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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOSE SALAZAR, Plaintiff and Appellant, v. LAKESHORE EQUIPMENT COMPANY, Defendant and Respondent.	B270561 (Los Angeles County Super. Ct. No. BC552837)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Affirmed.

Robert Stanford Brown; Esner, Chang & Boyer, Holly N. Boyer, Shea S. Murphy and Joseph S. Persoff, for Plaintiff and Appellant.

Jackson Lewis, John M. Remy, Sherry L. Swieca and Adam Y. Siegel for Defendant and Respondent.

Jose Salazar sued his former employer, Lakeshore Equipment Company, doing business as Lakeshore Learning Materials, for retaliation and failure to prevent retaliation in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The jury returned a verdict in favor of Lakeshore. On appeal Salazar contends the trial court abused its discretion by excluding evidence that Lakeshore had fired another employee for making similar complaints. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Salazar's Employment with Lakeshore*

Lakeshore hired Salazar in 1999 as a mechanic in its distribution center and in 2007 promoted him to shop foreman, a supervisory position. During most of Salazar's time as foreman, he reported directly to his brother, Carlos Salazar, his immediate supervisor. In January 2013 Lakeshore terminated Carlos Salazar's employment; Salazar began reporting to Lakeshore's vice-president of distribution, Richard Soto. Salazar's relationship with Soto as his supervisor was problematic. Salazar was demoted to mechanic in May 2013 and terminated in November 2013.

2. *The Evidence at Trial*

a. *Salazar's theory of the case and evidence*

Salazar's theory of the case was that Soto, whose tenure with Lakeshore spanned more than 30 years, was friendly with Bo Kaplan, Lakeshore's chief executive officer, and very close friends with Kelli Miller, Lakeshore's vice-president of human resources. When Salazar reported to each of them that Soto had made racist and sexually demeaning comments creating a hostile

workplace environment, Lakeshore retaliated by demoting him and then terminating his employment.[1]

Salazar testified Soto routinely used offensive language, called women "bitches" and "fucking whores" and referred to African-Americans with the "N-word." Salazar did not report Soto's behavior at first. However, when Soto blamed Salazar and his staff for a malfunctioning conveyor belt, called them all "motherfucking faggots" and purported to fire all of them on the spot, Salazar claimed he could no longer keep silent.

On May 1, 2013, the day after the conveyor belt incident, Salazar told Kaplan about Soto's tantrum the previous evening and questioned whether he and his staff still had their jobs. During this meeting Salazar also reported Soto's practice of making racist and sexually demeaning comments to, and about, employees. Kaplan expressed great concern about Salazar's disclosures. He assured Salazar he was not fired and the matters he identified would be investigated promptly.

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[1] In addition to his FEHA retaliation claims, Salazar's complaint included claims for age discrimination in violation of FEHA, intentional infliction of emotional distress and whistleblower retaliation in violation of Labor Code section 1102.5. At the beginning of trial Salazar voluntarily dismissed his claim for age discrimination. During trial a great deal of time was spent on evidence relating to Salazar's whistleblower/Labor Code allegation that Salazar was demoted and then terminated for reporting that Soto had falsified purchase orders and stolen materials from Lakeshore. However, by the time the case was submitted to the jury with a special verdict form, the only remaining issue was whether Salazar had been demoted and/or terminated for reporting that Soto had created a hostile work environment by making racist and sexist comments in the workplace.

At Kaplan's direction Miller immediately began interviewing mechanics in the shop asking them about morale under Soto. Kaplan and Salazar encouraged the mechanics to be candid. In his interview with Miller Salazar repeated the accusations he had made against Soto during his earlier meeting with Kaplan. After the interviews were complete, Lakeshore demoted Salazar from foreman to mechanic, albeit without a cut in pay. Emotionally exhausted and suffering from anxiety and high blood pressure, Salazar took medical leave. When he returned in August 2013, his temporary supervisor gave him menial tasks to perform. In November 2013, after a permanent shop foreman was hired, Salazar was terminated.

b. *Lakeshore's theory of the case and evidence*

Lakeshore painted a very different portrait of the events leading to Salazar's demotion and termination. Kaplan insisted Salazar met with him only for a few minutes in May 2013 to give him "his side of the story" about the conveyor belt incident and to determine whether he or any of his staff had been fired. Kaplan promptly called Soto, who assured him no one had been fired. Kaplan conveyed that information to Salazar. Concerned about the incident with the conveyor belt and the morale of the department, Kaplan immediately instructed Miller to begin an investigation and personally encouraged the mechanics to be candid.

