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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

PATRICIA JOSEPH-MITCHELL, as Personal Representative, etc., Plaintiff and Respondent, v. SEIU LOCAL 721, Defendant and Appellant.	B289210 (Los Angeles County Super. Ct. No. BC575572)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed as modified.

Horvitz & Levy, Lisa Perrochet, Jeremy B. Rosen, Eric S. Boorstin, Scott P. Dixler; Skiermont Derby, Paul B. Derby, Hajir Ardebili and Mane Sardaryan for Defendant and Appellant.

Shegerian & Associates, Carney R. Shegerian and Jill P. McDonell for Plaintiff and Respondent.

INTRODUCTION

SEIU Local 721 appeals from a judgment entered after a jury awarded Talbert Mitchell over $2 million in compensatory damages and $6.1 million in punitive damages for whistleblower retaliation, disability discrimination, medical leave discrimination, wrongful termination in violation of public policy, and intentional infliction of emotional distress. Local 721 argues that the trial court erred in excluding certain evidence and that substantial evidence does not support the jury's awards of noneconomic and punitive damages. Local 721 also argues the punitive damages award is excessive under state and federal constitutional law.

We conclude that the trial court's evidentiary rulings in the liability and damages phase of the trial were not erroneous and that Local 721 has failed to show prejudicial evidentiary error in the punitive damages phase. We also conclude that substantial evidence supports the compensatory damages award, but that substantial evidence does not support the findings of fact underlying the punitive damages award. Therefore, we modify the judgment to reduce the punitive damages award to reflect Local 721's financial condition at the time of trial. As modified, we affirm the judgment. We also affirm a postjudgment order awarding Mitchell his expert witness fees.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Mitchell Becomes the De Facto Head of the Advocacy Department at Local 721*

Mitchell began working in 1997 for the predecessor to Local 721, a union that represents over 100,000 members including employees of Los Angeles County. In 2000 Mitchell became an Advocate, a union employee who helps union members resolve disputes with their employers. If a Local 721 member experienced a problem in the workplace, another member of the union, called a Steward, would initially attempt to resolve the dispute. If the Steward failed to facilitate a resolution, an Advocate (who was not a member of Local 721) assisted the member with the employee's grievance. If resolution remained elusive, the grievance was referred to arbitration and, if the Los Angeles County Employee Relations Commission (ERCOM) approves the arbitration, Local 721's legal department represented the member in the arbitration. The legal department was also responsible for scheduling arbitration hearings with Los Angeles County employers.

In 2012 Local 721 promoted Mitchell to the position of interim coordinator in the advocacy department, and several months later he became the coordinator. The union's general counsel, Rebecca Yee, and its chief of staff, Gilda Valdez, recommended Mitchell's promotion. Cathleen Garcia, Local 721's director of human resources, announced Mitchell's promotion in an email that stated, "[Mitchell] has extensive experience and knowledge in representation and . . . has been praised for the great work he has done as an Advocate in helping protect our members['] rights. He also has developed relationships with

several employers and through those relationships he has been able to gain trust and respect for Local 721." The promotion included a 5 percent pay raise, and Mitchell's title changed to Advocacy Manager in January 2013.

Mitchell reported to Yee, who reported to Robert Schoonover, the president and executive director of Local 721. Mitchell supervised approximately 17 employees in the advocacy department, including a legal assistant, Deborah Tejeda, and two advocates, Stephanie Aguilar and Craig McNair. A director oversaw the advocacy department when Mitchell started working at the union, but from 2009 to early 2014 there was no formal director overseeing Local 721's advocacy department. From mid-2012 to September 2013, Mitchell led the department and performed many of the duties a director would have performed.

Employees in the advocacy department spoke highly of Mitchell. Aguilar called Mitchell "very knowledgeable" and said she and other advocates frequently went to him for advice. Aguilar said that Mitchell was always professional and a "very hard worker" and that he "went over and above for the members and fought for them." She also said Mitchell had "great working relationships" with Los Angeles County human resources departments, which facilitated settlements for union members. McNair described Mitchell as an "ideal supervisor" and said Mitchell was knowledgeable and always available and willing to help. McNair interacted daily with Mitchell and said Mitchell was never disrespectful or insubordinate to anyone in management. McNair said that, with Mitchell "at the helm," the advocacy department was "a very cohesive team," and its members "were all confident." Tejeda similarly said that Mitchell was a strong advocate for union members and that he always

treated her with dignity and respect. Until 2014 neither SEIU nor Local 721 ever reprimanded or counseled Mitchell for insubordination, failing to follow a directive from a supervisor or another manager, or failing to represent members competently. The only negative report in his personnel file was from 2009, when a prior Director of Advocacy counseled Mitchell to keep information in the computer system up to date.

B. *Mitchell and Others Complain About an Arbitration Backlog in the Legal Department*

Beginning in 2012 employees in the advocacy department began hearing complaints from union members whose arbitrations had been approved by ERCOM but not scheduled for up to five years. Boxes of pending case files were also stacking up in the advocacy department. Mitchell and others in the advocacy department believed union members could sue Local 721 for breaching its duty of fair representation to its members. And ERCOM Rule 7.07(d) required Local 721 to schedule arbitrations within 180 days of the date the employee filed the matter with ERCOM or risk automatic dismissal of the arbitration request.[1] In December 2012 Mitchell told Yee he was concerned about the number of calls from members asking about the status of their arbitrations, and Yee told Mitchell she would look into it.

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[1] Los Angeles County Employee Relations Commission Rules and Regulations (1995) <https://ercom.lacounty.gov/LinkClick.aspx?fileticket=rLIQAGUh6hU%3D&portalid=36> (as of Jan. 7, 2020), archived at <https://perma.cc/954Q-TRZC>.

In early 2013 Tejeda used Local 721's electronic case management system (CMS) to create a list of backlogged cases. The report identified cases that ERCOM had approved for arbitration but that CMS still listed as "open." Because the legal department did not regularly update a case's status on CMS, and because of other ambiguities in the system, it was unclear whether the "open" cases identified in Tejeda's report were actually open and unscheduled arbitrations or cases that had been arbitrated and closed but not yet updated by the legal department. Nevertheless, Tejeda described the size of the backlog as "substantially more" than at any other time in her 38 years at the union. She brought the backlog report to Mitchell, who notified the legal department. Mitchell reiterated his concerns to Yee about the numerous complaints the advocacy department had received from members in the spring of 2013. Mitchell said Yee appeared to be "tired of hearing about the complaints." Yee told Mitchell "to just be concerned with advocacy, and legal would take care of legal."

On June 25, 2013 Yee sent Mitchell an email expressing concerns Mitchell had been "third partying" Yee by criticizing her and the legal department to others in Local 721. Yee told Mitchell that what he says "travels back" to her, Valdez, and Schoonover. Mitchell said the only concern he had expressed to others was concern about the arbitration backlog. Mitchell also had a meeting with Yee in which he expressed concerns "there was no movement as far as scheduling" arbitrations.

In August or September 2013 Mitchell asked Aguilar to run another report of open cases that had been approved for arbitration. The report listed 500 to 600 cases. Mitchell provided the report to Michael Green, the Los Angeles County Regional

Director of Local 721, hoping Green would raise the backlog issue with "someone higher up the chain." Aguilar stated, "We thought we were trying to bring [the backlog] to light so we could fix it." Around the same time, Mitchell learned the legal department was trying to blame the advocacy department for the backlog. Mitchell heard from the chair of the Stewards Council that, at one or more monthly Stewards Council meetings, Yee tried to "pin the backlog on advocacy." Aguilar also reported that the Stewards Council "was very vocal" about the backlog and blamed the advocacy department for it. Mitchell also learned and discussed with Green that the legal department was attempting to close cases without notifying affected members.

After Mitchell began telling Yee about the high number of calls from members complaining about their pending arbitrations, Mitchell, Aguilar, and Tejeda noticed Yee treated Mitchell differently. Mitchell stated that Yee was not "as cordial" as she had been previously and that their relationship deteriorated. Tejeda said she saw "upper management" treat Mitchell "poorly," including by talking down to him, berating him, avoiding him, and not supporting him after Mitchell "informed the Legal Department that there was a backlog of arbitrations that needed to be moved on." Aguilar said of Yee, "She went from zero to 60 with all of us. It was very hostile."

C. *Mitchell Takes Medical Leave*

Mitchell was diagnosed with a heart condition in 2000 and had cardiac procedures in 2000, 2002, and 2003. Mitchell believed those procedures cured his heart condition, and he did not discuss it with anyone at Local 721. Mitchell thought Garcia nevertheless was aware of it.

Two weeks after providing Green the backlog report in September 2013, Mitchell commenced a medical leave of absence for a hernia operation. Several days after Mitchell began his leave, Yee sent Mitchell an email asking if he could "take alternate dates" because the union was in negotiations with Los Angeles County and would benefit from Mitchell's continued supervision of the advocacy department. Mitchell explained to Yee by phone he could not reschedule his surgery because he had been experiencing pain and discomfort for some time and needed to have the surgery. He did not disclose the nature of the procedure he was having. Mitchell said Yee "sounded like she was disappointed" he would not try to reschedule his surgery.

After his surgery Mitchell developed an infection that required several extensions of his leave of absence. While on leave Mitchell received several letters from Garcia stating Local 721 could not guarantee Mitchell would be reinstated if he did not return to work at the end of his approved leave or provide medical certification, even though Mitchell had provided such certification for each extension. Mitchell interpreted these letters as "threatening" because Garcia never acknowledged Mitchell had the right to return to his position as long as he provided the necessary medical certifications.

In November 2013 Mitchell went to work for one day even though he was still on medical leave because he wanted to participate in an interview of a candidate for the advocacy department. After the interview, Yee told Mitchell in front of Garcia that Valdez and Schoonover questioned the legitimacy of his medical leave. Although his wound had not fully healed, Mitchell returned to work on January 20, 2014 because he was concerned that extending his leave any longer would jeopardize

his job. Garcia, however, said Local 721 had approved an additional extension of his medical leave, and Mitchell returned with no medical restrictions. Mitchell said certain directors did not talk to him after he returned from medical leave.

D. *The Advocacy Department Continues To Express Concerns About the Arbitration Backlog During Mitchell's Leave of Absence*

While on leave, Mitchell received an email from Alvaro Cardona, Assistant Chief of Arbitrations for the Los Angeles County Department of Health Services, attaching a November 20, 2013 letter Cardona sent to ERCOM. The letter requested dismissal of approximately three dozen arbitrations filed by Local 721 for which Local 721 had yet to schedule arbitrations in accordance with ERCOM Rule 7.07(d). The letter stated the Department was asking Local 721 "to schedule arbitrators on an ever growing and stagnant number of cases important to the County and more importantly to County employees affected." The letter continued, "[d]espite repeated requests by [the Department], [Local 721], to date, has made no efforts to schedule any of the certified cases for arbitration" that had been identified in a previous communication. The letter confirmed Mitchell's concerns the arbitration backlog would have negative consequences for Local 721 and its members.

In early January 2014 Green asked Mitchell for another backlog report, and Mitchell asked Aguilar to generate an updated report from CMS. The report showed the backlog remained in the "high 500's." Mitchell directed Aguilar to share the report with Green, which Aguilar did on January 8, 2014. Aguilar said that "the Stewards and the field reps were asking

for reports like [that]. . . . [W]e were stalling and avoiding giving out these reports because we didn't want anybody to get wind of how many [cases] were actually pending and what the backlog was."

The next day, January 9, 2014, the advocacy department (not including Mitchell, who was still on leave) met with Green and others to discuss an internal program called "representational excellence." A union member and chair of the Stewards Council also attended the meeting. Green did not show Aguilar's report to anyone at the meeting, but he said Local 721 could not work on representational excellence until "we take care of this backlog of arbitrations, which is in the hundreds." Green said that he heard about the backlog every month at the Stewards Council meetings and that he knew the issue would come up again at the next meeting. The union member "popped up" and asked, "What do you mean backlog and hundreds of cases?" The union member said he was going to talk with the legal department about reducing the backlog.

On January 10, 2014 Yee sent an email to Green, Aguilar, and several others and copied Schoonover, Local 721's vice president Linda Dent, and Valdez. The email strongly (in capital letters) denied the "rumor being circulated that we have 500+ arbitrations in backlog." Yee stated in her email, "I heard this rumor at least one other time from another manager," and "IT IS COMPLETELY 100% FALSE." Yee wrote that for two years she had periodically asked the advocacy department to direct members with complaints about their grievances to the legal department and that she had not received any complaints. Yee asked in her email, "If this was such a big issue, why hasn't any manager brought this to my attention? Why hasn't any member

brought this to my attention? In my opinion, I feel that this rumor is being spread to deflect from serious deficiencies in other areas concerning representation." Yee conceded there was a backlog of cases, but she attributed the backlog to a recent work stoppage by ERCOM, not to the legal department. She concluded her email by stating that "quite frankly, I'm not even sure how arbitration issues are your concern. As [an outside consultant to Local 721] reminds us to do, I respectfully ask that you stay in your lane." Aguilar discussed this email with Mitchell, and they agreed that, as long as Yee continued to deny the backlog existed, "we're never going to get anywhere."

On January 17, 2014 employees of the advocacy department who were also members of another union, United Union Professionals, filed a "group grievance" with the management of Local 721. Among other things, the grievance stated: "[The] [a]rbitration backlog continues, and members continue to call the Advocate to inquire of the status of their cases, which reflects on Advocacy and representation services as a whole, when members trust us to get their case processed and heard in a timely fashion. It is very concerning if we are told that arbitration is of no concern to Advocates. Is that helpful when there has been discussion of developing staff to expand to cover arbitrations? And . . . we should be given regular updates on status of cases but we are not." As a manager, Mitchell was not a member of United Union Professionals, but Aguilar, one of the primary authors of the grievance and a member of the United Union Professionals, said she discussed the content of the grievance with Mitchell before submitting it.

At the same time the advocacy department filed this grievance, some members of the advocacy department protested

at a departmental staff meeting by putting tape over their mouths and tying their hands together. Their actions intended to symbolize the advocates' feelings that they had no say or control over reducing the backlog and to protest the way management had treated Mitchell.

