Filed 4/17/18 Mateen-Bradford v. City of Compton CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KAREEMAH MATEEN-BRADFORD, Plaintiff and Appellant, v. CITY OF COMPTON, Defendant and Respondent.	B276236 (Los Angeles County Super. Ct. No. TC026769)

APPEAL from a judgment and a postjudgment order of the Superior Court of the County of Los Angeles, William Barry and Brian S. Currey, Judges. Affirmed in part, reversed in part, and remanded.

Kraft, Miles, & Miller, Marcia L. Kraft and Joy Kraft Miles, and The Ehrlich Law Firm, Jeffery I. Ehrlich, for Plaintiff and Appellant.

Richards Watson Gershon, T. Peter Pierce, Ring Bender, Norman A. Dupont, Office of the City Attorney, Craig J. Cornwell, for Defendant and Respondent.

INTRODUCTION

The jury rendered a verdict in favor of defendant City of Compton (City) in plaintiff Kareemah Mateen-Bradford's (plaintiff) action for gender discrimination and retaliation. Plaintiff challenges the pretrial denial of her motion to enforce a settlement agreement under Code of Civil Procedure section 664.6,[1] claims instructional error and defects in the special verdict form compel reversal, and complains of the award of attorney fees (§ 1038) and costs to the City. We affirm the denial of the section 664.6 motion. Although we agree there was instructional error, that error alone did not result in a miscarriage of justice. The defect in the special verdict form, however, did result in a miscarriage of justice compelling reversal. Consequently, we also reverse the postjudgment order awarding attorney fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff joined the City in 1989 and became the director of human resources in 2006.[2] She made a formal gender discrimination claim on January 5, 2011, and was placed on administrative leave the same day "for a minimum of two weeks until [her] work [could] be evaluated."

The administrative leave lasted nine months. The City advised plaintiff in September 2011 of its intent to terminate her employment effective September 15, 2011. The notice listed the grounds for termination and advised plaintiff of her right to a

---

1 All statutory citations are to the Code of Civil Procedure.

2 At the time of trial, Bradford held the same position.

Skelly hearing.[3] The *Skelly* hearing was conducted on September 15, 2011, and plaintiff was terminated effective September 16, 2011.

Plaintiff appealed her termination pursuant to the City's disciplinary requirements. She also initiated this action on August 16, 2012.

Plaintiff prevailed in her administrative appeal. In September 2014, she was reinstated with full back pay and benefits when the administrative hearing officer, retired Court of Appeal Justice Candace Cooper, determined the City did not have sufficient reasons to fire her.

Back in the trial court, the City's motion for summary adjudication of the causes of action in the fourth amended complaint was granted in part, leaving only plaintiff's causes of action for gender discrimination and retaliation. Trial was scheduled for early 2015.

On January 2, 2015, with the trial date approaching, the parties engaged in mediation. The mediator proposed a settlement. Plaintiff timely accepted the proposal; defendant did not. Plaintiff then discharged her attorneys and began negotiating directly with defense counsel.

The trial was continued; and in November 2015, plaintiff sought to enforce the mediator's proposed settlement. The trial court denied the motion, and the jury trial followed. Plaintiff sought noneconomic damages.

---

[3] In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, the Supreme Court considered the procedural due process safeguards that must be afforded a permanent public employee prior to termination of employment, including notice of and a right to a predisciplinary hearing.

At the conclusion of the evidence, pursuant to the parties' stipulation, the trial court read the parties' stipulation:

"All right. There are a number of things that are not in dispute and that you do not have to decide in this case. As you've already heard, Ms. Bradford appealed her termination using the City's appeal process. As a result of that appeal process, it has already been determined there was insufficient reason to terminate Ms. Bradford. As she's been re-instated in her job with full back pay and back benefits. This determination is binding.

"The issue of wrongful termination is not an issue for you to decide. This determination . . . is not only binding on the parties involved, it's also binding on you . . . in your deliberations and it includes the following factual findings. . . .

