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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

JAMES ABBATE, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Appellant.	B245481 (Los Angeles County Super. Ct. No. BC448138)

APPEALS from the orders and judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

Law Offices of Gregory W. Smith and Gregory W. Smith; Benedon & Serlin, LLP, Douglas G. Benedon and Gerald M. Serlin for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, and Paul L. Winnemore, Deputy City Attorney for Defendant and Appellant.

Plaintiff James Abbate, a sergeant with the Los Angeles Police Department, filed a whistleblower retaliation action against his employer, defendant City of Los Angeles. (Lab. Code, § 1102.5, subd. (b).) The jury found in Abbate's favor and awarded him damages of over $1 million. The trial court denied the City's motion for judgment notwithstanding the verdict, but granted its motion for new trial on the grounds of insufficient evidence and excessive damages. (Code Civ. Proc., § 657.)

Both parties appealed. The City challenges the denial of its motion for judgment notwithstanding the verdict; Abbate seeks to reverse the new trial order and reinstate the judgment. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

By all accounts, Abbate, who held the rank of sergeant 2 and served as assistant watch commander of the West Los Angeles station, established an exemplary service record over his 28-year career. He received numerous commendations, including a Police Star for entering a burning building to rescue a trapped occupant. Before 2010, the only blemish on his record consisted of a minor traffic accident in 1991 that resulted in an admonition.

In late September 2009, Abbate enrolled in the DROP[1] program after concluding that his career was over because he had reported his superior, Captain De La Torre, for two Vehicle Code violations. Abbate contends that in 2010, De La Torre retaliated against him by sustaining two citizen-initiated complaints—which we refer to as the Getty complaint and the Long Beach complaint—that were meritless. Abbate claims he was forced by fear of retaliation to enter the DROP program two years before he could earn his maximum pension benefits.

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[1] DROP is the acronym for Deferred Retirement Option Plan. The DROP program allows qualifying police officers to retire for purposes of their pensions while continuing to work for up to five years. During the five-year period, the employee's pension accrues in a separate account that is not accessible until the employee terminates his or her employment.

According to Abbate, his problems began in early September 2009, when the West Los Angeles station received an internal memorandum from the Department's motor transport division inquiring about a particular vehicle that was assigned to the West Los Angeles station, with a certain license plate number, that was using the 91 express lanes without the transponder device that is necessary for the automatic payment of tolls. An officer at the West Los Angeles station, Sergeant Brunson, was given the "project" of identifying the officer who was assigned to the vehicle in question. Brunson called the central facilities division and ascertained that the vehicle was assigned to De La Torre, the patrol captain for the West Los Angeles station.[2]

Brunson testified that he returned the completed project to Lieutenant Leslie, who placed the paperwork in a manila envelope and said "I wish my fingerprints weren't even on here." Brunson also discussed the matter with Abbate, his immediate supervisor. A few days later, Brunson told Abbate that someone had seen De La Torre removing duct tape from the front license plate of his vehicle. When Brunson later noticed that De La Torre's car was missing its front license plate, he told Abbate about the missing plate and took photographs of the vehicle. Although Abbate told Brunson that he would take appropriate action, Brunson was not aware what, if anything, Abbate did with the information concerning the duct taping and removal of the vehicle's license plate.

Abbate testified that after he became aware of De La Torre's possible violation of the toll road statute, he reported the possible violation to Leslie during the first week of September 2009. When Abbate later learned about the duct taping and removal of the license plate on De La Torre's vehicle, he sent Terry Hara, then Deputy Chief of the West Bureau, an email stating that "a possible allegation of serious misconduct might have been concealed and not sent through the appropriate channels." By reply email, Chief Hara asked Abbate to call him. Abbate called Chief Hara twice, but was not able to

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[2] Two of the highest ranking officers at the West Los Angeles station are the area captain—who is in charge of the entire station and oversees matters concerning service, personnel, budget, crime suppression, traffic, and quality of life—and the patrol captain. Captain Nathan was area captain and Captain De La Torre was patrol captain during the events of this case.

speak with him. Abbate testified that he was trying to tell Chief Hara "that the toll road incident . . . and also the duct tape incident" had occurred because he was concerned the information was not being handled properly. Abbate explained that his concern was based on what "Lieutenant Leslie had said to Sergeant Brunson." Although Abbate did not elaborate further due to the sustaining of a hearsay objection, the jury heard Brunson testify to Leslie's statement, made upon receiving Brunson's report concerning De La Torre, "God, I wish my fingerprints weren't even on here."

