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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHEENA FREDERICK, Plaintiff and Respondent, v. PACWEST SECURITY SERVICES, Defendant and Appellant.	B268823 (Los Angeles County Super. Ct. No. BC534353)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Bunt & Shaver and David N. Shaver for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Plaintiff Sheena Frederick filed this action against her former employer, defendant Pacwest Security Services, alleging that Pacwest terminated her employment for taking a pregnancy disability and family care leave of absence, and for requesting a reasonable accommodation for a disability. The jury returned a special verdict in favor of Frederick and awarded her $15,000 in compensatory damages and $63,000 in punitive damages. On appeal, Pacwest argues that the trial court erred in denying its motion for a new trial and motion for judgment notwithstanding the verdict because the evidence was insufficient to support the jury's verdicts on both liability and damages. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Complaint

Frederick filed suit against Pacwest in February 2014. In her first amended complaint, she alleged two causes of action: (1) a statutory claim for wrongful termination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), the California Moore-Brown-Roberti Family Rights Act (CFRA) (Gov. Code, § 12945.2), and the federal Family Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.); and (2) a common law claim for wrongful termination in violation of public policy. The gravamen of Frederick's complaint was that Pacwest refused to reinstate her to her former position and provide her a reasonable accommodation for a disability upon her return from a pregnancy-related leave of absence, and then terminated her employment because of her leave of absence and request for an accommodation. Frederick sought compensatory and punitive damages in her complaint.

II. Liability Phase of the Trial

A. Testimony of Frederick

Frederick was employed by Pacwest as a security guard starting in April 2009. In her signed employment application for Pacwest, Frederick acknowledged that she would be an at-will employee and that Pacwest would have the "right to change [her] work schedule, base pay and job assignment in accordance with job availability and job skill requirements." The Pacwest employee handbook that Frederick received following her hire similarly provided that "[d]ue to the nature of [the] business and client contracts, and the at-will nature of the employment relationship, employees may be transferred from one post assignment to another at the [c]ompany's sole discretion."

During her first four years of employment at Pacwest, Frederick was assigned to be a security guard at various sites owned by Unire Real Estate Group, one of Pacwest's clients. As of April 2013, Frederick specifically was assigned to a Unire site located at 2029 Cashdan Street (the "Cashdan site"). Frederick's job duties at the Cashdan site consisted of monitoring a vacant office building that was for sale, and accompanying potential buyers during walkthroughs of the building. Frederick's work hours were Monday through Friday from 6:00 a.m. to 2:00 p.m., and her rate of pay was $10 per hour.

On May 9, 2013, Frederick requested and was granted a pregnancy disability leave of absence due to complications that she was experiencing in her pregnancy. Her anticipated date of return to work from her pregnancy disability leave was August 23, 2013. On August 14, 2013, following the birth of her child and while on pregnancy disability leave, Frederick requested and was granted a six-week family care leave of absence to bond with

her newborn baby. Her anticipated date of return to work from her family care leave was September 25, 2013.

Frederick returned to work at Pacwest on September 27, 2013. Upon her return, Frederick met with her supervisor, Adam Limon, who told her that Pacwest's contract with Unire had ended, and that she could not be reinstated to her former position at Unire or reassigned to her former daytime shift. Limon offered Frederick three other positions, one of which was at a company called Alcoa. The position at Alcoa was a graveyard shift from 10:00 p.m. to 6:00 a.m., and the rate of pay was $9 per hour. The job duties for the position consisted of walking the perimeter of a large property owned by Alcoa and standing outside the property to monitor and greet visitors. Because her former Unire position was no longer available, Frederick accepted the Alcoa position.[1]

When Frederick returned from her leave of absence, her doctor did not place any restrictions on her ability to work. Upon her return, however, Frederick still had pregnancy-related anemia, which caused her to miss some days of work and to feel cold. Because her position at Alcoa required her to work outside on the graveyard shift, Frederick wore a second jacket under her Pacwest uniform jacket to stay warm. On October 15, 2013, after Frederick had been working at Alcoa for about two weeks, Limon met with Frederick to issue her a written reprimand. During the meeting, Limon told Frederick that Alcoa had complained about

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[1] At trial, Frederick could not recall the details of the two other positions that were offered to her upon her return to work. She recalled that at least one of the positions required working a swing shift from 4:00 a.m. to 12:00 p.m. with "mixed days off," and that she promptly told Pacwest she could not work that shift.

her wearing two jackets at work and had requested that she be removed from her position at its site. Frederick explained to Limon that she had been wearing two jackets because she had anemia. In response, however, Limon did not return Frederick to her position at Alcoa, allow her to wear two jackets at work, or offer her any other accommodation for her condition.

