Filed 8/27/12 Moran v. Qwest Communications Internat., Inc. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

AMY MORAN, Plaintiff and Appellant, v. QWEST COMMUNICATIONS INTERNATIONAL, INC. et al. Defendants and Appellants.	A128840 (San Francisco County Super. Ct. No. CGC-08-480654)

Qwest Communications International, Inc., Qwest Corporation,[1] and Dennis Sherwood, defendants below, appeal the judgment entered upon a jury verdict in favor of Amy Moran, plaintiff below. The jury found all defendants liable for the sexual harassment of Moran and Qwest liable for failure to take reasonable steps to prevent the sexual harassment and for terminating Moran's employment in violation of public policy. The jury awarded Moran $492,710 for economic damages, a total of $2.8 million for noneconomic damages, and $1 million in punitive damages. Defendants contend that: (1) the jury's findings of liability were not supported by substantial evidence; (2) the trial court prejudicially abused its discretion when it admitted evidence that Sherwood harassed other individuals at Qwest and had been investigated for sexual harassment at a previous job; (3) the award for noneconomic damages is excessive; and (4) Qwest cannot

[1] Both Qwest Communications International, Inc. and Qwest Corporation are hereafter referred to collectively as Qwest.

be liable for punitive damages because the jury's finding that Sherwood was a managing agent of Qwest was not supported by substantial evidence.

Moran cross-appeals from the order of the trial court granting summary adjudication to defendants on her first and fifth causes of action, for gender-based discrimination and for failure to pay wages on termination, contending that triable issues of fact exist.

With the exception of the awards for noneconomic damages, we affirm the judgment entered by the trial court. The awards of noneconomic damages are reversed and we remand the cause for a new trial, solely on the issue of noneconomic damages, unless Moran accepts a remission of noneconomic damages in the amount of $750,000. We also affirm the court's order granting summary adjudication to defendants on Moran's first and fifth causes of action.

BACKGROUND

Because our review of the jury's findings of fact will be for substantial evidence, we state the facts with a view of the evidence in the light most favorable to Moran, resolving any conflicts in a manner to support the findings and indulging all reasonable inferences to sustain the findings and the judgment. (*Jeffrey Kavin, Inc. v. Frye* (2012) 204 Cal.App.4th 35, 43.)

Moran Joins Qwest and Sherwood Replaces Her Initial Supervisor

Moran joined Qwest in early 2006 when she was hired by Tom Rabone, her supervisor at a previous job with Lucent Technologies. Her position was that of "customer premises equipment" (CPE) overlay. CPE refers to equipment that physically resides on a customer's premises, connecting with Qwest's communications networks. Moran had the responsibility of building relationships with hardware vendors, establishing discount agreements, arranging for product demonstrations, and training Qwest's sales representatives.[2] Moran was often involved in customer sales calls with

[2] Qwest sales personnel were either "senior account executives" (SAEs) or "major account executives" (MAEs), the latter more senior in rank. Unless a distinction is required, we refer to both ranks collectively as sales representatives.

sales representatives, sometimes taking the lead with customers and sometimes working behind the scenes.

The CPE overlay position was compensated in base salary plus commission. When Moran joined, Rabone's region had made only $300,000 in hardware sales and Moran was given a $2 million sales quota for 2006.

Moran reported directly to Rabone, as did the managers of sales teams in San Francisco, Walnut Creek, San Jose, and Sacramento (Rancho Cordova). The region managed by Rabone had about 30 sales representatives working under the sales managers.

When Rabone held management meetings, Moran was very involved and she felt that Rabone valued her expertise. Rabone was a demanding executive, but his criticisms were "always relating to business, not anything personal."

By May of 2006, Moran was already over her quota for the year. That month, Rabone left and was replaced by Dennis Sherwood. Sherwood had received sexual harassment training at previous employers and recognized such harassment as a serious issue. In a position he held at SBC before coming to Qwest, Sherwood had suggested an intimate relationship with a subordinate employee, both while she was a candidate for hire and after she was hired. This employee eventually made a complaint against Sherwood and SBC concluded that the complaint was well founded. Sherwood was placed on "final warning" and was classified as "ineligible for rehire" when he left SBC.

Sherwood's management style was described as harsh to both men and women. Rabone's sales managers all eventually left Qwest, leaving Moran the sole holdover from Rabone's management team.

Sherwood's Treatment of and Comments about Third Parties at Qwest

Cassie Huynh was one of the top SAEs in the San Jose office. Huynh's boyfriend worked for LinkedIn and Huynh had developed leads and connections at that company. After a sale to LinkedIn, which Moran attributed to her own and Huynh's work, Sherwood remarked, "Oh, you know, she's making sales quotas for her boyfriend."

Moran did not hear Sherwood make such personal comments concerning male employees.

Stacey Lyn was the highest performing SAE at Qwest nationally. Lyn described Sherwood as being "more reverent to the male employees, more interested in what they had to say," but condescending or disinterested in her. She stated that Sherwood, when talking with her, would get very close, leer at her, and stare at her chest.

Before Rabone left Qwest, he and Lyn had discussed Lyn's large sales quota and Rabone said he intended to lower it before the end of the year. After Sherwood replaced Rabone, Lyn discussed the issue of her quota with him. Sherwood told Lyn that he would try to help with the quota, but the way he said it made Lyn feel uncomfortable: "It was as if he would try to take care of it, like condescending, and as if there was some sort of string attached to him taking care of it." While discussing this with Lyn, Sherwood was "very close in [her] space" and looking down on her. Lyn concluded that "he want[ed] something in return for this and it might not be something [she] want[ed] to give him."

In the summer of 2006, the air conditioning in the Walnut Creek office, where Lyn worked, was broken and the office became very warm. Employees were allowed to dress casually when they had no meetings scheduled and because of the heat, Lyn was wearing tank tops to the office. One day, Lyn and a coworker passed by a glass-walled conference room and were observed by the sales managers, who were holding a meeting. Randy Trevino, one of Sherwood's sales managers, recalled that at a restaurant lunch that day, Sherwood "brought up that Stacey was sitting [nearby] wearing a tank top and that he didn't think she should be dressed like that" because she was "large breasted."[3] The next time that Lyn met with her manager, Roger Pruett, she was told that she would not receive a previously promised promotion to MAE, that she needed more seasoning, that she dressed too casually, and that her shirts were always too tight. Pruett said that he and

[3] Moran, whether at the restaurant or on another occasion, also heard Sherwood talk about Lyn's tight shirt and said he referred to "tits or something."

Sherwood were in accord on these issues. Sherwood subsequently mandated a dress code in his region requiring business casual attire.

Lyn contacted Qwest Human Resources (HR) in Denver to complain about Sherwood and spoke with Sandy Hudnall.[4] Lyn felt that Hudnall was dismissive of her complaints. She heard nothing further from HR but the next day received a voice message from Sherwood that said he was aware of the complaint and that he would be handling the matter. Lyn felt threatened that her complaint had been turned over to the person about whom she had complained and felt that her job was in jeopardy. Lyn resigned from Qwest because HR was not adequately addressing her complaint and she later filed an EEOC complaint but did not pursue a lawsuit. Moran was present in Sherwood's office when Sherwood received a call from Lyn's lawyer, after which Sherwood told Moran, "That was Stacey Lyn's lawyer. What a joke."

Janine Lappin was another sales representative at Qwest and Trevino, her supervisor, said that Sherwood told him that Lappin's husband made a lot of money, that Sherwood didn't know why Lappin was working and that Lappin was a "high roller." Moran reported Sherwood saying of Lappin: "Oh, you know, . . . Janine's husband is very wealthy. He's so rich she doesn't need to work. And, you know, she's lazy. She's not doing anything." This made Moran uncomfortable because Lappin had been working on a large sales opportunity with Netflix.

One day Sherwood met with Trevino in the latter's San Jose office and said that he had "the scoop" on Lappin—that she was "an aggressive, assertive woman" who "wanted to do whatever she wanted to do and thought she could do anything she wanted." Sherwood also told Trevino that Lappin wasn't working and wasn't competent to be in the job. At the time these remarks were made, Lappin was working on the Netflix sale, which, once closed, would put her very close to her quota.

Sherwood asked Trevino to place Lappin on an "action plan." Trevino did not think this was necessary, but he acquiesced to Sherwood's request. Finally, in early

[4] Qwest had no HR personnel in Northern California.

September, Trevino had to tell Lappin that she would soon be placed on a performance improvement plan. This prompted Lappin to contact Qwest HR, because she felt that Sherwood was trying to "run her out of the business," and she spoke with Hudnall. She told Hudnall that she felt Sherwood had a problem with women and had created a hostile environment for her. In an email afterwards, Hudnall informed Lappin that her complaint had been forwarded to Qwest's Equal Employment Opportunity group and that Lappin would hear from them, but Lappin never did. Hudnall's email also said that she would contact Sherwood about providing proper notice for meetings, an issue about which Lappin had also complained. Hudnall called Trevino, who told her that he did not agree with Sherwood's approach to managing Lappin, whom he felt would successfully meet her quota that year.

A few days later an account review meeting was held in Walnut Creek. The meeting was held in a conference room that had a large window facing a hallway. When it came time for review of Lappin's accounts, Sherwood asked everyone else to leave the room so he could converse privately with Lappin. Lappin was taken aback when Sherwood leaned forward and said, "I need to know what you're doing." Lappin said she was there to give her review and Sherwood said, "Fine, just fine. Get your boss." Moran observed this from outside, without hearing, and described Sherwood as "definitely furious" and Lappin as "scared and upset." Trevino also observed the encounter and said Sherwood was talking with Lappin "pretty fervently." Moran was aware that Lappin had filed a complaint against Sherwood with Qwest HR.

At the end of the day, Sherwood told Trevino to put Lappin on a performance improvement plan immediately and to make it "airtight" because she had gone to HR and "made a lot of comments" about him. Trevino was to tell Lappin that she would not "beat" the plan with the Netflix sale, which was due to close soon. Trevino was also put on a performance improvement plan that day. Trevino complained to Hudnall that Sherwood was trying to fire him for attempting to protect Lappin.

As part of her performance plan, Lappin was required to report into the office at 8:30 in the morning every day, whether or not she had a customer meeting that would

require her to leave the office immediately and retrace the route she had just driven to work. Lappin could not see the business sense in the requirement, which was not imposed on other sales representatives. She was given no grace time to make arrangements for her daughter, whose daycare would not allow her to be dropped off so early as to ensure that Lappin could be in the office at 8:30 am. When Trevino told Lappin that Sherwood had said to make the performance plan "airtight," Lappin decided to resign. Even though Lappin believed that she should have been credited with the Netflix sale, it was credited to a male sales representative who had not been involved in the negotiations. After several iterations of his own performance improvement plan, Trevino was fired in December 2006.

Sherwood's Treatment of Moran

Moran's role in management meetings changed after Sherwood replaced Rabone: "I was put more into the background and not a forefront on the agenda. Maybe I got a couple of minutes in, but it was definitely different." Moran felt disrespected and humiliated at these meetings because Sherwood regularly criticized her for being too emotional or for giving him a "diatribe" instead of answers. In an early meeting, Sherwood imitated Moran's habit of breathing through her mouth. Moran observed that Sherwood was generally harsh with everyone in his organization, but that with women his harshness was "more personal and hostile versus just being hard on you about your activity or your sales, which was the case with the men."[5]

At business meetings, in the presence of others, Sherwood would comment on Moran's dating status. In one such meeting, Moran felt insulted when Sherwood told her "You're never going to get married. You're good at being single." Trevino thought that Sherwood was dismissive of Moran and did not respect her, once calling her a "silly girl." At a business gathering, Trevino asked Moran what she was doing that evening, and Sherwood interjected with: "Oh, are you going out looking for sex tonight?" or "Oh, Amy, are you going out to look for some?"

[5] Moran conceded that, in the cases of Randy Trevino and Paul Haines, Sherwood's harshness was personal.

