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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DANIELLE BAEZ, Plaintiff and Appellant, v. BURBANK UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B219581 (Los Angeles County Super. Ct. No. BC372092)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Reversed.

Law Offices of Victor L. George, Victor L. George and Wayne C. Smith for Appellant.

Doumanian & Associates and Nancy P. Doumanian for Respondents Burbank Unified School District and Craig Jellison.

INTRODUCTION

Danielle Baez filed a complaint against Craig Jellison and the Burbank Unified School District alleging sexual harassment and related claims. The District filed a cross-complaint against Baez alleging intentional misrepresentation in her acceptance of income from the District based on a medical leave of absence for a period of time during which she worked at another job. The jury found against Baez on her complaint and in favor of the District on its cross-complaint. We reverse.

FACTUAL AND PROCEDURAL SUMMARY

In December 2007, Danielle Baez filed a (first amended) complaint against the Burbank Unified School District and its Chief Facilities Officer Craig Jellison, alleging causes of action for discrimination, harassment and retaliation in violation of Government Code section 12940, battery, false imprisonment, intentional infliction of emotional distress and invasion of privacy. Beginning in December 2005, she alleged, Jellison began sending her suggestive and offensive e-mails and pursued her with the intention of starting an extramarital affair. When Baez told Jellison his advances were unwelcome, he admitted he had been "an ass" and agreed to "back off." Days later, he propositioned her to spend the weekend with him in Lake Mead. She rejected him again. He continued sending increasingly graphic e-mails and making explicit propositions which she recounted in her complaint.

When Baez turned Jellison down, she said, he would retaliate by refusing to cooperate with her in preparing necessary reports and projects. She tried to avoid Jellison but learned in the summer of 2006 he was attempting to switch her secretarial assignments and have her transferred to his department to work under his sole supervision and control. On July 26, 2006, at about 4:30 p.m., Jellison summoned Baez to his office, ostensibly to discuss her transfer, indicating her position would be reclassified so her pay would increase. After locking the door, he directed Baez to a chair

near his desk, then suddenly pinned her there.[1] She described in detail how he sexually assaulted her before she was able to break away and run from the office. She said he also taunted her with an e-mail after the attack.

Thereafter, Baez alleged, "Jellison began spreading a rumor that [she] was involved in an improper relationship with her other supervisor, triggering an investigation by the Burbank Unified School District." Following her complaints of Jellison's sexual harassment and battery, she said, the District purported to undertake an investigation of these claims, demanding that she file a police report and provide the District with a copy. She filed a police report in March 2007. Although Jellison had been disciplined previously for other acts of harassment against other employees, the District did not discipline him after Baez's report and took no steps to insure he could not approach or come in contact with Baez at work. However, in retaliation for her complaints and in ratification of Jellison's conduct, the District took away Baez's notary stipend and refused to pay her overtime. As a result, she alleged, she was constructively terminated on March 20.

In their answer, the District and Jellison asserted various affirmative defenses, including the following:

"[Baez's c]omplaint fails as a whole given that the . . . District *properly and timely investigated [her] complaints of harassment and discrimination* in the work[]place." (Italics added.)

"[Baez's c]omplaint as a whole is barred given that [Baez] engaged in misconduct in the work[]place in the form of an inappropriate sexual relationship with her supervisor Steve Bradley which resulted in an investigation and disciplinary action against [Baez] and her supervisor.

"[Baez's c]omplaint as a whole is barred given that the [District's] employment practices are lawsuit [sic] given that they are necessary to the function of its business. The purpose of the employment practice and selection policy is to operate the business

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1 Baez described Jellison as weighing 260 pounds.

safely and efficiently, and the employment practice and selection policy substantially accomplishes this business purpose."

"[Baez's c]omplaint as a whole is barred given that *[Baez] was never subjected to harassment or discrimination on the basis of her sex or gender; [Baez] was never subjected to unwanted harassing conduct; any harassing conduct was not severe or pervasive; [Baez] never considered the work environment to be hostile or abusive; no supervisor engaged in any harassing or abusing conduct of [Baez]*." (Italics added.)

"[Baez's c]omplaint as a whole is barred given that Baez could have avoided all or some of the harm with reasonable effort; *in that [the District] took reasonable steps to prevent the harassment;* [Baez] unreasonably failed to use [the District's] harassment complaint procedures; that [sic] reasonable use of [the District's] procedures would have prevented some or all of [Baez's] alleged harm."