Instead, Limon told Frederick that she needed to be reassigned and offered her two other positions that would require her to work a swing shift with irregular work hours and days off. One of the positions was with a company called Advantage Rent A Car. The work hours were Sunday and Monday from 4:00 a.m. to 12:00 p.m., Tuesday and Wednesday from 12:00 p.m. to 8:00 p.m., and Thursday from 8:00 p.m. to 4:00 a.m. Frederick could not work that shift, however, because she did not have childcare during those hours for her three young children, and her newborn baby also had medical issues that required more frequent doctor's visits. During the meeting, Frederick told Limon that she needed to be returned to the daytime shift and reassigned to another Unire site, where she had seen other Pacwest security guards working since her return from her leave. Limon maintained, however, that Pacwest had lost its account with Unire and that Frederick had to be reassigned to another position. At the end of the meeting, Frederick told Limon that she would accept the position with Advantage Rent A Car, but she first needed to see if she could find childcare for her children. Limon agreed to hold the position open for Frederick for one week.

On or about October 21, 2013, Frederick called Limon and told him that she could not accept the swing shift position because she was unable to find childcare. In response, Limon told Frederick, "If you don't take this, then you're resigning."

Frederick stated that she was not resigning, and that she wanted to wait and see if another position became available that could accommodate her. Limon did not agree to this arrangement, however, and told Frederick that she needed to return her Pacwest uniforms. That same day, Frederick also spoke with Claudia Blosky, the Human Resources Manager. Blosky explained to Frederick that, under company policy, she could not remain an employee if she was not working, and as a result, Pacwest "would have to fire [her]."

On October 31, 2013, Blosky sent a letter to Frederick in which she expressed concern about Frederick's failure to contact Pacwest about her employment status. Blosky noted that, during their last conversation, she had asked Frederick to visit the branch office to see about available positions, and that Frederick had stated that her schedule was difficult at that time due to her child's medical appointments. Blosky advised Frederick to let Pacwest know if she needed to take a leave of absence. Blosky also indicated that, if Frederick did not contact the branch office within 10 business days about her employment status, Pacwest would assume she had voluntarily resigned.

Frederick began searching for other job opportunities shortly after she was assigned to the Alcoa position. On November 3, 2013, she was offered a temporary job with Allied Barton Security at a rate of pay of $10.75 per hour. Frederick accepted the offer and began working for Allied Barton on a temporary basis on November 4, 2013.

On November 8, 2013, Frederick met with Limon and Jacob Rojas, another Pacwest manager, at the company's office. During the meeting, Frederick was presented with an Employee Status Change form, which indicated that she was voluntarily resigning.

She also was told that she was "basically quitting" because she had not accepted an available position. Frederick stated that she was not resigning and refused to sign the form. She then returned her Pacwest uniforms as requested and was provided her final paycheck.

In December 2013, Frederick was hired by Allied Barton as a regular, full-time security guard. At trial, Frederick testified that she suffered emotional distress due to losing her position at Pacwest. Frederick explained that she was a single mother of three young children and their sole financial support, and that she worried she would not be able to pay the bills and support her children when her employment at Pacwest ended.

B. Testimony of Pacwest Employees

1. Claudia Blosky

Claudia Blosky, Pacwest's Human Resources Manager, testified that the company employed approximately 700 security guards in California and had an extremely high turnover rate. According to Blosky, due to the nature of the business, Pacwest "could hire 200 people a year and . . . could also see 200 people a year go." Blosky was aware that Frederick took a pregnancy disability leave between May and August 2013, and then took a family care leave to bond with her baby between August and September 2013. Blosky also was aware that Frederick applied for and received paid family leave benefits from the state during her family care leave. Blosky believed that, because Frederick was on a "paid family leave" when she returned to work in September 2013, her job at Pacwest was "not protected" and she did not have any right to reinstatement to her former position.

Blosky testified that, when Frederick returned from her

leave of absence, she would have been offered any position that was available at that time pursuant to company policy. Blosky admitted, however, that she had no personal knowledge as to whether Frederick's former position at Unire's Cashdan site was available upon her return, or whether there were open positions at other Unire sites that could have been offered to her. Blosky further testified that, at some point, Limon told her that Alcoa had requested that Frederick be removed from her position at its site because she was wearing two jackets and was complaining about her assignment. Limon also told Blosky that Frederick had stated that she needed two jackets because she had anemia. Blosky did not take any action to determine whether Frederick could wear two jackets and still perform the essential functions of her position at Alcoa. Blosky also did not investigate whether there were other available positions that could accommodate Frederick's condition.

On October 21, 2013, about a week after Frederick was removed from the Alcoa position, Blosky called Frederick because she was concerned Frederick was not accepting available work. Blosky advised Frederick that she needed to come into the branch office to see which positions were available and begin working again. Blosky testified that the position offered to Frederick with Advantage Rent A Car would have been the only position that was available at that time, but admitted that she lacked personal knowledge as to whether any other positions may have been open. Blosky further testified that, even though Pacwest had an extremely high turnover rate, she did not consider allowing Frederick to remain employed for a few additional weeks to see if another position became available that could accommodate her childcare needs. Blosky stated that Pacwest expected all of its

employees to be actively working and would not "allow anybody just to sit on our books."

