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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SOLEDAD ALBARRACIN, Plaintiff and Respondent, v. FIDELITY NATIONAL FINANCIAL, INC., et al., Defendants and Appellants.	B292895 Los Angeles County Super. Ct. No. BC642922

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Jackson Lewis, Henry L. Sanchez, Negin Iraninejadian; Greines, Martin, Stein & Richland, Robin Meadow and Laurie J. Hepler for Defendants and Appellants.

Arias Sanguinetti Wang & Torrijos, Mike M. Arias, Katherine E. Harvey-Lee; Rodriguez & Tran, Griselda Rodriguez, Derek T. Tran; The Ehrlich Law Firm and Jeffrey I. Ehrlich for Plaintiff and Respondent.

INTRODUCTION

Soledad Albarracin sued Fidelity National Financial, Inc. (Financial), Fidelity National Management Services, LLC (Management),[1] and her former supervisor, Robert Wilson, for intentional infliction of emotional distress and several employment-related claims arising out of the termination of her employment after she complained that Wilson had sexually harassed her during a work retreat. A jury found the Fidelity defendants liable for intentional infliction of emotional distress, retaliation for engaging in protected activity under the Fair Employment and Housing Act (FEHA) (Gov. Code,[2] § 12900 et seq.), and wrongful termination. The jury awarded Albarracin $250,000 for past emotional distress caused by the Fidelity defendants and imposed $1,950,000 in punitive damages against Financial. After the trial court denied the Fidelity defendants' motions for new trial and judgment notwithstanding the verdict (JNOV), it awarded Albarracin nearly $820,000 in attorneys' fees.

On appeal, the Fidelity defendants challenge the punitive damages award, arguing: (1) insufficient evidence supports the jury's finding that they engaged in oppressive or malicious conduct; and (2) the amount of the punitive damages award is unconstitutionally excessive. The Fidelity defendants also contend we must remand the matter for recalculation of Albarracin's attorneys' fees award if we reverse or reduce the punitive damages award. We conclude substantial evidence

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[1] We refer to Financial and Management collectively as the Fidelity defendants or the company.

[2] All undesignated statutory references are to the Government Code.

supports the jury's finding of oppressive or malicious conduct and the amount of the award does not exceed constitutional limits. We therefore affirm the judgment and orders.

FACTUAL BACKGROUND

1. The Incident in Colorado Springs

In November 2014, the Financial defendants hired Albarracin as a paralegal in its major claims department in Los Angeles. Wilson, an attorney in major claims, was one of Albarracin's supervisors.

In September 2015, the company organized a training retreat in Colorado Springs, Colorado for the major claims employees. Albarracin and about 25 other employees, including Wilson, attended the retreat.

On September 9, 2015, the second night of the retreat, Albarracin and Tamela Pittman, a paralegal in Financial's Dallas office, went to the hotel bar. They ran into Wilson, who bought them each a glass of wine. After Albarracin, Pittman, and Wilson talked for about 20 minutes, they left the bar to go back to their own hotel rooms. Pittman took the elevator to her floor, while Wilson and Albarracin took the stairs to their floor.

As Albarracin was walking up the stairs, Wilson approached her and asked, "So, your room or mine?" Albarracin replied that she was going back to her room and continued to walk up the stairs. Wilson followed her. When she reached her floor, Albarracin became nervous and accidentally walked into a dead-end. When she turned around, Wilson was standing in front of her.

Albarracin tried to walk past Wilson, but he raised his arms and said, "So?" Panicking, Albarracin tried to walk to her

room. When Albarracin asked Wilson where his room was, Wilson said he was staying in the room next to hers. Wilson then leaned in and tried to kiss Albarracin on her lips. Albarracin pushed Wilson back and moved her head to the side. Wilson replied, "Oh, come on," and tried to kiss Albarracin again. Albarracin pushed Wilson back a second time.

Albarracin then put her hands on Wilson's shoulders and directed him to his room. When they reached Wilson's door, Albarracin said, "this is your room, I am going to mine." Once inside her room, Albarracin sent text messages to her ex-boyfriend describing her encounter with Wilson.