"[Baez's c]omplaint as a whole is barred given that *Baez was never subjected to unlawful or discriminatory employment practices and there is not evidence [the District] failed to take reasonable steps to prevent the harassment, retaliation or discrimination*." (Italics added.)

"[Baez's c]omplaint as a whole is barred given that *Baez never complained about any allegedly improper conduct or commentary by . . . Jellison at any time, and only raised this claim when she was the subject of an investigation for an inappropriate sexual relationship* between her and her supervisor Steve Bradley." (Italics added.)

The District also filed a cross-complaint against Baez, asserting causes of action for fraud, deceit and misrepresentation; concealment and implied and equitable indemnity. The District alleged Baez was working elsewhere and receiving income during a time when she had submitted medical documentation in support of a medical leave of absence indicating she was incapable of working; in addition, the District alleged Baez was paid overtime pay authorized by her supervisor Steve Bradley when she had not worked overtime hours.

During discovery, in 2008, the District and Jellison sought to compel Baez to answer certain deposition questions regarding her relationship with her supervisor

(Bradley), but the trial court denied the motion, ruling as follows: "'In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator shall establish specific facts showing that there is good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence.' CCP 2017.220; *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557; *Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11. The evidence submitted by Defendant fails to meet this burden.

"Defendant's assertion that plaintiff's alleged extramarital relationship is relevant to her credibility and the absence of damages has no merit. It is undisputed that the emails (Exh. B to motion) were sent by and between plaintiff and Bradley; they are already part of the record and can be used by defendant to address the issues of credibility, motive and damages. Whether there was a physical sexual relationship adds nothing. Defendant's argument that other stressors in plaintiff's life may be responsible for her claimed mental distress and other damages is likewise unpersuasive. Before a defendant can require plaintiff to disclose information about any marital difficulties experienced before the termination itself, it 'must first identify the specific emotional injuries which [plaintiff] claims resulted from the termination of the contract and then demonstrate there is a nexus between damages from termination and those which may arise out of the marital relationship.' *Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1388. Defendant has not offered evidence supportive of either of these elements.

"The limitation on discovery under California law 'involves not only plaintiff's right to privacy but the privacy of uninterested third persons,' such as Bradley. *Mendez, supra,* 206 Cal.App.3d at 568. Defendant has not demonstrated any compelling need for invading the privacy right of Bradley, who in any event has not put his personal life at issue."

By the time of trial, Baez's claim against the District was limited to the sexual harassment cause of action. As to Jellison, Baez's claims for sexual harassment as well as battery, false imprisonment and invasion of privacy remained.

Prior to trial, Baez filed a motion in limine seeking to exclude evidence of her extramarital affair or any sexual or flirtatious relationship between herself and any person, other than Jellison, and cited to the trial court's prior discovery order. Baez also argued the District's head of Human Resources as well as their investigator (Sukhi Sandhu) had testified there was no District policy prohibiting a consensual relationship between two District employees, even in the case of a supervisor and subordinate. The District and Jellison opposed the motion, arguing the evidence was admissible for several reasons: (1) it fell under the "loss of consortium" exception contained in Evidence Code section 1106, subdivision (a); (2) the affair was relevant to Baez's credibility; (3) the affair was relevant to Baez's motivation; (4) the affair "goes to the heart of claimed damages." (Baez denied she was making a loss of consortium claim.)

The trial court denied Baez's motion, stating: "The court finds that Evidence Code section . . . 1106(c) applies here rather than 1106(a). [¶] The evidence of plaintiff's affair with Bradley is being offered to rebut evidence introduced by the plaintiff, to wit, that this actual assault by Jellison occurred. It's also being offered pursuant to [Evidence Code section] 1106(d) to attack the plaintiff's credibility.

"The court has given some thought to whether defendants' stated reasons for introducing evidence of plaintiff's affair with Bradley is really to paint the plaintiff as a woman of loose morals who likely consented to a sexual relation with Jellison. [¶] Indeed, if the allegations of sexual harassment against Jellison involved an ongoing series of sexual or sexually-charged encounters between plaintiff and Jellison and the issue were whether plaintiff was a willing participant in those encounters, the plaintiff's argument would be well-taken.

