Filed 3/9/18 Guia v. Smart & Final Stores CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LORENA GUIA, Plaintiff and Appellant, v. SMART & FINAL STORES, LLC, Defendant and Respondent.	B276435 (Los Angeles County Super. Ct. No. BC554278)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

The Mirroknian Law Firm, Reza Mirroknian and Hider Al-Mashat for Plaintiff and Appellant.

Jackson Lewis, Theresa M. Marchlewski, Sherry L. Swieca and Christopher M. Habashy for Defendant and Respondent.

Plaintiff and appellant Lorena Guia appeals a judgment in favor of defendant and respondent Smart & Final Stores, LLC (S&F), her former employer.

The issues presented include whether the trial court erred in determining that certain claims were time-barred, and whether it abused its discretion in limiting trial testimony, in limiting rebuttal evidence, and in excluding an exhibit.

As discussed below, we perceive no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pleadings.*

On August 8, 2014, Guia filed suit against S&F alleging the following seven causes of action: (1) disability discrimination pursuant to the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq., § 12940, subd. (a));[1] (2) failure to engage in a timely, good faith interactive process to determine effective, reasonable accommodations (§ 12940, subd. (n)); (3) failure to provide reasonable accommodations (§ 12940, subd. (m)); (4) retaliation for engaging in protected activities (§ 12940, subd. (h)); (5) failure to take all reasonable steps necessary to prevent discrimination from occurring (§ 12940, subd. (k)); (6) wrongful termination in violation of public policy; and (7) intentional infliction of emotional distress (IIED).

2. *Partial summary adjudication.*

On October 27, 2015, the trial court granted S&F's motion for summary adjudication of Guia's second and third causes of

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[1] All further statutory references are to the Government Code, unless otherwise specified.

action, failure to engage in the interactive process and failure to provide reasonable accommodation.

3. *Bench trial on remaining issues*.

Prior to trial, Guia's counsel withdrew the cause of action for IIED and the case proceeded to a bench trial on the four remaining causes of action: (1) disability discrimination; (2) retaliation; (3) failure to prevent discrimination; and (4) wrongful termination in violation of public policy. The evidence presented at trial is summarized as follows:[2]

In May 2011, Guia, a former produce clerk working at an S&F store, suffered an industrial injury to her hand, which resulted in a physical disability. Guia filed a workers' compensation claim and was granted a leave of absence from July 28, 2011 to July 9, 2012. Guia subsequently provided S&F with a doctor's note releasing her to full duty (as opposed to modified duty), effective July 9, 2012. She provided S&F with a follow-up note from the same provider, dated August 8, 2012, reiterating that her work status was "full duty."

Guia returned to work under store manager Peter Sandoval (Sandoval) and assistant manager Mario Rosales (Rosales). She had never previously worked with either of them. Guia testified that after returning from her workers' compensation leave she had difficulty lifting heavy produce. Sandoval, Rosales and Fortunato Rodriguez (Rodriguez), the store's produce manager, all testified that service clerks assisted Guia with the heavy produce. Guia also complained to Sandoval about being assigned

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[2] This factual summary is derived largely from the statement of decision. Although Guia asserts the statement of decision is ambiguous and incomplete, she does not challenge the trial court's factual findings.

to the cash register, thus not allowing her to timely complete her duties as a produce clerk. Other store associates would also be placed on the cash register if the store was busy. Nevertheless, Sandoval spoke with Rosales and Rodriguez and told them that Guia should only be assigned to the cash register as a last resort.

On August 16, 2012, Guia met with Rosales and Rodriguez to discuss the work that needed to be done in the produce department. Guia was not scheduled to work on August 17 through August 19. The final schedule for the week of August 20, 2012 was not yet completed and was to be posted on Friday, August 17, 2012. Guia alleged that Rodriguez informed her that she would not be working on either the 20th or 21st of August. However, Guia repeatedly contradicted herself at trial regarding the circumstances that led her to believe that she was not scheduled to work on those two days. Further, Rodriguez testified he did not tell her she could have those days off because he "d[id]n't have the authority to give days off."

