Filed 4/18/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARIETTA HARVEY, **Plaintiff and Appellant,** **v.** **SYBASE, INC.,** **Defendant and Appellant.**	**A109300** **A111450** **(Alameda County** **Super. Ct. No. RG03107881)**

In this employment discrimination case, the same person who terminated plaintiff had previously hired and promoted her. Defendant, the employer, relies on several California and federal cases to argue that this "same actor" evidence compels a reversal of the trial court's denial of defendant's motion for judgment notwithstanding the verdict (JNOV) on the issue of liability. We conclude such evidence is entitled to no special weight and does not modify the standard of review, which requires us to affirm if substantial evidence supports the jury's verdict.

Between 1995 and 2003, Nita White-Ivy supervised plaintiff Marietta Harvey in the human resources departments of two separate companies. White-Ivy hired and promoted Harvey at Pyramid Technology and at defendant Sybase, Inc. (Sybase). Following her termination from Sybase by White-Ivy in 2003, Harvey filed an action under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, parts I.B., II.A. and II.C. of this opinion are not certified for publication.

seq.) claiming that Sybase, acting through White-Ivy, violated the FEHA by terminating Harvey based on either her race or her gender. The jury agreed, returned a verdict in Harvey's favor on that claim, and awarded both compensatory and punitive damages. Sybase unsuccessfully moved for JNOV, and, on appeal, challenges that ruling, arguing that the evidence of discriminatory intent Harvey presented was insufficient in light of White-Ivy's long history of treating Harvey with extraordinary favor. Sybase also claims that the trial court committed prejudicial error in responding to a question posed by the jury during deliberations.

Harvey has filed a cross-appeal, contending the trial court erred in granting Sybase JNOV on the issue of punitive damages and nonsuit on Harvey's claims of wrongful termination in violation of the public policies expressed in Labor Code sections 232 and 232.5. Harvey also contends that the trial court applied the wrong standards when it awarded her attorney fees as a prevailing party under the FEHA.

In the published portion of this opinion, we examine two of the issues raised by the parties in their respective appeals. First, we reject Sybase's contention that same actor evidence should be accorded special weight in reviewing a trial court's decision to deny an employer's motion for JNOV. Second, we analyze the use of Labor Code sections 232 and 232.5 as the bases for claims of wrongful termination in violation of public policy. We determine that the trial court correctly granted nonsuit as to each of these claims because Harvey failed to engage in the activity protected by Labor Code section 232 and because the policy set forth in Labor Code section 232.5 was not "well established" at the time of her discharge.

We address the other issues raised by the parties' appeals in the unpublished portion of our decision. We reverse the trial court's grant of JNOV on the jury's award of punitive damages to Harvey, and we reverse, in part, the court's award of attorney fees. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In 1995, eight years prior to Harvey's February 2003 termination from Sybase, she was hired as a human resources (HR) representative at Pyramid Technology by White-Ivy, who was then head of Pyramid's HR department. Both Harvey and White-Ivy are Filipina. White-Ivy promoted Harvey to HR manager a year later. John Chen, who was then Pyramid's president and chief executive officer (CEO), subsequently awarded Harvey a stock bonus.

Chen left Pyramid in 1997 and became president and chief operating officer at Sybase. Soon thereafter, White-Ivy followed Chen to Sybase, where she became a vice-president in charge of worldwide HR. In the spring of 1998, White-Ivy hired Harvey as an HR director at a salary of $100,000 per year. White-Ivy repeatedly promoted Harvey, first to senior HR director, then to group HR director in 2001. The latter position was one that White-Ivy created specifically for Harvey and which made her the second-highest ranking manager in Sybase's HR department. In addition to the promotions, White-Ivy granted Harvey frequent, significant increases in salary and awarded her a number of bonuses and perks. And from the time of her hiring in 1998 until the fall of 2002, White-Ivy gave Harvey very high ratings for her job performance.

In early 2001, Sybase senior manager Steven Capelli remarked to Chen that he thought Sybase's HR department looked like "an airport." Chen interpreted Capelli's comment to mean that the HR department had "diversity problems."[2] Chen then passed the comment on to White-Ivy in early 2001. Following this, White-Ivy made a series of comments reflecting a preference for employing white males.

---

[1] In this appeal, Sybase challenges the denial of its motion for JNOV. In such a case, we state the facts in the light most favorable to Harvey, who was the prevailing party below. (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 4, fn. 1.) Here, we also recite the same actor evidence relied upon by Sybase in order to properly resolve its argument that such evidence impacts our review.

[2] Capelli did not testify at the trial and we have no direct evidence of what message he intended to convey by his airport remark.

For example, in the spring of 2001, White-Ivy told HR employee Katie Flotten there were too many Asians in the HR department, there should be more white males, and the department was starting to look like an airport. Senior HR representative Linda Hartman recalled that at a recruiter meeting in approximately February 2002, White-Ivy expressed a preference for hiring white males. HR employee Kristin Straka was present at the meeting and recalled that White-Ivy had expressed a preference for hiring males (but not necessarily white males) and had said "we need more men in this department, because there is too much gossip." Straka also recalled that during a department meeting held sometime after January 2002, White-Ivy said that Chen had commented that the HR department looked like an airport. Flotten recalled that at "various meetings" White-Ivy commented that "we have too many women, because all these people are pregnant and going out on leave." Although Flotten could not remember precisely when White-Ivy made these comments, she testified that the last time she heard them was sometime after January 2002.

In 2002, White-Ivy disclosed certain performance concerns to Harvey. In late September 2002, White-Ivy informed Harvey that she was taking back Harvey's responsibility for corporate staffing, "[d]ue to the criticality of the staffing function and the fact that this is a corporate function." In mid-December, White-Ivy told Harvey that she was considering demoting Harvey from group HR director to senior director. White-Ivy stated she was troubled about a decline in Harvey's performance and she believed that Harvey's performance might improve if her responsibilities were reduced.[3]

In mid-December 2002, directly after White-Ivy told Harvey about the possible demotion, Harvey spoke to Sybase's chief financial officer (CFO), Pieter Van der Vorst, and told him White-Ivy was planning to demote her and cut her pay, but she did not understand why. Harvey did not ask Van der Vorst to speak with Chen about the matter,

---

3 The parties presented conflicting evidence at trial concerning the alleged decline in Harvey's performance. This evidentiary dispute has minimal relevance to these appeals because Sybase does not contend that it terminated Harvey for poor performance. (See *Lowe v. J.B. Hunt Transport, Inc.* (8th Cir. 1992) 963 F.2d 173, 175.)

but Van der Vorst volunteered to do so. After her conversation with Van der Vorst, Harvey had a similar conversation with Sybase senior vice-president Raj Nathan. Harvey testified White-Ivy had not told her how much her pay would be cut and that she was "just waiting for the [personnel action request]."

That same month, Sybase executive vice-president Michael Bealmear spoke to Harvey at an office holiday party and told her he had heard she would no longer be supporting his group. Bealmear later asked White-Ivy why Harvey was in the "penalty box," a term Bealmear had coined, not a term Harvey had used. White-Ivy told Bealmear she was disappointed with Harvey's performance and was trying to reduce Harvey's workload to help her.

In January 2003, White-Ivy told Harvey she would not be demoting her or reducing her pay. Harvey told both Van der Vorst and Nathan that she would not be demoted.

That same month, White-Ivy orally approved two new positions in the HR department, a senior generalist HR director and a senior director of staffing. Requisitions opening the positions were completed on February 5.[4] During a discussion between HR employee Marilyn Seuss-Myers and White-Ivy about the staffing director position, White-Ivy told Seuss-Myers she would not give Seuss-Myers the position because she had concerns about Seuss-Myers' performance. White-Ivy said further that Chen wanted her to hire two white males because he felt that the HR department looked like an airport. White-Ivy told Seuss-Myers that she was helped by the fact that she (Seuss-Myers) was white, but was disadvantaged by the fact that she was not male.

On February 13, 2003, Flotten met with Van der Vorst and told him that she was concerned that she might be terminated because she had gone out on stress leave and had filed a workers' compensation claim. She also mentioned that she felt that the data in an HR department survey had been tampered with. On the same day, Kristin Straka spoke

---

[4] To approve a new position at Sybase, the HR department completes a "requisition," a written approval of the position. After the requisition has been completed, the job opening is published and recruitment occurs.

to Van der Vorst about the HR department survey and explained that she had been told that some of the results were changed to make them appear more favorable to the HR department.

After hearing from Harvey, Flotten, and Straka, Van der Vorst met with Chen and told him about the conversations. Chen gave Van der Vorst permission to discuss the matter with White-Ivy. On February 13 or 14, 2003, Van der Vorst met with White-Ivy and discussed with her some of the concerns that Harvey, Flotten, and Straka had voiced to him. After Van der Vorst met with White-Ivy alone, he met with her again in Chen's presence to discuss the concerns of these three HR employees.

