Filed 8/21/13 Hoffman v. 10520 Wilshire Owner Assn. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

NICHOLE HOFFMAN, Plaintiff and Appellant, v. 10520 WILSHIRE OWNER ASSOCIATION, Defendant and Respondent.	B239652 (Los Angeles County Super. Ct. No. BC428060)

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

Shegerian & Associates, Carney R. Shegerian and Alex K. DiBona for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt and Christine T. Hoeffner for Defendant and Respondent.

Plaintiff Nichole Hoffman worked as the general manager at defendant 10520 Wilshire Owner Association's (Association) condominium complex known as the Dorchester. After termination of her employment, she commenced this action alleging nine claims. Two of her claims (defamation and intentional infliction of emotional distress) were dismissed on summary judgment. After the case went to trial, the court granted Association's motion for nonsuit on her breach of implied employment contract claim, and the jury returned a verdict in favor of Association on plaintiff's remaining claims.

On appeal, Hoffman argues that the trial court erred in (1) granting summary judgment because factual issues exist on her claims; (2) granting the Association's motion for nonsuit; (3) ruling on her objections to biased jurors on her panel and juror misconduct; (4) instructing the jury on the unpaid wage penalty; and (5) correcting the jury's inconsistent verdict. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Hoffman was employed for approximately four and a half years (from April 2005 to her termination in November 2009) by defendant Association as the general manager of the Dorchester, a condominium complex located in on Wilshire Boulevard.

After her termination on December 14, 2009, Hoffman commenced this action, alleging (1) discrimination and harassment under the Fair Employment and Housing Act (FEHA) based on her gender, (2) retaliation for her complaints of FEHA violations, (3) wrongful termination in violation of public policy, (4) defamation, (5) harassment and intentional infliction of emotional distress, (6) negligent hiring, retention, and supervision, (7) failure to pay wages in a timely manner, (8) violation of right to privacy, and (9) breach of implied contract not to terminate except for cause. Hoffman claimed that she performed her duties in an exemplary manner, but that she was harassed by the Association's president, Richard Pech, based on her gender; Pech made defamatory statements that she was incompetent, and she was required to defame herself in repeating the statements to prospective employers; her termination was retaliation for her complaint about Pech's treatment of minority Association employees; the Association invaded her privacy by

inquiring into her private life and looking at her personal possessions; and the Association failed to pay her wages in a timely fashion after she was terminated.

On November 2, 2010, the Association moved for summary judgment/adjudication on Hoffman's claims. The motion successfully disposed of Hoffman's claims for defamation and intentional infliction of emotional distress (a claim in part based on defendant's harassment of plaintiff). Jury selection commenced October 4, 2011, and trial commenced October 6, 2011. Hoffman unsuccessfully moved for a mistrial based on jury tampering, and defendant successfully moved for nonsuit on plaintiff's implied contract claim. The jury found in defendant's favor in a special verdict on Hoffman's remaining claims.

DISCUSSION

I. Summary Judgment

A. Factual Background

1. Defendant's Motion

Defendant asserted that Hoffman was hired by the Association in March 2005, and received a copy of the Association's employee handbook. In December 2005, she signed an employment agreement stating that her employment was "at-will."[1] Pursuant to the Association's bylaws, the Association president had authority over Hoffman. Pech became president of the Association in December 2007. Around this time, the Association asserted Hoffman's performance began to deteriorate. As part of her job duties, Hoffman was required to provide Pech with daily reports summarizing tasks Hoffman completed on a daily basis as well as building-related functions, but in October 2009, although she had been completing the reports for 11 months, Hoffman refused to provide the reports. Hoffman also questioned Pech's authority and told him he was "overstepping his role" as Association president, and she asked him to stop doing so. Pech responded that as Association president, he was only answerable to the board.

---

[1] The employment agreement appears to be the last two pages of the handbook and contains a signature block.

On October 6, 2009, Pech sent Hoffman an email advising Hoffman it was inappropriate to keep a dog in her office because it was affecting her performance and prohibited by the employee handbook. Pech, while acknowledging that he had permitted Hoffman to keep the dog in her office, requested her to remove the dog by October 21, 2009. On October 19, 2009, Pech wrote Hoffman and reminded her not to bring her dog to work, and requested her reports, which had not been turned in for two weeks. Hoffman forwarded the email to the Association treasurer, Rob Kovacs, and told Kovacs that Pech was retaliating against her for not turning in her daily reports.

Pech continued to email Hoffman requesting reports, even partially completed ones, and on October 23, 2009, Hoffman reported that she would have the daily reports for him on the following Monday. Pech responded that he believed Hoffman was angry about the dog issue, was resentful she was the only employee required to send reports, and was resentful that Pech questioned anomalies in her timekeeping, including changing a specific employee's time card.

On October 27, 2009, Hoffman permitted a real estate agent, in violation of Association bylaws, to schedule an open house at the complex. After Kovacs complained to her about the open house, Pech also advised Hoffman the open house should be cancelled. Hoffman refused to cancel the open house and advised Pech it was not really an open house because attendees had to RSVP to the event. Pech disputed Hoffman's interpretation of the bylaws, yet Hoffman refused to cancel the open house.

During the period October 26, 2009 through November 5, 2009, Pech wrote Hoffman several times concerning what he considered to be her "insubordination." Pech had discovered some vehicles parking in a dangerous fashion and wanted them towed, but Hoffman disputed that the vehicles could be towed. On October 29, 2009, Pech complained to Hoffman that he had not been able to find her and discovered she had left work early and had not come in on two other occasions.

