misconduct; (4) the trial court erred in not allowing Freedman to testify as to his conclusions after investigating Abarca's claim; (5) the punitive damages award was based on a privileged document; (6) the compensatory damage award is contrary to public policy; (7) the trial court erred when it excluded evidence of Abarca's domestic violence conviction; and (8) the award for past lost earnings should be reversed because Abarca was awarded wages for a period of time he could not work. We address each contention in turn.

I. Judicial estoppel

Citizens contends that judicial estoppel bars Abarca's claims because, in his successful application for disability benefits, Abarca represented that he was unable to work, but then sued Citizens for lost wages contending that he could have worked all along. According to Citizens, Abarca cannot reconcile the conflict between the finding that he was "temporarily totally disabled" for purposes of receiving state disability benefits and his present claim for lost wages.

" 'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position

previously taken in the same or some earlier proceeding.' " (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) " 'The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." ' " (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449.) Judicial estoppel may bar an employee from making a claim for lost wages when the employee sought and obtained disability benefits based on the representation that he or she was totally disabled and unable to work. (See, e.g., *Jackson*, at p. 187; *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 958; *Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382, 1384 (*Bell*); *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 963.)

The United States Supreme Court addressed this issue in the federal context in *Cleveland v. Policy Management Systems Corp.* (1999) 526 U.S. 795.[2] In *Cleveland*, an employee sought and obtained Social Security Disability Insurance benefits (SSDI). (*Id*. at p. 798.) The employee also filed suit under the ADA for wrongful termination based on disability discrimination. (*Ibid*.) The employer moved for summary judgment, arguing the employee was estopped from proving that she could perform the

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[2] Because of the similarity between state and federal employment discrimination laws, California courts look to federal court interpretation of the ADA for guidance when addressing claims under FEHA. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.)

essential functions of her job with reasonable accommodations because she also claimed to be totally disabled in her application for disability benefits. (*Id.* at p. 799.) The district court granted summary judgment in favor of the employer, and the Fifth Circuit affirmed. (*Id.* at p. 800.) The Supreme Court reversed, explaining, despite the appearance of conflict between the SSDI program and the ADA, the two claims do not inherently conflict to the point where courts should apply a special negative presumption that the employee is estopped from pursuing an ADA claim. (*Id.* at pp. 802–803.) There are "many situations in which an SSDI claim and an ADA claim can comfortably exist side by side." (*Id.* at p. 803.) For example, "when the [Social Security Administration] determines whether an individual is disabled for SSDI purposes, it does *not* take the possibility of 'reasonable accommodation' into account." (*Ibid.*) "[A]n ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it." (*Ibid.*) "[A]n individual might qualify for SSDI under [the Social Security Administration's] administrative rules and yet, due to special individual circumstances, remain capable of 'performing the essential functions' of her job." (*Id.* at p 804.) "[T]he nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision." (*Id.* at p. 805.)

Ultimately, *Cleveland v. Policy Management Systems Corp.*, *supra*, 526 U.S. at page 807 held that an employee should have the opportunity to explain how she can be both entitled to

disability and recover lost wages in a disability discrimination action based on her ability to perform at her job with reasonable accommodations. The employee's "explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.' " (*Ibid.*)

"The determination of whether judicial estoppel can apply to the facts is a question of law reviewed de novo." (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 408.) However, "the findings of fact upon which the application of judicial estoppel is based are reviewed under the substantial evidence standard of review." (*Ibid.*) Even if the necessary elements of judicial estoppel are found, because it is an equitable doctrine, whether it should be applied is a matter within discretion of the trial court. (*Ibid.*) "The exercise of discretion for an equitable determination is reviewed under an abuse of discretion standard." (*Ibid.*)

In viewing the evidence in the light most favorable to the jury's verdict and resolving all conflicts and drawing all inferences in favor thereof, we find no abuse of discretion here. Abarca's explanation at trial was that he could have continued working for Citizens had they continued to honor his work restriction. This is critical because disability determinations do not consider whether an employee can perform his job duties with reasonable accommodations. (*Bell*, *supra*, 62 Cal.App.4th 1382, 1388.) The jury found that Citizens provided Abarca with reasonable accommodations, for example, by asking his fellow employees to help, limiting his lifting to lighter boxes, or allowing

him to separate out the jeans to move them in bundles. Therefore, provided reasonable accommodations, Abarca could have continued to do his job for Citizens.

