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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JERRY STOCKETT et al., Plaintiffs and Respondents, v. ASSOCIATION OF CALIFORNIA WATER AGENCIES JOINT POWERS INSURANCE AUTHORITY, Defendant and Appellant.	C035330 (Sup.Ct.No. 96AS04669)
JERRY STOCKETT et al., Plaintiffs and Appellants, v. ASSOCIATION OF CALIFORNIA WATER AGENCIES JOINT POWERS INSURANCE AUTHORITY, Defendant and Respondent.	C035469 (Sup.Ct.No. 96AS04669)

After plaintiff Jerry Stockett's employment with defendant Association of California Water Agencies Joint Powers Insurance Authority (JPIA) was terminated, he and his wife, Judith, filed the required government claim and then brought suit for unlawful termination and loss of consortium. The case proceeded to trial on the theory of unlawful termination in violation of public policy, based on alleged retaliation for the following acts: supporting claims of sexual harassment and objecting to an attempt to weaken JPIA's sexual harassment policy, objecting to a conflict of interest that violated Government Code section 87100, and free speech to the press. A jury awarded the Stocketts over $4.5 million dollars in damages. JPIA appeals from the judgment, contending the trial court improperly allowed the case to go to the jury on factual theories not set forth in the government claim; there was juror misconduct; and the million dollar damage award for loss of consortium was excessive. The Stocketts also appeal, contending it was error to strike their memorandum of costs.

We find merit in JPIA's first contention. While the Stocketts's claim included facts that would support an action for unlawful termination in violation of public policy based on retaliation for objecting to sexual harassment, it contained no facts to support theories of recovery based on retaliation for opposing a conflict of interest or exercising free speech in speaking to the press. The case was presented to the jury on all three theories of unlawful termination in violation of public policy with a general verdict, and there is no way to

determine that the jury did not rely on the legally improper theories. Further, a review of the record indicates it is reasonably probable that a result more favorable to JPIA would have been reached absent the inclusion of the improper theories at trial. Therefore, the judgment must be reversed. Since we reverse the judgment, we need not address the remaining contentions.

FACTUAL AND PROCEDURAL BACKGROUND

The Association of California Water Agencies is a nonprofit organization of about 425 water districts, created to advocate water rights for member agencies. Numerous of these water agencies joined forces and created JPIA to provide insurance services and risk management services. In August 1995, JPIA had three main programs: a liability program, a worker's compensation program, and a property program.

Each water agency that is a member of JPIA sends a director to the JPIA board of directors. This board elects a 10-member executive committee. In 1995, Warren Buckner was president of the executive committee and Wesley Bannister was vice-president.

In 1983, Stockett was hired as general manager of JPIA. The general manager of JPIA was the head staff person and reported to the executive committee. The general manager made all day-to-day decisions, analogous to a chief executive officer of a corporation. Originally, Stockett had employment contracts for specified periods. In 1992, he signed an employment contract with no specified period; it was terminable at will. In January 1995, Stockett received 97 percent of the bonus for

which he was eligible. His salary was about $120,000 per year. On August 25, 1995, after a closed meeting of the executive committee, Stockett's employment was terminated. He received $65,000-68,000 in severance pay.

The Stocketts filed a government claim for damages pursuant to Government Code section 910. In August 1996, they filed a complaint for damages. After various demurrers, amended complaints, and an unsuccessful motion for summary judgment, the case proceeded to jury trial, which lasted over three months.

The central dispute at trial was the reason for Stockett's termination. Much of the testimony centered on conflicts between Stockett and William Malone, JPIA's insurance broker. Malone had been involved with JPIA's excess liability insurance since 1979; first as an underwriter and since 1991 as a broker. There were discussions about him becoming JPIA's in-house broker, but they could not reach an agreement on salary.

At one time Malone bought dinners for the executive committee before their meetings. Stockett stopped that practice. Beginning in 1995, Malone had to fill out Form 730, Statement of Economic Interests, as a consultant. This practice stopped after Stockett was terminated.

In the spring of 1995, JPIA was looking into ways to market its programs and increase membership. John Sacco, JPIA's risk manager, presented a proposal for in-house marketing, which stressed controlled growth and aggressive risk control. Malone presented a competing proposal for a joint venture marketing

plan between JPIA and his company; he offered a reduced commission. The executive committee adopted the joint venture.

