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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TABITHA MASON,

Plaintiff and Appellant,

v.

LANCASTER HOSPITAL
CORPORATION,

Defendant and Respondent.

B278297

Los Angeles County
Super. Ct. No. MC024417

APPEAL from a judgment of the Superior Court of
Los Angeles County, Stephen M. Moloney, Judge. Affirmed.

Shernoff Bidart Echeverria, Ricardo Echeverria and
Stephen Schuetze for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and
John L. Barber for Defendant and Respondent.

The trial court denied Tabitha Mason's motion for a new trial based on juror misconduct. Mason appeals, and we affirm.

BACKGROUND

Mason filed a complaint against Lancaster Hospital Corporation dba Palmdale Regional Medical Center (the Hospital) on March 14, 2014. Mason alleged the Hospital terminated her employment as a nurse in retaliation for her complaints about violations of nurse to patient staffing ratios and fraudulent reporting in patient records. She alleged causes of action for retaliation in violation of Health and Safety Code section 1278.5, Labor Code section 1102.5, and Business and Professions Code section 510; retaliation and discrimination in violation of the Fair Employment and Housing Act, Government Code section 12940 et seq.; wrongful termination in violation of public policy; and aiding and abetting.

After the Hospital's motion for summary adjudication was granted, trial began on Mason's remaining claims for retaliation under Health and Safety Code section 1278.5 and Labor Code section 1102.5, and for wrongful termination in violation of public policy. Mason contended that in April 2012 she was singled out for retaliatory firing, because, in March 2012, she complained that the Hospital emergency room violated the required nurse to patient staffing ratios, and also complained about falsification of records. The Hospital contended it fired Mason because in March 2012, after a patient was admitted with bacterial meningitis, Mason distributed an antibiotic to around 29 individuals without a doctor's order, without following the Hospital's protocol, and in violation of the Hospital's rules and regulations. Mason argued that the Hospital's reasons were a pretext.

On July 5, 2016, the jury found in favor of the Hospital, concluding the Hospital had legitimate nonretaliatory reasons for firing Mason.

The trial court entered judgment on July 20, 2016, and notice of entry was served on July 27, 2016.

Mason filed a notice of intention to move for a new trial and filed her supporting brief on August 12, 2016. Mason attached four declarations from jurors, which she argued showed misconduct during deliberations on questions 7 and 10 of the special verdict form. The misconduct resulted in prejudice because the 9-3 “yes” vote on question 10 meant the Hospital was not liable for damages for firing Mason.

In opposition, the Hospital argued the declarations were inadmissible as statements of the jurors’ thought processes during the deliberations. Three of the four declarations were by the dissenting jurors who voted “no” on question 10. The declarations did not show bias, and Mason had not shown prejudice. In reply, Mason argued the declarations were admissible to show the jury relied on matters outside the evidence in reaching the verdict.

The trial court held a hearing on the new trial motion on September 9, 2016.

On September 15, 2016, the trial court filed an order denying Mason’s motion. The court found the declarations admissible to show that the jurors made certain statements, not to prove the truth of the statements or their effect on the jurors’ mental processes in reaching the verdict. The juror statements regarding a “‘1% rule’” and the possibility of reporting the Hospital later were therefore admissible, but not to show that the statements played any role in how any juror voted. The juror

describing the 1% rule and the juror opining on reporting the Hospital relied on their own life experiences. As there was no juror misconduct, the court did not find prejudice.

Mason filed a timely appeal.

DISCUSSION

The jury unanimously answered “yes” to question 3 on the special verdict form, which asked whether the Hospital believed Mason had complained about unsafe patient care practices, and, by a vote of 11-1, answered “no” to question 5, which asked whether the Hospital had proven that Mason’s complaint did not contribute to the decision to discharge Mason. The jury unanimously answered “yes” to question 8, which asked whether Mason had refused to violate the law regarding nurse to patient staffing ratios, and, by a vote of 11-1, answered “yes” to question 9, which asked whether Mason’s refusal to violate the law regarding staffing ratios was a contributing factor in the Hospital’s decision to discharge her.