The court could infer in that situation that the real reason the evidence that the affair with Bradley was being offered was to show that plaintiff consented to have sex with Jellison, but that is not the case here. [¶] The evidence of sexual harassment that

forms the basis of plaintiff's cause of action is a single episode [apparently following the grant of the District's motion for summary adjudication], the alleged sexual assault. [¶] And the court notes here that the series of sexually-charged e-mails between plaintiff and Jellison were by plaintiff's own admission consensual. [¶] The District and Jellison do not argue that plaintiff consented to the single incident alleged. They deny it happened at all.

"It is thus more difficult to infer that the evidence of the affair with Bradley is being offered to persuade the jury that plaintiff is a loose woman. The more likely inference to be drawn about the District's purpose in offering the evidence plaintiff's affair with Bradley is that it is, in fact, being offered to rebut the plaintiff's claim that Jellison sexually assaulted her.

"The District is entitled to introduce evidence of the affair and the District's investigation of it to show that the plaintiff may have manufactured the claim of Jellison's sexual assault to deflect attention from the District's investigation of her conduct with Bradley. [¶] The jury will have to decide whether the plaintiff or the District is telling the truth. [¶] The evidence is thus also being offered to attack the credibility of the plaintiff and may be used for that purpose pursuant to Evidence Code section 1106(d)."[2]

The trial court also denied Baez's motion in limine to exclude evidence of a miscarriage allegedly suffered in September 2006, which Defendants insinuated resulted from Baez's relationship with Bradley. The District and Jellison claimed entitlement to present evidence of infidelity with Bradley as well as any pregnancies or miscarriages and said such facts were relevant to attack Baez's loss of consortium claim (which Baez denied bringing).

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[2] The trial court granted the defendants' motion in limine to bar evidence of a sexual harassment claim made against Jellison by another woman (Camille Nelson) pursuant to Evidence Code section 352.

Baez's testimony included not only her own description of Jellison's conduct, but also the conclusions of the District's investigator (Sandhu), specifically finding in her report "sufficient credible evidence" in support of Baez's account of an unwelcome sexual contact, while Jellison was "not credible." As the District's counsel acknowledged, the Baez-Bradley relationship was the focus of her defense strategy. Jellison denied Baez's account and admitted sending one of the e-mails at issue, claimed he had never sent many other e-mails although they had been sent from his personal account, and said his friend Eddie Smith had written another one without his knowledge (but they had a good laugh about it according to Smith).

After the presentation of considerable evidence relating to Baez's relationship with Bradley in addition to the testimony relating to the events of July 26, 2006 at issue in Baez's complaint, the jury ultimately returned a special verdict in favor of the District and Jellison and against Baez, answering "no" to the following question: "Was Plaintiff Danielle Baez subjected to unwanted harassing conducted by the Burbank Unified School District because of her gender on July 26, 2006?" The jury found in favor of the District and against Baez on the District's cross-complaint and awarded damages in the amount of $18,565.01, plus punitive damages in the amount of $1; judgment was then entered on the special verdict.

Baez then filed a motion for a new trial under Code of Civil Procedure section 657, based on the allegedly improper admission of evidence of Baez's extramarital affair. According to one juror's supporting declaration (John Voors), during the three days of jury deliberations, 35 to 40 percent of the discussion was devoted to the Baez-Bradley affair, including speculation about who was the father of Baez's miscarried fetus. These issues negatively impacted the credibility of Baez and her husband (Alex Carl) he said. According to Voors, another juror he identified made several comments that because Baez slept with her boss, she was sure whatever happened in Jellison's office was consensual. Voors said other jurors made similar comments and described them. "[S]he slept with her own boss, c'mon . . . how can you believe her?" Another juror (Virginia Lopez) described similar comments and noted repeated references to Baez as a "slut."

The District filed opposition, supported by declarations from jurors stating Baez had failed to satisfy her burden of proof. The trial court denied the motion for new trial.

Baez appeals.