E. *Local 721 Hires a New Director of Advocacy*

Mitchell spoke with Yee numerous times between June 2012 and June 2013 about becoming the Director of Advocacy. Yee repeatedly told him Local 721 was not hiring anyone to fill that position. Mitchell believed he was qualified for the job, and no one ever told him he was not doing a good job leading the department. Members of the advocacy department said they supported Mitchell for the job.

On January 17, 2014, while Mitchell was still on leave, Local 721 posted a job opening for Director of Advocacy. Yee, however, had already offered the job to her friend Rocio Garcia-Reyes (Reyes), an attorney Yee met 10 years earlier. Yee had also asked Garcia to change the position's job description to state a preference for applicants with a law degree, which Reyes had but Mitchell did not. Garcia admitted that hiring Reyes before posting the position "violate[d] the basic tenets of human resources."

When Mitchell returned to work on January 20, 2014, neither Garcia nor Yee told him they had offered the Director of Advocacy position to Reyes. On January 22, 2014 Mitchell applied for the position. The letter accompanying his application stated, "The responsibilities for Director of Advocacy coincide perfectly with my qualifications and experience." Yee told Garcia that Local 721 would not consider Mitchell for the job, but Yee

still did not tell Mitchell the position had been filled. Mitchell learned Yee had hired Reyes from subordinates in the advocacy department who saw Reyes's posts about her new job on social media. Mitchell said he felt humiliated and disrespected.

Members of the advocacy department sent a letter dated January 31, 2014 to Valdez stating, "[Mitchell] has worked tirelessly to improve our working conditions and build relationships with employers and managers so that we can get the best possible outcomes for our members and preserve their jobs. He has acted in the position of our director and leader for years and the repayment for that is to bring in ANOTHER attorney to oversee our department. ANOTHER attorney that we must assume knows nothing about our largest membership in Los Angeles County because she comes from a State workers union." The letter also stated, "The backlog of arbitrations continues and members continue to call us and complain why the long wait. We have brought many of the important issues that affect our member's jobs and working conditions to the legal department with nothing but excuses as to why the support and work we need can't get done."

Reyes began working at Local 721 on January 31, 2014. According to Mitchell, Reyes took over supervision of advocates who represented Los Angeles County employees, leaving Mitchell to supervise only advocates who represented Los Angeles city workers. On February 3, 2014 Local 721 cut the "additional responsibilities pay" that Mitchell received while performing the duties of a director. Mitchell assumed he had been demoted.

F. *The Advocacy Department Continues To Complain About the Backlog*

After Reyes became Director of Advocacy, Aguilar and other members of the department raised the arbitration backlog issue with Reyes. In response, Reyes told Aguilar, "Don't worry about that. That's none of your concern. You let me deal with Legal." Aguilar also began noticing cases were deleted from CMS "without any action [taken on them] whatsoever." Aguilar said 40 to 50 cases were closed within "a couple weeks" with no "closing letter" notifying the affected member the case had been closed prior to arbitration. Aguilar raised her concerns with Mitchell, and they discovered a temporary worker in the information technology department had been closing cases on CMS.

Aguilar said advocates continued to raise concerns about the arbitration backlog at departmental meetings Yee and another attorney in the legal department attended. At a Stewards Council meeting attended by Mitchell, Dent, Green, Yee, and Reyes, Yee reportedly said the backlog was "coming from Advocacy."

G. *Local 721 Terminates Mitchell for Insubordination*

On January 27, 2014, one week after Mitchell returned from his three-month medical leave of absence, Mitchell received an email from Schoonover asking him to attend a meeting with Schoonover, Dent, Valdez, and Yee on January 29 at 6:30 p.m. On January 28, 2014 Mitchell responded and said he did not believe he could attend because he had a deposition in Long Beach that day and did not know how long it would last. Mitchell said he was available on January 31. He also asked about the

"nature of this meeting." Yee responded to Mitchell's email and stated that Schoonover was not available January 31 and that, because the deposition would probably end by 5:00 p.m., Mitchell should have "sufficient time to return" for the meeting on January 29. Mitchell responded 20 minutes later stating, "I also want to let you know I can't come in because I have to pick up my daughter that day [from school and] she has no other way home but me." Mitchell said it was common knowledge within Local 721 he picked up his daughter from school three or four times each week.

Yee responded, "It's excuse after excuse. What now? Should we try to move it to tonite? Are you free?" Through Tejeda, Mitchell said by email he did not "appreciate [Yee's] comment with regards to me dealing with my daughter." Valdez also appears to have sent an email stating, "Everyone is available for tonight at 6:30pm so I will resend the invite for today." Garcia's assistant, whom Schoonover had copied on his original email, responded, "Why do you need to resend an invite? The invite already went out on behalf of Bob Schoonover?? I'm confused." Mitchell sent another email to Yee stating, "I still need clarification of what the meeting is about?" Mitchell did not receive a response from Yee, so Tejeda sent an email to Garcia's assistant asking if she knew what the meeting was about. Garcia's assistant suggested Mitchell call Schoonover, which he did. Mitchell left a voice mail message for Schoonover stating, "I was trying to respond to the meeting that you guys want to have tonight with me at 6:30, and I have no problems with that. I just want to know what the nature of the meeting will be." Mitchell did not receive a response from Schoonover.

That evening at 6:30 p.m., Schoonover, Dent, Valdez, and Yee gathered for a meeting, but Mitchell did not attend. Mitchell said he never received confirmation of the meeting from Schoonover. Yee attempted to contact Mitchell, and Mitchell sent her a text message stating he never received confirmation of the meeting and had already left the office.

On January 29, 2014, at the behest of Schoonover, Yee sent Mitchell an email stating, in part: "We are extremely disappointed that you failed to attend the meeting yesterday. You also failed to notify us in advance that you did not intend to come to the meeting. . . . Your behavior was disrespectful, unprofessional and selfish. . . . You've wasted everyone's time, and it's truly unacceptable and unbecoming of a manager. [¶] [Mitchell], this is not the first time that you have been insubordinate. We have been documenting the times that we've asked you to complete a task or assignment, and you had refused or ignored us. Then you commit acts to self-help and promote your own interests, including countless times when you third-party your supervisors. You have demonstrated that you are unable and unwilling to work with the management team. Your conduct makes us question whether you even have the skills to be an effective and responsible manager.

. . . .

"It is very clear that you were informed that the meeting was confirmed, evidenced by the emails as well as your voicemail message to [Schoonover]. It is also clear that you deliberately failed to attend the meeting just because you were unaware of its nature. But rather than be honest, you blatantly lie about the reason for not showing up. Dishonesty by any manager will not be tolerated at this organization.

"As a long-time advocate, you should know that acts of insubordination and dishonesty described above would lead to immediate termination for represented employees. As your supervisors, we demand and deserve respect and professionalism from you. You are required to follow our directives and you must learn to work with the management team. If you engage in acts of insubordination, dishonesty or disloyalty again, it could lead to your immediate termination." Yee copied Valdez on her email.

Mitchell testified that, prior to January 29, 2014, Local 721 never accused him of any of the offenses identified in the email from Yee. On February 3, 2014 Local 721 reduced Mitchell's pay by 5 percent. Shortly thereafter, Mitchell returned to his office following a staff meeting to find his office furniture and personal belongings in the hallway. He felt embarrassed and humiliated because no one told him he had to move his office and he was with subordinate members of the advocacy department when he discovered his belongings in the hall. Yee admitted she directed Local 721 staff to remove the furniture from Mitchell's office. She then sent an email to Local 721's chief financial officer and Schoonover telling them that Mitchell "stripped all the furniture out of the office," and she asked for new furniture for Reyes.

On February 12, 2014 an attorney sent a letter to Garcia on behalf of Mitchell questioning the propriety of his salary reduction and stating Mitchell was "exploring EEOC issues at this time." Garcia did not investigate any potential "EEOC issues," but advised counsel for Mitchell she could inspect Mitchell's personnel file.

On March 6, 2014 Valdez, Yee, Garcia, and Reyes met with members of the advocacy department who were also members of the United Union Professionals to discuss their grievance.

Aguilar attended the meeting and said Yee "freak[ed] out" about the alleged backlog. Aguilar said Yee told the advocacy department members they had to go through Reyes to present anything to the legal department. That same day Reyes informed Valdez that Mitchell refused to introduce Reyes to certain County employee relations personnel and did not include her in meetings with them. She also told Valdez that Mitchell would not respond to her emails and was "generally uncooperative and being somewhat insubordinate." Valdez called Mitchell into a meeting with herself, Schoonover, Yee, and Garcia. Valdez asked Mitchell why he did not bring Reyes to the meeting with a County manager. Mitchell explained that her presence would not have benefitted the union member. Valdez also asked Mitchell if he would support Reyes as Director of Advocacy. Mitchell thought the question implied he had not supported her in the past, so instead of answering "yes," Mitchell said he never said he would not support her. Valdez repeated the same question four or five times, and Mitchell provided the same response each time. He also said he would do "the best" he could.

Mitchell stated that, by the end of the meeting, "it seemed like they would not accept anything that I would say," so he said something like, "You are going to do whatever you want so just go ahead and do what you want." After the meeting Valdez, Schoonover, Yee, and Garcia agreed Local 721 should terminate Mitchell's employment for insubordination and failing to maintain satisfactory relations with his supervisors. Schoonover and Garcia admitted that, other than the incidents related to the meetings of January 28 and March 6, they were not aware of any other incident in which Mitchell was insubordinate, and his personnel file included no other instance of insubordination.

On March 12, 2014 Mitchell was called to a meeting in Schoonover's office with Schoonover, Dent, and Garcia. Schoonover said, "We're moving in a different direction," and gave Mitchell an envelope of documents to sign including a termination notice. Schoonover never gave Mitchell a reason for his termination. Garcia later said Local 721 terminated Mitchell's employment for insubordination and failure to maintain satisfactory relations with his supervisors. She also said the progressive discipline protocol that applied to unionized staff members of Local 721 did not apply to managers like Mitchell.

Following Mitchell's termination, on April 14, 2014, the Stewards Council sent a letter to Local 721 calling the "timing" of Mitchell's termination "suspect." The letter stated the legal department had done nothing to resolve more than 600 pending arbitration cases and had hired a new attorney who could not "give any accountability as to why." The Stewards Council's letter said, "Members have contacted [Local 721] as their cases have mysteriously closed without notification to the member as to why." The letter also accused Local 721 of terminating Mitchell's employment out of "spite" and without justification or notification to the Stewards Council, despite Mitchell's "excellent job in supervising the advocacy department" and his service to Local 721 "with pride and dignity." Schoonover, Dent, Valdez, Yee, and others attended a Stewards Council meeting in June to discuss the letter, but Schoonover never conducted any investigation into the backlog or the legal department's response to it.

H. *Mitchell Sues Local 721 and Prevails at Trial*

Mitchell sued Local 721 for age, disability, and medical leave discrimination under Government Code section 12900 et seq. (FEHA), disability and medical leave retaliation, wrongful termination in violation of public policy, intentional infliction of emotional distress, and whistleblower retaliation under Labor Code section 1102.5.[2] At trial, Local 721's "primary defense" was that it terminated Mitchell's employment "solely because he refused to cooperate with his supervisors and disrespected the union's leadership."

The jury returned a special verdict finding in favor of Mitchell on his causes of action for whistleblower retaliation, disability discrimination, medical leave discrimination, wrongful termination in violation of public policy, and intentional infliction of emotional distress. The jury awarded Mitchell $384,779 in past economic damages, $476,612 in future economic damages, $1.5 million in past noneconomic damages, and $0 in future noneconomic damages, for a total compensatory damages award of $2,361,391. The jury also found by clear and convincing evidence that Local 721 acted with malice, oppression and/or fraud, and in a bifurcated phase of the trial, awarded Mitchell $6.1 million in punitive damages.

Local 721 filed a motion for partial judgment notwithstanding the verdict and a motion for a new trial, both of

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[2] Prior to trial Mitchell dismissed Yee, Reyes, Garcia, Schoonover, and Valdez without prejudice. Mitchell also voluntarily dismissed his cause of action for age discrimination, and the trial court summarily adjudicated Mitchell's causes of action for disability and medical leave retaliation.

which the trial court denied. The trial court awarded Mitchell his attorneys' fees and costs, including $64,356 in expert witness fees. Local 721 timely appealed from the judgment and the cost award.[3]

DISCUSSION

A. *Evidentiary Issues Regarding Liability*

Local 721 argues the trial court abused its discretion in excluding as inadmissible hearsay certain electronic notes Reyes made about her interactions with Mitchell and in excluding as not produced in discovery certain notes Yee kept in her personal files. Local 721 also argues the trial court improperly excluded alleged "after-acquired evidence" that would have given Local 721 cause to fire Mitchell.

1. *Standard of Review*

"Trial judges enjoy '"broad authority"' over the admission and exclusion of evidence." (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1156; accord, *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1331.) We review a trial court's evidentiary rulings for an abuse of discretion. (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 606; *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1202.) "The burden rests with the party claiming error to demonstrate not only error but also the

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[3] During the pendency of this appeal, Mitchell died. We granted an unopposed motion to substitute Patricia Joseph-Mitchell, Mitchell's widow and personal representative, as the plaintiff and respondent in this action.

resulting prejudice." (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 198; see *Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2012) 212 Cal.App.4th 1181, 1196-1197.) "A court's error in excluding evidence is grounds for reversal only if the appellant demonstrates a miscarriage of justice, that is, that a different result would have been probable had the error not occurred." (*Major v. R.J. Reynolds Tobacco*, at p. 1202; see *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1286.)

2. *The Trial Court Did Not Abuse Its Discretion in Excluding Reyes's Electronic Notes*

a. *Relevant Proceedings*

Counsel for Local 721 attempted to introduce at trial six pages of notes Reyes created electronically after various interactions with Mitchell. The notes described Mitchell's reluctance to respond to emails from Reyes, his reasons for not inviting her to certain meetings with County employers, his failure to attend a Stewards meeting, and various verbal responses by Mitchell to requests or comments from Reyes. Reyes testified that she took contemporaneous handwritten notes during these interactions, "enhanced" them when she typed her notes into a personal information manager program that included task-management and note-taking functions, and then discarded the handwritten notes. The so-called enhancements included "other things [she] thought were important right after the meeting." Reyes did not send her typed notes to anyone else in Local 721, and they were not part of Mitchell's personnel file. Reyes admitted that none of the officers or directors of Local 721

who decided to terminate Mitchell's employment saw her notes prior to the termination decision.