"Number one: The failure of [plaintiff] to submit the 2009 personnel board minutes to the city council until October 19, 2010, was not a violation of any rule, policy, or practice, and did not provide sufficient cause for [plaintiff's] termination.

"Number two: Prior to the October 2010 city council meeting, there had been no direction by then Compton city manager Willie Norfleet for [plaintiff] to submit personnel board minutes to the city council.

"Three: [Plaintiff] complied with Mr. Norfleet's request that [she] get the 2010 personnel meeting minutes ready and to the city council.

"[Four]: [Plaintiff's] failure to comply with Mr. Norfleet's uncommunicated desire that the 2010 personnel board minutes be included on the December city council agenda was not a failure to comply with the direction of a superior and was not sufficient cause for her termination.

"Five: [Plaintiff's] absence from the January 4, 2011, city council meeting was excused.

"[Six]: [Plaintiff's] absen[ce] from the January 4th 2011, city council meeting was not sufficient cause for her termination.

"[Seven]: Entries of [plaintiff] into the human resources department while on administrative leave were not sufficient cause for her termination.

"Eight: [Plaintiff] did not represent herself as a human resources director at the July 21st, 2011, personnel board meeting.

"Nine: As a member of the Compton community, [plaintiff] had the lawful right to be present at the July 21, 2011, personnel board meeting.

"Ten: [Plaintiff's] attending and speaking at the July 21, 2011, personnel board meeting was not sufficient cause for her termination. This alleged ground was frivolous and contrived.

"[Eleven]: The alleged instances of misconduct contained in the notice of intent to terminate do not provide, individually or collectively, sufficient cause to terminate [plaintiff's] employment.

"[Twelve]: Mr. Norfleet conducted minimal, if any, investigation into the allegations against [plaintiff].

"[Thirteen]: City council member Barbara Calhoun's isolated comments did not create a hostile work environment and do not constitute harassment or employment discrimination.

"Those are facts and issues that have already been decided. The determination that you will be asked to make in this case is whether [plaintiff's] termination was the result of gender-based discrimination and/or retaliation for making complaints of

conduct that [plaintiff] reasonably believe to be gender discrimination and/or harassment.

"Further, if you believe that gender discrimination or retaliation for a protected activity was a substantial motivating reason for the City's decision to terminate [plaintiff], and that [plaintiff] was harmed thereby, you will be asked to determine the amount of damages she may have suffered."

Invoking Justice Cooper's name, title, and conclusive findings, plaintiff's counsel argued to the jury, "Lies about why an employee was fired can be used to infer a discriminatory motive. Not lies alone, but you're looking at this whole picture, are [there] lies, are [there] events combined that give[] you the hunch that more likely than not, this is discrimination based on gender. [¶] . . . [¶] The City can't prove a legitimate non-discriminatory and honestly believed reason to terminate [plaintiff]."

In his closing argument, defense counsel responded that plaintiff's termination, unsupported as it was, had nothing to do with gender and everything to do with an employee who failed to achieve departmental goals (e.g., updating the employee handbook) and was diagnosed as paranoid, depressed, and "painfully sensitive to criticism with rejections and fixed misinterpretations of the motives of others."[4] The City's attorney did not argue plaintiff harassed and verbally abused the employees she supervised or engaged in any severe misconduct that independently would have justified her termination.

The jurors were given a special verdict form and they answered the applicable questions as instructed. Judgment was

---

[4] Evidence concerning plaintiff's emotional health was admitted.

entered in the City's favor. Posttrial, the trial court awarded the City costs and expert fees in the amount of $43,373 and attorney fees in the amount of $182,339, for a total award of $225,712.

Plaintiff's motion for new trial was denied, and she timely appealed.