DISCUSSION

According to Baez, the trial court's admission of sexual conduct with anyone other than Jellison was plain legal error, and the trial court's finding that Evidence Code section 1106, subdivision (d) permitted evidence of her sexual conduct with Bradley and others cannot stand because the District and Jellison did not follow the mandatory procedures set forth in Evidence Code section 783 to Baez's considerable prejudice. According to the District and Jellison, the evidence was properly admitted to attack Baez's credibility because her "revelations surfaced *only after* she was being investigated for having an inappropriate relationship with her boss," and she "downplayed Mr. Bradley's role in her marital and life drama."[3]

Evidence Code section 1106 provides as follows: "(a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium. [¶] (b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator. [¶] (c) If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff. [¶] (d) *Nothing in this section shall be construed*

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[3] The District's brief is woefully lacking in citations to the record in support of factual assertions contained within it and, where such citations are provided, the record contradicts or at the very least fails to support the statement made.

to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783." (Evid. Code, § 1106, italics added.)

Evidence Code section 783 specifies: "In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures *shall* be followed: [¶] (a) *A written motion shall be made by the defendant* to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented. [¶] (b) The written motion shall be *accompanied by an affidavit in which the offer of proof shall be stated*. [¶] (c) If the court finds that the offer of proof is *sufficient, the court shall order a hearing* out of the presence of the jury, if any, and at the hearing allow the questioning of the *plaintiff* regarding the offer of proof made by the defendant. [¶] (d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."[4] (Italics added.)

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4 "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] (a) His demeanor while testifying and the manner in which he testifies. [¶] (b) The character of his testimony. [¶] (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. [¶] (d) The extent of his opportunity to perceive any matter about which he testifies. [¶] (e) His *character for honesty or veracity or their opposites*. [¶] (f) The existence or nonexistence of a *bias, interest, or other motive*. [¶] (g) A statement previously made by him that is consistent with his testimony at the hearing. [¶] (h) A statement made by him that is *inconsistent* with any part of his testimony at the hearing. [¶] (i) The existence or *nonexistence of any fact* testified to by him. [¶] (j) His attitude toward the action in which he testifies or toward the giving of testimony. [¶] (k) His *admission of untruthfulness*." (Evid. Code, § 780, italics added.)

"The Legislature declared its intent in enacting section 1106 as follows: '[I]t is the existing policy of the State of California to ensure that the causes of action for . . . sexual harassment, sexual assault, or sexual battery are given proper meaning. The discovery of sexual aspects of complainant's [sic] lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants [which] is unnecessary and deplorable. Without protection . . . , individuals whose intimate lives are unjustifiably and offensively intruded upon might face the . . . risk of enduring further intrusions into details of their personal lives in discovery, and in open quasi-judicial or judicial proceedings. [P] . . . [A] similar state of affairs once confronted victims in criminal prosecutions for rape . . . . The Legislature has taken measures to curb those abuses in rape proceedings. It is the intent of the Legislature to take similar measures in sexual harassment, sexual assault, or sexual battery cases. [P] The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial.' (Stats. 1985, ch. 1328, § 1, pp. 4654-4655.)" (*Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 460.)

In light of the legislative intent, the term "sexual conduct" within the meaning of section 1106 is broadly defined. (*Rieger v. Arnold*, *supra*, 104 Cal.App.4th at p. 462 ["Consequently, testimony about the plaintiff's racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits were all 'sexual conduct' under section 1106 and subject to exclusion."].)

We reject the District's claim the evidence was properly admitted to undercut causation of Baez's damages and provide her relationship with Bradley as an alternate source of damage. As the court observed in *Mendez v. Superior Court*, *supra,* 206 Cal.App.3d 557 (*Mendez*) in the discovery context, "An essential aspect of the damage in any case of sexual harassment, sexual assault or sexual battery is the outrage, shock and

humiliation of the individual abused. We cannot conceive of a circumstance where a cause of action for sexual assault, battery, or harassment could accrue devoid of any consequential emotional distress. (See *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 66-67 [91 L.Ed.2d 49, 59, 106 S.Ct. 2399]; *Henson v. Dundee* (11th Cir. 1982) 682 F.2d 897, 904; *Howard University v. Best* (D.C.App. 1984) 484 A.2d 958, 979-980; Note (1981) 14 U.C. Davis L.Rev. 711, Sexual Harassment in the Work Place: New Rules for an Old and Dirty Game.) Thus, the average or usual case would normally carry with it a concomitant claim for emotional upset inflicted by the conduct. (See *Robinson v. Jacksonville Shipyards, Inc.* (M.D.Fla. 1988) 118 F.R.D. 525.)