We find *Bell*, *supra*, 62 Cal.App.4th 1382 instructive. There, a bank employee sued his employer for discrimination after it refused to allow him to telecommute from home one day per week. (*Id.* at p. 1384.) The employer initially honored the accommodation but later told the employee he would no longer be able to telecommute. Prior to that point, the employee had been successful at his job and the accommodations had been effective. The employee's physician informed the employer that without the accommodation, the employee would have to obtain disability benefits, which he did after resigning from his position. (*Ibid.*) The trial court granted summary judgment on the ground that the employee was estopped from claiming disability discrimination because he admitted his inability to perform the essential functions of his job to obtain disability benefits. (*Id.* at p. 1385.) The court of appeal reversed, finding the positions taken by the employee were "not mutually exclusive" and the employee "viewed himself as 'disabled' and incapable of performing his customary duties solely because [the employer] disturbed the status quo." (*Id.* at p. 1388.)

Abarca's situation is like that of the employee in *Bell* where, because the employer upset the status quo, the employee considered himself disabled, though he could have continued working with an accommodation. Thus, Abarca's positions were not necessarily inconsistent.

The authority cited by Citizens does not compel a different conclusion. In *Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th 171, a police officer sustained work injuries. To

obtain a workers' compensation award, he stipulated that he was " 'restricted to working in an environment free of emotional stress and strain, and no heavy work.' " (*Id.* at p. 189.) In compliance with the restriction, the county placed him on extended medical leave. (*Id.* at p. 175.) The officer then filed an action under the ADA for failure to accommodate his disability and wrongful termination. (*Ibid.*) The trial court granted summary judgment in favor of the county and the court of appeal affirmed. (*Ibid.*) It explained that the officer's positions were "totally inconsistent" because the plaintiff "cannot have a stress-free work environment *and* perform the essential functions of a safety police officer." (*Id.* at p. 190.) In the workers' compensation proceeding, the officer agreed with his doctor's assessment that he had to have a stress-free job; while in the civil action, he claimed he could perform the essential functions of a safety police officer. (*Ibid.*) The officer admitted that all the duties of a police officer involve stress, thus, a reasonable accommodation was impossible. There is no equivalent admission here. *Jackson* is also distinguishable in that when the county tried to find the officer an alternative job, he indicated that the only job he wanted was that of a police officer. (*Ibid.*) Abarca's application for disability insurance benefits did not exclude the possibility that he could have continued working with a reasonable accommodation. Abarca was able to do his regular and customary work as a quality control inspector, as he did during the 30 days prior to his termination, as long as he was provided with a lifting restriction.

Drain v. Betz Laboratories, Inc., *supra*, 69 Cal.App.4th at page 950 is also distinguishable. In that case, an employee was estopped from bringing a claim for racial harassment and wrongful discrimination after he sought and obtained disability

benefits based on his "total inability to perform any of his job functions or any other occupation." (*Id.* at p. 960.) The employee's claim that he was unable to perform any of his job-related duties was supported by a physician's report confirming that he was totally disabled. (*Id.* at p. 955.) Again, Abarca never stipulated or asserted in his state disability application that he was totally disabled and unable to perform any job, but only that he was unable to perform the regular or customary work. Accordingly, we find no abuse of discretion.

II. The punitive damages award did not violate due process

Citizens contends that the punitive damages award violates the due process clause of the Fourteenth Amendment to the United States Constitution. (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712 (*Roby*).) Due process entitles a tortfeasor to fair notice of " ' "the conduct that will subject him to punishment" ' " and " ' "the severity of the penalty that a State may impose." ' " (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 (*Simon*).) "There is no simple formula for calculating punitive damages in that there is no particular sum that represents the *only* correct amount for such damages in any given case. Instead, there is a wide range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented." (*McGee v. Tucoemas Federal Credit Union* (2007) 153 Cal.App.4th 1351, 1362.)

Our review is de novo. The jury's findings of fact are entitled to deference. (*Simon*, *supra*, 35 Cal.4th at p. 1172.) In assessing an award for punitive damages we look to: " '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference

between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " (*Ibid.*) Other factors include the amount of compensatory damages awarded and the wealth of the defendant. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

" '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' " (*Simon*, *supra*, 35 Cal.4th at p. 1180.) In evaluating reprehensibility, we look at whether " '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' " (*Roby*, *supra*, 47 Cal.4th at p. 713.)

