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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROSARIO JUAREZ,

Plaintiff,

v.

AUTOZONE STORES, INC.,

Defendant.

Case No. 08-CV-00417-WVG

HON. WILLIAM V. GALLO

DEFENDANT AUTOZONE STORES, INC.'S REPLY RE MOTION FOR NEW TRIAL

Date: March 4, 2015
Time: 8:00 a.m.
Dept: Courtroom 2A

I. INTRODUCTION

As shown below, the arguments made in Juarez' Opposition to AutoZone's new trial motion are without merit. Under applicable law, a new trial should be granted.

II. ANALYSIS

A. The Misconduct By Plaintiff and Her Counsel

Juarez errs in focusing on the number of times her attorney and she engaged in misconduct before the jury. There is no "magic number" of instances of misconduct that require a new trial; even one improper question can be sufficient. *County of Maricopa v. Maberry*, 555 F.2d 207, 222 (9th Cir.1977). It is the effect of misconduct that is determinative, not its particular frequency. "Every litigant is entitled to a fair, impartial trial [and] a jury… not being even possibly influenced by improper questions intentionally put to witnesses who appear before it." *Id*. at 224.

The presumption found in *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258 (9th Cir.2000) is not an ironclad rule; misconduct situations exist where instructions are "insufficient to immunize the jury[.]" *Fineman v. Armstrong World Industries, Inc*., 980 F.2d 171, 206 (3rd Cir.1992). Here, the enormous and unjustified size of the jury's compensatory and punitive damage awards evidences both the prejudicial effect of the misconduct, and that this jury was not rehabilitated by curative instructions. *City of Cleveland v. Peter Kiewitt Sons' Co*., 624 F.2d 749, 759 (6th Cir.1980).

B. Dr. Kalish

"'A new trial is warranted on the basis of an incorrect evidentiary ruling if the ruling substantially prejudiced a party.'" *Cotton ex rel. McClure v. City of Eureka Cal.*, 860 F.Supp.2d 999, 1022 (N.D.Cal. 2012) (citing *U.S. v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992))[1]. AutoZone seeks a new trial, not because Juarez exceeded her stipulation, but rather for the Court's subsequent decision to exclude Dr.

[1] Juarez erroneously asserts that in ruling on a new trial motion, a trial judge assesses its earlier evidentiary rulings on an "abuse of discretion" standard. The abuse of discretion standard applies only *at the appellate level*. *Lust v. Merrell Dow Pharms.*, 89 F.3d 594 (9th Cir. 1996), simply stands for the wholly unremarkable proposition that a Fed.R.Evid. 702 ruling is reviewed for abuse of discretion *at the appellate level*.

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Kalish's rebuttal testimony once Juarez elected to "open the door." Juarez' claims that AutoZone should have objected to Juarez' testimony or sought an admonishment that the jury disregard her testimony both miss the point. Judge Bencivengo's earlier ruling made clear the cure for Juarez testifying beyond her prior stipulation to limit the scope of her claims to past non-continuing and garden variety emotional distress:

> If something happens at trial … that suggests they've opened the door to some sort of emotional distress claim where Dr. Kalish's testimony would then be responsive and relevant, you can re-request to bring him ...

(07/19/2013 Hearing Tr. 7:3-7.) AutoZone properly followed the procedure set forth in Judge Bencivengo's ruling, and waived nothing.

Juarez's reliance on *Turner v. Imperial Stores*, 161 F.R.D. 90 (S.D.Cal. 1995) is also misplaced. At trial, AutoZone did not move for a Rule 35 medical examination. AutoZone simply wanted to present rebuttal testimony referencing Juarez's existing medical records. It is undisputed that, at trial, Juarez ignored her prior stipulation and testified both as to continuing emotional distress and "really bad" physical problems (Vol. 5, 51:15-52:9), as well as depression (Vol. 4, 178:23-179:3) – something Judge Bencivengo noted would not be coming in. (07/19/2013 Tr. 7:13-16.)

The Court's ruling substantially prejudiced AutoZone by allowing Juarez to testify to types of emotional distress that she had earlier expressly agreed not to assert in order to avoid facing rebuttal testimony. Allowing Juarez to expand her testimony without allowing Dr. Kalish's rebuttal evidence clearly "tainted the verdict" as it left the jury with only Juarez's expanded claims of harm, and without any of the alternative causation evidence that would have been provided through Dr. Kalish.