DISCUSSION

A. The Trial Court Properly Denied the Section 664.6 Motion[5]

---

[5] The denial of a section 664.6. motion may be challenged by writ or on appeal from the final judgment. (See *Dornan v. Magan* (1999) 76 Cal.App.4th 1287, 1293-1294 [interlocutory order denying enforcement of a settlement under section 664.6 is not directly appealable until a final judgment is entered in the action; Court of Appeal declined to treat the premature appeal as a petition for writ relief in the absence of extraordinary circumstances to do so].)

The City argues plaintiff waived the right to challenge the denial of the motion on appeal based on her conduct before and after the section 664.6 motion was heard. The City's waiver argument based on plaintiff's postagreement/prehearing conduct was not raised, much less adjudicated, in the trial court. The City opposed the section 664.6. motion only on the basis plaintiff failed to sign the proposal as modified by the City. The City has forfeited the argument on this score.

Nor are we persuaded there was any posthearing waiver. By electing to proceed first under section 664.6, plaintiff was not precluded from thereafter pursuing alternative remedies, particularly as they were all consistent with her request for specific performance of a settlement agreement. For this reason, we deny the City's request for judicial notice of the documents pertaining to the Government Claims Act claim plaintiff filed after the section 664.6 motion was denied.

1. Background

With plaintiff's firing overturned and trial imminent on plaintiff's claims for gender discrimination and retaliation, the parties engaged in a day-long mediation on January 2, 2015. At the conclusion of the session, the mediator presented the parties with a written mediator's proposal: The City was to restore plaintiff's vacation and sick time from the date of her termination to the present and pay her $1,650,000 in three equal installments, 30 days apart. The parties were to be given 30 days to draft and execute a long-form agreement,[6] with the first payment due 30 days after signing. If no long-form agreement was reached, the first payment was due 40 days after the litigants signed the mediator's proposal.

The mediator's proposal added that until a long-form settlement agreement was signed or in the event the parties never signed a long-form agreement, the mediator's proposal constituted "an enforceable, binding settlement agreement pursuant to [section] 664.6 and Evidence Code [section] 1123 . . . and shall be admissible as evidence for the purpose of enforcing this binding agreement." Even in the absence of a long-form settlement agreement, the specified terms were to be "effective upon acceptance of the mediator's proposal."

---

[6] The City was to prepare the long-form agreement and include, inter alia, a confidentiality clause; a provision confirming that neither party was admitting liability; a provision requiring plaintiff to execute and deliver a dismissal with prejudice to defendant's counsel who was not to file it until all settlement proceeds were paid; a comprehensive release and a waiver of Civil Code section 1542; and attorney fees, choice of law, and severability provisions.

The mediator gave the parties until 5:00 p.m. on January 7, 2015, to accept the proposal. On that date, plaintiff signed the mediator's proposal and the mediator granted the City's request to extend the acceptance period to January 12, 2015, at 5:00 p.m., presumably to give counsel for the City time to obtain the client's approval and a representative's signature.

The next day, January 8, 2015, the City's attorney, Mr. Dupont, telephoned plaintiff's counsel, Mr. D'Oro of Wesierski & Zurek, and informed him the City was willing to accept the mediator's proposal, but only if the third payment was made in July of 2015, the first month of the City's next fiscal year. Plaintiff's counsel subsequently advised Mr. Dupont that plaintiff agreed to the modification and filed with the court the Judicial Council form for "Notice of Settlement of Entire Case." There, plaintiff's counsel characterized the settlement as "unconditional" and advised a "dismissal will be filed within 45 days after [January 8, 2015]."

Also on January 8, 2015, another Wesierski attorney, Mr. Ferrante, confirmed by email to the mediator that plaintiff agreed to modify the payment terms as follows: "The City will make its first payment of $500,000 on the 30th day, the second payment of $325,000 on the 90th day, and the third payment of $825,000 after July 1, 2015 (the start of the City's fiscal year)."

