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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

SUN K. BYUN et al., Plaintiffs and Respondents, v. JOONG-ANG DAILY NEWS CALIFORNIA, INC., Defendant and Appellant.	B270539 (Los Angeles County Super. Ct. Nos. BC511504, BC511505 & BC511506)

APPEAL from a judgment of the Superior Court of Los Angeles County. Victor E. Chavez, Judge. Affirmed.

Lee Law Offices and W. Dan Lee for Defendant and Appellant.

Prima Law Group, Inc. and Naveen Madala for Plaintiffs and Respondents.

Joong-Ang Daily News appeals from a judgment which awards a total of $584,611.67 to three former employees for failure to pay overtime wages and for wrongful discharge in violation of public policy. We affirm the judgment.

FACTS

Joong-Ang publishes the Korea Daily, a Korean language newspaper, in California. Plaintiffs Sun K. Byun, Hyub Choi, and Ju Hun Min worked at Joong-Ang's printing facility in Cerritos. The printing department employed 25 to 30 people. On June 7, 2013, Plaintiffs filed three individual lawsuits against Joong-Ang for failure to provide rest periods under Labor Code section 226.7, failure to provide meal periods under Labor Code sections 512 and 226.7 and failure to pay overtime wages under Labor Code sections 510 and 1194. Three claims were added to their first amended complaints: wrongful discharge in violation of public policy, waiting time penalties under Labor Code section 203, and unfair business practices under Business and Professions Code section 17200. The three cases were consolidated for purposes of trial.

At trial, Joong-Ang's CEO, Kae Hong Ko, testified the decision to shut down the printing department was made at the end of 2012. Ko explained Joong-Ang had purchased a TKS press machine from Korea, which cost $1.5 million to install. After three years, subscriptions for the newspaper had declined and the company realized it was too costly to operate the press itself. Ko decided to shut down the entire printing facility and sell it to Berit Publishing, which was already operating two other printing machines located in the Cerritos facility. However, Ko admitted, "one of the reasons [why Plaintiffs were terminated] is that not only they lodged the lawsuit, but they were instigating other

people to join their lawsuit and coercing other people to testify on their behalf."

Plaintiffs were terminated on August 15, 2013, and asked to leave the premises the same day. The remaining printing department employees were also given notice on August 15, 2013, but were allowed to remain until the department closed on September 30, 2013, 45 days later. Ko acknowledged, "at the time a few of them were laid off early. Because Mr. Byun and few others were not working and was persuading and coercing other employees to testify on his behalf, therefore, we let those go first."

The CEO of Berit Publishing, Yopie Sioeng, confirmed he began discussions with Joong-Ang at the end of 2012 to buy the building and the presses in Cerritos, including the TKS printing machine. By the time of the trial in May 2015, however, Berit had not completed the sale, though Sioeng expected to do so "in the coming weeks or months." Sioeng testified he was the printing department head for Joong-Ang for a short time starting June 2012, but his duties were "bringing more business into the TKS press, printing business."

Berit had leased or purchased the other two printing machines in Cerritos. Berit hired 11 of Joong-Ang's employees to run the TKS machine by posting a job notice at Joong-Ang's Cerritos plant on August 15, 2013 the day of the termination notice. Berit hired all of the employees from Joong-Ang who applied and no others. Berit did not advertise the job notice anywhere else. Plaintiffs testified they were unaware of the opportunity with Berit. Berit took over printing the Korea Daily for Joong-Ang on October 1, 2013.

Byun testified he began working at Joong-Ang in 2001 or 2002. In 2009, he became a shift leader for the GOSS printing machine. In that capacity, he ran the press for printing during his shift. From 2009 to 2011, Byun arrived 30 minutes before his shift in order to properly take over from the previous shift and stayed 30 minutes afterwards to organize and change clothes. He was not paid for that extra hour of work. In January 2011, he became a team leader, who was responsible for printing of the newspaper, closing up the plant, and submitting a daily work log. When he became team leader, he worked four to five hours a day of overtime. He was demoted to shift leader on August 31, 2012. During his entire time with Joong-Ang, Byun worked six days a week. Byun testified he was unable to find work after his termination from Joong-Ang.

Byun prepared a spreadsheet, admitted into evidence as exhibit 66, showing the number of hours he worked at Joong-Ang for which he was not paid. On cross-examination, however, he acknowledged he did not remember exactly how many overtime hours he actually worked, but calculated his unpaid overtime based on his best recollection and estimates. Byun also testified he filed an unemployment insurance claim which stated he was laid off from Joong-Ang due to the newspaper's financial status, but made no mention of the lawsuit.