In one-on-one meetings, Sherwood would tell Moran that she "wasn't bringing anything to the table" and that she was riding the coattails of the sales representatives. He told her that her parents didn't raise her properly. Sherwood would often "get very heated" and raise his voice. Moran had never before been "badgered to tears," but became "teary-eyed" after her meetings with Sherwood.

Sherwood did not consistently behave in ways that Moran found offensive or that upset her. At times he would be encouraging and compliment her on a job well done. Sherwood gave Moran a good performance review in 2006. Some email between Moran and Sherwood demonstrated mutual appreciation. But Moran thought that Sherwood was "literally Jekyll and Hyde, because a couple of weeks [after receiving a compliment] he's like, you didn't do anything on that. Like, you aren't responsible for that sale, that was all the rep."

During 2006, Moran was always over her quota, and at the end of the year CPE sales had amounted to about $8 million, despite her initial quota of $2 million. At the end of the year, Moran was awarded for exceeding her sales targets and she expected to be even more successful in 2007. However, she was not enjoying the job, which she described as "stressful and starting to take a toll" because of Sherwood's behavior. She did not consider complaining to Qwest's HR department because she had seen what happened to Lyn and Lappin after they had done so. Instead, Moran simply "hoped it would get better."

For 2007, Sherwood increased Moran's quota to $8 million. During the year, Moran stayed on track toward meeting that quota and Sherwood admitted that Moran's performance during 2007 was satisfactory. In spite of this, Moran characterized one-on-one meetings with Sherwood as worse in 2007 than in 2006. Sherwood told her that none of the managers or sales representatives liked her and that she was on thin ice. He compared Moran to "his insecure 15-year-old daughter." Moran thought these meetings were "pretty hostile." During a telephone call with his own supervisor, at which Moran was present, Sherwood said that Moran was doing an "okay job" but that they needed to find someone "really qualified to do the position."

Sherwood continued to make personal comments during 2007 in other business settings as well. Once, Moran was discussing her style of working with sales representatives and observed that she didn't like to push herself on them. Sherwood interjected that the conversation was not about her personal life and how she pushed herself on men. At a business dinner Sherwood made Moran "very uncomfortable" by describing how "hot" his daughter looked in a bikini, "going on and on about her breasts."

In mid-2007, Sherwood hired a second CPE overlay, a male, Shawn Larsen, for his region. Moran had no objection to Larsen's hire, but felt that the way it was positioned, that she "couldn't get the job done so we had to bring a man in to do the job" was "unfair and insulting." At the time, Moran was ahead of her sales quota, but the sales team managed by Pruett was struggling and was harder to work with. When Sherwood split the sales teams between Moran and Larsen, Pruett's team was assigned to Moran because, Sherwood explained, other teams had more senior sales representatives and Moran was not qualified to work with them. Despite this assignment, Moran continued to meet her quota, but Larsen did not.

In 2007, Moran had a worsening knee problem that required physical therapy starting in the summer. Moran discussed her need for physical therapy with Sherwood. Her doctor had told her to reduce her driving and Sherwood was aware, from more than one conversation, that driving caused Moran pain.

Moran put her physical therapy appointments in her online calendar, to which Sherwood had access. However, Sherwood and Pruett frequently claimed ignorance of Moran's appointments and questioned her non-attendance at conflicting meetings. Moran reminded them that her appointments were posted, but this did not change their conduct, even though Moran frequently moved her physical therapy appointments to accommodate meetings.

In the fall of 2007, Sherwood imposed a requirement on Moran to make five customer visits a week. Moran saw the business logic for the requirement, which she "was pretty much doing" already. Sherwood also imposed a requirement that she be in a

different Northern California Qwest office (Rancho Cordova, Walnut Creek, San Jose, and San Francisco) each day. Moran saw no business logic to this requirement because driving up to five hours each day interfered with performing her role. Moran, consulting with her doctor, bought a new car in order to meet the increased driving requirement.

Around this time, Qwest had arranged a weekend excursion on the Wine Train for those meeting their quota. Moran was not able to attend because she was ill that weekend and her aunt was in critical condition in the hospital. Moran called Sherwood to inform him she would not be attending and Sherwood responded with an email that said, "Amy, if you are really sick, I hope you feel better. And if your aunt is in fact dying, I hope she gets better. And, you know, I want you to know the ticket cost $200 and so this is really, you know, really kind of unfair, rude of you, you know, to cancel out at the last minute."

In November 2007, Moran went to the emergency room with "stomach problems," which she attributed to stress. Moran took a day off work and when she returned, Sherwood said, during a management conference call, "Oh, Amy, you are back from the land of the living dead."

In December, Sherwood was planning a regional Christmas party with the managers. Sherwood asked who would be bringing a guest and Moran said that she would come alone. Sherwood's response was: "What do you mean? You know, you said you had a boyfriend and I want proof. And you go back and find out when your boyfriend can come to this party, and I'm going to schedule the party to be on this date. You know, I want proof that you have a boyfriend." Moran felt insulted.

By this time, Moran was receiving up to 10 phone calls or emails a day from Sherwood asking, "Where are you? What are you working on? What are you doing? Where are you today?" Moran found this "extremely distractive" and felt that she was "constantly defending [herself] in what [she] was doing, and where [she] was going, and what office [she] was in, that it became very impossible for [her] to focus and to do [her] job."

One day in December, Moran had a physical therapy session at 3:30 p.m. and also had to submit some paperwork to Cisco by 5:00 p.m. Because driving back to the office

would have meant missing the Cisco deadline, Moran went to a Starbuck's after her therapy to finish the work on her laptop. Sherwood called while Moran was there, asking "Where are you?" Moran explained and Sherwood berated her and asked, "Why are you not driving back to the office?"

Sherwood called Moran again at home that evening. Sherwood was furious, telling her she could not work from home and had to be in the office each day. Moran again explained that she had not been working from home, but had been at a Starbucks. Sherwood wanted proof that she had submitted the paperwork to Cisco and Moran provided it.

The next day, Sherwood again berated Moran, asking why she did not go back to the office, telling her that she was "on thin ice with this company" and that none of the managers or sales representatives liked her. Moran asked why he was making an issue of doing what was necessary to accomplish her work and Sherwood replied, "You know, Amy, I'm turning up the heat on you, and I'm making it very uncomfortable for you and I know it."

Despite being afraid of retaliation and losing her job, Moran contacted Qwest HR and spoke with Beverly Emmanuel on the phone. Emmanuel gave her a "compliance number" to call in order to talk with an organization external to Qwest about her complaint. On December 13, 2007, Moran went to the Qwest garage and called the compliance number while sitting in her parked car so no one would overhear. Moran was asked for "a couple of examples" of incidents. Moran provided some examples and explained that what she was experiencing was interfering with her health and ability to work. The person with whom she spoke seemed to be making notes but Moran never saw them. Moran was given a confirmation number. All calls are given an A, B, or C priority and Moran's call was marked a C (lowest) priority.

After having no contact concerning her complaint for a week or more, Moran called Qwest HR again and gave her confirmation number. Emmanuel told Moran that Ali Barry was her HR representative and that Barry would call her regarding the complaint. Barry, however, did not call back and Moran left her a voice message. Barry

returned Moran's call a day or two later and told her, "Well, I don't really see where the problem is here. It's just a couple of rude comments." Moran said it was more than that and gave further examples, telling her that the problem had been going on for a year and a half. She also explained that Sherwood's driving requirements caused her pain and were "counterintuitive and counterproductive."

Barry asked if Sherwood had said he was harassing Moran because she was a woman. Moran said no, not directly, but that Sherwood would compare her to his 15-year-old daughter. Moran told Barry, "I know that I have rights here, and I know that I deserve not to be bullied or harassed at work." Moran reminded Barry that Qwest had a code of conduct prohibiting harassment or bullying based on gender and said that Sherwood was "clearly violating that."

Barry told Moran that Moran could talk to Sherwood, they could talk to him together, or Barry could talk to Sherwood alone. Moran asked for time to consider these options. When Moran called Barry back the next day, she told Barry that the relationship with Sherwood was broken and that she was counting on Barry to fix things. Barry said she would call Sherwood and "give him some coaching about his comments." Moran again reminded Barry that her complaint was about more than comments and that she didn't think Barry's approach would resolve the problem.

Barry called Sherwood and told him that Moran had "two complaints": (1) the comparison of Moran to Sherwood's daughter and (2) the email saying, "If you are really sick, I hope you feel better." Sherwood told Barry he had customer feedback that Moran was "late, unprepared, and forgetful." He claimed that Moran would not tell him when she had physical therapy sessions scheduled and that she was not "doing what she needed to do." Sherwood convinced Barry that he was "really open to feedback" and Barry saw no need to conduct a fact-finding investigation.

Barry then called Moran and told her that she had asked Sherwood to "remove any inappropriate comments from your conversations." Again, Moran told Barry that the issue was more than inappropriate comments and that she did not feel she was in a safe

work environment. Barry said that Sherwood would want to talk with Moran about the situation, and this made Moran "very scared."

After talking with Barry, Moran received a voice message from Sherwood telling her to meet him the next day "at 8:30 a.m. sharp." Sherwood's tone "was very harsh and he was clearly very upset." Sherwood followed up with an email relaying the same message. Fearing retaliation, Moran called her doctor and went on medical leave.

No one from Qwest ever called Moran to follow up her complaint. Sherwood left Moran voice messages twice while she was on medical leave. The first message simply stated that Sherwood knew she was on leave and would return at a certain point, but Moran thought he sounded annoyed. After Moran extended her medical leave, Sherwood called again and asked her to let him know if she planned on resigning so that he could fill the position. At the end of her medical leave, Moran reluctantly decided to resign, even though professionally she loved the job.

Procedural Background

Moran filed suit against defendants in 2008, alleging the following causes of action: (1) gender-based discrimination; (2) sexual harassment; (3) failure to take reasonable steps to prevent discrimination; (4) termination in violation of public policy; and (5) failure to make immediate payment of wages upon discharge, plus waiting time penalties. All five causes of action were alleged against Qwest. The sole cause of action alleged against Sherwood was the second, for sexual harassment.

The claim of gender-based discrimination was based on the allegation that Sherwood had doubled Moran's 2006 sales quota from $2 million to $4 million and that this action operated to deprive Moran of $100,000 in income for 2006. The claim of failure to pay wages on discharge was based on the failure to pay Moran the income that she lost due to the change in her sales quota.

Defendants filed a motion for summary judgment or, in the alternative, summary adjudication on all five causes of action. The trial court denied the motion for summary judgment, but granted summary adjudication as to the first (discrimination) and fifth (failure to pay wages) causes of action. The court determined that defendants had offered

a nondiscriminatory reason for increasing Moran's quota and that Moran had failed to provide evidence that this reason was a mere pretext. The court also found that Moran was paid all the compensation to which she was entitled under her compensation agreement. Defendants' motion for summary adjudication was denied on the three remaining causes of action.

The case then went to trial before a jury. Using a special verdict form, the jury found: (1) Sherwood subjected Moran to unwanted harassing conduct; (2) Sherwood's harassing conduct was based on gender; (3) the gender-based harassing conduct was severe or pervasive; (4) a reasonable woman in Moran's circumstances would have considered the work environment created by Sherwood to be hostile or abusive; (5) Moran considered the work environment created by Sherwood to be hostile or abusive; (6) the gender-based harassing conduct by Sherwood was a substantial factor in causing harm to Moran; (7) Qwest failed to take reasonable steps to prevent Moran from being subjected to sexual harassment; (8) Qwest's failure to take such reasonable steps caused additional harm to Moran; (9) the sexual harassment to which Moran was subjected was so intolerable that a reasonable person in Moran's position would have had no reasonable alternative except to resign; (10) Moran resigned her position with Qwest because of sexual harassment; (11) the sexual harassment which caused Moran to resign was a substantial factor in causing harm to Moran; (12) Qwest had a procedure in place to address complaints of sexual harassment; (13) Moran did not unreasonably fail to use Qwest's harassment complaint procedures; (14) Sherwood engaged in gender-based harassment with malice, oppression, or fraud; (15) Sherwood was an officer, director or managing agent of Qwest acting on behalf of Qwest; (16) no persons other than Sherwood who were officers, directors or managing agents of Qwest, acting on behalf of Qwest, engaged in sexual harassment of Moran with malice, oppression, or fraud; (17) no persons other than Sherwood who were officers, directors or managing agents of Qwest, acting on behalf of Qwest, acted with malice, oppression, or fraud in failing to take reasonable steps to prevent sexual harassment of Moran; and (19) no officer, director or

managing agent of Qwest, acting on behalf of Qwest, knew of Sherwood's conduct and adopted or approved it after it occurred.