The final schedule was posted on August 17, 2012 and Guia was scheduled to work on August 20 and August 21. Guia did not come in to work on either date. Guia did not call the store to see what days she was scheduled to work for the week of August 20. Guia made no attempt to obtain her work schedule. Further, Sandoval attempted to contact Guia on both days even though he was not obligated to do so.

S&F's attendance policy, also known as the "No Call/No Show" policy, states: "Two (2) consecutive scheduled work days of absence without advising your Manager or District Manager will be considered as a voluntary quit." Guia acknowledged that she had seen and understood the policy. Sharon Quigley (Quigley), the human resource representative, testified that S&F

terminates 20 to 30 individuals per month for violating the "No Call/No Show" policy.

4. *Trial court grants S&F's motion for judgment.*

After Guia presented her case and rested, S&F read about ten pages of Guia's deposition testimony into the record to contradict her trial testimony. S&F then made a motion for judgment pursuant to Code of Civil Procedure section 631.8. After considering the evidence presented by Guia at the nonjury trial and the parties' arguments, the trial court ruled as follows:

Guia did not meet her burden to establish that she was disabled or perceived to have a disability upon her return to work on July 9, 2012. Guia provided S&F with two doctor's notes upon her return to work that indicated she was able to return to work without any work restrictions. Although Guia claimed her doctors told her that she would need work restrictions, there was no testimony from her doctor that this was in fact true. Therefore, S&F was entitled to rely on the doctor's notes stating that Guia did not require any restrictions. Guia's complaint that she could not lift heavy boxes did not demonstrate that she had a disability and would need to be accommodated. Moreover, S&F provided Guia with the assistance of service clerks to help her with the lifting of heavy boxes.

The trial court further found:

There was no evidence that Guia was terminated because of her alleged disability or because she had returned from a workers' compensation leave. S&F had a legitimate nondiscriminatory reason for terminating Guia. She was terminated because she was scheduled to work on August 20 and 21, 2012, but failed either to appear for work as scheduled or to contact anyone at S&F to inform them that she would be absent.

Guia failed to show that S&F's given reason for termination was pretextual. The fact that S&F terminates 20 to 30 employees per month for violating the "No Call/No Show" policy undermined Guia's argument that her termination was pretextual. Guia failed to establish that she was terminated in retaliation for taking an authorized workers' compensation leave. Because Guia failed to prove that she suffered discrimination or retaliation, there was no merit to her claim that S&F was liable for failing to prevent discrimination or retaliation. Finally, because Guia failed to establish a violation of FEHA, she could not prevail on her cause of action for wrongful termination in violation of public policy, which was tethered to her FEHA claims.

The trial court also noted that pursuant to Code of Civil Procedure section 631.8, Guia requested an opportunity to present additional evidence to rebut evidence that Guia felt was adverse to her. The trial court granted Guia's request to allow her to rebut deposition testimony read into evidence by S&F. However, Guia then declined to present any such evidence.

On May 25, 2016, the trial court entered judgment in favor of S&F. Guia timely appealed.

CONTENTIONS

Guia contends: (1) the trial court erred in granting S&F's motion for summary adjudication as to her second cause of action for failure to engage in a timely, good faith interactive process, and her third cause of action for failure to provide reasonable accommodation; and (2) the trial court abused its discretion at trial in limiting the presentation of her case to six hours, in denying her the opportunity to provide rebuttal under Code of Civil Procedure section 631.8, and in rejecting her Exhibit 81.2-5 outlining her permanent disability.

DISCUSSION

1. *Trial court properly granted summary adjudication on second and third causes of action.*

a. *Pleadings.*

In the second cause of action, Guia pled that S&F failed to engage in a timely, good faith interactive process in accordance with section 12940, subdivision (n).[3] Guia alleged that as of May 2011 and thereafter, she was physically disabled within the meaning of FEHA due to an industrial injury to her hands, and that S&F was aware of her disability because she repeatedly so informed S&F until it discharged her on August 24, 2012.

In the third cause of action, Guia pled that S&F failed to provide her with reasonable accommodations pursuant to section 12940, subdivision (m),[4] and that instead of providing her with reasonable accommodations, it terminated her employment.

