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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANE RINEHART, Plaintiff and Respondent, v. BANK CARD CONSULTANTS, INC., Defendant and Appellant.	G054080 (Super. Ct. No. 30-2014-00699599) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Conditionally affirmed as modified.

The Law Offices of Cole Sheridan and Cole Sheridan for Plaintiff and Respondent.

Horwitz + Armstrong, John R. Armstrong and Vanoli V. Chander for Defendant and Appellant.

* * *

A jury awarded $498,873.53 in compensatory damages to plaintiff Dane Rinehart on his claim against his former employer for wrongful termination in violation of public policy. The jury also awarded plaintiff $1 million in punitive damages. On appeal, defendant Bank Card Consultants, Inc., argues that (1) the wrongful termination jury instruction and the special verdict form given to the jury were incomplete because they did not require a finding of "but for" causation; (2) the trial court improperly instructed the jury to disregard plaintiff's independent contractor agreement; (3) emotional distress damages were unavailable or alternatively excessive; and (4) the punitive damages award was excessive. We agree with defendant on the final point and modify the punitive damage award. We affirm the judgment as modified provided plaintiff consents to the modification. If plaintiff does not consent, we reverse the punitive damage award and remand for retrial on the issue of punitive damages only.

FACTS

Defendant is a small company that provides merchant services, such as credit card processing and bank card transactions. Defendant was formed in 2008 by three individuals, each of whom has an equal stake in the business.

In early 2009, defendant engaged plaintiff to sell credit card services. Several months later, plaintiff and defendant entered into a 12-page "Independent Contractor Agreement," the term of which was to be three years. Plaintiff testified that despite being classified as an independent contractor, he was required to come into the office Monday through Friday from 9:00 a.m. to 5:00 p.m.

Schedule A of the independent contractor agreement sets forth the terms of plaintiff's compensation and required him to bring in a certain number of new merchants or a certain amount of processing volume in order to be paid. According to plaintiff, defendant's president told him that he "wouldn't make much at the very beginning" but

that he would make more money over time as a result of ongoing residual payments. During plaintiff's first three months of work for defendant, he was paid only $13.19.

Plaintiff's income gradually increased with time. However, defendant made certain deductions from his paychecks, such as "desk fees" and "telephone fees," to help cover defendant's operating expenses. Also, from June to October 2011, defendant repeatedly charged plaintiff a "contract non-compliance . . . 20 [percent]" penalty, deducting such funds from plaintiff's paychecks because of his alleged failure to meet his minimum sales quotas as set forth in schedule A of the independent contractor agreement.

In November 2011, defendant did not pay plaintiff at all. According to defendant's owners, they withheld payment as a "last ditch" effort to encourage plaintiff to come to the office and get on board with building his business. Plaintiff complained to defendant in November 2011 that he had not been paid.

According to defendant's owners, they had discussions in December 2011 about possibly terminating plaintiff's contract but instead decided to keep him on and pay him because of the Christmas holiday. Defendant's owners further testified that they had discussions in the middle of January 2012 about whether to renegotiate plaintiff's contract, but decided instead to move forward with the termination because of his noncompliance with the contract.

According to plaintiff, he did not receive his January 15, 2012 paycheck (which should have been direct deposited on Friday, January 13), so he called one of defendant's owners, asked when he would be paid, and was assured he would be paid soon. Defendant then stopped responding to his calls, so plaintiff texted one of the owners the evening of Tuesday, January 17 reiterating that he needed to be paid.

Defendant wrote plaintiff a letter on January 18, 2012, explaining that his contract was being terminated effective January 17 because of his "failure to fulfill [the] contract." According to defendant, the letter was mailed the following day, January 19. According to plaintiff, he called defendant's owners, and asked about the pay he had not

received. Defendant's owners told him that *plaintiff owed defendant* $1,800 for unpaid desk fees and that he would not be paid anything further.