On February 18, 2003, White-Ivy went to Harvey's office and accused Harvey of having spoken to Van der Vorst the previous Friday and to Bealmear about being put in the "penalty box." Harvey denied having spoken to Van der Vorst the previous Friday and said she had not told Bealmear that White-Ivy had put her in the "penalty box," adding that "[t]hose are not my words." White-Ivy instructed Harvey to come to her office at 2:00 p.m.

When Harvey arrived for the 2:00 p.m. meeting, White-Ivy said that the purpose of the meeting was to terminate Harvey's employment at Sybase. White-Ivy said Harvey had "stabbed [White-Ivy] in the back" by telling Bealmear that White-Ivy had put her in the "penalty box." Harvey denied using the phrase "penalty box" in speaking to Bealmear. At the end of the meeting, White-Ivy told Harvey she was eliminating Harvey's group director position. In Sybase's HR documentation, White-Ivy characterized the termination as an "elimination of position" rather than as one for cause. White-Ivy offered Harvey two and one-half month's severance pay provided Harvey signed a release of claims against Sybase. Harvey did not sign the release and received no severance package.

White-Ivy later stated she terminated Harvey because Harvey had betrayed her trust by making derogatory comments about White-Ivy, by lying about speaking to Van der Vorst, and by telling Van der Vorst (untruthfully, in White-Ivy's view) that she did not understand why White-Ivy proposed demoting her. The decisive factor, according to

White-Ivy, was Harvey's conversation with Van der Vorst; that "completed [her] decision" to terminate Harvey.

The next day, February 19, 2003, White-Ivy held a meeting for the entire HR department. During the meeting, White-Ivy discussed a restructuring of responsibilities within the HR department, and explained that there would be two new senior HR directors. About one week later, Harvey called Chen to express her interest in being considered for one of the positions. Chen told Harvey he "would love for [Harvey] to come back to Sybase" but she should talk to White-Ivy to work out their differences.

Harvey and White-Ivy then arranged an interview for Harvey on the evening of April 2, 2003. On that day, however, Harvey received a letter from White-Ivy stating she had chosen other candidates for the positions sought by Harvey. The two positions were ultimately filled by two white males.

On July 22, 2003, after receiving a right to sue letter from the FEHA, Harvey filed an action against Sybase in Alameda County Superior Court. Her complaint alleged Sybase had violated Government Code section 12940[5] by terminating and not rehiring her due to her gender, race, or national origin. She also claimed wrongful termination in violation of the public policies expressed in Labor Code sections 232.5 and 923.[6] The trial court later granted Harvey leave to amend her complaint to add a claim for wrongful termination in violation of the public policy expressed in Labor Code section 232. Sybase defended the action, claiming that discrimination had played no part in the

---

[5] Government Code section 12940, subdivision (a), provides in pertinent part: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] (a) For an employer, because of the race, . . . , national origin, . . . , [or] sex, . . . of any person, to refuse to hire or employ the person or . . . to discharge the person from employment . . . , or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

[6] On appeal, Harvey does not address her claim under Labor Code section 923, and we therefore treat it as abandoned.

company's decision to terminate Harvey, and White-Ivy had fired Harvey for lying and insubordination.

Trial in this action began in September 2004. After the close of plaintiff's case, the trial court granted Sybase's motion for nonsuit on Harvey's claims for wrongful termination in violation of public policy, but denied Sybase's motion for nonsuit on Harvey's discrimination claims.

The jury returned a verdict for Harvey. It found that Harvey's race or gender was a motivating reason for her termination and further found that White-Ivy would not have terminated Harvey without regard to her race or gender. The jury also found that Harvey's race or gender was a motivating reason in the decision not to rehire her, but found that White-Ivy would not have rehired her in any event. Based on these findings, the jury awarded Harvey a total of $1,342,943 in compensatory damages. After a bifurcated punitive damages phase, the jury awarded Harvey $500,000 in punitive damages.

Sybase then moved for a new trial and for JNOV. It challenged the sufficiency of the evidence to support both liability and punitive damages, and argued that the trial court had prejudicially erred in responding to a question the jury had posed during the course of its deliberations.[7] In an order filed December 6, 2004, the trial court granted JNOV on the punitive damages verdict and a conditional new trial on that component in the event its JNOV ruling was set aside on appeal; it denied the motions in all other respects. The trial court found as a matter of law that White-Ivy's conduct did not amount to malice or oppression. It concluded that although White-Ivy obviously intended to fire Harvey, this was not the sort of "intent to cause injury" required to support an award of punitive damages.

---

[7] During its deliberations, the jury had asked the court to explain the meaning of a portion of the jury instructions. The question concerned what constituted a legitimate reason for discharge and asked whether "retaliation" was a legitimate reason for termination. We set out the facts relevant to this issue in the discussion section of this opinion.

The trial court then entered judgment for Harvey in the amount of $1,342,943, plus costs to be determined by the court. The trial court subsequently entered an order awarding Harvey $28,602.98 in costs.

Sybase filed an appeal from the judgment and the portion of the trial court's order denying its motion for JNOV or, in the alternative, for new trial. Harvey cross-appealed from the judgment and from the portion of the trial court's order granting JNOV to Sybase on the issue of punitive damages.

After briefing and argument, the trial court awarded Harvey approximately $620,000 in attorney fees for the fees incurred in prosecuting her case. In a separate order, the trial court granted Harvey $75,000 for "fees-on-fees," or the fees incurred in pursuing her attorney fee claims against Sybase. Harvey appealed from both fee orders, and Sybase filed cross-appeals. We then consolidated the appeals for briefing and disposition.

DISCUSSION

I. SYBASE'S APPEAL

Sybase first challenges the trial court's denial of its motion for JNOV. It argues there was no substantial evidence from which the jury could find that Harvey was terminated for discriminatory reasons. It also contends the trial court erred in its response to a question the jury posed during deliberations concerning Sybase's "mixed-motive" affirmative defense.

A. *The Sufficiency of the Evidence*

1. *Standard of Review—The Substantial Evidence Test*

Sybase challenges the superior court's denial of its motion for JNOV. An appeal from a denial of such a motion is a challenge to the sufficiency of the evidence supporting the jury's verdict and the trial court's decision. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320.) "In ruling on a motion for JNOV, ' "the trial court may not weigh the evidence or judge the credibility of the witnesses, . . . but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible. Such order may be granted only when, disregarding conflicting

evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is no evidence sufficiently substantial to support the verdict." ' [Citation.]" (*Ibid.*)

In reviewing the trial court's denial of a motion for JNOV, our task is to determine whether there is any "substantial evidence," whether contradicted or uncontradicted, supporting the jury's conclusion; if such substantial evidence exists, we must uphold the trial court's denial of the motion. (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 730.) " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] 'Substantial evidence . . . is not synonymous with "any" evidence.' Instead, it is ' " 'substantial' proof of the essentials which the law requires." ' [Citations.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) The ultimate question before us is "whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; accord, *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 150.)[8]

2. *Proving Discriminatory Intent—Legal Framework*

The FEHA prohibits discrimination in employment on the basis of certain enumerated personal characteristics, including race, national origin, and gender. (Gov. Code, § 12940, subd. (a).) In an action under the FEHA, a plaintiff must show that she suffered an adverse employment action because of a protected characteristic. (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2007) ¶ 7:345, p. 7-57) One way a plaintiff may do this is by proving "disparate treatment," which is "*intentional* discrimination against one or more persons on prohibited grounds." (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 354, fn. 20; *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 822.)

---

8 Because of the similarity between federal and state antidiscrimination laws, California courts look to pertinent federal precedent when applying the FEHA. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.)

"In some cases, the evidence will establish that the employer had 'mixed motives' for its employment decision. [Citation.]" (*Heard v. Lockeed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748.) In such a case, "both legitimate and illegitimate factors contribute to the employment decision." (*Ibid*.) In a mixed-motive case, the plaintiff's initial burden is to prove that discrimination was a motivating factor in the adverse employment action, even though other factors may also have been involved. (Chin et al., Cal. Practice Guide: Employment Litigation, *supra*, ¶ 7:488, p. 7-82.) If the plaintiff meets this burden, then the burden shifts to the employer to demonstrate that it would have taken the same action even if it had not taken the prohibited characteristic into account. (*Id.*, ¶ 7:490, p. 7-83.)

Once the case is submitted to the jury, "the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's [nondiscriminatory] reasons for the employment decision." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 204.) As a consequence, in reviewing the denial of Sybase's motion for JNOV, we consider only "whether the trial court correctly concluded that . . . substantial evidence supported the jury's conclusion." (See *Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 73.)