Abbate testified that he reported the duct tape incident to Leslie, but could not recall whether he did so before September 26, 2009. Leslie, however, testified that Abbate *never* told him about the duct taping or removal of the license plate on the vehicle. Leslie stated that after he received the completed project concerning the toll road violation from someone, probably Abbate, he turned the project over to De La Torre, his immediate supervisor.

During this same period, the Getty Center filed a citizen's complaint against Abbate that originated from a noise disturbance call the Getty had made on the evening of September 10, 2009. When the noise disturbance call was made, there was confusion on the part of the West Los Angeles station as to whether the Getty was in Malibu, which is under the Los Angeles County Sheriff's jurisdiction, or Pacific Palisades, which is under the Department's jurisdiction. The Getty, which is in Pacific Palisades, had received the telephone number for the watch commander from one of Abbate's superiors. Getty employee Raj Kumar, who called that number to report the noise disturbance, claims Abbate reprimanded him for calling that number and told him to call the sheriff's department or 911. After Kumar explained that the Getty was located in the Department's jurisdiction, Abbate agreed to send a patrol car to handle the noise complaint. However, the communications center diverted the patrol car to other more urgent calls. The communications center placed a follow-up call to the Getty, but canceled the patrol car after being told by someone at the Getty that police were no longer needed. Kumar, who was unaware the Getty had canceled the call, complained to

the station that Abbate had been discourteous. Kumar later changed his complaint to state that Abbate had failed to send a unit to handle the noise complaint.

Bob Combs, the Getty's director of security, also complained to Nathan that Abbate had been rude. Nathan instructed an aide to initiate a citizen's complaint against Abbate, and directed De La Torre to investigate the matter. Nathan testified that at the time, she was unaware of the allegation that De La Torre had violated the toll lane statute, which she did not learn about until sometime between November 2010 and February 2011.

On September 11, 2009, Abbate met with De La Torre to discuss the Getty complaint. De La Torre told Abbate that he did not like the way Abbate was handling the watch commander assignment. When Abbate denied being discourteous, De La Torre became angry. De La Torre clenched his fists, stood up, and yelled, "I don't care about discourtesy."

The September 11 meeting convinced Abbate that he was being targeted by De La Torre for retaliation and his career was over. Abbate believed the Getty incident was very minor and the true cause of De La Torre's anger was that he had reported him for the toll road violation. Abbate testified that although he had "no evidence that Lieutenant Leslie told Captain De La Torre that [he was] the one [who] reported that the license plate was his," Abbate was "sure" that Leslie had related this information to De La Torre.

Abbate testified that after the September 11 meeting made him realize that De La Torre was targeting him for retaliation, he feared being downgraded, demoted, or terminated. He testified that in order to protect his pension, he signed up for the DROP program on September 28, 2009, two years before he would have reached the maximum pension level of 70 percent.

After enrolling in the DROP program, Abbate continued working as assistant watch commander at the West Los Angeles station. He did not suffer any loss in rank or pay grade.

In June 2010, De La Torre and Nathan sustained the Long Beach complaint, which was filed in 2009 (prior to the toll lane incident) by Jason Lehman of the Long Beach

Police Department. Lehman was unhappy with Abbate's handling of a possible domestic violence crime that he had brought to Abbate's attention at the suggestion of a friend, Richard Ludwig, an officer on the staff of the Department's Chief of Police. When Ludwig learned that Abbate had not sent any officers to investigate the possible domestic violence crime, Ludwig called Abbate and found him to be very short and curt. Ludwig reported the matter to Nathan, who initiated a citizen's complaint against Abbate (the Long Beach complaint) and sent detectives from the West Los Angeles station to locate the possible domestic violence victim. As a result of their investigation, the victim was located and a suspect was arrested that same day.

Nathan testified that when she initiated the Long Beach complaint against Abbate, she was unaware of the toll lane violation allegations against De La Torre. She further testified that it was De La Torre who persuaded her that the appropriate penalty for the Long Beach complaint should be a conditional official reprimand, rather than the harsher penalty of a four-day suspension and demotion that she wanted to impose.

In August 2010, De La Torre and Nathan sustained the Getty complaint, which resulted in Abbate's second conditional official reprimand in a short period. Abbate attributed both sustained allegations to retaliation for reporting De La Torre's toll lane violations.