2. The Investigation

On the morning of September 10, 2015, Albarracin reported her encounter with Wilson to Helen Straekle, the assistant to Joseph Tucker, the senior vice president of Financial's major claims department. Albarracin met with Tucker later that day in the hotel's restaurant and told him about the encounter. Tucker told Albarracin that he would come to the Los Angeles office sometime during the next week to further investigate her claim, and he advised Albarracin to take a day off of work.

Tucker, who testified that Financial has a "zero tolerance" policy for "discrimination or harassment of any kind," had recently received a complaint from a former employee, Linda Hudson, accusing Wilson of sexual harassment.[3] Nevertheless, Tucker did not take any notes of his conversation with Albarracin. When later asked if he believed Albarracin's allegations were serious, Tucker replied, "To [her], sure."

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[3] We discuss Hudson's complaint in greater detail below.

After speaking to Albarracin, Tucker met with Wilson. Wilson claimed Albarracin made up the allegations, and he denied ever trying to kiss her. Tucker did not take any notes of his conversation with Wilson.

Albarracin and Wilson flew back to Los Angeles on separate flights. When Albarracin returned to work on September 14, 2015, Wilson asked her, "Where were you on Friday? We missed you on the flight back." Albarracin was "horrified and freaked out, because [she] thought [Wilson] had been told not to talk to [her.]" The next day, Albarracin made an appointment with her doctor because she was "falling apart … and more tense and more tense, having to be in the same place with a man who attacked [her]."

On September 15, 2015, Tucker went to Los Angeles to investigate Albarracin's claim against Wilson. Tucker interviewed Albarracin, Wilson, and four other employees who did not attend the retreat at the Los Angeles office. Tucker spoke to Albarracin and Wilson about Albarracin's allegations, and he questioned the other employees about Albarracin's and Wilson's relationship and Albarracin's work performance. Tucker issued Wilson a written "Notice of Performance Counseling" and directed Wilson to attend a sexual harassment training course.

On September 16, 2015, Tucker updated Albarracin on his investigation. He told her: " 'I have talked to people. I have talked to people in—the corporate attorneys, and to the people in H.R. And I can't tell you what measures we have taken against Robert Wilson, but I can tell you that he—it's not going to be very easy for him here. And I'm sorry, but you are going to have to work with him.' " Albarracin responded, " 'I can't work with him. I—the last three days that I've been here has been a nightmare. I am a

complete mess. I am [falling] apart. My body—every single muscle in my body is tight. … I can't work with [Wilson]. … [Y]ou can't make me work with him.' " Tucker replied that he could not "take stronger measures or … do something else" unless he had "more proof of something."

Albarracin tried to find additional evidence to corroborate her complaint against Wilson. Although the hotel in Colorado Springs did not have security footage of the encounter, Albarracin told Tucker that she could provide him the text messages she sent her ex-boyfriend immediately after the encounter. Tucker never asked to see the text messages.

Shortly after her meeting with Tucker on September 16, 2015, Albarracin left work because she "desperately needed to see a doctor." Albarracin's doctor wrote Albarracin a "Work Status Report" excusing her from work through September 18, 2015, which she sent to Tucker. On September 18, 2015, Albarracin sent Tucker a second "Work Status Report" from her doctor excusing her from work through September 25, 2015.

On September 24, 2015, Albarracin sent Tucker an email detailing her encounter with Wilson in Colorado. Albarracin asked Tucker to "reconsider moving [her] to any other department in Fidelity since apparently [Wilson] cannot be touched." Albarracin also asked Tucker to forward the email to "the person in charge of Human Resources in Major Claims." Tucker never replied to, or otherwise spoke to Albarracin about, the email. Tucker did, however, forward the email to Karen Harper, the director of Financial's human resources department. Harper later testified that, as director of human resources, she had a duty to conduct a formal review of Albarracin's complaint.

On September 28, 2015, Albarracin was examined by a psychiatrist, who placed her off work through November 22, 2015. According to the psychiatrist, Albarracin was " 'very anxious' " and " 'trembled the entire [45 to 50 minute] session.' "

Harper spoke to Albarracin over the phone on September 28, 2015. They discussed the incident in Colorado Springs as well as possible arrangements that could be made to allow Albarracin to return to work, such as moving Wilson's office or Albarracin's desk to prevent Albarracin from having to interact with Wilson. At the end of the conversation, Harper promised she would call Albarracin back after speaking to Tucker about the proposed arrangements. Harper never spoke to Tucker about a possible accommodation, nor did she call Albarracin back.