On October 31, 2009, Pech prepared a memorandum for the Association board in which he summarized Hoffman's job performance deficiencies, and recommended her

termination. These included Hoffman's failure to provide daily reports, her refusal to cancel the open house, Hoffman's changing of an employee's time card, Hoffman's letting her dog into a condominium so that she could keep the dog at work. The board scheduled a meeting for November 10, 2009 to discuss Hoffman's termination.

On November 8, 2009, Hoffman sent the board an email in which she asserted that Pech had violated the rights of current employees as well as an applicant for a position by commenting on the applicant's race. Hoffman also accused Pech of taping a conversation with Nader Esmailzadeh (the employee whose time card she had changed) asking Esmailzadeh whether he was having a romantic relationship with Hoffman. Hoffman asserted that Pech and his wife had entered her office at 11:00 p.m. and had gone through her office. Pech asserted this was the only time Hoffman lodged any complaints about his conduct.

At the November 10, 2009 meeting, the board voted to terminate Hoffman's employment. Hoffman was terminated in person on November 11, 2009 when she arrived for work. Plaintiff is currently employed at Westview Towers in West Hollywood as the general manager, a position she has held since July 15, 2010.

Defendant argued that Hoffman's defamation claim (based on Pech's statements about her, as well as her assertedly compelled self-defamation) failed because there were no defamatory statements: her statements that she had to inform people she was terminated were not false. Further, Hoffman's intentional infliction of emotional distress claim failed because such claims cannot be based on personnel management actions.

2. Hoffman's Opposition

Hoffman's opposition asserted that she was the only female employee at the Dorchester out of a staff of 25. During her employment, she received pay raises and bonuses every year until 2009 when a salary freeze was initiated. During the interview process, no mention was made that her employment was "at-will," and she did not receive the employee handbook until December 2005. When Hoffman wanted to fire an employee,

the board told her she could not do so because the employee had been at the Dorchester "too long."

During her orientation, Kovacs told her that Pech did not want to hire a woman as general manager because Pech believed a man was better for the job. Pech directed her not to hire female valets because they would not interact well with the male valets. Pech told her not to hire a female engineer because the applicant was "too soft-spoken" and would be unable to oversee the male custodial staff. Pech accused plaintiff of being "'too sensitive,'" "'too soft-spoken,'" and "'too emotional.'"

When Hoffman was given a dog as a gift, she got Pech's permission to keep the dog at work until she was able to get the dog vaccinated. She denied putting the dog into an owner's unit.

In 2008, the board told Hoffman she would receive her full bonus, but Pech tried to cut her bonus in half in order to give it to other employees "who deserved it more." Commencing in October 2008, Hoffman complained to the Board about Pech's behavior, including his snide and sarcastic comments, derogatory comments toward women, and complained that Pech interfered with her duties. Pech pried into Hoffman's private life, and asked Esmailzadeh about his sex life with Hoffman.

Hoffman felt unfairly criticized about the format and content of her reports. Pech accused her of falsely changing Esmailzadeh's time card, but she asserted she had inadvertently done so. Hoffman denied having a romantic relationship with Esmailzadeh. Further, she did not have a set time to report for work. Hoffman asserted the open house she scheduled was not an open house in violation of the Association rules because persons had to respond that they would be attending and those who had not responded were turned away.

While looking for new work after her termination, Hoffman was forced to tell prospective employers the reason for her termination, and was denied employment because of the circumstances of her termination. She has suffered from depression and anxiety since her termination.

Hoffman argued that there was direct evidence of harassment, including Pech's sex-stereotyping of her, and her strong work performance and defendant's failure to institute progressive discipline supported an inference of pretext; the law presumed a defamatory statement was false, and defendant had failed to establish the truth of the statements; and defendant's conduct in harassing Hoffman was severe and pervasive, and went beyond the bounds normally tolerated in a civilized society, causing severe emotional distress.

3. Trial Court Ruling

The trial court granted defendant's summary judgment motion on Hoffman's claims for defamation and intentional infliction of emotional distress, finding that Hoffman failed to establish the allegations of sexual misconduct were published to third parties, or that defendant's statements were false.[2] Further, Hoffman's intentional infliction of emotional distress claim failed because Hoffman had not put forth facts sufficient to establish that Pech's harassment of her was pervasive such that it would have interfered with her ability to do her job or would have seriously affected the psychological well-being of a reasonable employee.

B. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar*, at p. 850.) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.) Where summary

---

[2] Hoffman appears to assert that the trial court also entered summary judgment on her first cause of action for discrimination and harassment; however, the court's order shows it denied summary judgment on that claim. Rather, the court entered summary judgment on the fifth cause of action, which included an allegation of Pech's harassment of Hoffman as an element of her intentional infliction of emotional distress claim.

judgment has been granted, "[w]e review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.)

C. Defamation

Hoffman argues that her defamation claim survives summary judgment as a matter of law because Pech published false comments about her conduct with Esmailzadeh, Pech falsely stated that she altered time cards and wrongfully entered a condominium unit and that her incompetence was the reason for her termination. Further, her self-defamation claim was established because she was required to be truthful on her job application claims and thus compelled to repeat the reasons for her termination.