Applying these factors, we find that Citizens's conduct was certainly reprehensible. The termination resulted in harm to Abarca's physical and financial wellbeing as reflected in the jury's award of compensatory damages. When Abarca reported his injury, Casas did not advise Abarca to fill out a workers' compensation claim form. Only on the day of his termination did Casas advise Abarca to fill out a claim form and then asked him to postdate when Citizens was notified of the injury. Notwithstanding that Abarca's termination was a one-time incident and the jury found that Citizens provided Abarca with reasonable accommodations for a time, Abarca's financial vulnerability weighs heavily in favor of finding a high degree of reprehensibility. After he was terminated, Abarca, a 57-year-old laborer with lifting restrictions, could not find work. His job with

Citizens had provided the only income source for his family. Abarca ultimately spent his savings and resorted to collecting bottles and cans for income. Thus, while Abarca's termination may have been an isolated incident, its consequences were far reaching for Abarca and his family.

Next, we look to the disparity between the actual or potential harm suffered by Abarca and the punitive damages award. (*Simon*, *supra*, 35 Cal.4th at p. 1172.) "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425.) However, "due process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element." (*Simon*, at p. 1189.) While the jury awarded Abarca $35,000 for past non-economic losses, thus, implying a punitive element in that portion of the award, the ratio of punitive damages to compensatory damages remained within single-digits. Abarca was awarded $70,000 in compensatory damages and $550,000 in punitive damages, a ratio of roughly 7.8 to 1.[3]

Citing *Roby*, *supra*, 47 Cal.4th at page 712, Citizens argues that a 1 to 1 ratio is the constitutional limit in these circumstances. In *Roby*, the jury awarded an employee

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[3] The jury originally awarded $100,000 in compensatory damages, but the trial court modified the jury's award, striking the jury's award for other past economic loss and reducing past non-economic losses to $35,000. Thus, the original ratio between punitive and compensatory damages was five and a half to one. The trial court declined to exercise its discretion to alter the punitive damages award.

$3,511,000 in compensatory damages and $15 million in punitive damages against the employer, as well as $500,000 in compensatory damages and $3,000 in punitive damages against a supervisor who was responsible for the harassment. (*Id.* at pp. 692–693.) The California Supreme Court found the punitive damages award against the employer violated due process because: (1) civil penalties in comparable cases could not exceed $150,000, an amount far less than the $15 million awarded by the jury (*id.* at p. 719); (2) $1.3 million in compensatory damages was awarded solely for Roby's physical and emotional distress and reflected the jury's indignation at the employer's conduct (*id.* at p. 718); (3) the employer's wrongdoing was limited to its decision to adopt a strict attendance policy that did not reasonably accommodate employees who had disabilities or medical conditions (*id.* at p. 713); and (4) the record only weakly supported the jury's finding that a managing agent was informed of the one of its supervisors' unlawful harassment of the plaintiff (*id.* at p. 715).

This case is distinguishable from *Roby*. The evidence here showed that Citizens's managing agent approved of the discriminatory conduct toward Abarca. Casas was aware of the discriminatory nature of Abarca's termination and may have actively tried to conceal that fact. Freedman, acting as Citizens's attorney of record and the investigator into Abarca's claims, ratified the decision and had more than just a passing knowledge of the discriminatory conduct. As a result, Abarca and his family suffered serious consequences.

An award of punitive damages also serves the public to benefit the public, to punish wrongdoing, and to deter future misconduct, either by the same defendant or other potential

wrongdoers. (*Power Standards Lab, Inc. v. Federal Express Corp.* (2005) 127 Cal.App.4th 1039, 1047.) Here, the award of punitive damages should deter Citizens and other employers in the garment industry who rely on low-wage laborers from wrongfully discharging their employees.[4] There is no evidence that the award will constitute an undue burden or result in Citizens's financial downfall. In 2015, approximately two years before trial, Citizens was worth an estimated $119 million.

The punitive damages award does not violate due process under these circumstances.