Plaintiff brought a claim for unpaid wages and other damages with the California Labor Commissioner. Following a hearing, the Labor Commissioner found that plaintiff had been misclassified as an independent contractor and that he was entitled to $58,859.64 for unpaid wages, unpaid commissions, liquidated damages, interest, and waiting time penalties. Defendant appealed the award but later abandoned the appeal.

Plaintiff filed the subject lawsuit against defendant. In plaintiff's operative first amended complaint, he alleged causes of action for (1) wrongful termination in violation of public policy, (2) breach of contract, and (3) failure to provide itemized wage statements in violation of Labor Code section 226. On the eve of trial, plaintiff withdrew his second and third causes of action and decided to proceed solely on the wrongful termination claim. The trial was bifurcated, with the issue of punitive damages being tried separately in the second phase.

During phase one, the court issued jury instructions that were closely modeled on CACI Nos. 2430 (wrongful termination), 2507 (defining "substantial motivating reason"), and 2433 (wrongful termination damages). There is no indication in the record that defendant ever objected to these instructions. There is also no indication that defendant ever requested the use of CACI No. 2512 (the instruction on the "same decision" limitation of remedies).

After phase one closing arguments but before the jury began deliberations, defendant made an "emergency motion" to add a question to the special verdict form on "but for" causation. The trial court denied defendant's motion, and the jury was instead asked to complete the following special verdict form (which had previously been submitted by the parties): "1. [Were plaintiff's] complaints to [defendant] about not being paid a substantial motivating reason for [defendant's] decision to discharge

[plaintiff]?" "2. Did the discharge cause [plaintiff] harm?" "3. What are [plaintiff's] damages from [defendant's] termination of his employment?"

The jury answered the first two questions in the affirmative, and then went on to award plaintiff $273,873.53 for past economic losses, $200,000 for past emotional distress, and $25,000 for future emotional distress. The jury also found "by clear and convincing evidence that the conduct constituting malice, oppression or fraud was committed by one or more officers, directors or managing agents of [defendant] acting on behalf of [defendant.]"

Phase two of the trial then commenced. After hearing evidence of defendant's financial condition and the argument of counsel, the jury awarded plaintiff an additional $1 million in punitive damages.

Defendant moved for a new trial and judgment notwithstanding the verdict, both of which were denied. The court entered a judgment consistent with the jury's verdict, and defendant appealed.

DISCUSSION

The Type of Causation Necessary to Prevail on a Wrongful Termination Claim

Defendant's primary contention on appeal is that the court erred by denying its emergency motion to add a "but for" causation question to the special verdict form.[1] According to defendant, wrongful termination claims are subject to a "but for" causation

[1] "But for" causation describes the notion that "the employer would not have taken the action *but for* its consideration of a protected characteristic." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215 (*Harris*).) "But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way." (*Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 240 [superseded by statute on other grounds].)

standard, such that a plaintiff must prove that "'but for' the employee's engaging in protected activity, the employer would not have terminated the employee." Thus, contends defendant, the trial court erred in denying its request to add the following question to the special verdict form: "Would [defendant] have terminated [plaintiff] even if [he] had not complained to [defendant] about being paid?"

Defendant misstates plaintiff's burden of proof on the element of causation in a wrongful termination claim. Plaintiff was only required to prove that his protected activity (i.e., his complaint(s) about not being paid) was a "substantial motivating reason" for his termination; he was not required to prove, as defendant suggests, that his complaint was the "but for" cause of his termination. Although defendant does not frame its argument on appeal in so many words, it appears what defendant really wanted was a question in the special verdict form on the so-called "same decision" limitation of remedies defense outlined in *Harris, supra,* 56 Cal.4th at page 241. However, as we explain below, the inclusion of such a question was not warranted in this case.