Counsel for Local 721 argued Reyes's notes were admissible under the business records exception to the hearsay rule. (See Evid. Code, § 1271, subd. (a).) Counsel argued that the court had already admitted Mitchell's personnel file under that exception and that Reyes's notes qualified as business records too. The trial court disagreed and stated in its order denying Local 721's motion for a new trial that Reyes's transcribed notes were not contemporaneous with her interactions with Mitchell.

b. *Local 721 Failed To Qualify Reyes's Notes as Business Records, and in Any Event Their Exclusion Was Not Prejudicial*

Local 721 contends the trial court abused its discretion by excluding Reyes's notes because transcribing her handwritten notes into the personal information manager program did not "take the notes out of the business records exception." "The business records exception requires a foundational showing that (1) the writing was made in the regular course of business; (2) at or near the time of the act, condition, or event; (3) the custodian or other qualified witness testifies to its identity and mode of preparation; and (4) the sources of information and mode and method and time of preparation indicate trustworthiness." (*Conservatorship of S.A.* (2018) 25 Cal.App.5th 438, 447; see Evid. Code, § 1271; *Klem v. Access Ins. Co.*, *supra*, 17 Cal.App.5th at p. 606.) "The trial court has wide discretion to determine whether there is a sufficient foundation to qualify evidence as a business record." (*Conservatorship of S.A.*, at p. 447.)

The trial court did not abuse its discretion in ruling Local 721 failed to show Reyes transcribed her notes "at or near the time of the act, condition, or event." Counsel for Local 721 never asked Reyes when she created her handwritten notes or how long after her interactions with Mitchell she transcribed them, and Local 721 provided no metadata or other evidence indicating when Reyes created the files in her personal information manager program. (See *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1100 [metadata on the plaintiff's phone showed the date and time the plaintiff took a photograph that the court admitted into evidence].) In addition, because Reyes threw away her contemporaneous handwritten notes, there was no way to compare them to the transcribed notes for accuracy, and Reyes admitted she "enhanced" her handwritten notes with information she did not write down contemporaneously. Thus, Local 721 failed to satisfy all of the requirements for the business records exception to the hearsay rule under Evidence Code section 1271. (See *People v. Dean* (2009) 174 Cal.App.4th 186, 197, fn. 5 [foundation for business records exception requires a showing that the records were based on "personal knowledge, not on secondhand information days following the act, condition or event"].)

Moreover, the exclusion of Reyes's notes did not prejudice Local 721. Reyes testified about her interactions with Mitchell, including the interactions covered by her electronically enhanced notes. For example, Reyes testified Mitchell told her, in response to her request that he respond to her emails, "'My office is right next door to yours. Why can't you just come talk to me?'" She testified that Mitchell told her his contacts with County employers were "his" and that meetings with them "'[we]ren't for

[her].'" She also testified that Mitchell did not attend monthly management meetings and that he told her he did not "need to go to those meetings." Reyes stated that Mitchell "didn't seem to want to work together with [her] as a team" and "didn't want to do" things she asked him to do. Because the excluded notes included much of the same content, their exclusion did not prejudice Local 721. (See *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480-1481 [exclusion of letters was not prejudicial where the trial court admitted other evidence, including witness testimony about a similar subject matter]; *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405 [there was no prejudice from the exclusion of evidence where other evidence was introduced "to make th[e] same point"]; *Berg v. Sonen* (1964) 230 Cal.App.2d 434, 441 ["'rulings excluding testimony are harmless when the evidence is otherwise fully developed by the same or other witnesses'"].) To the extent Reyes's electronic notes addressed additional interactions with Mitchell not covered in Reyes's testimony, nothing prevented counsel for Local 721 from asking about those interactions.[4] That counsel did not ask any such questions indicates they likely were not significant. Finally, the possibility Reyes's notes might have bolstered her testimony does not demonstrate a miscarriage of justice.

Local 721 argues counsel for Mitchell "exacerbated" the prejudice from the court's purportedly erroneous exclusion of

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[4] For example, Reyes's electronic notes described an incident in which Mitchell sent Tejeda home from work without first consulting with Reyes, but counsel for Local 721 did not ask Reyes about this incident at trial.

Reyes's electronic notes by "interrupting" Reyes's direct examination to challenge the admissibility of the notes and "falsely" telling the jury in his closing argument that Local 721 "had no documentation describing Mitchell's insubordinate behavior." Local 721, however, does not contend the trial court erred by allowing counsel for Mitchell to question Reyes about her notes (perhaps because it was entirely appropriate for counsel for Mitchell to ask questions relevant to the business records hearsay exception Local 721 was asserting applied), and counsel for Local 721 did not object to the portions of counsel for Mitchell's closing argument that Local 721 now asserts were objectionable. (See *Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 488 [failure to timely object to improper statements in closing argument forfeits any appellate challenge based on such misconduct]; *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598 ["To preserve a claim of attorney misconduct for appeal, a timely and proper objection must have been made at trial; otherwise, the claim is forfeited."].)

3. *The Trial Court Did Not Abuse Its Discretion in Excluding Yee's Notes*

a. *Relevant Proceedings*

Yee testified on cross-examination she kept a file on Mitchell that was not a part of his personnel file. Included in that file, according to Yee, was evidence that she "wrote [Mitchell] up" for failing to perform. She said her "contemporaneous" notes reflected instances when she "counseled" Mitchell and "talked over different issues where [she had] gone through point by point how [she] would like to see

improvement." Local 721 did not produce Yee's notes in discovery; Yee said she gave her notes to counsel for Local 721 a week before her trial testimony.

Counsel for Local 721 tried on redirect examination to introduce Yee's notes concerning Mitchell. Counsel asked Yee if she had any notes in her files regarding "the topic of an arbitration backlog." Counsel for Mitchell made a hearsay objection, which the court sustained. Counsel for Local 721 asked if Yee had any documents in her file that she understood Mitchell had requested in discovery, and Yee replied "No." She said the documents in her file were not responsive to any category of documents requested by Mitchell. Counsel for Local 721 asked the court to admit Yee's notes regarding Mitchell. Counsel for Mitchell objected that Local 721 did not produce Yee's notes in discovery. The court sustained the objection.

b. *Local 721's Failure To Produce Yee's Notes in Discovery Justified Their Exclusion at Trial, Which in Any Event Was Not Prejudicial*

Local 721 argues the trial court abused its discretion in excluding Yee's notes because none of Mitchell's document requests asked for those documents and the circumstances did not warrant "evidence preclusion." Local 721 argues the notes "would have discredited Mitchell's unsupported testimony that he repeatedly raised the alleged backlog with Yee" because the notes "contain[ed] *no* mention of an alleged arbitration backlog."

Mitchell served discovery requests asking for documents "showing all disciplinary procedures that . . . Local 721 implemented in an attempt to improve any aspect of [Mitchell's]

work performance for [Local 721]," "reflecting notes . . . and informal documents prepared by [Local 721's] supervisors and/or managers that reflect any aspect of [Mitchell's] job performance," as well as all documents that were ever a part of Local 721's "personnel file(s)" or "departmental file(s)." Local 721 argues Yee's notes "were not made in connection with evaluating any aspect of Mitchell's job performance, and thus were not part of Mitchell's personnel file." But Yee testified otherwise. She said her notes showed she had counseled Mitchell about how she wanted to see improvement in his job performance. She also characterized her file on Mitchell as a type of "personnel file." In response to a question from counsel for Mitchell asking Yee to admit that, "[i]n the entire personnel file of Mr. Mitchell, [she] never wrote him up once," she replied, "I wrote him up, and I kept my own file for [Mitchell]." The trial court did not abuse its discretion in ruling that Yee's notes were responsive to Mitchell's requests for production of documents and that Local 721's failure to produce the notes warranted their exclusion.

Local 721 argues the trial court overstepped its authority because it did not find any "'repeated and egregious discovery abuse'" or a willful failure to comply with a court order before imposing "[e]vidence preclusion sanctions." But a trial court's ""'inherent power to . . . promote fair process extends to the preclusion of evidence.'"" (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 425; see *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 107-108.) Even in the absence of a discovery abuse, ""'the trial court enjoys 'broad authority of the judge over the admission and exclusion of evidence.' . . . [T]rial courts regularly exercise their 'basic power to insure that all parties receive a fair trial' by precluding evidence.'"" (*Cottini*, at

p. 425; see *Continental Ins. Co.*, at p. 108.) The trial court did not abuse its discretion by excluding at trial evidence Local 721 failed to produce in discovery without first imposing a lesser sanction.[5]

Moreover, as with the exclusion of Reyes's notes, Local 721 cannot show prejudice from the exclusion of Yee's notes. Local 721 contends Yee's notes would have tended to prove a negative; i.e., that Mitchell never complained to Yee about the arbitration backlog. But there was no testimony the six pages of Yee's notes Local 721 sought to admit documented every communication and interaction between Yee and Mitchell in the six months during which Mitchell said he told Yee (at least four times) about complaints from members whose arbitrations had not been scheduled. And there is no guarantee Yee would have made a note about the backlog even if Mitchell raised the issue during a meeting with Yee. Finally, Local 721 contends Yee's notes would have discredited Mitchell's "unsupported" testimony he informed Yee about the backlog, but Mitchell's testimony was supported by the testimony of Tejeda and Aguilar, both of whom said Mitchell raised his concerns with Yee. Thus, it is not reasonably probable Local 721 would have obtained a more favorable result had the trial court admitted Yee's notes.

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[5] At the time the trial court excluded Yee's notes, counsel for Local 721 did not request or propose any lesser sanction. In response to the trial court's ruling on counsel for Mitchell's objection to Yee's notes, counsel for Local 721 asked, "I cannot use [the notes]?" The court responded, "That is correct," and counsel for Local 721 moved on.

4. *The Trial Court Did Not Abuse Its Discretion in Excluding Local 721's Purported After-acquired Evidence*

"The 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.) The employer has the burden to demonstrate the employee would have been terminated as a matter of settled company policy. (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 846.) Local 721 argues the court abused its discretion by excluding after-acquired evidence of Mitchell's alleged alcohol consumption, which Local 721 argues would have justified his lawful termination.

a. *Relevant Proceedings*

During Mitchell's deposition, counsel for Local 721 questioned Mitchell about his alcohol consumption on the job and whether he kept alcohol in his office. Mitchell filed a pretrial motion in limine to exclude any evidence and testimony about his alcohol consumption. Mitchell argued such evidence was not relevant because his alcohol consumption played no role in the termination of his employment, Local 721 knew the extent of his alcohol consumption before his termination, and any such evidence would be highly prejudicial. The court granted the motion, but ruled Local 721 could introduce evidence of Mitchell's alcohol consumption "if he's on the job working and [Local 721] ha[s] a rule against drinking at work."

Counsel for Local 721 told the jury in opening statement Mitchell "loved his margaritas" at lunch and "smelled like alcohol

around a few of the members." Counsel for Mitchell objected and asked the court to exclude any references to Mitchell's drinking at lunch because, "on his lunch break, [Mitchell was] entitled to do what he wants to do." Counsel for Local 721 argued drinking at lunch was drinking on the job because Mitchell attempted to settle cases during lunch meetings with Los Angeles County employers where he drank alcohol. Observing that Local 721 had not made that argument in opposition to Mitchell's motion in limine, the court sustained Mitchell's objection and ruled Local 721 could not refer to Mitchell's alcohol consumption at lunch unless there was a rule or policy prohibiting such conduct.

On the next day of trial the court declared a mistrial because the judge had a family emergency. Pretrial hearings resumed for the second time nine months later. In a supplemental brief regarding the motion in limine, Mitchell asked the court to exclude all references to his alcohol consumption because, in depositions following the mistrial, the two witnesses who "would have fired [Mitchell] if they knew that he drank on the job . . . said he didn't drink on the job." The court declined to modify its previous order.

b. *To the Extent the Evidence Was After-acquired, the Trial Court Did Not Err in Excluding It*

Local 721 argues the court abused its discretion by limiting evidence of Mitchell's alcohol consumption to instances where "Mitchell may have consumed alcohol while physically in the office during work hours." Local 721 contends it had evidence of "a pattern of inappropriate drinking while [Mitchell performed] his job duties or otherwise in violation of Local 721's written

policy . . . that could well have been the source of [Mitchell's] declining cooperation and his increasing insubordination." That evidence included Mitchell's deposition testimony in which he admitted he kept gifted bottles of alcohol in his desk at work and occasionally drank alcohol in the evening with other employees to celebrate special occasions, an email message from a County employee stating that Mitchell "loves his [Margaritas]" (which Local 721 characterized as indicating Mitchell chose locations for his working lunches based on the availability of alcohol), and testimony from Dent that Mitchell sometimes smelled of alcohol during the "daytime" and took "long lunches" with "other people," after which she "could tell they had been drinking."

It was undisputed, however, Local 721 had knowledge of the so-called after-acquired evidence before the termination of Mitchell's employment. Valdez testified in her deposition she smelled alcohol on Mitchell's breath during the work day when Mitchell was still a coordinator in the advocacy department, long before the termination of his employment. Valdez also testified in her deposition Mitchell's alcohol consumption played no role in her decision to fire him.[6] Moreover, to invoke the after-acquired

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[6] Dent also knew of Mitchell's alcohol consumption prior to the termination of Mitchell's employment. Local 721 argues that "the full scope" of Mitchell's drinking did not come to light until after his termination, including, for example, that Mitchell consumed alcohol while negotiating with County employers over lunch meetings. Even if Local 721 acquired that knowledge after the union terminated Mitchell's employment, Local 721 has not cited any evidence the union would have terminated Mitchell's employment because of it. Indeed, Valdez testified she would not recommend termination for alcohol use until after she had

evidence doctrine, "'the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it"'" and "'that such a firing would have taken place as a matter of "settled" company policy.'" (*Murillo v. Rite Stuff Foods, Inc.*, *supra*, 65 Cal.App.4th at pp. 845-846; see *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352, 362-363 [115 S.Ct. 879].) Local 721 cites no evidence Mitchell's alcohol consumption was sufficiently problematic to support termination on that ground alone. Local 721's argument suggests as much by equivocating on whether Mitchell's alcohol consumption contributed at all to the events leading up to the termination of his employment. The trial court did not abuse its discretion by excluding the evidence Local 721 characterizes as "after-acquired."