III. There was substantial evidence Citizens ratified its employees' malicious, oppressive, and fraudulent conduct.

Citizens argues that Abarca failed to prove that its conduct was oppressive, fraudulent, or malicious and that such conduct was not engaged in, authorized, or ratified by an officer, director, or managing agent. An employee can only collect punitive damages against their employer if the employee proves that (1) the employer engaged in malicious, oppressive, or fraudulent conduct and (2) a "managing agent" of the company engaged in, authorized, or ratified such conduct. (Civ. Code, § 3294, subd. (b).) Here, the jury found that Manzano, Casas, and Mendoza engaged in conduct that was malicious, oppressive, or

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[4] To the extent we need to evaluate the difference between the punitive damages awarded by the jury and potential civil penalties, there is no cap on civil penalties for employers who are liable for disability discrimination under FEHA.

fraudulent. It also found that Casas authorized the conduct and Freedman subsequently approved it.

We review the jury's findings for substantial evidence, keeping in mind that Abarca was required to meet the heightened burden of proof of clear and convincing evidence. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.) We " 'consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment.' " (*Ibid.*, italics omitted.)

One month before his termination, Abarca reported an injury and presented Citizens with a doctor's note with a work restriction. Citizens did not advise Abarca to file a workers' compensation claim form at that time and then terminated Abarca two business days after the work restriction expired. Citizens's head of human resources had Abarca fill out a claim form on the day of his termination and instructed him to postdate the day that Abarca first reported the injury to Citizens. Abarca also presented evidence that Citizens did not follow its own policies when it terminated Abarca or received notice that he was injured. Casas may have also partially misled Abarca about the reason for his termination.

Regarding ratification, Citizens does not contest that Freedman was a managing agent. Rather, Citizens challenges whether Freedman approved of or ratified the wrongful conduct because, at the time, it appeared that Abarca had been properly terminated for poor performance from a job he could not perform. Citizens's position is based on the fact that Freedman did not participate in the decision to terminate Abarca; he investigated the termination over a year after Abarca was terminated, and

after Abarca made a claim against the company; he spoke with Casas and Manzano regarding the termination; and, he reviewed a written disciplinary warning, concerning inappropriate comments Abarca made to two female coworkers in August 2011.

However, Abarca also presented the testimony of a human resources expert who opined that the circumstances surrounding Abarca's termination should have alerted Citizens that something may have been amiss and that he was terminated for an improper purpose. When the termination decision came to Freedman's attention, his response to the suspicious timing of Abarca's termination was that Abarca's initial notice did not establish that the injury was necessarily work-related. But, the jury was entitled to disregard Freedman's benign explanation. Finally, Freedman took responsibility for and approved of Abarca's termination, acknowledging that "the buck stopped with me on ultimate decisions about things like . . . Abarca." We find there is substantial evidence to support the jury's finding that Citizens engaged in malicious and oppressive conduct which was approved and ratified by its managing agents.

Citizens also argues that the trial court erred when it refused to poll the jury on whether Casas or Mendoza were managing agents. We disagree. Code of Civil Procedure section 618 creates a rebuttable presumption that if a verdict appears complete, it is complete unless there is an affirmative showing during polling to the contrary. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 257.) " 'If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case.' " (*Id.* at p. 256, italics omitted.) No such showing was made here. The trial court

correctly refused to poll the jurors because, as we explain, there is no point in polling the jury on a question that it was not asked.

Question 35 of the verdict form asked the jury if Manzano, Casas, or Mendoza engaged in any conduct with malice, oppression, or fraud. The jury responded yes and then identified Manzano, Casas, and Mendoza as the agents who engaged in the conduct. Then, the first part of question 36 asked whether the identified agents were managing agents acting on behalf of Citizens. The jury answered yes and when the trial court polled the jurors the verdict was 11 to 1. The trial court then polled the jury about the next part of question 36 which asked "[d]id one or more officers, directors, or managing agents of Citizens of Humanity authorize this conduct?" The jury verdict was again 11 to 1, finding that Casas was a managing agent who authorized the malicious conduct. The final part of question 36 asked "[d]id one or more officers, directors, or managing agents of Citizens of Humanity know of this conduct . . . or approve it after it occurred?" The jury answered yes and polled 11 to 1, finding that Freedman approved of the conduct after it occurred. Thus, the jury's verdict does not turn on whether Manzano was a managing agent because they voted 11 to 1, finding that both Freedman and Casas were managing agents who ratified and approved of the malicious and discriminatory conduct.