This portion of Juarez' opposition seeks to downplay her expanded emotional distress, as "brief" and "transitory" testimony. Yet *elsewhere in her opposition* (at p.13:7-15) she uses the same testimony, which was deliberately brought out through her own counsel's questions[2], to claim she suffered serious physical and emotional

[2] This purposeful action by Juarez, to disregard her own prior stipulation, is but one of the many sharp practices engaged in by Juarez through her counsel, as addressed more fully in AutoZone's opening memorandum and attorney misconduct briefing.

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harm that should entitle her to especially high punitive damages. This Court should reject Juarez's undisguised attempt to "speak out of both sides of her mouth."

Juarez's own psychiatric expert, Dr. Dominick Addario, was stricken by Judge Major on July 12, 2011 due to Juarez's failure to timely disclose him. (Doc. 107.) Juarez's inability to have expert testimony of her own was entirely Juarez's fault. Juarez then agreed to limit her testimony so she could obtain Judge Bencivengo's original ruling also excluding Dr. Kalish. Judge Bencivengo, however, made clear that if Juarez "opened the door" at trial, AutoZone could re-request to bring in Dr. Kalish. Knowing full well the consequences, Juarez deliberately chose to ignore her prior stipulation and opened the door. Juarez cannot claim "prejudice" from her own knowing and voluntary action. This Court has already recognized that Juarez went well beyond what she had agreed to testify to. (Vol. 7, 9:9-11.)

C. Compensatory Damages

The Opposition has little to say in defense of the excessive compensatory damages awards. With respect to the economic awards, it summarily asserts Juarez supposedly had "the potential for bonuses of $24,000.00 per year" (Opp. at 5:26-6:3), but has no counter whatsoever to AutoZone's showing that there was no evidence in the record by which one could extrapolate Juarez receiving bonuses amounting to anything over $5,000 a year, and any bonus extrapolation by the jury would also be wholly speculative and improper. (See, CACI 3900, 3903: lost earning are limited to those "reasonably certain.") In all there is no evidentiary justification for the jury awarding $175,000 more in backpay and doubling the front pay award beyond that calculated by Juarez's expert – only prohibited jury passion and prejudice.

With respect to the excessive emotional distress award, Juarez again has no counter to AutoZone's showing that "garden variety" emotional distress, as originally stipulated to by Juarez, will not support an emotional distress award in excess of $35,000, and even the additional emotional distress that Juarez testified to at trial might only support, *at the very most*, an emotional distress award not even half as

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large as the plainly excessive $250,000 award here. It is of no help to Juarez to simply say larger emotional distress awards have sometimes been approved in other employment discrimination/retaliation cases, without examining the amount of emotional distress that existed in those cases. *Anderson v. American Airlines*, 352 Fed.Appx. 182 (9th Cir.2009) nowhere describes the emotional and physical distress experienced by that plaintiff – it merely says there was enough evidence in the record to support the award. In *Passantino v. Johnson and Johnson*, 212 F.3d 493, 503 (9th Cir. 2000), the plaintiff testified that her emotional and physical distress required both medical attention and pastoral care. By comparison, none of Juarez's claimed emotional harm rose to a level of her needing any treatment or care. Here, the excessive size of the emotional distress damages award again reflects passion and prejudice, and a new trial should be ordered.

D. The Punitive Damages Award

1. No Punitive Damages Award Is Permissible In This Case

AutoZone here incorporates by reference all of its reply brief in support of its renewed JMOL as to why no punitive damages award is proper in this case.

2. The Constitutional Challenge Has Been Properly Raised

Juarez's claim that AutoZone's constitutional challenge to the amount of the monstrous punitive damages award has been forfeited by being raised in a new trial motion, and not a motion for judgment as a matter of law, is wholly without merit.

Fed.R.Civ.P. 50 governs JMOL motions. Rule 50(a) directs such motions be made before the case is submitted to a jury. Rule 50(b) provides that the motion may be renewed post-verdict, but only on the same grounds raised in the Rule 50(a) motion. *EEOC v. Go Daddy Software*, 581 F.3d 951, 961 (9th Cir.2009) ("[b]ecause it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion"). Juarez' claim that AutoZone's constitutional challenge to the punitive damages *amount* should have been made in a renewed Rule 50(b) motion is nonsensical. AutoZone could not possibly have first

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brought a Rule 50(a) pre-verdict motion challenging the constitutionality of the *amount* of the punitive damages award that had not yet been rendered by the jury.