"The legislative statement of purpose compels the conclusion that because such distress is inextricably intertwined in the cause of action that to allow privacy intrusion in the ordinary case would have a chilling effect on the pursuit of a cause of action for sexual harassment or sexual assault. Any other conclusion would render the statute meaningless in the face of a simple claim for damages involving consequential mental distress. Thus, the legislative requirement that only in extraordinary circumstances (as opposed to ordinary circumstances) is inquiry to be permitted, compels the conclusion that the Legislature did not intend, and its statement of purpose disavows, that a simple claim for derivative emotional trauma waives the right of privacy.

"Defendants' argument, taken to its natural conclusion, would allow inquiry into anything that might conceivably cause some measure of distress or anxiety without regard to its protected nature. It creates the very Catch-22 the Legislature was seeking to avoid. The Legislature has emphatically stated, and we agree, that such inquiry would at most generate results of minimal probative value and should be discouraged. We see no basis for this court to place its imprimatur on the concept alleged by defendants to the destruction of the statute's protection.

"We hold that in a case involving sexual harassment, sexual assault or sexual battery, the bare fact that plaintiff alleges that the improper behavior produced emotional distress will not justify a defendant's requested invasion of plaintiff's sexual privacy

under section 2017, subdivision (d). In order to justify such inquiry, either the plaintiff must claim some special damage (see, e.g., *Vinson v. Superior Court* [(1987)] 43 Cal.3d [833,] 842; *Morales v. Superior Court* [(1979)] 99 Cal.App.3d [283,] 289) or defendant must demonstrate some extraordinary circumstance attendant to plaintiff's claim. Here, neither instance occurred. We conclude, therefore, that the trial court did not abuse its discretion in finding the defendants failed to establish good cause in light of the restrictions of section 2017, subdivision (d). (*Vinson v. Superior Court, supra*, 43 Cal.3d at p. 844.)" (*Mendez, supra,* 206 Cal.App.3d at pp. 573-574.)

Accordingly, because Baez did not seek damages for loss of consortium or some other "special damage" and the District failed to identify any "extraordinary circumstance," the extensive evidence of Baez's extramarital affair with Bradley was not properly admitted for this purpose.

The District says the evidence was properly admitted to attack Baez's credibility, and Evidence Code section 1106 does not make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783. However, section 783 requires the defendant to file a written motion in compliance with the statute's provisions. The defendant may then offer evidence pursuant to the order of the court." In this case, the defendants never brought such a motion. Plaintiff's counsel did however file a motion in limine seeking to exclude evidence of Baez's relationship with Bradley, and despite plaintiff's counsel's repeated attempts to seek the court's ruling in this regard, the trial court required that the trial proceed and indicated that specific rulings would depend on what evidence came out as witnesses testified such that noncompliance with section 783 resulted in an evisceration of the protections of section 1106 and 783 as contemplated by the Legislature.

While subdivision (d) states that evidence to attack the plaintiff's credibility is not made inadmissible by section 1106, it mandates the scrutiny with which the claim of admissibility for this purpose must be examined. As a result, on this record, the question of whether Jellison sexually assaulted Baez on July 26, 2006, was lost in a trial focused

on Baez's relationship with Bradley. In *Mendez, supra,* 206 Cal.App.3d 557, the plaintiff (Peery) sued her employer (County) and a fellow employee and deputy (Mendez), alleging Mendez had sexually assaulted her. At the discovery stage, the defendants similarly claimed the plaintiff's sexual history reflected on her credibility. The *Mendez* court had this to say: "Although finely framed, County's argument appears to assert, and conclude, that sexually-active people may be less credible than more chaste individuals. Taken to its natural conclusion, if such an interpretation has substance, then County's claim of relevance would arguably justify discovery of the sexual practices of all potential witnesses. In order to accept the legitimacy of the deposition inquiries as to Peery's other sexual activities on the grounds asserted by County, the basic proposition must be accepted that promiscuity has a bearing on one's veracity. . . . However, County furnishes no support for the thinly veiled proposition that promiscuity engenders prevarication other than speculation and innuendo. The argument is predicated upon a perception and stereotype that has neither a basis in experience nor proof. Common perceptions do not rise to the level of truth simply because of repetition or general regard." (*Id.* at p. 575.)