There was tension between Malone and Stockett over the marketing plan. Stockett did not think Malone could effectively do the marketing. Malone thought Stockett was not being supportive. Malone also got upset that Stockett was not providing him all the information he sought. The conflict between Stockett and Malone was discussed in a closed session of the executive committee. Afterwards Stockett, Malone and Bannister met to discuss the conflicts. After a candid discussion, Stockett believed they came to a resolution and each would make an effort to make the joint venture work. The joint venture was not a success.

In October 1994, JPIA agreed to a three-year contract of excess liability insurance. Malone was the broker for this insurance. In the Spring of 1995, Stockett asked an old friend, Gary Rimler of Jardine Insurance, to check out the market for this insurance. Stockett did not tell the executive committee he was testing the market.

Malone learned Rimler was soliciting bids; he asked Stockett for a meeting in Tahoe to discuss the apparent conflict with the existing contract and asked that Buckner and Bannister be included. Stockett declined to include Buckner and Bannister in the meeting, so Malone invited them himself. Two representatives from the insurer and Dan Klaff, the assistant general manager for JPIA, were also in attendance. Malone expressed the concern that Stockett was in the marketplace when

there were three years left to run on the contract. Stockett said he had every right to be in the marketplace and Buckner agreed, but Stockett had no right to change insurance without the executive committee's approval. At the end of the meeting, Stockett understood he could be in the market and make inquiries, but that he was not to solicit formal bids.

Stockett later reported to Buckner and Bannister that Rimler was indeed soliciting proposals and the bidder had been told that JPIA would break its existing contract if adequate savings were shown. He took "full responsibility for any misunderstandings that now exist" and apologized for the position he had put JPIA in. He requested advice on whether he should "kill the Jardine proposals at this time" or accept them and use them only for market information.

Buckner responded with a harshly worded handwritten memo to Stockett, that began: "I am appalled at your duplicity and lack of ethics." Buckner stated he expected both sides to honor the existing contract and ordered Stockett to kill the Jardine proposal. At trial Bannister explained that going into the market while a contract is in place gives one the image of a shopper who does not honor contracts and that image is very injurious. He further explained that it is difficult to get quotes if there is more than one broker. If you use multiple brokers, you should allocate the market, so two brokers do not contact the same carrier.

Malone then proposed a contract extension at a substantial savings. This proposal was adopted immediately after Stockett was terminated.

Another dispute over competing bids for insurance arose with respect to property insurance. For two years JPIA had been attempting to change some policy language in an excess property coverage policy. The problem became acute when there was a mud slide that was not covered. The executive committee instructed Malone to get quotes for coverage. Malone reported he was having trouble dealing with insurers because another broker, Goldman, was shopping the same market. Bannister called Klaff and told him to get Goldman out of the market.

John Sacco, JPIA's risk control manager, reported to Stockett that one of his administrative assistants, Ashley Smalley, complained that Malone came up behind her at the copy machine and rubbed against her. Sacco also mentioned another incident where Malone had stroked a woman's hair. Stockett showed Malone Sacco's memo and Malone said he was sorry and it would not happen again. Stockett told Buckner and Bannister about the incident and considered it closed.

Bannister then wrote Stockett about a perceived problem with sexual harassment claims. He asked that the current procedures be reviewed and perhaps revised, particularly since the accused person was being confronted by someone other than the accuser. Although Bannister expressed no tolerance for sexual harassment or abuses of any kind, he was also concerned about damaging the party accused and potential litigation

against JPIA. He proposed a detailed agenda item about handling sexual harassment situations. Among his suggestions were consideration of a unisex uniform and training in dress codes. Bannister had not reviewed JPIA's sexual harassment policies.

Bannister continued to dwell on the Malone incident, telling Stockett that Malone had denied the conduct and was threatening to sue. In response to Bannister's concerns, Stockett conducted an additional investigation of the incident, which included obtaining a statement from Smalley. Stockett admitted part of his motivation for the investigation was to protect himself in the event of a confrontation with Malone.

At a personnel committee meeting, Bannister expressed his concern about revising the policies to protect the "innocently accused." Stockett was directed to meet with counsel to draft new procedures for handling sexual harassment complaints and present them at the next executive committee meeting. Stockett and others met with counsel; they believed Bannister's suggestions were nonsense, but made changes to placate him. No one took Bannister's suggestion for unisex uniforms seriously. Bannister complained that the changes to the sexual harassment policy were not occurring quickly enough. No one else was concerned.

When Bannister received a copy of the tentative agenda for the August 25 executive committee meeting he was unhappy that the agenda item concerning sexual harassment was directed to the executive committee rather than to staff. He wrote Stockett, castigating him for his inability to follow instructions.