2. Salvador Crespo

Salvador Crespo, Pacwest's Regional Vice President, was responsible for overseeing the company's business operations in Los Angeles County. Crespo testified that he managed the Unire account for Pacwest, and that each Unire site that used Pacwest's security services was governed by a separate contract. The contract for the Cashdan site was cancelled by Unire effective July 31, 2013. Under Pacwest's policy, when a client contract was cancelled, the security guards assigned to that site would be offered any other positions that were available at that time. If an employee did not accept an available position that was offered, Pacwest would consider the employee to be voluntarily resigning from the company. Crespo also testified that Pacwest had a very high turnover rate, and that he regularly met with his staff to review recent hiring and firing decisions and any open positions. In describing how an open position was offered to a security guard, Crespo stated: "We have such a turnover that what I don't have available today, I might have available tomorrow. So whatever is offered to the [guard] is at the time they come into our office."

Crespo testified that, when Frederick returned from her leave of absence, her position at Unire's Cashdan site no longer existed, and there were no open positions at any other Unire site. Some of the security guards assigned to a different Unire site had been hired by Pacwest while Frederick was on leave, but Crespo did not consider offering Frederick any of those positions upon her return because they already had been filled. Crespo did not personally review which positions were available when Frederick

returned from her leave. Rather, Crespo spoke with Jacob Rojas, Pacwest's scheduling manager, who told Crespo that there were no available positions at a Unire site.

Crespo further testified that he authorized Frederick's removal from her position at Alcoa after the client complained about Frederick's performance and attire. Crespo stated that all security guards were required to wear a company-issued uniform to identify themselves as a Pacwest security guard. Crespo admitted, however, that wearing a second jacket underneath a Pacwest uniform jacket would not affect a security guard's ability to perform his or her job, and that the contract with Alcoa did not include any requirements regarding attire. Crespo also testified that he had seen a video from the Alcoa site and that Frederick was not wearing her Pacwest uniform jacket in the video. Crespo did not, however, bring a copy of the video to court when he testified. Crespo denied any knowledge that Frederick had asked for permission to wear two jackets at work or had requested any other accommodation. Crespo stated that, after Frederick was removed from her position at Alcoa, he did not participate in any discussions with her regarding her employment.

C. Jury Verdict on Liability

At the conclusion of the liability phase of the trial, the jury returned a special verdict in favor of Frederick. The jury found that (1) Frederick was discharged or constructively discharged by Pacwest; (2) Frederick's taking a leave of absence was a substantial motivating reason for her discharge or constructive discharge; (3) Frederick's request for an accommodation of a disability was a substantial motivating reason for her discharge or constructive discharge; and (4) the discharge or constructive discharge caused Frederick harm. The jury also found that an

agent or employee of Pacwest had engaged in conduct with malice, oppression, or fraud, and that one or more officers, directors, or managing agents of Pacwest knew of the conduct and adopted or approved it after it occurred. The jury awarded Frederick a total of $15,000 in emotional distress damages and $0 in economic damages.

III. Punitive Damages Phase of Trial

Simon Semaan, the President of Pacwest, was the sole witness called to testify at the punitive damages phase of the trial. Semaan testified that Pacwest had been in operation since 1995 and currently employed 200 to 700 security guards. The company had its main offices in Los Angeles and Orange County and satellite offices in San Diego, San Francisco, and Ontario.

In 2013, Pacwest had gross receipts of approximately $11 million and net income of $63,000. In 2014, Pacwest had gross receipts totaling between $9 million and $10 million. Semaan attributed the decline in gross receipts between 2013 and 2014 to the loss of a major client. When asked about the net worth of Pacwest, Semaan testified that security companies do not have a defined "net worth" because it is "an extremely high turnover business with very low profit margin." Semaan further testified that Pacwest's only assets were the uniforms worn by the security guards and the office equipment used in the company's various offices. As of 2015, Pacwest had three loans totaling $1 million and a $500,000 line of credit. Semaan's annual salary as the President of Pacwest was $105,000.

At the conclusion of the punitive damages phase, the jury returned a special verdict awarding Frederick $63,000 in punitive damages. The trial court thereafter entered judgment

in favor of Frederick on the special verdicts.

IV. Post-Trial Motions

On October 8, 2015, following the entry of judgment, Pacwest filed a motion for a new trial and a motion for judgment notwithstanding the verdict. Pacwest argued that the evidence was insufficient to support the jury's special verdicts on liability and damages, and that the amount of punitive damages awarded was excessive as a matter of law.