Fed.R.Civ.P. 59 provides that the court may grant a new trial on all or some of the issues "after a jury trial, for any reason for which a new trial as heretofore been granted in an action at law in federal court[.]" A historical recognized basis for a new trial is excessive damages. *Molski v. M.J. Cable, Inc*., 481 F.3d 724, 729 (9th Cir. 2007). Whether a punitive damages award is excessive is routinely decided in federal court through a party seeking a new trial.[3] See, e.g., *Arizona v. Asarco LLC*, 733 F.3d 882, 892 (9th Cir.2013) ("We conclude that the punitive damages award of $300,000 is outside of constitutional limits, so it must be vacated. On remand, the district court may order a new trial unless plaintiff accepts a remittitur to $125,000"); *Watson v. County of Santa Clara*, 2012 U.S.Dist.LEXIS 3544 (N.D.Cal. 2012); *Yates v. GunnAllen Fin*., 2006 U.S.Dist.LEXIS 46304 (N.D.Cal. 2006); *Mitri v. Walgreen Co*., 2014 U.S.Dist.LEXIS 168292 (E.D.Cal. 2014) (construing a constitutional challenge to a punitive damages award as a Rule 59 motion, instead of a Rule 50(b) motion).

Juarez correctly notes that determining the constitutional ceiling of a punitive damages award is a question of law for the court. *White v. Ford Motor Co*., 500 F.3d 963, 974 (9th Cir.2007). However, she has cited no authority for her argument that the court cannot entertain this question of law as part of ruling on a Rule 59 motion for a new trial.[4] On the contrary the above cited cases clearly show otherwise.

3. The Punitive Damage Award Is Constitutionally Excessive

Juarez uses hyperbole and illogic to try to defend the monstrous $185 million punitive damages award, which Juarez calls merely an "above the scale" award.

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[3] In this case, federal procedure for addressing excessiveness of punitive damages is followed. *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 (1996) ("federal courts sitting in diversity apply state substantive law and federal procedural law.")

[4] Contrary to Juarez's claim, *Tortu v. Las Vegas Metropolitan Police Dept*., 556 F.3d 1075 (9th Cir.2009), which involved an issue of qualified immunity in a motion for a new trial, is not analogous. An issue of law such as qualified immunity can be raised before the matter goes to the jury. The same cannot be said of the constitutionality of the *amount* of a punitive damages award that has not yet even been rendered.

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a. Punitive Damages: Degree of Reprehensibility

Physical v. Economic Harm – the Opposition at p.10:26-13:6 simply recites the evidence Juarez submitted to support a liability finding, and does not speak to whether her harm was "physical as opposed to economic." While *here* in her brief, Juarez tries to play up her emotional distress, Juarez presents no evidence AutoZone acted with any intent to cause her any emotional or physical harm. Also, Juarez fails to acknowledge the holding in *Planned Parenthood [etc.] v. Am. Coalition of Life Activists*, 433 F.3d 949, 958 (9th Cir.2005) that where the harm has both economic and physical components the reprehensibility factor "does not cut either way."

Compare also, *Gober v. Ralphs Grocery Co.*, 137 Cal.App.4th 204, 214 (2006), where Ralphs, through an identified managing agent, Smith, failed to take action to stop an employee (Misiolek) known to engage in serial sexual harassment, who later caused plaintiffs "actual or potential physical harm." "As [t]he bulk of the harm caused by Misiolek ... was in the nature of emotional injury and ... did not threaten life and limb," the Court held "within the spectrum of possible conduct under the first subfactor (i.e., from no potential or actual physical harm, to a defendant purposefully threatening the lives of the innocent), ... Ralphs's actions are on the mitigated side of the continuum ... [and] "'of only a modest degree of reprehensibility.'"

Finally, Juarez' citation of two out-of-circuit and non-California cases (*Goldsmith v. Bagby Elevator Co*., 513 F.3d 1261 (11th Cir. 2008); *EEOC. v. W&O Inc.*, 213 F.3d 600, (11th Cir.2000)) and a further unpublished, non-employment, District of Oregon case, are neither binding nor even expressive of California law's application of this due process constitutional reprehensibility factor.