As compensatory damages, the jury awarded: (1) $492,710 for past lost earnings against Qwest for gender based harassment; (2) $750,000 for past noneconomic loss, including physical pain and mental suffering, against Sherwood for gender-based harassment; (3) $50,000 for past noneconomic loss, including physical pain and mental suffering, for constructive discharge; and (4) $2 million for past noneconomic loss, including physical pain and mental suffering, against Qwest for failure to prevent sexual harassment.

The issue of punitive damages had been bifurcated and was presented to the jury after the jury's findings supported the imposition of punitive damages. After deliberation, the jury awarded Moran $1 million in punitive damages against Qwest.

The trial court entered judgment on the jury verdict on April 7, 2010. Defendants filed motions for judgment notwithstanding the jury's verdict and for a new trial. Moran filed a motion for a new trial on her first and fifth causes of action, for which the court had granted summary adjudication in favor of defendants. The court denied all of these motions on June 4, 2010. Defendants timely filed their notices of appeal. Moran timely filed her notice of cross-appeal.

DISCUSSION

I. *Evidence that Sherwood Harassed Others*

Prior to trial, the court denied defendants' motions in limine to exclude evidence that Sherwood had sexually harassed others at Qwest ("me too" evidence) and to exclude evidence that Sherwood had sexually harassed a subordinate while employed at SBC. On appeal, defendants argue that the trial court prejudicially abused its discretion by admitting this evidence because it was not relevant to Moran's claims and "could only serve to prejudice the jury and . . . persuade them that Sherwood's innate propensities supported Moran's allegations."

Evidence Code section 1101, subdivision (a), generally prohibits introducing evidence of character or character traits, in the form of opinion, reputation, or specific

instances of conduct, in order to prove conduct on a specific occasion. Evidence Code section 1101, subdivision (b), makes clear that when evidence of past acts is relevant to prove a fact ("such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented") other than disposition to commit such acts, admission of the evidence is not prohibited.

Defendants rely on *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511 (*Beyda*). In *Beyda*, the plaintiff argued that the trial court had erred by excluding evidence of other acts of sexual harassment by two of the defendants because such acts, occurring when the plaintiff was not present, were not relevant to prove that the plaintiff was sexually harassed. (*Id*. at pp. 515-516.) The *Beyda* court first rejected "the use of the proffered evidence of other acts of harassment by respondents to prove that they engaged in similar conduct against appellant" because this would be evidence of propensity and therefore inadmissible. (*Id.* at p. 518.) However, the court found that the evidence would be relevant for another, permissible purpose: " 'The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.' " (*Id.* at p. 519.) Further, the court opined that "a reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace, even if he or she does not personally witness that conduct. [¶] If, however, the plaintiff neither witnesses the other incidents nor knows that they occurred, these incidents cannot affect his or her perception of the hostility of the work environment." (*Ibid*.)

Applying *Beyda*, defendants contend that because Moran knew nothing about the SBC complaints during her employment, the SBC evidence was inadmissible. Defendants also argue that "Moran likewise had no personal knowledge of most of the incidents allegedly experienced by Lyn, Lappin, and Trevino at Qwest," rendering the evidence of sexual harassment of others at Qwest also inadmissible.

The flaw in defendants' reasoning is that *Beyda* considered one permissible purpose for which such evidence could be admitted, but it does not bar litigants from proposing other permissible purposes for evidence of the sexual harassment of others.

That evidence of the sexual harassment of others may be admitted for purposes not considered by *Beyda*, even when the plaintiff was not aware of such harassment during his or her employment, is demonstrated by *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 760 (*Johnson*): "*Beyda* did not address whether the evidence could be admitted under the provisions of subdivision (b) of Evidence Code section 1101. . . . [M]any courts have held that evidence of the type sought to be introduced by the plaintiff in *Beyda* . . . is admissible under rule 404 (b) of the Federal Rules of Evidence . . . to show intent or motive, for the purpose of casting doubt on an employer's stated reason for an adverse employment action, and thereby creating a triable issue of material fact as to whether the stated reason was merely a pretext and the actual reason was wrongful under employment law." The *Johnson* court examined numerous federal cases admitting evidence of sexual harassment by others and concluded that the plaintiff's evidence "sets out the factual scenarios related by former employees of defendant that are sufficiently similar to the one presented by plaintiff concerning her own discharge by defendant" to be relevant under Evidence Code section 1101, subdivision (b). (*Johnson*, at p. 767; accord, *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 (*Pantoja*).)

Defendants observe that *Johnson* was a gender-based discrimination case and not one of sexual harassment. However, *Pantoja*[6] extended the *Johnson* reasoning to cases of sexual harassment as well: "*Johnson* also applies by analogy to Pantoja's claim of hostile environment sexual harassment. Like her claim that gender discrimination motivated her firing, Pantoja's claim of hostile environment harassment required her to show a discriminatory intent on Anton's part. . . . It follows that if the me-too evidence was probative of Anton's intent in behaving as Pantoja alleged, . . . then that evidence

[6] We note that *Pantoja* was not available to the parties at the time they briefed this issue.

was admissible under [Evidence Code] section 1101, subdivision (b). . . . [¶] We recognize that the *kind* of intent or motivation required for hostile environment harassment may be different from the kind required for discriminatory hiring or firing. An employer may refuse to hire a woman because the employer thinks women are less competent than men. The employer may create a hostile environment, for example, because the employer feels important or powerful while humiliating women. Either way, however, the defendant's discriminatory mental state is crucial. Sex discrimination of the first type (e.g., discriminatory hiring or firing) and sexual harassment are 'distinct causes of action' under the FEHA [citation], but a hostile environment, to be actionable, still must constitute a form of ' " 'discrimina[tion] . . . because of . . . sex,' " ' [citation,] and, in fact, the FEHA 'regard[s] the prohibition against sexual harassment as part and parcel of the proscription against sexual discrimination' [citation]. There is no reason why me-too evidence would be admissible under section 1101, subdivision (b), to prove the defendant's discriminatory mental state in one type of case but not the other. In fact, evidence of one type of discriminatory conduct can even be probative of a defendant's mental state in engaging in another type of conduct." (*Pantoja, supra,* 198 Cal.App.4th at pp. 114-115.)

Here, Moran was obligated to prove that actions and comments of Sherwood that were directed toward her were motivated by Moran's gender. Evidence that Sherwood sexually harassed others at Qwest would tend to show that Sherwood harbored a gender bias. (See *Pantoja, supra*, 198 Cal.App.4th at p. 114 ["[t]he excluded evidence tended to show that Anton harbored a gender bias and therefore tended to disprove the ostensible reason for her dismissal"].) The evidence was also relevant to the question of whether Qwest failed to take reasonable steps to prevent harassment because it tended to show that Qwest had notice of allegations that Sherwood was harassing others.

The jury was instructed that any discriminatory conduct or statements that Moran did not personally witness were not relevant in its determination of whether Moran had actually experienced harassment, but the jury was not so constrained when determining whether the harassment was because of Moran's gender. These instructions are actually

more restrictive than *Beyda*, *Johnson*, and *Pantoja* require, because the jury could also have considered the evidence in question, when determining whether Moran actually experienced harassment, if Moran had been aware of it during her employment, not only if she had personally witnessed it. We see no abuse of discretion by the trial court when it admitted evidence of Sherwood's sexual harassment of others at Qwest.

As for the evidence of prior sexual harassment by Sherwood at SBC, the evidence was admitted, as the jury was instructed, "for the limited purpose of considering whether Sherwood was aware that the behavior alleged by Moran constituted sexual harassment and for assessing Sherwood's credibility." As Moran argued in her opposition to defendants' motion in limine, "[t]his evidence is relevant towards plaintiff's burden to show that Sherwood's attitude was not the result of ignorance, but was a deliberate decision to violate the rights of female employees despite having had unusually relevant prior experience showing him that his conduct was unlawful and a serious infringement on the rights of subordinates." Evidence of other acts, admitted to demonstrate knowledge, is permitted by Evidence Code section 1101, subdivision (b), and the court did not abuse its discretion by admitting the evidence.

II. *The Jury's Factual Findings Supporting Liability*

Defendants seek reversal of the jury's findings of liability, contending that Moran failed to prove that she experienced severe or pervasive harassment, harassment because of her gender, constructive termination, or termination in violation of public policy. Defendants also argue that Moran failed to prove that Sherwood was an officer, director or managing agent of Qwest, and thus failed to prove that Qwest was liable for punitive damages.

A. *Standard of Review*

A challenge to findings of fact is reviewed to determine if the jury's verdict was supported by substantial evidence. (*Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1569.) "The substantial evidence standard has two components, and both work generally against [defendants]: First, all *conflicts* in the evidence must be resolved in favor of the prevailing party; second, all *reasonable inferences* from the

evidence (all conflicts already having been resolved) must be drawn in favor of the prevailing party." (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1205-1206 (*Le*).) For evidence to be substantial, it " 'must be reasonable in nature, credible, and of solid value.' " (*Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1219.)

Defendants suggest an approach to review that they claim "collapses the distinction between substantial evidence review and independent review. . . ." They propose that an appellant can "minimize issues of fact" on review for substantial evidence "by predicating [its] argument solely on the testimony of" the respondent and asking the reviewing court to "confine [its] review" to that testimony while indulging every inference favorable to the judgment. (*Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1250 (*Jara*).) Defendants ask the court to rely "on Moran's own testimony and a few documentary trial exhibits of undisputed authenticity." Then, so the argument goes, all the facts are undisputed and the question becomes a purely legal issue—a circumstance in which independent review is the proper standard. (*Le*, *supra*, 180 Cal.App.4th at p. 1206.)

We decline the invitation to confine our review to less than the entire record. In *Jara*, the relevant evidence on the issue in question was "found in the testimony of the parties themselves" and defendants minimized issues of fact "by predicating their argument solely on the testimony of Jara, Sr., whom the trial court found most credible." (*Jara*, *supra*, 121 Cal.App.4th at p. 1250.) Here, as discussed above, we conclude that the testimony of other witnesses, besides Moran, is relevant to the question of whether Sherwood acted because of Moran's gender. Unlike *Jara*, defendants do not ask us to limit our review solely to Moran's testimony, but to also consider selected documents entered as evidence at trial. Doing so would mean that we ignore other documents, also of "undisputed authenticity," that were admitted into evidence. We will not modify the well established scope of substantial evidence review by allowing defendants to cherry-pick helpful trial evidence while ignoring the rest.

B. *Sexual Harassment*

The Fair Employment and Housing Act (FEHA) prohibits an employer from harassing an employee because of sex or gender. (Gov. Code, § 12940, subd. (j)(1).) " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (Gov. Code, § 12940, subd. (j)(4)(C).)

Sexual harassment may be alleged upon one or both of two theories: (1) quid pro quo harassment, "where a term of employment is conditioned upon submission to unwelcome sexual advances," and (2) hostile work environment, "where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment." (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1058-1059.) A claim of hostile work environment sexual harassment requires a showing that the employee was subjected to comments and/or conduct that were (1) unwelcome, (2) because of sex, and (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 (*Lyle*).)

" ' "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [Citation.]' [Citation.] Therefore, to establish liability in a FEHA hostile work environment sexual harassment case, a plaintiff employee must show she was subjected to sexual advances, conduct, or comments that were severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment." (*Lyle*, *supra*, 38 Cal.4th at p. 283, italics omitted.) "With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Ibid.*)

"To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' [Citations.] That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle*, *supra*, 38 Cal.4th at p. 284.)