Abbate sued the City for retaliation in violation of Labor Code section 1102.5,[3] seeking economic damages (including the decrease in his pension resulting from his entry into the DROP program) and for emotional distress. In addition to the sustained complaints, Abbate argued the retaliation included a temporary reassignment to the day shift, a comment card for his failure to report a 2:00 a.m. date rape call to De La Torre, and an email concerning a Fair Labor Standard Act violation. Abbate claimed he was physically and emotionally devastated by the retaliatory conduct, which caused him to

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[3] Unless otherwise indicated, all further statutory references are to the Labor Code. We note that section 1102.5 was rewritten in 2013. Our decision is based on the version of the statute in effect during the events in question.

suffer severe anxiety and depression that required hospitalization, psychiatric care, and medication.

The jury found in favor of Abbate and awarded him $111,224 for future economic damages, which corresponded to his expert's calculation of the decrease in pension resulting from his early entry into the DROP program. The jury also awarded Abbate $475,000 in past non-economic damages and $434,000 in future non-economic damages, for a total recovery of $1,020,224.

The City moved for judgment notwithstanding the verdict, which was denied, and a new trial, which was granted. In its written ruling, the trial court granted the City's motion for new trial on three distinct grounds. First, "the evidence presented at trial was insufficient to support a finding that plaintiff engaged in protected activity and was a whistleblower when he reported De La Torre's toll violation to his employer. The City was already aware of the [toll violation that was] reported from the 91 Express Lanes in the 8/3/09 notice. The City assigned a project to West LA to identify who was assigned the vehicle when the violations occurred. Abbate could not be a whistleblower and report a legal violation of a law that his employer was already aware of and was investigating."

"In addition, plaintiff failed to present evidence at trial of the City's retaliatory animus when it disciplined him for two citizen-initiated complaints. Plaintiff offered only his unreasonable subjective belief that De La Torre was retaliating against him. No objective proof was offered. No witness agreed that these two minor penalties were 'career-enders' as plaintiff sought to portray them. The City offered its legitimate, non-retaliatory reason that plaintiff was disciplined because he neglected his duty on two occasions. Further, De La Torre did not have the sole power to discipline the plaintiff."

Finally, the "future economic damages of $111,224 are excessive because Abbate voluntarily entered DROP on September 28, 2009. . . . Abbate's decision to retire was his voluntary decision. The record is clear that Abbate did not lose any wages. . . . The past non-economic damages of $457,000 and the future non-economic damages of $434,000 are also excessive."

These timely appeals followed.

DISCUSSION

In order to establish a prima facie case of whistleblower retaliation, the plaintiff must show that (1) he engaged in a protected activity, (2) he was subjected to an adverse employment action, and (3) there is a causal link between the protected activity and the adverse employment action. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287–288.)

Section 1102.5 protects an employee's disclosure of certain violations of law. Subdivision (b) of the statute provides: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

I

In denying the City's motion for judgment notwithstanding the verdict, the trial court concluded the evidence was sufficient to support a finding that the Department had retaliated against Abbate in violation of section 1102.5. The City challenges this ruling, arguing the evidence was insufficient as a matter of law to support a finding that Abbate is entitled to protection under subdivision (b) of the statute. We are not persuaded.

A motion for judgment notwithstanding the verdict may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 575.) According to Abbate's testimony, he made two reports to his supervisor that qualified for protection under section 1102.5. In the first week of September 2009, he reported to Leslie that the vehicle involved in the possible toll lane violation was assigned to De La Torre. Later that month, he told Leslie that De La Torre had removed or concealed the license plate on his vehicle. Abbate contends that because he disclosed De La Torre's previously unknown violations of the Vehicle Code, he is entitled to the protection of section 1102.5. The City disagrees,

arguing that neither report fell within the statute because Abbate was simply relaying information given to him by Brunson.

The City cites *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832 for the proposition that section 1102.5 does not protect an employee who simply repeats or relays information to his or her employer. However, that was not the court's holding. The court simply stated that where "the supervisor is *not* the alleged wrongdoer (i.e., the supervisor's own conduct is not the asserted wrongdoing that is being disclosed to that supervisor), it cannot categorically be stated that a report to a supervisor in the normal course of duties is not a protected disclosure." (*Id.* at p. 858.) It did not exclude the possibility that, under appropriate circumstances, a disclosure made to a supervisor who is not the alleged wrongdoer might qualify for protection under section 1102.5.[4] As our colleagues in Division Three explained in *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 (*Hager*), the court in *Mize-Kurzman* "never considered whether a second employee who disclosed the same unlawful activity that Mize-Kurzman disclosed would or would not have been protected under section 1102.5(b)." (*Id.* at p. 1549.) We find *Hager's* analysis and conclusion—that the federal cases cited in *Mize-Kurzman* do not support a "'first report' rule" (*id.* at pp. 1550–1552)—to be well-reasoned and adopt it as our own.