3. *Same Actor Evidence*

In support of the verdict, Harvey points to a number of statements demonstrating a discriminatory animus. In particular, she relies on the "airport" remark made by Capelli to Chen in 2001, and relayed by Chen to White-Ivy. Chen testified that he understood Capelli's remark to mean that the HR department had "diversity problems" because in his "experience the airport, at the time, was very dominated by Asians." Harvey also argues that certain comments by White-Ivy, testified to by HR employees Flotten, Straka, Hartman and Seuss-Myers, provided substantial evidence that White-Ivy understood Chen's remark to her as a directive to increase the proportion of white males in the HR department, and Harvey's discharge was designed to help accomplish this goal. We agree. Though the "pivotal issue in disparate treatment cases [is] whether a *particular individual* was discriminated against and why" (*Heard v. Lockeed Missiles & Space Co.,*

supra, 44 Cal.App.4th at p. 1756), remarks by the decision maker reflecting a general intent to discriminate against members of the same protected group as the plaintiff provide substantial evidence of a discriminatory animus toward the plaintiff. (*Cordova v. State Farm Ins. Co.* (9th Cir. 1997) 124 F.3d 1145, 1149; see *Chuang v. Univ. of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1128; *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221.)

Relying on both federal and California case law, Sybase argues, however, that the jury's verdict was not supported by substantial evidence because the "same actor rule" raised a strong inference that White-Ivy did not discriminate in terminating Harvey, and Harvey failed to offer substantial evidence to overcome that inference. " '[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.' " (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809, quoting *Bradley v. Harcourt, Brace and Co.* (9th Cir. 1996) 104 F.3d 267, 270-271; accord, *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 980; *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1158.)

The rationale underlying this inference is that " '[f]rom the standpoint of the putative discriminator, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." ' " (*Horn v. Cushman & Wakefield Western, Inc., supra,* 72 Cal.App.4th at p. 809, quoting *Proud v. Stone* (4th Cir. 1991) 945 F.2d 796, 797.) The same actor inference has also been applied in cases in which the putative discriminator promoted the plaintiff before taking adverse action against him. (See *Coghlan v. American Seafoods Co. LLC.* (9th Cir. 2005) 413 F.3d 1090, 1098.)

Judicial analysis of the effect of same actor evidence has been clouded by imprecise language. California cases, for example, have stated that same actor evidence creates both an "inference" and a "presumption," sometimes within the same sentence. (See *Horn v. Cushman & Wakefield Western, Inc., supra,* 72 Cal.App.4th at p. 809, fn. 7; see also *West v. Bechtel Corp., supra,* 96 Cal.App.4th at p. 981.) The Ninth Circuit has

explained that "[t]he same actor inference is neither a mandatory presumption (on the one hand) nor a mere possible conclusion for the jury to draw (on the other). Rather it is a 'strong inference' that a court must take into account on a summary judgment motion. [Citation.]"[9] (*Coghlan v. American Seafoods Co. LLC., supra,* 413 F.3d at p. 1098.) "[W]hen the allegedly discriminatory actor is someone who has previously selected the plaintiff for favorable treatment, that is very strong evidence that the actor holds no discriminatory animus, and the plaintiff must present correspondingly stronger evidence of bias in order to prevail." (*Id.* at p. 1096, fn. 10; see also *Bradley v. Harcourt, Brace and Co., supra,* 104 F.3d at p. 271 ["strong inference"].) *Horn* also adopted the "strong inference" language. (*Horn*, at p. 809.)

Sybase's reference to a "same actor *rule*" is not rooted in any cited case. And presumptions and inferences, though similar, are distinct. Our Evidence Code defines a *presumption* as "an assumption of fact that the *law requires to be made* from another fact or group of facts . . . established in the action" (Evid. Code, § 600, subd. (a), italics added), and presumptions may be created by case law as well as by statute (2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2008) Presumptions, § 46.30, p. 1094). But, despite the apparent assumptions in *Horn* and *West,* no California case or statute has created a same actor presumption. An *inference*, on the other hand, is driven by logic, not law. It "is a deduction of fact that may logically and reasonably be drawn from

---

9 *Coghlan* applied the same actor inference in the context of a summary judgment motion. (*Coghlan v. American Seafoods Co. LLC., supra,* 413 F.3d at p. 1098.) Appellate courts have also applied the inference in reviewing postverdict motions. (*West v. Bechtel Corp., supra,* 96 Cal.App.4th at pp. 980-981 [applying same actor inference in reversing denial of employer's motion for JNOV]; see also *Grossmann v. Dillard Department Stores, Inc.* (8th Cir. 1997) 109 F.3d 457, 459 [considering same actor inference in reversing district court's denial of employer's motion for judgment as a matter of law]; *Jacques v. Clean-Up Group, Inc.* (1st Cir. 1996) 96 F.3d 506, 512 [considering same actor inference in reviewing denial of plaintiff's motion for judgment as a matter of law after verdict for employer]; *Birkbeck v. Marvel Lighting Corp.* (4th Cir. 1994) 30 F.3d 507, 513 [applying same actor inference in affirming judgment as a matter of law for defendant employer]; cf. *Lowe v. J.B. Hunt Transport, Inc., supra,* 963 F.2d at pp. 174-175 [applying same actor inference in affirming directed verdict for employer].)

another fact or group of facts . . . established by the evidence." (Evid. Code, § 600, subd. (b).) Clearly, same actor evidence will often generate an inference of nondiscrimination. But whether or not the inference so drawn is a *strong* inference should not be an *a priori* determination, divorced from its factual context. Among the factors that influence the strength of such an inference are: (1) the nature of the benefit(s) conferred and the adverse employment action taken by the actor; (2) the length of time between the positive and negative actions taken; and (3) the existence and nature of any motivating factors for the adverse action that arose after the benefit was conferred. The facts of our case well illustrate the mistake in positing that same actor evidence always creates a strong inference.

The existence of same actor evidence in an employment discrimination case should not change the standard for reviewing the denial of a motion for JNOV or alter the meaning of the term "substantial evidence" contained in that standard. The *West* case, relied upon by Sybase in its same actor argument, in fact supports our conclusion. The procedural posture of *West* was identical to our own. Plaintiff had prevailed on his age discrimination claim in the trial court, and Bechtel's motion for JNOV had been denied. On appeal, Bechtel claimed the trial court erred in denying its motion. Following a two-step analysis, *West* agreed. First the same individual who fired West had hired him one month before, creating an inference of nondiscrimination. (*West v. Bechtel Corp., supra,* 96 Cal.App.4th at pp. 980-981.) Second, "[n]o substantial evidence support[ed] any contrary implication." (*Id.* at p. 981.) *West*, in other words, recognized that in the appeal of a denial of a motion for JNOV, the same actor inference does not change the standard of review: if substantial evidence to support the plaintiff's verdict exists, we must affirm.

In its briefing, Sybase pays lip service to this principle. But Sybase consistently argues that the introduction of same actor evidence places a higher burden on a plaintiff in an employment discrimination case. Principally, Sybase contends that its same actor evidence requires Harvey to introduce specific evidence of White-Ivy's animus *toward Harvey*. Sybase argues that evidence of an intent to discriminate against members of Harvey's race and gender is insufficient.

We disagree. We would usurp the jury's function if we adopted the Sybase approach. Our case contains strong same actor evidence, but there is also substantial evidence that White-Ivy had formed the intent to make race- and gender-based personnel decisions in the HR department. It is not our job to determine, as a matter of law, the strength of the competing inferences. Instead, the jury must do so, and, on review we are limited to deciding if substantial evidence supports that determination. Evidence that the same actor conferred an employment benefit on an employee before discharging that employee is simply evidence and should be treated like any other piece of proof. (*Waldron v. SL Industries, Inc.* (3d Cir. 1995) 56 F.3d 491, 496, fn. 6; see *Williams v. Vitro Services Corp*. (11th Cir. 1998) 144 F.3d 1438, 1443.) Placing it in a special category as a "rule" or "presumption" or stating it creates a "strong inference" attaches undue influence to same actor evidence and threatens to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment and postverdict motions. The trial court correctly rejected the argument that the jury's verdict lacked substantial evidence to support it.

B. *Sybase's Claim of Instructional Error*[*]

Sybase contends that the trial court prejudicially erred in responding to a question the jury posed to the court during its deliberations concerning the jury instruction on Sybase's mixed-motive affirmative defense.

At trial, Harvey testified that when she decided to speak to Van der Vorst about her problems with White-Ivy, she did so in reliance on Sybase's internal "Open Communication/Feedback" policy. This policy explained that when raising work-related questions, problems, or concerns with management, a Sybase employee "is not required to follow the usual chain of communication/organizational chain and may raise concerns at any management level in the organization." The policy stated "Sybase has a non-retaliation policy, which means that those raising any legitimate issues or concerns are

---

[*] See footnote, *ante*, page 1.

protected from retaliation or reprisal." Harvey testified she believed that going to Van der Vorst would be protected activity under the policy.

White-Ivy testified she believed Harvey had been untruthful when she spoke with Van der Vorst, Bealmear, and others and had later lied when she described those conversations to White-Ivy. White-Ivy explained that it was Harvey's conversation with Van der Vorst that completed White-Ivy's decision to terminate her. Sybase's counsel stated in closing argument that Harvey's conversations with Bealmear and Van der Vorst had motivated White-Ivy to fire her second in command, and that White-Ivy had done so because Harvey had mischaracterized White-Ivy's actions when speaking to others at the company and had then lied to White-Ivy when asked about those conversations.