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) "In some cases, the originator of a statement may be liable for defamation when the person defamed republishes the statement, provided that the originator 'has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents. [Citations.]'" (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 497.) However, this rule "has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them.'" (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1285.) "Moreover, the originator of the statement must foresee the likelihood of compelled republication when the statement is originally made." (*Beroiz*, at p. 497.) In *Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, the court held that the plaintiff had failed to raise a triable issue of fact that there was a "'strong compulsion'" to republish the defamatory matter to prospective employers "because he failed to show there was ever any 'negative job reference'" attributable to the employer that he had to explain. (*Id.* at p. 373.)

"[Civil Code] section 47[, subdivision] (c) establishes that certain communications made between persons on a matter of common interest are privileged if the statements are made 'without malice.' [Civil Code] section 48, in turn, provides that with respect to statements falling within section 47[, subdivision] (c), 'malice is not inferred from the communication.' For purposes of this statutory privilege, malice has been defined as '"a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person"'" and if the privilege applies, the statement cannot constitute defamation under California law. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203–1204, fn. omitted.) "'"The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable ground for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights [citations]."'" (*Taus v. Loftus, supra*, 40 Cal.4th at p. 721.) A shifting burden generally applies to the common-interest privilege. Upon the defendant showing an occasion of common interest, it becomes the plaintiff's burden to show malice. (*Lundquist*, at p. 1212)

The common interest privilege applies to employer-employee relationships. (*King v. United Parcel Service* (2007) 152 Cal.App.4th 426, 440.) "Clearly, an employer is privileged in pursuing its own economic interests and that of its employees to ascertain whether an employee has breached his responsibilities of employment and if so, to communicate, in good faith, that fact to others within its employ so that (1) appropriate action may be taken against the employee; (2) the danger of such breaches occurring in the future may be minimized; and (3) present employees may not develop misconceptions that affect their employment with respect to certain conduct that was undertaken in the past." (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 849.)

Hoffman has failed to establish, other than her conclusory statements, that she was forced to tell prospective employers anything other than that she was terminated for cause and that she had to repeat such statements in order to refute them. Further, she has failed to rebut the privilege that arose in the Association's favor as her former employer by showing

it acted with malice in repeating any statements about her job performance; with respect to any statements concerning her private life, there is no evidence those statements were published to anyone who was not either on the board or an employee of the Association such that the privilege would not apply. Summary judgment was therefore proper on this claim.

D. Intentional Infliction Of Emotional Distress[3]

Hoffman argues that Pech's pervasive conduct in engaging in demeaning, derogatory, offensive commentary on women, and his invasion of her privacy was outrageous conduct causing her extreme emotional distress, and that the jury could have inferred that she was subject to harassment based on the duration and extent of Pech's conduct and the fact that her employment was terminated because of her gender.

To recover on a claim for intentional infliction of emotional distress, the plaintiff must demonstrate (1) outrageous conduct by the defendant, (2) directed at the plaintiff with the intent of causing extreme emotional distress, (3) causing severe emotional distress to the plaintiff, and (4) plaintiff's severe or extreme emotional distress. (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) Outrageous conduct is conduct which exceeds the bounds of that usually tolerated in civilized society. Such conduct must be directed at the plaintiff or occur in the plaintiff's presence. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) A simple pleading of personnel management activity is insufficient to support a claim for intentional infliction of emotional distress, even if improper motivation is alleged: "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. . . . If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.)

---

[3] Hoffman's first cause of action for violation of FEHA in part asserted that Pech's harassment caused plaintiff to suffer emotional distress. Her fifth cause of action alleged that Pech's conduct in asking about her sex life and otherwise harassing her based on her gender caused her severe emotional distress. Thus, these two claims overlap somewhat, although the trial court denied summary judgment on the first cause of action.

Here, Hoffman cannot show extreme and outrageous conduct in the employment decisions Association made, or in the conduct of Pech, as Hoffman's supervisor, in exhorting her to perform her job duties, or perform them in a timely manner, or to perform them properly. Additionally, to the extent that Pech made comments about women or plaintiff in general, such comments would form the basis of Hoffman's discrimination/harassment claim, yet she failed to demonstrate any nexus between the adverse employment action and Pech's sexist comments. As a result, summary judgment was proper on Hoffman's intentional infliction of emotional distress claim.

II. Juror Irregularities

A. Homeowner Bloomberg

1. Factual Background

On the first day of voir dire, prospective jurors were in the courtroom. A homeowner at the Dorchester and court spectator Helma Bloomberg spoke out during the court's questioning of the jurors that she knew someone on the witness list because she was a homeowner. The court responded, "But you're not a juror." Bloomberg repeated that she was a homeowner. The next day, Bloomberg spoke to three potential jurors (Jurors Nos. 2, 8 and 12[4]). She admitted telling Juror No. 12 she was a homeowner, and Juror No. 12 asked if she were on the jury. Juror No. 12 stated he believed he could be fair notwithstanding the conversation. The court said it would speak to the jurors and threatened to exclude Bloomberg from the courtroom. Juror No. 2 stated that Bloomberg approached her and said something about the Playboy Club. According Bloomberg, she spoke to "the lady with the blond hair because she said she worked as a Playboy Bunny, so I just talked to her about her Playboy Bunny experience and that was it." Juror No. 2 told the court it did not affect how she viewed the case. Bloomberg also said something to Juror No. 2 about "us girls and stewardesses. . . . [Bloomberg] did most of the talking." Bloomberg admitted to speaking to Juror No. 8, telling the court that, "I [told] him I admired the way he was running, I guess, his company because when he was on the jury pool, he said something to the effect that he

---

[4] We use the juror numbers used to identify the jurors during voir dire.

had never fired anyone. . . ." The court asked Bloomberg "what possessed" her to talk to the juror. Bloomberg responded that she "admired the fact that he got along well with his employees." The court admonished Bloomberg that she was "interfering with the judicial process." Bloomberg stated she did not mean to do so. Hoffman moved to dismiss the jurors. The court excused all three jurors, and excluded Bloomberg from the courtroom.