Choi testified he was a press man whose job duties included loading the paper for the press machine and assisting with printing, though he had no skill in printing. In 2011, he began working on the TKS printing machine. Choi testified he was required to clean the restrooms, the office, and the plant without being paid. This extra work took an hour each day and he worked six days a week. He was also required to help plant

pineapple and jujube trees for an executive at the company one day without compensation. Choi likewise prepared an exhibit, number 68A, which was admitted into evidence, showing his unpaid overtime hours. Choi testified he was not paid overtime in 2011 and 2012. He also testified he had no unpaid overtime hours in 2009, 2010 and 2013.

Min testified he began working for Joong-Ang in 1995. He worked as a team leader in the distribution department from June 7, 2009 until October 2012. From June 7, 2009 to January 2010, he worked one 12-hour shift from 5:00 p.m. to 5:00 a.m. Beginning January 2010, Min worked two shifts, one from 8:00 a.m. to 5:00 p.m. and another from 7:00 p.m. to 4:00 or 5:00 a.m. He testified he never saw his children and usually ate and slept at the plant during that time. He worked two shifts until February 2012.

During this time, he helped install the TKS printing machine with workers from Korea who were employed by a company called HKE. He drove the HKE workers to and from the plant each morning and evening. He initially submitted overtime, but was told the overtime request was rejected by management. He was instructed by his supervisor not to submit any more overtime because he was exempt. He was assured that once the installation was complete, the company would compensate him. Min prepared exhibit 67, admitted into evidence, showing his unpaid overtime.

Former Joong-Ang employees testified to the Plaintiffs' overtime. Min Gyu Song testified he was the head of printing at Joong-Ang from January 2009 to December 2012. He confirmed team leaders were not eligible for overtime. He also verified he approved purchases made by Min for the TKS machine, the

receipts for which showed the purchases were made outside of Min's regularly scheduled shift. Yun Hwan Park, who worked at Joong-Ang from January 2009 to October 15, 2012, testified he saw Byun and Choi come in 30 minutes early for their shifts in 2009. He also observed them working additional time in 2010.

The jury returned verdicts in Plaintiffs' favor on their claims for failure to pay overtime and wrongful discharge in violation of public policy. In particular, Byun was awarded a total of $208,692.40, Choi $73,401.75, and Min $302,517.52. Joong-Ang's motion for directed verdict on the issue of punitive damages was granted. It also moved for a new trial, which was denied. Thereafter, Joong-Ang filed its notice of appeal.

DISCUSSION

Joong-Ang presents seven issues, four involving Plaintiffs' wrongful discharge claim and three involving Plaintiffs' unpaid overtime claim in its appeal. Joong-Ang's challenge to the wrongful discharge verdict is two-fold: first, it argues the purported reason behind Plaintiffs' termination is not against public policy and second, Joong-Ang's financial decision to close the entire printing department supercedes any other reason for Plaintiffs' termination such that Plaintiffs may not be awarded damages beyond September 30, 2013, when the entire printing department was closed. As to the overtime claim, Joong-Ang contends the jury's special verdicts are defective and insufficient evidence supports the jury's damages determination. We conclude Joong-Ang has failed to present any issue justifying reversal.

Issue 1: Plaintiffs' Termination Violated Public Policy

At trial, Joong-Ang moved the court pursuant to CACI No. 2430 to determine whether the purported reason for discharging Plaintiffs was a violation of public policy. The trial court found the case involved claims of Labor Code violations and the layoff of the Plaintiffs served as a predicate for a claim of wrongful discharge in violation of public policy. As a result, the jury was instructed with CACI No. 2430 and its related instructions. Joong-Ang challenges the trial court's public policy determination.

Joong-Ang characterizes Plaintiffs' asserted public policy violation as "access to courts without adverse employment consequences" and portrays the reason behind Plaintiffs' early termination as a business decision. Joong-Ang claims that "[i]f an employer is prohibited, as a matter of public policy, from discharging an at-will employee, as here, after filing a lawsuit for unpaid overtime wages, even when the employer shuts down its operation, the employee can use a lawsuit as a shield from discharge from employment. Otherwise, an employer can never terminate an employee at will who once files a lawsuit for unpaid overtime compensation against the employer to the effect that the employee would argue that he or she was discharged because he or she filed a lawsuit against the employer." The facts and long-standing case law discredit Joong-Ang's argument.