At the close of the trial, the jury was instructed on Sybase's mixed-motive affirmative defense. (See BAJI No. 12.26.) The instruction read to the jury stated: "If you find that the employer's action, which is the subject of plaintiff's claim, was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decisions. [¶] An employer may not, however, prevail in a mixed motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Neither may an employer meet its burden by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The essential premise of this defense is that a legitimate reason was present, and standing alone, would have induced the employer to make the same decision."

During deliberations, the jury sent a note to the trial judge concerning the mixed-motive jury instruction. The note read: "Page 24 line 7 of the jury instructions talks about 'a legitimate reason.' Is retaliation a 'legitimate reason' or is retaliation illegal, and, therefore, not a 'legitimate reason' for termination? If the reason is against Sybase's policy is it not legitimate?"

After receiving the note, the trial court asked counsel for their views on how to respond. Harvey's counsel argued that "retaliation for exercising legal rights" would be

illegal, but stated "the fact that [the reason] is against Sybase's policy alone does not make it illegitimate." Sybase's counsel responded that "retaliation in the abstract is not illegal" and the jury should be so instructed. Sybase's counsel also stated there was "nothing unlawful in and of itself in violating the company policy . . . unless it's in violation of the law as to what your instruction says" and asked the court to instruct the jury that a violation of company policy would not be illegal. After Sybase's counsel requested that the court explain that the retaliation claim was no longer in the case, Harvey's counsel noted "one of the things we argued in closing argument . . . was that it was retaliation because of her race. That she was fired, unlike the two White workers because of her race, so . . . if we say retaliation is no longer an issue, that would be misleading, as well." Sybase's counsel then responded that "[i]t's not a retaliation case. It's a discrimination case as to her race." Sybase's counsel then argued that because Harvey's claims of wrongful termination in violation of public policy were no longer in the case, retaliation *would* be a legitimate reason for discharge "because [the reason] has to be against the law, a violation of [Sybase's] policy would not be a violation of the law, and, therefore, it would be a legitimate reason."

After hearing from counsel, the trial court summoned the jury back to the courtroom. The trial court attempted to answer the question as follows:

"THE COURT: First of all, I will give you an additional jury instruction that could have been given earlier. [¶] The plaintiff's claim that her termination was contrary to public policy is no longer an issue in this case. Do not speculate as to why this claim is no longer involved in this case. You should not consider this during your deliberations. [¶] . . . [¶] There is a reference here to a legitimate reason and the question is: Is retaliation a legitimate reason or is retaliation illegal, and, therefore, not a legitimate reason for termination. [¶] The word 'retaliation' is sort of a loaded word. I mean, when you hear retaliation, it seems to indicate from just stating it that it's illegal, but in the abstract, retaliation is not illegal. Retaliation is illegal only if the reason for the retaliation is illegal. That may not help you much, but that's the way it works. [¶] When retaliation is illegal, again, it depends on whether the reason for the retaliation is illegal.

The remaining claims in this case rest only on what we generally call discrimination. In other words, the claim as to the termination and the claim as to the potential new jobs, each must rest on discrimination due to gender or race or not. [¶] Part of this question says if the reason is against Sybase's policy is it not legitimate? I'll answer it this way. The fact that a company does not follow its own policies does not make it illegal by itself. It doesn't become illegal just because the company doesn't follow its own policies. That's about all I can tell you. I hope that's helpful. If you want something else, you can ask me. [¶] You're welcome to try to ask the question now. I realize it puts you on the spot and you can send me out a written question, if you want.

"THE JURY FOREPERSON: Okay. Does that answer it? (Comment directed to jury panel.)

"THE COURT: If somebody retaliated because of a person's race, for example, that would be illegal retaliation. In another context somebody could be said to retaliate, but it's not illegal unless there is an illegal reason for it. I guess I'll put it that way. I hope that is helpful.

"JUROR NO. 7: I guess the question for us nonlegal people, we don't know if retaliation is illegal, and we are being asked to say if we think retaliation was legitimate, and we don't know how to do that since we don't know if it's illegal. We don't know if . . .

"THE COURT: Well, if I didn't give you the jury instruction that said a particular act was illegal, then you should not assume that it is illegal, and there are other instructions that might be helpful. There aren't very many instructions that touch on the liability here, and you might look at all the instructions that deal with liability. There are only three, four or five that deal with liability. If you look at all those together, it might be helpful to you. Okay. Thank you."

When the proceedings began the next day, the trial court stated, "When you asked a question yesterday I'm not sure that I gave you a clear enough answer off the top of my head, so I will read the following to you and you will have it in writing. This instruction applies only if you first find that an employment decision was motivated, in part, by an

employee's race or gender. That is, if you answer to either question, question 1 or 5 on the verdict form, if the plaintiff's race or gender played a motivating role in the decision, the employer has the burden to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken race or gender into account. . . . [T]hat covers the complicated instruction that you have."

Later that day, the jury returned a verdict for Harvey. By a vote of nine to three, the jury found (1) Harvey's race or gender was a motivating reason for Harvey's discharge and (2) White-Ivy would not have terminated Harvey without regard to her race or gender. On Harvey's failure to rehire claim, the jury returned a verdict for Sybase, finding by a vote of nine to three that Harvey's race or gender were motivating factors in the decision not to rehire her, but finding by a vote of 11 to one that White-Ivy would not have rehired her anyway.

1. *Standard of Review*

We engage in a two-step review. We first determine whether the trial court's response to the jury correctly stated the law, and if we conclude it did not, we then ask whether the erroneous instruction was prejudicial. (See, e.g., *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875 [examining whether instruction was properly given before proceeding to consider prejudice].) Whether an instruction misstates the law is a legal issue that we review de novo. (*Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F.3d 838, 858 (en banc), affd. *sub nom. Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90; accord, *National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 427.) We assess prejudice in the context of the entire trial record. (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1249.) When we do so, " 'we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.' [Citations.]" (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.)

2. "*Legitimate*" *Reasons for Adverse Employment Action*

In *Guz*, an age discrimination case, the California Supreme Court explained what constitutes a "legitimate" reason for an adverse employment action. Because the ultimate issue in employment discrimination cases "is simply whether the employer acted with *a motive to discriminate illegally*," " 'legitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination*. [Citations.]" (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 358, fn. omitted.) Such reasons, if nondiscriminatory, "need not necessarily have been wise or correct." (*Ibid.*) Thus, an employer's reason need not be laudable to qualify as "legitimate" for these purposes; indeed, the reason may even be reprehensible so long as it is nondiscriminatory.[10] (See, e.g., *Slatkin v. University of Redlands, supra,* 88 Cal.App.4th at p. 1157 [personal grudge is a legitimate, nondiscriminatory reason for adverse employment action].) This is because the relevant statutes make it illegal only for employers to take action against employees on the basis of certain prohibited characteristics.[11] (See, e.g., Gov. Code, § 12940, subd. (a).) The statutes do not prohibit employers from taking adverse action against employees for

---

10 Many reasons that might motivate an employer to take action against an employee are less than admirable but are not prohibited by antidiscrimination laws. Thus, in some cases, "[t]he true reason for the action of which the plaintiff is complaining might be something embarrassing to the employer, such as nepotism, personal friendship, the plaintiff's being a perceived threat to his superior, a mistaken evaluation, the plaintiff's being a whistleblower, the employer's antipathy to irrelevant but not statutorily protected personal characteristics, a superior officer's desire to shift blame to a hapless subordinate . . . or even an invidious factor but not one outlawed by the statute under which the plaintiff is suing; or the true reason might be unknown to the employer; or there might be no reason." (*Wallace v. SMC Pneumatics, Inc.* (7th Cir. 1997) 103 F.3d 1394, 1399.)

11 The FEHA also prohibits certain forms of retaliation. For example, "Government Code section 12940, subdivision (h) . . . , . . . forbids employers from retaliating against employees who have acted to protect the rights afforded by the [FEHA]." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1035.) This form of retaliation is not at issue in this case, and it is apparent from the jury's note that it was not using the word "retaliation" in this sense.

reasons the average person might consider unfair or distasteful. (See *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

3. *The Trial Court Adequately Answered the Jury's Question*

Viewed in light of the record, we conclude that the trial court's response to the jury's inquiry was a correct statement of the law and adequately responded to the question posed. First, the trial court gave an answer that largely reflected what had been requested by Sybase's counsel. Sybase's counsel had argued that "retaliation in the abstract is not illegal," and the trial judge told the jury specifically that "in the abstract, retaliation is not illegal." Sybase's counsel had also argued the court should instruct that a violation of company policy would not, by itself, constitute illegal conduct, and the court so instructed. (See *Brewer v. Board of Trustees of University of Il* (7th Cir. 2007) 479 F.3d 908, 922 [The Civil Rights Act of 1964 "does not create liability for any decision that violates [an employer's] policy, only for decisions that violate [the act's] policy against racism"].) Second, the trial court correctly admonished the jury that Harvey's remaining claims were based on alleged race or gender discrimination, explaining that "the claim as to the termination and the claim as to the potential new jobs, each must rest on discrimination due to gender or race or not." (See *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 361 [liability for discriminatory employment action must be based on evidence of intentional discrimination on grounds prohibited by statute].) Finally, after giving his initial response to the jury's question, the trial judge invited the jury to ask further questions and told the jurors, "you can send me out a written question, if you want." One juror did ask a follow-up question, to which the judge responded, but after that there were no further inquiries from the jury. We must therefore assume that the jury was satisfied with the judge's response.