B. *Substantial Evidence Supported the Jury's Award of Noneconomic Damages*

Local 721 argues the evidence at trial did not support the jury's award of $1.5 million in noneconomic damages. Local 721 contends Mitchell offered evidence of only "trivial or transitory emotional distress." But the evidence showed more.

1. *Applicable Law and Standard of Review*

"Noneconomic damages compensate an injured plaintiff for nonpecuniary injuries," which include "physical pain and various forms of mental anguish and emotional distress. [Citation.] Such

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counseled an employee about alcohol abuse, a precondition she said never occurred with Mitchell.

injuries are subjective, and the determination of the amount of damages by the trier of fact is equally subjective." (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1332.) Noneconomic damages include more than emotional distress and pain and suffering. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 (*Bigler-Engler*).) "[A] plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893; accord, *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1015-1016.) "[M]ental suffering frequently constitutes the principal element of tort damages" (*Capelouto*, at p. 893) and "may include compensation for the plaintiff's loss of enjoyment of life" (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 763).

"There is no fixed standard to determine the amount of noneconomic damages. Instead, the determination is committed to the discretion of the trier of fact." (*Corenbaum v. Lampkin*, *supra*, 215 Cal.App.4th at p. 1332; see *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 299 ["'The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial.'"]; *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1213 [same]; *Garfoot v. Avila* (1989) 213 Cal.App.3d 1205, 1210 [the jury has "relatively unfettered authority and responsibility to calculate damages for pain and suffering"].)

"We review the jury's damages award for substantial evidence, giving due deference to the jury's verdict and the trial court's denial of the new trial motion. [Citations.] 'In considering the contention that the damages are excessive the appellate court

must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record.'" (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 300; see *Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363 [an '"'"appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict"'"'"]; *Major v. Western Home Ins. Co.*, *supra*, 169 Cal.App.4th at p. 1208 ["[s]o long as there is 'substantial evidence' to support a jury award, the appellate court must affirm, even if the reviewing court would have ruled differently had it presided over the proceedings below, and even if other substantial evidence would have supported a different result"].) "The 'focus is on the quality, not the quantity, of the evidence.'" (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 396.) "'An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.'" (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 299.)

2. *Substantial Evidence Supported the Verdict on Noneconomic Damages*

Local 721 argues the jury's award of $1.5 million in past noneconomic damages for the four-year period of time between the termination of Mitchell's employment and trial is excessive and was likely "the product of a desire to punish Local 721 rather than to compensate Mitchell." Local 721 contends Mitchell introduced only a "paucity of evidence," but this characterization contradicts the record.

Mitchell testified that after Local 721 fired him he sat in his office and cried for 30 minutes before security arrived to escort him out of the building. He said he went home, but after taking care of the members of his family for 33 years and "always be[ing] there for [them]," Mitchell could not tell his wife for more than a week that he had been fired. He said he was "numb": "I had always worked. I had always had a job. I was 60 years old. I didn't know what I was going to do. I didn't know if I could ever find a job making the salary that I made, the benefits that I had." He said the experience was "extremely painful." "I didn't know what I was going to tell my family. I didn't know what I was going to do." Mitchell testified that losing a job he had held for more than 20 years caused "a complete depression." He said he did not seek professional help because he "always tried . . . to handle things as best I could myself."

Mitchell went to visit his brother in San Diego shortly after Local 721 fired him. Mitchell's brother testified that Mitchell told him he was "fired . . . in a disrespectful manner" and that he saw "water well up in his eyes" for the first time since they were "kids." "[I]t was devastating to watch," Mitchell's brother testified. In the months following the termination of his employment, Mitchell's brother said, Mitchell "changed." He "became more serious," less "joyful," no longer enjoyed watching sports, and no longer cared how he dressed. Mitchell's brother also testified Mitchell called him several times after his termination from Local 721 because he could not sleep.

A psychologist called by Mitchell, Dr. Anthony Reading, assessed Mitchell's mental state in October 2016. Dr. Reading administered two psychological tests and interviewed Mitchell for almost five hours. One of the psychological tests showed that

Mitchell's mental symptoms were normal but that he was not forthcoming about "negative emotions" and "personal limitations." Dr. Reading said the results did "not preclude the idea" Mitchell "could have been suffering symptoms greater than what he was reporting." The other psychological test showed "an elevational stress" but not "high levels of distress."

Dr. Reading stated that during his examination Mitchell "became tearful" when he talked about having to "put on [an] act for his family" after he lost his job and over his inability to provide financially for his daughter and grandchildren. Dr. Reading said Mitchell reported "a constellation of symptoms that he claimed to have erupted following" his job loss. Mitchell reported feeling depressed, devastated, loss of self-worth, loss of meaning, loss of identity, loss of pleasure, loss of satisfaction, and loss of motivation in his life. He described ongoing sleep difficulties, irritability, worry, and intrusive and upsetting thoughts about the loss of his job. Dr. Reading found no indication Mitchell was "over-reporting" or malingering, and said that, if anything, Mitchell could have been "a lot worse than he actually show[ed]" because Mitchell was not "forthcoming."

With regard to not seeking professional treatment, Dr. Reading said of Mitchell: "That would be antithetical to his whole lifelong coping style of not showing weakness, not being revelatory in terms of how he genuinely was feeling, other than perhaps with his wife." Dr. Reading stated that not seeking professional treatment following loss of a job is "not uncommon" because people view "the only cure" is to get another job.

Dr. Reading testified that, prior to Mitchell's job loss, his concerns about the changes in his workplace caused worry, anxiety, and difficulty sleeping. After his termination Mitchell

developed the "constellation of symptoms" that amounted to psychiatric illness, but the symptoms "plateaued eventually." Dr. Reading explained that Mitchell still experienced loss of self-worth, loss of meaning, and loss of lifestyle, but not "major depression." Dr. Reading diagnosed Mitchell with "adjustment disorder with depressed mood" and said Mitchell had been in that "altered state" for over three years.

Local 721 also retained an expert to assess Mitchell's mental health. Dr. Marc Cohen interviewed Mitchell and administered a psychological test, which Dr. Cohen said "did not demonstrate any clinical psychopathology, meaning [Mitchell] was not having any symptoms that were causing him any distress" at the time of the test. With regard to over- or under-reporting his symptoms, Dr. Cohen said Mitchell was "inconsistent." Dr. Cohen testified that Mitchell sometimes was "quite willing to emphasize the degree of distress he was experiencing," but Dr. Cohen admitted the psychological test he administered indicated Mitchell had a tendency to present himself in a favorable light.

The testimony of Mitchell, his brother, and Dr. Reading was substantial evidence supporting the jury's noneconomic damages verdict. An award of $1.5 million for the emotional distress Mitchell suffered as a result of his termination does not shock the conscience or suggest passion, prejudice, or corruption on the part of the jury. (See *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 299.) To the contrary, by limiting the award of noneconomic damages to the period preceding the trial, and not awarding any future noneconomic damages, the jury appears to have listened closely to the evidence presented, including Dr. Reading's

assessment that Mitchell's symptoms "plateaued eventually" and no longer indicated extreme distress.

Local 721 does not cite anything in the record suggesting the jury "'was influenced by improper considerations,'" such as "inflammatory evidence, misleading jury instructions, improper argument by counsel, or other misconduct." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 299; see *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 ["to evaluate the defendant's claim that the judgment . . . is so excessive as to shock the conscience and give rise to a presumption that it was the result of passion and prejudice . . . , it is necessary to review the record on the question of the plaintiff's counsel's contribution to such a result"].) Instead, Local 721 argues the jury's award was excessive in light of awards in "similar employment discrimination cases." That, however, is not a reason for an appellate court to interfere with the jury's authority to determine damages for emotional distress. (See *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12 ["For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding."]; *Fernandez v. Jimenez* (2019) 40 Cal.App.5th 482, 491 [same]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 ["[t]his method of attacking a verdict was disapproved by our Supreme Court in *Bertero*].)[7]

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[7] Local 721 argues that, if we were to remand, Mitchell's causes of action for whistleblower retaliation, disability discrimination, and intentional infliction of emotional distress, and his claim for punitive damages "should not be retried." In

C. *Punitive Damages*

Local 721 argues that the evidence at trial fell short of meeting the clear and convincing standard for punitive damages and that the trial court erred by precluding Local 721's controller from testifying. Local 721 also argues that insufficient evidence supports the trial court's finding of Local 721's financial condition at the time of trial and that the resulting punitive damages award is disproportionate to Local 721's ability to pay and constitutionally excessive. We agree in part with the latter contention.

1. *Substantial Evidence Supported the Jury's Award of Punitive Damages*

Local 721 contends substantial evidence did not support the jury's or the trial court's subsequent findings that an officer, director, or managing agent of Local 721 engaged in sufficiently malicious, oppressive, or fraudulent conduct to justify an award of punitive damages. Viewing the evidence in the light most favorable to Mitchell, we agree with the trial court's ruling on Local 721's posttrial motion that Schoonover, the president of the union, engaged in or ratified conduct that was malicious, oppressive, or fraudulent. In addition, there was substantial evidence Garcia, who as the director of human resources was a managing agent, engaged in malicious conduct toward Mitchell.

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this regard, Local 721 urges that "this court should reverse the judgment and remand for a new trial on both liability and damages, but without affording a retrial for the claims on which Mitchell failed to present sufficient evidence to support a verdict." Because we affirm the judgment and are not remanding for a new trial, we do not consider these arguments.

a. *Applicable Law and Standard of Review*

"Punitive damages may be awarded only on proof by 'clear and convincing evidence' that the defendant 'has been guilty of oppression, fraud, or malice.'" (*Mazik v. Geico General Ins. Co.* (2019) 35 Cal.App.5th 455, 462 (*Mazik*); see Civ. Code, § 3294, subd. (a).) "[Civil Code] [s]ection 3294 defines 'malice' as intentional injury or 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' [Citation.] 'Oppression' is 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.'" (*Mazik*, at p. 470; see Civ. Code, § 3294, subd. (c).) """"Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. . . . Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate."""" (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 715-716; see *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050-1051.)

In an employment case, wrongful termination, without more, will not support an award of punitive damages. (*Scott v. Phoenix Schools, Inc.*, *supra*, 175 Cal.App.4th at p. 717.) But evidence that an employer offered a pretextual basis to justify an otherwise wrongful termination may support a finding of malice or oppression. (See *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912 [evidence the defendant passed over the plaintiff for a promotion because of her gender, and then tried to use subsequently created criteria for the job to cover up the illegal

basis for the decision, supported a finding of malice or oppression]; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1403-1404 [unwarranted criticism created to support a wrongful termination constituted oppressive behavior where the criticism damaged the plaintiff's reputation and subjected the plaintiff to embarrassment], disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4 (*White*).) Similarly, wrongful termination coupled with callousness or spite may support a finding of oppressive or malicious behavior. (See *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 428 (*Wysinger*) [callous and retaliatory conduct justified an award of punitive damages]; see also *Scott*, at p. 716 [circumstances of aggravation or outrage, such as spite or a fraudulent or evil motive, may support a finding of malicious or oppressive conduct].)

Civil Code section 3294, subdivision (b), provides that an employer may not be liable for punitive damages based on the conduct of an employee "unless the employer (1) 'had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others'; or (2) 'authorized or ratified the wrongful conduct for which the damages are awarded'; or (3) 'was personally guilty of oppression, fraud, or malice.'" "And, with respect to a corporate employer, 'the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.'" (*Mazik*, *supra*, 35 Cal.App.5th at pp. 463-464.)

"[M]anaging agents are employees who 'exercise substantial independent authority and judgment in their

corporate decisionmaking so that their decisions ultimately determine corporate policy.' [Citation.] . . . [U]nder [Civil Code] section 3294, subdivision (b), a 'plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.'" (*Mazik*, *supra*, 35 Cal.App.5th at p. 464; see *White*, *supra*, 21 Cal.4th at pp. 566-567.) To "justif[y] punishing an entire company for an otherwise isolated act of oppression, fraud, or malice," a managing agent must have discretionary authority over "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 714-715 (*Roby*).) A supervisor does not qualify as a managing agent merely because he or she has the ability to hire and fire workers. (*White*, at p. 566; *Mazik*, at p. 464.) "The scope of a corporate employee's discretion and authority is . . . a question of fact" for the jury to decide "on a case-by-case basis." (*White*, at p. 567; see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 63.)

A plaintiff may prove oppression, fraud, or malice either expressly by direct evidence probative of the existence of hatred or ill will or by implication from indirect evidence from which the jury may draw inferences. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66-67; see *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894.) We review a finding the defendant engaged in oppression, fraud, or malice for substantial evidence. (*Mazik*, *supra*, 35 Cal.App.5th at p. 462; *Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1125.) "In applying that standard, we "'view the evidence in the light most favorable to the prevailing party, giving it the

benefit of every reasonable inference and resolving all conflicts in its favor.'"" (*Mazik*, at p. 462.)[8]

b. *President Schoonover Engaged in or Ratified Malicious or Oppressive Conduct*

As the president of Local 721, Schoonover was an officer of the organization and a member of its executive board. As the executive director of the union, Schoonover oversaw the staff and was "extremely involved" in "day-to-day dealings" with management. Schoonover testified his relationship with Mitchell was not "strained" leading up to Schoonover's decision to terminate his employment. Schoonover knew Local 721 had promoted Mitchell to coordinator, personally approved his title of Manager, and had talked with Mitchell about Mitchell's desire to be promoted to Director of Advocacy. As far as Schoonover knew, Mitchell performed his job "up to standards," and Schoonover considered Mitchell a "valuable asset" to Local 721. Yet,

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[8] Local 721 argues the standard of review is "'whether the record contains "substantial evidence to support a determination by clear and convincing evidence."'" As explained in *Mazik*, *supra*, 35 Cal.App.5th 455, incorporating the clear and convincing standard of proof into the substantial evidence standard of review "is not of great significance on appeal." (*Id.* at p. 462.) "The clear and convincing requirement in the trial court does not change the rule on appeal that we consider 'conflicting evidence in a light favorable to the judgment, with the presumption the trier of fact drew all reasonable inferences in support of the verdict.' [Citation.] The practical effect of this rule is that the quantum, or weight, of the evidence before the jury is not a factor for appellate review." (*Id*. at pp. 462-463.)