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[3] Section 12940, subdivision (n), makes it an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

[4] Section 12940, subdivision (m), makes it an unlawful employment practice to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.

b. *S&F's motion for summary adjudication with respect to the second and third causes of action.*

S&F moved for summary adjudication with respect to the second and third causes of action on the ground they were time-barred.

S&F argued as follows: Before bringing a civil suit on a cause of action under the FEHA, an employee must exhaust her administrative remedies by filing a valid complaint with the Department of Fair Employment and Housing (DFEH) and receiving a right-to-sue notice. (§ 12960, subd. (b).) The administrative charge must be filed with the DFEH within one year of the alleged unlawful conduct (§ 12960, subd. (d)), and a failure to exhaust the administrative remedy is a jurisdictional defect that bars the cause of action under FEHA.

S&F further argued: Guia based her second and third causes of action on the hand injury that she sustained in May 2011. Although Guia alleged that S&F had failed to accommodate her, Guia did take a leave of absence from July 28, 2011, to July 9, 2012, and she testified that when she returned to work in July 2012, she did not have any medical restrictions. Accordingly, Guia would have had to file her DFEH complaint on or before July 28, 2012, one year after she commenced her workers' compensation leave. Because Guia did not file her DFEH claim until August 13, 2013, more than two years after the alleged unlawful conduct, Guia's claims for failure to accommodate and failure to engage in the interactive process were time-barred.

c. *Guia's opposition to the motion for summary adjudication with respect to the second and third causes of action.*

In opposition, Guia did not dispute that upon returning to work on July 9, 2012, she did not have any medical restrictions.[5] However, Guia contended that S&F's failure to accommodate and failure to engage in the interactive process were not time-barred pursuant to the continuing violation doctrine. Guia argued that S&F's failure to accommodate and failure to engage in the interactive process *before she went out on leave* were "sufficiently similar in kind to the retaliation [she] faced when she returned to work in July 2012 and culminated in her August 2012 termination."

According to Guia, S&F's "retaliatory course of conduct, the hostility, negative attitude and treatment continued after Ms. Guia returned to work in July 2012 and stemmed from Ms. Guia's initial disability, her requests for accommodation, and her subsequent workers' compensation claim. In addition to Defendant's strategy to frequently change Ms. Guia's position only to reprimand her for falling behind, Mr. Sandoval's comments made clear to Ms. Guia that her recent disability and workers' compensation claim would be held against her and she understood her job was in jeopardy because of Mr. Rodriguez's outright statement wishing to fire her . . . . These retaliatory actions are sufficiently linked to Defendant's retaliatory conduct

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[5] An August 8, 2012 report by Dr. Chaves indicating that Guia had permanent restrictions following her return to work, a document which Guia proffered at trial, was not part of her opposition to the motion for summary adjudication.

that occurred prior because they stem from the same disability. [Citation.]"

d. *Trial court's ruling*.

The trial court granted summary adjudication in favor of S&F with respect to the second and third causes of action, stating as follows:

"It is undisputed that plaintiff returned to work following her worker's compensation leave [which ended] on 7/9/12, and that she did not have any medical restrictions upon her return. [Citation.] Though plaintiff asserts that she only returned to work on 7/9/12 to save her job, she does not point to any evidence that she needed or requested an accommodation on or after her return. [Citation.] Therefore, plaintiff's claims based on defendant's failure to accommodate her injury must have accrued prior to 7/9/12. Plaintiff did not file a complaint with the DFEH until 8/13/13. [Citation.]

"Plaintiff argues that the continuing violation doctrine applies. This argument is not well taken. Under the continuing violation doctrine, an employer is liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1056 [citing *Richards v. CH2M Hill, Inc*. (2001) 26 Cal.4th [798], 812).) . . . .

"Plaintiff does not point to any conduct sufficiently similar in kind to the failure to accommodate; indeed, as stated above, plaintiff does not point to any evidence that she requested or needed an accommodation after her return. It appears that the offending course of conduct, i.e., the failure to adequately respond to plaintiff's request for an accommodation, had been brought to

an end prior to 7/9/12. Any discriminatory or retaliatory conduct occurring after this date would not be sufficiently similar in kind to a failure to accommodate or engage in the interactive process.