At a hearing on November 9, 2015, the trial court denied both motions. With respect to the jury's verdict on liability, the court concluded that there was sufficient evidence to support a finding that Pacwest acted with a discriminatory intent when it failed to reinstate Frederick to the daytime shift upon her return from her leave of absence and disclosure that she was suffering from pregnancy-related anemia. The court noted that the jury reasonably could have found that the testimony of Pacwest's witnesses about the lack of available positions was not credible, and concluded that Pacwest could have assigned Frederick to a daytime shift given the high turnover rate in the company. With respect to the jury's verdict on punitive damages, the court concluded that there was sufficient evidence to support a finding that Pacwest acted with malice in refusing to reinstate Frederick to a comparable position upon her return from leave. The court also concluded that the punitive damages award was not so disproportionate to the compensatory damages award as to be excessive as a matter of law. Following the denial of its post-trial motions, Pacwest filed this appeal.

DISCUSSION

On appeal, Pacwest contends that the trial court erred in denying its motion for a new trial and motion for judgment notwithstanding the verdict because there was no substantial evidence to support the jury's special verdicts on liability and damages. With respect to liability, Pacwest argues that the evidence was insufficient to support the findings that Pacwest discharged Frederick for taking a leave of absence and for requesting an accommodation for a disability. With respect to damages, Pacwest asserts that the evidence was insufficient to support the finding that Pacwest acted with malice, oppression, or fraud, and to support the $63,000 punitive damages award.

I. Standard of Review

Code of Civil Procedure section 629 provides that, upon the motion of a party against whom a verdict has been rendered, the trial court "shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (Code Civ. Proc., § 629, subd. (a).) "A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) ""The trial judge cannot reweigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citation.]""

(*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 226-227.) "On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

Code of Civil Procedure section 657 authorizes the trial court to grant a new trial on grounds that include "[e]xcessive or inadequate damages," and "[i]nsufficiency of the evidence to justify the verdict or other decision." (Code Civ. Proc., § 657, subds. (5), (6).) However, "[a] new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.) "'A trial court has broad discretion in ruling on a new trial motion, and the court's exercise of discretion is accorded great deference on appeal. [Citation.] An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence or . . . excessive damages only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted.' [Citation.]" (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415-1416.)

II. The Jury's Special Verdict on Liability

In its special verdict on liability, the jury found that Pacwest discharged or constructively discharged Frederick for taking a leave of absence and requesting an accommodation for a disability, which caused Frederick harm. Viewing the evidence in the light most favorable to the verdict, we conclude the jury's findings on liability were supported by substantial evidence.

A. Overview of Governing Law

1. CFRA and FMLA

The CFRA, and its federal counterpart, the FMLA, allow eligible employees to take a leave of absence from work for certain personal or family medical reasons without jeopardizing their job security. (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 919 (*Richey*.) Both the CFRA and the FMLA have two principal components: (1) a right to take up to 12 weeks of family care or medical leave in a 12-month period (29 U.S.C. § 2612(a); Gov. Code, § 12945.2, subd. (a)); and (2) a right to reinstatement to the same or equivalent position at the end of the leave (29 U.S.C. § 2614(a); Gov. Code, § 12945.2, subd. (a)). Under both statutes, family care or medical leave includes leave for the birth or adoption of a child, and leave for the serious health condition of the employee or the employee's child, spouse, or parent. (29 U.S.C. § 2614(a)(1); Gov. Code, § 12945.2, subd. (c)(3)).)

An employee's right to reinstatement upon return from a family care or medical leave is similar under the CFRA and the FMLA. The CFRA provides that the "employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of

pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." (Cal. Code Regs., tit. 2, § 11089, sub. (b).) The FMLA similarly states that the "employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment." (29 C.F.R. § 825.214.) An "equivalent position" under the FMLA is "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status," and "must involve the same or substantially similar duties and responsibilities." (29 C.F.R. § 825.215(a).) Both the CFRA and the FMLA provide that "[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the . . . leave period. (Cal. Code Regs., tit. 2, § 11089, sub. (d)(1); 29 C.F.R. § 825.216(a).) Where reinstatement is denied, however, the burden is on the employer to prove that the employee would not otherwise have been employed at the time the reinstatement was requested. (Cal. Code Regs., tit. 2, § 11089, sub. (d)(1); 29 C.F.R. § 825.216(a); see also *Richey, supra*, 60 Cal.4th at p. 919.)

The CFRA makes it an unlawful employment practice for an employer "to discharge, fine, suspend, expel, or discriminate against" an employee for the "exercise of the right to family care and medical leave," or "to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided" under the CFRA. (Gov. Code, § 12945.2, subds. (l)(1), (t)).) The FMLA

likewise provides that it is unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" under the FMLA, or "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the FMLA. (29 U.S.C. § 2615(a).) In accordance with these provisions, courts have recognized "two theories of recovery under the CFRA and the FMLA. 'Interference' claims prevent employers from wrongly interfering with employees' approved leaves of absence, and 'retaliation' or 'discrimination' claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights." (*Richey*, *supra*, 60 Cal.4th at p. 920.)

