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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALEXA ROMERO, Plaintiff and Appellant, v. LEON MAX, INC., Defendant and Respondent.	B226820, B230313 (Los Angeles County Super. Ct. No. BC400145)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Fink & Associates, Keith A. Fink and Sarah Ella Hernandez for Plaintiff and Appellant.

Towle Denison Smith & Maniscalco, Martin C. Washton and Amanda R. Washton for Defendant and Respondent.

This case involves a jury award against defendant Leon Max, Inc., and in favor of plaintiff Alexa Romero of economic damages in the amount of $6,359.10, plus $168 for missed lunch or rest breaks, and punitive damages in the amount of $50,000 and a "grossly inflated" claim by Romero for $717,828.50 as attorney fees.

On appeal from the judgment, Romero contends the jury failed to award her compensation for overtime hours worked and all her missed meal breaks and rest periods because the jury erroneously misclassified her as an exempt employee. On appeal from the order granting judgment notwithstanding the verdict (JNOV), Romero contends the trial court erred in vacating the jury's $50,000 punitive damages award and entering zero as the amount awarded.[1] On appeal from the order denying an attorney fee award, Romero contends the trial court abused its discretion in refusing to award any fees based solely on its findings that the requested fee amount was grossly inflated; Romero may have misevaluated her case; and she had turned down a reasonable settlement offer.[2]

Based on our review of the record and applicable law, we affirm the judgment as modified by the JNOV order and the order denying any attorney fee award.

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[1] This court granted Romero's request for judicial notice of the record in the separate appeal (B224573) filed by Romero from the JNOV order; dismissed that appeal (B224573) as nonappealable; and authorized Romero to file a combined brief under B226820, the appeal from the judgment.

[2] This court ordered that the appeal from the attorney fee order (B230313) be consolidated with the appeal from the judgment under B226820 for purposes of argument and disposition.

BACKGROUND

1. Factual Summary[3]

Defendant sells women's clothing and accessories under the name of "Max Studio" through various retail stores, including a store at the Citadel Outlets and another at the Paseo Colorado shopping mall (Paseo). In late January or early February 2002, plaintiff was hired as a sales associate at the Citadel store and later was promoted to "key holder" and then to assistant manager.

On April 8, 2002, while at the Citadel store, plaintiff was promoted to key holder. She testified, as a key holder, she had a key to the store, and if working the opening shift, she would open the store, and if working the closing shift, she would close the store for the day. Originally, plaintiff was paid an hourly wage but on February 9, 2004, she became a key holder on salary.

On May 20, 2004, plaintiff was promoted to assistant manager. Her pay was increased from $27,040 to $34,320 as of July 1, 2005, per year. The store change of status report stated plaintiff was "promoted from keyholder to assistant manager" because she "always follows polices [and] procedures [and] has played an important role in the success of [the] Citadel [store]." As an assistant manager, plaintiff was a salaried employee and therefore did not qualify for overtime. Plaintiff was paid a "flat salary," not by the hour. As a key holder she would get commissions on her individual sales but not as an assistant manager. As an assistant manager, she received commissions based on store sales if the store goal were met at the Citadel location. Her duties as an assistant

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[3] The facts are summarized from the reporter's and clerk's transcripts filed in B224573, B226820, and B230313. "[A]ll intendments are in favor of the judgment and this court must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court. The test, of course, is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor of the respondent. [Citations.]" (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403–404.) Similarly, this court must resolve all conflicts in the evidence in favor of the jury's verdict and sustain the jury's findings if supported by substantial evidence. (*Walker v. Kimball Fruit Co.* (1930) 209 Cal. 629, 631.)

manager included "payroll, closing out for the month, or the week"; inventory; and sending "corporate a package with all our deposits." In preparing the employees' schedule, she did not set the work shift but she would pick "which sales associates would work which shifts[.]" She would also "merchandise the store," which meant "putting clothes on mannequins, moving clothes from one part of the store to the next on shelves or on racks" based on instructions from "corporate." If the particular merchandise were unavailable, plaintiff would select something similar. At times, she would assist a key holder or sales associate to sell an item or "team-sell together." She also would clean the stores by sweeping the floor, wiping down shelving, and cleaning the mirrors and bathrooms.