On January 21, 2015—after the mediator's January 15, 2015 extended deadline—Mr. Dupont emailed the mediator a copy of the signed, but modified, proposal: "I apologize for the delay, but I am attaching the [City's] copy of the [m]ediator's [p]roposal as executed by Craig Cornwell, the City Attorney. This proposal is accepted with the following modification of the payment terms specified in paragraph 2 that was agreed to by

myself and [plaintiff's counsel] Mr. D'Oro: [¶] (1) First payment will be made of $500,000 by the City within 30 days of execution of the long-form settlement agreement; [¶] (2) Second payment will be made of $325,000 by AIG insurance within 90 days of execution of the long-form settlement agreement; and [¶] (3) Third and final payment will be made of $825,000 by the City on or before July 31, 2015."

Counsel for the parties then began negotiating terms for the long-form settlement agreement. The City approved the form and sent it to plaintiff's counsel on January 30, 2015. On February 3, 2015, Mr. Ferrante provided the City's attorney with a copy of the email he had sent to the mediator days earlier consenting to the payment modification.

However, on the same date, plaintiff emailed the City's attorney directly to advise the Wesierski firm no longer represented her and she did not agree to the modified mediator's proposal or the proposed long-form agreement: "You may have received false information from my former counsel. Please be advised that the details of the release were not discussed with me, and I received a copy from my previous[] law firm on January 30, 2015. I was never informed that anything was filed on January 8th, [and] you will not find any documents with my signature agreeing to anything other than the 30, 60[] and 90 day payment arrangements. [¶] The details of any new arrangements were not properly delivered. I was just ordered to sign on the 30th then ordered by the 6th. [¶] Are you requesting to receive or did my former counsel agree to a date to have the release signed? [¶] If there was an agreement, please provide me with the information. [¶] Thank you."

Plaintiff followed that communication with a second email six days later: "I will be filing the substitution of attorney, which will temporarily list me as representing myself In Pro Per, upon finalizing terms with new Counsel, they will update accordingly. [¶] In the interim, I have changes to the proposed settlement agreement. I was not included at all or advised of anything listed outside of the mediator[']s proposal, the document was emailed to me on January 30th. The mediator[']s proposal that I was brow beat[en] into signing does not include a July 31st payment. I was not given clear information on the City's request during the initial phone call, [and] upon finally receiving it, I requested the following in exchange for the later date . . . ." (Emphasis added.) The email then listed a number of proposed revisions to the long-form settlement agreement, all favorable to plaintiff. Plaintiff followed this email with another on March 12, 2015, attaching a revised draft of a long-form settlement agreement.

The City reached out to plaintiff in April 2015 to resume the settlement dialogue, but otherwise the record is silent until July 16, 2015, when plaintiff, then representing herself, advised she planned to seek enforcement of the settlement. The following month, the City restored 706 hours to plaintiff's vacation/sick leave account, consistent with one term in the mediator's proposal.

Plaintiff, however, did not begin efforts to enforce the settlement agreement until the fall of 2015. Several appearances and rounds of briefs followed. At the November 2, 2015 hearing, plaintiff, then represented by specially appearing counsel, advised plaintiff was willing to accept the mediator's proposal as modified by the City and dispense with a long-form agreement. Citing *Levy v. Superior Court* (1995) 10 Cal.4th 578, 580 (*Levy*),

the City took the position the parties never agreed to the mediator's proposal because plaintiff never affixed her signature to it, as modified by the City, but instead "repudiated [the City's modifications] in two emails in early February . . . ." The trial court denied the motion to enforce the settlement.

2. Analysis

California's "strong public policy" favors the voluntary settlement of civil cases. (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1357, 1359 (*Osumi*).) Consistent with that policy, section 664.6 provides a summary procedure for specific performance of settlement agreements that meet statutory criteria.[7] Section 664.6 gives trial courts "the power to resolve factual disputes relating to the agreement [and] to extend the deadline for performance . . . ." (*Id.* at p. 1357.) However, "nothing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810, italics in original.) And our Supreme Court has determined that section 664.6 means what it says: To be enforceable, a written settlement agreement must be signed by the litigants themselves. (*Levy, supra,* 10 Cal.4th at p. 586.)