Schoonover terminated Mitchell's employment without warning six weeks after Mitchell returned from medical leave, despite that (1) Mitchell had only a single write-up in his personnel file concerning an unrelated department protocol, (2) Schoonover knew of only two incidents where Mitchell had arguably been insubordinate (and in connection with the January 28, 2014 meeting Mitchell did not attend, Schoonover admitted that he knew Mitchell had childcare obligations and that he never responded to Mitchell's voice mail message), (3) one of those incidents occurred only one week after Mitchell returned to work, and (4) there had been no previous discussion (or reason to have a previous discussion) about terminating Mitchell's employment. That was pretty bad.

In addition, there was substantial evidence Schoonover knew Mitchell had expressed concerns about the arbitration backlog, and Schoonover acknowledged Local 721's failure to take timely actions on behalf of its members' grievances could violate Local 721's bylaws. Yee copied Schoonover on her January 10, 2014 email advising Aguilar, Green, and others (but not Mitchell) the rumored arbitration backlog was not their concern and telling them to "stay in [their] lane." That email also stated Yee had heard about the backlog "at least one other time from another manager," and Schoonover said he knew Yee had been "frustrate[ed]" with Mitchell and the advocacy department since late 2013. Coincidentally (or not), the meeting with Schoonover on March 6, 2014 at which Schoonover claims he made up his mind to terminate Mitchell followed a meeting that same day between Valdez, Yee, Reyes, and the advocacy department to discuss the department's January 17, 2014 grievance concerning the backlog.

Given the speed with which Mitchell went from a "valuable asset" to terminated employee, the jury reasonably could have concluded Schoonover's decision to go in a "different direction" was a pretext for silencing the vocal complaints by Mitchell and his subordinates about the arbitration backlog. (See *Wysinger*, *supra*, 157 Cal.App.4th at p. 421 [jury could infer that a sudden decision to "'change the culture'" by declining to transfer a whistleblowing employee was a pretext for retaliation]; see also *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 945 [evidence there had been no dissatisfaction with the plaintiff's job performance until the last two days of his employment "could lead the jury to believe that the statements of lack of job knowledge and lack of cooperation were maliciously motivated," disapproved on another ground in *White, supra*, 21 Cal.4th at p. 574, fn. 4].) The jury also reasonably could have concluded that terminating a 60-year-old employee with 30 years of service to the union to protect the union from complaints and possible legal action over its failure to properly represent its members was sufficiently despicable to constitute malicious or oppressive conduct.

Schoonover's conduct toward Mitchell was particularly callous given that Schoonover contributed to the hostile environment Mitchell faced upon returning from his medical leave. Schoonover accused Mitchell of insubordination for failing to attend a single meeting Schoonover never confirmed with Mitchell despite receiving a call from him, approved the job offer to Reyes before Local 721 posted the opening despite having discussed the position with Mitchell, and fired Mitchell without any warning or prior counseling despite Mitchell's virtually

untarnished 30-year tenure with the union.[9] (See *Wysinger*, *supra*, 157 Cal.App.4th at p. 428.) It was also a reasonable inference from the evidence that Schoonover conspired with others at Local 721 to fabricate evidence, or at a minimum to drastically overemphasize it, in an attempt to justify the termination of Mitchell's employment, which also rises to the level of "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2); see *Brandon v. Rite Aid Corp., Inc.* (E.D.Cal. 2006) 408 F.Supp.2d 964, 982 [fabricating evidence to justify a wrongful termination "would constitute clear and convincing evidence of a 'willful and conscious disregard'" of the plaintiff's rights]; see also *Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1349 ["'[s]ubstantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom'"].)

The jury also reasonably could have concluded Schoonover ratified malicious or oppressive conduct by Yee. (See *Pulte Home Corp. v. American Safety Indemnity Co.*, *supra*, 14 Cal.App.5th at p. 1124 ["[r]atification is shown if an officer, director, or managing agent of the corporation has advance knowledge of, but consciously disregards, authorizes, or ratifies an act of oppression, fraud, or malice"].) There was evidence Mitchell raised the arbitration backlog issue with Yee, Mitchell's

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[9] Local 721 contends Yee warned Mitchell in her January 29, 2014 email that continued subordination was a ground for termination. Even assuming Yee sent that email in good faith, it did not warn Mitchell he could be terminated for stating he would do his best to cooperate with Reyes instead of responding with "yes" or "no" when asked whether he would cooperate with her.

subordinates documented the backlog and shared those reports with other Local 721 employees and at least one union member, Yee reacted angrily to accusations the legal department was responsible for the arbitration backlog, and Mitchell's subordinates protested the legal department's handling of the backlog and asked Local 721 to promote Mitchell to Director of Advocacy when Yee intended to install her friend in that position.[10] Yee sent Mitchell and Local 721 executives an email accusing Mitchell of dishonesty and disloyalty for failing to attend a grand total of one meeting scheduled eight days after he returned from his medical leave and after Mitchell expressed concerns he would not be able to attend. Yee then recommended Local 721 fire Mitchell—a 60-year-old employee with 30 years of service whose promotion to coordinator Yee supported a year earlier—without warning, after Mitchell said he would do his "best" to cooperate with Reyes. Such conduct supports a reasonable inference that Yee manufactured evidence to support her recommendation Local 721 terminate Mitchell's employment for making and supporting efforts to bring the arbitration backlog to light.

As for Schoonover, he knew Yee was frustrated with Mitchell and the advocacy department and, after receiving her "stay in your lane" email of January 10, 2014, Schoonover must have known at least one source of Yee's "frustration" was the alleged arbitration backlog. (See *Pusateri v. E. F. Hutton & Co.* (1986) 180 Cal.App.3d 247, 255 [knowledge required for ratification may be proven by circumstantial evidence]; *Siva v.*

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[10] Local 721 did not interview any candidates other than Reyes for the position.

General Tire & Rubber Co. (1983) 146 Cal.App.3d 152, 159 [ratification to support corporate liability for punitive damages "is a fact question and may be proved by circumstantial evidence"].) Schoonover said he never investigated the backlog, perhaps because he acknowledged its existence. Yet Schoonover did nothing when Yee accused Mitchell of dishonesty and disloyalty, and he did nothing to attempt to remediate the obvious rift between the legal department and the advocacy department. Instead, he accepted Yee's recommendation to terminate Mitchell's employment, thus ratifying her malicious conduct. (See *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 726 [ratification occurs "where the employer or its managing agent is charged with . . . failing to investigate or discipline the errant employee once such misconduct became known"]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 621 ["ratification may be inferred from the fact that the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing or discharging the employee"].)

c. *Human Resources Director Garcia Also Engaged in Malicious or Oppressive Conduct*

In its ruling denying Local 721's motion for judgment notwithstanding the verdict, the trial court found Schoonover committed or ratified conduct that was oppressive, malicious, or fraudulent. The trial court did not consider whether the conduct of any other officer, director, or managing agent of Local 721 justified an award of punitive damages. Mitchell argues that

Garcia qualified as a managing agent and that she, too, engaged in malicious or oppressive conduct. Substantial evidence supported that finding too.

Although Schoonover testified Garcia did not have authority to establish union-wide policy, the jury could have credited other testimony she did. For example, Schoonover testified he did not create the policies in Local 721's Policies and Procedures Manual, he merely approved the policies drafted by human resources directors like Garcia. And Garcia stated she and another employee wrote the employee handbook and updated Local 721 policies. She also testified she had responsibility to ensure Local 721 complied with applicable laws, union policies, and procedures and to address employee disputes, workplace complaints, and alleged misconduct. Thus, because there was substantial evidence Garcia exercised substantial discretionary authority over significant aspects of Local 721's business, she was a managing agent under Civil Code section 3294, subdivision (b). (See *Mazik*, *supra*, 35 Cal.App.5th at p. 464.)

There was also substantial evidence Garcia recommended the termination of Mitchell's employment for fabricated or pretextual reasons. Garcia had known Mitchell for eight years at the time the union terminated Mitchell's employment, and she knew he had been written up only once for failing to keep certain computer files updated. She posted the position of Director of Advocacy and accepted Mitchell's application for the job, all the while knowing Local 721 had already filled the position with Yee's friend. Upon receiving Mitchell's application for the no-longer-open position, she ominously sent an email to Schoonover, Valdez, and Yee, stating only, "He submitted today," which suggested the highest ranking officers and managers of Local 721

anticipated Mitchell would apply for the position even though the union had already offered it to Reyes. Inexplicably, Garcia never told Mitchell that Local 721 had hired Reyes, leaving Mitchell to discover Local 721 had filled the position from his staff, who learned the news from Reyes's social media posts. Garcia later admitted that hiring Reyes before posting the position "violate[d] the basic tenets of human resources." Her callous indifference to a valued employee's dignity also suggested her conduct was malicious.

Garcia admitted she received a letter on February 12, 2014 from counsel for Mitchell raising the possibility of "EEOC issues." A month later, without having investigated Mitchell's concerns, Garcia recommended Local 721 terminate Mitchell's employment based on his conduct at the March 6, 2014 meeting. Garcia admitted she never reviewed Mitchell's personnel file before recommending his termination, never counseled him or asked him (outside of Reyes's presence) about his relationship with Reyes, never asked him why he did not include Reyes in certain meetings with Los Angeles County employers, never gave him a warning or informed him his performance was inadequate, and never recommended any lesser form of discipline than termination. Given the slim factual record on which to recommend termination and the numerous policies and practices Garcia was willing to bend or break to summarily terminate Mitchell's employment, the jury reasonably could have inferred a malicious motive. Although Garcia did not make the ultimate decision to terminate Mitchell, she participated significantly in the decision, was in the best position to know his summary termination violated "good [human resources] practices," and could have recommended discipline short of termination

consistent with those practices. (See *Wysinger*, *supra*, 157 Cal.App.4th at p. 421 [jury may infer animus where a "substantial contributor" to an adverse employment action had the requisite animus].)

2. *The Trial Court's Error in Precluding Local 721's Controller from Testifying Was Harmless*

Local 721 argues the trial court abused its discretion in denying its motion for a new trial on punitive damages because the court improperly excluded the testimony of Local 721's controller. Local 721 contends the controller would have testified that Local 721's net worth was "a fraction of the amount claimed by Mitchell," that Local 721 could not access certain funds designated for its political action committee or external organizing funds to pay a punitive damages award, and that "a large punitive damages award would be financially devastating to Local 721 and its membership." The trial court's error in excluding the controller's testimony, however, was harmless.

a. *Relevant Proceedings*

Local 721 designated Dr. Joseph A. Krock as an expert witness to testify about the "conclusions, opinions, and/or reports" of Mitchell's expert economist, Dr. Tamorah Hunt. The joint witness list the parties filed on December 29, 2016 after the final status conference included Dr. Krock as Local 721's "expert economist," as well as David Green, Local 721's Treasurer.

The liability phase of the trial ended on November 22, 2017, the Wednesday before Thanksgiving, with the jury's finding Local 721 acted with malice, oppression, and/or fraud. Before adjourning until the following Monday for the punitive damages

phase of the trial, the court asked counsel for Mitchell and counsel for Local 721 about their witnesses for phase two. Anthony Nguyen, one of Mitchell's attorneys, told the court that Dr. Hunt would testify and that Mitchell was asking Green to appear "regarding the financials." Paul Derby, one of Local 721's attorneys, stated, "The C.F.O. is going to be the person who knows the financials much better than the elected Treasurer, but—" The court interrupted and asked Mr. Nguyen if he "want[ed] them both here." Mr. Nguyen responded yes. The following discussion occurred with Mane Sardaryan, another attorney for Local 721:

"The Court: Okay. So we have David Green. And who was the other one?

"Mr. Derby: Mark Zubin.

"Ms. Sardaryan: No. It's actually Edwin— . . . I will get his last name, Your Honor.

"The Court: Okay. Great. And then spell it for us. [¶] And then they're ordered to appear here on Monday. [¶] Do you need to interview them before or—

. . . .

"Mr. Nguyen: I don't. Well, I mean, if we get to speak with them maybe briefly in the morning.

"The Court: That's what I'm saying.

"Mr. Nguyen: That's fine, Your Honor.

. . . .

"Ms. Sardaryan: It's Grigorian, G-R-I-G-O-R-I-A-N."

The court suggested all witnesses arrive by 8:30 a.m. Monday morning "so if anybody desires to talk to them, they can." The court asked counsel for Local 721 if the person who audited Local 721's income statements would be appearing. Mr. Derby

stated that Local 721 retained an outside auditor, but that Mr. Grigorian "can speak to these financials."

On Sunday, November 26, 2017, the afternoon before the trial was to resume, counsel for Local 721 sent an email to counsel for Mitchell stating, "Local 721 reserves the right to call Dr. Joseph Krock tomorrow to provide testimony in rebuttal to the testimony of Dr. Tamorah Hunt."

Before bringing the jury into the courtroom on Monday morning, November 27, 2017, the court considered a motion filed by Mitchell to introduce evidence of Local 721's insurance policy. During argument on that motion, counsel for Mitchell, Carney Shegerian, who had not been in court the previous Wednesday, suggested Local 721 call Green, whom counsel called "the head of [its] financial department," to testify regarding Local 721's insurance policy. Mr. Derby responded, "[T]o be clear, [Green is] not the head of the financial department. [¶] A gentleman named Edwin Grigorian is the Controller and the person who handles the finances, not the elected official." Then:

"Mr. Shegerian: But Mr. Grigorian can't testify. He was never disclosed as a witness. [¶] Mr. Green was. He's the Treasurer of [Local 721] . . . .