2. Discussion

Hoffman argues the prejudice that flows from Bloomberg's conduct was never rebutted because remaining jurors—who had heard about Bloomberg's conversations with the jurors—remained on the jury.

Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict. A trial court is afforded broad discretion in determining whether the conduct of a spectator is prejudicial. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) "The court ordinarily is present in the courtroom at any time when a spectator engages in an outburst or other misconduct in the jury's presence and is in the best position to evaluate the impact of such conduct on the fairness of the trial." (*People v. Cornwell* (2005) 37 Cal.4th 50, 87.) In cases of spectator misconduct, prejudice is not presumed; defendant must establish it. (*Id*. at p. 88.)

Where the claimed spectator misconduct is brief, minor and not "'of such a character as to prejudice the defendant or influence the verdict'" there is no ground for reversal. (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 87.) Indeed, the "'mere fact that a spectator is guilty of some misconduct . . . does not mandate the declaration of a mistrial, . . . especially where the judge takes immediate action to avert possible juror prejudice.' [Citation.]" (*People v. Miranda* (1987) 44 Cal.3d 57, 114.)

Here, plaintiff has failed to show prejudice. The three prospective jurors had innocuous conversations that did not touch on the issues of the case; the jurors were dismissed immediately by the court; and Bloomberg was ejected from the courtroom. These curative measures indicate the court dispelled any potential prejudice to Hoffman and that there is no likelihood Bloomberg's conduct affected the verdict.

B. Removal of Jurors for Cause

Hoffman argues three jurors' admissions during voir dire established they harbored bias. She contends the trial court failed to dismiss such jurors for cause, necessitating her use of peremptory challenges to remove them from the panel, requiring reversal.

1. Factual Background

Juror No. 11 told the court he was pro-defendant, harbored an anti-plaintiff bias, and had served on a homeowner's Association for 12 years. Juror No. 11 stated, "I don't know if I could truly be open because I have served so much and I know what Associations go through." Juror No. 11 said he would try to keep an open mind, but that he was "only human." Hoffman challenged the juror. The court asked Juror No. 11 about his change in view; the previous day, the juror had expressed reservations about his own impartiality, but now was stating he would be fair. The court asked Juror No. 11 if he would use his personal experience to decide the case, and Juror No. 11 said he would try not to, but that he was sympathetic to homeowner Associations. Juror No. 11 told the court he would listen to the facts and decide based on the evidence. In response to a question whether he could be "fair to both sides," and objective in the case, Juror No. 11 stated, "Probably, yeah." The court denied Hoffman's challenge, and as a result, she used a peremptory challenge on Juror No. 11.

Juror No. 18, a registered nurse, told the court she had hostility toward employment litigation cases; if she were fired, she would just move on. However, that was her own view; she would not apply her view to everyone. Hoffman challenged Juror No. 18. The court denied the request, finding Juror No. 18 stated that her view of employment litigation was only a view she applied to herself.

Juror No. 13 advised the court he had served on the board of a homeowners Association for 25 years, and his Association had been recently sued. Although he was on the board, he did not know much about the situation. He did sympathize with defendant's position based on his tenure on a homeowner's association board. He believed his experience would color his view of the evidence. Juror No. 13 did believe he would be fair.

Hoffman challenged the juror for cause, but the court denied her challenge. Hoffman did not have any peremptory challenges left, and Juror No. 13 remained on the jury.

2. Discussion

"'To find actual bias on the part of an individual juror, the court must find "the existence of a state of mind" with reference to the case or the parties that would prevent the prospective juror "from acting with entire impartiality and without prejudice to the substantial rights of either party."'" (*People v. Horning* (2004) 34 Cal.4th 871, 896.) We examine the context in which the trial court denied the challenge in question to determine whether the court's decision that the prospective juror's beliefs would not substantially impair the performance of his duties fairly is supported by the record. (*People v. Crittenden* (1994) 9 Cal.4th 83, 122.) If "a prospective juror provides conflicting answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind is binding upon the appellate court." (*Ibid*.) Whether to remove a prospective juror for cause rests within the trial court's wide discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) "To preserve a claim based on the trial court's overruling a defense challenge for cause, a defendant must show (1) he [or she] used an available peremptory challenge to remove the juror in question; (2) he [or she] exhausted all of his [or her] peremptory challenges or can justify the failure to do so; and (3) he [or she] expressed dissatisfaction with the jury ultimately selected." (*People v. Maury* (2003) 30 Cal.4th 342, 379.) "To prevail on [appeal], [the party] must demonstrate that the court's rulings affected his right to a fair and impartial jury." (*People v. Yeoman* (2003) 31 Cal.4th 93, 114.) The court's manner of conducting voir dire will not be disturbed on appeal unless it renders the trial fundamentally unfair. (*People v. Carter* (2005) 36 Cal.4th 1215, 1250.)