The jury also answered “yes” to questions 7 and 10 on the special verdict form.

Question 7 asked: “Has Palmdale Regional proven that it would have discharged Tabitha Mason anyway at that time for legitimate, independent reasons even if she had not reported or complained that Palmdale Regional had engaged in unsafe patient care practices?” The “yes” vote was 9-3.

Question 10 asked: “Has Palmdale Regional proven that it would have discharged Tabitha Mason anyway at that time for legitimate, independent reasons even if she had not refused to violate the law regarding nurse to patient staffing ratios?” The “yes” vote was 9-3.

In support of her motion for new trial, Mason submitted declarations from Juror Nos. 6, 11, 7, and 9, reporting the following events during deliberations on questions 7 and 10. Three of the four jurors were among those voting “no” on questions 7 and 10.

All four jurors stated that during jury discussions on question 10, Juror No. 8 stated that at her work there was a “‘1% rule,’ ” meaning someone who was 1% at fault could be fired. All four jurors also stated they heard some, many, or all of the nine jurors who voted “yes” on question 10 say they voted “yes” because of the 1% rule described by Juror No. 8.

Three of the four juror declarations stated that Juror No. 4 said she was a psychologist and knew the Hospital could be reported after the verdict if the jury found the Hospital not liable for damages. Juror No. 9 stated she changed her vote on question 10 from “no” to “yes” based on the 1% rule and because the Hospital could be reported later.

Mason contends on appeal that Juror No. 8’s statement about a 1% rule, and Juror No. 4’s statement that the Hospital could be reported later, constituted juror misconduct prejudicial to Mason’s right to a fair trial.

Jury misconduct proven by juror affidavit is a ground for granting a new trial. (Code Civ. Proc., § 657, subd. 2.) The trial court must first determine whether the juror declarations are admissible, which we review for abuse of discretion. (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.) Second, the court must determine whether the admissible evidence shows facts that constitute misconduct. (*Ibid.*) The moving party has the burden to establish juror misconduct, and, on review, we accept the trial court’s credibility determinations, and its factual findings if

supported by substantial evidence. (*Ibid.*) If the trial court finds misconduct, it must then determine whether the misconduct was prejudicial. (*Ibid.*)

1. ***The overt acts were not admissible to show the effect on the jury's subjective thought processes or votes.***

Mason does not dispute the trial court's ruling on admissibility. Under Evidence Code section 1150, subdivision (a), evidence is admissible "as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.*" (Italics added.) As a result, "[e]vidence of jurors' internal thought processes ordinarily is not admissible to impeach a verdict. [Citations.] Evidence is admissible to impeach a verdict only if the evidence refers to objectively ascertainable statements, conduct, conditions, or events." (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58.)

The trial court concluded that the declarations were admissible as evidence of the following overt conduct during deliberations: Juror No. 8 said at her work there was a rule that an employee could be fired if he or she was 1% at fault, and she thought the jury should use this rule in determining their answer on question 10; some, many, or all of the jurors stated they were using the 1% rule to vote "yes" on question 10; Juror No. 4 stated she knew from her work as a psychologist that the Hospital could be reported later if it was found not liable; Juror No. 9 stated she

based her “yes” vote on question 10 on the 1% rule and the ability to report the Hospital after the verdict.

While these objectively ascertainable acts are admissible, they are not admissible to show their effects on the individual jurors’ subjective thought processes or their votes. (Evid. Code, § 1150, subd. (a).) “ ‘[T]he subjective quality of one juror’s reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning. To hold otherwise would destroy the rule . . . which clearly prohibits the upsetting of a jury verdict by assailing these subjective mental processes. It would also inhibit and restrict the free exchange of ideas during the jury’s deliberations.’ ” (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1367.) “ ‘[W]hen a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror’s mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.’ ” (*People v. Lewis* (2001) 26 Cal.4th 334, 389.) Here, three of the four declarations were by dissenting jurors who voted “no” on question 10, making this limitation especially relevant, “ ‘prevent[ing] one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors’ mental processes or reasons for assent or dissent.’ ” (*Hassan v. Ford Motor Co* (1982) 32 Cal.3d 388, 413.)