---

[7] Section 664.6 provides in pertinent part: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

This is the Achilles' heel in the effort to enforce the mediator's proposal. Plaintiff signed it within the deadline. The City's representative signed it a week after the extended deadline, but only on condition it be modified. The litigants did not sign the same agreement within the period allowed for acceptance. There was no enforceable settlement agreement under section 664.6.[8]

B. Instructional Error

Jury "instructions cannot be read in a vacuum. They must be read with the other instructions." (*Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 458.) In *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317 (*Guz*), the Supreme Court determined the employer was entitled to summary adjudication on a terminated employee's FEHA claim of age discrimination "if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive

---

[8] Had the City signed the mediator's proposal without any changes, the trial court would have had the power to adjust the payment schedule. (*Osumi, supra,* 151 Cal.App.4th at p. 1357.) Additionally, any stalemate over the long-form terms would have been irrelevant, as the trial court simply could have enforced the mediator's proposal as signed by both parties. Alternatively, the City could have gone back to the mediator to request a new proposal and a new deadline. Or, at any time before the performance deadlines lapsed, plaintiff could have ratified her attorney's assent to the modified proposal. Any number of options were available to the litigants here, but enforcement of a mediator's proposal that lacked the required signatures of all litigants under section 664.6 was not one of them.

was discriminatory." (*Id.* at p. 361.) The Supreme Court reached this conclusion by observing, "an inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons [for termination.] The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.] Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Id.*, at pp. 360-361, italics in original.)

Relying on *Guz,* the trial court agreed to give the City's special instruction number one:

> The City of Compton must have a legitimate reason for terminating [plaintiff]. 'Legitimate reason' means only that the reason is facially unrelated to prohibited bias. This means that the City['s] reason for termination, if nondiscriminatory on its face, and honestly believed, is sufficient even if the reason is foolish, trivial, or baseless. The issue is whether the reason was based on gender discrimination or retaliation, not whether the City['s] reason was wrong or mistaken, or whether the City . . . is wise, shrewd, prudent, or competent. *An inference of intentional discrimination cannot be drawn solely from evidence, if any, that the City lied about its*

> *reasons. The statutes do not prohibit lying, they prohibit discrimination.* (Italics added.)

Plaintiff objected to the final two sentences, italicized above. Plaintiff also objected to the trial court's decision to refuse her proffered special instruction number six:

> You may infer the ultimate fact of intentional discrimination if you discredit and/or disbelieve the City ['s] stated reasons for the termination of [plaintiff].

Plaintiff contends the trial court committed prejudicial error when it instructed the jury with the City's special instruction number one and then compounded the error by refusing her special instruction number six. We do not agree.

The last sentence of the City's special instruction number one, while it was appropriate for counsel's closing argument, should not have been included in a jury instruction. Its inclusion was error. (*Soule v. General Motors Cor*p. (1994) 8 Cal.4th 548, 572 ["A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence"].) But taken alone, this instructional error was not prejudicial and does not compel reversal.

Moreover, the trial court did not err in refusing plaintiff's proposed special instruction number six. *Guz, supra,* 24 Cal.4th 317 requires "evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Id.* at pp. 360-361, italics in original.) Given the *Guz* language that "[a]n inference

of intentional discrimination cannot be drawn solely from evidence, if any, that the City lied about its reasons" (*id.* at p. 360), plaintiff's proffered instruction was confusing and risked misleading the jurors.

Because, as we explain in the following section, we are reversing the judgment based on the prejudicial defect in the special verdict form, we add the following comment: On remand, if the City again requests special instruction number one, the last sentence should be deleted.

C. Special Verdict Form

Plaintiff argues the modified special verdict form was prejudicially defective because it erroneously allowed the jury to rule in favor of the City if it found the City had nondiscriminatory or nonretaliatory reasons for terminating plaintiff, without requiring the jury to consider whether gender bias and/or retaliation were substantial motivating reasons for the termination decision. We agree and conclude the error resulted in a miscarriage of justice requiring reversal.