Buckner took Stockett's side that the agenda item was appropriate; Buckner thought Bannister was over-reacting. Bannister then put Stockett's performance on the agenda for the next executive committee meeting.

In June 1995, JPIA decided to purchase group worker's compensation insurance from California Compensation Insurance Company (Cal Comp), rather than continue to self-insure. Stockett was interviewed about the change by Smart's Worker's Comp Bulletin. In an article published in early August, Stockett was quoted as saying Cal Comp was willing to incur some losses on the business to obtain the JPIA account. "The big thing from my perspective is that they're buying business and willing to take some loss on it." Buckner was very upset about the article; he thought the comments were ill-advised and did not reflect well on JPIA. He sent Stockett a copy of the article with a note that read in part: "Calling Cal Comp liars and accusing them of breaking the law by selling insurance below cost are very serious accusations." Buckner indicated apologies had been made to Cal Comp and Malone was trying to avert a cancellation of the policy.

In anticipation of his performance being evaluated by the executive committee, Stockett obtained Buckner's permission to contact the members of the executive committee about their concerns. After speaking with several members of the executive committee, Stockett prepared a defense of his position, responding to their concerns. He apologized for the Smart's article and insisted he was only answering a reporter's

question. With respect to the Goldman situation, he explained that Klaff had asked to permit Goldman to bid on property coverage and Stockett told him market assignments would need to be made. When Malone was asked his preference for markets, he made his plea for assignment of all remaining markets directly to Buckner and Bannister, without responding to staff. Stockett relied on Buckner's letter to show that he had followed the instructions to review and revise sexual harassment policies. Stockett defended his comments that were perceived as lacking in support of the marketing plan and he blamed staff for the failure to get an acceptable property program in two years.

At the August 25 meeting of the executive committee, a closed session was held to discuss Stockett's performance. Nine members voted to terminate his contract; there was one abstention. Stockett was not allowed to address the executive committee and was not certain all members saw his written defense. Klaff was immediately appointed interim general manager.

Buckner testified there were four incidents that showed Stockett's disregard for executive committee orders and poor judgment, which were the reasons for his termination. At the meeting in Tahoe Stockett loudly proclaimed his right to be in the market. Jardine was procuring quotes that would require JPIA to break its existing contracts. In Buckner's view JPIA should honor its contracts. When there was a flood and mudslide in San Diego County they thought they were covered, but discovered they were not. Stockett resisted any action except

maybe filing a lawsuit. The executive committee asked Malone to get replacement coverage. He ran into difficulty because there was another broker shopping the market. Buckner had to tell Klaff to call Goldman and tell him to cease and desist. Buckner claimed everyone agreed you do not have two brokers shopping the same market. Finally, Stockett told Smart's that Cal Comp was buying their insurance by quoting a rate lower than what they could hope to sustain.

Bannister testified repeatedly two things triggered his desire to terminate Stockett: his marketing the liability program midstream against Buckner's instructions and his comments to Smart's. He said Stockett's delay in reviewing the sexual harassment policy was discussed in the closed session, but was not part of the decision to terminate him.

Ronald Vickery, a member of the executive committee, testified Stockett was terminated due to his unwillingness to carry out the requests of the executive committee, his inability to deal with people, and because he wanted to take JPIA nationwide and it was hard to get him to stop pursuing that. Stockett used JPIA funds to get involved in nationwide pools and the executive committee told him to stay out.

Jim Edwards described the closed executive committee meeting discussing Stockett as a "general gripe session." He suggested that if everyone was unhappy, they should buy out Stockett's contract. Buckner thought that was premature. After a 20-minute discussion, the executive committee voted to terminate the contract. There was no discussion of sexual

harassment or Malone, but the Smart's article did play a role in the decision.

The jury returned a general verdict, finding JPIA liable for wrongful termination in violation of public policy. It awarded Stockett $2,514,615 in economic damages and $1,000,000 in noneconomic damages. The jury awarded Judith Stockett $1,000,000 for loss of consortium.

DISCUSSION

JPIA contends the trial court committed reversible error in allowing the jury to consider theories of recovery based on facts that differed from those in the claim form.