2. Pregnancy Disability Leave Law

In addition to the rights afforded by the CFRA and the FMLA, the California Pregnancy Disability Leave Law (PDLL), which is part of FEHA, requires an employer to provide up to four months of leave to an employee disabled by pregnancy, childbirth, or a related medical condition. (Gov. Code, § 12945, subd. (a)(1).) The PDLL also requires an employer to provide a reasonable accommodation to an employee for a condition related to pregnancy or childbirth, if she so requests, with the advice of her health care provider. (Gov. Code, § 12945, subd. (a)(3)(A).)

Under the PDLL, "[a]n employee who exercises her right to take pregnancy disability leave is guaranteed a right to return to the same position" that she held prior to the leave, or if the position no longer exists, "to a comparable position." (Cal. Code Regs., tit. 2, § 11043, subd. (a).) An employee has no greater right to reinstatement "than those rights she would have had if she had been continuously at work during the pregnancy

disability leave." (Cal. Code Regs., tit. 2, § 11043, subd. (c)(1).) A refusal to reinstate the employee to the same position is only justified, however, if the employer proves that "the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave." (Ibid.) If the employer is excused from reinstating the employee to her same position, the employee must be reinstated to a comparable position unless the employer proves that it "would not have offered a comparable position to the employee if she would have been continuously at work during the pregnancy disability leave," or that "[t]here is not a comparable position available." (Cal. Code Regs., tit. 2, § 11043, subd. (c)(2).)

It is an unlawful employment practice for an employer to discharge or discriminate against an employee on the basis of sex, which includes pregnancy, childbirth, and related medical conditions. (Gov. Code, §§ 12926, subd. (r)(1), 12940, subd. (a)). It also is unlawful for an employer "to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided" by the PDLL. (Gov. Code, § 12945, subd. (a)(4).)

3. Disability Rights Under FEHA

FEHA also makes it an unlawful employment practice for an employer to discharge or discriminate against an employee on the basis of a physical or mental disability. (Gov. Code, § 12940, subd. (a).) A physical disability includes "any physiological disease, disorder, [or] condition" . . . that both "[a]ffects one or more of the [major] body systems" and "[l]imits a major life activity." (Gov. Code, § 12926, subd. (m)(1).) Major life activity is "broadly construed and includes physical, mental, and social

activities and working." (Gov. Code, § 12926, subd. (m)(1)(B)(iii).) "FEHA protects individuals not only from discrimination based on an existing physical disability, but also from discrimination based on a potential disability or the employer's perception that the individual has an existing or potential disability." (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 584.)

In addition to prohibiting disability discrimination, FEHA makes it unlawful for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee," unless the accommodation would cause "undue hardship" to the employer. (Gov. Code § 12940, subd. (m)(1).) "[A]n employer 'knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation.'" (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887.) "Once an employer is aware of a disability, it has an 'affirmative duty' to make reasonable accommodation for the employee. [Citation.]" (*Soria v. Univision Radio Los Angeles, Inc.*, *supra*, 5 Cal.App.5th at p. 597.) In response to a request for an accommodation, the employer also has a duty to "engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations." (Gov. Code, § 12940, subd. (n).)

B. Substantial Evidence Supported the Jury's Special Verdict Findings on Liability

1. Discharge or Constructive Discharge

In Question 1 on the special verdict form, the jury found that Pacwest discharged or constructively discharged Frederick. On appeal, Pacwest challenges the sufficiency of the evidence

supporting this finding, and contends that the testimony at trial established that Frederick voluntarily resigned after she refused to accept available work. We conclude the evidence was sufficient to support a finding that Frederick was involuntarily discharged.

Frederick testified that, following her removal from her position at Alcoa, she tentatively agreed to accept a swing shift position at Advantage Rent A Car, but told her supervisor, Adam Limon, that she first needed to see if she could find childcare for her three young children. When Frederick later informed Limon that she could not work the swing shift schedule because she had been unable to secure childcare, Limon told her, "If you don't take this, then you're resigning." In response, Frederick made clear that she was not resigning, and wanted to wait and see if another position became available that could accommodate her childcare needs. When Frederick subsequently met with Limon and again was told that she was "basically quitting" by failing to accept the open position, she reiterated that it was not her intent to resign. She also refused to sign a form presented to her which stated that her termination was a voluntary resignation. From this evidence, the jury reasonably could have concluded that Frederick did not voluntarily resign from her employment, but rather was discharged by Pacwest after she asked for additional time to find a position that could accommodate her childcare needs.