California law has long recognized a common law tort action for wrongful termination in violation of public policy, often called a "*Tameny* claim." (See *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172.) Such claims can arise in the context of withheld wages. For example, an employer who terminates its employee in retaliation for requesting payment of wages due or in order to avoid paying wages due violates public policy and thus may be subject to a wrongful termination claim. (Lab. Code, § 98.6, subd. (a) [employers may not terminate or retaliate against employees for complaining they are owed unpaid wages]; *Phillips v. Gemini Moving Specialist* (1998) 63 Cal.App.4th 563, 571, abrogated on other grounds in *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902-903; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1148)

To prevail on a cause of action for wrongful termination, a plaintiff must prove that his or her protected activity was a "substantial motivating reason" for the

defendant's termination decision. (*Yau v. Allen.* (2014) 229 Cal.App.4th 144, 154 (*Yau*) ["The elements of a claim for wrongful discharge in violation of public policy" include that "the termination was substantially motivated by a violation of public policy"]; *Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341-1342 (*Mendoza*) [in a wrongful termination case, the jury must "determine whether [the employee's] report of sexual harassment was a substantial motivating reason for [his] discharge"]; see *Husman v. Toyota Motor Credit Corp*. (2017) 12 Cal.App.5th 1168, 1192 [trial court should have denied summary adjudication on wrongful termination cause of action in light of triable issue of material fact as to whether gender stereotyping "was a substantial motivating factor for his termination"].)

Consistent with these authorities, the Judicial Council's wrongful termination jury instruction, CACI No. 2430, requires a plaintiff to prove that his or her protected activity "was a substantial motivating reason for [his or her] discharge." CACI No. 2430 was recently blessed by another appellate court (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1319-1323 (*Davis*)), and we agree with that result.

In accordance with these authorities, the court properly gave the following instruction to the jury based on CACI No. 2430: "[Plaintiff] must prove the following:" "2. [Plaintiff's] complaints to [defendant] about not being paid were a substantial motivating reason for [his] discharge." There is no indication in the record that defendant ever objected to this instruction.

Disregarding the above, defendant contends that the California Supreme Court has adopted a "but for" causation requirement for wrongful termination claims. Not so. *Harris, supra*, 56 Cal.4th 203, on which defendant chiefly relies, reached the near opposite conclusion. *Harris* held that in a mixed-motive FEHA[2] discrimination

[2] California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.).

action, a plaintiff is not required to prove "but for" causation to establish liability, but rather must show by a preponderance of the evidence that discrimination was a "substantial motivating factor" in the adverse employment decision. (*Harris*, at pp. 215, 230-232.) Specifically rejecting a "but for" standard of causation, the Supreme Court reasoned that "[g]iven the FEHA's statement of its purposes and the harms it sought to address, we cannot ascribe to the Legislature an intent to deem lawful any discriminatory conduct that is not the 'but for' cause of an adverse employment action against a particular individual." (*Id.* at p. 230.) Notably, the *Harris* "substantial motivating factor" test has since been extended to wrongful termination claims — both in mixed-motive cases (see, e.g., *Davis, supra,* 245 Cal.App.4th at p. 1324) and in single-motive pretext cases (see, e.g., *Mendoza, supra,* 222 Cal.App.4th at pp. 1340-1341; see also *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 469-470). In short, *Harris* does not remotely support defendant's contention that plaintiff was required to prove "but for" causation in order to recover damages for wrongful termination.

Defendant also cites *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 (cited in *Harris*), which is equally inapposite. *Guz* held that the three-stage burden-shifting test articulated in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 applies in FEHA employment discrimination cases that do not involve mixed motives (i.e., single-motive pretext cases). (*Guz*, at pp. 354-356.) In such cases, (1) the plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer took an adverse employment action based on a prohibited criterion, thereby creating a presumption of discrimination; (2) the employer must rebut that presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason; and (3) the plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination. (*Ibid.*; see *Husman v. Toyota Motor Credit Corp., supra,* 12 Cal.App.5th at p. 1182 ["the traditional *McDonnell Douglas* burden-shifting test [is] intended for use in cases

presenting a single motive for the adverse action, that is, in 'cases that do not involve mixed motives'"].) Nothing in *Guz* alters our conclusion above that a plaintiff alleging wrongful termination must prove that his or her protected activity was a "substantial motivating reason" (not the "but for" reason) for the defendant's termination decision.