The trial judge's response to the jury was a correct statement of the law. In any event, even if the trial court's response erroneously suggested to the jury that it could find that firing Harvey was "illegitimate" because it violated company policy, we would conclude that Sybase was not prejudiced by the remark. In its special verdict, the jury made no findings that the basis for firing Harvey was "legitimate" or "illegitimate."

Instead, the jury found race- or gender-based *discrimination* motivated the termination, and no termination would have occurred in the absence of this discrimination. Any confusion on the jury's part as to the scope of the term "legitimate" would not have influenced these findings.

II. HARVEY'S CROSS-APPEAL

A. *Substantial Evidence Supported the Jury's Award of Punitive Damages*[*]

Harvey challenges the trial court's decision to grant JNOV to Sybase on the issue of punitive damages. In its posttrial order, the trial court found "as a matter of law that the punitive damage award was wrong and that there was no substantial evidence to support it." We disagree with the trial court's ruling, and order reinstatement of that damages award.

1. *Standard of Review*

"The trial court may grant [JNOV] only if the verdict is not supported by substantial evidence." (*Begnal v. Canfield & Associates, Inc., supra,* 78 Cal.App.4th at p. 72.) We may uphold the order granting JNOV "only if, reviewing all the evidence in the light most favorable to [Harvey], resolving all conflicts, and drawing all inferences in her favor, and deferring to the implicit credibility determinations of the trier of fact, there was no substantial evidence to support the jury's verdict in her favor." (*Ibid*.; see also *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 911 [applying standard to JNOV on jury's finding that employer acted with malice and oppression].)

Under Civil Code section 3294, subdivision (a), a party may recover punitive damages "where it is proven *by clear and convincing evidence* that the defendant has been guilty of oppression, fraud, or malice." (Italics added.) Despite this more stringent burden of proof at the trial level, we nevertheless confine our review to determining whether the record contains evidence of circumstances warranting the imposition of punitive damages. (*Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576.)

---

[*] See footnote, *ante*, page 1.

2. *The Jury's Finding of Intentional Discrimination Was Sufficient to Support an Award of Punitive Damages*

Sybase defends the trial court's grant of JNOV on the punitive damages issue by arguing that "evidence that establishes *liability* under [the] FEHA does not automatically support punitive damages." Relying on a number of tort cases, Sybase contends that "courts have . . . required 'something more' than the commission of a tort" to justify imposition of punitive damages.[12] Thus, Sybase argues, the mere fact that the jury found that White-Ivy had discriminated against Harvey is insufficient, standing alone, to support an award of punitive damages.

Sybase is wrong. Employment discrimination is a species of *intentional* tort. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1212 [listing "civil rights violations" and "job discrimination" among intentional torts].) In actions "involving intentionally wrongful conduct, *the evidence sufficient to establish the tort is usually sufficient to support punitive damages.*" (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1286, italics added.) Civil Code section 3294, subdivision (a), permits recovery of punitive damages upon proper proof of "malice." Under that section, one definition of malice is "conduct which is intended by the defendant to cause injury to the plaintiff." (Civ. Code, § 3294, subd. (c)(1).) The evidence that supported the jury's determination that White-Ivy intentionally discriminated against Harvey in terminating her also suffices to support an award of punitive damages. (*Tomaselli*, at p. 1286.) The jury found that Harvey had proved by clear and convincing evidence that White-Ivy had "acted with

---

[12] Sybase also relies on a number of federal cases arising under title VII of the Civil Rights Act of 1964. As Harvey correctly points out, the standards set forth in those cases have been largely overtaken by the United States Supreme Court's decision in *Kolstad v. American Dental Assn.* (1999) 527 U.S. 526, 533-539, which held that punitive damages are available in title VII cases without the need to show egregious or outrageous discrimination independent of the employer's state of mind.

malice, fraud or oppression" in terminating Harvey. Neither the statute nor the case law requires more.[13]

Accordingly, we reverse the trial court's grant of JNOV to Sybase on the issue of punitive damages and reinstate the original jury's punitive damages award. (*Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 575.)

B. *The Trial Court Properly Granted Nonsuit on Harvey's Claims of Wrongful Termination in Violation of Public Policy*

In her cross-appeal, Harvey challenges the superior court's grant of nonsuit on her claims of wrongful termination in violation of public policy.[14] Harvey alleged in her complaint that "[t]he decisions to terminate [her] employment and to refuse to rehire [her] were made in retaliation for [her] alleged disclosure and discussion of information about [Sybase's] working conditions with other employees of [Sybase]." She claimed the decisions to terminate and not rehire her violated the public policies set forth in Labor Code sections 232.5[15] and 923. Harvey later amended her complaint to include a claim

---

[13] Having determined that the evidence supports a finding of malice in the sense of "conduct which is intended by the defendant to cause injury to the plaintiff" (Civ. Code, § 3294, subd. (c)(1)), we need not address whether it would also support a finding of "fraud" or "oppression." We likewise need not address whether the evidence meets the statute's alternative definition of malice—"despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (§ 3294, subd. (c)(1).)

[14] In the court below, the parties devoted considerable effort to briefing whether Harvey's wrongful termination claims are preempted by federal labor law. (See *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1378, fn. 2 (*Grant-Burton*) [noting that federal law may preempt such wrongful termination claims in certain circumstances].) The trial court did not address this issue, and the parties scarcely mention it in their briefs in this court. We note, however, that the question of preemption is jurisdictional and cannot be waived. (*Ibid.*, citing *Longshoremen v. Davis* (1986) 476 U.S. 380, 387-393.) Because we hold that neither of Harvey's claims of wrongful termination in violation of public policy meets the substantive requirements of *California* law, we need not determine whether Harvey's claims arguably fall within the protections of *federal* law.

[15] Labor Code section 232.5 provides in pertinent part: "No employer may do any of the following: [¶] . . . [¶] (c) Discharge, formally discipline, or otherwise discriminate

under Labor Code section 232[16] that she was terminated and not rehired because of her "alleged disclosure and discussion of information about [Sybase's] working conditions and [her] salary with other employees of [Sybase]." On appeal, Harvey no longer relies on section 923 (see fn. 6, *ante*, p. 7) and confines her argument to her claims based on sections 232 and 232.5.

Although Harvey's claims based on these statutes are closely related factually, we analyze each of the statutory provisions separately to determine whether Sybase was entitled to judgment as a matter of law on these claims. In reviewing a grant of nonsuit, the appellate court views the evidence in the light most favorable to plaintiff to determine whether evidence presented by plaintiff is insufficient to permit the jury to find in her favor. (See *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

1. *Elements of the Claim*

In California, employment contracts are generally terminable at will. (Lab. Code, § 2922.) Thus, "[a]n employer may discharge an at-will employee 'for no reason, or for an arbitrary or irrational reason.' " (*Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 929.) "On occasion, employers have abused the at will relationship by discharging employees for reasons contrary to public policy as expressed in statutory or constitutional mandates. In response, courts have created an exception to, or qualification of, the at will employment principle . . . : An employer may not discharge an at will employee for a reason that violates fundamental public policy. This exception is enforced through tort law by permitting the discharged employee to assert against the employer a cause of action for wrongful discharge in violation of fundamental public policy." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 887 (*Stevenson*).)

---

against an employee who discloses information about the employer's working conditions."

16 Labor Code section 232 provides in pertinent part: "No employer may do any of the following: [¶] . . . [¶] (c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages."

To establish a claim for wrongful termination in violation of public policy, a plaintiff must prove: (1) an employer-employee relationship, (2) termination, (3) a nexus between the termination and the employee's engagement in protected activity, (4) causation, and (5) damages. (See Chin et al., Cal. Practice Guide: Employment Litigation, *supra*, ¶ 5:10, p. 5-2, citing *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426.) California courts have recognized a tort cause of action for wrongful termination in violation of public policy in a number of instances, including where an employee is discharged for "exercising . . . a statutory or constitutional right or privilege." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 454.) However, where an employee asserts that she has been discharged for exercising a statutory right, she must prove that she actually exercised the right protected by the statute. (See *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 539 [plaintiff could state no claim for "whistleblowing" under Lab. Code, § 1102.5, which prohibits retaliation against employees who disclose violations of law to government or law enforcement agencies, where plaintiff made no complaints to any governmental agency].)