The use note to CACI No. 2430 directs the trial judge to first "determine whether the purported reason for firing the plaintiff would amount to a violation of public policy." If the trial judge concludes the alleged reason for firing the plaintiff is a violation of public policy, the jury is to be instructed with CACI

No. 2430 and must decide whether: 1) the plaintiff was employed by the defendant; 2) the defendant discharged the plaintiff; 3) the alleged violation of public policy was a motivating reason for the plaintiff's discharge; and 4) the discharge caused the plaintiff harm.

CACI No. 2430 is premised on the California Supreme Court's holding that "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co*. (1980) 27 Cal.3d 167, 170 (*Tameny*).) In *Tameny*, the high court explained an employer does not enjoy an absolute right to discharge at-will employees when the discharge clearly violates an express statutory objective or a fundamental principle of public policy. (*Tameny, supra*, 27 Cal.3d at p. 172.) A policy is "fundamental" when it is "carefully tethered" to a policy "delineated in constitutional or statutory provisions." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095.) Thus, it involves a duty affecting the public at large, rather than one owed to or imposed solely upon the parties to a dispute. Additionally, it must be "'well established'" and "sufficiently clear" to the employer at the time of the discharge. (*Id*. at p. 1090.)

We review this question of law de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

First, *Tameny* clearly holds that an employer's ability to terminate an at-will employee is circumscribed by public policy. The duty to pay overtime wages is a well-established fundamental public policy in California. "California courts have long recognized wage and hours laws 'concern not only the health

and welfare of the workers themselves, but also the public health and general welfare.' [Citation.] . . . [O]ne purpose of requiring payment of overtime wages is '"to spread employment throughout the work force by putting financial pressure on the employer . . . ."' [Citation.] Thus, overtime wages are another example of a public policy fostering society's interest in a stable job market. [Citation.] Furthermore, . . . the Legislature's decision to criminalize certain employer conduct reflects a determination the conduct affects a broad public interest . . . Under Labor Code section 1199 it is a crime for an employer to fail to pay overtime wages as fixed by the Industrial Welfare Commission." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1148-1149 (*Gould*).) If an employer discharges an employee for exercising his right to overtime wages, the employee will have a viable cause of action for wrongful termination. (*Ibid.*)

Here, Plaintiffs do not allege they were terminated simply because they filed a lawsuit against Joong-Ang. As the trial court recognized, Plaintiffs alleged they were terminated because they sued Joong-Ang for unpaid overtime and other wage claims. This is a fundamental public policy which gives rise to a wrongful discharge claim under *Tameny*. (*Gould, supra,* 31 Cal.App.4th at p. 1148.)

Joong-Ang relies on cases which hold that employees are not entitled to be protected from termination when they sue their employer for other reasons. These cases are inapplicable because they involve causes of action which have not been held to implicate fundamental public policy. (See *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174 [fraud and deceit claims]; *Sullivan v. Delta Air Lines* (1997) 58 Cal.App.4th 938 [lawsuit involving

employer's failure to accommodate employee's alcohol or drug rehabilitation]; *Becket v. Welton Becket & Associates* (1974) 39 Cal.App.3d 815, 820-822 [lawsuit involving claims for breach of fiduciary duty, corporate waste and injunctive relief]; *Whitman v. Schlumberg Ltd.* (N.D. Cal. 1992) 793 F.Supp.228 [lawsuit for breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment].)

Issue 2: A Nexus Exists Between The Public Policy Violation And Plaintiffs' Employment

Joong-Ang next argues the lawsuit was not the motivating factor behind Plaintiffs' termination because the decision to close the printing facility was made prior to Plaintiffs' lawsuits and, in any case, Plaintiffs were not immediately terminated upon the filing of the lawsuit. Instead, they were terminated approximately 70 days after their June 6, 2013 complaints were filed. The jury disagreed with Joong-Ang's characterization of the reasons behind Plaintiffs' termination and we find substantial evidence supports its finding. (*Alderson v. Alderson* (1986) 180 Cal.App.3d 450, 465.)

Joong-Ang's CEO acknowledged Plaintiffs were terminated 45 days prior to their colleagues due to their lawsuit and their efforts to recruit witnesses. Based on this testimony alone, substantial evidence supports a finding that Plaintiffs' wage and hour claim was a motivating factor leading to their termination, even if other factors contributed to it as well. Joong-Ang's contention that Plaintiffs' early layoff was a business decision, even if "good, bad, mistaken, unwise, or even unfair," does not override the jury's finding. There is sufficient evidence to show a nexus between the alleged violation of public policy—Plaintiffs'

attempt to recover their unpaid overtime wages—and Joong-Ang's adverse employment decision.