Indifference To The Health/Safety Of Others - contrary to Juarez' hyperbolic claim that AutoZone's conduct was "vicious abuse," *Gober* is again instructive. Finding Smith showed some indifference to Ralphs employees' health and safety since he knew of Misiolek's prior misconduct, but failed to address it, "in comparison to other cases involving punitive damages, the jeopardy in which Ralphs placed the

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plaintiffs was not dire." Contrasting *Boeken v. Philip Morris, Inc.*, 127 Cal.App.4th 1640 (2005) where a cigarette manufacturer's behavior was "extremely reprehensible" because it deliberately exploited consumer ignorance to reap profits despite the fact smokers, including the plaintiff, were developing fatal forms of lung cancer – *Gober* (at p.219-220) found the failure to properly redress Misiolek's behavior created a low risk of serious injury, thus "representing only a modest degree of reprehensibility."

Financial Vulnerability – Juarez fails to mention that in *Arizona v. ASARCO*, the Ninth Circuit stated that "[plaintiff's] financial vulnerability is not as significant as it would be if it had been directly exploited". 733 F.3d at 887. Unless financial vulnerability is itself exploited, this weighs lowly in the punitive damages calculus. *In re Exxon Valdez*, 490 F.3d 1066, 1087 (9th Cir.2006) ("there must be some kind of intentional aiming or targeting of the vulnerable"), vacated on other grounds, *Exxon Shipping v. Baker*, 544 U.S. 471 (2008). No such targeting has been shown by Juarez. See also, *Gober,* 137 Cal.App.4th at 220, finding that even where the victims were a group of grocery store employees that relied on their jobs for their livelihoods, the vulnerability subfactor militated in favor of a modest degree of reprehensibility.

Repeated Actions – Juarez' complaint essentially alleged two unlawful acts under the FEHA – her removal as a store manager in February 2006 and her discharge in November 2008 – not continuous unlawful treatment as she now argues. (Doc. 39.) How certain AutoZone managers may have felt when a consent decree (involving a company AutoZone purchased) was lifted, is also of no help to Juarez. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis". *State Farm v. Campbell*, 538 U.S. 408, 423 (2003.)

Intentional Malice, Trickery, Deceit Or Mere Accident – AutoZone has recognized that discrimination/retaliation requires intentional conduct supportive of a finding of some malice. However, if that was all that was necessary to find "extreme reprehensibility" as Juarez suggests, that would be true of all such FEHA violations,

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which, as shown below, is certainly not the case. Moreover, Juarez has no answer to the fact that Dan Merchant, the decisionmaker in this case, was *not* a managing agent whose conduct could support any punitive damages award.

Other Factors - Juarez' recidivism charge falls flat. Juarez lists two previous judgments against AutoZone separated by 4 years involving two far apart stores. *Robles* involved false imprisonment, not a FEHA claim. *Kell* involved disability discrimination. These cases show no repeated pattern of discrimination on the basis of gender/pregnancy, as claimed by Juarez. (*State Farm,* 538 U.S. at 423, "in the context of civil actions courts must ensure the conduct in question replicated the prior transgressions.") AutoZone has "several thousand employees" in California, and in employment matters has gone to trial on "eight or nine cases" in 15 years. (Supp. Stanik Decl., Ex. A, 54:22-55:4.) As for AutoZone's size or financial worth, even a large or profitable company is entitled to due process. (*Simon*, 35 Cal.4th at 1185-86.)

b. The Ratio of Harm to Punitive Damages

In a diversity action such as this, the excessiveness of punitive damages is first measured by California's state-law standard. (See the New Trial Motion, fn. 12 at 23:26-28.) Juarez does not dispute that. Nonetheless, Juarez ignores the CA Supreme Court's statement in *Simon v. San Palo U.S. Holding*, 35 Cal.4th 1159, 1182 (2005) that a "presumption" exists that ratios significantly greater than a single digit ratio violate due process, absent special justification (extreme reprehensibility, or small, hard to detect or measure compensatory damages) – which are not present here.

Juarez' claim of "extreme reprehensibility" is addressed and debunked above. While Juarez argues this case involves "small" compensatory damages, (rhetorically stating "'small' is a relative term" (Opp. p.21)), Juarez was awarded $872,719.52 with a large emotional distress component already containing a punitive element. This is not a "small" compensatory damages case.[5] Finally, Juarez' view that the ratio rule

[5] Case law reflects a range of $12,000 to $25,000 as the outer limit of a "small" compensatory damages for constitutional due process purposes. See Goldman and Levin, *State Farm at Three: Lower Courts' Application of the Ratio Guidepost*, 2

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should not apply to cases involving front pay or emotional distress damages is at odds with *Roby v. McKesson Corp*., 47 Cal.4th 686, applying the ratio test in a FEHA case.