In light of plaintiff's high sales, defendant made concessions. She was allowed to receive commissions on her individual sales as an assistant manager, rather than fall within the assistant manager bonus structure. In other words, defendant made plaintiff an assistant manager with a commission structure of a key holder. She also was allowed to be paid for working 40 hours a week, although she worked only 35 hours and she did not have to work on Saturday.

Plaintiff had a problem with and challenged authority. She was "highly aggressive," and commissions were "very important for her." She was insubordinate in that she did not want to participate in anything "asked of her that would not generate dollars to her in the form of commissions[.]" On one occasion, Vanessa Lopez, the store manager, had to counsel plaintiff about her extreme reluctance to participate in taking clothing out of boxes, pulling them out from the back room, and hanging up clothing.

Linda Oroz, the Citadel store's regional manager, testified that it was the employee's choice whether to take a break or "complete" a sale. She had observed plaintiff abandon a customer to take a break on one occasion. Oroz observed plaintiff take lunch breaks.

Plaintiff testified she clocked in and out for 30-minute lunch breaks at the Citadel store. There were times she was unable to take lunch. She missed a lunch break about

"three times a week." She complained to Lopez and Gabriela Martinez, then national outlet director whose territory included the Citadel store, but was never compensated for the missed breaks. Also, she was never given a 15-minute break.

In May 2005, plaintiff complained to Dennis Slipakoff, defendant's human resources consultant, that she refused to work with Martinez because none of her complaints were being addressed. He suggested a transfer to the Paseo store with the same position and at the same rate. Plaintiff responded she would accept the transfer.

In June 2006, plaintiff was transferred to the Paseo store as an assistant manager with the same commission compensation structure intact. Plaintiff did not want to be under the supervision of Martinez because plaintiff did not like Martinez's management style. Martinez also might have been ready to fire plaintiff.

Beginning about June 2006, plaintiff was an assistant manager at the Paseo store. Marcia Kaye was the store manager. Kaye decided which employees worked which shift. Turmoil erupted and an "atmosphere of unhappiness " and discord ensued following plaintiff's transfer to the Paseo store. Plaintiff's "attitude and whole general tone around her was . . . extremely abrasive[.]" Within two to three weeks, plaintiff began making complaints about Kaye. Plaintiff never complained to Linda Oroz about meal or rest breaks during the entire 14-month period from her transfer to the Paseo store and Oroz's departure from defendant's employment in August 2007.

Kaye testified plaintiff's duties as assistant manager were "pretty much the same" as hers. If Kaye were not there, plaintiff was "supposed to run the store like I am there." As assistant manager, plaintiff was expected to "supervise the sales force," but there were "[m]any, many times," over 10 times, plaintiff failed to discipline or delegate anything for those employees plaintiff supervised; rather, she allowed those "other employees [to] do whatever they want[ed]." Also, if Kaye were on vacation, plaintiff would have to do the scheduling.

On September 7, 2006, plaintiff received a "write up" for leaving a deposit in the locked register overnight, which was a violation of the policy to put the deposit in the

safe. She was warned that, as an assistant manager, she was required to perform her job description, which she failed to do by leaving the deposit in the drawer overnight, which was unacceptable. The original "write up" did not have checked off the box "'[s]ubstandard job performance.'" There was "white-out" in the box for "satisfactory."

On November 16, 2006, two months later, plaintiff received another written warning regarding a deposit that appeared to be short, but "[t]he overage had been left in the drawer once again" and Oroz had to place it in the depository. Plaintiff was warned that she performed the closing procedures in a "careless manner" and that she must "take the time to do the job[, rather than] rush to go home." She was admonished that "[p]aperwork should be neat and organized. Missing sections are not acceptable." She was further warned that failure to correct this behavior would lead to possible termination.

While at the Paseo store, beginning in June 2006 and in January 2007, plaintiff complained "a lot" to Oroz about Kaye's inappropriate conduct, namely, writing Kaye was present when actually taking the day off; leaving early every day; using company "UPS" to send out personal packages; bringing her TV to work and watching it during work hours; not allowing staff to take breaks; and accusing staff of stealing markers later found, for which accusations she would not apologize.