2. *Sybase Was Entitled to Judgment on Harvey's Labor Code Section 232 Claim Because Harvey Did Not Disclose the "Amount of Her Wages"*

Labor Code section 232, subdivision (c) prohibits an employer from discharging an employee "who discloses the amount of his or her wages." In *Grant-Burton*, the Second District held that section 232, in combination with Labor Code section 923 and provisions of the National Labor Relations Act (29 U.S.C. § 151 et seq.), could support a claim of wrongful termination in violation of public policy. (*Grant-Burton, supra,* 99 Cal.App.4th at p. 1376.) We conclude, however, that no substantial evidence supports Harvey's claim under this statute.

Harvey argues her conversations with Van der Vorst concerning White-Ivy's announced intention to demote Harvey and cut her pay provide a factual basis for her claim under Labor Code section 232. Harvey claims that she "disclose[d] the amount of her wages" during these conversations and that Sybase later terminated her in part

because of this claimed disclosure. The undisputed evidence, however, establishes that she did not disclose the amount of her wages to Van der Vorst.

Harvey admitted in her trial testimony that, during her meetings with Van der Vorst, she did not tell him how much she made and did not discuss the amount of her wages. This was entirely consistent with Van der Vorst's account of their conversations. He testified Harvey did not discuss her salary with him and they did not speak about the amount of the proposed pay cut. In light of this consistent and undisputed testimony, it is apparent that Harvey did not "disclose[] the amount of . . . her wages." (Lab. Code, § 232, subd. (c).) The trial court's grant of nonsuit to Sybase on this claim was, therefore, entirely proper.[17] (See *Hejmadi v. AMFAC, Inc., supra,* 202 Cal.App.3d at p. 539.)

Harvey seeks to avoid this result by relying on *Grant-Burton*. According to Harvey, the plaintiff in *Grant-Burton* "did not disclose any amount of her wages whatsoever, but only the fact that her compensation package did not include a bonus." Harvey also points to dictum in *Grant-Burton* in which the court stated that "[t]he very purpose of [Labor Code section 232] is to protect employees who want to discuss some aspect of their compensation, for example, a possible increase in pay, perceived disparities in pay, or the awarding of bonuses." (*Grant-Burton, supra,* 99 Cal.App.4th at pp. 1376-1377, underscoring by Harvey.) Harvey reasons that "if section 232 protects a discussion about a 'possible increase in pay,' it also protects the disclosure of a

---

[17] Sybase argues that Harvey could not have "disclosed" the amount of her wages to Van der Vorst in any event, because, as Sybase's CFO, Van der Vorst either knew how much Harvey earned or had access to her salary information. Sybase contends that to constitute a disclosure within the meaning of Labor Code section 232, the employee must reveal his or her wages "to someone who was unaware of or has no access to the amount of the wages disclosed." We need not address this argument because it is undisputed that Harvey never discussed the amount of her wages with Van der Vorst. We likewise decline to address Sybase's contention that the disclosures protected by section 232 do not include what Sybase calls "compensation 'discussions' (. . . with managers or corporate officers)."

threatened decrease in pay." As we explain, *Grant-Burton* will not bear the weight Harvey places upon it.

In *Grant-Burton,* the plaintiff, a marketing director for a company, had taken part in a meeting with her fellow marketing directors at which the subject of bonuses was discussed. (*Grant-Burton, supra,* 99 Cal.App.4th at p. 1366.) At that meeting, plaintiff revealed to her coworkers that she did not receive a bonus. (*Id.* at p. 1367.) Six days later, the company fired the plaintiff, and company officials later admitted that plaintiff's discussion of bonuses was one of the reasons for her termination. (*Id.* at pp. 1367-1368.) Contrary to Harvey's contention, the court in *Grant-Burton* expressly recognized that the plaintiff in that case *did* disclose the amount of her wages. Indeed, in rejecting the employer's claim that the plaintiff had not done so, the court noted, "Grant-Burton did not receive a bonus. *The amount of her wages in that respect was zero*." (*Id.* at p. 1378, italics added.) Thus, Harvey's interpretation of the case is simply incorrect.

Though *Grant-Burton* made a passing reference to "a possible increase in pay," cases are not considered legal authority for propositions that are not squarely presented by the facts. (See, e.g., *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1039; see also *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 65-66 [language used in any opinion must be understood in light of the facts and the issue then before the court].) Harvey seems to assume that the hypothetical discussion of "a possible increase in pay" alluded to in *Grant-Burton* would not involve a discussion of the *amount* of the possible increase. But there is nothing in the language of the case to justify such an assumption, and for good reason. In *Grant-Burton* there was no evidence of a possible pay increase in an undisclosed amount, and the court had no occasion to consider whether such a discussion would be protected by Labor Code section 232. The case does not support Harvey's argument, and we see no reason in this case to expand *Grant-Burton* beyond its holding.

3. *Sybase Was Entitled to Judgment on Harvey's Claim Under Labor Code Section 232.5 Because There Was No "Well Established" Public Policy Prohibiting Her Termination at the Time of Her Discharge*

In the court below, Harvey also advanced a claim for wrongful termination in violation of the public policy expressed in Labor Code section 232.5, which prohibits the discharge of an employee "who discloses information about the employer's working conditions."[18] (§ 232.5, subd. (c).) Although no case has yet held that a wrongful termination claim may be based on section 232.5, we will assume solely for the purposes of our discussion that the statute could support such a claim in appropriate circumstances. (See *Grant-Burton, supra,* 99 Cal.App.4th at p. 1372 [the statutes that most clearly support a claim for wrongful termination in violation of public policy are those that expressly prohibit termination of employment for specified reasons].) We will also assume, without deciding, that Harvey's conduct satisfied the statute's requirements that Harvey "disclose" information about Sybase's "working conditions."[19] Even so, we conclude that the trial court properly granted nonsuit on Harvey's claim because the policy set forth in section 232.5 was not "well established" at the time of Harvey's discharge.

---

[18] Like Harvey's claim under Labor Code section 232, her claim that she disclosed "working conditions" is based on her conversation with Van der Vorst. As Harvey's counsel explained at the hearing on Sybase's motion for nonsuit, Harvey had "talked to . . . Van der Vorst about her demotion which resulted in a change of her duties, a change of her pay, a change of her working conditions, the terms of her employment. She talked to . . . Van der Vorst about the difficulty of working with . . . White-Ivy and the environment in HR." In this court, Harvey states that the factual support for this claim was "evidence that she had told . . . Van der Vorst about White-Ivy's erratic, dysfunctional and demoralizing management style and about poor morale in the HR department."

[19] Sybase disputes both that Harvey's internal complaint to Van der Vorst "disclose[d] information" within the meaning of Labor Code section 232.5 and that her complaint concerned "working conditions." These terms might well be susceptible to more than one interpretation, but because we resolve Harvey's appeal on this point on a different ground, we need not define the precise extent of their reach.

a. *Determining Whether a Statutory Policy Will Support a Claim for Wrongful Termination*

The California Supreme Court has "articulated a four-part test for determining whether a particular policy can support a common law wrongful discharge claim. The policy 'must be: (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental.' " (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1159, quoting *Stevenson, supra,* 16 Cal.4th at p. 894.) We focus on the third prong of this test. As a leading treatise explains, the rationale underlying this requirement is that "[e]mployers must have *adequate notice* of the conduct that will subject them to tort liability." (Chin et al., Cal. Practice Guide: Employment Litigation, *supra*, ¶ 5:106, p. 5-17.)

b. *Labor Code Section 232.5's Policy Was Not "Well Established" When Harvey Was Terminated*

Sybase contends that the trial court's nonsuit ruling was correct because at the time of Harvey's discharge, there was no "well established" public policy protecting Harvey's right to complain about her proposed demotion or her supervisor. (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090 (*Gantt*), overruled on another point in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6, citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 669-670; see also *Stevenson, supra,* 16 Cal.4th at p. 894.) As Sybase notes, Labor Code section 232.5 became effective on January 1, 2003 (see Stats. 2002, ch. 934, § 2), approximately six weeks before Harvey's termination.

Harvey argues that once a policy is expressed in a statute, it is necessarily "well established" for purposes of a wrongful termination claim. In her view, when the employee's right and the employer's obligation stem directly from a statute, "the concern that they be 'well established' or 'firmly established' is eliminated—the legislature has well and firmly established the right and obligation." Her argument rests on a statement

in *Stevenson* that the third prong of the test is that "the policy must have been *articulated at the time of the discharge*." (*Stevenson, supra,* 16 Cal.4th at p. 890, italics added.) For several reasons, we disagree with her contention.

First, only four pages after the quoted passage appears, the Supreme Court restated the test, and explained that "for a policy to support a wrongful discharge claim, it must be: . . . (3) *well established at the time of the discharge*." (*Stevenson, supra,* 16 Cal.4th at p. 894.) And only two paragraphs before the passage in question, *Stevenson* had noted the requirement set out in *Gantt* that the policy be " 'well established' at the time of the discharge." (*Stevenson*, at p. 889, citing *Gantt, supra,* 1 Cal.4th at p. 1090.) More important, the *Stevenson* court later explained that the policy in question in that case—the FEHA's prohibition against age discrimination—had been in effect since 1961, some 19 years before the FEHA's enactment in 1980. (*Stevenson*, at p. 895.) This observation would have been unnecessary had the enactment of the FEHA been all that was required to create a "well established" public policy.