IV. The trial court did not abuse its discretion when it excluded Freedman's conclusions

Citizens argues that reversal of the judgment is required because the trial court precluded Freedman from offering his conclusions of his investigation into Abarca's claim. Specifically, the trial court excluded Freedman's legal conclusion on whether Citizens's conduct had been malicious and whether Citizens had

provided reasonable accommodations. On direct examination, Citizens's counsel asked Freedman, "[W]hat did you personally conclude about whether Citizens had properly accommodated . . . Abarca?" Citizens's counsel also asked Freedman whether he thought there was anything malicious or done out of spite against Abarca. The trial court sustained Abarca's objection to each question on the grounds that the testimony went to an ultimate issue in the case. We review that ruling for an abuse of discretion. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444.)

A court may exclude a witness' testimony that concerns a legal conclusion and would have embraced the ultimate issue in the case. (See *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179.) Freedman's testimony on these issues was problematic because, at the inception of the case, Freedman was acting as Citizens's attorney of record while also investigating Abarca's claim. Thus, even though Freedman was testifying as a lay witness, his testimony regarding his legal conclusions carried special weight given that he was an attorney working on the case. The trial court acted within its discretion in precluding Freedman from testifying as to an ultimate issue in the case.

But, even if we were to assume the trial court abused its discretion in excluding Freedman's opinion, we fail to see how Citizens was prejudiced. Freedman testified that he was satisfied with the termination decision after investigating Abarca's claim, implying he found nothing malicious in Citizens's conduct. Further, both sides presented testimony from human resources experts who opined about Abarca's termination and

Citizens's investigation. We fail to see what Freedman's testimony would have added.

V. The jury's punitive damages award was not based on a privileged act

Citizens argues that a new trial is warranted as to punitive damages because the trial court permitted the jury to base its award on an act that was (1) protected by the litigation privilege under Civil Code section 47 and (2) not the conduct for which Citizens was held liable. Mainly, Citizens argues it was improper for Abarca's counsel to use the postdated workers' compensation form as a basis for finding that Citizens's conduct was fraudulent for purposes of assessing punitive damages.

We agree with Citizens that the litigation privilege applies to the workers' compensation form. "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege applies even when the publication was "prepared and communicated maliciously and with knowledge of its falsity." (*Harris v. King* (1998) 60 Cal.App.4th 1185, 1188.) The privilege applies to workers' compensation proceedings. (See, e.g., *id.* at p. 1187.) However, unlike other privileges, which act to exclude evidence, the litigation privilege only operates as a limit on liability. (*Block v. Sacramento Clinical Labs, Inc.*, (1982) 131 Cal.App.3d 386, 389.) Statements that are otherwise privileged nonetheless may be used in some circumstances to prove the speaker's state of mind. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168.) "[W]hen allegations

of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent." (*Ibid.*)

Here, the jury did not specify whether it found Citizens's conduct malicious, oppressive, or fraudulent or some combination of all three. However, the postdated workers' compensation form could serve as evidence of Citizens's intent to fire Abarca for reporting his injury. There is no dispute that Abarca presented Citizens with a work restriction and had been complaining about pain in his shoulder and neck area, yet Citizens did not advise Abarca to fill out a workers' compensation claim form, and then fired him two days after the work restriction expired. Therefore, the postdated claim form was only one piece of evidence supporting the jury's finding that Citizens acted with malice, oppression, or fraud. Further, it is also the fact that Abarca presented a doctor's note with a work restriction a month before his termination that gives the date on the claim form special significance. Without this other document, Abarca's testimony that Casas made him post-date the claim form does not carry as much weight. Accordingly, we cannot say that the claim form was the only basis on which the jury found Citizens's conduct was fraudulent.

VI. The compensatory damages award did not violate public policy

Citizens argues under *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 that compensatory damages would serve no legitimate purpose because they would have terminated Abarca anyway. *Harris* held that an employee's remedies are limited to injunctive relief, fees, and costs when the employer establishes a

same-decision defense, that is, the employer would have terminated the employee in the absence of any discrimination at the time it made its decision. (*Id.* at p. 233.) Citizens did not establish a same-decision defense, i.e., they would have terminated Abarca anyway for a nondiscriminatory purpose. In fact, the jury came to the opposite conclusion, finding that Citizens would not have discharged Abarca at the time based on his poor performance had Citizens not also been substantially motivated by discrimination due to his physical condition. *Harris* does not apply.