The Stocketts filed a claim against JPIA pursuant to Government Code section 910, a prerequisite to a suit for damages. (Gov. Code, § 954.4.) The claim stated that in the spring and summer of 1995, Stockett became aware that Malone was sexually harassing members of the JPIA staff. Stockett brought this behavior to the attention of the executive committee and was instructed to relax his position on sexual harassment issues; he was told that he was being too harsh on Malone. During the same time, Stockett became aware there were other brokers who might be able to provide insurance services to JPIA at a lower cost than that provided by Malone and he considered the possibility of placing a brokerage account to competitive bid. Malone learned of this and lobbied for the survival of his exclusive contract and for Stockett's removal as general manager. Stockett also became aware of a growing alliance between Dan Klaff, assistant general manager, and Malone.

Malone also had several private phone calls with Bannister. Thereafter, Stockett received hostile calls and memoranda from Bannister. He was terminated as general manager and replaced by Klaff.

The claim stated it was based on a conspiracy to violate the Brown Act (Gov. Code, § 54953 et seq.), conspiracy to deprive Stockett of the benefits of his employment contract, a knowing and willful determination to purchase insurance products from one who did not offer the lowest price or best value in violation of JPIA's duty to provide the best insurance product at the lowest cost, intentional acts designed to disrupt Stockett's employment relationship, and retaliation for Stockett's support of staff complaints against Malone for sexual harassment. The claim asserted violations of the Brown Act and the Fair Employment and Housing Act, which were violations of public policy.

The initial complaint mirrored the claim. After demurrers and amended complaints, the surviving causes of action were wrongful termination in violation of public policy based on retaliation for supporting complaints of sexual harassment and an accompanying loss of consortium claim.

The Stocketts then sought to file a fourth amended complaint and their motion was granted. This complaint alleged Stockett was a member of a protected class, discriminated against in retaliation for objecting to sexual harassment in violation of Government Code section 12940 and the First

Amendment. It further alleged that Malone and Bannister persuaded JPIA to discharge Stockett in retaliation for (1) objecting to sexual harassment, (2) his reluctance to change JPIA's policies on sexual harassment, and (3) advocating the purchase of insurance policies on the open market rather than from Malone, who Stockett believed had a conflict of interest in violation of Government Code section 87100. The complaint alleged Stockett's termination violated his First Amendment rights.

JPIA opposed the filing of this amended complaint, contending it failed to comply with the claims act. JPIA continued, unsuccessfully, to raise this point in its trial brief, a motion in limine for a trial on a special defense, a nonsuit, and a motion for a judgment notwithstanding the verdict or a new trial.

The trial court ruled the claim adequately stated the grounds set forth in the complaint. The court later ruled the pleadings were broad enough to cover the Smart's article and if not, leave to amend would be granted. The Stocketts argued termination for Stockett's comments in the Smart's article was a violation of his First Amendment rights.

JPIA contends the trial court erred in all these rulings and in instructing the jury on theories of violation of public policy that were not included in the claim.[1] JPIA contends these

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[1] The court instructed the jury: "To establish termination of employment in violation of public policy, it must be established

errors are reversible because with a general verdict it is not possible to determine whether the jury reached its verdict based on a legally impermissible theory.

The Stocketts contend any claim of defect in the verdict has been waived because JPIA did not appeal the general verdict form. The Stocketts misunderstand JPIA's contention. JPIA does not contend it was error to use a general verdict.[2] Instead, it contends that it was error to permit the jury to find unlawful termination based on theories whose factual underpinnings were not set forth in the claim.

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that the termination of plaintiff's employment was a violation of public policy. [¶] Relevant public policies of the State of California are as follows: [¶] (1) An employer shall not terminate an employee in retaliation for disclosing a practice that violates the conflict of interest provisions of the Political Reform Act. [¶] It is a violation of the conflict of interest provisions of the Political Reform Act for a public official to make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision in which he knows, or has reason to know, he has a financial interest. [¶] (2) An employer shall not terminate an employee in retaliation for opposing sexual harassment in the workplace, as prohibited by the Fair Employment and Housing Act. [¶] It is an unlawful employment practice for an employer or any other person to harass an employee because of sex. An entity shall take all reasonable steps to prevent harassment from occurring. [¶] (3) An employer shall not terminate an employee in retaliation for the exercise of the right to freedom of speech, protected by the First Amendment of the Constitution of the United States. The First Amendment protects the right to speak out on matters of public concern."

[2] A special verdict could have clarified the basis of the finding of a public policy violation. As recognized by the parties and the trial court, use of the general verdict carried the risk of reversal if one or more of the theories of recovery was struck down on appeal.