In the middle of September 2007, Kaye told Daira Vega, defendant's human resources coordinator, that she was considering demoting plaintiff, because she did not feel plaintiff was "a strong assistant manager," in that she lacked the required "leadership skills": She did not "take ownership of the store" or "give direction to the employees like she should." Also, Kaye did not feel plaintiff was "an ally to her, worked with her, to make the store a profitable store." By "ownership of the store," Kaye meant "initiative," such as making sure incoming packages were unpacked and the merchandise was placed on the floor in a timely manner. Kaye also "said something" about plaintiff "was not worth the money she was getting as individual commissions." Vega signed plaintiff's change of status to key holder on September 12, 2007. Kaye testified plaintiff was

demoted because she was not flexible about scheduling; she was insubordinate, disrespectful to Kaye; and she lacked leadership: Under plaintiff's direction, coworkers did not follow the rules. Plaintiff acted like one of the sales force, "chitchatting on the floor, neglecting customers" rather than as an assistant manager. She did not discipline or delegate anything to the sales persons.

The change of status report dated October 1, 2007, stated plaintiff was no longer the assistant manager and that she had been demoted to a key holder at $14 an hour. The reason listed why plaintiff was not qualified to be an assistant manager was she "has no leadership nor dedication to the company." Although she continued to receive commissions on individual sales, she did not receive any store sales commission. Plaintiff testified she was entitled to two 15-minute breaks a day or 10 for the week. She did not take any of her entitled 40 breaks.

When Vanessa Orriols began working at the Paseo store in July 2007, Kaye was the manager and plaintiff was the assistant manager. After plaintiff was demoted, Orriols became the assistant manager. During the 13 months she was employed there, Orriols was able to take her lunch breaks and rest breaks.

Also on October 2, 2007, after her demotion, plaintiff complained at a meeting to Vega and Slipakoff about the UPS incidents, her missed 15-minute breaks, but not about missed lunch breaks, the demotion, and a shoving incident. Shauna Davis, who also worked at the Paseo store and was present at the meeting, told Vega she saw Kaye push plaintiff. Oroz testified that in July 2007, a meeting in the Paseo stockroom took place at which Oroz, plaintiff, and Kaye were present. Plaintiff testified Kaye shoved plaintiff in the presence of Oroz and another. Kaye, who was standing behind plaintiff to the side, shoved plaintiff, who was speaking, with two hands on her back shoulder. Kaye said, "'You don't know what you're talking about" and began "to talk over" plaintiff. Plaintiff admitted that although she "was shocked and uncomfortable," she did not feel pain. Outside plaintiff's presence, Oroz told Kaye not to touch plaintiff and later instructed

plaintiff to let Oroz know if anything like this happened again. Oroz did not recall witnessing any such touching.

On October 2, 2007, plaintiff "hit [her] toe on a C-rack," which was a rack on which merchandise was placed. She felt "excruciating pain," a "10" on a scale of "1 to 10," and her foot became swollen.

After plaintiff's injury, Orriols observed plaintiff frequently, as needed, sitting during business hours. She told plaintiff to sit the one time plaintiff asked if she could. Orriols never observed Kaye telling plaintiff not to sit. Plaintiff never complained to Orriols, and Orriols never heard her complain to anyone else, that plaintiff was not being accommodated.

On October 12, 2007, plaintiff reported the injury to Kaye, who told her to go to the doctor when she had a day off, and plaintiff also reported the injury to Vega. Plaintiff had been able to work between October 2, 2007, and October 16, 2007, by putting up her foot and sitting down sometimes. On October 16, 2007, plaintiff saw a company doctor because the pain worsened. The doctor's note reflected the diagnosis was "'[l]eft food contusion/sprain'" and indicated plaintiff's duties were to be modified by minimizing walking and standing. Plaintiff faxed the note to Vega, who instructed her to pull a chair behind the register and sit if needed, which plaintiff did on several occasions. Plaintiff testified that notwithstanding knowledge of the restrictions, Kaye directed plaintiff to stand while working. Plaintiff complained to Vega on October 17 and again on October 22, 2007.

In the October 22 phone conversation, plaintiff told Vega she could not work with Kaye any further. Vega told plaintiff that she could collect disability and asked if she wanted to transfer to another location. Plaintiff responded yes. Vega said she would get back to plaintiff in a couple of days. Kaye testified that after seeing the doctor's note, Kaye told plaintiff "whatever was needed to do, if she needed to sit down, if she needed to take a moment for herself, anytime she needed, it was totally okay." Plaintiff's last day of work was October 21, 2007.