Defendant also cites *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164 in support of its "but for" causation argument. It is true, as defendant argues, that *General Dynamics* references a "but for" standard. (See *id.* at p. 1191 ["plaintiff, of course, bears the burden of establishing . . . that the employer's conduct was motivated by impermissible considerations under a 'but for' standard of causation"].) This is dictum, however. In *General Dynamics*, the California Supreme Court "granted review to consider an attorney's status as 'in-house' counsel as it affects the right to pursue claims for damages following an allegedly wrongful termination of employment" (*id*. at p. 1169), and the court devoted the decision to resolving aspects of this issue. We have located no published decisions in the past 24 years citing *General Dynamics* for the notion that wrongful termination claims are subject to a "but for" causation standard. (See *Marlo v. United Parcel Service, Inc.* (C.D.Cal. 2012) 890 F.Supp.2d 1243, 1244-1245 [agreeing that excerpt of *General Dynamics* cited by plaintiff is dictum and observing that "*General Dynamics* did not resolve the standard of causation for claims of retaliation in violation of public policy, at least where there is evidence of a mixed motive"].)

In summary, defendant's contention that wrongful termination claims are subject to a "but for" causation requirement is incorrect. Courts have uniformly applied the "substantial motivating factor" requirement to wrongful termination claims, and the cases defendant cites do not compel a different result.

In challenging the special verdict form (both in the trial court and now on appeal), defendant did not and does not contend that the special verdict form should have included a question on the "same decision" limitation of remedies; defendant instead

challenges the special verdict form's failure to require proof of "but for" causation. However, the language that defendant contends should have been included in the special verdict form — "*Would* [*defendant*] *have terminated* [*plaintiff*] *even if* [*he*] *had not complained to* [*defendant*] *about* [*not*] *being paid?*" — is notably similar to the Judicial Council's jury instruction and special verdict form for the "same decision" affirmative defense, CACI No. 2512 and CACI No. VF-2515. (Italics added.)[3] Accordingly, we address the "same decision" affirmative defense and its applicability here.

The "same decision" affirmative defense may be asserted in a mixed-motive wrongful termination case as follows. If the plaintiff shows "by a preponderance of the evidence that discrimination [or another illegal criterion] was a substantial factor motivating his or her termination, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proves by a preponderance of the evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, backpay, or an order of reinstatement." (*Harris*, *supra*, 56 Cal.4th at p. 241; *Davis*, *supra*, 245 Cal.App.4th at p. 1309 [defense enables an employer to "avoid liability for damages by establishing that it would have made the same decision without the wrongful motivation" for the termination].) The employer bears the burden of showing "that it would have

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[3] CACI No. 2512 states in pertinent part: "If you find that [*e.g., plaintiff's poor job performance*] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/it] would have [discharged/[*other adverse employment action*]] [*name of plaintiff*] anyway at that time based on [*e.g., plaintiff's poor job performance*] even if [he/she/it] had not also been substantially motivated by [discrimination/retaliation]." Similarly, CACI No. VF-2515 includes the following two questions: "5. Was [*specify employer's stated legitimate reason, e.g., plaintiff's poor job performance*] also a substantial motivating reason for [*name of defendant*]'s [discharge/refusal to hire/[*other adverse employment action*]]? . . . [¶] 6. [If yes,] [w]ould [*name of defendant*] have [discharged/refused to hire/[*other adverse employment action*]] [*name of plaintiff*] anyway at that time based on [*e.g., plaintiff's poor job performance*] had [*name of defendant*] not also been substantially motivated by [*discrimination/retaliation*]?"

made the same employment decision in the absence of any discrimination." (*Harris, supra,* 56 Cal.4th at p. 224; see *id.* at p. 241.)