Albarracin sent Harper a psychiatrist's note placing Albarracin off work through November 22, 2015. In response, Harper explained that Albarracin was not eligible for leave under the Family and Medical Leave Act (FMLA) and instructed Albarracin to apply for a personal leave of absence through Financial.

On September 29, 2015, Financial's leave administrator, FMLASource, contacted Albarracin. The leave administrator explained that Albarracin needed to submit medical certification by October 15, 2015 before her personal leave request could be approved.

On October 6, 2015, Harper sent the following email to an employee in Financial's human resources department: "This is the girl that claimed sexual harassment which could not be validated. She went to her doctor then stopped showing up for work. I told her to apply for the personal leave and I don't think she ever did." The employee confirmed that Albarracin had

applied for leave and that the company was waiting for her to submit medical certification.

On October 13, 2015, Albarracin's psychiatrist submitted a "Medical Certification" stating that, on September 9, 2015, Albarracin began suffering from a medical condition that precluded her from working for at least two months. Financial approved Albarracin's request for sixty days of personal leave, beginning on September 17, 2015 and expiring on November 17, 2015.

On October 30, 2015, Tucker asked Harper if he could hire a new full-time, rather than a temporary, employee to fill Albarracin's position. Harper told Tucker she would follow up on his request. In early November 2015, staff in Financial's human resources department informed Harper that Albarracin would become eligible for protected FMLA leave on November 24, 2015.

On November 2, 2015, Harper sent two emails to the leave administrator. In the first email, Harper explained that Financial should inform Albarracin that her position could not be guaranteed while she was on leave. In the second email, Harper said, "Mark your calendar because next step after [November 17, 2015] will be to tell her we can no longer hold her position open and that she will need to return to work on [November 18, 2015]."

On November 10, 2015, the leave administrator informed Albarracin that her personal leave would expire on November 17, 2015, and that she was expected back at work on November 18, 2015. Around November 11, 2015, Albarracin requested two additional months of leave, to run from November 18, 2015 through January 17, 2016. On November 12, 2015, the leave administrator sent Albarracin a letter confirming that it had received her leave extension request and instructing her to

submit medical certification supporting her request by November 28, 2015.

On November 16, 2015, an employee in Financial's human resources department contacted the leave administrator to verify that Albarracin had requested a two-month extension of her leave. The administrator confirmed that it was waiting for Albarracin to submit additional medical certification to support her request.

3. Albarracin's employment is terminated.

On November 18, 2015, Albarracin did not return to work. Financial treated Albarracin's failure to return to work as "job abandonment" because she didn't provide the leave administrator or "the company with notification for her need to extend [her personal leave] with the appropriate certification paperwork."

On November 20, 2015, Financial terminated Albarracin's employment. That same day, Albarracin sent a "Work Status Report" from her doctor to Financial's human resources department. On November 23, 2015, Albarracin emailed an employee in human resources, explaining that she couldn't provide supporting documentation for her extension request at an earlier time because she had scheduled nearly two months in advance her November 19, 2015 doctor's appointment. Later that same day, Financial's leave administrator informed human resources that Albarracin had provided sufficient medical certification to extend her leave of absence through November 22, 2015.

Harper never finished her investigation of Albarracin's sexual harassment complaint or wrote any formal report about the complaint or the investigation before Financial fired Albarracin. In addition to never speaking to Tucker about

providing Albarracin an accommodation that would allow her to return to work, Harper never interviewed Wilson or any other Fidelity employee about Albarracin's complaint.

Albarracin testified that she continues to experience stress and anxiety as a result of her encounter with Wilson. She often suffers panic attacks, insomnia, depression, nervousness, and feelings of worthlessness. She has difficulty trusting men, and she hasn't been in an intimate relationship since the encounter with Wilson.