On October 23, 2007, plaintiff saw the company doctor for a follow-up visit. The doctor's note again reflected plaintiff was to perform modified duties to minimize walking and standing. On November 14, 2007, plaintiff returned. The doctor's note this time reflected she could return to work with no limits or restrictions.

On October 24, 2007, plaintiff received at her home a letter dated October 23, 2007, signed by Vega stating that "'[t]he company accepts your resignation.'" On the same date she spoke with Slipakoff over the phone. When he said he was "'sorry to hear [she] quit,'" plaintiff responded that she did not quit. She did not return to work and was unemployed until May 2008, when she began working at Chinese Laundry, a shoe manufacturer. In the interim she was so stressed that she gained 20 pounds, her hair fell out, and she could not sleep. She could not afford to see a doctor.

Vega testified she believed plaintiff had resigned because Kaye was going to continue to be the Paseo store manager and plaintiff expressed no interest in Slipakoff's offer of a transfer to the Topanga or Sherman Oaks stores.

Kaye testified the demotion change of status form (exhibit 39) had been already filled out by Oroz before Kaye signed it. That document had marked off "substandard job performance"; "careless errors"; "failure to follow directions"; and "failure to carry out job responsibilities." Kaye admitted she was the one who "whited-out 'satisfactory' on the box that says 'conduct' on Exhibit 51"; changed the evaluation to "marginal"; and left blank the box indicating whether plaintiff would be "'eligible for rehire.'"

Plaintiff testified her total lost salary was $13,960, namely, $13,720 for seven months she had been unemployed plus $240 for the six months she worked at Chinese Laundry (where she earned $40 a month less than working for defendant). When the $10,244 plaintiff received in unemployment benefits was subtracted from $13,960, she still had $3,716 in lost salary. When her lost commissions were added to the $3,716 sum, plaintiff's total lost earnings was $6,359.10.

2. Procedural History

Plaintiff filed a 17-count complaint against defendant and Kaye.[4] The 13th, 14th, 15th, and 16th causes of action, respectively, for assault, battery, intentional infliction and negligent infliction of emotional distress, were pleaded against both defendant and Kaye.[5] The remaining causes of action were addressed to defendant.

The first through eighth causes of action pleaded violations of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA) for sexual harassment; sex discrimination; disability discrimination; failure to reasonably accommodate disability; failure to engage in a timely good faith interactive process; failure to prevent the harassment and discrimination; and wrongful termination. The ninth cause of action was for wrongful termination in violation of public policy. The 10th through 12th causes of action pleaded violations of the Labor Code, sections 510 and 1194 et seq. (overtime pay); sections 226.7 and 512 (meal and rest period violations); and section 201 et seq. (wages due and owing upon her wrongful termination). The 17th cause of action, under the unfair competition law (Bus. & Prof. Code, § 17299 et seq.) (UCL), alleged defendant "maintained a workplace rife with harassment, discrimination and retaliation on the basis of sex."

On September 30, 2009, the trial court granted summary adjudication in favor of defendant on the causes of action for sexual harassment (first), sex discrimination (second), and failure to prevent harassment and discrimination (seventh), and in favor of defendant and Kaye on the 16th cause of action for negligent infliction of emotional distress.

On October 16, 2009, the matter was called for trial, which was conducted in three phases. Trial on the claims for punitive damages and the UCL violation (17th cause of action) were bifurcated from the other claims. The first phase was a jury trial on the

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[4] All other defendants subsequently were dismissed.

[5] Defendant's culpability in the 13th and 14th causes of action was based on a vicarious liability theory.

remaining claims. The second was a jury trial on the punitive damages claim, and the third was a court trial on the UCL violation claim.

On November 2, 2009, the jury returned a special verdict in favor of Kaye on the assault and battery causes of action (13th and 14th). On the intentional infliction of emotional distress cause of action (15th), the jury found Kaye's conduct was outrageous and committed with reckless disregard of probability that plaintiff would suffer emotional distress; plaintiff did suffer severe emotional distress; and Kaye's conduct was a substantial factor in causing such distress. The jury found that Kaye did not engage in unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury to plaintiff and that plaintiff failed to prove Kaye's conduct constituted malice or oppression. The jury also found plaintiff sustained past and future "non-economic loss, including physical pain/mental suffering," in the amount of zero.