"Accordingly, defendant's request for summary adjudication of the second and third causes of action is GRANTED."

e. *Trial court properly granted summary adjudication of the second and third causes of action due to Guia's failure to file a DFEH charge within one year of the alleged violations; Guia's reliance on the continuing violation doctrine is misplaced.*

A litigant must file an administrative complaint with the DFEH within one year of the date of the alleged unlawful practice before suing for a violation of the FEHA. "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred . . . ." (§ 12960, subd. (d).)

The record reflects that Guia filed her administrative complaint on August 13, 2013, alleging, inter alia, that S&F "[d]enied a good faith interactive process" and "[d]enied reasonable accommodation," and that the most recent discrimination took place less than one year earlier, on August 24, 2012.

Because Guia filed her administrative complaint on August 13, 2013, any discriminatory conduct prior to August 13, 2012 "cannot serve as the basis for liability unless some exception to the one-year limitations period applies." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1040.) The continuing violation doctrine is one such exception. (*Ibid.*)

"[T]he continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in

part outside the limitations period." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812.) In *Richards*, a disabled employee resigned from her job after a five-year period during which she claimed her employer was unwilling to effectively accommodate her disability. (*Id.* at p. 801.) The Supreme Court was called upon to decide whether "an employer [is] liable for actions that that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period." (*Id.* at p. 812.) *Richards* concluded that an employer's conduct over a period of time would be deemed a continuing violation "if the employer's unlawful actions are (1) sufficiently similar in kind . . . ; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.]" (*Id.* at p. 823.)

Here, in connection with the motion for summary adjudication, it was undisputed that "[u]pon returning to work on July 9, 2012, Plaintiff did not have any medical restrictions." A medical note from Western Hand and Orthopedics (Western Hand), dated June 27, 2012, stated that Guia's status was "full duty" (as opposed to modified duty), effective July 9, 2012. A subsequent note, following an August 8, 2012 return appointment, likewise stated Guia's status was "full duty." Further, in opposition to the motion, Guia did not show that she requested or needed any accommodation after returning to work on July 9, 2012.

Therefore, by the date Guia returned to work, Guia had no basis for a claim against S&F with respect to either a failure to accommodate or a failure to engage in an interactive process to determine a reasonable accommodation. Although Guia contends that after she returned to work she was subjected to negative

treatment, such as a remark by store manager Sandoval to "make sure your other hand does not get injured," such acts were *not* a continuation of any earlier alleged failure to accommodate and alleged failure to engage in an interactive process.

Accordingly, we agree with the trial court that Guia failed to show a continuing violation after July 9, 2012, when she returned to work, with respect to either a failure by S&F to accommodate or a failure by S&F to engage in the interactive process to determine a reasonable accommodation. To reiterate the trial court's ruling, "[a]ny discriminatory or retaliatory conduct occurring after this date would not be sufficiently similar in kind to a failure to accommodate or engage in the interactive process" before Guia went out on leave.

Guia also argues she returned to work on July 9, 2012, only because she was informed by S&F that it would not extend her leave and that she would be terminated if she were not released to work within two weeks, and that she "returned to work on July 9, 2012 to save her job." However, the undisputed fact that Guia did not require any accommodation upon returning to work on July 9, 2012 established there was no continuing violation with respect to either a failure to accommodate or a failure to engage in the interactive process after her return to work.

In sum, because S&F's alleged conduct relevant to either a failure to accommodate, or a failure to engage in the interactive process to identify a reasonable accommodation, ended by the time Guia returned to full duty on July 9, 2012, the administrative complaint filed August 13, 2013 was untimely with respect to those causes of action. (§ 12960, subd. (d).) Therefore, the trial court properly granted summary adjudication with respect to the second and third causes of action.

2. *No showing of a prejudicial abuse of discretion in trial court's limitation on trial testimony.*

Guia contends the trial court abused its discretion in limiting the presentation of her case to six hours.

The record reflects that early in the litigation, in the case management statement, Guia estimated trial of her case to be a seven to ten day jury trial. A joint witness list filed shortly before trial estimated that testimony would consume about 60 hours. Thereafter, the parties filed an amended joint witness list that estimated 28 hours of testimony. At the time of the final status conference, the trial court indicated that each side would have six hours for its presentation. The trial court adhered to its six hours per side time limit.