Second, if we were to adopt Harvey's argument, we would effectively merge the first and third prongs of the Supreme Court's four-part test. The first prong of the test requires that the policy be "tethered" to either a constitutional or statutory provision. (*Gantt, supra,* 1 Cal.4th at p. 1095.) If the mere passage of a statute meant that a public policy was well or firmly established such that it could support a tortious discharge claim, then there would be no need for the third prong of the test.

Finally, it is clear that Harvey's interpretation of *Stevenson* is inconsistent with the reading that both the California Supreme Court and this court have given to it. Since the opinion in *Stevenson* was issued, our Supreme Court has reiterated that the public policy upon which a tortious discharge claim is based be "well established at the time of the discharge" (*City of Moorpark v. Superior Court, supra,* 18 Cal.4th at p. 1159), a formulation anticipated by this Division (*Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal.App.4th 938, 942).

Harvey then argues that the policy was well established prior to the enactment of Labor Code section 232.5. Citing a statement in *Hentzel v. Singer Co.* (1982)

138 Cal.App.3d 290, Harvey contends that "California has long maintained a policy of protecting the right of employees to voice their dissatisfaction with working conditions." (*Id.* at p. 296.) But the court in *Hentzel* was dealing with "hazardous working conditions caused by other employees smoking in the workplace." (*Id.* at p. 293.) Such environmental workplace hazards are not at issue here. In addition, in support of this policy, *Hentzel* relied on Labor Code section 923 (*Hentzel*, at p. 296), and Harvey has abandoned her claims under that section (see fn. 6, *ante*, p. 7). *Hentzel* also relied on other provisions of the Labor Code that had established a state policy of guaranteeing safe and healthful workplaces since 1917. (*Hentzel*, at pp. 297-298.) *Hentzel* is inapposite; it fails to support the contention that Harvey's right to discuss her proposed demotion was firmly established before the enactment of section 232.5.

We need not fully flesh out the precise amount of time that is required before a statutory policy may be considered "well established," in order to conclude that the six-week period in this case is too short. Absent evidence that the policy predated the statute's effective date, a policy so new cannot serve as the basis for the "potent remedy" of a tort action for wrongful termination. (Cf. *Gantt, supra,* 1 Cal.4th at p. 1090.) Accordingly, we hold that the superior court properly granted nonsuit to Sybase on Harvey's claim for wrongful termination based upon Labor Code section 232.5.

C. *Attorney Fees*[*]

Harvey also appeals from the trial court's order granting her attorney fees, contending the trial court applied the wrong legal standard in exercising its discretion on fees. This argument is twofold. First, Harvey contends the trial court applied the wrong standard in reducing the lodestar amount of the fees sought. Second, Harvey asserts that the trial court erred as a matter of law by refusing to award a multiplier. We find no abuse of discretion by the trial court and accordingly affirm its order.

---

[*] See footnote, *ante*, page 1.

1. *The Trial Court's Fee Award*

After prevailing at trial, Harvey moved for an award of fees under the FEHA's fee-shifting provision, Government Code section 12965, subdivision (b). To arrive at a "claimed merits fees lodestar," Harvey's counsel multiplied the total number of attorney hours expended by the attorneys' respective hourly billing rates. Counsel then applied "discrete billing judgments (the difference between total hours and claimed hours)," which reduced the gross lodestar figure from $1,006,456 to $954,002.50. According to Harvey, these reductions reflected "all time devoted solely to the wrongful termination and punitive damages claims or to other noncompensable efforts." Harvey's counsel then applied a 5 percent across-the-board reduction to this figure, which yielded a "claimed merits fee lodestar" of $906,302.38. Harvey requested that the trial court enhance the lodestar amount using a multiplier of 1.3, for a total fee merits request of $1,178,193.09.

Sybase challenged neither the rates that Harvey's counsel requested as part of the lodestar, nor the reasonableness of the time that Harvey's counsel devoted to any specific task. Instead, Sybase argued that because Harvey prevailed on only one of the five causes of action she alleged, the trial court should award only fees for time expended in pursuing Harvey's one successful claim—the claim of discriminatory termination. Sybase contended that a review of the deposition and trial transcripts in the case showed that only 39 percent of Harvey's claimed attorney fees were related to the discriminatory termination claim.

The trial court rejected Sybase's proposed analysis of the fee claim. Instead, the trial court relied upon its own observation of the trial and reduced the proposed fee request to account for time spent on causes of action on which Harvey did not prevail. Although Harvey prevailed on only one of her five causes of action, the trial court recognized that some of the attorney time and effort related to more than one cause of action, and it ultimately concluded that "[t]he proper result is therefore to reduce the claimed lodestar fees of $954,002.50 by 35 [percent] to $620,101.62."

2. *Standard of Review*

In FEHA actions, "the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs." (Gov. Code, § 12965, subd. (b).) Because the statute vests discretion in the trial court to decide both whether to award fees and to determine the amount of those fees, we review the trial court's decision under the deferential abuse of discretion standard. (E.g., *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 422.) Furthermore, the trial court's order awarding fees is presumed correct. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.) We may reverse only if we find a prejudicial abuse of the trial court's discretion. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393 (*Horsford*); accord, *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 660.)

3. *The Trial Court Applied the Correct Standard*

Harvey's first contention is that the trial court applied an improper standard in reducing the lodestar amount. The argument is based in part on the language that the trial court used in its order awarding attorney fees. The trial judge found that, based on "what [he] saw at trial, approximately 20 [percent] of the time was spent on evidence that *only pertained to* the cause of action alleging wrongful failure to rehire, where the jury found for [Sybase]. For one thing, evidence of what happened after [Harvey] was fired had little *relevance to* her claim that she had been wrongly terminated." (Italics added.) Harvey contends that the trial court's use of the words "pertained to" and "relevance to" demonstrates that it applied the wrong standard. She argues that the correct standard is whether the causes of action on which she lost were "related" to the one claim on which she prevailed.

Initially, we observe that it is far from clear that there is any substantive difference between the language employed by the trial court and the standard proposed by Harvey. The verb "pertain" is synonymous with "relate." (Burton, Legal Thesaurus (2d ed. 1992) p. 385, col. 1 ["**PERTAIN**, . . . have interrelationship with, . . . have relation to, . . . relate, stand in relation to"]; accord, Roget's II, The New Thesaurus (3d ed. 1995) p. 726,

col. 1 ["**pertain** . . . [¶] To be pertinent: appertain, apply, bear on . . . , concern, refer, relate"]; boldface type in original.) The same is true of "relevance." (See Burton, *supra*, at p. 440, col. 2 ["**RELEVANCE**, . . . pertinence, reference, relation, relationship"]; boldface type in original.)

More significantly, the case law grants the trial court broad discretion in determining the appropriate fee award. Both parties agree that the seminal case in this area is the United States Supreme Court's opinion in *Hensley v. Eckerhart* (1983) 461 U.S. 424. *Hensley* explained the proper inquiry for a trial court when presented with a fee request in a case in which a prevailing plaintiff has succeeded on only some of his or her claims for relief. (*Id.* at pp. 434-437.) "In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" (*Id.* at p. 434.) The *Hensley* court acknowledged that in many cases "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the [trial] court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." (*Id.* at p. 435.) Nevertheless, if a plaintiff has achieved only partial success, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." (*Id.* at p. 436.) *Hensley* thus demands a two-part inquiry: (1) whether plaintiff failed to prevail on claims unrelated to those on which she succeeded, and (2) whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for a fee award. (*Thomas v. City of Tacoma* (9th Cir. 2005) 410 F.3d 644, 649; see also *Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1316-1317.)

In keeping with *Hensley,* California courts have recognized that fees need not be apportioned between successful and unsuccessful claims when the prevailing plaintiff's claims for relief "are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units. [Citations.]" (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687.) The trial court is in the best position to understand the relationship between the plaintiff's claims and to determine whether time spent on a related claim contributed to the plaintiff's objectives at trial. (*Greene v. Dillingham Construction N.A., Inc., supra,* 101 Cal.App.4th at p. 423; see also *Thomas v. City of Tacoma, supra,* 410 F.3d at p. 649 [question of whether successful and unsuccessful claims are related is one for trial court to decide].)

"[I]f the plaintiff's successful and unsuccessful claims involve a common core of facts or related legal theories, the court should determine 'the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' " (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1019, quoting *Hensley v. Eckerhart, supra,* 461 U.S. at p. 435.) Where a plaintiff's claims cannot be easily segregated into successful and unsuccessful ones, the trial court may therefore take a plaintiff's lack of success into account in adjusting the lodestar amount. (*Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 975.) "The bulk of discretion retained by the [trial] court lies in the second, significance of relief, inquiry. [Citation.]" (*Thomas v. City of Tacoma, supra,* 410 F.3d at p. 649.)