2. Wrongful Discharge Based on Frederick's Leave of Absence

In Question 2 on the special verdict form, the jury found that Frederick's leave of absence was a substantial motivating reason for her discharge. Pacwest argues that the evidence was insufficient to support this finding because it acted in accordance

with applicable law and company policy in how it treated Frederick upon her return from leave, and Frederick failed to show pretext in the discharge decision. We conclude there was substantial evidence to support the jury's finding on this issue.

The evidence at trial demonstrated that Claudia Blosky, Pacwest's Human Resources Manager, did not attempt to comply with the applicable leave laws regarding Frederick's right to reinstatement following her leave because Blosky assumed such laws did not apply. Blosky testified that Frederick did not have any reinstatement rights upon her return to work because she had been on a "paid family leave," which according to Blosky, meant that Frederick's "job [was] not protected." This testimony about Frederick's alleged lack of reinstatement rights constitutes a fundamental misstatement of the law. The record showed Frederick took about three months of pregnancy disability leave followed by six weeks of family care leave to bond with her newborn baby. During her family care leave, Frederick also applied for and received paid family leave benefits through the State Disability Insurance program. The California Paid Family Leave (PFL) law provides temporary disability insurance benefits to employees who take time off from work to care for a seriously ill family member or to bond with a newborn baby. (Unemp. Ins. Code, § 3300 et seq.) While the law does not provide leave rights or job protection, the receipt of PFL benefits does not supplant or diminish an employee's right to take up to 12 weeks of unpaid leave under the CFRA and the FMLA, and to be reinstated to the same or equivalent position upon return from a CFRA or FMLA leave. Indeed, the PDL law specifically provides that "[n]othing in this [statute] shall be construed to abridge the rights and responsibilities conveyed under the CFRA or pregnancy disability

leave." (Unemp. Ins. Code, § 3301, subd. (a)(2).) Therefore, contrary to Blosky's testimony, Frederick's receipt of PFL benefits did not transform her family care leave of absence into an unprotected leave with no restatement rights.

There was also substantial evidence to support a finding that Pacwest acted with a discriminatory or retaliatory intent when it reassigned Frederick to the position at Alcoa upon her return from leave and then terminated her employment less than two months later. It is undisputed that Frederick could not be returned to the same position that she held prior to her leave because Pacwest's contract with Unire's Cashdan site ended, and thus, Frederick's former position at the Cashdan site no longer existed at the time of her return. While Frederick did not have a right to be reinstated to a position that had been eliminated during her leave for unrelated business reasons, she did have a right to be reinstated to a comparable position with equivalent hours, pay, and working conditions. The evidence at trial showed that the Unire position that Frederick held prior to her leave was a daytime shift position that paid $10 per hour and required her to work indoors monitoring a vacant office building. In contrast, the Alcoa position that was offered to Frederick upon her return from leave was a graveyard shift position that paid $9 per hour and required her to work outside monitoring the perimeter of a large property. From this evidence, the jury reasonably could have concluded that the two positions were not comparable, and that Pacwest denied Frederick's right to reinstatement when it assigned her to the Alcoa position upon her return from leave.[2]

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[2] The jury was instructed on an employee's reinstatement rights under the PDLL. However, Frederick's reinstatement rights were actually governed by the CFRA because, as discussed,

Pacwest asserts that it complied with the law pertaining to reinstatement when it offered Frederick any positions that were available at the time of her return from leave. Pacwest reasons that Frederick had no greater right to reinstatement under the law than if she had been continuously employed, and that she was treated the same as any other employee who needed to be reassigned to a new position at the end of a client contract. It is true that Pacwest's two witnesses, Blosky and Salvador Crespo, testified that it was company policy to offer employees in need of new assignments any available positions, and that this policy was applied equally to Frederick upon her return to work. However, both Blosky and Crespo admitted that they did not personally review which positions were available when Frederick returned from leave, and thus, they did not have any firsthand knowledge whether a position on the same shift or at the same rate of pay

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Frederick took a six-week family care leave to bond with her baby after her three-month pregnancy disability leave. Where, as here, an employee takes a CFRA leave for the birth of her child at the expiration of a pregnancy disability leave, "the employee's right to reinstatement to her job is governed by CFRA and not [the PDLL]." (Cal. Code Regs., tit. 2, § 11043, subd. (e).) Although the jury should have been instructed on the right to reinstatement under the CFRA, Pacwest does not raise any instructional error claim on appeal. Moreover, for purposes of this appeal, the differences between the CFRA and the PDLL with respect to an employee's right to reinstatement are not significant. Both statues similarly require an employee to be reinstated to the same position or a comparable position upon return from leave, and also provide that an employee has no greater right to reinstatement than if she had been continuously employed during the leave period. (See Cal. Code Regs., tit. 2, §§ 11089, subds. (b), (d)(1), 11043, subds. (a), (c)(1).)

that Frederick held prior to her leave may have been available. Both Blosky and Crespo also testified that Pacwest had a turnover rate that was close to 100 percent, and Crespo explained that, due to the high turnover, positions that were filled one day could easily be available the next day. On this record, the jury reasonably could have found that the witnesses' testimony that Frederick was offered all available positions upon her return from leave was not credible. The jury also reasonably could have inferred that, given the high turnover rate in the company, there would have been at least one comparable daytime shift available around the time of Frederick's return, but Pacwest instead chose to assign her to a graveyard shift position at a lower rate of pay.