It is established that the trial court has the inherent authority and responsibility to fairly and efficiently administer the judicial proceedings before it, and has the power to expedite proceedings to avoid unduly prolonging a trial. (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22.) Guia has not shown any error in this regard.

First, although Guia contends that she waived her right to a jury trial only "because she was faced with the daunting burden and unfair requirement" that she present her approximate 14 hour case to the jury in six hours, Guia did not object on the record to proceeding by way of a bench trial. The portion of the transcript cited by Guia merely contains a statement by the trial court that "I understand the parties have waived jury." Thus, the record simply reflects that Guia affirmatively waived a jury trial.

Moreover, Guia did not object below to the six-hour time limit. In addition, she did not make an offer of proof to the trial

court with respect to the testimony that she would introduce if she were allotted additional trial time.

Guia concedes she did not object below to the six-hour time limit, but contends such an objection "would have been futile" because the trial court previously had rejected the 60-hour and 28-hour time estimates. However, Guia provides no support for her theory that the trial court's adverse rulings with respect to the 60-hour and 28-hour time estimates relieved her of having to object to the 6-hour limit. " 'An appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not, presented to the lower court by some appropriate method. [Citations.]' [Citation.] Failure to object to the ruling or proceeding is the most obvious type of implied waiver. [Citation.]" (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.) Accordingly, Guia's acquiescence below in the six-hour time limit, with no offer of proof of what additional evidence she needed to present, forecloses her from raising the issue on appeal. (*Ibid.*)

3. *No merit to Guia's contention the trial court abused its discretion in denying her the opportunity to present additional evidence following S&F's motion for judgment.*

Guia contends the trial court abused its discretion in refusing her the opportunity to present additional evidence to rebut and rehabilitate pursuant to Code of Civil Procedure section 631.8.[6]

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[6] Code of Civil Procedure section 631.8 states in relevant part at subdivision (a): "After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may

On March 23, 2016, Guia rested her case, after using 5.8 hours of her allotted six hours. S&F then requested judicial notice of the following exhibits: Guia's DFEH complaint, filed August 13, 2013, which came in without objection; and documents showing the mileage from Guia's home address to her workplace, which the trial court found was not relevant. S&F then read about ten pages of Guia's deposition testimony into the record to contradict Guia's trial testimony.[7] After the presentation of this evidence, S&F made a motion for judgment pursuant to Code of Civil Procedure section 631.8.

After the motion for judgment was argued and the trial court ruled that it was granting the motion, Guia's counsel requested the opportunity to present additional testimony by calling: Lika Olotoa, S&F's supervisor for workers' compensation claims; Sharon Quigley, a human resources manager at S&F; and Guia, to testify. Guia's counsel argued that under the statute, the party against whom a judgment is made shall have the

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move for a judgment. *The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party*, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence. The court may consider all evidence received, *provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party*." (Italics added.)

[7] In her deposition, Guia testified she was told she had to be at work during the week of August 20.

opportunity to present additional evidence to rebut adverse evidence received during the presentation of evidence, and to rehabilitate the credibility of a witness. Guia's counsel sought to present additional testimony to rehabilitate Guia in terms of credibility, "and then to present additional evidence to rebut the evidence that they presented."

The trial court stated, "[t]he only evidence [S&F] presented . . . after [Guia] rested was the deposition testimony of Ms. Guia." The trial court ruled that it would give Guia "the opportunity . . . to present rebuttal testimony from Ms. Guia as to the deposition testimony that was read." The trial court stated that because the reading of Guia's deposition testimony took about ten minutes, it would allow Guia 10 or 15 minutes to rebut that evidence.

Guia's counsel objected, stating "I don't want it limited to that, your honor. I want to be able to present additional evidence to rebut the evidence." Guia's counsel made no offer of proof regarding what any additional witnesses would testify to or what evidence they would rebut.

The trial court responded, "[b]ut . . . you've rested. If they had presented no other evidence, you don't have an ability to then come back after I decide against you and present other testimony . . . . [¶] . . . But they . . . did present a little bit of more evidence after you rested, and I think you're entitled to rebut the evidence that they presented." The trial court then reiterated that Guia would have brief additional time to testify to rebut the deposition testimony that was read into the record.