"Mr. Derby: Your Honor, on Wednesday Mr. Grigorian was identified as a witness [for] today, and we spent the weekend discussing with him the financial condition. [¶] He's the person who knows the financial condition of [Local 721]. He was identified as a witness by plaintiff's counsel. [¶] We brought him here at the request of plaintiff's counsel. We had him here at 8:30 to be interviewed, if necessary, by order of the court. . . .

. . . .

"Mr. Nguyen: We did not request Mr. Grigorian. We requested Mr. Green. It was counsel [for Local 721] who suggested Mr. Grigorian, even though we did not request him specifically. . . .

. . . .

"Mr. Shegerian: And he just can't testify. He was never disclosed as witness in this case. [¶] [Local 721] has known about the punitive damages being at issue in this case since the case was filed, March 13, 2015."

Shortly after this exchange, counsel for Local 721 informed the court Local 721 would call Grigorian to testify. Counsel for Mitchell again objected that Local 721 did not disclose Grigorian on the witness list. Counsel for Local 721 stated that Grigorian "was confirmed as of Wednesday" and that Grigorian "knows the financials," "created the financials," and "worked with the auditors on the financials, so he's the guy." Counsel for Mitchell argued allowing Local 721 to call Grigorian violated the local rules of court, the California Rules of Court, and the trial court's final status conference order because Local 721 did not include Grigorian on the joint witness list and did not timely disclose Grigorian. Counsel for Local 721 argued Grigorian "was disclosed and accepted and ordered to be here to testify today and to be examined in the hallway. He was standing in the hallway, pursuant to this court's order, at 8:30 a.m."

Counsel for Mitchell called Dr. Hunt to testify based on Local 721's audited financial statements for 2007 through 2016 and the union's 2016 Labor Organization Annual Report filed with the United States Department of Labor. Based on the audited financial statements, Dr. Hunt testified that Local 721's total assets in 2016 were approximately $53 million and that its

net assets in 2016 were $19 million based on the report filed with the Department of Labor and $33 million based on audited financial statements. Dr. Hunt explained that the report to the Department of Labor reflected future obligations to pay for Local 721's postretirement medical plan and employees' accrued vacation that were not included in the financial statements. Dr. Hunt said the "vast majority" of the $19 million in net assets identified in the Department of Labor report reflected equity in Local 721's real estate holdings. She estimated the fair market value of those holdings was approximately $50 million, $8 to $11 million of which exceeded the "book value" of the cost of the buildings, land, improvements, and depreciation.

Dr. Hunt also testified Local 721's financial statement for 2016 identified cash-on-hand between $13 million and $14 million. She identified the sources of Local 721's cash-on-hand as the general fund, an external organizing fund, a political action committee fund, real estate, and a training fund. In response to questions from counsel for Local 721, Dr. Hunt stated she did not know whether money in the political action fund was subject to federal regulations or whether those funds, or funds in the external organizing fund, could be used for other purposes.

Following Dr. Hunt's testimony, counsel for Local 721 called Grigorian to testify. In response to questions from the court, Mr. Derby admitted Grigorian was not on the witness list, was not designated as an expert, and was not disclosed in any supplemental disclosure, "[e]xtra designation," "[l]ate designation," or "[a]nything ever." The court sustained Mitchell's objection and stated, "I think that there were other things that could have been done to plan for this event, but . . . maybe you weren't planning for this. [¶] And so [Grigorian] was never

designated. Nobody knows anything about him, and so I'm not going to allow him to testify." Counsel for Local 721 did not offer any explanation for why Local 721 did not disclose Grigorian earlier, and Local 721 did not call Green or Dr. Krock to testify about Local 721's finances or financial condition.

b. *Applicable Law and Standard of Review*

The propriety of the trial court's ruling precluding Grigorian from testifying rests in part on the scope of its authority to control proceedings, which is a question of law we review de novo (*In re Taylor* (2015) 60 Cal.4th 1019, 1035), and in part on the exercise of its discretion within that scope (*People v. Arias* (1996) 13 Cal.4th 92, 147-148). We also consider whether the trial court's ruling comports with its authority to enforce local rules of court. (See generally *In re Harley C.* (2019) 37 Cal.App.5th 494, 503.)

As stated in connection with Local 721's prior arguments concerning the exclusion of evidence, a trial court's inherent authority includes precluding evidence at trial. (*Cottini v. Enloe Medical Center*, *supra*, 226 Cal.App.4th at p. 425.) This authority derives from courts' "'inherent power to control litigation before them'" and "'"to exercise reasonable control over all proceedings connected with pending litigation."'" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351; accord, *People v. Suff* (2014) 58 Cal.4th 1013, 1038; see *Cottini*, at p. 425.) Although this power exists independently of any statute (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 635), its existence is acknowledged by statute (Code Civ. Proc., § 128, subd. (a)(5) ["Every court shall have the power . . . [t]o control in furtherance of justice, the conduct . . . of all . . . persons in any manner connected with a

judicial proceeding before it, in every matter pertaining thereto"]) and must not be exercised in a manner that contravenes statutory law (*Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1144). A trial judge may use this inherent authority to prevent a party from calling an eleventh-hour witness (*Castaline v. City of Los Angeles* (1975) 47 Cal.App.3d 580, 592) or to prevent "trial by ambush" and other "unfair results" stemming from "abus[ive]" litigation tactics (*People v. Bell* (2004) 118 Cal.App.4th 249, 256; *Peat v. Superior Court* (1988) 200 Cal.App.3d 272, 288, 289-290).

Superior Court of Los Angeles County, Local Rules, rule 3.25(f)(1), requires parties to file witness lists and other documents at least five days prior to the final status conference. "Failure to exchange and file these items may result in not being able to call witnesses" and other possible sanctions. (*Ibid.*)[11] Code of Civil Procedure section 575.2 permits a court to sanction a party that fails to comply with local rules of court. A trial court may not impose a sanction for a violation of local rules, however, if the sanction punishes the party for its attorney's error (Code Civ. Proc., § 575.2, subd. (b)) or if less severe sanctions would be effective (Gov. Code, § 68608, subd. (b)). (*Garcia v.*

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[11] Local Rules, rule 3.25(f)(1) provides in relevant part: "At least five days prior to the final status conference, counsel must serve and file lists of pre-marked exhibits to be used at trial [citations], jury instruction requests, trial witness lists, and a proposed short statement of the case to be read to the jury panel explaining the case. Failure to exchange and file these items may result in not being able to call witnesses, present exhibits at trial, or have a jury trial."

McCutchen (1997) 16 Cal.4th 469, 471, 475; *Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, 1061-1062; see *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1154, 1162 [court may not sanction party for violating courtroom-specific rules regarding a "curable defect"].)

c. *The Trial Court's Error in Preventing Grigorian from Testifying Was Harmless*

Local 721 argues it wanted Grigorian to rebut Dr. Hunt's testimony on Local 721's financial condition. The trial court precluded Grigorian from testifying based on counsel for Local 721's failure to identify Grigorian on the joint witness list, as required by local rules. The trial court, however, should not have punished Local 721 for what appears to be an error by its attorney without a hearing "to fix responsibility for the failure to comply with local rules." (*In re Marriage of Colombo* (1987) 197 Cal.App.3d 572, 579; accord, *State of California ex rel. Public Works Bd. v. Bragg* (1986) 183 Cal.App.3d 1018, 1029; see Code Civ. Proc., § 575.2, subd. (b).) And while the trial court has inherent power to preclude evidence to ensure a fair trial, the court in this instance abused its discretion by excluding Grigorian from testifying after essentially indicating on the Wednesday before Thanksgiving he would be able testify. On that day, counsel for Mitchell did not object to Grigorian's appearance, and counsel for Local 721 relied on the court's statements suggesting Grigorian could testify.

Local 721, however, suffered no prejudice as a result of the court's error. The court did not prevent Local 721 from presenting other evidence of its net worth or financial condition, for example, by calling Green or Dr. Krock to testify. (See *Pfeifer*

v. John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1310 (*Pfeifer*) [defendant "was free to call an expert" if it believed additional evidence was needed to explain the extent of its liabilities].) Local 721 did not seek to call any other witnesses, despite having informed counsel for Mitchell the night before that Local 721 reserved the right to call Dr. Krock.

Local 721 also has not shown that Grigorian was the only witness who could have testified Local 721 could not access funds from its political action committee or external organizing funds or that a punitive damages award of any particular amount would financially devastate the union. Green, as the union's treasurer, or Schoonover, as the union's president, could have provided relevant testimony on these topics, and both of them were on the joint witness list.[12] Local 721 argues Grigorian would have testified Local 721's net worth was "a fraction of the amount claimed by Mitchell," but Local 721 does not explain how or why Grigorian would have reached that conclusion, nor has Local 721 shown that neither Green nor Schoonover had sufficient knowledge to testify about Local 721's net worth or finances.[13]

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[12] Local 721 argues neither Green nor Schoonover had Grigorian's "extensive personal knowledge of Local 721's financial condition," but does not contend they did not have any relevant knowledge on this topic.

[13] Local 721 makes several additional arguments, all of which boil down to complaints that counsel for Mitchell made improper statements regarding punitive damages in his closing argument during phase two of the trial. For example, Local 721 argues counsel for Mitchell "capitalized" on the trial court's ruling precluding Grigorian from testifying by stating Local 721 "didn't

3. *Substantial Evidence Does Not Support the Amount of the Punitive Damages Award*

Local 721 argues the punitive damages award is excessive under California's three-part analysis set forth in *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 (*Neal*) and *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (*Adams*) and under the United States Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418 [123 S.Ct. 1513] (*State Farm*), especially in light of findings of fact that arguably inflated Local 721's net worth. In its order denying Local 721's motion for a new trial, the trial court found that, "[b]ased on the reprehensibility of the conduct and the net worth of $41 million to $44 million, a punitive damages award of $6.1 million is not excessive." Substantial evidence, however, does not support the factual basis of the court's ruling that Local 721's net worth was between $41 and $44 million.

a. *Applicable Law*

"The purposes of punitive damages are to punish the defendant and deter the commission of similar acts. [Citations.] Three primary considerations govern the amount of punitive damages: (1) the reprehensibility of the defendant's conduct; (2) the injury suffered by the victims; and (3) the wealth of the defendant." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at pp. 307-308; accord, *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640,

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call a single witness" in phase two. Local 721 did not object to any of these statements, thus forfeiting its arguments based on them on appeal. (See *Pearl v. City of Los Angeles*, *supra*, 36 Cal.App.5th at p. 488; *Regalado v. Callaghan*, *supra*, 3 Cal.App.5th at pp. 598-599.)

1689; see *Adams*, *supra*, 54 Cal.3d at p. 110; *Neal*, *supra*, 21 Cal.3d at p. 928.) "[T]he key question before the reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.'" (*Adams*, at p. 110; see *Neal*, at p. 928.) Thus, "the most important question is whether the amount of the punitive damages award will have deterrent effect—without being excessive. Even if an award is entirely reasonable in light of the . . . nature of the misconduct and amount of compensatory damages . . . , the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*." (*Adams*, at p. 111; accord, *Bigler-Engler*, at p. 307.)

"Evidence about a defendant's financial condition is necessary to determine punitive damages." (*Wysinger*, *supra*, 157 Cal.App.4th at p. 429; see *Adams*, *supra*, 54 Cal.3d at p. 114.) "The function of this requirement is to ensure that the amount of punitive damages does not exceed the level necessary to properly punish and deter. [Citations.] 'The ultimately proper level of punitive damages is an amount not so low that the defendant can absorb it with little or no discomfort [citation], nor so high that it destroys, annihilates, or cripples the defendant.'" (*Pfeifer*, *supra*, 220 Cal.App.4th at p. 1308; see *Rufo v. Simpson*, *supra*, 86 Cal.App.4th at pp. 621-622.) "[T]he plaintiff has the burden of proving the defendant's financial condition, for purposes of an award of punitive damages." (*Pfeifer*, at p. 1307; accord, *Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648.)

The California Supreme Court has not prescribed a rigid standard for measuring ability to pay. (See *Adams, supra*, 54 Cal.3d at p. 116, fn. 7; *Pfeifer*, *supra*, 220 Cal.App.4th at

p. 1308.) "Net worth," however, "generally is considered the best measure of a defendant's 'wealth' for purposes of assessing punitive damages." (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 391 (*Devlin*); see *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 (*Soto*) ["[e]vidence of the defendant's net worth is the most commonly used" metric]; *Pfeifer*, at p. 1308 ["net worth is the most common measure"].) But because "net worth 'is subject to easy manipulation'" (*Pfeifer*, at p. 1308; see *Soto*, at p. 194), courts have also considered "various asset and income figures relevant to the issue of punitive damages" (*Devlin*, at p. 391; see *Soto*, at p. 194 ["there is no one particular type of financial evidence a plaintiff must obtain or introduce to satisfy its burden of demonstrating the defendant's financial condition"]). Indeed, courts have upheld punitive damages awards even when a defendant had a negative net worth. (See *Pfeifer*, at pp. 1308-1309 ["a defendant may have the ability to pay the award of punitive damages, even though the defendant's net worth is negative"]; *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581 [evidence showed the defendant had the ability to pay the punitive damages award even though it had a negative net worth at the time of trial].)

In general, "'evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.] . . . Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.'" (*Pfeifer*, *supra*, 220 Cal.App.4th at p. 1308; see *Soto*, *supra*, 239 Cal.App.4th at p. 194 ["Evidence of a defendant's income, standing alone, is not '"meaningful evidence."'"].) '"'Without evidence of the actual total financial

status of the defendants, it is impossible to say that any specific award of punitive damage is appropriate.'"" (*Soto*, at p. 194.)