On the disability discrimination cause of action (third), the jury found plaintiff had a physical disability and she was able to perform her essential job duties with reasonable accommodation for her condition. The jury further found that although defendant knew of plaintiff's physical disability and had discharged plaintiff, plaintiff's physical disability was not a motivating reason for defendant's discharge of her.

On the reasonable accommodation cause of action (fourth), the jury found defendant failed to provide reasonable accommodation for plaintiff's physical disability but that plaintiff suffered no harm from this omission.

On the engaging in interactive process cause of action (fifth), the jury found defendant failed to engage in a good-faith interactive process to determine a reasonable accommodation for plaintiff's disability to enable her to perform essential job requirements, although such an accommodation was available, and that such failure was a substantial factor in causing plaintiff harm.

On the wrongful discharge in violation of public policy and retaliation causes of action (ninth and sixth, respectively), the jury found plaintiff's complaints of discrimination based upon disability regarding disparate treatment or failure to

reasonably accommodate or engage in interactive process "and/or" complaints of failure to provide meal and rest periods a motivating reason for defendant's decision to discharge plaintiff; that plaintiff was harmed by such discharge; and plaintiff's discharge was in retaliation for plaintiff's complaints.

As to the above findings against defendant regarding its failure to engage in a good-faith interactive process, its wrongful discharge of plaintiff, and its intentional infliction of emotional distress on plaintiff, the jury was asked to determine plaintiff's damages. The jury found plaintiff sustained damages in the form of "[p]ast economic loss, including lost earnings" in the amount of $6,359.10. The jury found zero to be the amount plaintiff sustained as to "[p]ast non-economic loss, including physical pain/mental suffering" and as to "[f]uture non-economic loss, including physical pain/mental suffering."

On the issue of whether clear and convincing evidence existed that defendant's conduct constituted "malice, oppression, or fraud," the jury answered "no" as to defendant's disparate treatment conduct, its failure to provide reasonable accommodation, its failure to engage in the interactive process, and wrongful termination of plaintiff; the jury answered "yes" as to defendant's conduct amounting to intentional infliction of emotional distress on plaintiff.

Last, the jury found plaintiff was an exempt employee and therefore was not entitled to overtime wages (10th cause of action); defendant failed to provide plaintiff 12 meal or rest breaks to which she was entitled in the amount of $168 based on her applicable hourly wage (11th cause of action); and defendant did not willfully fail to pay or tender payment of the full amount of wages plaintiff earned on her last day of employment (12th cause of action).

Following the trial on punitive damages, the jury returned a special verdict against defendant for punitive damages in the amount of $50,000.

Thereafter, a court trial was held on the UCL cause of action (17th). The court found credibility was "a major issue," noting the jury found defendant owed plaintiff for

12 missed meal or rest breaks and thereby disbelieved plaintiff's testimony that she had missed many more breaks. Martin Washton, defendant's counsel, argued plaintiff was a nonexempt employee as to 12 missed breaks because the only way the jury could have awarded plaintiff $168 for missed breaks was to multiply 12 by the $14 hourly wage plaintiff earned after her demotion. The court found plaintiff not to be credible and that she was an exempt employee as to her claim for additional missed breaks and, alternatively, the court found plaintiff was entitled to "no rest breaks, no meal breaks, based on the entire record." The court took the matter under submission and later dismissed the UCL claim.

Later, following argument, the trial court granted defendant's motion for JNOV insofar as the motion challenged the award of punitive damages. The court found "no punitive damages were awardable, since the punitive damages were awarded for intentional infliction of emotional distress and the jury found that there were no compensatory damages suffered for emotional distress." The court alternatively found if this court reversed its "striking of the verdict for punitive damages, an appropriate ratio for punitive to compensatory damages would be 1 to 1, or $6,527.10."

The court entered the judgment as modified by its JNOV order striking the $50,000 punitive damages award. The court ordered plaintiff was to recover from defendant "the sum of $6,359.10 in economic damages for Wrongful Termination in Violation of Public Policy and Retaliation and the sum of $168.00 in economic damages on her claim for missed meal and rest breaks, for a total payment of $6,527.10[.]"