Here, each of the challenged jurors assured the trial court during voir dire that they believed they could be fair and set aside their personal experiences and judge the case fairly based upon the evidence presented. We cannot say the trial court, who observed the jurors' demeanor during voir dire, was not justified in accepting their responses as true. "'"'The trial judge's function [during voir dire] is not unlike that of the jurors later in the trial. Both

must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.'"'" (*People v. Whalen* (2013) 56 Cal.4th 1, 30.)

C. Juror Misconduct

On October 11, 2011, plaintiff moved for a mistrial, contending Juror No. 10[5] committed misconduct when he photographed her outside the courtroom, and Juror No. 10 was also observed communicating with Pech during the trial. She contends this misconduct mandates reversal.

1. Factual Background

During trial, Hoffman accused Juror No. 10 of photographing her as she left the courtroom; he was sitting in a white pickup truck about 100 feet from her. The court questioned Juror No. 10, who stated that he used public transit to get to the courthouse, but admitted he had taken a photograph with his iPad several days earlier. He showed the iPad to the court. The court did not find any photographs of plaintiff on the juror's iPad, instead finding photographs of downtown landmarks, such as Disney Hall. The court determined Hoffman was mistaken. Juror No. 10 admitted saying "hello" and "good morning" to Pech.

2. Discussion

"To challenge the validity of a verdict based on juror misconduct, a [party] may present evidence of overt acts or statements that are objectively ascertainable by sight, hearing, or the other senses." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116.) "When the record shows there was juror misconduct, the defendant is afforded the benefit of a rebuttable presumption of prejudice. [Citations.] This presumption is provided as an evidentiary aid to the defendant because of the statutory bar against evidence of a juror's subjective thought processes and the reliability of external circumstances to show underlying bias. [Citations.] If a review of the entire record shows no substantial likelihood of juror bias, the presumption has been rebutted. [Citations.]" (*Ibid.*)

---

[5] Juror No. 10 was Juror No. 13 during voir dire.

"Juror bias does not require that a juror bear animosity towards the defendant. Rather, juror bias exists if there is a substantial likelihood that a juror's verdict was based on an improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant. [Citations.] [¶] The question of what constitutes juror bias varies according to the circumstances of the case. [Citation.]. . . . [¶] Ultimately, the test for determining whether juror misconduct likely resulted in actual bias is 'different from, and indeed less tolerant than,' normal harmless error analysis. [Citations.] If the record shows a substantial likelihood that even one juror 'was impermissibly influenced to the defendant's detriment,' reversal is required regardless of whether the court is convinced an unbiased jury would have reached the same result." (*People v. Cissna*, *supra*, 182 Cal.App.4th at pp. 1116–1117.)

On appeal from a ruling denying relief based on juror misconduct, we defer to the trial court's factual findings if supported by substantial evidence, and exercise our independent judgment on the issue of whether prejudice arose from the misconduct (i.e., whether there is a substantial likelihood of inherent and/or circumstantial juror bias). (*People v. Ault* (2004) 33 Cal.4th 1250, 1263–1264.)

Here, Juror No. 10's innocuous greetings to Pech do not mandate reversal. A greeting, smile, and head nods do not support a conclusion that a juror is so biased for the defense that he or she is unable to perform their duty. (See *People v. Bennett* (2009) 45 Cal.4th 577, 621.) Further, the trial court's finding that there was no juror misconduct in the first instance is supported by substantial evidence. Hoffman's testimony that she saw Juror No. 10 photographing her from a white pickup truck was refuted by the juror's own statements. Thus, no inference of prejudice based on misconduct arises in the first instance, and we find no error.

III. Nonsuit On Implied Contract Claim

Hoffman contends she established a prima facie case on her claim for breach of implied employment contract because an implied contract defeats the at-will presumption of

Labor Code section 2922; the circumstantial evidence of four *Foley*[6] factors plus the actual understanding of the parties establishes an implied contract; and the question of whether good cause existed for termination was a question of fact for the jury.

A. Factual Background

The testimony and evidence at trial[7] established that while working at the Dorchester, Hoffman received raises every year, and Kovacs and the board told her that she was doing a good job and that the board looked forward to working with her for "many more years." She received raises and bonuses. At the time she was hired, Hoffman was not told that the job was at-will, and she did not receive an employee manual until December 2005. However, the employee handbook at paragraph 20 (the last two pages of the handbook) provided, "**At-Will Employment.** Each party has the right to terminate their employment relationship AT WILL, which means at any time, for any reason, with or without cause and without prior warning. Employer is NOT obligated to use progressive discipline prior to terminating Employee, and may transfer or demote employees at will." The handbook further provided, "Employee Handbook. The Employee Handbook is NOT an employment contract."

Hoffman was required to prepare daily reports for the board of directors, and submit the reports to Pech, who was her supervisor. Hoffman told Pech she was overloaded and was having trouble getting the reports done in October 2009. Hoffman did not prepare the reports as required or transmit the reports to Pech in October 2009.

Kovacs and Pech instructed Hoffman to cancel an open house held October 27, 2009 because it was against Association rules to hold open houses. Hoffman refused to comply because she did not believe the event was an "open house" because an RSVP was required;

---

[6] *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 (*Foley*).