"Mendez argues that evidence of plaintiff's alleged extramarital affairs will be potentially admissible to assail her denial under oath, at [her] deposition, of having engaged in extramarital conduct. In addressing this argument, Mendez notes that at the time of the deposition inquiry, plaintiff's husband had alleged a cause of action for loss of consortium. Assuming, arguendo, that the line of inquiry might have had some relevance on that issue, that cause of action was dropped by the time of the trial court's order herein. Therefore, any relevancy the information might have had to the cause of action disappeared with the cause of action. Mendez asserts that plaintiff's denials coupled with contradictory evidence from other witnesses constitutes specific facts supporting the relevance of the evidence as to plaintiff's credibility. Mendez contends plaintiff was untruthful in her denials and that discovery of impeaching evidence is proper to attack her veracity. Mendez, however, overlooks several issues. As the consortium cause of action

was dropped, any remaining relevancy must be predicated upon its impact on credibility. In order to justify further discovery on this issue, the requirements of both section 2017, subdivision (d), coupled with the constitutional protections of plaintiff's right of privacy must be observed. The admonition of *Board of Trustees v. Superior Court* [(1981)] 119 Cal.App.3d 516, 525, bears repeating. 'And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a "careful balancing" of the "compelling public need" for discovery against the "fundamental right of privacy."'

"In balancing 'compelling public need' against the 'fundamental right of privacy,' the probative value of the sought-after information is a substantial consideration. Jefferson provides an excellent yardstick for a determination of the issue of materiality and probative value: 'This involves the strength of the relationship between the evidence and inferences derived therefrom and the issue upon which the evidence is offered, and whether such evidence tends to prove a main issue or a collateral matter. If proffered evidence affords strong inferences on a main issue in a case, its probative value is substantial. If the evidence affords only weak inferences of fact on a major issue, its probative value is obviously weak or slight. Also, if such evidence tends to prove some collateral, disputed issue, such as impeachment of a witness on a collateral matter, its probative value is less than that of evidence offering substantial proof of a main issue.' (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 22.1, p. 589, italics added.)

"As we have noted, proof as to plaintiff's alleged extramarital affairs could not, being irrelevant directly on the issue of credibility, have been independently shown on that issue. However, questions were asked and denials given. Absent the existence of a contradictory statement, therefore, the line of inquiry is irrelevant. Thus, the question and the contradictory proof are, at best, collateral.

"As noted succinctly by Witkin: 'If the matter could have been proved without any statement of the witness to contradict, it can also be proved to contradict his statement. (See *People v. Chin Mook Sow* (1877) 51 C. 597, 600; *Moody v. Peirano* (1906) 4 C.A.

411, 416,. . . ["If the answer of the witness is a matter which would be allowed on your part to prove in evidence . . ., then it is a matter on which you may contradict him"]; *People v. Factor* (1932) 125 C.A. 618, 621, . . . ; McCormick 3d, §§ 36, 47; 3A Wigmore (Chadbourn Rev.) §§ 1003 et seq., 1020 et seq.; 81 Am.Jur.2d, Witnesses § 613.)' (3 Witkin, Cal. Evidence (3d ed. 1986) Trial, § 1984, pp. 1941-1942.)

"The matter at issue at the time of the trial court's order had clearly become a collateral inquiry on credibility. We are unmoved by Mendez's argument that further discovery on this issue should be compelled or inquiry permitted. Mendez does not deny that he has impeaching witnesses and the record substantiates their existence. Defendants' showing not only fails to legitimate further inquiry in a discovery proceeding of this nature, it emphasizes the lack of 'compelling need' balanced against further inquiry in an area that is collateral.

"Further, Mendez's argument is weakened by the substantial question whether such evidence will be permitted at trial. . . . We have already determined that the line of inquiry has become inappropriate. Mendez's and County's position would imply that the existence of an inconsistent statement is admissible to attack credibility. However, there must be a statement to attack. If the statement to be impeached is not admissible then the impeachment of it is not permissible. (*People v. Belmontes* (1983) 34 Cal.3d 335, 341 [193 Cal.Rptr. 882, 667 P.2d 686]; *People v. Blackburn* (1976) 56 Cal.App.3d 685, 693 [128 Cal.Rptr. 864].) Further, specific instances of conduct relevant only to prove 'a trait of his character [are] inadmissible to attack or support the credibility of a witness.' (Evid. Code, § 787.)" (*Mendez, supra,* 206 Cal.App.3d at pp. 575-577.)