In this case, we cannot say that the trial court abused its discretion. The trial court was in the best position to determine the relationship between Harvey's various claims and whether pursuit of those claims contributed to Harvey's objectives at trial. (*Greene v. Dillingham Construction N.A., Inc., supra,* 101 Cal.App.4th at p. 423.) "Where several claims are presented and the plaintiff prevails on less than all, the court must decide how related the claims were to one another. [Citation.] This is a classic question of degree. Where the plaintiff achieves only partial or limited success, the court may at its discretion make a percentage reduction." (*Fine v. Ryan Intern. Airlines* (7th Cir. 2002) 305 F.3d 746, 757 [upholding district court's percentage reduction of fee award where plaintiff lost

on claims for sexual harassment and sex discrimination but prevailed on retaliation claim; reduction not abuse of discretion even though plaintiff "received all the monetary relief she could have gotten"].) Thus, even if one were to accept Harvey's argument that all of the legal theories that she pursued at trial constituted a single "claim," the trial court nevertheless retained discretion to reduce the fee award. (*Ibid*. [percentage fee reduction may have reflected district court's view "that counsel wasted time pursuing less promising theories of liability"]; accord, *Thomas v. City of Tacoma, supra,* 410 F.3d at pp. 649-650.)

Harvey also complains that the trial court reduced the amount of her fees using a lodestar amount that her counsel had already adjusted to reflect "discrete billing judgment reductions." She notes that the unadjusted lodestar amount was $1,006,456, and that her counsel had proposed discrete billing reductions of $52,453.50, plus an across-the-board reduction of 5 percent, or $47,700.12. Harvey's proposed "net adjusted lodestar" was therefore $906,302.38. Harvey complains that the trial court applied its 35 percent reduction to the *adjusted* lodestar amount ($954,002.50) rather than the *unadjusted* lodestar amount ($1,006,456). Harvey appears to proceed from the assumption that the trial court's award must be based on the initial lodestar calculation, which should include any and all hours expended by counsel in the litigation. This premise is incorrect.

In *Hensley,* the United States Supreme Court explained that "[t]he [trial] court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended.' [Citation.]" (*Hensley v. Eckerhart, supra,* 461 U.S. at p. 434.) The high court admonished that "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' [Citation]." (*Ibid.*; see also *Harman, supra,*136 Cal.App.4th at p. 1310 [discussing *Hensley*].) Thus, rather than presenting a fee request that represents the

entire initial lodestar amount, counsel for a prevailing party are *expected* to reduce that amount through the exercise of this type of billing judgment. Such judgment will almost inevitably result in a fee request that is lower than the total, unadjusted lodestar figure. The trial court therefore did not abuse its discretion in applying its 35 percent reduction to the adjusted lodestar rather than the initial, unadjusted amount.[20]

4. *The Trial Court Was Not Required to Apply a Multiplier to Increase Harvey's Fee Award*

Harvey also contends that the trial court "erred as a matter of law" in denying a contingent risk multiplier. Relying heavily on the Fifth District's opinion in *Horsford*, Harvey contends that "[i]n a contingent fee case, use of a multiplier is the rule, not the exception." She points to the statement in *Horsford* that "the contingent and deferred nature of the fee award . . . *requires* that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is greater than the equivalent noncontingent hourly rate. [Citation.]" (*Horsford, supra,* 132 Cal.App.4th at pp. 394-395, italics added.) Harvey's reliance on *Horsford* is misplaced.

First, Harvey's reading of *Horsford* is at odds with the California Supreme Court's opinion in *Ketchum v. Moses* (2001) 24 Cal.4th 1122. There, our high court explained that "the trial court is not *required* to include a fee enhancement to the basic lodestar figure *for contingent risk,* exceptional skill, or other factors, although it retains discretion to do so in the appropriate case." (*Id.* at p. 1138, second italics added.) *Ketchum* confirms that the decision to include a fee enhancement based on contingent risk is one that is committed to the trial court's discretion. (*Ibid.*) In addition, the Fifth District recently clarified that *Horsford* may not be read to imply that a trial court is somehow bound to include a multiplier when awarding attorney fees. In *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, the Fifth District reiterated the "established principle that a trial court's decision whether to apply a multiplier is a discretionary one," and clarified

---

20 We note also that the trial court disregarded Harvey's counsel's 5 percent across-the-board reduction in making its fee award. The trial court based its award on the adjusted lodestar of $954,002.50, rather than on Harvey's "net adjusted lodestar" of $906,302.38.

that "*Horsford* did not hold otherwise." (*Id.* at p. 1241.) Thus, contrary to Harvey's apparent belief, *Horsford* "did not mandate the use of a multiplier." (*Nichols*, at p. 1241.)

Harvey next contends that the trial court "manifestly did not consider the legally mandated enhancement factors." To the extent that this argument appears to assume that a fee enhancement is mandatory, we have already demonstrated that it is incorrect. Moreover, Harvey fails to demonstrate that the trial court did not consider the proper factors. These factors were extensively briefed by the parties in their moving papers, and we have no reason to doubt that the trial court gave them appropriate consideration.[21] (See *Ketchum v. Moses, supra,* 24 Cal.4th at p. 1140 [where record reflected that superior court reviewed extensive documentation concerning the amount of fees, court had "no reason to doubt that the superior court conducted an independent assessment of the evidence presented"].) And on appeal from an order awarding fees, we must indulge all intendments and presumptions in support of the judgment, even on matters on which the record is silent. (*Ibid.*; see also *Rebney v. Wells Fargo Bank* (1991) 232 Cal.App.3d 1344, 1349 [in fee appeal, "we must infer all findings on these points in favor of the prevailing parties"].)

Finally, we reject Harvey's contention that the "highly contingent nature of this case" necessarily justified application of a contingent risk multiplier. As Division One of this court has explained, the classic case justifying an upward adjustment of the lodestar based on contingency is public interest litigation that "result[s] in no fund of money from which attorney fees might be paid, nor . . . in any monetary recovery by the plaintiffs."

---

21 Harvey points to a comment in the trial court's order awarding fees that "plaintiff argued . . . that a decent award is necessary to teach the defendant a lesson not to discriminate." Harvey contends that this demonstrates that the trial court confused the standard for awarding a multiplier with the standard for awarding punitive damages. We are unwilling to draw this inference from this comment, which Harvey admits is ambiguous. In and of itself, the comment is an accurate statement of the law. (See *Ketchum v. Moses, supra,* 24 Cal.4th at p. 1139 ["Nor should a fee enhancement be imposed for the purpose of punishing the losing party"]; *id.* at p. 1142 ["an enhancement for contingent risk or quality of representation may not properly be imposed merely for the purpose of punishing" the losing party].)

(*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1174; *id*. at pp. 1173-1174.) In contrast, in this case, as in *Weeks*, "because of the availability of attorney fees under the FEHA, the attorneys had reason to assume that the amount of [Harvey's] recovery would not limit the amount of fees they ultimately received." (*Weeks*, at p. 1174.) The contingent risk in this case was therefore simply the risk that Harvey would not prevail. "Such a risk is inherent in any contingency fee case and is managed by the decision of the attorney to take the case and the steps taken in pursuing it." (*Id.* at p. 1175.) As a consequence, the risk that Harvey's attorneys would not be compensated for their work on the case was no greater than the risk inherent in any contingency fee matter, and "because of the availability of statutory fees the possibility of receiving full compensation for litigating the case was greater than that inherent in most contingency fee actions." (*Id.* at p. 1174.)

5. *Limited Remand Is Required*

Although we conclude that the trial court did not abuse its discretion in awarding attorney fees, we nevertheless remand the matter to the trial court with directions that it adjust the award to reflect our disposition of the issue of punitive damages. The trial court deducted 5 percent from the fee award for efforts that related only to Harvey's punitive damages claim. Because we have concluded that the trial court improperly set aside the jury's punitive damages verdict, the trial court must now restore an appropriate portion of the amount it deducted from the fee award as a result of its JNOV on punitive damages.

DISPOSITION

We reverse the superior court's grant of JNOV to Sybase on the issue of punitive damages and direct the superior court to reinstate the jury's punitive damages verdict. We remand the award of attorney fees with directions that the superior court restore to the fee award an appropriate amount for time spent on the punitive damages issue. In all other aspects, the judgment is affirmed. Each party shall bear its own costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.*

(A109300)
(A111450)

* Retired Associate Justice of the Court of Appeal, First District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Superior Court of Alameda County, No. RG03107881, Stephen Allen Dombrink, Judge

Reed Smith LLP, Paul D. Fogel and Raymond A Cardozo; Wilson Sonsini Goodrich & Rosati, Fred W. Alvarez and Troy A. Valdez for Defendant and Appellant

Adams | Nye | Sinunu | Bruni | Becht, Bruce Nye, David J. Becht, Barbara R. Adams and John Lee; Rosen, Bein & Asaro and Andrea G. Asaro for Plaintiff and Appellant