C. ***Moran's "Admission" that Harassment was not Because of Her Gender***

Before talking to Qwest HR, Moran had written three pages of notes concerning events that had offended her. During cross-examination, Moran said that she had not listed the "most significant" events because she "wasn't in sexual harassment thinking." Also during cross-examination, Moran said, "[Barry] asked me if he said—she said to me, 'Is he harassing you? Did you say he's harassing you because you're a woman?' [¶] And I said, 'No, he's not.' " These two snippets[7] from Moran's extensive testimony are, defendants propose, "fatal to every cause of action that reached the jury." As authority for this conclusion, defendants cite *Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1378 (*Jones*) (holding that plaintiff "negat[ed] her FEHA claim" by admitting that hostile comments were not based on her gender or race).

We first note that Moran testified at other points that she *did* indicate to Barry that Sherwood's actions and words were based on her gender. Moran told Barry that Sherwood was not allowed to bully someone based on gender and Sherwood was "clearly violating that." Moran twice testified that Barry asked her whether Sherwood had said he

---

[7] Defendants also claim that Moran "testified that she did not start thinking in [sexual harassment] terms until she consulted with an employment lawyer." They point to the following question by appellant's counsel: "Would it be fair to say that it wasn't until after you consulted with counsel that you thought about putting some things down about sexual harassment?" Moran replied, "I'm sorry. Could you repeat that?" The court then took a break and the question was never repeated. Defendants do themselves no service by mischaracterizing the insinuation of counsel's question as the testimony of Moran, who said nothing to affirm the insinuation.

was harassing her because she was a woman, to which Moran responded that Sherwood had not, but had indirectly indicated that he was.

In the context of Moran's entire testimony, what defendants find to be an admission that Moran told Barry that Sherwood had not harassed her because of her gender is more easily interpreted as a confused reiteration of her previous testimony that Sherwood had not *said* that he was harassing her because of her gender. It does not amount, as defendants claim, to "testimony so firm and unequivocal that it appeared to retract a contradictory prior statement . . . ." Nor is it equivalent to the example of *Jones*. Jones was asked several times "whether the comments and complaints her coworkers made about her were prompted by her gender or race" and she "repeatedly answered" that they were not or that she didn't know. (*Jones*, *supra*, 152 Cal.App.4th at p. 1378.)

As for Moran's testimony that, when she made her notes, she was not in "sexual harassment thinking," defendants argue that a claim of hostile work environment sexual harassment must fail when the plaintiff does not, during the time of employment, view the harassing conduct as based on gender. For this proposition, defendants cite *Schneider v. NBC News Bureaus, Inc.* (S.D.Fla. 1991) 801 F.Supp. 621, 629: "We find that during the course of her employment, Schneider was in no way offended by the foregoing incidents nor did she at any time view them as sexually offensive." We do not read *Schneider* as imposing more than the requirement from *Lyle*, recited above, that a plaintiff, while employed, subjectively perceive the work environment as hostile or abusive. *Lyle* does not impose a similar subjective prong to the element that the harassment be because of sex or gender; nor, as we read it, does *Schneider*. In any case, because a layperson may not necessarily equate gender based hostility with sexual harassment, Moran's admission that she was not in "sexual harassment thinking" does not mean that she did not perceive the harassment she experienced to be based on her gender.

D. ***Evidence that Sherwood's Harassment of Moran was Severe or Pervasive***

Moran was required to prove that the harassment she experienced was so severe or pervasive as "to alter the conditions of her employment and create a hostile or abusive

work environment." (*Lyle*, *supra*, 38 Cal.4th at p. 283, italics omitted.) Defendants argue that "Moran testified to only a handful of incidents with any sexual tinge whatsoever over a roughly 19-month span of employment." Defendants also review a number of cases in which allegations of sexual harassment have failed the "severe or pervasive" test even though the sexual component of the plaintiff's allegations was arguably more severe than the incidents to which Moran testified. (See, e.g., *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1040 [defendant implied he would release funds requested by plaintiff only if she had sex with him, and later told her, " 'I'll get you on your knees eventually. I'm going to fuck you one way or another' "].)

The problem with defendants' argument is that it ignores Sherwood's actions towards Moran that did not have a "tinge" of sexual content. "Sexual harassment does not necessarily involve sexual conduct. It need not have anything to do with lewd acts, double entendres or sexual advances. Sexual harassment may involve conduct, whether blatant or subtle, that discriminates against a person solely because of that person's sex." (*Accardi v. Superior* (1993) 17 Cal.App.4th 341, 345 (*Accardi*).)[8] Hostile work environment sexual harassment "shows itself in the form of intimidation and hostility for the purpose of interfering with an individual's work performance." (*Accardi*, at p. 348.) This court has approved the analysis of *Accardi* "as both intuitively and legally sound . . . ." (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1001.)

During 2007 Moran was meeting her sales quota and Sherwood regarded Moran's performance as satisfactory. Despite these facts, during the last quarter of 2007, Sherwood imposed a requirement that Moran be present at a different Qwest sales office each day, adding many hours of extra driving time per week. Sherwood knew that driving caused Moran pain because of her knee injury and the extra driving reduced

[8] Some courts have noted that *Accardi* was disapproved on other grounds by *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798. However, that case actually reversed the Court of Appeal opinion that had disapproved *Accardi*. The discussion of *Accardi* in the majority opinion is not disapproving.

Moran's ability to perform the tasks upon which her performance was judged. Sherwood also subjected Moran to numerous, distracting phone calls to check on her whereabouts and activities. When Moran finished one of her required activities at a Starbucks after a physical therapy session in order to meet a deadline, Sherwood repeatedly challenged her reasonable justification for doing so and told her that she was on "thin ice" with the company, that he was "turning up the heat" on her and that he knew he was "making it very uncomfortable" for her.

The jury could reasonably conclude that, during the last three months of 2007, Moran daily experienced physical pain imposed by Sherwood's driving requirement, was forced to waste many hours driving instead of performing useful tasks, and was distracted daily, perhaps even hourly, by Sherwood's calls or emails that conveyed the message that Sherwood distrusted her and had no confidence in her. The jury could also conclude that Sherwood intended to undermine Moran's morale and performance, and that a reasonable woman in Moran's position would find these actions hostile, abusive, and destructive of work performance. We conclude that substantial evidence supported the jury's finding that Sherwood's harassment of Moran was severe or pervasive.

E. ***Evidence that Sherwood's Harassment was Because of Moran's Gender***

Even though Sherwood's harassment of Moran was severe or pervasive, the harassment is not actionable under FEHA unless Moran could also show that the harassment was due to her gender, i.e., that she would not have been subjected to the harassment if she had been male.

In *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 80-81 (*Oncale*),[9] the court noted three ways that a plaintiff might demonstrate that harassing behavior was based on gender: (1) "proposals of sexual activity"; (2) harassment "in such sex-specific and derogatory terms . . . as to make it clear that the harasser is

[9] *Oncale* is a title VII (42 U.S.C. § 2000e et seq.) case. Because of the similarities between title VII and FEHA, "California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment." (*Lyle*, *supra*, 38 Cal.4th at p. 278.)

motivated by general hostility to the presence of women in the workplace"; and (3) "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." Defendants contend that Moran failed to present substantial evidence that Sherwood harassed Moran because of her gender via any of these routes.

In the first category, proposals of sexual activity, the only evidence in the record is that Lyn believed that, while Sherwood was standing close and looking at her breasts, his manner suggested that Lyn might obtain quota relief if she granted him sexual favors. This single incident during Moran's employment at Qwest was not an explicit sexual proposal and was completely different from any of the harassment alleged by Moran. It is not evidence from which a reasonable jury could conclude that Sherwood's harassment of Moran was motivated by Moran's gender.

Most of Moran's evidence comes in the second category, sex-specific and derogatory terms. Sherwood used terms, when talking to Moran or about Moran to others, that Moran characterizes as "sex stereotypical terms": "emotional"; "silly girl"; comparing Moran "to his insecure 15-year-old daughter"; and that her parents did not "raise [her] properly." Sherwood expressed speculation about Moran's relationships, or lack thereof: "good at being single"; "going out looking for sex"; "I want proof that you have a boyfriend." Sherwood made disparaging remarks about other female employees: Lappin made "too much money" and didn't need to work because her husband was rich; Lappin was an "aggressive, assertive woman;" Huynh made a sale because of her boyfriend's help. Sherwood also made comments about Lyn's tight shirt and referred to her "tits or something."

As for the third *Oncale* category, direct comparative evidence, Moran testified that male colleagues were not subjected to the kinds of personal comments to which Sherwood subjected Moran. Similarly, Lyn testified that Sherwood was more reverent to male employees but condescending or disinterested in her. When Sherwood hired a second CPE overlay, Larsen, a male, Moran was assigned to work with the less senior sales representatives. Even though Moran continued to meet her sales quota during 2007

and Larsen did not, Sherwood "turn[ed] up the heat" on Moran and told her that she was on "thin ice" with the company.

"[P]roof of discriminatory intent often depends on inferences rather than on direct evidence . . . ." (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 203.) Defendants contend that, at most, Moran proved that Sherwood "was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike." (*Lack v. Wal-Mart Stores, Inc.* (4th Cir. 2001) 240 F.3d 255, 262.) We disagree. The words and incidents recited above present numerous and varied indications from which a reasonable jury could infer that Sherwood's hostility to Moran was motivated by her gender. We conclude that there was substantial evidence supporting the jury's finding on the "because of gender" element.

F. *Constructive Termination and Termination in Violation of Public Policy*

In order to prevail on her cause of action for termination in violation of public policy, Moran had to show that she had suffered constructive termination, which requires proof that "the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251, disapproved on other grounds by *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.)

As detailed above, a reasonable jury could find that Sherwood's requirement that Moran be present at a different Qwest sales office each day, adding many hours of painful extra driving time each week, and his numerous, distracting phone calls and emails to check on her whereabouts and activities constituted severe or pervasive harassment. Sherwood refused to accept Moran's reasonable justification for finishing a work assignment at Starbucks and announced to Moran that she was on "thin ice" and that he was "turning up the heat" on her. A jury could reasonably conclude that the working relationship between Sherwood and Moran was beyond repair. After following Qwest's internal complaint procedures, Moran was told only that Sherwood had been

coached concerning inappropriate comments. Faced with severe or pervasive harassment and Qwest's unwillingness to intervene, a jury could reasonably conclude that a reasonable worker in Moran's position would have no alternative except to resign.

Defendants find it significant that when Moran went on medical leave, she still regarded her position as a "dream job" and that during her medical leave she intended to return to Qwest, until the day she finally resigned. In the testimony that defendants cite, however, Moran describes how she concluded that it would be "unsafe" for her to return and expressed regret because her position at Qwest had been her "dream job." That Moran intended to return to Qwest, despite what she had experienced, could as easily be interpreted by the jury as determination not to be forced out of a job rather than that the conditions were not objectively intolerable. "[T]he employer, who has created or permitted the persistence of known intolerable conditions, should not be able to complain of delay when the employee retains employment in the hope that conditions will improve or that informal conciliation may succeed." (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 740.)

We conclude that substantial evidence supported the jury's findings that Moran had suffered constructive termination.

G. *Failure to Take Reasonable Steps to Avoid Sexual Harassment*

The evidence showed that Qwest was on notice of potential sexual harassment by Sherwood because of Lyn's and Lappin's complaints of sexual harassment and Trevino's complaint of retaliation for supporting Lappin. With both Lyn and Lappin, Qwest notified Sherwood and left the matter in his hands. When Moran complained, Barry characterized what Moran described as "just a couple of rude comments." Barry discussed Moran's complaint directly with Sherwood, did not discuss Moran's most serious issues with him, and accepted Sherwood's account without further investigation. Substantial evidence supported the jury's finding that Qwest failed to take reasonable steps to avoid the sexual harassment of Moran.

H. ***Liability for Punitive Damages***

Defendants urge that Qwest should not have been liable for punitive damages because substantial evidence did not support the jury's finding that Sherwood was an officer, director, or managing agent of Qwest.