The City also argues that whistleblower status is not afforded to a government employee who simply reports up the chain of command suspected illegal activity that was previously disclosed by another employee. This argument is based on the statutory language, "[a]n employer may not retaliate against an employee for *disclosing* information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information *discloses* a violation of state or federal

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[4] The current version of Labor Code section 1102.5, subdivision (b) protects a government employee who discloses a violation to a supervisor or another employee who has the authority to investigate, discover or correct the violation or noncompliance, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute.

statute, or a violation or noncompliance with a state or federal rule or regulation." (§1102.5, subd. (b); italics added.)

The verb "disclose" is not defined in the statute. The City contends that to disclose means to reveal something that is hidden and unknown. (Citing *Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 858–859.)

The statute, however, specifically provides that "[a] *report* made by an employee of a government agency to his or her employer *is* a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b)." (§ 1102.5, subd. (e), italics added.) Because a "report does not necessarily reveal something hidden or unknown," a government employee's "report" need not reveal something hidden or unknown in order to qualify as a "disclosure of information" within the meaning of the statute. (*Hager*, *supra*, 228 Cal.App.4th at p. 1549–1550.)

The City argues that subdivision (e) of section 1102.5 does not abrogate subdivision (b)'s disclosure requirement in the case of a government employee. The City contends that subdivision (e), when properly construed, confers whistleblower status and protection to a government employee who reveals, uncovers, or reports previously hidden and unknown information directly to his employer, without imposing any requirement that the information be reported first to another government or law enforcement agency. We find nothing in the statute that supports the City's interpretation.

As we have discussed, Abbate testified that he attempted to report the toll road and duct tape incidents to Chief Hara because, based on what "Lieutenant Leslie had said to Sergeant Brunson," he feared that Brunson's report had not been forwarded up the chain of command. This testimony provided substantial evidence that Abbate's report to Leslie constituted a disclosure of information that was not known by higher officers. But in any event, because Abbate is a government employee, his report qualified as a protected disclosure of information under section 1102.5, subdivision (e) regardless of whether the information was hidden or unknown.

The City has not cited any applicable authority in support of its contention that, as a matter of law, Abbate was not engaged in a protected activity when he reported that De

La Torre was involved in a possible toll lane violation. To adopt the City's narrow construction of the statute would undermine the strong public interest that "workplace 'whistleblowers,' . . . may without fear of retaliation report concerns regarding . . . illegal conduct." (*Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1123.) We therefore affirm denial of the City's motion for judgment notwithstanding the verdict.

II

In granting the City's motion for new trial, the trial court concluded, after weighing the evidence, that a jury could reasonably find that Abbate did not qualify for protection under section 1102.5, and he did not suffer retaliation for reporting De La Torre. The trial court also found that the damages awarded by the jury were excessive. On appeal, Abbate contends the trial court's findings are not supported by the record, and the order granting a new trial must be reversed. Although we conclude Abbate qualified as a whistleblower, we find no basis to overturn the trial court's discretionary ruling to grant a new trial.

An order granting a motion for new trial "'must be sustained on appeal unless the opposing party demonstrates that no reasonable trier of fact could have found for the movant on [the trial court's] theory.' [Citation.]" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 409 (*Lane*).) When ruling on a motion for new trial, the trial court "'sits . . . as an independent trier of fact,' [citation] [and its] factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Id*. at p. 412.) "'The presumption of correctness normally accorded on appeal to the jury's verdict is *replaced* by a presumption *in favor* of the [new trial] order.' [Citation.]" (*Id.* at p. 416.)

"The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for

granting the new trial, and there must be substantial evidence in the record to support those reasons. [Citation.]" (*Lane*, *supra*, 22 Cal.4th at p. 412.) An order granting a new trial on the ground of excessive damages is presumed correct, and must be affirmed unless no reasonable fact finder could have concluded damages were excessive. (*Ibid.*)

Applying the abuse of discretion standard of review,[5] we disagree with the trial court's finding that Abbate was not a whistleblower. Unless an exemption applies, driving in the express lane without an electronic toll payment device is a violation of state law. (Veh. Code, § 23302.) By its terms, section 1102.5 protection is not limited to the first disclosure of a violation of law. Even assuming De La Torre's possible violation was already known to the Department, there is no legal basis for denying the protection afforded by the statute. (§ 1102.5, subd. (e); see *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77 [section 1102.5 reflects a broad policy interest in encouraging whistleblowers to report violations of law without fear of retaliation].)