In *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 (*Harris*), the Supreme Court held the trial court determines "in the first instance whether the evidence of discrimination . . . warrants [the substantial motivating reason] instruction." (*Id.* at p. 232.) Then it is up to the jury to decide whether discrimination was a substantial motivating reason for the employee's discharge. (*Ibid.*)

The trial court did precisely that here.[9] In a series of instructions, the trial court provided the jury with the definition for the phrase "substantial motivating reason" (CACI 2507) and identified "substantial motivating reason" as an essential element in both the gender and retaliation claims (CACI 2500 and 2505).[10]

These instructions were given against the backdrop of two significant and unchallenged jury instructions. The first was the joint instruction discussed earlier that advised the jury "there was insufficient reason to terminate [plaintiff] and she has been reinstated in her job with full back-pay and back benefits." The

---

[9] The parties' joint special instruction advised in part, "The determination that you will be asked to make in this case is whether [plaintiff's] termination was the result of gender based discrimination and/or retaliation for making complaints of conduct that [plaintiff] reasonably believed to be gender based discrimination and/or harassment. Further if you believe that gender discrimination or retaliation for a protected activity was a substantial motivating reason for the City's decision to terminate [plaintiff], and [plaintiff] was harmed thereby, you will be asked to determine the amount of damages she may have suffered."

[10] CACI 2507 ("'Substantial Motivating Reason' Explained") defined "substantial motivating reason" as "a reason that actually contributed to the adverse employment action. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the adverse employment action." Both CACI 2500 ("Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))") and CACI 2505 ("Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))" repeated the "substantial motivating reason for her termination" language as an essential element of each claim.

second was CACI 2506, which advised the jurors the City "would have discharged [plaintiff] anyway" regardless of any gender discrimination and retaliation claims.[11]

CACI 2506 was given based on the City's claim it learned after the wrongful termination that it had a legitimate reason to discharge plaintiff. This "doctrine of after-acquired evidence refers to an employer's discovery, *after* an allegedly wrongful termination of employment . . . of information that would have justified a lawful termination." (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428 (*Salas*).)[12] Typically, the doctrine does

---

[11] CACI 2506 ("Limitation on Remedies—After-Acquired Evidence) as read to the jury, stated, "The City . . . claims that it would have discharged [plaintiff] anyway if it had known that [plaintiff] threatened and verbally abused and harassed employees under her direct supervision and control. You must decide whether the City of Compton has proved all of the following: [¶] 1. That [plaintiff] threatened or verbally abused or harassed employees under her direct supervision and control; [¶] 2. That [plaintiff's] misconduct was sufficiently severe that the City . . . would have discharged her because of that misconduct alone had the City . . . known of it; and [¶] 3. That the City . . . would have discharged [plaintiff] for her misconduct as a matter of settled City policy."

[12] The difference between "mixed motive" and "after-acquired evidence" cases is timing, i.e., when the employer discovers the information that justifies a lawful termination. In "after-acquired evidence" cases, the employer does not learn of the information until after the wrongful termination. In the former, presumably, the employer possessed the information at the time of the wrongful termination. In both cases, the employer's position is that it would have made the same decision regardless of any claim of discrimination or retaliation. (Compare, e.g.,

not provide "a complete defense [in an employee's FEHA action. To hold otherwise] would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity." (*Id.* at p. 430.)

In the usual case where the doctrine applies, the employee has not already been reinstated with full back pay and benefits before trial, as was plaintiff here. Moreover, the after-acquired evidence doctrine may coexist with discriminatory or retaliatory employer conduct. A plaintiff may first demonstrate that discrimination and/or retaliation were substantial motivating reasons for termination, which shifts the burden to the employer to show "it would have made the same decision in any event." (*Harris, supra,* 56 Cal.4th. at p. 232.) The Supreme Court has referred to the "same-decision showing [as] a hypothetical, counterfactual construct." (*Id.* at p. 233.)