We review a trial court's determination of excessiveness under California law for abuse of discretion (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 83 (*Bankhead*); *Boeken v. Philip Morris, Inc.*, *supra*, 127 Cal.App.4th at p. 1689) and examine the record to determine whether the challenged award rests on substantial evidence (*Farmers & Merchants Trust Co. v. Vanetik*, *supra*, 33 Cal.App.5th at pp. 647-648; *Soto*, *supra*, 239 Cal.App.4th at p. 195). "The appellate court cannot reweigh the credibility of witnesses or resolve conflicts in the evidence. [Citation.] The appellate court must view the conflicting evidence regarding punitive damages in the light most favorable to the judgment pursuant to the familiar substantial evidence rule." (*Rufo v. Simpson*, *supra*, 86 Cal.App.4th at p. 622.) "A reviewing court will reverse as excessive '"only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice."'" (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.*, *supra*, 89 Cal.App.4th at p. 583, quoting *Neal*, *supra*, 21 Cal.3d at p. 927; see *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535.)

b. *Substantial Evidence Does Not Support the Trial Court's Finding Local 721's Net Worth Was $41-$44 Million*

The trial court found Local 721's net worth was "between $41 million and $44 million" based on Dr. Hunt's testimony that Local 721's audited financial statements for 2016 indicated a "net value" of $33,079,169, plus another $8-$11 million for Local 721's

real estate holdings. "Accordingly," the trial court ruled, "the punitive damages are between approximately 14%-15% of [Local 721's] ne[t] worth." Based on the reprehensibility of Local 721's conduct and its net worth, the trial court concluded "a punitive damages award of $6.1 million is not excessive." Local 721 argues the punitive damages award is excessive in comparison to its net worth, which it claims was "no greater than $18,926,706" at the time of trial. Based on this calculation, Local 721 contends the punitive damages award is 32 percent of its net worth.

Local 721 is correct that Dr. Hunt's testimony does not support the trial court's finding that the union's net worth was between $41 million and $44 million at the time of trial. Mitchell introduced two sets of documents to prove Local 721's financial condition. One set, Local 721's audited financial statements, was prepared by Local 721's accountants using a modified-cash basis accounting method. The audited financial statements did not account for accrued but not yet payable obligations for items like postretirement medical benefits and accrued vacation. The other set included Local 721's 2016 Form LM-2 Labor Organization Annual Report filed with the United States Department of Labor. That filing used "generally accepted accounting principles" and, unlike the audited financial statements, included future obligations to pay retirement and vacation benefits in its calculation of Local 721's total liabilities. Dr. Hunt testified those obligations brought Local 721's net assets "down to just under $19 million" as reported on the Form LM-2, "rather than the $33 million that's reported on the modified-cash basis financial statement." Thus, unlike Form LM-2, Local 721's 2016 financial statements provided only "a selective presentation" of Local 721's financial condition. (See *Farmers & Merchants Trust Co. v.*

Vanetik, *supra*, 33 Cal.App.5th at p. 648 ["A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny."].) Mitchell never contested the existence or validity of Local 721's future obligations to pay postretirement or accrued vacation benefits, nor did Mitchell or his expert explain why the jury should not take those liabilities into account in determining Local 721's financial condition.[14] Failing to include those liabilities resulted in an artificially high net worth and an artificially robust financial condition.

We disagree, however, with Local 721's contention that its net worth at the time of trial was only $19 million. As Dr. Hunt testified, Local 721's real estate holdings at the time of trial were worth between $8 and $11 million more than their "book value." Local 721 argues Dr. Hunt's valuation of Local 721's real estate was based on inadmissible hearsay, but Local 721 did not object to Dr. Hunt's testimony on that ground at trial. Therefore, Local 721 forfeited the argument on appeal. (Evid. Code, § 353, subd.

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[14] Mitchell argues future estimated liabilities should not be taken into account unless future revenue streams are also considered. Fair enough. But Mitchell, who had the burden of proving Local 721's financial condition, did not introduce any evidence of Local 721's anticipated future revenue. Moreover, Local 721's financial statements showed that in 2013 and 2014 Local 721 suffered losses of over $1 million, in 2015 the union had only $174,512 in net income, and in 2016 it had $4,386,396 in net income. This track record suggests the reserves designated by Local 721's Executive Board for future liabilities, which Mitchell asks us to ignore, reflected prudent financial planning directly relevant to Local 721's financial condition at the time of trial.

(a); see *People v. Stevens* (2015) 62 Cal.4th 325, 333 ["the failure to object to the admission of expert testimony or hearsay at trial forfeits an appellate claim that such evidence was improperly admitted"].) Adding $9.5 million—the median value of Local 721's real estate holdings over and above their book value—to the amount Local 721 concedes was its net worth at the time of trial—$18,926,706—produces a net worth of $28,426,706.

The trial court found a punitive damages award of 14 to 15 percent of Local 721's net worth was reasonable in light of the reprehensibility of Local 721's conduct. Applying 15 percent to Local 721's adjusted net worth of $28,426,706 yields a punitive damages award of $4,264,005.09.

Of course, 15 percent is greater than 10 percent, and Local 721 asserts "California courts have consistently disfavored awards exceeding 10 percent of a defendant's net worth." But that assertion and the primary case on which Local 721 relies, *Bigler-Engler*, *supra*, 7 Cal.App.5th 276, do not withstand scrutiny. The court in *Bigler-Engler* cited *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596 and *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515 (*Storage Services*) for the proposition that punitive damages awards "'generally are not allowed to exceed 10 percent of the net worth of the defendant.'" (*Bigler-Engler*, at p. 308.) *Michelson v. Hamada*, however, cited only *Storage Services* (see *Michelson v. Hamada*, at p. 1596), which in turn cited only *Devlin*, *supra*, 155 Cal.App.3d 381. (See *Storage Services*, at p. 515). *Devlin*, however, does not support the 10-percent benchmark referred to in the *Storage Services* opinion.

In fact, *Devlin* is contrary to the attempt by the court in *Storage Services* to devise a mathematical formula to determine

when a punitive damages award is excessive. The court in *Devlin* considered the propriety of an award that was 17.5 percent of the defendant's net worth. (*Devlin*, *supra*, 155 Cal.App.3d at p. 391.) The court considered an unscientific sampling of 16 appellate decisions spanning almost 25 years "in an effort to determine whether [the court] could discern from the cases a single formula for calculating punitive damages." (*Id.* at p. 388.)[15] The court concluded it could not. "Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so. [¶] Although we may now live in a highly computerized society, it is important to recognize the justice system need not and should not mirror a mechanistic view of life. The life of the law should continue to be experience. The concept of justice connotes a human process, performed by judges and juries in good faith, exercised with compassion, still tinged with sufficient subjectivity to conform the rules of law to the realities of life. Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damages awards, applying those factors in the customary manner to reach what we believe is a decision consistent with precedent." (*Ibid.*)

Applying those familiar factors—the nature of the defendant's acts, the amount of compensatory damages awarded, and the wealth of the defendant— the court in *Devlin* held the punitive damages award in that case, while "somewhat greater

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15 The *Devlin* court described its data set as "neither a comprehensive nor a scientific survey of every punitive damages case ever decided by a California court." (*Devlin*, *supra*, 155 Cal.App.3d at p. 388, fn. 5.)

than comparable ratios contained in the reported cases [included in the appendix]," was within "a range of reasonableness for punitive damages." (*Devlin*, *supra*, 155 Cal.App.3d at p. 391.) The court explained, "[W]e cannot say these numerical differences mandate a finding of excessiveness. The lesson we learned from parsing the cases is that the reason why there is no simple formula for calculating punitive damages is that there is no particular sum which represents the *only* correct amount for such damages in any given case. . . . [¶] . . . . To say, relative to the reported cases, the 17.5 percent net worth award must be reduced by a certain percentage . . . is merely to substitute the factfinding of appellate judges for that of trial courts in the guise of mathematical semantics. In the context of this case, shaving the percentages would give the reported cases a sacrosanct quality without reason." (*Id.* at p. 392.)

Rather than follow the analysis and reasoning of *Devlin*, the court in *Storage Services* cited the appendix of cases attached to the court's opinion in *Devlin* and concluded "[t]his survey indicates that punitive damage awards are generally not allowed to exceed 10 percent of the defendant's net worth, and that significantly lower percentages are . . . the norm." (*Storage Services*, *supra*, 214 Cal.App.3d at p. 515.) The court in *Storage Services* then held that the award in that case, which was approximately 33 percent of the defendant's net worth, was outside the "range of reasonableness" in *Devlin* and "presumptively the result of passion and prejudice." (*Storage Services*, at pp. 515-516.) *Bigler-Engler* and *Michelson v. Hamada* later cited *Storage Services* in reversing punitive damages awards of 14 percent and 28 percent, respectively. (See *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 308; *Michelson v.*

Hamada, *supra*, 29 Cal.App.4th at p. 1596.) California law, however, does not presume a punitive damages award is excessive based solely on "mathematical semantics." (See *Devlin*, *supra*, 155 Cal.App.3d at p. 392.)

In addition to contradicting *Devlin*, the opinion in *Storage Services* and its one-size-fits-all "range of reasonableness" contradicts *Adams*, *supra*, 54 Cal.3d 105, where the Supreme Court stated, "The determination of whether an award is excessive is admittedly more art than science." (*Adams*, at p. 112; see *ibid*. ["'[t]he channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences,'" quoting *Devlin*].) Moreover, *Storage Services* and the cases citing it also place too much emphasis on the defendant's net worth, which, as this case attests, is subject to manipulation and is not the only measure of a defendant's ability to pay. (See *Soto*, *supra*, 239 Cal.App.4th at p. 194; *Pfeifer, supra*, 220 Cal.App.4th at p. 1308; *Bankhead, supra*, 205 Cal.App.4th at pp. 79-80;[16] *Zaxis Wireless Communications, Inc.*

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16 The court's opinion in *Bankhead* includes a thorough discussion rejecting the 10-percent benchmark endorsed by *Storage Services* and cases citing it and advocated by Local 721. (See *Bankhead*, *supra*, 205 Cal.App.4th at pp. 79-83; see also *id.* at p. 83 ["we reject the argument that 10 percent of net worth constitutes a ceiling above which juries may not go in setting the amount of punitive damages"].) *Bigler-Engler*, decided after *Bankhead*, did not discuss, distinguish, or even cite that case.

v. Motor Sound Corp., *supra*, 89 Cal.App.4th at p. 582; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1064-1065 & fn. 3.)[17]

Based on the evidence in the record, we cannot say the trial court abused its discretion in finding that an award equal to 14 to 15 percent of Local 721's adjusted net worth, though large, was disproportionate to Local 721's ability to pay or excessive under California law. Many other cases have approved similar awards. (See, e.g., *Pfeifer*, *supra*, 220 Cal.App.4th at p. 1309 [defendant had the ability to pay $14.5 million in punitive damages based on a net worth exceeding $98 million]; *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 454 [defendant had the ability to pay $1.237 million in punitive damages based on its profits of more than $677,000 in the most recent year]; *Devlin*, *supra*, 155 Cal.App.3d at p. 391 [award representing 17.5 percent of defendant's net worth not excessive for intentional fraud].)

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[17] *ENA North Beach, Inc. v. 524 Union Street* (Dec. 12, 2019, A152431/A152937) ___Cal.App.5th___ [2019 WL 6767208], like *Bigler-Engler*, *supra*, 7 Cal.App.5th 276, cited *Michelson v. Hamada*, *supra*, 29 Cal.App.4th 1566 for the proposition that punitive damages awards "'generally are not allowed to exceed 10 percent of the net worth of the defendant.'" (*ENA North Beach*, at p. ___ [p. 24], quoting *Michelson*, at p. 1596.) Unlike *Bigler-Engler*, however, the court in *ENA North Beach* also cited *Bankhead*, *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.*, and *Devlin*, but the court in *ENA North Beach* distinguished those cases because the record showed the defendant would have been "effectively 'destroyed'" by the jury's punitive damages award. (*ENA North Beach*, at p. ___ [p. 25].) Local 721 presented no such evidence in this case.

Therefore, we modify the judgment to reduce the punitive damages award to $4,264,005.09. (See Code Civ. Proc., § 43 ["the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered]; *Behr v. Redmond*, *supra*, 193 Cal.App.4th at p. 533 ["When the evidence is sufficient to sustain some but not all alleged damages, we will reduce the judgment to the amount supported by the evidence."]; see also *Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 ["'Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination.'"].)

4. *The Adjusted Punitive Damages Award Is Not Excessive Under Federal Constitutional Law*

"'The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages.'" (*Bankhead*, *supra*, 205 Cal.App.4th at p. 84; see *State Farm, supra*, 538 U.S. at pp. 416-418; *Roby*, *supra*, 47 Cal.4th at p. 712.) "'The imposition of "grossly excessive or arbitrary" awards is constitutionally prohibited, for due process entitles a tortfeasor to "'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'"'" (*Bankhead*, at p. 84; see *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 (*Simon*).) The United States Supreme Court in *State Farm* articulated "'three guideposts' for courts reviewing punitive damages: '(1) the degree of

reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" (*Roby,* at p. 712, quoting *State Farm,* at p. 418; see *Simon*, at pp. 1179-1180; *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 307.)

In its order denying Local 721's motion for a new trial the trial court did not address Local 721's argument the award exceeded federal due process limits under *State Farm*. In any event, "[i]n adjudicating a due process challenge to a punitive damages award, . . . we make our own 'independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct.'" (*Bankhead*, *supra*, 205 Cal.App.4th at p. 85; accord, *Simon, supra*, 35 Cal.4th at p. 1172; see *Mazik*, *supra*, 35 Cal.App.5th at p. 463 ["[w]e review de novo whether an award of punitive damages is constitutionally excessive"].)

Reprehensibility. "Of the three guideposts that the high court outlined in *State Farm* [citation], the most important is the degree of reprehensibility of the defendant's conduct. On this question, the high court instructed courts to consider whether '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.'" (*Roby*,

supra, 47 Cal.4th at p. 713, quoting *State Farm*, *supra*, 538 U.S. at p. 419.)

With regard to the first subfactor, the harm to Mitchell was "'physical' in the sense that it affected [his] emotional and mental health, rather than being a purely economic harm" (*Roby*, *supra*, 47 Cal.4th at p. 713), but on the "spectrum of possible conduct," Local 721's actions suggest only a modest degree of reprehensibility (see *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 219 ["spectrum of possible conduct" runs "from no potential or actual physical harm, to a defendant purposefully threatening the lives of the innocent"]). It was, however, objectively reasonable to assume Local 721's acts of discrimination and retaliation against Mitchell would affect his emotional well-being, and therefore, under the second subfactor, Local 721's "'conduct evinced an indifference to or a reckless disregard of the health or safety of others.'" (See *Roby*, at p. 713; see also *State Farm, supra*, 538 U.S. at p. 419.)

