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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ENGIE KHALIL,

Plaintiff and Respondent,

v.

TRI CASCADE, INC., et al.,

Defendants and Appellants.

G064165

(Super. Ct. No. 30-2019-
01068073)

O P I N I O N

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, Robert S. Nelson, Judge. Affirmed.

Law Offices of Thomas M. McIntosh and Thomas M. McIntosh for Defendants and Appellants.

JML Law and Jennifer A. Lipski for Plaintiff and Respondent.

A jury awarded plaintiff Engie Khalil damages for wrongful termination, retaliation and harassment, as well as civil penalties for unpaid wages, against her former employer, defendant Tri Cascade, Inc., and its chief executive officer, defendant Max Li (Li), who the jury also found liable for workplace harassment.¹ Defendants moved for a new trial under Code of Civil Procedure section 657, subdivision (4) (section 657(4)), citing “newly discovered” evidence they contend disproves plaintiff’s retaliation and wrongful termination claims. The trial court denied the motion on the ground defendants failed to show the evidence “could not, with reasonable diligence, have [been] discovered and produced at the trial.” (§ 657(4).)

Defendants appeal the order denying their motion for a new trial. They also appeal the judgment, asserting the evidence was insufficient to support plaintiff’s retaliation claim, the verdict was internally inconsistent, and the damages award was excessive. We find no error and affirm both the judgment and the denial of a new trial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff filed her complaint against Tri Cascade and Li² on May 3, 2019, alleging multiple employment causes of action, including

¹ In addition to Tri Cascade, Inc., plaintiff named its affiliated companies Sky Fidelity, Inc. and Saddle Ranch Media, Inc. (also known as SRMX), as defendants. We refer to Tri Cascade, Inc., and its affiliated company defendants collectively as Tri Cascade. We refer to Li collectively with Tri Cascade as defendants.

² Plaintiff also sued Alicia Mellor (Mellor), part owner and vice president of sales of Tri Cascade, Inc., who prevailed at trial on the wage claims alleged against her, and another defendant, Timothy Peabody, who was dismissed from the action. Only Tri Cascade and Li have appealed the judgment.

discrimination, harassment, retaliation, wrongful termination, and waiting time penalties arising from various wage and hour violations. Defendants filed an answer and cross-complaint against plaintiff and her spouse for invasion of privacy.³ Plaintiff answered the cross-complaint.

The case was tried to a jury in January 2024, more than four years after plaintiff filed her complaint. The jury found in plaintiff's favor on her claims against Tri Cascade for retaliation and wrongful termination, and on her claims against both Tri Cascade and Li for work environment harassment and waiting time penalties.⁴ The jury found Tri Cascade acted with malice, oppression, or fraud. The jury awarded plaintiff waiting time penalties of \$5,416.66 and damages of \$350,056.03, which consisted of lost earnings of \$20,056.03, pain and suffering of \$300,000, and punitive damages of \$30,000. The trial court entered judgment on February 14, 2024.

On March 15, 2024, defendants moved for a new trial on plaintiff's claims for retaliation and wrongful termination based on a single ground: newly discovered evidence pursuant to section 657(4). Specifically, defendants contended that *after* the trial concluded, they conducted a forensic search of their computers for an e-mail on which plaintiff had relied heavily at trial to support her retaliation and wrongful termination claims. Plaintiff testified at trial defendants retaliated against her and terminated her employment after she sent an e-mail dated January 25, 2019, to Li—with copies to Alan Bailey (chief financial officer of Tri Cascade) and Amy Yang—

³ Defendants later dismissed their claims against plaintiff's spouse.

⁴ The jury rejected plaintiff's claims for discrimination and failure to prevent discrimination, as well as defendants' cross-claim against plaintiff for invasion of privacy.

demanding payment of her outstanding wages and threatening to report defendants to the Division of Labor Standards Enforcement (DLSE). But according to defendants' new trial motion, their posttrial forensic search disclosed that none of the recipients had ever received the e-mail, from which defendants inferred plaintiff never actually sent the e-mail. Plaintiff opposed the motion.

The trial court denied defendants' motion on April 11, 2024, finding defendants had not satisfied the requirements for a new trial under section 657(4) because they failed to show they could not have discovered the claimed new evidence (that plaintiff never sent the January 25, 2019 e-mail) with reasonable diligence and introduced it at trial. Defendants timely appealed.

DISCUSSION

I.

THE COURT DID NOT ERR IN DENYING THE MOTION FOR NEW TRIAL

Defendants contend the trial court abused its discretion in denying their motion for new trial. We disagree.

“A motion for a new trial on the grounds of newly discovered evidence is generally ‘a matter which is committed to the sound discretion of the trial court’” (*Aron v. WIB Holdings* (2018) 21 Cal.App.5th 1069, 1078.) The trial court's exercise of discretion is given great deference on appeal. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160.) Thus, we will not interfere with the trial court's exercise of discretion “unless a clear abuse of discretion is shown.” (*Aron v. WIB Holdings, supra*, at p. 1078.)