Indeed, other comparator FEHA cases have set punitive damages at the lower, if not lowest, end of the single digit ratio. Although Juarez ignores its existence, *Roby* is especially instructive. Also a FEHA wrongful discharge and discrimination case, the Supreme Court, despite finding a majority of the reprehensibility factors present at varying levels, concluded a 1:1 ratio of punitive to compensatory damages was the constitutional maximum, particularly where (as here) the compensatory damages verdict includes a substantial award of noneconomic damages. Even the dissent in *Roby* would have set the maximum allowable ratio at 2:1. See also, *O'Quinn v. Raley's*, 2008 WL 686894 (E.D.Cal. 2008) (approving 2:1 ratio in an employment discrimination and FEHA case).[6]

Juarez' claim that attorneys' fees should be included in compensatory damages for a ratio analysis is also flawed. The out-of-state cases cited do not apply California law. Instead, *Amerigraphics, Inc. v. Mercury Casualty Co*., 182 Cal.App.4th 1538, 1564 (2010), holds that, in determining the compensatory damages award for ratio purposes, attorneys' fees are "properly excluded" because they are awarded by the court after a jury returns its verdict.[7] Juarez' claim of great potential harm "had she suffered a miscarriage, personal injury or death" (Opp. p. 21-22) likewise fails. "The

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NYU J L & Bus 509, 514-15 (2005-06). *Cf., Arizona v. ASARCO LLC,* 2014 WL 6918577 at *6 (9th Cir. 2014)(en banc) ("[b]ecause *nominal damages* measure neither damage nor severity of conduct, it is not appropriate to examine the ratio of nominal damages award to punitive damages award") (emphasis supplied).

[6] *Bullock v. Phillip Morris USA*, 198 Cal.App.4th 543 (2011), is a *factually inapposite* tobacco case involving the defendant's repeated and knowing lies over the course of decades causing the plaintiff-smoker agonizing pain and suffering, and ultimately death – where the court found "extreme reprehensibility" (not present here). Other non- California cases are also of no help to Juarez as the punitive damages award here is excessive under both California and federal constitutional due process standards.

[7] *Walker v. Farmers Insurance Exchange*, 153 Cal.App.4th 965, 973, fn. 8 (2007) does not say that a fee award can be taken into account when analyzing compensatory versus punitive damages ratios. There is nothing in that case to suggest the appellate court thought the fees should be taken into account; fn. 8 was merely an illustration that even "if" fees were included, the trial court felt the ratio would still be excessive.

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potential harm that is properly included in the due process analysis is 'harm that is likely to occur from the defendant's conduct'." *Id*. (internal citation omitted).

c. Civil Penalties

The U.S. Supreme Court directs courts to look to comparative civil penalties in order to determine if the applicable statute would "provide fair notice that a violation of ... its provisions might subject an offender to a multimillion dollar penalty." *BMW v. Gore*, 517 U.S. 559, 584 (1996). Juarez argues this Court should not consider the maximum $150,000 administrative fine under CA Gov't Code §12970(a)(3)-(4), which *Roby* applied, because §12970 was repealed on January 1, 2013. However, here, any AutoZone conduct that might warrant punitive damages occurred in 2008 or before when the maximum $150,000 fine was still in effect. Juarez' implicit argument that, while engaging in conduct in 2008 or earlier, AutoZone should have divined that five or more years later the law might change, is nonsensical. *Rope v. Auto-Chlor System of Washington, Inc.*, 220 Cal.App.4th 635, 646-647 (2013) ("the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal," citing *McClung v. Employment Development Dept.*, 34 Cal.4th 467, 475 (2004)).

Under all three guideposts, the $185,000,000 punitive award cannot stand and should be reduced to a 1:1 ratio, or at most a 2:1 ratio.

III. CONCLUSION

For all the reasons stated above and in AutoZone's moving papers, a new trial should be ordered due to misconduct during trial, the error in excluding Dr. Kalish, and the excessive compensatory damages awards. Any punitive damages award must also be reduced to constitutional limits or an alternative new trial granted.

Dated: January 29, 2015

Respectfully submitted,
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