At trial, Stockett claimed his termination violated public policy based on three distinct sets of fact: his objection to the watering down of JPIA's policies on sexual harassment, his objection to Malone's conflict of interest in participating in decisions in which he had a financial interest, and his exercise of free speech, particularly in speaking to Smart's. JPIA contends the claim gave notice only of the retaliation related to sexual harassment. It argues the claim is devoid of any facts relating to Malone's conflict of interest, his participation in JPIA's decisions, or Stockett's exercise of his free speech rights.

The Stocketts retort that this contention is specious and the claim was adequate because it identified the cause of the injury as Stockett's wrongful termination. It was not necessary to specify the legal theory that made the termination unlawful.

As JPIA is a public agency, the Stocketts were required, under Government Code section 945.4, to file a claim against the agency before proceeding with a civil action for damages. "[T]he factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint;" and a plaintiff may not proceed on "a factual basis for recovery which is not fairly reflected in the written claim." (*Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79.)

"A claim served on a governmental entity must fairly describe what that entity is alleged to have done. A theory of recovery not included in the claim may not thereafter be maintained. [Citations.] However, while the circumstances

described in a claim must substantially correspond with the causes of action pled, the claim need not conform to pleading standards. [Citation.] 'The primary function of the [Government Tort Claims Act] is to apprise the governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate, avoid litigation by settling meritorious claims. [Citations.]' [Citation.]" (*Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1426.)

There are two lines of cases addressing the variance between a government claim and a subsequent complaint. In the first, the claim was held inadequate as the complaint referred to different factual circumstances. In *Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431, decided by this court, the claim stated the accident was caused by a defective door that closed with excessive force. The subsequent complaint premised the right to recover on the school's negligent failure to supervise students engaged in "dangerous horse-play." (*Id.* at p. 434.) This court found the attempt to premise liability on an entirely different factual basis than that set forth in the tort claim was a fatal variance. (*Id.* at p. 435.)

In *Donohue v. State of California* (1986) 178 Cal.App.3d 795, the claim asserted the defendant was negligent in permitting an uninsured motorist to take a driving test, whereas the complaint alleged negligence in failing to instruct, direct and control the motorist during his driving examination. The court found the act of permitting a uninsured motorist to take a driving test was not the factual equivalent of failure to

control or direct the motorist during the test. (*Id.* at p. 804.)

In *Lopez v. Southern Cal. Permanente Medical Group* (1981) 115 Cal.App.3d 673, a claim alleged that the State negligently issued a driver's license to an epileptic. Plaintiffs later sought to amend the complaint to allege that the state was negligent in failing to suspend or revoke a license for failure to comply with financial responsibility laws. The court found the proposed complaint alleged facts not in the claim. (*Id.* at p. 677.)

The factual circumstances alleged in the claim in *Turner v. State of California* (1991) 232 Cal.App.3d 883, also decided by this court, were failure to warn or take adequate precautions against anticipated gang-related violence and reckless conduct of security officers in firing the shot that hit plaintiff. There was also a general charge of dangerous conditions of property. This court held a complaint alleging inadequate lighting constituted a complete shift in theory from what defendants were alleged to have done. (*Id.* at pp. 890-891.)

A second line of cases finds variance acceptable where the difference between the claim and the subsequent complaint is the result of the addition of factual details, but the basic facts remain unchanged. In *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, at page 223, decided by this court, the claim alleged the accident was due to "'Negligent maintenance and construction of the highway surface. Failure to sand and care for highway for safetyness of automobile transportation.'" We

found allegations in the complaint relating to lack of guard rails, slope of the road, and failure to warn were premised on the same foundation that because of negligent construction and maintenance, the highway was a dangerous condition of public property. (*Id.* at p. 226.)

In *White v. Superior Court* (1990) 225 Cal.App.3d 1505, the claim stated a police officer falsely arrested and beat a bus driver. The subsequent complaint added causes of action for false imprisonment and negligent hiring, training and retention of the officer. The court found the claim and the complaint were premised on the same fundamental facts -- the officer's alleged mistreatment of the bus driver. The additional causes of action merely sought to show direct responsibility of the City for the officer's conduct. (*Id.* at p. 1511.)

In *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, the claim stated claimant's father fell in his apartment during an earthquake and was not discovered until seven days later. He suffered injuries which resulted in his death. The complaint alleged causes of action for negligent failure to disclose latent defects in the apartment, breach of the statutory duty to inspect the premises for safety, and negligent failure to inspect. The housing authority argued the claim focused on events after the earthquake while the complaint focused on events before the earthquake. The court found the variance permissible; although the legal theories were more detailed in the complaint, the claim referenced the father's fall and negligent maintenance of the apartment. The addition

of details merely elaborated on the basic facts set forth in the claim. (*Id.* at p. 278.)