"Defendant Mendez also suggests the evidence was relevant to plaintiff's credibility in a third way. Insofar as plaintiff claimed that she forebore from reporting the incident for several months to her superiors out of 'fear of defendant Mendez and his "high-ranking sheriff friends,"' defendant suggests this evidence is relevant to her credibility. Specifically, defendant points to the fact that the sergeant was defendant Mendez's superior. The thrust of this argument seems to be that, if plaintiff were having

an affair with someone in the department with power, she should not have been afraid to report the incidents. *The claimed relevancy appears extremely speculative, obtuse and remote*. . . . [¶] Alternatively, insofar as defendants want such information to impeach plaintiff with her failure to make a 'fresh complaint,' the evidence is not relevant. Plaintiff admits she told no one initially about the assaults. Defendants want to use this failure to show that such things normally would be reported and plaintiff's failure to do so makes it possible/probable that such events did not occur. However, the fact that plaintiff may have had or been having illicit relationships with others does not bolster defendants' 'impeachment.'. . ." (*Mendez, supra,* 206 Cal.App.3d at pp. 578-579, italics added.)

Similarly, in this case, the District had the evidence of Baez's delay in reporting her claim of Jellison's harassment without necessity of tying it to her extramarital affair with Bradley. To the extent the District urges the evidence was admissible to show Baez may have fabricated her claim against Jellison to deflect attention from the investigation of her improper relationship with Bradley, the record does not support the contention. While the District then pursued an investigation into Baez's claim Jellison assaulted her, there is no indication Baez perceived the investigation into Bradley (and according to the record, the District's concern was with Bradley's conduct, not Baez's (his secretary), because Bradley was a high-ranking supervisor with the District) would be abandoned or undermined in any way. According to the evidence, there was no policy against a consensual relationship, even involving a supervisor. The District urged Baez did not want to lose the "gravy train" and "perks" of working for a boss who approved overtime and a discontinued $75 notary stipend, but failed to explain how accusing Jellison would preserve her "gravy train" when the Bradley investigation was already underway. To the extent the argument is that Bradley and Baez were pressuring witnesses not to speak of their relationship or conduct after work hours, the District cites to testimony from a night custodian who testified through a Spanish interpreter Baez asked her about what she may have seen or heard and said to come see her or Bradley if she had questions or needed

anything but who also said she did not feel Baez was threatening her. The suggestion that Baez fabricated the allegation against Jellison based on this evidence was particularly tenuous. As in *Winfred D. v. Michelin North America* (2008) 165 Cal.App.4th 1011, 1038, the "motive theory" had insufficient evidentiary support and did not provide a basis for the admissibility of this evidence, particularly where the District had evidence to impeach Baez's credibility without the considerable evidence of her extramarital affair with Bradley.

Throughout the trial, the District and Jellison focused on Baez's relationship with Bradley. In her opening statement, the District's counsel emphasized Baez's and Bradley's exchange of emails referring to "sexual encounters that happened and that were going to happen," and described the text as "dirty, filthy email." Over Baez's repeated objections, the trial court ruled the witnesses "can talk about the emails, but the emails themselves are not coming in," but further stated "[t]o the extent they are relevant to show anything important to the case," they could. From that point on, the District and Jellison were permitted to introduce and emphasize evidence well beyond that which should have been permitted under the applicable Evidence Code provisions.

Baez's counsel repeatedly attempted to obtain the trial court's ruling with respect to what evidence within Evidence Code section 1106 would be permitted, but the trial court repeatedly indicated that the court would have to hear the evidence at trial in order to rule. Having reviewed the record, we find that as a result of this approach, rather than compliance with Evidence Code section 783, considerable evidence was admitted which should not have been admitted upon a proper consideration under Evidence Code section 783 and Evidence Code 1106, and Baez was prejudiced as a result such that reversal is warranted.

Had the District been put to the requirement of presenting its offer of proof with Baez given the opportunity to respond and the court meeting its obligation to specify questions to be asked and answered, it is reasonably probable on this record a result more favorable to Baez would have been obtained. (*Winfred D. v. Michelin North America,*

Inc., supra, 165 Cal.App.4th at p. 1040.) Accordingly, the judgment must be reversed, and the case shall be remanded for a new trial.

DISPOSITION

The judgment is reversed. Baez is entitled to her costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.