On December 29, 2010, the court denied plaintiff's motion for an award of attorney fees because the amount requested was excessive, namely, "grossly inflated," among other reasons.

DISCUSSION

1. Exempt Status Bars Overtime, Meal Breaks, and Rest Periods Claims

It is uncontroverted that an employee who is viewed as management is exempt from the overtime, meal break and rest period requirements of the Labor Code and that

plaintiff held the position as an assistant manager at the time of these claimed unpaid work-related benefits. Both the jury in the first phase of trial and the trial court in the third phase of trial expressly found plaintiff was an exempt employee as to unpaid overtime, meal breaks, and rest periods claimed on appeal. Substantial evidence supports the implicit findings that plaintiff was actually a management employee, not merely a manager in name only. Although plaintiff received commissions on individual sales, which is an earmark of a key holder, not an assistant manager, the evidence established this particular arrangement was made for plaintiff's benefit because of her high sales output, although traditionally assistant managers would earn commissions on store sales only. Accordingly, plaintiff's claim for unpaid overtime, meal breaks, and rest periods is unsuccessful.

a. Applicable Legal Principles

"Generally speaking, California workers are statutorily entitled to overtime compensation for working in excess of a 40-hour workweek or in excess of an eight-hour workday, unless they are properly classified as falling within one of the narrow exemption categories. [Citation.] The [Industrial Welfare Commission] has promulgated numerous wage orders—one concerning the state minimum wage and the balance covering workers employed in various industries. [Citation.] . . . Workers employed in an executive, administrative or professional capacity are exempt from sections 3 through 12 of Wage Order 9, which include provisions concerning overtime compensation, meal and rest periods, and related recordkeeping requirements, among other things. [Citation.]" (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1010 (*UPS*).) As in the case of overtime, the "'additional hour of pay' [for a missed meal break or rest period] is a premium wage, not a penalty."[6] (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1120.)

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[6] The requirement of one additional hour of pay for missed mandated meal or rest periods is set forth in Labor Code section 226.7. Subdivision (a) of this section provides: "No employer shall require any employee to work during any meal or rest period

An employee in the mercantile industry who qualifies under the "Executive Exemption" provision of these wage orders is exempt from the requirements overtime, meal breaks, and rest periods. An employee who qualifies for an "Executive Exemption" is defined as: "A person employed in an executive capacity . . . : [¶] (a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and [¶] (b) Who customarily and regularly directs the work of two or more other employees therein; and [¶] (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and [¶] (d) Who customarily and regularly exercises discretion and independent judgment; and [¶] (e) Who is primarily engaged in duties which meet the test of the exemption. . . ." (Cal. Code Regs., tit. 8, § 11070, subd. 1.(A)(1)(a)–(e).) Also, the employee's monthly salary must be equivalent to no less than two times the state minimum wage for full-time employment. (Cal. Code Regs., tit. 8, § 11070, subd. 1.(A)(1)(f).)

The elements of this exemption are stated in the conjunctive. For the exemption to apply, all elements therefore must be established. (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 828–829 [exemption imposes separate and independent requirements]; accord, *UPS*, *supra*, 190 Cal.App.4th at p. 1014.)

A determination of whether "all of the elements of the exemption have been established is a fact-intensive inquiry. The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by

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mandated by an applicable order of the Industrial Welfare Commission." Subdivision (b) provides: "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee *one additional hour of pay at the employee's regular rate of compensation* for each work day that the meal or rest period is not provided." (Italics added.)

that employee." (*UPS, supra*, 190 Cal.App.4th at pp. 1014–1015.) The applicable wage order expressly provides that "[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered . . . ." (Cal. Code Regs., tit. 8, § 11070, subd. 1.(A)(1)(e), italics added.) "No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations . . . .' [Citations.]" (*UPS, supra,* 190 Cal.App.4th at p. 1015; see also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802.)