Government Code section 910 sets forth the information a claim must contain. As pertinent here, the claimant must set forth: "(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted. [¶] (d) A general description of the . . . injury, damage or loss incurred . . . . [¶] (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known."

The basic circumstances in a retaliatory termination of employment are that the employee engages in a protected activity and the employer fires him in retaliation. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614.) As to the conflict of interest, the claim states only that Stockett learned there might be insurance available from a less expensive source than Malone, and he considered seeking a competitive bid, but Malone lobbied to keep his exclusive contract and to get rid of Stockett. The claim makes no mention of a conflict of interest; it does not state that Stockett objected to a conflict of interest, took any action to oppose it, or otherwise engaged in any protected activity. Stockett only "considered" competitive bidding. In the claim, Stockett is a passive victim of Malone's greed; in the complaint, he is punished for his virtuous actions in protecting the public interest.

The claim also stated Buckner, Bannister, Klaff and Malone decided to purchase insurance that was not the best value and

lowest cost and refused to select insurance through competitive bidding, all in violation of JPIA's duty to provide the best insurance product to its members. While the claim describes a conspiracy by Malone and others to get rid of Stockett to protect Malone's financial interest, JPIA's improper act is identified only as spending too much money on insurance. The claim does not allege that JPIA allowed Malone to participate in decisions where he had a financial interest and then fired Stockett for his objection to this practice. The complaint changes the act and actors. This case, therefore, falls into the first line of cases where the variance between the claim and the complaint is unacceptable because the complaint sought recovery based on different facts.

The Stocketts contend all that was necessary to give the notice required by the claims act was to identify the claim as wrongful termination in violation of public policy. At oral argument, they argued it was not possible to give all the details of the termination as Stockett had not been allowed to attend the closed meeting of the executive committee and was not told the reason for his discharge. Until they conducted discovery, they were not able to describe fully the violations of public policy. The Stocketts contend it is unfair to require a terminated employee to give factual details in his government claim for wrongful termination in violation of public policy.

We reject this argument for two reasons. First, the premise that Stockett was wrongfully denied proper notice of the reasons for his termination is fundamentally at odds with his at

will employment. Second, Stockett was able to file a factually detailed claim within six months and was aware of the concerns that led to his termination. His complaint did not merely supplement his claim, but changed its factual underpinning.

It was undisputed that Stockett's employment was at will. "Labor Code section 2922 establishes the presumption that an employer may terminate its employees at will, for any or no reason. A fortiori, the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 350.) Part of the employment bargain that an employer obtains with at will employment is a freedom from cumbersome reasons and procedures for terminating an employee. The employer may terminate an employee "for any or no reason." Thus, an at will employee has no right to be present at the discharge meeting or to be given reasons for the discharge. Of course, "an employer has no right to terminate employment for a reason that contravenes fundamental public policy as expressed in a constitutional or statutory provision. [Citation.]" (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) There is nothing unfair in requiring a discharged employee to describe the facts showing his discharge violated a public policy.

As the record shows, Stockett was able to provide very detailed factual allegations in his claim as to the public policy violations in his termination. He outlined his stand

against Malone's sexual harassment, Malone's attempts to protect his exclusive contract at the cost of higher priced insurance, and the conspiracy to remove Stockett. This is not a case where a broad general claim is supplemented by additional facts in the complaint. Rather, the detailed allegations of the claim were replaced by different detailed allegations in the complaint. Stockett did not merely expand on his claim; he changed both the acts and the actors. To permit such a drastic change in the factual underpinnings of the claim would permit the claimant to mislead the public entity as to the nature of the claim and would abrogate the value of the claim as an investigative tool.

Further, Stockett cannot maintain that he was completely unaware of any reasons for his termination. Once his performance was placed on the agenda for the meeting, he contacted the various members of the executive committee about their concerns. There was considerable testimony about his notes of these conversations and the various concerns raised; several members of the executive committee mentioned the Smart's article as a concern. Thus, Stockett had adequate notice that the Smart's article was a reason for his termination and the ability to claim his termination violated his free speech rights if he so believed. Instead, in his written defense, he apologized to the executive committee for the article. "In retrospect, I am sorry that I was so candid about expressing my personal views."