During these interviews the mechanics told Miller the relationship between Soto and Salazar after Soto became supervisor was extremely tense and made their work environment very difficult. Morale was low. Soto was hot-tempered and gave preferential treatment to his son, Richie Soto, who was not a skilled mechanic. Salazar, they said, was a nice

guy but lacked leadership skills. According to Miller, the mechanics believed they lacked direction under Salazar and many times did not know what was expected from them or how to proceed.

Following these interviews Miller and Kaplan decided new leadership in the shop was necessary. Lakeshore removed Soto as supervisor and reduced his annual pay by 20 percent. (At trial Salazar said he had not known Soto's pay had been cut.) Salazar was demoted from foreman to mechanic, but without a reduction in pay. Miller explained the purpose of that employment action was to provide leadership for the mechanics, not to punish Salazar. Kaplan also transferred Richie Soto from his father's area of responsibility; Richie soon left the company. Salazar, upset by the demotion, took a medical leave.

Kaplan and Miller both testified that in their May 2013 meetings with Salazar he did not report that Soto had made racist and sexist comments to or about other employees. In fact, the first time either had heard those complaints and other examples of Soto's alleged wrongdoing was when Salazar raised them in August 2013 during his deposition in his workers' compensation case. Lakeshore investigated and determined Salazar's accusations were without merit.

In October 2013 Lakeshore hired an outside manager, John Stieber, as permanent shop foreman. Stieber believed the department was in disarray and created exacting job classifications and descriptions. Stieber also began identifying employees who were unable or unwilling to fulfill the requirements of their job classification. Stieber identified three such individuals, one of whom was Salazar. According to Stieber, Salazar lacked basic skills for the position. He cited three

examples of Salazar's deficiencies as a mechanic. All three individuals he recommended for termination were fired. (Soto was also asked to leave the company at or near the same time. He immediately took medical leave and never returned to work.)

Lakeshore also presented testimony of the individuals Salazar had identified at trial as being subjected to Soto's racial and sexually demeaning remarks. Each testified that Soto had used offensive language generally, but not in a racially or sexually demeaning way. He did not use the N-word or call anyone a bitch or a fucking whore. According to these employees, the specific incidents to which Salazar testified never occurred.

3. *The Special Verdict*

In a special verdict the jury found Salazar had not made complaints to Kaplan and Miller regarding sexist and/or racist remarks on May 1, 2013; Salazar had made complaints about sexist and/or racist remarks to Lakeshore in August 2013; and those complaints were not a substantial motivating reason for Lakeshore's decision to terminate his employment. The jury returned a verdict in favor of Lakeshore.

DISCUSSION

1. *Standard of Review*

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1120; *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) We may reverse only if the appellant demonstrates the ruling was "'so irrational or arbitrary that no reasonable person could agree with it.'" (*Sargon Enterprises Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773; accord, *People v. McDowell* (2012) 54 Cal.4th 395, 430.)

2. *Salazar Has Not Shown the Trial Court Committed Prejudicial Error in Limiting the Testimony of a Former Lakeshore Employee*

a. *Relevant Proceedings*

Gildardo Ochoa worked for Lakeshore as Salazar's assistant until Lakeshore fired him on April 4, 2013. At trial Ochoa testified Soto had made racist and sexually demeaning comments "all the time" to or about people in the workplace. He also testified that Soto demonstrated favoritism toward his son, falsified purchase orders and time sheets and stole materials from the company for his own personal use. In addition, Ochoa explained, Soto "retaliated" against him when he questioned Soto about purchase orders and turned down Soto's offer for a promotion to night supervisor.

During direct examination Ochoa also testified he had complained about Soto to human resources. Asked by Salazar's counsel to describe the nature of that complaint and the reasons Lakeshore gave him for terminating his employment, defense counsel objected on relevance grounds. The trial court sustained objections to both questions and asked Salazar's counsel to make an offer of proof. Salazar's counsel stated he wished with Ochoa's testimony to establish a common scheme or plan on behalf of Lakeshore: Complain about Soto, and you will be fired.