The jury was instructed that it could award punitive damages only if Moran had proved by clear and convincing evidence that Sherwood had engaged in conduct that harmed Moran "with malice, oppression, or fraud." (See Code Civ. Proc., § 3294, subd. (a).) The jury was further instructed that it could award punitive damages against Qwest based on Sherwood's conduct if Moran had proved by clear and convincing evidence that an officer, director, or managing agent of Qwest, acting with malice, oppression, or fraud, took one of four specified actions (direct action, reckless hiring, authorizing Sherwood's conduct, or knowingly adopting or approving that conduct). (See Code Civ. Proc., § 3294, subd. (b).) The jury found that Sherwood had acted with malice, oppression, or fraud in harassing Moran; that Sherwood was an officer, director or managing agent; and that no other officer, director or managing agent of Qwest had acted with malice, oppression, or fraud in injuring Moran.

Because no evidence was presented that Sherwood was an officer or director of Qwest, the issue presented is whether there was substantial evidence that Sherwood was a managing agent of Qwest.[10]

The jury was instructed that an employee is a managing agent if he or she "exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy." (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 577 (*White*).) A managing agent

[10] That the fact in question must be established by clear and convincing evidence does not change our standard of review for substantial evidence. (*Stromerson v. Averill* (1943) 22 Cal.2d 808, 815 ["[t]he sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal"]; *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.)

must be shown to have "exercised substantial discretionary authority over significant aspects of a corporation's business." (*Ibid.*) In *White*, a zone manager responsible for eight stores and 65 employees, who had been delegated most of the responsibility for running those stores, was found to be responsible for a significant aspect of the corporate business and to be a managing agent. (*Id.* at pp. 577-578.) In *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 714-715, the court clarified that the "policies" referred to in *White* were "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership."

Here, Sherwood managed four Qwest sales offices: Walnut Creek, San Jose, Sacramento, and San Francisco Sherwood directly managed four sales managers, Moran and Larsen. Around 30 sales representatives reported to Sherwood through their sales managers. Sherwood reported to Chris Ancell, vice-president for the western region.

Sherwood restructured the territories under him. He set policies on dress in the offices under his supervision. Sherwood reviewed the performance of his direct reports and exercised control over the discipline of employees reporting to him indirectly. He set the quotas for those in his organization. Sherwood could fire employees in his organization, but had to obtain "input" from Ancell, Qwest HR, and the Qwest legal department beforehand.

In 2007, Sherwood's organization had a total quota of over $4 million each month. Sherwood's organization was responsible for establishing relationships with channel partners such as Juniper Networks, Polycom, and Cisco. Sherwood's predecessor, and presumably Sherwood as well, could make major decisions regarding channel partners, such as whether to maintain a relationship with a channel partner around which issues had arisen. Sherwood set a policy of pursuing larger accounts than his predecessor had—accounts that could take up to a year to negotiate.

The evidence outlined above constitutes substantial evidence that Sherwood had significant discretionary authority over the operation of his branch. Because Sherwood also established sales strategies for the pursuit of CPE sales and directed activities that included establishing and maintaining relationships with channel partners, relationships

upon which CPE sales were dependent, a jury could reasonably conclude that Sherwood's decisions affected a significant portion of Qwest's business and that Sherwood's success or failure in making decisions and establishing policies for pursuing CPE sales and working with channel partners would likely come to the attention of corporate leadership.

Defendants respond that the revenue generated by Sherwood's region is an insignificant percentage of Qwest's total operating revenue and that the number of employees in Sherwood's management chain is an insignificant percentage of Qwest's total employee count.[11] Such considerations may be relevant in many cases, but where, as here, a jury could conclude that the corporate relationships for which Sherwood was responsible and the development of new sales strategies were in themselves significant to the corporation, the revenue generated by Sherwood's organization and its employee count become irrelevant.

We conclude that substantial evidence supported the jury's finding that Sherwood was a managing agent.

III. *The Damages*

Because we affirm the jury's findings of liability, we reach defendants' alternative requested remedy—a new trial on noneconomic and punitive damages. Defendants contend that the award of $2.8 million in noneconomic damages is excessive, that CACI No. 3905A (a jury instruction concerning noneconomic damages) is unconstitutional, and that the jury committed misconduct.

[11] Defendants argued in their brief for the actual insignificance of Sherwood's activities, both as a percentage of Qwest's revenue and as a percentage of Qwest's headcount. Responding to these arguments, Moran filed a motion with this court to strike an exhibit from defendants' supplemental appendix, information on a website referred to in defendants' reply brief, and defendants' arguments that are based on that information. Because we did not use the disputed information or arguments in reaching our conclusion on this issue, we deny Moran's motion as moot.

A. *The Issue of Excessive Damages is Preserved on Appeal*

When Qwest moved for a new trial, one of the bases listed for its motion, among others, was that the damages awarded by the jury were excessive. Moran contends that defendants failed to preserve the issue of excessive damages because they failed to brief and argue that issue before the trial court.

Among the other bases for its motion for a new trial, defendants included their charge of jury misconduct, which they did brief and argue before the trial court, and which, as here, defendants argued led to an award of excessive damages. Defendants' memorandum in support of its motion for a new trial contended that "the jury's improper award of non-economic damages for punitive purposes caused prejudice because no other, proper basis existed for awarding any non-economic damages. Grounds for non-economic damages include physical pain and suffering requiring medical or other professional attention, loss of reputation, and subjection to public scorn. . . . Here, there was ***no*** evidence that Moran incurred ***any*** such harms."

In their reply memorandum in support of their motion for a new trial, defendants argued that the award for noneconomic damages was inordinately high in comparison with a case in which proof of noneconomic damages was much stronger. During oral arguments, defendants also argued that the damages were excessive considering the harms indicated by the evidence.

We conclude that the issue of excessive noneconomic damages was properly raised in the trial court and that defendants preserved their right to raise the issue on appeal.

B. *The Constitutionality of CACI No. 3905A*

When instructing the jury, the trial court read CACI No. 3905A, which states: "No fixed standard exists for deciding the amount of [noneconomic] damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense." Defendants argue that this instruction "violates due process by conferring limitless discretion on the jury to inflict a 'grossly excessive' punishment that 'furthers no legitimate purpose and constitutes an arbitrary deprivation of property.' "

(Quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (*State Farm*).) Defendants suggest that an instruction directing the jurors to consider factors such as those outlined in *Price v. City of Charlotte, North Carolina* (4th Cir. 1996) 93 F.3d 1241, 1254 (*Price*), would have provided proper bounds on the jury's discretion and led to a reduced award in this case.[12]

Defendants' reliance on *State Farm*, which concerned punitive damages and not compensatory damages, is misplaced. In *State Farm*, the court was clear about why excessive punitive damage awards implicate due process: "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered." (*State Farm, supra,* 538 U.S. at p. 417.) Any imprecision in how compensatory damages are administered does not raise the concerns at issue with punitive damages. Defendants cite no case from any jurisdiction that extends the reasoning of *State Farm* to compensatory damages. *Price* does not suggest that use of the factors that it lists rise to a constitutional requirement, only that the factors "aid triers of fact in determining the propriety of awarding compensatory damages for emotional distress, as well as appellate courts in reviewing sufficiency challenges to such awards." (*Price*, *supra*, 93 F.3d at p. 1254.)

Defendants argue that "by conferring limitless discretion on juries, the instruction invites them to erase the boundary between compensatory and punitive damages." Defendants ignore the fact that CACI No. 3905A explicitly binds the jury's discretion by the evidence and the jury's common sense. Defendants also argue the effect of CACI

---

[12] *Price* noted factors used in different federal circuit opinions, including: (1) whether the plaintiff lost esteem of her peers; (2) whether the plaintiff suffered physical injury as a consequence of her emotional distress; (3) whether the plaintiff received psychological counseling; (4) whether the plaintiff suffered loss of income; (5) the degree of emotional distress; (6) the context of the events surrounding the emotional distress; (7) the evidence tending to corroborate the plaintiff's testimony; (8) the nexus between the challenged conduct and the emotional distress; and (9) any mitigating circumstances. (*Price*, *supra*, 93 F.3d at p. 1254.)

No. 3905A in isolation, ignoring the context created by other jury instructions. (See *People v. Thomas* (2011) 52 Cal.4th 336, 356 ["[a] single jury instruction may not be judged in isolation, but must be viewed in the context of all instructions given"].) Shortly after CACI No. 3905A was read to the jury, the court read CACI No. 3958: "If you decide that Sherwood's conduct caused Moran harm, you must decide whether that conduct justifies an award of punitive damages against Sherwood and, if so, against Qwest. The amount, if any, of punitive damages will be an issue decided later. There is no provision in the verdict form for punitive damages and you should award only the damages provided for in the form." If CACI No. 3905A erased the boundary between compensatory and punitive damages, an effect we do not concede, that boundary was restored by CACI No. 3958.

We conclude that the use of CACI No. 3905A is not unconstitutional.

C. *The Charge of Jury Misconduct*

In support of its motion for a new trial, defendants argued, as they do here, that the jury committed misconduct, relying on the declaration of Juror D.F. The trial court denied defendants' motion. "We will not disturb the trial court's determination of a motion for a new trial unless the court has abused its discretion. [Citation.] When the court has denied a motion for a new trial, however, we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion. [Citation.]" (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

Code of Civil Procedure section 657 specifies the grounds upon which a trial court may grant a new trial. One of these grounds is: "Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." (Code Civ. Proc., § 657, subd. 2.) Whether the affidavits of more than one juror are required to prove jury misconduct that does not involve decisions submitted to

chance, a question for which we find no relevant precedent,[13] we must regard a charge of jury misconduct that is supported by a single juror declaration to be very weak at the outset.

In order to establish that reversal is required because of jury misconduct, juror declarations must establish an express agreement to violate an instruction or employ improper considerations, or an implicit agreement demonstrated by extensive discussions. (See *Krouse v. Graham*, *supra*, 19 Cal.3d at p. 81; *Tramell v. McDonnell Douglas Corp., supra,* 163 Cal.App.3d at p. 172; *Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 147.)

"Evidence of jurors' internal thought processes is inadmissible to impeach a verdict. [Citations.] Only evidence as to objectively ascertainable statements, conduct, conditions, or events is admissible to impeach a verdict. [Citations.] Juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they describe the effect of any event on a juror's subjective reasoning process. [Citation.] Accordingly, juror declarations are inadmissible to the extent that they purport to describe the jurors' understanding of the instructions or how they arrived at their verdict. [Citations.]" (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1125; see also Evid. Code, § 1150, subd. (a).)

Defendants charge misconduct first because, according to the Juror D.F. declaration: "In reaching our decision to award Moran $750,000 in damages for past non-economic loss, . . . the jurors discussed what we thought Sherwood's annual compensation might be." This indicates only that a discussion of unknown extent

---

[13] All cases that we have consulted have involved multiple juror declarations. (See, e.g., *Krouse v. Graham* (1977) 19 Cal.3d 59, 79 [four declarations]; *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 162-163 [two declarations]; *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 332 [five declarations]; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683 [six declarations]; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 813 [three declarations]; *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 154 [three declarations].)

occurred, not that any explicit agreement was reached among the jurors or that discussion was so extensive as to constitute an implicit agreement.

The Juror D.F. declaration also states: "In reaching our decision to award Moran $2,000,000 in damages for past non-economic loss, including physical pain/mental suffering related to her claim that Qwest failed to prevent sexual harassment, . . . the jurors discussed that we wanted to award an amount that would cause the company to take notice of the verdict. We discussed that $2,000,000 would be a sufficient amount to achieve this objective." Again, this indicates only that a discussion of unknown extent occurred, not that any explicit agreement was reached among the jurors or that discussion was so extensive as to constitute an implicit agreement.

Juror D.F. went on to state: "When it was announced that the jury would be called back after returning our verdict on February 26, 2010, to consider the issues of punitive damages, most if not all of the jurors expressed surprise. We, the jury, discussed that we thought we had already awarded punitive damages." Defendants argue that this dispels "any doubt that the jury used noneconomic damages to punish the defendants." We consider this portion of the [Juror D.F.] declaration to be inadmissible, because it "purport[s] to describe the jurors' understanding of the instructions or how they arrived at their verdict." (*Bell v. Bayerische Motoren Werke Aktiengesellschaft*, *supra*, 181 Cal.App.4th at p. 1125.) Even if it were admissible, this part of the declaration does not establish an express agreement or extensive discussion concerning the use of improper criteria.