4. Hudson's Harassment Complaint

In 2015, Linda Hudson worked as a temporary legal assistant in Financial's Los Angeles office. Hudson worked for Wilson for several months.

On August 23, 2015, Hudson filed a workplace complaint, accusing Wilson of engaging in inappropriate and harassing conduct. On one occasion, Wilson walked up behind Hudson, reached over Hudson's head, and handed a piece of paper to Albarracin. When Hudson told Wilson not to reach over her head again, he "just kind of chuckled and did not apologize." The next day, Wilson quietly approached Hudson from behind and tried to frighten her.

Wilson would sometimes refer to Hudson as " 'his girl' " to other people in the office. After Hudson once brought Wilson his mail, Wilson said, " 'There she is! There's my girl, yeah, there's my girl!' " Hudson was "shocked" and "felt so horrible and degraded" by Wilson's comments that she "went to the bathroom to pray." Wilson also would harshly criticize Hudson in front of other employees when she made minor mistakes at work.

In early August 2015, Hudson asked a supervisor at Financial to move her desk so that her back would not face

Wilson's office. Hudson stopped working for the company in mid-August 2015.

PROCEDURAL BACKGROUND

According to the first amended complaint,[4] Albarracin asserted five causes of action: (1) sexual harassment and hostile work environment in violation of FEHA (§ 12940, subd. (j)); (2) failure to prevent sexual harassment in violation of FEHA (§ 12940, subd. (k)); (3) retaliation for engaging in protected activity under FEHA (§ 12940, subd. (h)); (4) wrongful termination in violation of public policy; and (5) intentional infliction of emotional distress. Albarracin sought compensatory and punitive damages against each defendant.

Albarracin's claims against the Fidelity defendants and Wilson were tried in two phases before a jury in April 2018. In the first phase of trial, the jury found the Fidelity defendants liable for retaliation, wrongful termination, and intentional infliction of emotional distress. The jury also found the Fidelity defendants' agents or employees acted with malice, oppression, or fraud. The jury found in favor of the Fidelity defendants and Wilson on Albarracin's claim for sexual harassment and hostile work environment, and it found in favor of Wilson on Albarracin's claim for intentional infliction of emotional distress. The jury

[4] Management and Wilson are named as defendants in the first amended complaint; Financial is not named as a defendant in that pleading. It appears, however, that the operative pleading is a second amended complaint, and that Financial and Management are named as defendants in that pleading. The second amended complaint is not in the record on appeal.

awarded Albarracin $250,000 in non-economic damages for past emotional distress.

In the second phase of trial, the parties presented evidence that the Fidelity defendants made $662 million in after-tax profit in 2017. The jury imposed $1,950,000 in punitive damages against Financial, but it did not impose any punitive damages against Management.

On July 5, 2018, the court entered judgment for Albarracin and against the Fidelity defendants.

On July 20, 2018, the Fidelity defendants filed motions for new trial and JNOV. The Fidelity defendants challenged the judgment on two grounds: (1) the jury's finding that agents or employees of the Fidelity defendants acted with malice, oppression, or fraud is not supported by the evidence; and (2) the amount of the punitive damages award was constitutionally excessive.

On August 30, 2018, the court denied the Fidelity defendants' motions. On September 26, 2018, the Fidelity defendants appealed from the judgment and the order denying the JNOV motion.

On November 19, 2018, the court awarded Albarracin $819,355 in attorneys' fees. On January 15, 2019, the Fidelity defendants appealed from the order awarding Albarracin attorneys' fees.[5]

[5] We consolidated the Fidelity defendants' appeals.

DISCUSSION

1. The Jury's Finding of Malice or Oppression

The Fidelity defendants contend the court erred in denying their JNOV motion because insufficient evidence supports the jury's finding that they acted with malice or oppression when investigating Albarracin's sexual harassment complaint and terminating her employment. The Fidelity defendants do not challenge any of the underlying findings of liability for retaliation under FEHA, wrongful termination, or intentional infliction of emotional distress. And because they do not differentiate Financial's acts or omissions from Management's acts or omissions, we treat these defendants interchangeably in determining whether substantial evidence supports the jury's finding of malice or oppression.