VII. Emotional distress damages

Citizens challenges the jury award of $35,000 for non-economic damages including mental suffering on the ground that the trial court improperly excluded countervailing evidence of Abarca's prior conviction for domestic violence from 1991.[5] Citizens contends that the domestic violence conviction was relevant to counter Abarca's portrayal of himself as a single father, who was embarrassed by Citizens in front of his children. Primarily, however, Citizens argues the evidence was relevant to

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[5] Although the trial court granted Abarca's motion in limine to exclude the evidence, there is no substantive ruling in the record, nor was a reporter present at the hearing on the motion. Nonetheless, the record does show that the trial court excluded the evidence under Evidence Code section 352. With respect to Abarca's motion to exclude evidence of his domestic violence conviction, Citizens provided us with the moving papers, the trial court's minute order summarily granting the motion, and the trial court's reference in passing that the evidence was excluded under Evidence Code section 352. Citizens did not, however, provide a settled or agreed statement which might reveal a more detailed account of the trial court's reasoning.

show that Abarca lied to his psychologists regarding his criminal history. Citizens's position is that, because the jury awarded $35,000 in non-economic damages, including mental suffering, evidence that Abarca was not truthful with his psychologists was highly relevant to call into question their assessment of Abarca's psychological injuries.

"If a proper objection under [Evidence Code] section 352 is raised, the record must affirmatively demonstrate that the trial court did in fact weigh prejudice against probative value. The trial court need not make findings or expressly recite its weighing process, or even expressly recite that it has weighed the factors, so long as the record . . . shows the court understood and undertook its obligation to perform the weighing function." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599.) The record must affirmatively show that the trial court did in fact weigh prejudice against probative value, but no more is required. (*People v. Clair* (1992) 2 Cal.4th 629, 660.) "The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) We review the trial court's application of Evidence Code section 352 for abuse of discretion and it "will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice." (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1685.) "The abuse-of-discretion standard requires us to uphold a ruling which a reasonable judge might have made, even though we would not have ruled the same and a contrary ruling would also

be sustainable." (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1153.)

With our limited record on this issue, we find that the trial court properly weighed the probative value against prejudice in excluding evidence of Abarca's prior conviction. The domestic violence conviction was from 1990 or 1991 and is too remote in time and collateral to the issue of whether Abarca made inappropriate comments to two of his female coworkers. And, although Citizens claims that the conviction is based on an assault where Abarca cut his wife's chin with a knife, there is nothing in the record that reveals the underlying facts of the conviction. To the extent the statements were relevant to impeach Abarca's statements to his psychologists, we fail to see how that evidence would call into question the entirety of the psychologists' conclusions and justify overturning the jury's verdict. The psychologists testified that their conclusions were based on a battery of psychological tests meant to identify malingerers, not only a single question about Abarca's criminal history.

The trial court's ruling found the conviction "more speculative than probative" and found that the conviction was too remote in time from the relationship between Citizens and Abarca to be admissible. The trial court properly weighed the relevant factors and its decision was not arbitrary and capricious. We find no abuse of discretion here.

VIII. Past lost earnings

Citizens argues that the jury's award of $35,000 for past lost earnings was excessive because it included lost wages for a seven-month period during which Abarca was collecting state disability and not looking for work. While an employee should

not collect a windfall, that position is not persuasive when the employer's wrongful act, not the employee's injury, prevented the employee from working, as is the case here. (See *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1434.) Citizens bears the burden of proving "the amount which the employee . . . has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181.) Citizens, however, relies on Abarca's single interrogatory response that stated he received "disability benefits from approximately October 10, 2012 to October 8, 2013, and thus was not searching for employment." This does not conclusively establish that he was totally disabled for reasons having nothing to do with Citizens's tortious conduct. As discussed in more detail above, it was Abarca's position that he could have worked with reasonable accommodations until Citizens terminated him and that Citizens's conduct placed Abarca in a materially worse position when he was injured.

Alternatively, Citizens argues that it should nevertheless be given a credit for the disability benefits Abarca received. However, the collateral source rule bars offsetting Abarca's recovery by his state disability payments because those payments are independent of Citizens. (See *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10.)

DISPOSITION

The judgment is affirmed. Noe Abarca is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.