Review of the determination that a plaintiff was an exempt or not an exempt employee is a mixed question of law and fact. (*Ramirez v. Yosemite Water Co*., *supra*, 20 Cal.4th at p. 794.) Whether the elements of the exemption exist is a question of fact subject to review for substantial evidence. (*Nordquist v. McGraw–Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.) Under the substantial evidence standard, we "must consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment." (*Ibid.*) In contrast, this court independently evaluates the employee's duties in the context of the "Executive Exemption" definition. (*Ramirez*, *supra*, at p. 794.)

b. Exempt Employee Status Supported by Substantial Evidence and Law

We conclude plaintiff's duties as an assistant manager are consistent with those required in the definition of the "Executive Exemption" and that substantial evidence supports the findings of the jury and the trial court that plaintiff in fact was an exempt employee under that definition.

Defendant's written description of plaintiff's job duties as an assistant manager reveal her duties and responsibilities involve management of defendant's retail store business. The testimony at trial on this issue reveals defendant expected and counted on plaintiff performing these duties and responsibilities. This testimony further supports the finding that plaintiff customarily and regularly directed the work of two or more employees, and although she did not have the authority to hire or terminate employees, her suggestions as to hiring, firing, promotion or other changes in status would be given "particular weight" because the assistant manager was authorized to discipline and "write-up" sales personnel. Further, plaintiff was expected to and did exercise discretion and independent judgment.

The jury was instructed that plaintiff's monthly salary must be more than $2,773.33, or no less than two times the state minimum wage for full-time employment, and on the other elements of the "Executive Exemption." Both the jury and the trial court found plaintiff fell within the "Executive Exemption," and thus was an exempt employee for the purposes of overtime, meal break, and rest period premium wages.

Substantial evidence supports the finding that plaintiff is an exempt employee within the meaning of the "Executive Exemption." Her monthly salary as an assistant manager was $2,860, which is more than $2,772.33. Plaintiff's written assistant manager job description sets forth, among other matters, her responsibilities and duties. The scope of her responsibility was to "[m]anage the sales, operations and personnel functions of the store to ensure maximum profitability and compliance with [defendant's] standards and provide leadership by acting as a role model." Her daily responsibilities and duties included she "[e]nsure [the] sales floor is adequately stocked, supervised and staffed"; "[e]nsure daily reconciliation[]s, banking, opening and closing procedures are adhered to"; be "[r]esponsible for the accurate completion of all paperwork"; "review staff performance"; and "[m]otivate sales staff." Among the special skills required were "[s]upervisory skills."

At trial, testimony was presented that plaintiff's duties as assistant manager were substantially identical to those of the Paseo store manager, which included supervision of the sales staff, and that plaintiff was to do the staff scheduling when the store manager was away. Plaintiff was entitled to receive commissions on her individual sales, which is what a key holder would receive, rather than be restricted, as were other assistant managers, to commissions based on the store sales.[7] Other testimony, however, raised the reasonable inference, which the triers of fact drew, that this earmark of a key holder was simply a bonus carved out for plaintiff in view of her value as an employee who generated high sales rather than as part of her compensation based on her job performance as an assistant manager. That plaintiff received individual commissions therefore did not signify she was a key holder and not an assistant manager.

In sum, plaintiff's duties fell within the definition of "Exempt Employee," and substantial evidence supports the triers of fact's findings that plaintiff indeed was an "Exempt Employee" regarding overtime, meal breaks, and rest period premium wages.

2. Zero Proper Amount of Punitive Damages Award

Contrary to plaintiff's position, she is not entitled to an award of any punitive damages. "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) The jury specifically found defendant guilty of oppression, fraud, or

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[7] Defendant set a written policy regarding managerial commissions which were tied to the sales goal set for a particular store. The policy provided that with regard to monthly commissions, "[t]he store manager and assistant manager will split the commission, store manager 60% and assistant manager 40%." The policy also listed a particular amount to be paid the manager and the assistant manager based on the success of the store in meeting or exceeding that goal. The policy admonished that defendant "expect[ed] the [m]anager and [a]ssistant [m]anager to be responsible for 25% of the store's goal. In most situations, the goal will be split 5% for the manager and 20% for the assistant manager." The remaining portion of the goal would be divided among "[t]he keyholder and sales associates based on hours and time of the week worked[.]"

malice as to the intentional infliction of emotional distress cause of action only. The jury also specifically awarded plaintiff $6,359.10 as economic damages, including lost wages, in connection with the wrongful discharge and retaliation causes of action, not the intentional infliction of emotional distress cause of action. The jury did not award plaintiff any damages for the intentional infliction of emotional distress cause of action, finding zero to be the amount plaintiff sustained for past and zero for future sustained "non-economic loss, including physical pain/mental suffering."