Thereafter, following the lunch break, Guia's counsel decided not to call her back to testify, stating that after he reviewed the deposition testimony that was read into the record,

"I don't think there's anything there for me to rehabilitate her on."

In essence, Guia's position below, and on appeal, is that she was entitled to a wholesale reopening of her case rather than a brief rebuttal. We disagree. On the record presented, we perceive no abuse of discretion in the trial court's ruling. After the trial court ruled in favor of S&F on the motion for judgment, the trial court afforded Guia the opportunity to testify in order to rebut the deposition testimony that S&F read into the record. Guia declined to do so and thus waived the opportunity to present rebuttal testimony and to rehabilitate her credibility.

4. *No showing of a prejudicial abuse of discretion in trial court's ruling that Exhibit 81.2-5 was inadmissible*.

Guia contends the trial court abused its discretion in refusing to admit Exhibit 81.2-5.

By way of background, Exhibit 81, pages 2 through 5, was an August 8, 2012 workers' compensation report by Dr. Chaves at Western Hand to Sedgwick, the carrier, stating Guia's condition was "permanent and stationary having reached maximum medical improvement," and that she was "permanently restricted from having to perform activities that require repetitive elbow motion." Guia sought to have the document admitted to establish S&F's knowledge of her work restrictions, and further, that this knowledge motivated S&F to terminate her.

S&F objected to the exhibit on the ground Dr. Chaves's report constituted hearsay statements by a physician outside the presence of the court. The trial court excluded the proffered exhibit as hearsay and because Olotoa, S&F's supervisor for workers' compensation claims, testified that she had never seen the document.

Even assuming the exhibit should have been admitted into evidence, a conclusion we do not reach, Guia cannot show that its exclusion was prejudicial error affecting the result because the pertinent portion of the exhibit was read into the record as part of Olotoa's testimony. The transcript contains the following colloquy:

"Q Now let's look at the remaining pages of Exhibit 81. [¶] This is a report dated August 8th, 2012? Yes?

"A Yes. That's what it says.

"Q And this is from her treating doctor at Western Hand . . . ?

"A Primary treating physician.

"Q Now if you look at the last page, there's a permanent work restriction section, correct?

"A Correct."

Guia's counsel then proceeded to question Olotoa concerning the effect of the permanent work restrictions reflected in the report. Olotoa denied that she disregarded the work restrictions in the report, stating "I didn't receive it."

Thus, notwithstanding the exclusion of documentary evidence in the form of Exhibit 81.2-5, the trier of fact received oral testimony that there was a document from Guia's primary treating physician, dated August 8, 2012, stating that Guia had permanent work restrictions. Therefore, at most, the excluded exhibit would have supplied cumulative evidence of the fact there was a document that reflected Guia's doctor's opinion that she had permanent work restrictions.

The exclusion of Exhibit 81.2-5 did not affect the outcome for the additional reason that the trial court did not base the judgment on whether or not Guia was permanently disabled.

The trial court explained: "So it's not clear to me that Ms. Guia actually qualifies as disabled or as having a perceived disability. [¶] But the real problem I think for plaintiff's case here is that [she hasn't] met [her] burden to show that her termination, which I think is the adverse employment action, . . . was based upon her disability or perceived disability. . . . [¶] . . . [P]laintiff hasn't met her burden to show that it was, in fact, her disability or her complaining about a disability or her return from a workers' compensation [leave] was a substantial motivating factor. In other words, I think plaintiff's strongest argument is [that] . . . her missing two days was a pretext, and they were just looking for a reason to terminate her, and they said, aha, we've got the reason now. . . . I don't believe plaintiff has met [her] burden to show that. [¶] Given that the court's conclusion [is] based on the evidence and the determination of the credibility of witnesses presented to me, I'm going to grant defendant's motion for judgment under [Code of Civil Procedure section] 631.8."

In view of the above, we reject Guia's claim of prejudicial error arising out of the exclusion of Exhibit 81.2-5.

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

CURREY, J.*

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