The trial court sustained the objection under Evidence Code section 352. In the colloquy with counsel that followed, the court explained its ruling, expressing concern that the trial, already delayed, would devolve into a minitrial on the "he said/it said" reasons for Ochoa's termination. Salazar's counsel did not address those concerns or argue the pattern could be established with as little as two or three questions. He also did not indicate

whether Ochoa's alleged complaint about Soto to human resources pertained to FEHA-protected activity.

b. *Salazar failed to demonstrate the court's evidentiary ruling, if error, was prejudicial*

Salazar contends the court erred in limiting Ochoa's testimony because evidence that a third-party employee was the target of retaliation for engaging in the same conduct, sometimes referred to as "me too" evidence, is relevant and admissible to show the employer's retaliatory intent. (Cf. *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 113 (*Pantoja*) [evidence of prior acts of sexual harassment against other employees—"me too" evidence—was relevant and compelling to prove employer's motive in discharging a plaintiff and to rebut defense evidence of legitimate business reason for the adverse employment action; court abused its discretion in excluding it under Evid. Code, § 352]; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 762 (*Johnson*) ["me too" evidence of discrimination proffered by other employees created triable issue of material fact on summary judgment and would be admissible at trial to prove employer's discriminatory intent].)

To prove actionable retaliation prohibited by FEHA, Salazar was required to show he had engaged in activity he reasonably and in good faith believed to be protected under FEHA and suffered an adverse employment action as a result of that protected activity. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043; *Lewis v. City of Benecia* (2014) 224 Cal.App.4th 1519, 1535.) Although Salazar's offer of proof did not indicate Ochoa's complaints about Soto involved FEHA-protected activity (cf. *Pantoja, supra,* 198 Cal.App.4th at p. 113 ["me-too" evidence related to FEHA protected activity]; *Johnson,*

supra, 173 Cal.App.4th at p. 762 [same]),[2] Salazar insists for purposes of proving a claim of retaliation the nature of Ochoa's complaint to human resources need not have been FEHA-related. If Ochoa had complained about Soto for any reason and was fired as a result, Salazar contends, that evidence would have bolstered his case that his FEHA-related complaint to Lakeshore was met with a similar response.

Even if Salazar is correct that in this context evidence was admissible that another employee was fired because he had complained to human resources about Soto, regardless of the nature of the complaint, the trial court permitted Salazar to introduce most of Ochoa's "me too" testimony: Ochoa testified he had complained about Soto to human resources and he was then fired. He also testified he had been the target of retaliation during his problematic interactions with Soto. Salazar, Ochoa's supervisor, also testified later at trial that Ochoa was fired soon after reporting to human resources that Soto was stealing from the company. When the court sustained Lakeshore's objections to questions relating to the company's explanation for Ochoa's termination, however, Salazar made no offer of proof as to what Ochoa would have said had the court permitted him to respond.

Perhaps Lakeshore told Ochoa he was terminated for complaining about Soto, although that seems doubtful.

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[2] In fact, there is every reason in this record to conclude Ochoa's complaint did not involve FEHA-protected activity. Ochoa testified he had numerous conflicts with Soto relating to Soto's falsification of purchase orders, use of company employees to assist him in building his house on company time, exhibiting favoritism to his son and "retaliating" against Ochoa after he turned down Soto's offer of a promotion.

Alternatively, Lakeshore may have given him an explanation similar to that it gave Salazar or, possibly, no explanation at all. We do not know what Ochoa's response would have been because no offer of proof as to that limited evidence was made at trial. As a result, Salazar cannot show the court's narrow ruling, even if erroneous, compels reversal. (See Evid. Code, § 354, subd. (a) [to gain reversal for improper exclusion of evidence on appeal, the appellant must show "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means"]; *People v. Anderson* (2001) 25 Cal.4th 543, 580-581 [the rule that a judgment may not be reversed for the erroneous exclusion of evidence unless the substance, purpose and relevance was made known to the court "is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice"]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176 [offer of proof must consist of material that is admissible and be sufficiently specific so that trial court and reviewing court can knowledgeably rule on the evidentiary issue presented]; *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 168 [to preserve objection and demonstrate prejudice, offer of proof must contain "precise testimony" that would have been presented].)[3]

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[3] Although an offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of excluded evidence when the trial court has declared "an entire class of evidence" inadmissible "or the trial court has clearly intimated that it will receive no evidence of a particular type or class, or upon a particular issue" (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 91), the court's limited ruling under Evidence Code section 352 did not result in any

DISPOSITION

The judgment is affirmed. Lakeshore is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

BENSINGER, J.*

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categorical exclusion of evidence or intimate that an offer of proof would be futile or unreasonable. To the contrary, the court expressly requested an offer of proof at trial, and Salazar's counsel limited his offer to the "me too" aspect of the complaint to human resources, evidence that was ultimately elicited at trial.

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