[7] In her brief, Hoffman combined the fact statements for the summary judgment motion with the trial evidence. For purposes of evaluating whether nonsuit was properly granted, we focus on plaintiff's trial evidence.

previously, such RSVP open houses had been held at the Dorchester. She also believed she could not order the realtor to remove "open house" signs that were on a public sidewalk.

The Dorchester acquired a new time-card system in approximately July to October 2009. Hoffman had to learn the new program on her own. Sometimes the clock function did not work and she had to change employees' time cards. Hoffman did this approximately 75 to 100 times. However, the employee handbook provided that employees were subject to immediate dismissal if any other person punched their time card. Hoffman denied having a romantic relationship with Esmailzadeh; at the time, in October 2009, she had a boyfriend. Esmailzadeh worked as a valet and in maintenance. On October 14, 2009, she changed Esmailzadeh's time card, but claimed it was inadvertent.

Pech made a written recommendation on October 31, 2009 to terminate Hoffman. The memorandum listed five specific violations of the employee handbook and additional performance issues. The specific violations were (1) failure to provide daily reports; (2) and (3) violations related to the open house occurring on October 27, 2009 and Hoffman's refusal to cancel it; (4) changes to Esmailzadeh's time card on October 14, 2009; (5) Hoffman's unauthorized entry into an owner's unit for the purpose of keeping her pet dog at work. The memorandum listed other performance issues, including a continuous failure to arrive by 9:00 a.m.; failure to adequately supervise personnel; "lack of leadership;" and "overall emotional immaturity."

According to Hoffman, the employee handbook reflected that progressive discipline was required before termination of an employee, and the board had a practice of only terminating employees for "good cause." While general manager, Hoffman terminated approximately 10 to 15 employees. Although Hoffman was told to improve the quality of the staff, she was told that she could not fire employee without cause because they had been at the Dorchester "too long."

Kovacs told her that Pech was not happy they had hired her because she was a woman, and Pech did not believe a woman should be managing the building. When Richard Pech became president of the board in October 2008, he began to yell at her on a regular

basis. Pech told her that he had "'bent over backwards to be extremely sensitive to your emotional insecurity because you are an outstandingly honest, dependable employee who has the best interest of the Dorchester as a priority.'" Pech made sexist remarks to her about female tenants of the building, saying they were "off their meds," or would make fun of the way women walked.

Hoffman complained to the board about Pech's behavior.

Prior to her termination, Hoffman was not "written up" for insufficient performance. No one other than Pech made comments to her about her performance. Neither Pech nor the board told her that unless she submitted her reports in a timely fashion, they would terminate her. As a result of the conditions at her job and her termination, Hoffman had major depressive disorder.

Defendant moved for nonsuit on Hoffman's breach of contract claim based on the signed employment agreement, and Hoffman's failure to establish that there was an agreement to discharge only for cause, that she substantially performed her duties, and that the Association nonetheless discharged her without good cause. Neither Hoffman's opposition nor the trial court's ruling on the motion are part of the record. However, the special verdict form indicates the issue was not submitted to the jury.

B. Standard of Review

"On review of a judgment of nonsuit, as here, we must view the facts in the light most favorable to the plaintiffs. '[C]ourts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper. The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor. [Citations.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff's evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the

evidence in plaintiff['s] favor . . . .'" [Citation.] The same rule applies on appeal from the grant of a nonsuit. [Citation.]" (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214–1215.)

C. Discussion

Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." Thus, an agreement for "permanent employment," or "lifetime employment," or even "for so long as the employee chooses" is deemed at-will employment; with no specified term, the employment is terminable at the will of either party. (*Foley, supra*, 47 Cal.3d at p. 678.) The statute creates a presumption that the employment is at will. The presumption affects the burden of proof because it is based on public policy considerations. Therefore, the burden is on the employee to prove the employment was not at will by evidence of a contract, express or implied, for a fixed term or to terminate only for cause. (*Haycock v. Hughes Aircraft Co*. (1994) 22 Cal.App.4th 1473, 1488–1489.)

Absent proof of a contrary agreement or other limitation on the employer's right to terminate, an employer may discharge at any time, and for any lawful reason. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335.) Where the employment is at will, the employer's motive for termination and lack of care in doing so are generally irrelevant. Thus, it is immaterial that the employer acted in "'bad faith'" or "'without probable cause.'" (*Id.* at p. 351.) Further, the employer is not required to treat all employees alike: "[T]he employer may act peremptorily, arbitrarily or inconsistently." (*Id.* at p. 350.)

In the absence of an express agreement stating employment is at-will, an employee may rebut the statutory presumption of at-will employment by proving the existence of an implied-in-fact promise not to discharge without good cause. Such a contract may be proved by a course of conduct, including oral representations. (*Foley, supra*, 47 Cal.3d at pp. 675–676; *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 337.) An express at-will provision in a written agreement, signed by the employee, cannot be overcome by proof of an implied contrary understanding. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384,

389.) However, such provisions in employee handbooks or manuals are not conclusive and do not preclude proof of an implied-in-fact contract to discharge only for cause "particularly where other provisions in the employer's personnel documents themselves suggest limits on the employer's termination rights." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 339.) Personnel handbooks are not individualized integrated agreements that would preclude contrary parol evidence; as a result, employee handbook disclaimers "should not permit an employer, at its whim, to repudiate promises it has otherwise made in its own self-interest, and on which it intended an employee to rely." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 340.)