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[5] The parties contend this standard does not apply. They cite *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veteran Affairs* (1998) 67 Cal.App.4th 743 for the proposition that where a trial court grants a new trial motion after indicating that it will never allow a jury verdict in favor of the prevailing party to stand, the trial court has misused the new trial motion as a de facto dispositive motion, and in such circumstances, the standard of review on appeal is not the deferential abuse of discretion standard, but the less deferential substantial evidence standard that applies when reviewing a judgment notwithstanding the verdict.

That is not the situation before us. The record does not support a finding that the trial court misused the motion for new trial, or that the order granting the motion for new trial was the equivalent of a judgment notwithstanding the verdict. To the contrary, the trial court expressly denied the motion for judgment notwithstanding the verdict. And it granted the motion for new trial on three distinct grounds, including the insufficiency of the evidence to support a finding of retaliatory animus. Even if the trial court erred in concluding Abbate was not a whistleblower, it expressly granted the motion for new trial on the *additional* ground that the evidence failed to show he was the victim of retaliation. We therefore evaluate the new trial ruling under the abuse of discretion standard.

For the reasons previously discussed, we conclude that by reporting De La Torre's possible violation of the toll lane statue, Abbate engaged in a protected activity.[6] Existing case law, including *Mize-Kurzman v. Marin Community College Dist.*, *supra*, 202 Cal.App.4th 832, does not compel a contrary result.

In order to prevail on a retaliation claim, the plaintiff must show there was a causal link between the protected activity and the adverse employment action. (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at pp. 287–288.) In this case, the record contains credible evidence that the Department would have sustained the Getty complaint regardless of Abbate's allegations against De La Torre. It was Nathan, not De La Torre, who initiated the investigation of the Getty complaint, and according to her testimony, she was unaware of any allegations against De La Torre when the complaint was sustained in August 2010. She testified that she did not learn about De La Torre's alleged misconduct until sometime between November 2010 and February 2011. Given her lack of knowledge concerning De La Torre's misconduct, Leslie's denial of receiving the second report, and the lack of direct evidence concerning De La Torre's knowledge of Abbate's allegations against him, a trier of fact could reasonably conclude the Getty complaint was sustained for legitimate reasons.

The same is true for the Long Beach complaint, which Nathan initiated in July 2009, before becoming aware of De La Torre's alleged misconduct. Nathan expressly denied retaliating against Abbate, and stated that she would have selected a stiffer penalty than the conditional reprimand that De La Torre persuaded her to impose. Lieutenant Burditt, who investigated the Long Beach complaint, testified that although he did not believe any discipline was warranted, Abbate should have assigned a detective to locate the possible domestic violence victim. When Nathan sent detectives to locate the victim

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[6] The duct taping and removal of the license plate is a different matter, because there was conflicting evidence as to whether Abbate reported that information to Leslie. Although Abbate testified that he made such a report, Leslie testified to the contrary. We assume for purposes of this discussion that the trial court found that Abbate did not report the duct taping and license plate removal information to Leslie.

shortly after the complaint was brought to her attention, the victim was readily found and a suspect was arrested that same day.

As to the other claims of alleged retaliation—Abbate's temporary reassignment to the day shift, the comment card for failing to report a 2:00 a.m. date rape call to De La Torre, the email about a fair labor standard act violation—we conclude the trial court reasonably found the evidence was insufficient to sustain a finding of retaliation in violation of section 1102.5. The reassignment to the day shift lasted for only one duty period; comment cards are placed in the officer's personnel file and purged after two years; and the question concerning a possible Fair Labor Standard Act violation was cleared in Abbate's favor by a subsequent email.

Because the trial court was entitled to weigh the evidence and draw its own reasonable inferences, it did not abuse its discretion by granting the City a new trial on liability, which will necessarily require a new trial on damages.

DISPOSITION

The order denying the City's motion for judgment notwithstanding the verdict is affirmed. The order granting the City's motion for a new trial is also affirmed. The City's protective cross-appeal from the judgment is dismissed as moot. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

EDMON, J*

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