Finally, Juror D.F. stated: "We awarded the additional punitive damages on March 1, 2010, because we did not want the company to be able to claim that it had avoided the imposition of punitive damages." This conclusory statement, which demonstrates neither agreement nor discussion among the jurors, is inadmissible because it purports to show how the jury reached its determination of punitive damages.

We conclude that the Juror D.F. declaration was not sufficient to establish that jury misconduct occurred and the trial court did not abuse its discretion when it denied defendants' motion for a new trial because of jury misconduct. However, as discussed

below, the Juror D.F. declaration, so far as it is admissible, does lend support to our conclusion that the award of noneconomic damages was so excessive as to suggest passion or prejudice on the part of the jury.

D. *The Award of Noneconomic Damages*

After deliberating for some two and one-half days,[14] the jury returned with its verdict, using a special verdict form. The jury awarded noneconomic damages as follows: (1) $750,000 against Sherwood for gender-based harassment; (2) $50,000 against Qwest for constructive discharge; and (3) $2 million against Qwest for failure to prevent sexual harassment. At each step in enumerating damage amounts, the jury was instructed on the form not to include any damages already stated at previous steps.

In sum, the total awarded to Moran for past noneconomic loss was $2.8 million. Defendants contend that the evidence of injury before the jury was insufficient to justify an award of this magnitude. We agree.

The standard of review governing a claim of excessive damages is well established: "The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507; accord, *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078; see also *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 491 [" '[t]o say that a verdict has been influenced

[14] The jury deliberations began in the afternoon of February 22, consumed all day February 23, all day February 25, and finally resulted in a verdict at 11:53 a.m. on February 26.

by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence' "].)

This, we conclude, is the situation here. The award of $2.8 million for noneconomic damages was excessive and suggests that the jury acted on the basis of passion or prejudice.

We recognize that each case is sui generis, and also that time and inflation are variables to take into account, making it somewhat difficult to compare verdicts from other cases at other times. However, it is appropriate for us to consider awards in other cases, while bearing in mind that each case must be judged on its own facts. (*Seffert v. Los Angeles Transit Lines*, *supra*, 56 Cal.2d at p. 508.) Both Moran and defendants compare the award for noneconomic damages in this case with damages awarded in other cases.

In regard to such comparison, Moran's brief states: "Moreover, even among the reported appellate cases Qwest's apparent belief that seven-figure awards are out of the question is not supported. *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1279, 1294 [(*Watson*)] (Non-economic damages of $1,102,000 in racial harassment case.)[15] In *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 503 [(*Passantino*)], a court upheld a $1 million award for a plaintiff who testified that, as a result of issues surrounding her opportunities for other jobs at the employer 'she constantly worried, cried, and felt trapped and upset. She felt she was forced to spend less time with her family because she feared she would lose her job, given that her performance rating had been declining. She suffered stomach problems, rashes, and headaches which required medical attention. In addition, she sought counseling from her pastor.' Based on the *Passantino* case, the award of the jury in this case for prolonged daily mental and physical abuse that continued for months,

[15] Actually, the award for noneconomic damages appears to have been $1,117,000. The general verdict was for $1.5 million, with economic damages apparently of $383,000. (*Watson*, *supra*, 212 Cal.App.3d at pp. 1279, 1294.) The difference—$1,117,000—must represent the noneconomic damages.

combined with an 'internal complaint' procedure that was an excuse for employer derision of a vulnerable employee seeking help, is hardly beyond reason."

At another point in Moran's brief, she takes issue with a statement in defendants' brief: "Qwest's claims that the award of non-economic damages in this case is so unprecedented in sexual harassment cases that it is obviously invalid ('the highest award that Qwest has found from any jurisdiction for emotional distress in a sex-harassment case was $1 million'). [Citation.] The fact is that juries in California and elsewhere have made comparable or higher awards for non-economic damages, excluding punitive damages in harassment cases." This statement ends with a footnote in which Moran cites six unpublished cases, five from California and one from Arizona.[16] None of the cases—published or unpublished—supports the noneconomic damages awarded Moran.

Watson, the first published case cited by Moran, involved a female of Black, Mexican, and Asian descent who was denied a promotion to vocational rehabilitation assistant. (*Watson*, *supra*, 212 Cal.App.3d at pp. 1277, 1279.) She sued on several theories and, as noted, the jury awarded her $1,117,000 in noneconomic damages. (*Id.* at pp. 1277-1279, 1294.) The Court of Appeal affirmed the award as supported by substantial evidence, which included: "Watson had symptoms of an emotional breakdown during a number of months in 1981. She complained of headaches, chest pains, loss of appetite, memory loss, loss of sexual drive; she had nightmares; she awakened screaming every night; she heard voices. Watson attempted suicide when her college program was terminated and on two other occasions shortly thereafter." (*Id.* at p. 1283.) Beyond that, an expert psychiatrist "diagnosed [Watson] as suffering from a severe psychiatric disorder which had grown progressively worse since 1981, characterized as a major depressive disorder with psychotic features. He predicted that Watson would in the future require intensive medical treatment, including medication and

[16] The five unpublished cases from California are merely verdict summaries of superior court cases. Because these citations are not to opinions of the Court of Appeal or the superior court appellate division, they are not prohibited by California Rules of Court, rule 8.1115. Thus, we consider the facts presented in these verdict summaries for purposes of comparison.

possibly hospitalization. He attributed her emotional and psychological problems and her somatic complaints to stresses experienced as a result of the refusal to promote her to a counseling position. She could not remain in a stressful environment." (*Id.* at p. 1283.) The effects of Sherwood's harassment on Moran pale in comparison to the harm suffered by Watson.

So, too, the harm experienced in *Passantino, supra*, 212 F.3d 493, the second published case cited by Moran. There, a woman who had been with the employer and received glowing evaluations for 15 years saw her career disintegrate after she complained about male colleagues' sexually-based crudities. (*Id.* at pp. 499-500.) After hearing of the myriad consequences—both mental and physical—already quoted from Moran's brief, the jury awarded Passantino $1 million in noneconomic damages. (*Id.* at p. 504.) The reviewing court rejected the employer's contention that the awards were both excessive and not supported by substantial evidence. (*Id.* at pp. 510-514.) Again, Moran's evidence of emotional distress and physical pain is a far cry from the evidence presented by Passantino.

The unpublished verdict summaries cited by Moran are equally unavailing.

Ambruster v. California. Casualty Management (Super. Ct. Santa Clara County, Nov. 19, 1993, No. 724952) 1993 WL 794686, involved a plaintiff who presented evidence that after she was fired for becoming pregnant, she suffered posttraumatic stress disorder from which she would suffer lifelong effects.

Kotla v. Regents of the University of California (Super. Ct. Alameda County, May 23, 2005, No. V0147998(III)) 2005 WL 1421309, involved a plaintiff who presented evidence that her attempted suicide was due to her termination and that her emotional distress was serious and permanent.

Wallace v. Busch Agricultural Resources, Inc. (Super. Ct. Yolo County, Dec. 24, 1998, No. 69707) 1998 WL 1054771, involved two plaintiffs who survived a campaign of "workplace terrorism" by five colleagues who made sexual comments; rubbed their genitals in full view of plaintiffs; vandalized plaintiffs' cars and homes; left razor blades and bullets lying around as warnings; threatened violence against plaintiffs and their

children; and also burglarized and threatened a female investigator assigned to plaintiffs' case. Plaintiffs claimed they were coerced to quit under fear for their lives and the lives of their families.

Scully v. Acada Pharmaceuticals, Inc. (Super. Ct. San Diego County, Aug. 24, 2005, No. GIC834204) 2005 WL 2398080, involved a plaintiff who was fired for complaining about an executive who made lewd comments about her body; solicited her to go out with him; frequently touched her in the workplace; and made her feel that continued success with the company was contingent on her surrendering to his sexual advances. The verdict summary provides no description of Scully's symptoms.

Park v. Sun's California Inc. (Super. Ct. Los Angeles County, Oct. 2, 2007, No. BC340337) 2007 WL 4624435, involved a plaintiff whose pain and suffering occurred after her employer did nothing to prevent a restaurant patron from going on a traumatic rampage that included being dragged into the men's restroom where she was choked and molested, and then being dragged into the kitchen where she was knocked unconscious and suffered a ruptured spinal disc that required two surgeries.

We fail to see how Moran's evidence is remotely comparable to the evidence in any of these cases.

We do find other decisions in California to be apt, however, especially *Kelly Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397 (*Kelly-Zurian*); *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577 (*Hope*); and *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121 (*Mokler*).

Kelly-Zurian involved a plaintiff who had endured years of sexual advances, verbal abuse, and unwanted sexual contact by a supervisor. (*Kelly-Zurian, supra,* 22 Cal.App.4th at pp. 406-407.) She resigned, sued, and won a total verdict of $125,000. (*Id.* at p. 407.) Defendants contended that the award was excessive, as her "wage loss was only about $7,000, . . . her medical bills were merely $320, and the remainder of the award could only have been for emotional distress." (*Id*. at p. 409.) The Court of Appeal rejected this argument, as Kelly-Zurian proved that she suffered from "panic attacks consisting of anxiety, tightness in the chest and heart palpitations," was "depressed and

unable to sleep," developed a "serious drinking problem," was diagnosed with posttraumatic stress disorder, experienced "recurring and intrusive recollections of the events," and had "recurring nightmares of the sexual harassment and flashbacks of the events." (*Id*. at p. 410.)

Hope was a cook in a youth correctional facility who for some five years was subjected to vicious comments about his sexual orientation by coworkers on essentially a daily basis. (*Hope*, *supra*, 134 Cal.App.4th at pp. 580-581, 592.) Though cooks were assisted by wards of the facility, such assistance was withdrawn from Hope, increasing his workload. (*Id.* at p. 581.) Coworkers would throw trash in areas Hope had just cleaned and his reports about potentially violent wards were torn up. (*Id.* at pp. 582-583.) When Hope was promoted, the promotion was rescinded without cause four days later (*id.* at pp. 583-584), and he was denied a merit pay increase because of "substandard" working relationships. (*Id.* at p. 586.) Hope complained to supervisory personnel many times, but no substantive action was ever taken. (*Id.* at pp. 582-587.)

Hope's award of $1 million for emotional distress was upheld, based on evidence that included testimony from a psychiatrist that "anxiety caused Hope to develop a bleeding blister in the retina of his right eye, leading to a permanent loss of vision." (*Hope*, *supra*, 134 Cal.App.4th at pp. 584-585.)

Mokler was a case involving a county employee's retaliatory discharge, and the jury awarded almost $1.7 million in noneconomic damages. (*Mokler*, *supra*, 157 Cal.App.4th at p. 132.) The trial court granted a new trial if Mokler did not accept a reduction in those damages to $125,000. (*Id.* at p. 133.) The Court of Appeal affirmed this decision because "[a]lthough Mokler testified she felt threatened and humiliated by the County's actions surrounding her termination, she did not require medical or professional attention" and there was no evidence that her reputation was damaged. (*Id.* at p. 147.)

We have scoured the record for evidence of Moran's physical pain and mental suffering due to defendants' actions, and find the following:

Moran felt it was "kind of humiliating" and "disrespectful" to be told that she was too emotional or not to give a diatribe at management meetings. She found such comments about the way she communicated "insulting." and thought it was weird for Sherwood to imitate her breathing through her mouth. She also found disrespect in Sherwood's comments about Moran pushing herself on men, comparing her to his insecure 15-year-old daughter, and that Qwest needed someone "really qualified" to do Moran's job. Moran also found the "really qualified" remark to be insulting. Sherwood's comment about pushing herself onto men was considered insulting and made Moran "upset." She was "really humiliated" that Sherwood intimated to the branch that she was not qualified to work with the more senior sales representatives.