The trial court, having decided there was sufficient evidence of discrimination and/or retaliation, as well as of an after-acquired nondiscriminatory and nonretaliatory reason to terminate plaintiff, instructed the jury on all the issues. It was then responsible for submitting a verdict form that addressed each of them. The modified special verdict form included three sections—gender discrimination, retaliation, and damages. It included questions directed to both plaintiff's and the City's theories.

Question 3 was in the first section for plaintiff's gender discrimination claim. Presumably pertaining to the City's after-acquired evidence defense, it read, "Did the City . . . terminate

---

CACI 2506 and *Salas, supra,* 59 Cal.4th 407 [after-acquired evidence] with CACI 2512 and *Harris, supra,* 56 Cal.4th 203 [mixed motive].)

[plaintiff] for non-discriminatory reasons?" Question 4 asked, "Was [plaintiff's] gender a substantial motivating reason for the City . . . to terminate her?"

In the retaliation section, after the jury found plaintiff complained about gender discrimination and "reasonably believe[d]" the City engaged in gender discrimination or harassment, question 10—also based on the City's after-acquired evidence defense—asked, "Did the City . . . terminate [plaintiff] for non-retaliatory reasons?" Question 11, asked, "Was [plaintiff's] complaint of gender discrimination or harassment a substantial motivating reason for the City . . . to terminate her."

The problem stemmed from the directions that followed questions 3 and 10. Once the jurors answered yes to questions 3 and 10—finding the City had nondiscriminatory and nonretaliatory reasons to terminate plaintiff—they were told to skip questions 4 and 11, even though they had been instructed to decide whether discrimination or retaliation was a "substantial motivating reason" behind her termination.

A special verdict suffers from a fatal defect if does not permit the jury to resolve all controverted issues. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1240 (*Taylor*).) Our review of the verdict form is de novo, and we do "not imply findings in favor of the prevailing party." (*Id.* at p. 1242.)

After determining "substantial motivating reasons" were controverted issues in the gender discrimination and retaliation claims and instructing the jury on them, the trial court submitted a modified special verdict form that prevented the jury from resolving those issues. The modified special verdict form was therefore defective. (*Taylor, supra,* 222 Cal.App.4th at p. 1241.)

Even a fatally defective special verdict form is subject to a harmless error analysis, however. (*Taylor, supra*, 222 Cal.App.4th at p. 1245.) And no civil judgment is to be set aside unless the error "has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

Here, we conclude the directions in the special verdict form that prevented the jury from determining whether gender bias and/or retaliation were substantial motivating factors in plaintiff's termination were erroneous and prejudicial. The jury's findings that the City had nondiscriminatory and nonretaliatory reasons for terminating plaintiff did not foreclose findings that gender discrimination and/or retaliation were also "substantial motivating factors." This is particularly so because it must be remembered that (1) Justice Cooper determined plaintiff had been wrongfully terminated, (2) the City reinstated plaintiff, (3) and the after-acquired evidence of "sufficiently severe" misconduct by plaintiff did not result in a second termination, as plaintiff was still in the City's employ at the time of trial. On the record before us and viewing the evidence "in the light most favorable" to plaintiff (*Huffman v. Interstate Brands Corp*. (2004) 121 Cal.App.4th 679, 692), "there is a reasonable probability that in the absence of the error, a result more favorable to [plaintiff] would have been reached." (*Soule, supra,* 8 Cal.4th at p. 574.)[13]

---

[13] Reversal for prejudicial error in the special verdict form compels reversal of the award to the City of attorney fees and costs.

DISPOSITION

The order denying the section 664.6 motion is affirmed. The judgment and postjudgment order awarding attorney fees and costs are reversed, and the matter is remanded for further proceedings consistent with this opinion. Plaintiff is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

* Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.