Importantly, "to be entitled to mixed-motive instructions, the employer must raise as an affirmative defense that nondiscriminatory reasons standing alone would have caused it to make the same decision." (*Davis*, *supra*, 245 Cal.App.4th at p. 1323 fn. 14; see *Harris*, *supra*, 56 Cal.4th at p. 240 ["if an employer wishes to assert the defense, it should plead that if it is found that its actions were motivated by both discriminatory and nondiscriminatory reasons, the nondiscriminatory reasons alone would have induced it to make the same decision"]; *Alamo*, *supra*, 219 Cal.App.4th at p. 481 [similar].) The purpose of this pleading requirement "is to give the other party notice so that it may prepare its case." (*Harris*, *supra*, 56 Cal.4th at p. 240.)

Defendant's answer to the complaint did not include a "mixed motive," "same decision," or "legitimate non-discriminatory reasons" affirmative defense. It did include a so-called "Prior Breaches/Non-Performance" affirmative defense that made passing references to plaintiff's alleged failure to meet his sales quota,[4] but it is not clear to us that the verbose and somewhat vague language employed by defendant was sufficient to put plaintiff on notice of defendant's intent to assert the "same decision" affirmative defense. In any event, even if the "same decision" affirmative defense had

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[4] In this affirmative defense, defendant alleged: "Plaintiff's breach of the only known agreement between Plaintiff and Defendant serves as an absolute bar to each and every cause of action in Plaintiff's FAC. Specifically, the agreement shows that Plaintiff was not an employee but was an independent contractor, Defendants' [*sic*] are informed and believe and so allege that Plaintiff failed to meet sales quotas and thereby failed to perform under the agreement. Defendant BCC fully performed under the terms of the agreement and only until and but for Plaintiff's breach and failure to perform under the agreement, including without limitation, Section 1.0 of Schedule A, did Defendant BCC terminate the independent contractor agreement with Plaintiff. Attached as Exhibit 'A' is a true and correct copy of the Independent Contractor Agreement, which Agreement is incorporated by this reference as though fully set out here, such that all defenses available under this Agreement are pled here."

been adequately pleaded, it should not have been included in the special verdict form (or the jury instructions).

The "same decision" defense is only available if the employer can demonstrate that it would have made the same termination decision for "legitimate" and "lawful reasons." (*Harris, supra,* 56 Cal.4th at p. 241.) Defendant did not do so here. Plaintiff's alleged noncompliance with schedule A of the independent contractor agreement did not and could not constitute a "legitimate" or "lawful" termination reason because that provision was illegal and unenforceable under California law. As already noted, schedule A provided that plaintiff *would not be paid* unless certain quotas were met, in direct contradiction of California's minimum wage requirements. Defendant cannot justify its termination decision by invoking a provision that is itself illegal under California law. (See *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 740 [right to minimum wage "cannot be abridged by contract or otherwise waived"]; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094 (*Gantt*), overruled on a different ground in *Green v. Raelee Engineering Co*. (1998) 19 Cal.4th 66, 80, fn. 6 ["there can be no right to terminate for an unlawful reason . . . . Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose"].) The very fact that defendant cites its *illegal* deductions from plaintiff's paychecks (i.e., the 20 percent contract "non-compliance" penalties) as corroborating evidence of its stated reason for terminating plaintiff is troubling. As a matter of fairness, defendant should not be able to limit its liability for wrongful termination by pointing to an equally problematic basis for terminating plaintiff's employment; that is not the purpose of the "same decision" defense. (See *Harris* at p. 233 [limitation of remedies avoids "unduly limiting the freedom of employers to make *legitimate* employment decisions" (italics added)].)