The evidence at trial also was sufficient to support a finding that Pacwest discharged Frederick because she exercised her right to take a protected leave of absence and then sought reassignment to a comparable position upon her return. During the October 15, 2013 meeting with Limon about her removal from the Alcoa position, Frederick stated that she needed to be reinstated to the daytime shift and reassigned to another Unire site. In response, Limon maintained that Pacwest had lost its account with Unire and that the only open positions were on a swing shift with irregular hours and days off. When Frederick later informed Limon that she could not accept a swing shift position due to a lack of childcare, he refused to allow her to wait a few weeks to see if another position became available. Both Limon and Blosky also conveyed to Frederick that if she did not accept the swing shift position, she would be discharged. Less than two months after Frederick returned from her leave, Pacwest terminated her employment without ever offering her a comparable position on her former daytime shift or at her former

rate of pay. Based on the totality of this evidence, the jury reasonably could have found that Frederick's leave of absence was a substantial motivating factor in the discharge decision.

3. Wrongful Discharge Based on Frederick's Request for a Disability Accommodation

In Question 3 on the special verdict form, the jury found that Frederick's request for an accommodation for a disability was a substantial motivating reason for her discharge. Pacwest claims that the evidence at trial failed to prove that Frederick had a known disability, that she requested an accommodation for a disability, or that Pacwest took any adverse action against her on the basis of a disability. We conclude the jury's finding on this issue was supported by substantial evidence.

First, the jury reasonably could have concluded that Frederick had a disability that was known to Pacwest. Frederick testified that she had pregnancy-related anemia that persisted following the birth of her child and return from her leave. The anemia caused Frederick to miss days of work and affected her ability to work outside in inclement weather because she had a tendency to feel cold. (See Gov. Code, § 12926, subd. (m) [FEHA defines "'[p]hysical disability'" as including any physiological condition that limits a major life activity such as working]; *Sanchez v. Swissport Inc.* (2013) 213 Cal.App.4th 1331, 1340 [pregnancy-related condition that rendered employee unable to work was a disability under FEHA].) Frederick further testified that she disclosed her condition to Limon during their October 15, 2013 meeting, and specifically told him that she had been wearing two jackets at work because she had anemia and was cold. Blosky also was aware of Frederick's condition prior to her

discharge because Limon told Blosky that Frederick had disclosed that she had anemia and needed to wear two jackets to stay warm. The fact that Blosky and Limon may not have known that Frederick's anemia was a disability within the meaning of FEHA is of no consequence. "An employer need only know the underlying facts, not whether those facts fit into the statutory definition of 'disability' under FEHA." (*Soria v. Univision Radio Los Angeles, Inc.*, *supra*, 5 Cal.App.5th at p. 593.)

Second, the jury reasonably could have concluded that Pacwest failed to provide Frederick with a reasonable accommodation for her disability. Frederick testified that, after she disclosed her anemia and need to wear two jackets to Limon, he did not agree to return her to her position at Alcoa, did not permit her to wear a second jacket under her uniform jacket, and did not offer her any other accommodation for her condition. It is true, as Pacwest asserts, that Frederick never explicitly stated that she was requesting an accommodation for a disability. However, "[a]n employee is not required to specifically invoke the protections of FEHA or speak any '"magic words"' in order to effectively request an accommodation under the statute." (*Soria v. Univision Radio Los Angeles, Inc.*, *supra*, 5 Cal.App.5th at p. 598.) It was sufficient that Frederick informed her supervisor of her medical condition and her need to wear a second jacket due to such condition. The evidence further showed that, in response to Frederick's disclosure, Pacwest did not make any effort to assess whether she could perform the essential functions of the position at Alcoa or any other client while wearing two jackets. Although Crespo testified that the use of a company-issued uniform was necessary to identify an employee as a Pacwest security guard, he admitted that wearing a second jacket under a

uniform jacket would not prevent a guard from being properly identified or otherwise interfere with the performance of his or her job duties.