Personal attacks during one-on-one meetings with Sherwood, which occurred no more than monthly, left Moran crying and "visibly shaken." Moran was "very, very disturbed" and "physically taken aback" by the comment comparing her to Sherwood's 15-year-old-daughter. She was insulted and "probably upset at that point and probably had tears in [her] eyes."

Moran thought Sherwood's comments about her dating status to be "creepy, kind of weird," "intolerable," and humiliating. She found it insulting for Sherwood to say that she would never get married and was good at being single. She was "disgusted" when Sherwood said he wanted proof that Moran had a boyfriend, finding the comment "creepy" and "weird." The comment made her feel very uncomfortable and humiliated. Moran was "floored," offended and "extremely shocked" when Sherwood asked if she was going out looking for sex.

Moran found it "really insulting" when Sherwood chided her for letting a $200 Wine Train ticket go unused, in a way that suggested he didn't believe her excuse of illness. She found it humiliating when Sherwood told her in a group that she didn't eat enough meat and that he was going to force her to eat a burger.

When Sherwood told Moran that if anything happened to her job, she could just give Rabone a call, Moran felt uneasy about her job security.

Moran felt "uncomfortable" when Sherwood said that Lappin did not have to work because her husband was rich. She thought it was insulting for Sherwood to insinuate that Huynh made a sale because of her boyfriend. She found it "very uncomfortable" when Sherwood talked about how hot his daughter looked in a bikini.

Moran did not complain to Qwest HR earlier than she did because she was afraid of retaliation and losing her job. When Moran made her notes about incidents of sexual harassment, she was "possibly" in an "emotional frame of mind." She called Qwest HR from her car in the company garage because she knew she would start crying and would get emotional. During this call, Moran was "very scared" and was "probably crying." At the time of the call, she was "really, really afraid of retaliation."

Moran was "really upset" during a conversation with Barry from Qwest HR and was "really sad," "really disappointed" and "disgusted" with the call. During the call, she was "very emotional" and found it "unpleasant" because Barry "was clearly not seeing [her] side." Moran told Barry, "I'm in a lot of pain" because Sherwood was undermining her ability to get to physical therapy. She was "very discouraged," "outraged and saddened" after this conversation with Barry.

After a later call with Barry, Moran was dissatisfied and her voice was "cracking." Moran believed she sounded like she was losing her composure. She told Barry that she was not in a safe work environment and did not feel protected. When Barry told her that Sherwood would want to talk with Moran about her complaint, Moran was "very scared." When she made her complaints, it was a "very upsetting time" for Moran. After her conversations with Barry and Sherwood's messages to meet him the next morning, Moran was "really scared" and feared retaliation. During her medical leave, Moran realized that she "wasn't in a good place," the situation had "taken a toll" on her, and the job would not be a "safe situation." Moran continued to feel that it would be unsafe to return to work during her medical leave. When Sherwood left Moran a voice message during her medical leave, Moran said that simply hearing the message was "terrorizing for me to think I would have to go back to that."

Moran also testified to some psychic wear and tear: "if somebody is badgering you everyday and beating you down, how long can you take that?"

For several months, Moran experienced an unspecified increase in her level of knee pain because Sherwood imposed requirements that added four to six hours per day of driving time. Moran went to the emergency room for "stomach problems," which she felt were at least partially due to stress.

Essentially all of the evidence of emotional distress, such as it was, came from Moran. There was no evidence from any expert about any claimed adverse effect on her, let alone any psychosis. There was no evidence that Moran had sought therapy or hospitalization, and no evidence from any family member or friend. There was essentially nothing but "insult" and "humiliation" and various synonyms. It is simply not enough.

Courts have described some claims of emotional distress as "garden-variety," claims so minor that they do not even allow discovery into the plaintiff's emotional history. (See, e.g., *Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1881.) As one state court has put it, in such claims the evidence is " 'limited to the testimony of the plaintiff, who describes the emotional distress in vague or conclusory terms, presents minimal or no evidence of medical treatment, and offers little detail of the duration, severity, or consequences of the condition.' " (*City of Hollywood v. Hogan* (Fla.App. 4 Dist. 2008) 986 So.2d 634, 648-649; see *Hill v. Airborne Freight Corp.* (E.D.N.Y 2002) 212 F.Supp.2d 59, 73-74 [survey of awards for "a plaintiff's general testimony of humiliation and distress, without medical corroboration" range from $5,000 to $100,000]; *Epstein v. Kalvin-Miller Intern., Inc.* (S.D.N.Y 2001) 139 F.Supp.2d 469, 480 ["[a] 'garden variety' emotional distress claim is one that did not require medical treatment"].)

Addressing this subject, Moran's brief observes as follows: "Qwest particularly discusses *City of Hollywood v. Hogan* . . . which, on its face, could not be more different from this case: 'garden-variety emotional-distress . . . in which . . . the evidence is limited to the testimony of the plaintiff who describes the emotional distress in vague or conclusory terms, presents minimal or no evidence of medical treatment, and offers little

detail of the duration, severity, or consequences of the condition.' [Citation.] The *Hogan* plaintiff was 'embarrassed and hurt that he had not been promoted . . . [and] requested an award for . . . loss of dignity for the 800 days from [his] rejection for promotion to [his] retirement.' [Citation.] *Hogan* is simply inapposite to this case." (Fns. omitted.) Apposite or not may be in the eyes of the beholder. We believe Moran's own description of Hogan bears striking similarity to the evidence here.

Faced with the paucity of evidence of the emotional effect, Moran focuses on the physical pain due to her knee problems, exacerbated by the "counterproductive driving requirement," to the point that Moran's brief has no fewer than five footnotes talking about the physical pain. And confronted at oral argument about the lack of support for emotional distress, counsel referred to the "three to four months" of driving "up to four hours a day." But even assuming some pain for some period each workday for 20 weeks—an assumption not supported by the record—the noneconomic damages in this case would reflect an award of $28,000 a day!

In sum and in short, a comparison of Moran's *evidence* with the *evidence* in other cases demonstrates by itself that the award of $2.8 million for noneconomic damages cannot stand. But the verdicts themselves also indicate that the jury must have been acting from passion or prejudice.

As noted, the jury awarded the $2.8 million in noneconomic damages in three components: $750,000 against Sherwood for the sexual harassment; $50,000 against Qwest for the constructive discharge; and $2 million against Qwest for failure to prevent sexual harassment. While analytically it may be the case that separate awards could be rendered against Qwest for the different claims, such is not possible here, because there was no evidence that there was any different effect on Moran due to the different claims. Moran's evidence did not differentiate between or among the theories of recovery. Beyond that, all of the wrongdoing was focused on Sherwood who, to put it bluntly, had to be held responsible for all the damage under settled law. (See *Stewart v. Cox* (1961) 55 Cal.2d 857, 864 [negligent act of another is not a superseding cause]; *Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal.App.3d 620, 639; see generally Rest.3d

Torts, Liability for Physical and Emotional Harm, § 34.) Sherwood directly or proximately caused all of the noneconomic damages to Moran, so the jury had no basis, except for passion or prejudice, to assess additional noneconomic damages against Qwest.

As we discussed above, the declaration of Juror D.F. was insufficient, as proof of jury misconduct, to justify granting Qwest's motion for a new trial on damages. However, although not necessary to reach our conclusion that the noneconomic damage award resulted from the passion or prejudice of the jury, the D.F. declaration lends support to that conclusion. Juror D.F. declared that the jurors discussed an award substantial enough that Qwest "would take notice of the verdict." One of the objectives of punitive damages is to "send a message" to the offender. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967.) Evidence that the jury, in a context outside the imposition of punitive damages, discussed "sending a message" or causing a defendant "to take notice" is evidence of the passion or prejudice of the jury, even if that evidence is insufficient to support a finding of jury misconduct. A jury is to award the noneconomic damages to which a plaintiff is entitled—not to attempt to get the defendant's attention.

In those infrequent instances where a reviewing court concludes that the jury returned a verdict influenced by passion or prejudice, the reviewing court may determine that a retrial can—and should be—avoided if possible. (See *Slaughter v. Van Winkle* (1931) 213 Cal. 573, 574-575; *Livesey v. Stock* (1929) 208 Cal. 315, 322-323; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 865, p. 926.) As Witkin notes: "[t]he more common [remedy in the reviewing court] is rendition of a conditional judgment, ordering a reversal unless the respondent (plaintiff) remits the excess, or an affirmance as modified if the excess is remitted. (See *Bellman v. San Francisco High School Dist.* (1938) 11 C.2d 576, 588 . . . .)" (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1739, p. 1275.)

We choose to follow that path here, especially where there is an amount of noneconomic damages awarded by the jury that could be considered supported—the

$750,000 awarded against Sherwood, the sole antagonist here. We thus hold that the judgment is reversed and the cause remanded for a new trial solely on the issue of noneconomic damages unless, within 30 days from the filing of our remittitur in the trial court, Moran shall remit from the judgment all noneconomic damages except the sum of $750,000.

E. *The Award of Punitive Damages*

Defendants attack the award of punitive damages only on the grounds of jury misconduct and that substantial evidence did not support the finding that Sherwood was a managing agent of Qwest. Having already determined that these grounds lack merit, we affirm the award of punitive damages.

IV. *The Cross-Appeal*

A. *Background*

When Moran joined Qwest she was given an annual base salary of $90,000 along with the opportunity to earn additional compensation through commissions. Moran's sales commissions were governed by a written agreement, the 2006 Sales Compensation Agreement (the agreement). Section 15 of the agreement reserved Qwest's right to raise or lower Moran's sales quotas: "Quotas are forecasts of sales goals based on a number of underlying assumptions regarding matters such as market conditions, sales strategies, product lists, account ownership, etc. Such matters change frequently during the course of a Plan year. As such, Qwest has the express right to raise or lower quotas and such adjustments may affect sales incentive compensation." The agreement incorporated by reference an appendix that stated: "Sales Management sets quotas for participants under this plan. Sales Management has the right to change quotas, including retroactively, and you understand that such changes may affect your sales compensation."

Moran received credit against her quota when sales representatives in Sherwood's organization made CPE sales. Qwest maintains that Sherwood consistently assigned sales quotas to CPE overlays that were 80 to 85 percent of the total that Sherwood's region was expected to generate that year from sales of equipment. Moran disputes this and maintains that her 2007 quota was over 90 percent of Sherwood's branch

expectation. When Sherwood joined Qwest in May 2006, he inherited a branch expectation in equipment sales of $5 million, but Moran's quota had been set at $2 million. Sherwood discussed whether to raise Moran's quota to 80 percent of the branch expectation with Jim Foy, Qwest's western region staff manager of compensation. Foy agreed that Moran's quota should be raised and Sherwood did so, on around July 1, 2006, setting Moran's new quota at $4 million, 80 percent of his branch expectation. When Sean Larsen joined Qwest as a second CPE overlay in Sherwood's region, Moran's quota was reduced, consistent with each of them serving two of Sherwood's four sales teams. Moran, however, alleged that the teams were split with an advantage to Larsen for future success.

When Moran filed suit, her first cause of action, for gender-based discrimination, was based on Sherwood's doubling of Moran's 2006 sales quota from $2 million to $4 million. Moran alleged that this action operated to deprive Moran of $100,000 in income for 2006. Moran's fifth cause of action, for failure to pay wages on discharge, was based on the failure to pay Moran the income that she lost due to the change in her sales quota. The trial court issued an order granting defendants' motion for summary adjudication on these causes of action and Moran now appeals that order.

B. *Standard of Review*

The grant or denial of a motion for summary adjudication is reviewed de novo. (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 374.) We consider all evidence, for which no objection has been made and sustained, presented in the parties' moving papers. (*Schofield v. Superior Court* (2010) 190 Cal.App.4th 154, 156-157.) We also liberally construe the evidence in support of the party opposing summary adjudication, resolving doubts concerning the evidence in that party's favor. (*Ibid.*)

C. *Moran's Claim of Gender-Based Discrimination*

FEHA prohibits an employer from discriminating against an employee on the basis of gender "in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).) In FEHA discrimination cases, "California has adopted

the three-stage burden-shifting test established by the United States Supreme Court . . . . [Citations.]" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); see *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).)