We reject Joong-Ang's argument that Plaintiffs would have lost their jobs anyway due to the closure of the entire printing department on September 30, 2013. Joong-Ang's CEO acknowledged Plaintiffs were terminated 45 days earlier than their colleagues due to their lawsuit. Substantial evidence supports Plaintiffs' theory that the closure was a ruse to limit liability in the event of an adverse judgment. Berit's CEO, who previously headed Joong-Ang's printing department, testified he posted a job notice only at the Cerritos location and hired all eleven of the Joong-Ang employees who applied. Printing of the Korea Daily was uninterrupted when Berit took over. As of the trial, almost three years after talks began and almost two years after Berit took over the printing of the newspaper, the sale had still not been completed.

We also reject Joong-Ang's contention that Plaintiffs' statements to the California Employment Development Department (EDD) to receive unemployment should be dispositive of the reason for their termination. In a form filed with the EDD, Byun and Min described the reason for separation to be: "Due to the company's financial reasons, the company found it necessary to undergo a reduction-in-force. My employment was terminated on 8/15/[13.]" Choi submitted a similarly worded EDD statement. According to Joong-Ang, Plaintiffs should be judicially estopped from asserting they were fired for any other reason. We disagree and find judicial estoppel inapplicable here.

Judicial estoppel may be invoked to preclude a litigant from obtaining an unfair advantage by taking a position in a judicial or administrative proceeding that is inconsistent with a position successfully asserted by the litigant in an earlier proceeding. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Because it is an equitable doctrine, the decision whether to apply judicial estoppel in a given case rests in the sound discretion of the trial court. (*See People ex rel. Sneddon v. Torch Energy Services, Inc*. (2002) 102 Cal.App.4th 181, 189.)

The position taken by Plaintiffs in their unemployment insurance forms is not inconsistent with their wrongful discharge claim against Joong-Ang. Indeed, Joong-Ang's CEO admitted both reasons underlay Joong-Ang's decision to terminate Plaintiffs. Plaintiffs are required to show "a substantial motivating reason" which contributed to their discharge. It is well-established that this reason does not have to be the only reason for the discharge. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232.) Proof that the public policy violation was a substantial motivating factor in Plaintiffs' termination exposes the employer to liability even if other factors would have led the employer to make the same decision at the time. (*Ibid.*)

Issues 3 and 4: Damages Were Properly Determined

Joong-Ang claims the jury improperly determined the amount of damages to which Plaintiffs were entitled. Specifically, Joong-Ang contends "there is no evidence to show how [Plaintiffs] are entitled to any lost wages after September 30, 2013, when Daily News completely shut down the printing department, effective as of September 30, 2013, and never resumed it thereafter." Again, we disagree.

At trial, the jury was instructed pursuant to CACI No. 2433 to calculate the amount of damages by: "1. Decid[ing] the amount that Plaintiffs would have earned up to today, including any benefits and pay increases; and 2. Add[ing] the present cash value of any future wages and benefits that he would have earned for the length of time the employment with Defendants was reasonably certain to continue; and 3. Add[ing] damages for additional expenses in their efforts to regain their employment and emotional distress if you find that Defendants' conduct was a substantial factor in causing that harm." CACI No. 3903C was also given, which instructed the jury: "To recover damages for past lost earnings, Plaintiffs must prove the amount of wages that they have lost to date" and "To recover damages for future lost earnings, Plaintiffs must prove the amount of wages they will reasonably certain to lose in the future as a result of the injury."

The jury was then presented with a modified verdict form pursuant to CACI VF-2406, which correlated with the damages instructions under CACI Nos. 2433 and 3903C. The jury was asked to determine: 1) past economic loss including lost earnings; 2) future economic loss, including lost earnings and lost earning capacity; 3) past [non]economic loss, including physical pain/mental suffering; 4) future noneconomic loss, including physical pain/mental suffering.

The jury apportioned damages for the wrongful discharge claims as follows: Byun received $90,850 for past economic loss, $25,500 for future economic loss, $5,000 for past physical pain/mental suffering, and $0 for future noneconomic loss for a total of $121,350; Choi received $44,250 for past economic loss, $0 for future economic loss, $5,000 for past noneconomic loss, $0 for future noneconomic loss for a total of $49,250; Min received

$78,525 for past economic loss, $0 for future economic loss, $7,500 for past noneconomic loss, and $0 for future noneconomic loss for a total of $86,025.

As discussed above, substantial evidence supports a finding that Berit's takeover of the printing department was merely a ruse to prevent Plaintiffs from continuing to work at Joong-Ang. Berit hired all the Joong-Ang employees who applied, listed the job opening only at the Cerritos plant and none of the Plaintiffs were aware of the job openings. Thus, substantial evidence exists to impose liability on Joong-Ang for damages incurred after September 30, 2013.