"The primary function of the claims act is to apprise the governmental body of imminent legal action so that it may

investigate and evaluate the claim and where appropriate, avoid litigation by settling meritorious claims. [Citations.]" (*Elias v. San Bernardino County Flood Control Dist.* (1977) 68 Cal.App.3d 70, 74.) The claim did not serve that function here. An investigation of the claim would have centered on the cost of the insurance purchased, not on Malone's role in JPIA decisions. There would be no basis to investigate Stockett's role as a whistleblower. The Stocketts sought successfully "to impose upon the defendant public entity the obligation to defend a lawsuit based upon a set of facts entirely different from those first noticed. Such an obvious subversion of the purposes of the claims act, which is intended to give the governmental agency an opportunity to investigate and evaluate its potential liability, is insupportable. [Citation.]" (*Fall River Joint Unified School Dist. v. Superior Court, supra*, 206 Cal.App.3d at pp. 435-436.)

Different facts are involved to an even greater extent with respect to the free speech theory. The claim gave no notice that Stockett contended he engaged in the protected activity of free speech. There was no mention of Stockett speaking out or of the Smart's article. There was nothing to alert JPIA that Stockett contended that firing him was illegal because it was in retaliation for his exercise of free speech. This is especially true since the defense Stockett prepared for the executive committee apologized for his remarks to Smart's.

It was error to allow the case to proceed to the jury on the theories based on conflict of interest and free speech.

JPIA contends this error was prejudicial because it cannot be determined from the general verdict on which theory of a public policy violation the jury's verdict was based. JPIA argues the rule applied in criminal cases should be followed; where the verdict is based on a legally, not factually, inadequate ground, the verdict must be reversed absent a basis in the record to find the verdict was actually based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*).)

The Stocketts, on the other hand, argue any error was harmless under the settled rule that a general verdict will not be disturbed for uncertainty if one issue is sustained by the evidence and unaffected by error. "When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues. [Citation.]" (*Hume v. Fresno Irr. Dist.* (1937) 21 Cal.App.2d 348, 356-357.) Since JPIA does not challenge the sufficiency of the evidence to support a verdict based on the public policy of opposing sexual harassment, the Stocketts contend the judgment must be affirmed.

Although the rule regarding general verdicts is expressed in broad terms in *Hume*, it has not always been so broadly applied. "Although the rule does not appear to have been universally so limited, we are of the opinion that it applies only to situations where it reasonably may be presumed that the

jury, following the court's instructions, reached a proper verdict." (*Carpiaux v. Peralta Community College Dist.* (1989) 215 Cal.App.3d 1220, 1224.) In *Carpieux*, the court distinguished between a theory that is factually inadequate and one that is legally inadequate, in that case due to misinstruction. In the former case it would be presumed the general verdict was based on the supported theory, but in the latter it was likely the jury reached an improper verdict that must be reversed. (*Id.* at pp. 1224-1225.)

The same distinction between a factually inadequate theory and a legally inadequate theory was made in *Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472. "Where two theories are presented to a jury, of which only one is supported by substantial evidence, and a general verdict is returned in favor of the plaintiff, it is presumed that the verdict was based on the theory that is supported by the evidence. But where the jury is permitted to choose between two factual theories, is misinstructed as to the legal requisites for one of them, and there is no way to eliminate the likelihood that the jury chose the theory affected by the instructional error, 'it is likely that the jury, following the instructions, reached an improper verdict.'" (*Id.* at p. 480.)

The reason for distinguishing between factual and legal inadequacy is explained in *People v. Guiton, supra*, 4 Cal.4th 1116. In *Guiton,* the jury was allowed to convict defendant if it found he either sold or transported cocaine. There was insufficient evidence he sold cocaine. The California Supreme

Court had to determine whether to apply the *Green* rule (*People v. Green* (1980) 27 Cal.3d 1), which requires reversal where the case was presented on alternate theories, some legally correct and some not, and the reviewing court cannot determine from the record on which theory the jury based its verdict, or the *Griffin* rule (*Griffin v. United States* (1991) 502 U.S. 46 [116 L.Ed.2d 371]), under which it is presumed the jury based its verdict on the factually supported theory rather than the one lacking evidentiary support. The court harmonized the two rules by applying the *Griffin* rule where the inadequacy of a theory presented to the jury is factual and the *Green* rule where the inadequacy is legal. (*Guiton*, *supra*, 4 Cal.4th at pp. 1128-1129.)