2. ***The juror statements were not misconduct.***

Mason argues that the juror statements about the 1% rule and the ability to report the Hospital were nevertheless misconduct because they injected the jurors’ personal experiences into the deliberations and controverted the jury instructions. The court instructed the jury with CACI No. 5009: “You should use your common sense and experience in deciding whether

testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or may have learned through your training or experience is not a part of the evidence received in this case.”

“‘[J]urors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself.’ [Citation.] A juror does not commit misconduct merely by describing a personal experience in the course of deliberations.” (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 819.) “Jurors’ views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1265.) “A fine line exists between using one’s background in analyzing the evidence, which is appropriate, even inevitable, and injecting ‘an opinion explicitly based on specialized information obtained from outside sources,’ which we have described as misconduct.” (*Id.* at p. 1266.)

The statement regarding the 1% rule did not cross that fine line into misconduct. Juror No. 8 brought her life experience with her into the jury deliberations on question 10, which asked if the Hospital had proven it would have discharged Mason anyway for “legitimate, independent reasons” even if she had not refused to violate staffing ratios. The jury had already asked the trial court to define “legitimate” when it decided question 7, which, like question 10, asked whether the Hospital had proven it

would have discharged Mason anyway for legitimate reasons even if Mason had not complained about unsafe patient practices. The court had answered: “ ‘Legitimate’ refers to a reason or reasons that were legal, nonretaliatory, fair or reasonable, and consistent with the facts/evidence as presented at trial.”

The court concluded the reference to the 1% rule was Juror No. 8’s application of her life experience to the court’s definition of “legitimate,” and was not misconduct. We agree. Juror No. 8 did not apply specialized, outside information, but related her experience. What percentage of fault made a termination decision legitimate was not an issue at trial, and Juror No. 8’s work experience did not contradict a jury instruction.

The jurors’ declarations describe Juror No. 4 as saying, “ ‘[w]e’ll be able to get the hospital later on,’ ” and “ ‘[w]e can report the hospital afterwards.’ ” It is not clear what sort of reporting Juror No. 4 meant. Her statements are not related to any evidence at trial regarding reporting requirements, and do not conflict with any instructions.

Mason cites *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, but in that case the juror’s challenged comments during deliberations were directly related to a crucial issue at trial and therefore over the line. The plaintiff, who was dying from mesothelioma related to exposure to asbestos, had served in the United States Navy as a boiler technician on an aircraft carrier; the defendant constructed the boilers using insulation containing asbestos. (*Id.* at p. 152.) During the jury deliberations, a juror who had been in the Navy stated the asbestos-containing insulation would have been replaced before the plaintiff came on the ship; that the Navy replaces everything when it performs repairs; and that his own experience with

circuit boards was that the Navy always took everything apart and replaced all of the components whether they needed replacement or not. (*Id.* at p. 156.) The critical jury issue was whether the insulation had been replaced before the plaintiff arrived on the ship, and the juror injected specialized knowledge into the deliberations in violation of the court's instructions, so the trial court did not abuse its discretion in finding misconduct. (*Id.* at pp. 161-162.)

The jurors' statements in this case did not directly relate to a critical jury issue. Neither the percentage of Mason's fault required for a legitimate discharge, nor whether the Hospital could somehow be "reported" after the verdict, were factual issues at trial. The trial court did not err in finding that the juror statements were not misconduct.

"Because no misconduct occurred, we need not decide the issue of prejudice." (*Barboni v. Tuomi, supra*, 210 Cal.App.4th at p. 351.)

DISPOSITION

The judgment is affirmed. Costs are awarded to Lancaster Hospital Corporation.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.*

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