Third, the jury reasonably could have inferred from the evidence that Pacwest's stated reason for discharging Frederick was mere pretext for unlawful disability discrimination. The accommodation that Frederick sought for her disability—wearing a second jacket under her uniform jacket to stay warm—was simple, reasonable, and not unduly burdensome to Pacwest. Rather than engage in the interactive process, however, Limon told Frederick that she needed to be reassigned to another job and then offered her a position with an erratic schedule that conflicted with her childcare needs. Even though Frederick had been an employee for over four years in a company with a very high turnover rate, Pacwest refused to allow her to maintain her employment for a few additional weeks to see if another position became available. Instead, less than a month after Frederick disclosed her disability and need for an accommodation. Pacwest discharged her. On this record, the jury's finding that Frederick's request for an accommodation was a substantial motivating reason for her discharge was supported by substantial evidence.

III. The Jury's Special Verdict on Punitive Damages

Pacwest also challenges the sufficiency of the evidence supporting the jury's special verdict on punitive damages. Pacwest contends that the evidence was insufficient to support a finding that it acted with malice, oppression, or fraud. Pacwest also claims that Frederick failed to provide any evidence of its ability to pay a $63,000 punitive damages award. We conclude the jury's verdict was supported by substantial evidence.

A. Overview of Governing Law

Civil Code section 3294 permits an award of punitive damages "for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) Malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) Oppression is similarly defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) Therefore, to establish an entitlement to punitive damages, the plaintiff generally must prove that the defendant either intended to cause the plaintiff injury, or engaged in conduct that was despicable and carried on with a conscious disregard of the plaintiff's rights.

"An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. [Citations.]" (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 914.) There is no fixed standard for measuring a defendant's financial condition when assessing a punitive damages award. (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79.) Although a defendant's net worth is commonly used, it is not the exclusive measure. (*Baxter v. Peterson* (2007) 150 Cal.App.4th

673, 680.) Ultimately, "'[w]hat is required is evidence of the defendant's ability to pay the damage award.'" (*Ibid.*)

"Generally, punitive damages awards are reviewed under the substantial evidence standard of review 'in which all presumptions favor the trial court's findings and we view the record in the light most favorable to the judgment.' [Citation.] We are also 'guided by the "historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . ." [Citation.]' [Citation.] Stated differently, '[a]n appellate court may reverse an award of punitive damages only if the award appears excessive as a matter of law or is so grossly disproportionate to the ability to pay as to raise a presumption that it was the result of passion or prejudice.' [Citation.]" (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535.)

B. Substantial Evidence Supported the Jury's Special Verdict on Punitive Damages

Pacwest argues that there was no substantial evidence that it acted with malice, oppression, or fraud because the evidence at trial showed that it complied with applicable law and company policy in how it treated Frederick upon her return from leave. As discussed above, however, the evidence was sufficient to support a finding that Pacwest violated Frederick's right to reinstatement under the law because it could have offered her a comparable position upon her return from leave, but refused to do so. The evidence also supported a finding that Pacwest refused to offer Frederick a reasonable accommodation when she disclosed that she had pregnancy-related anemia and needed to wear two jackets on the graveyard shift to stay warm. Rather than comply

with these legal obligations, Pacwest advised Frederick that she could no longer remain an employee unless she accepted a non-comparable position with an erratic work schedule, despite management's knowledge that such harassment conflicted with Frederick's childcare needs as well as the healthcare needs of her newborn baby. After deciding to discharge Frederick, Pacwest then sought to mischaracterize the discharge as a voluntary resignation even though Frederick repeatedly expressed that she did not want to resign. Based on the totality of this evidence, the jury reasonably could have concluded that Pacwest engaged in conduct that was despicable and in conscious disregard of Frederick's employment rights.

Pacwest also asserts that the evidence was insufficient to support the punitive damages award because Frederick failed to present any evidence of Pacwest's financial condition at the time of trial. The record reflects that Frederick called Simon Semaan, the President of Pacwest, to testify at the punitive damages phase. According to Semaan's testimony, Pacwest had gross receipts of $11 million in 2013, and gross receipts of $9 million to $10 million in 2014. Pacwest's net income in 2013 was $63,000, and Semaan's annual salary in 2013 and 2014 was $105,000. Pacwest also had $1 million in loans and a $500,000 line of credit. The $63,000 in punitive damages award thus represented one year of Pacwest's net income as of 2013 and less than one percent of the company's annual gross receipts. The record does show that, in testifying about Pacwest's financial condition, Semaan was vague and cursory in some of his responses and broadly stated without support that "security companies don't have a net worth" due to the nature of the business. However, when the testimony as a whole is considered, it provided sufficient evidence

of Pacwest's financial condition at the time of trial and ability to pay a $63,000 punitive damages award. On this record, we cannot say that the award was excessive as a matter of law or so disproportionate to the ability to pay as to indicate passion or prejudice on the part of the jury.

DISPOSITION

The judgment is affirmed. Because no respondent's brief was filed, the parties are to bear their own costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

KEENY, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.