Defendants' motion cited only a single statutory basis for a new trial: newly discovered evidence. Section 657(4) “authorizes the court to grant

[a motion for new trial] where the moving party has discovered new, material evidence which could not, with reasonable diligence, have been discovered and produced at trial. ‘The essential elements which must be established are (1) . . . the evidence is newly discovered; (2) . . . reasonable diligence has been exercised in its discovery and production; and (3) . . . the evidence is material to the movant’s case.’” (*Sherman v. Kinetic Concepts, Inc., supra*, 67 Cal.App.4th at p. 1161.)

We find no error in the trial court’s conclusion defendants failed to demonstrate they could not, with reasonable diligence, have discovered the information regarding the January 25, 2019 e-mail prior to trial and introduced it at trial. On the contrary, defendants’ motion established the ease with which defendants could have discovered the fact before trial *if they had simply conducted a search for the e-mail*. The record fully supports the trial court’s findings that defendants could have conducted the forensic search for the e-mail “at any time over the last several years” prior to trial and that defendants made no showing why they did not do so or why the evidence could not have been discovered before trial. Defendants did not, and could not, contend they were unaware of the e-mail or of plaintiff’s intention to use it. Plaintiff submitted evidence in opposition to the motion that defendants knew of the e-mail well in advance of trial. For example, plaintiff showed she questioned Li about the e-mail during his deposition as Tri Cascade’s person most knowledgeable on February 5, 2020—roughly *four years* before the commencement of trial. Li admitted receiving the e-mail. Plaintiff also provided evidence she sent a copy of the e-mail to defendants’ counsel on February 21, 2021—*three years* prior to trial. Plaintiff herself testified about the e-mail during trial, and *so did Li*; in fact, when Li was

asked about the e-mail at trial, he again testified under oath that he had received it.

Defendants acknowledge (as they must under section 657(4)) that the e-mail was material to plaintiff's case and to their defense.⁵ Yet, defendants inexplicably waited until after trial was over to conduct any search for the e-mail to ascertain its authenticity. Defendants offer no plausible excuse or reason for their lack of diligent pretrial preparation.

Based on these undisputed facts, the trial court did not abuse its discretion in denying defendants' request for a new trial.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING OF RETALIATION

Tri Cascade contends there was insufficient evidence to support the jury's finding on plaintiff's retaliation claim. Specifically, defendants contend plaintiff failed to show that her *filing* of a claim with the DLSE was the reason defendants terminated her. We disagree with defendants' characterization of plaintiff's burden of proof and their argument the evidence was insufficient to support the jury's verdict.

When an appellant contends there is insufficient evidence to support a finding of fact, we apply the substantial evidence standard of review. (*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 581.) "Under [the substantial evidence] standard of review, "the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact." [Citation.] In so doing, we accept all evidence that supports

⁵ In their appellate briefing, defendants state: "If the principals never received the e-mail, then they did not retaliate against her for something they had no knowledge of."

the judgment, disregard contrary evidence, and draw all reasonable inferences to uphold the judgment. [Citation.] “It is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it.”” (*In re Marriage of Nelson* (2025) 115 Cal.App.5th 904, 914.)

First, plaintiff was not required to prove she actually filed a claim with the DLSE and defendants knew of that fact before they fired her. Plaintiff’s notice to defendants that she *might* do so was sufficient. The jury was instructed as follows: “[Plaintiff] claims that Tri Cascade, Inc., discharged her in retaliation for her disclosure of an unlawful act. In order to establish this claim, [plaintiff] must prove all of the following: [¶] That Tri Cascade, Inc., was [plaintiff’s] employer; that [plaintiff] disclosed or that Tri Cascade, Inc., believed [plaintiff] had disclosed *or might disclose to a government agency* or an employee with authority to investigate, discover, or correct legal violations of California Labor Code for failure to pay wages; [¶] That [plaintiff] had a reasonable cause to believe that the information disclosed was a violation of state statute; that Tri Cascade, Inc., discharged [plaintiff]; that [plaintiff’s] disclosure of information regarding her unpaid wages was a contributing factor in Tri Cascade, Inc.’s decision to discharge [plaintiff]; [¶] That [plaintiff] was harmed; that Tri Cascade, Inc.’s conduct was a substantial factor in causing [plaintiff’s] harm.” (Italics added; see Lab. Code, § 1102.5, subd. (b).)

Viewing the evidence in the light most favorable to plaintiff, we have no difficulty concluding substantial evidence supports the jury’s verdict in favor of plaintiff on her claim of retaliation. The evidence showed that, leading up to her termination, plaintiff repeatedly complained to executives of Tri Cascade (including Li) that the company owed her wages, demanded

payment of the unpaid sums, and threatened to file a claim with the DLSE. Plaintiff also produced evidence she had informed Li and others she had “contacted the DLSE” regarding her unpaid wages the day before she was terminated. This evidence is sufficient to support the jury’s verdict in favor of plaintiff on her retaliation claim.

III.