Defendant contends it does not matter that the independent contractor agreement was illegal because *at the time* of the termination decision, defendant *believed* that the agreement was valid. In support of this contention, defendant quotes from *Guz v.*

Bechtel National Inc., *supra*, 24 Cal.4th 317, wherein the Supreme Court noted that in applying the *McDonnell Douglas* burden-shifting test to a FEHA discrimination claim, the employer must show that its action was taken for "legitimate, nondiscriminatory reason[s]" (*Guz*, at p. 358), which "*need not necessarily have been wise or correct*" (*id.* at p. 358, italics added). We do not find this holding applicable in the context of a wrongful termination claim. The purpose of the burden shifting test articulated in *Guz* is to determine "simply whether the employer acted with *a motive to discriminate illegally*." (*Ibid.*) Here, by comparison, our focus is not on the employer's state of mind, but rather on whether the termination was lawful. We are not aware of any case finding that a wrongful termination becomes lawful if the employer *believed* it was acting lawfully. (Cf. *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 922-924 [employee stated a *Tameny* claim against former employer where wrongful termination was based on employer's *mistaken* belief that employee had reported alleged health code violations].) To that end, discriminatory or ill intent by the employer is not one of the required elements of a wrongful termination claim. (See *Yau, supra,* 229 Cal.App.4th at p. 154.) Thus, defendant's erroneous belief that it was acting lawfully should not shield it from liability for wrongful termination.

Accordingly, we conclude the court did not err in rejecting defendant's late request to include a question on "but for" causation or the "same decision" limitation of remedies defense in the special verdict.

The Independent Contractor Agreement Instruction

The second issue defendant raises on appeal concerns a jury instruction the court gave on the independent contractor agreement. Before discussing the instruction, it is helpful to review the reason the instruction was given. Prior to trial, the court granted plaintiff's motion in limine to preclude any argument that he was an independent contractor, reasoning that the Labor Commissioner had already determined that plaintiff

was in fact an employee. The court warned counsel that it would "give the jury an admonition if anything comes out [at trial] suggesting that [plaintiff] was an independent contractor."

During closing argument, defense counsel referenced the independent contractor agreement's three-year term when addressing the issue of how far into the future plaintiff's economic damages should go, arguing that the contract would have expired in April 2012 and would not have been renewed, and implying that any future economic damages should be so limited. After closing arguments, the court advised counsel that it would "admonish the jury again with regard to the independent contractor agreement being irrelevant." It then instructed the jury as follows: "An argument was made during closing that the term of the independent contractor agreement is three years, and therefore [defendant] would not have employed [plaintiff] beyond the term of the independent contractor agreement. You must disregard that argument. The independent contractor agreement is totally irrelevant in reaching your verdict."

The court did not err. It was proper in light of defense counsel's violation of the court's in limine ruling. Defendant misconstrues the instruction, asserting that the trial court "instructed the jury that [defendant] was *obligated* to employ plaintiff beyond the three-year term in his contract." (Italics added.) That is not what the instruction said. When read as a whole, the instruction clearly and properly conveyed that the three-year term of the independent contractor agreement should be disregarded.

The Emotional Distress Damages

Defendant next attacks the jury's $225,000 award of emotional distress damages, asserting that such damages were not recoverable. No so. A wrongful termination subjects the employer to "'liability for compensatory and punitive damages under normal tort principles.'" (*Gantt*, *supra*, 1 Cal.4th at p. 1101.) That includes emotional distress damages. (CACI No. 2433; see Chin et al., Cal. Practice Guide;

Employment Litigation (The Rutter Group 2018) ¶ 5:320 ["A plaintiff may recover a full measure of tort damages in an action for wrongful discharge in violation of public policy—including, in appropriate cases, damages for emotional distress and punitive damages"].) To the extent defendant means to suggest that emotional distress damages are not available if the employer successfully establishes a "same decision" affirmative defense, we hold that defendant forfeited that defense for the reasons stated above.