Joong-Ang criticizes the standardized CACI damages instructions given on the same ground: they do not limit damages for the wrongful discharge claim to August 16, 2013 until September 30, 2013. Joong-Ang contends the damages award was excessive because the jury was improperly instructed to include damages incurred after September 30, 2013, when the printing department was closed. For the reasons discussed above, we reject Joong-Ang's argument.

Issues 5 -7: The Evidence Supports the Overtime Verdict

The remaining three issues listed by Joong-Ang relate to the jury's verdict on Plaintiffs' overtime claims. Specifically, Joong-Ang contends the jury's special verdicts for this claim are hopelessly ambiguous, defective, and incomplete because the jury was required to either accept the damages figure presented by Plaintiffs regarding the overtime hours they worked or reject it entirely. According to Joong-Ang, the jury was not permitted to award any other amount of damages. When it failed to adopt the numbers set forth by Plaintiffs, it should have put "zero" in each

of the special verdict questions regarding overtime damages. Because the special verdict forms are silent as to how the jury determined its own overtime hours for each Plaintiff, Joong-Ang claims the verdict forms are necessarily arbitrary and warrant a new trial on Plaintiffs' unpaid overtime hours. Moreover, Joong-Ang contends the evidence was insufficient to uphold the jury's findings regarding Plaintiffs' unpaid overtime. We are not persuaded.

First, Joong-Ang has forfeited any challenge to the insufficiency of the verdict. Here, the verdict was read and the jury polled on the answers which were not unanimous. The jury was then discharged with no objection from Joong-Ang on the insufficiency of the verdict. "'Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected.' [Citation.]" (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 263-264, fn. omitted.) "The obvious purpose for requiring an objection to a defective verdict before a jury is discharged is to provide it an opportunity to cure the defect by further deliberation. [Citation.]" (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 764.)

When the jury was polled, it was clear the jury did not accept the exact figures provided by Plaintiffs. Because Joong-Ang did not object and had approved the verdict form, it forfeited its claim that the special verdict was defective. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242-1243.) As a result, we reject Joong-Ang's argument that the special verdict form was arbitrary and warrants a new trial.

Joong-Ang's arguments fail on the merits as well. The determination of damages is committed to the broad discretion of the jury. (*Leavy v. Cooney* (1963) 214 Cal.App.2d 496, 501-502.) The jury was instructed under CACI No. 3900 that "Plaintiffs do not have to prove the exact amount of damages that will provide reasonable compensation for the harm." Instead, Plaintiffs may prove the number of overtime hours worked by making a reasonable estimate of those hours if the employer failed to keep accurate payroll records. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727-728.) Indeed, Plaintiffs admitted they were unsure of the exact hours they worked. "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Id.* at p. 728.) The jury performed its duty and was not required to either entirely accept or reject Plaintiffs' damages estimate.

Finally, Joong-Ang pores through the record to show that there is no factual ground for the jury to award unpaid overtime hours where Plaintiffs admitted in deposition that they did not work overtime during that time period. For example, Joong-Ang argues, "As for the time period of June 7, 2009 through March 15, 2012, the jury accepted 532 unpaid overtime hours as stated in *Trial Exhibit No. 68A*. However, Respondent Choi testified under oath that he had no unpaid overtime hours in 2009 and 2010. Accordingly, there is no factual ground for the jury to award 288 [*sic*] unpaid overtime hours between June 7, 2009 and December 25, 2010."

A review of the record belies Joong-Ang's argument. In the example provided, Choi claimed 532 unpaid overtime hours in Trial Exhibit No. 68A, the chart prepared by Choi to show his

unpaid overtime hours. At deposition, Joong-Ang's counsel asked Choi, somewhat confusingly, "Now, going back to 2009, are you claiming any nonpayment of overtime hours that you did not get paid for?" Choi answered, "No." This portion of the deposition was read to the jury during Choi's testimony. Just prior to the deposition being read, however, Choi testified he was claiming 126 overtime hours for the period between June and November 2009. The jury was thus presented with conflicting evidence, which it was entitled to weigh. It apparently, in that instance, chose to accept the figures presented by Choi in his overtime chart, which was admitted into evidence. Contrary to Joong-Ang's assertion, it is not the case that there was no factual ground for the jury to conclude Choi worked 532 hours of unpaid overtime between 2009 and 2012. The other figures contested by Joong-Ang are similarly supported by Plaintiffs' overtime charts or testimony even if contradicted by their own trial or deposition testimony. We decline to disturb the jury's findings on this record.

DISPOSITION

The judgment is affirmed. Plaintiffs are to recover costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.