Factors considered in evaluating whether an implied-in-fact contract exists include the employer's personnel policies and practices; the employee's length of service; actions or communications by the employer reflecting assurances of continued employment; practices in the industry in which the employee is engaged; and whether the employee gave independent consideration for the employer's promise. (*Foley*, *supra*, 47 Cal.3d at pp. 680–681.) Each case turns on its own facts. (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380.)

The employer's own personnel policies and practices may limit grounds for termination of employment. (*Foley*, *supra*, 47 Cal.3d at pp. 681–682.) "When an employer promulgates formal personnel policies and procedures in handbooks, manuals and memoranda disseminated to employees, a strong inference may arise that the employer intended workers to rely on these policies as terms and conditions of their employment." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 344.) If an employer has written termination guidelines, a trier of fact may infer an agreement to limit the grounds for termination to those expressed in the guidelines. (*Foley*, at p. 681.) The employer's past practice of not terminating administrative personnel except for cause may point to an implied contract. (*Stillwell v. The Salvation Army*, *supra*, 167 Cal.App.4th at p. 382.) The employee's length of employment is a relevant consideration in deciding whether an implied

agreement not to terminate without cause has been formed. (*Foley*, at 681; *Stillwell*, at p. 382.)

However, the fact that an employer "'builds a file'" before terminating an employee does not prove a promise not to discharge without cause. The employer's instructions may merely reflect its concern to avoid unlawful terminations (e.g., for improper age discrimination). (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 367.) Length of employment is only one of several relevant factors and is not itself sufficient to establish existence of an implied contract: "(A)n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at pp. 341–342.) Favorable performance reviews, regular promotions, salary increases and bonuses are relevant factors but do not, without more, imply a contract limiting the employer's termination right. "Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continued valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Id.* at p. 342.)

Here, Hoffman has failed to establish breach of an implied contract not to terminate except for cause. Even assuming she overcame the at-will presumption and the express provision in the employee agreement stating that employment at the Dorchester is at-will and no progressive discipline is required by a showing that the Dorchester employed a progressive system of discipline, she had received raises and favorable reviews and commendations that the board hoped she would stay a long time, the record demonstrates defendant had good cause to terminate plaintiff based upon her violation of Association rules in holding the open house and in failing to perform her job duties by providing daily reports when requested. At trial, Hoffman did not challenge the accuracy of defendant's evidence of her violation of the open house rules or the failure to provide daily reports, and thus failed to rebut defendant's showing that she was properly terminated for cause.

IV. Instructional Error

Hoffman contends the trial court erred in instructing the jury that under Labor Code section 201, subdivision (a) her unpaid wages were due on November 12, 2009 when her actual termination date was November 11, 2009. She contends this error took away the jury's ability to determine whether defendant willfully made late payments when it paid her on November 12 instead of November 11.

A. Factual Background

Hoffman requested the court to give standard instructions based upon the Labor Code regarding payment of unpaid wages and her entitlement to a civil penalty under Labor Code section 203 based upon untimely payment of those wages. Hoffman asserted her employment was terminated November 11, 2009, but she did not receive her paychecks until November 13, 2009 (one by direct deposit and another dated November 12, 2009 that she picked up on November 13, 2009).

Hoffman requested a standard CACI instruction stating: "To recover the civil penalty [due under Labor Code section 203], Nichole Hoffman must prove all of the following: [¶] 1. The date on which Nichole Hoffman's employment ended; [¶] 2. The date on which 10520 Wilshire Owners Association paid Nichole Hoffman all wages due; [¶] 3. Nichole Hoffman's daily wage rate at the time her employment with 10520 Wilshire Owners Association ended; and [¶] 4. That 10520 Wilshire Owners Association willfully failed to pay these wages." (CACI No. 2704) Instead, over Hoffman's objection, the trial court instructed the jury: "To recover the civil penalty, Nichole Hoffman must prove all of the following: [¶] 1. That 10520 Wilshire Owners Association failed to pay all wages due by November 12, 2009; [¶] 2. That 10520 Wilshire Owners Association willfully failed to pay these wages." At trial, Hoffman disputed the date her employment ended, contending it was November 11, 2009; defendant later conceded that November 11, 2009 was the correct date.

B. Discussion

The trial court "must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572.) Civil

instructional error is prejudicial when it seems probable that the error prejudicially affected the verdict in light of its impact on a party's ability to place its case before the jury. Therefore, in determining whether an instructional error was prejudicial, the reviewing court must evaluate "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id*. at pp. 580–581.) We review challenges to the propriety of jury instructions de novo. (*Miller v. Weitzen* (2005) 133 Cal.App.4th 732, 736, fn. 3.)

Labor Code sections 201, 202 and 208 govern payment upon termination of employment. An employer who discharges an employee must immediately pay all compensation due and owing. (Lab. Code, § 201, subd. (a).) Where the employer willfully violates the provisions of this statute, section 203 provides "waiting time penalties" of up to 30 days' wages. If an employer willfully fails to pay "without abatement or deduction" wages due to an employee who quits or is discharged, the employee's wages continue as a penalty until paid, for up to 30 days. (Lab. Code, § 203.)

The place of payment at termination is "at the place of discharge, and every employee who quits shall be paid at the office or agency of the employer in the county where the employee has been performing labor." (Lab. Code, § 208.) Where the employee has authorized the employer to pay his or her wages into a bank account, the payment may be made by depositing the amount due into such account. (Lab. Code, § 213, subd. (d).)