THE JURY’S FINDING THAT PLAINTIFF WAS HARASSED BASED ON RACE, NATIONAL ORIGIN, AND RELIGION IS NOT INCONSISTENT WITH ITS REJECTION OF PLAINTIFF’S DISCRIMINATION CLAIM

Defendants’ argument on appeal that the jury’s verdict is inconsistent fares no better. Defendants contend the jury’s finding that plaintiff was harassed during her employment based on her race, national origin, and/or religion is inconsistent with its finding that defendants did not discriminate against plaintiff on the basis of her race, national origin, or religion when they terminated her employment. This argument borders on frivolous.

First, defendants failed to cite either to the appellate record or to legal authority in support of their contention. Failure to cite the applicable portion of the record violates California Rules of Court, rule 8.204(a)(1)(C). Moreover, we may treat arguments without legal authority as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Second, even if we address the substance of the argument, there is no inconsistency between the jury’s verdict on these two causes of action. The elements of a claim for discrimination are markedly different than the elements of a claim of harassment. To prevail on her claim of discrimination, plaintiff was required to prove her race, national origin, or religion was a substantial motivating reason she was demoted and discharged. (*Harris v.*

City of Santa Monica (2013) 56 Cal.4th 203, 232.) But to prove she suffered harassment on the same grounds, plaintiff need not show she suffered any adverse employment action. She simply had to show “she was subjected to harassing conduct that was (1) unwelcome; (2) because of race; and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment.” (*Bailey v. San Francisco Dist. Attorney’s Office* (2024) 16 Cal.5th 611, 627.) Accordingly, the jury’s finding that plaintiff was subjected to severe or pervasive harassment during her employment because of her race, national origin, or religion is not inconsistent with its finding that plaintiff was not demoted and discharged because of those factors.

IV.

DEFENDANTS WAIVED THEIR ARGUMENT THE DAMAGES AWARD WAS EXCESSIVE

On appeal, defendants level several attacks on the amount of the damages awarded to plaintiff. First, defendants contend plaintiff made a mathematical miscalculation of her daily wage in calculating her past economic losses, which resulted in an award that was \$528.49 higher than it should have been. Second, defendants contend the calculation of plaintiff’s past economic losses was excessive because it improperly included a time period when plaintiff was not working because she was laid off due to the COVID pandemic, which had nothing to do with the claims plaintiff asserted at trial. Specifically, defendants contend that “[a]lthough the jury saw through [plaintiff’s] exorbitant past economic losses and only awarded her \$20,056.03 . . . the award still is arguably 50% higher than [plaintiff] is

entitled to.” Third, defendants argue the jury’s award of \$300,000 in noneconomic damages is excessive. We find these arguments unavailing.

The overarching problem with defendants’ excessive damages arguments is that they are raising them for the first time on appeal. One of the grounds for a new trial is inadequate or excessive damages. (Code Civ. Proc., § 657, subd. (5).) Defendants did not, however, include any challenge to the excessiveness of the jury’s damages award in their motion for new trial. Such claims must be made in the first instance to the trial court as part of defendants’ motion for new trial and are not properly raised the first time on appeal. (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121 [“Failure to move for a new trial on the ground of excessive or inadequate damages precludes a challenge on appeal to the amount of damages if the challenge turns on the credibility of witnesses, conflicting evidence, or other factual questions”]; *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719–720.)

Each of the damages issues defendants have raised on appeal are factual questions, including the correct amount of plaintiff’s daily wages, the proper time period for which damages should be awarded, and whether an award of \$300,000 in noneconomic damages was just too high.⁶ It is not our

⁶ Moreover, as to the first issue regarding the miscalculation of plaintiff’s daily wage, defendants have not argued this de minimis error is grounds for reversal; rather, they suggest “this error in figures leads [defendants] to question the accuracy of additional figures presented to the jury.”

function as an appellate court to “reassess damages.” (*Jenkins v. Dahnert* (1962) 202 Cal.App.2d 567, 568.)

V.

DEFENDANTS WAIVED ANY OBJECTION UNDER EVIDENCE CODE SECTION 352
TO PLAINTIFF’S TESTIMONY REGARDING HER BACKGROUND

At the outset of plaintiff’s testimony, plaintiff was asked foundational questions about her background. Plaintiff testified she was born in Egypt and moved to the United States when she was two years old, and when asked if she lived anywhere else, plaintiff testified her father had kidnapped her when she was 14 years old and took her to Egypt for 11 months. Plaintiff then testified at some length about that experience and how it affected her life. Defendants now argue on appeal the trial court erred by permitting this testimony. But defendants’ counsel did not object to the testimony when it came in at trial, either on grounds of relevance or under Evidence Code section 352.⁷ “Because [defendants] did not raise this challenge at trial, the issue is waived.” (*People v. Bolin* (1998) 18 Cal.4th 297, 322.)

Even if the argument were not waived, we find no basis to conclude the admission of this extraneous information constituted reversible error.

⁷ Defendants contend they objected to the testimony later, when plaintiff brought the subject up again. In truth, they did not. When plaintiff returned to the subject later in her testimony, defendants objected solely on the ground plaintiff’s testimony constituted “more of a narrative than a response to the question.”

DISPOSITION

The judgment and postjudgment order denying the motion for new trial are affirmed. Plaintiff shall recover costs on appeal.

GOODING, J.

WE CONCUR:

MOTOIKE, ACTING P. J.

SCOTT, J.