The third reprehensibility subfactor is also present: Mitchell "had financial vulnerability" because he was a 60-year-old employee close to retirement age who could not easily replace his income, which was a main source of support for his family. (See *Gober v. Ralphs Grocery Co.*, *supra*, 137 Cal.App.4th at p. 220 [grocery store employees who relied on their jobs for their livelihood were financially vulnerable]; *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2005) 422 F.3d 949, 958 (*Planned Parenthood*) [physicians whose practices were targeted by anti-abortion protestors were financially vulnerable because "their livelihoods depended upon their practices"].)

"Under the fourth subfactor, conduct that is recidivistic can be punished more harshly than an isolated incident." (*Gober v. Ralphs Grocery Co.*, *supra*, 137 Cal.App.4th at p. 220.) The wrongful conduct supporting the jury's award of punitive damages includes retaliation against Mitchell for shining light on the arbitration backlog, discriminating against him and terminating his employment for having a perceived physical disability and taking medical leave, and intentionally inflicting emotional distress. Mitchell introduced evidence he was subjected to repeated retaliation and discrimination by Local 721, including by having his pay reduced and job duties eliminated, humiliating him in connection with the job posting for the director position, and placing his personal belongings in the office hallway, all of which occurred before Local 721 terminated his employment. These successive actions suggest a moderate, or moderate to high, degree of reprehensibility. Mitchell also introduced evidence that Local 721 harassed other employees, including Aguilar, for whistleblowing activities,[18] but the court cannot put "a great deal of weight" on this conduct because it did not harm Mitchell. (See *Planned Parenthood*, *supra*, 422 F.3d at p. 959.)

The last subfactor, whether the harm was the result of intentional malice, trickery, or deceit, or mere accident, also indicates at least a moderate degree of reprehensibility. Mitchell introduced evidence that Local 721 intentionally terminated his employment to cover up the union's 600-case arbitration backlog and that the union knowingly subjected Mitchell to humiliation

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[18] Aguilar testified that Yee harassed her after Aguilar complained about the arbitration backlog.

by posting the position of director after it had already hired Reyes. It is also a reasonable if not strong inference from the evidence that Local 721 fabricated support for Mitchell's firing, including by accusing him of dishonesty and disloyalty in circumstances suggesting, at worst, a miscommunication. In sum, while Local 721 suggests its conduct supports "only a mild sanction," the evidence showed a degree of reprehensibility warranting a more substantial penalty. (See *Planned Parenthood*, *supra*, 422 F.3d at pp. 958-959 ["'infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty'"], quoting *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 576.)

Ratio of Compensatory Damages to Punitive Damages. To evaluate the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, courts consider the ratio between the awards of compensatory and punitive damages. There is no "bright-line ratio which a punitive damages award cannot exceed" (*State Farm*, *supra*, 538 U.S. at p. 425), but courts have established some general guidelines for determining whether a particular award is reasonable in light of the harm caused by the defendant (see *BMW of North America, Inc. v. Gore*, *supra*, 517 U.S. at p. 581 ["the proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred'""]). For example, "[i]n cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of

constitutionality. [Citation.] In cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional." (*Planned Parenthood*, *supra*, 422 F.3d at p. 962; see *State Farm*, at p. 425 [an award of more than four to one "might be close to the line of constitutional impropriety"]; *Simon*, *supra*, 35 Cal.4th at p. 1182 ["'few awards' significantly exceeding a single-digit ratio will satisfy due process," but "[m]ultipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*"].)

The jury awarded Mitchell $1.5 million in past noneconomic losses, and $861,391 in past and future economic losses, for total compensatory damages of $2,361,391. The ratio of the adjusted punitive damages award to compensatory damages is therefore 1.8 to 1, which is well within the range of constitutional reasonableness for cases involving significant economic damages and moderately egregious behavior.

Local 721 argues the constitutional limit in this case should be a ratio of one to one or less because the compensatory damages were substantial and, according to the union, included a punitive element in the form of emotional distress damages. Citing *State Farm*, *supra*, 538 U.S. at pp. 425-426, the California Supreme Court in *Simon*, *supra*, 35 Cal.4th at p. 1189, indeed recognized that "due process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than [it does] between punitive damages and a substantial compensatory award for emotional distress; the latter may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent." And in *State Farm*, the United States Supreme Court stated that the noneconomic damages in that case likely included

a component duplicative of punitive damages because much of the plaintiffs' distress was caused by "outrage and humiliation." (*State Farm*, at p. 426.)

The levels of reprehensibility in *State Farm* and *Simon*, however, were low or modest. (See *State Farm*, *supra*, 538 U.S. at pp. 419-420 [the defendant's conduct warranted only a "modest punishment" to satisfy the state's legitimate objectives]; *Simon*, *supra*, 35 Cal.4th at p. 1189.) Every other case cited by Local 721 in support of a one-to-one ratio similarly involved conduct at the low end of reprehensibility. (See *Roby*, *supra*, 47 Cal.4th at p. 718 ["a ratio of one to one might be the federal constitutional maximum in a case involving, as here, relatively low reprehensibility and a substantial award of noneconomic damages"]; *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 309 [defendant's conduct "certainly justified the imposition of punitive damages, [but] it was not particularly reprehensible"]; *Walker v. Farmers Ins. Exchange* (2007) 153 Cal.App.4th 965, 974 ["The only reprehensibility factor . . . that is unquestionably present here is that respondents were financially vulnerable."]; *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1, 11 ["the harm the defendants caused was solely economic and did not involve, in any sense, a vulnerable victim"].)

The facts in this case were much worse. Local 721's conduct was at least moderately reprehensible, justifying a higher ratio of punitive to compensable damages, and Mitchell's emotional distress damages were not based solely on "outrage and humiliation." (See *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 966 ["[u]nlike in *State Farm,* the compensatory damages here do not include compensation for outrage and humiliation"].) Mitchell testified that he felt depressed and

devastated, that he experienced loss of self-worth, identity, satisfaction, and motivation, and that he suffered from sleep disturbances, irritability, anxiety, and upsetting thoughts about losing his job. Moreover, counsel for Mitchell told the jury "not [to] consider what you already awarded to [Mitchell]" in arriving at the amount of punitive damages, thus reducing the likelihood of a duplicative award. (See *ibid.* [closing arguments from both parties "made clear the purpose of the punitive damage award was to fine [the defendant] for its reprehensible conduct and warned the jury not to duplicate an amount awarded as part of the compensatory damages"].) Under the facts of this case, a ratio of 1.8 to 1 was not unconstitutionally excessive. (See *Bankhead*, *supra*, 205 Cal.App.4th at p. 90 [punitive damages award approximately 2.4 times compensatory damages was "well within the range for comparable cases, and [was] not extraordinarily high" where the conduct was highly reprehensible]; *Century Surety Co.*, at pp. 966, 967 [ratio of 3.2 to 1 was not excessive where the jury awarded a substantial amount for "fear, anxiety, and emotional distress," but not for "outrage and humiliation"]; *Gober v. Ralphs Grocery Co.*, *supra*, 137 Cal.App.4th at p. 223 ["six to one ratio of punitive to compensatory damages is. . . . reasonable and proportionate to the amount of harm suffered [for sexual harassment] and to the compensatory damages . . . , which already contained a punitive element"]; *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F.3d 1020, 1039 [seven to one ratio of $2.6 million punitive damage award to $360,000 in compensatory damages for racial discrimination (which included $223,155 for emotional distress) was not excessive]; see also *Turley v. ISG Lackawanna, Inc.* (2d Cir. 2014) 774 F.3d 140, 163, 165-166 [reducing seven-to-

one ratio to two-to-one ratio where $1.32 million compensatory damages for workplace discrimination were purely noneconomic].)

Relationship Between the Award and Civil Penalties for Comparable Conduct. "Finally, we consider 'the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases'" to assess the constitutionality of a punitive damages award. (*Roby, supra*, 47 Cal.4th at p. 718; see *State Farm, supra*, 538 U.S. at p. 418.) "Generally, civil penalties for acts comparable to the defendant's misconduct may demonstrate the existence of fair notice that wrongful conduct could entail punitive damages." (*Pfeifer*, *supra*, 220 Cal.App.4th at pp. 1314-1315.) The guidepost regarding civil penalties, however, is of limited use in cases involving only common law tort duties. (*Id.* at p. 1315; see *Simon, supra*, 35 Cal.4th at pp. 1183-1184.)

Local 721 points out that whistleblower retaliation is punishable under the Labor Code by a civil penalty "not exceeding ten thousand dollars." (Lab. Code, § 1102.5, subd. (f).) But Local 721 neglects to acknowledge that its wrongful conduct was much broader than whistleblower retaliation and included physical disability and medical leave discrimination, wrongful termination in violation of public policy, and intentional infliction of emotional distress. Local 721 does not identify any analogous civil or criminal penalties for this conduct against which to measure the award of punitive damages. The adjusted punitive damages award in this case is not excessive under the analytical

guideposts created by the United States Supreme Court.[19]

D. *The Trial Court Did Not Abuse Its Discretion in Awarding Mitchell His Expert Witness Fees*

Mitchell sought recovery of his expert witness fees under Government Code section 12965 in a memorandum of costs. Citing *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011 (*Anthony*), Local 721 objected that Mitchell could not recover expert witness fees under Government Code section 12965 by filing a memorandum of costs, but instead had to file a timely motion for expert fees. The trial court rejected that argument and awarded Mitchell $64,356 in expert witness fees.

Government Code section 12965, subdivision (b), gives trial courts discretion to award attorneys' fees and costs, including expert witness fees, to the prevailing party in an action under FEHA. (See *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 115 [under Government Code section 12965, "a prevailing *plaintiff* should ordinarily receive his or her costs and attorney fees unless special circumstances would render such an award unjust"].) The Judicial Council has established rules and procedures for claiming and contesting prejudgment costs. (See Code Civ. Proc., § 1034, subd. (a); Cal.

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[19] Local 721 also argues counsel for Mitchell inappropriately appealed to the jury to punish Local 721 for its litigation conduct, which according to Local 721, explains the "high punitive damages award in the absence of adequate supporting evidence." There was adequate supporting evidence, however, for the punitive damages award, and the award as adjusted is not excessive.

Rules of Court, rule 3.1700.) California Rules of Court, rule 3.1700(a)(1) states in part: "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment . . . , or within 180 days after entry of judgment, whichever is first." The rule does not specify whether "costs" are limited to those a party is entitled to "as a matter of right" under Code of Civil Procedure section 1032, subdivision (b),[20] or include discretionary costs, such as fees for expert witnesses not ordered by the court. Local 721 makes the former contention and argues prevailing plaintiffs must file a noticed motion to recover discretionary costs like expert witness fees.

In *Anthony* the prevailing plaintiff filed a timely memorandum of costs that did not seek expert witness fees and a noticed motion seeking an award of expert witness fees under FEHA. (*Anthony*, *supra*, 166 Cal.App.4th at p. 1014.) The defendant opposed the motion, contending among other things it was untimely because the plaintiff filed the motion more than 15 days after notice of entry of judgment. The trial court rejected that argument and awarded the plaintiff expert witness fees. (*Ibid*.)

The court in *Anthony* affirmed, stating: "It appears to us that rule 3.1700 applies only to the items 'allowable as costs' that are listed in subdivision (a) of section 1033.5—that is, those cost items to which a party is entitled 'as a matter of right.' (§ 1032, subd. (b).) In our view, this construction is the most sensible

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[20] Code of Civil Procedure section 1033.5 lists "allowable" costs to include "[f]ees of expert witnesses ordered by the court," but not other expert fees. (Code Civ. Proc., § 1033.5, subd. (a)(8).)

interpretation of rule 3.1700, which also requires the clerk of the court to 'immediately enter the costs on the judgment' if the opposing party does not move to strike or tax costs." (*Anthony*, *supra*, 166 Cal.App.4th at pp. 1015-1016.) The court explained: "[C]osts such as expert witness fees not ordered by the court . . . may not be 'immediately enter[ed]' by the clerk, and instead necessitate a decision by the trial court, exercising its discretion. In short, there would be no point in requiring a party to include in its memorandum of costs those cost items which are awarded in the discretion of the court and thus *cannot* be entered by the clerk of the court under rule 3.1700." (*Anthony*, at p. 1016.)

The court's holding in *Anthony*, however, does not preclude a prevailing plaintiff from recovering expert witness fees through a memorandum of costs where, as here, the trial court exercises its discretion to award them. The court in *Anthony* held only that a prevailing plaintiff also may recover such costs through a noticed motion. (See *Anthony, supra*, 166 Cal.App.4th at p. 1016 ["We therefore conclude, as did the trial court, that [the plaintiff] was not required to claim her expert witness fees within the 15-day time constraint imposed by rule 3.1700 for filing a memorandum of costs."].) Indeed, the court in *Anthony* stated the plaintiff could have asked the trial court to extend the time for serving and filing the cost memorandum and requested expert witness fees in that document. (*Anthony*, at p. 1016, fn. 2.) The court also observed that, because "the Judicial Council has not gotten around to specifying a procedure for expert fees, similar to that provided for attorney's fees," California Rules of Court, rule 3.1700 "should not be a ground for disallowing the claim in this situation." (*Anthony*, at p. 1016, fn. 3; see *ibid.* ["'California

Rules of Court, rule 1.5(a) says the rules "must be liberally construed to ensure the just and speedy determination of the proceedings that they govern."'"].)

Following *Anthony* and applying California Rules of Court, rule 1.5(a), we similarly conclude California Rules of Court, rule 3.1700 is not a ground for disallowing Mitchell's claim for expert witness fees, which the trial court granted in its discretion. Local 721 does not contend the trial court abused its discretion in doing so.

DISPOSITION

The judgment is modified to award punitive damages in the total sum of $4,264,005.09. As modified, the judgment and post-judgment order are affirmed. Mitchell is to recover his costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.