Civil Code section 11 provides that when the time for doing an act falls on a holiday, "it may be peformed upon the next business day, with the same effect as if it had been performed upon the day appointed." (See *Law v. Title Guarantee & Trust Co.* (1928) 91 Cal.App. 621, 626.)

As a result, because November 11 was a holiday (Veteran's Day), the court's substitution of November 12 for November 11 had the practical effect of taking into account the provisions of Civil Code section 11—namely, amounts due on Hoffman on November 11, a holiday, would be timely if paid the next day. Thus, we find no prejudice to Hoffman by the court's substitution of the instruction.

V. Inconsistent Verdicts

Hoffman argues the trial court erred in failing to have the jury redeliberate its inconsistent verdict that awarded her $15,000 in damages but found no liability on her claims. Yet a poll of the jury indicated an 8-4 vote on the retaliation claim, and the court was confused by one juror's answer concerning that juror's vote and dismissed the jury before counsel could object.

A. Factual Background

As relevant to the issue here, the special verdict form requested the jury to answer the following questions with a "yes" or "no" answer:

"Question No. 1: Was Nichole Hoffman's sex a motivating reason for 10520 Wilshire Owner Association's discharge of her?"

"Question No. 3: Was Nichole Hoffman's complaint(s) about harassment based on sex and/or race a motivating reason for 10520 Wilshire Owner Association's decision to discharge Nichole Hoffman?"

"Question No. 4: Was Nichole Hoffman's complaint(s) of what she reasonably perceived to be illegal conduct involving her privacy rights and/or those of other employees and/or illegal questions of a potential employee during the interview process a motivating reason for 10520 Wilshire Owners Association's decision to discharge her?" The jury answered "No" to all of these questions.

An instruction following Question No. 4 stated, "If your answers to Questions 1, 2, and 4 are all 'no,' please go to Question No. 6. If you answered any of these questions 'yes,' go to Question No. 5." Confusion arose when the trial court reviewed the special verdict form as filled out by the jury. Question No. 2 asked the jury if Hoffman had complained of retaliation to defendant; the jury answered "yes" to this question and as a result the jury had proceeded to answer Question No. 5. After some discussion with counsel, the parties concluded the instruction following Question No. 4 should have asked about Question 3 instead of Question 2, and should have read: "If your answers to Questions 1, 3, and 4 are all 'no,' please go to Question No. 6. If you answered any of these questions 'yes,' go to

Question No. 5." The court interlineated on the special verdict form to correct it as the parties discussed. The special verdict form reflects this interlineation, and also indicates the jury had written "$15,000" for past economic loss but had crossed that figure out.

After the jury reached a verdict, the court polled the jury. With respect to Question No. 4, the court asked the individual jurors if "no" was their answer to this question; all but four jurors responded "yes." Juror Nos. 1, 3, 4, and 11 responded "no," indicating that they answered this question in the affirmative. The court asked, "Juror No. 4, did you respond no to Question number 4?" Juror No. 4 responded, "I had answered yes to question 4." Juror No. 4 asked the court to repeat the question; the clerk reread Question No. 4 and stated the answer on the special verdict form was "No." In response, Juror No. 4 stated, "I answered Yes. Okay, Yeah."

The court polled the jury concerning damages. In response to all questions regarding damages (past economic loss, future economic loss, pasts noneconomic loss, future noneconomic loss), the jury responded to each category that they awarded "zero." The court explained to counsel that the jury realized they were not to award damages and thus the jury on its own had corrected the verdict by crossing out the $15,000 figure. Hoffman's counsel stated that he understood, and did not object any further to the jury verdict.

B. Discussion

Potentially defective special verdicts are subject to "a multilayered approach." (*Zagami, Inc. v. James A. Crone, Inc*. (2008) 160 Cal.App.4th 1083, 1091.) Prior to the jury's discharge, the trial court is obliged upon request to ask the jury to correct or clarify a potentially ambiguous or inconsistent verdict. (*Ibid*.) If the verdict is merely ambiguous, a party's failure to seek clarification of the verdict before the jury is discharged may work a forfeiture of the purported defect on appeal. (*Id*. at p. 1092, fn. 5.) However, absent forfeiture, courts may properly interpret a "merely ambiguous" verdict in light of the pleadings, evidence, and instructions. (*Id*. at p. 1092.) In contrast, if the special verdicts are "hopelessly ambiguous" or inconsistent, failure to seek clarification from the jury does not create a forfeiture, and the proper remedy is ordinarily a retrial on the issues underlying the

defective verdict. (*Id*. at p. 1092.) Finally, "[w]e analyze the special verdict form de novo." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.)

We disagree that the jury's verdict is ambiguous. The record reflects that Juror No. 4 likely misspoke when polled on how that juror voted on the retaliation claim due to the confusing way the court phrased the question (seeking an affirmative response that the party had given a negative response to the verdict question), and meant to affirm that he or she answered "no" to the special verdict question. To the extent there is any ambiguity here such that the juror's response could be interpreted to mean he or she meant to answer "yes" to Question 4 on the special verdict form, the verdict was not hopelessly ambiguous and therefore Hoffman's failure to seek an easy clarification at the time forfeits the issue.

Finally, at no time did the jury submit to the court a special verdict form that contained a damage award; the poll indicates they corrected the verdict before it was given to the court. As a result, there is no error in the special verdict.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.