Defendant alternatively argues that the emotional distress damages award was excessive, but it provides no citations to the record or authority on point. In light of testimony by both plaintiff and his fiancée regarding the *severe* emotional and financial impact defendant's conduct had on plaintiff, we find no reason to reverse this portion of the judgment.

Punitive Damages

Lastly, defendant argues the jury's $1 million punitive damages award is excessive under California law and must be reversed. As explainted below, we agree.

"Under California law, a punitive damages award may be reversed as excessive 'only if the entire record, viewed most favorably to the judgment, indicates the award was the result of passion and prejudice.'" (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 25; see *Adams v. Murakami* (1991) 54 Cal.3d 105, 118, fn. 9 (*Adams*) [same].) We consider three factors in making that determination: "(1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition." (*Stevens v. Owens-Corning Fiberglas Corp*. (1996) 49 Cal.App.4th 1645, 1658.)

Looking at the third factor, our Supreme Court has explained that "a punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams*, *supra*, 54 Cal.3d at p. 112.) "Even if an award is entirely reasonable in

light of the [first] two factors . . . , the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*." (*Id.* at p. 111.) "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Id*. at p. 112.)

"Our Supreme Court has not prescribed a rigid standard for measuring a defendant's ability to pay. [Citations.] Accordingly, there is no one particular type of financial evidence a plaintiff must obtain or introduce to satisfy its burden of demonstrating the defendant's financial condition. Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. [Citations.] Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' [Citations.] Evidence of a defendant's income, standing alone is not "'meaningful evidence."' [Citation.] 'Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.' [Citation.] "'Without evidence of the actual total financial status of the defendant[], it is impossible to say that any specific award of punitive damage is appropriate." [Citation.]' [Citation.] 'Thus, there should be some evidence of the defendant's actual wealth' [citation], but the precise character of that evidence may vary with the facts of each case. [Citations.] The evidence should reflect the named defendant's financial condition at the time of trial." (*Soto v.BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194-195,)

In reviewing a punitive damages award, we give considerable deference to the jury's award. (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720-721 ["We usually defer to the jury's discretion unless the record shows inflammatory evidence, misleading instructions, or improper argument by counsel that would suggest the jury relied on improper considerations"].) We also accord "great weight" to the trial

court's refusal to grant a new trial on the amount of punitive damages, as the trial court did here. (*Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 642.) However, we have a "responsibility to intervene when the verdict is so palpably excessive to raise the presumption of passion and prejudice." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1258.) That appears to have been the case here.

Here, the only evidence of financial condition at trial indicated that defendant's annual net income (at least in 2015) was roughly $180,000. And its net worth at the end of 2015 was roughly $86,000. (This was according to (1) the testimony of defendant's chief executive officer (CEO), (2) defendant's 2015 profit and loss statement, which reflected a total income of about $321,000, total expenses of about $141,000, and (3) defendant's 2015 tax return which reported its book value of about $86,000.)

Assuming defendant's net income was in fact about $180,000 and its net worth was about $86,000, as the above-described evidence indicates, the $1 million punitive damages award was the equivalent of over *five times* defendant's annual net income and more than *10 times* its net worth. Based on this evidence, the award was clearly excessive. (See, e.g., *Egan v. Mutual of Omaha Ins.. Co.* (1979) 24 Cal.3d 809, 823-824 [$5 million punitive damages award was excessive "as a matter of law" where it equaled 2.5 months of defendant's 1973 net income and over seven months of defendant's 1974 net income]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1011-1012 [$750,000 punitive damages award was held excessive where it constituted almost half of its net income for period under consideration]; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100 [punitive damages award equivalent to 3.64 weeks of defendant's net annual income was not excessive as a matter of law]; *Moore v. American United Life Insur. Co.* (1984) 150 Cal.App.3d 610, 642 [punitive damages award equivalent to 3.4 weeks of defendant's net

income was not excessive as a matter of law]; *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469-470 [punitive damage award of 15 percent of net worth excessive]; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 18 [punitive damage award of 30 percent of net worth excessive]; *Storage Servs. v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515 ["[P]unitive damage awards are generally not allowed to exceed 10 percent of the defendant's net worth"].)