"Under the *McDonnell Douglas* test, the plaintiff has the initial burden of establishing a prima facie case of discrimination. [Citation.] To meet this burden, the plaintiff must, at a minimum, show the employer took actions from which, if unexplained, it can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criterion. [Citation.]" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004 (*Scotch*).) Although the specific elements of a prima facie case may vary with the facts, an employed plaintiff (as opposed to a plaintiff denied employment) must generally produce evidence that he or she: (1) is a member of a protected class; (2) was performing competently; (3) suffered an adverse employment action; and (4) some other circumstance suggests discriminatory motive. (*Guz*, *supra*, 24 Cal.4th at p. 355.)

"If the plaintiff establishes a prima facie case, then a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact the employer took its actions for a legitimate, nondiscriminatory reason. [Citation.] If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive." (*Scotch*, *supra*, 173 Cal.App.4th at p. 1104.)

When an employer in a motion for summary judgment, proceeds "directly to the second step of the *McDonnell Douglas* formula" by presenting a nondiscriminatory reason for its actions, and if the employer's "explanation of nondiscriminatory reasons [is] creditable on its face," then the plaintiff has the burden "to rebut this facially dispositive showing by pointing to evidence that nonetheless raises a rational inference that intentional discrimination occurred." (*Guz*, *supra*, 24 Cal.4th at pp. 357-358.)

Moran's first cause of action was a claim that Qwest discriminated against her because of her gender, in violation of FEHA, by doubling her 2006 quota, the effect of which was to reduce her compensation under the 2006 contract.[17]

In their motion for summary judgment, defendants explained the doubling of Moran's quota with evidence that Sherwood established quotas for CPE specialists at 80 to 85 percent of his region's total quota for equipment sales. Moran received credit against her quota for any CPE sales made within Sherwood's organization, so setting Moran's personal quota as a high percentage of his organization's quota would seem to ensure that Moran could not be successful unless the organization as a whole was successful. With this explanation, Qwest advanced a nondiscriminatory reason for its action.

As evidence that Qwest's explanation was a pretext and that Sherwood's doubling of Moran's quota was based on Moran's gender, Moran submitted evidence that was substantially the same as that supporting her claim for sexual harassment, which was detailed above. However, none of Sherwood's behavior that supported Moran's claim for sexual harassment was related to the setting of quotas and the most serious incidents—the requirements that significantly increased Moran's driving and the very frequent phone calls that exhibited mistrust of Moran's activities—occurred more than a year later. We cannot conclude that this evidence, standing alone, raises a rational inference that intentional discrimination occurred, especially given the evidence that Sherwood discussed the raise in quota with Foy and obtained Foy's agreement.

Moran also argued that other evidence tended to more directly demonstrate that Qwest's explanation was a pretext. First, Moran claims that she presented evidence that mid-year quota increases did not occur at Qwest. However, the cited evidence only

---

[17] Moran's brief on appeal states: "In her first cause of action, Moran alleged that Qwest discriminated against her on the basis of sex when Sherwood doubled her quota in mid-2006 and when Sherwood again doubled her quota at the beginning of 2007." However, Moran's complaint contains no allegations concerning her 2007 quota. We consider the 2007 doubling of quota only to the extent that it might support an implication that the 2006 doubling was because of Moran's gender.

shows that sales managers reporting to Ancell would not expect mid-year quota increases, not that individual contributors reporting to a sales manager should not expect mid-year increases. Because Qwest does not claim that Sherwood's quota had been increased, this evidence does not cast doubt on Qwest's explanation.

Second, Moran argues that, according to Qwest, her sales were "closely tied" to those of the sales representatives with whom she worked, but that when Sherwood reviewed quotas after he joined Qwest, he doubled Moran's quota while maintaining or lowering everyone else's. Because Moran was the only CPE specialist in Sherwood's organization at the time, the fact that Sherwood did not raise the quotas of sales representatives would not cast doubt on Qwest's explanation for the doubling of Moran's quota unless Moran's quota was already set at a high percentage of the combined quotas of the sales representatives, a proposition for which there is no evidence and for which Moran does not argue.

Third, Moran contends that year-over-year increases of 25 to 30 percent were the upper limit, yet her 2007 quota was doubled. However, the evidence that Moran cites for a limit of 25 to 30 percent refers to quotas for sales managers, and Moran was not a sales manager.

Fourth, Moran argues that her original 2007 quota was 92 percent of Sherwood's branch total, casting doubt on Sherwood's claim of having maintained CPE overlay quotas at 80 to 85 percent of his branch quota. Granting that Moran's figure is correct, we do not regard as material a discrepancy between an upper limit of 85 percent and 92 percent. Even if Sherwood set Moran's 2007 quota 7 percent too high by his own standards, that fact does not cast doubt on his explanation for those standards, nor is it so far out of line with his stated standards, that it raises a rational inference that the standards themselves were a pretext.

Finally, Moran suggests that Sherwood gave contradictory explanations for the 2006 doubling of Moran's quota. Moran testified that when he raised her quota, Sherwood had told her that the fact that she was doing so well and making her quota was "raising red flags in Denver." However, Sherwood, when questioned about raising

Moran's quota in late 2009, first said that no one above him had suggested the quota change to him and, when the question was repeated in another way, said that he did not recall anyone suggesting that Moran's quota was out of line. This minor discrepancy does not raise a rational inference that Sherwood's explanation for why he raised Moran's quota was a pretense. If someone higher up had actually brought Moran's quota to Sherwood's attention, then that would bolster defendant's argument that the increase in Moran's quota was not an act of intentional discrimination. If not, and Sherwood was dissembling to Moran for some reason, Moran's argument for pretext is bolstered only if the fact of Sherwood's dissembling raises a rational inference that he was attempting to hide an illegitimate basis for raising her quota. Such an inference is not raised because there are other reasonable explanations for not telling Moran the actual reasons for raising her quota: (1) Sherwood may have simply felt that he owed no explanation to Moran, and blaming the increase on unidentified superiors disposed of the issue or (2) Sherwood may have preferred that Moran blame unidentified superiors rather than himself, because he had to work with Moran on a regular basis.

We conclude, as did the trial court, that the evidence offered by Moran did not raise triable issues of material fact that would tend to show that defendant's explanation for why Sherwood raised Moran's quota in 2006 was a pretext. Accordingly, we affirm the trial court's grant defendant's motion for summary adjudication as to Moran's first cause of action.

D. ***Moran's Cause of Action for Failure to Pay Wages on Discharge***

Moran's cause of action for failure to pay wages on discharge was also based on the doubling of her quota in 2006. Because the doubling of quota resulted in lower commission compensation for 2006, Moran claims that Qwest was obligated to pay her more for 2006 than it actually had, and Qwest had not satisfied this obligation at discharge. This cause of action is not wholly derivative to her cause of action for gender discrimination, discussed above, because Moran argues that even if Qwest's did not raise her quota because of her gender, the agreement was illusory or unconscionable.

First, Moran argues that the contract reserved for Qwest the right to change Moran's quota at any time, even retroactively, giving Qwest the effective right to reduce Moran's commission to zero, even after it had been earned. Because Qwest retained this right in the agreement, the argument proceeds, the contract is illusory and cannot be enforced. (See *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 16 ["an unqualified right to modify or terminate the contract is not enforceable"].)

Defendants urge that if Moran is correct, then we would be obligated to save the contract by imposing a good faith obligation on the exercise of Qwest's discretion. Moran contends that we have no right to impose a good faith obligation because the contract is not ambiguous. However, courts may impose a good faith obligation in order to save a contract from unenforceability when a grant of discretion to one party renders a contract illusory: "[C]ourts prefer to imply a covenant [of good faith] at odds with the express language of the contract rather than literally enforce a discretionary language clause and thereby render the agreement unenforceable." (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 805; see also *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc*. (1992) 2 Cal.4th 342, 372 ["The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith."].) With illusory contracts, courts are often "forced to resolve contradictory expressions of intent from the parties: the intent to give one party total discretion over its performance and the intent to have a mutually binding agreement. In that situation, imposing a duty of good faith creates a binding contract where, despite the clear intent of the parties, one would not otherwise exist." (*Third Story Music, Inc.*, at p. 805).

If Qwest's discretion over quotas renders the contract illusory, we would enforce the contract by requiring that the discretion be exercised in good faith. Thus, Moran's argument that the contract is illusory does not help her unless she can also show that her quota was doubled in bad faith, an issue we address below.

Moran also proposes that the agreement is unconscionable because it is a contract of adhesion containing an excessive grant of discretion to Qwest in adjusting quotas and

oppressive dispute resolution procedures. If we were to determine that the agreement is unconscionable, then the remedies are governed by Civil Code section 1670.5, subdivision (a): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

If the agreement is unconscionable because of the dispute resolution procedures, then we would not refuse to enforce the entire agreement, but would sever the dispute resolution procedures from it, which is easily accomplished without affecting its other provisions.[18] Here, the central purpose of the contract is sales compensation, not dispute resolution, so severance is the preferred remedy. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124 ["[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate"], overruled on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct 1740, 1748-1749].) However, severance of the dispute resolution provision does not help Moran because she did not use or attempt to use those provisions, and Qwest has not argued for their application.

If the contract is unconscionable because Qwest has excessive discretion in resetting quotas after they are established at the beginning of the year, then we are in the same position as with the argument that the contract is illusory. We would limit the application of the unconscionable clause by requiring that the discretion be exercised in good faith. Thus, as with Moran's argument that the contract is illusory, unconscionability is helpful to her only if she can also show that her quota was doubled in bad faith.

---

[18] The contract contains an express severability clause for its arbitration provision. It also contains a general severability clause for any provision found to be void or unconscionable.

The contract states that quotas are "forecasts of sales goals" and Moran does not dispute that a good faith change in business forecasts would justify a quota adjustment. However, Moran urges that "[c]hanging a quota after the sales have been completed is not changing a 'forecast,' for the same reason that the report of last night's baseball scores is not a 'forecast.' [¶] Qwest demands the right to determine what is an acceptable sales result and what is an outstanding result after it knows all the results and, in its sole discretion, to retroactively set a quota that turns a result that exceeds expectations to a result that is below expectations—as it did to Moran in 2006—not by predicting the future, but by erasing its predictions and substituting new numbers that achieve the result Qwest wants after the events have occurred."

Moran's reasoning fails to hold water because her quota was a quota for the entire 2006 year. When Qwest changed her quota at mid-year, it did not know what Moran's total sales during 2006 would be, so the new quota was a forecast and was not set after the fact. Because Moran had made half of the new quota (i.e., all of her original quota) by the mid-year point, it was not unreasonable for Qwest to forecast that she would succeed in selling just as much during the second half of the year. At root, Moran's argument is a replay of her claim that Sherwood raised her quota for improper reasons, cast here as an argument that Sherwood was deliberately attempting to make her less successful in 2006. This claim fails because Moran's cause of action for gender discrimination had already failed, and Moran points to no other evidence that would support an inference that Sherwood was deliberately sabotaging her ability to succeed.

Because Moran did not demonstrate that there is a triable issue of material fact that would support the inference that Sherwood doubled her 2006 quota in bad faith, Moran's arguments in contract fail. We conclude that the trial court did not err in granting summary adjudication to defendants on Moran's fifth cause of action for failure to pay wages on discharge.

DISPOSITION

The awards for noneconomic damages are reversed and the cause remanded for a new trial solely on the issue of noneconomic damages unless, within 30 days from the

filing of our remittitur in the trial court, Moran shall remit from the judgment all noneconomic damages except the sum of $750,000. If Moran elects to accept such remission, the judgment shall stand affirmed in full. In all other respect the judgment is affirmed.

We also affirm the court's order granting summary adjudication to defendants on Moran's first and fifth causes of action.

The parties will bear their respective costs on appeal.

_____
Lambden, J.

We concur:

_____
Haerle, Acting P.J.

_____
Richman, J.