In the absence of a qualifying award of actual or compensatory damages, no award of punitive damages is appropriate. (*Mother Cobb's Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203, 205–206; *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1674, 1677; cf. *Clark v. McClurg* (1932) 215 Cal. 279, 284–285 [in single verdict, "the jury, inadvertently or by some mischance, assessed the entire damages as exemplary, instead of segregating them," "'an error of form and not of substance'"].)

Additionally, a nexus must exist between an award of actual or compensatory damages and the requisite finding of oppression, fraud, or malice. In other words, no punitive damages are appropriate based on "actual damages" awarded on any cause of action in which this finding was not made.

In her intentional infliction of emotional distress cause of action, plaintiff alleged she sustained damages, among others, in the form of "[a] substantial reduction in loss of work-related benefits[.]" She did not allege any economic loss, such as lost wages attributable to absences arising from the emotional distress she suffered, which would qualify as the $6,359.10 economic damages the jury awarded. And the jury specifically found plaintiff suffered no damages for the intentional infliction of emotional distress. Indeed, such economic damages were thus awarded in connection with the wrongful discharge cause of action, to which the jury expressly found no oppression, fraud, or malice. (Cf. *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1557–1558 [punitive damages appropriate where jury intended to find Amerigraphics

was harmed by Mercury's bad faith in the same amount as by Mercury's breach of contract].)

3. No Attorney Fee Award Not Abuse Where Amount Requested "Grossly Inflated"

We are not persuaded that the trial court abused its discretion in refusing to award plaintiff any attorney fees under the FEHA. As the trial court explained in its exhaustive and enlightening minute order denying any award, "Plaintiff received $6359.10 on her claims, approximately one fourth of the unlimited jurisdiction threshold for civil unlimited cases," which is $25,000; plaintiff failed to properly evaluate her chances on prevailing on liability and damage issues; she turned down a reasonable settlement offer of $75,000 and engaged in a 13-day trial; and she made an excessive, namely, "grossly inflated" demand for attorney fees in the total amount of $717,828.50, which is "110 times the judgment of $6,527.10."

Recently, our Supreme Court posed the question: Under the FEHA, the trial court has "discretion to award attorney fees to a prevailing party. This statute has been interpreted to mean that in a FEHA action a trial court should ordinarily award attorney fees to a prevailing plaintiff unless special circumstances would render a fee award unjust. [Citations.] If . . . a party brings an action under the FEHA that is not brought as a limited civil case and recovers an amount that could have been awarded in a limited civil case, does the trial court have discretion . . . to deny that party's motion for attorney fees?" (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 976 (*Chavez*).) The court resolved this inquiry in the affirmative.

The court stated: "Here, the plaintiff brought an action under the FEHA and recovered damages of $11,500, which is less than half of the $25,000 jurisdictional limit for a limited civil case (see Code Civ. Proc., § 86). Plaintiff did not bring the action as a limited civil case, and the trial court, relying on section 1033[, subdivision] (a), denied plaintiff's motion seeking an attorney fee award of $870,935.50. On plaintiff's appeal, the Court of Appeal reversed, concluding that 'section 1033 does not apply in actions brought under FEHA.' [¶] We have determined that the Court of Appeal erred in so

concluding and that its judgment should therefore be reversed. As we explain, section 1033[, subdivision] (a), interpreted according to its plain meaning, gives a trial court discretion to deny attorney fees to a plaintiff who prevails on a FEHA claim but recovers an amount that could have been recovered in a limited civil case. In exercising that discretion, however, the trial court must give due consideration to the policies and objectives of the FEHA in general and of its attorney fee provision in particular. Here, we further conclude that, in light of *plaintiff's minimal success and grossly inflated attorney fee request, the trial court did not abuse its discretion in denying attorney fees.*" (*Chavez*, *supra*, 47 Cal.4th at p. 976, italics added.) Because the trial court gave due consideration, denial of fees was not an abuse of discretion.

DISPOSITION

The judgment and the order denying an award of attorney fees are affirmed. Leon Max, Inc., shall recover its costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.