The *Guiton* court accepted the *Griffin* court's distinction between legal and factual error: "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence [citation].'" (*Guiton, supra*, 4 Cal.4th at p. 1125, quoting *Griffin, supra*, 502 U.S. at p. 59.)

The same analysis applies to a civil case. Here, for example, the jury was not equipped to determine Stockett should not recover based on theories not included in his claim. Indeed, the jury was instructed Stockett could recover on these theories. Accordingly, we determine whether inclusion of those theories at trial was harmless. One way to find harmless error would be if we could determine the jury necessarily found for Stockett based on his opposition to sexual harassment. (*Guiton, supra*, 4 Cal.4th at p. 1130.)

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Unlike in many criminal cases, here the presentation of alternate theories did not require the jury to choose among them. The jury could have found for Stockett based on one, two, or all three theories presented. Thus, if it is reasonably

probable the jury would have found for Stockett based solely on the sexual harassment theory, the error in submitting the other theories would be harmless.

While JPIA does not challenge the sufficiency of the evidence on the sexual harassment theory, it is weak. The incident itself was minor; Stockett described it as "trivial." A single inappropriate touching is hardy severe and pervasive enough to constitute actionable sexual harassment. (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21-22 [126 L.Ed.2d 295, 302]; *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67, [91 L.Ed.2d 49, 60].)

There is ample evidence that that Bannister used the sexual harassment incident and its aftermath as a reason to terminate Stockett, although it is questionable whether Bannister was actually attempting to soften JPIA's sexual harassment policy or merely using the incident as a pretext to remove Stockett. There is little evidence, however, that the incident had much effect on the other members of the executive committee. Only Buckner mentioned it in his conversation with Stockett as a concern and he sided with Stockett over Bannister on the dispute over the sexual harassment agenda item and thought Bannister's unisex uniform idea was "over the top." There was no evidence that the other members of the executive committee considered the flap over Malone's inappropriate behavior or Stockett's reluctance to revise the sexual harassment polices in deciding whether to terminate Stockett. Stockett claimed the executive committee deferred to Bannister and anyone with a strong

position could sway the others. Bannister's alleged influence over the other members of the executive committee was challenged by evidence of their opposition to Bannister's position on various issues.

Indeed, Stockett himself undercut his reliance on the sexual harassment theory. When asked at trial what he believed the unlawful reasons for his termination were, Stockett at first mentioned only retaliation for getting insurance quotes, objecting to Malone's conflict of interest, and speaking to the press. It was only after a recess and his recollection was refreshed that Stockett added the retaliation for his investigation of the Malone sexual harassment incident and his resistance to changing the sexual harassment policies.

By contrast, the connection between Stockett's termination and the other two theories was manifest. The evidence that Stockett's remarks to Smart's, which he portrayed as an exercise of free speech, played a part in his termination was clear and direct. Almost every member of the executive committee cited the Smart's article as a reason for terminating Stockett. Although there was no evidence that Stockett ever objected that Malone had an unlawful conflict of interest, he portrayed his efforts to seek insurance from other sources as conduct in opposition to such a conflict. Both the Rimler and the Goldman incidents were cited as reasons for his termination. Thus, Stockett's theory based on a conflict of interest had a stronger connection to his termination than the sexual harassment theory.

Finally, we consider that much of the evidence at trial was directed at proving the conflict of interest and free speech theories. This evidence, which portrayed JPIA and the executive committee in a negative light, had an inevitable spill-over effect that made it more likely the jury would also accept the sexual harassment theory. By allowing the conflict of interest and free speech theories to be presented to the jury, the trial court allowed the Stocketts to present a very different case than one based solely on retaliation for objection to sexual harassment. In closing argument, counsel for the Stocketts summarized the case as "truly about a government agency that is running illegally, and it has no overseer."

Our review of the entire cause, including the evidence, leads us to the opinion that it is reasonably probable JPIA would have achieved a more favorable result absent the inclusion of the two theories of recovery that were not presented in the claim. (*People v. Watson, supra*, 46 Cal.2d 818, 836.) Accordingly, we reverse the judgment. Any retrial shall be limited to theories of recovery based on facts set forth in the claim.

Since we reverse the judgment, we need not address JPIA's remaining contentions or the Stocketts's contention on cross-appeal.

DISPOSITION

The judgment is reversed. JPIA shall recover its costs on appeal.

MORRISON, J.

We concur:

SIMS, Acting P.J.

KOLKEY, J.