We recognize plaintiff tried to demonstrate at trial that defendant in fact had far greater assets, but plaintiff failed to produce any evidence (as opposed to mere argument) to that effect.[5] Importantly, it is the *plaintiff* who has the burden of proof as to the defendant's financial condition. (*Adams, supra*, 54 Cal.3d at p. 109.)[6] Argument and speculation about defendant's true net worth are insufficient to carry that burden. The

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[5] In the punitive damages phase of trial, plaintiff's counsel attempted to ask defendant's CEO questions about his side income working as an independent contractor for other merchant processing companies, but the trial court sustained objections to this line of questioning, instructing that plaintiff could only ask about defendant's, not the CEO's, finances. Despite those instructions, during closing argument plaintiff's counsel called into question the veracity of defendant's alleged net income, arguing that it makes no sense that defendant's three owners would each earn only $60,000 per year. Plaintiff's counsel further argued that the fact that the owners worked as independent contractors for another company suggests "that the owners are using [defendant] just as a shell" or a "front" "to cover all their expenses," and they then "funnel just enough money into [defendant] not to raise any issue with the IRS." Defense counsel objected to this argument multiple times, but the trial court overruled his objections. Nevertheless, it is well established that "disbelief of a witness's statement is not proof that the opposite is true." (*Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 Cal.App.5th 487, 496; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205 ["the disregard or disbelief of the testimony of a witness is not affirmative evidence of a contrary conclusion"].)

[6] One exception to the *Adams* rule is that a plaintiff's burden may be excused if the defendant violates an order compelling production of financial information at trial. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 609 [by ignoring court order to produce financial documents, "defendant improperly deprived plaintiff of the opportunity to meet his burden of proof on the issue"].) Nothing in the record or briefs suggests this exception applies to the case before us.

burden of proof does not ever shift to the defendant to prove it is *not* as wealthy as the plaintiff's evidence would suggest.

Assuming defendant's net income was in fact about $180,000 and its net worth was about $86,000 (as the evidence suggests), the $1 million punitive damages award was clearly excessive. It is also true, however, that the jury — individuals who brought the sense of the community to the decision-making process and who diligently sat and listened to all the evidence before rendering their collective judgment — determined that defendant's conduct was reprehensible, richly qualifying for a substantial punitive damage award. Taking into account the jury's determination in this case, but also exercising our independent discretion not to permit an excessive award, we conclude that the punitive damage award should be modified to reflect an amount near the high end of awards held by the courts not to be excessive. Thus, an award of one month of net income, or 10 percent of net worth, would approximate the maximum award that could pass muster. One month of defendant's net income of $180,000 would be $15,000. Ten percent of defendant's net worth of $86,000 would be $8,600. We will average those amounts and approve a punitive damage award of $11,800. Such a reasonable and proportionate award well serves the state's interest in retribution and deterrence. We therefore reverse the punitive damages award and remand for a new trial as to that issue only unless plaintiff consents to the decreased amount of $11,800 and complies with the procedures set forth in rule 8.264(d) of the California Rules of Court. (See *Boeken v. Philip Morris, Inc*. (2005) 127 Cal.App.4th 1640, 1703 [appellate court may affirm the liability and compensatory damage aspects of a judgment while modifying punitive damage award and ordering a new trial limited to punitive damages unless plaintiff consents to the remittitur].)

DISPOSITION

The judgment is affirmed in all respects except the amount of punitive damages. The judgment is modified to reduce the punitive damage award to $11,800, provided plaintiff files a timely consent to such reduction in accordance with rule 8.264(d) of the California Rules of Court. If no such consent is filed within the time allowed, the judgment is reversed as to the amount of punitive damages only and remanded for a new trial solely upon that issue. Each side is to bear its own costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.