1.1. Applicable Law and Standard of Review

To support a punitive damages award, the plaintiff must prove by clear and convincing evidence that the "defendant has been guilty of oppression, fraud, or malice."[6] (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." (*Id.*, subd. (c)(1).) " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Id.*, subd. (c)(2).)

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[6] The parties do not dispute that the jury's punitive damages award was based on a finding of malice or oppression, and not fraud.

" 'Despicable conduct' is conduct that is ' "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by most ordinary decent people." ' [Citation.]" (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1159.) Typically, such conduct has "the character of outrage associated with crime." (*Ibid*.) Defendants act with " 'conscious disregard' " when they are aware of the probable dangerous consequences of their conduct and willfully and " ' "deliberately failed to avoid those consequences." ' [Citation.]" (*Ibid*.) Thus, defendants must have actual knowledge of the risk of harm created by their conduct and, despite that knowledge, fail to take steps they know " 'will reduce or eliminate the risk of harm.' [Citation.]" (*Ibid*.)

Generally, something more than the mere commission of a tort is required to support an award of punitive damages. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894.) Thus, "wrongful termination, without more, will not sustain a finding of malice or oppression." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 717.) But evidence that the employer acted with callousness or spite, a discriminatory intent, or offered a pretextual explanation to justify its wrongful termination may support a finding of malice or oppression. (See *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 428 [employer's "callous and retaliatory" conduct toward employee supported punitive damages award]; *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912 (*Cloud*) [employer's use of a false explanation to hide gender-based termination supported punitive damages award]; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1403 [employer's fabricated criticism to justify wrongful termination supported

punitive damages award], disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.)

Malice and oppression may be proven through direct evidence or inferred from the circumstances surrounding the defendant's conduct. (*Monge v. Superior Court* (1986) 176 Cal.App.3d 503, 511.) Because malice, oppression, or fraud must be proven by clear and convincing evidence, we review the jury's finding to determine "whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true." (*Conservatorship of O.B.* (July 27, 2020, S254938) __ Cal.5th __ [p. 12] [courts must apply a heightened standard of review on appeal to account for the clear and convincing standard of proof].) We view "the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence." (*Ibid.*)

1.2. Substantial evidence supports the jury's finding.

As discussed below, substantial evidence supports the jury's finding that the company acted with malice or oppression.

We begin by addressing the way the Fidelity defendants handled Albarracin's sexual harassment complaint. Shortly after she complained that Wilson had sexually harassed her, Albarracin told Tucker that she was suffering severe anxiety and stress because of that encounter, and she provided supporting medical documentation. Harper became aware of that information in late-September 2015. Albarracin also explained to Harper and Tucker that she could not return to work if she would be required to interact with Wilson, and she proposed

accommodations that could resolve that issue, such as moving her workspace away from Wilson's office or transferring her to a different department.

Tucker never responded to Albarracin's request for an accommodation. And, although Harper promised Albarracin she would discuss potential accommodations with Tucker, Harper never did. Nor did Harper otherwise make any effort to find Albarracin an accommodation that would enable her to return to work. Moreover, Harper never interviewed any employees, including Wilson, about Albarracin's sexual harassment complaint, even though she admitted it was her duty to investigate such complaints filed by Financial employees. Instead, Harper focused her efforts on determining when Albarracin would become eligible for protected FMLA leave and when Financial could terminate her employment. Based on this evidence, the jury could infer that the company's handling of Albarracin's sexual harassment complaint was malicious or oppressive because Tucker and Harper acted with conscious disregard of Albarracin's emotional distress and her right to complain about workplace harassment.[7] (See *Butte Fire Cases*, *supra*, 24 Cal.App.5th at p. 1159.)

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[7] Under Civil Code section 3294, subdivision (b), an employer may not be liable for punitive damages based on the actions of its employees unless: (1) the employer had "advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others"; (2) the employer "authorized or ratified the wrongful conduct for which the damages are awarded"; or (3) the employer is "personally guilty of oppression, fraud, or malice." The Fidelity defendants do not contend that they could not be held liable for punitive damages based on any of the grounds outlined in Civil Code section 3294, subdivision (b).

The jury also could find that the company provided a false explanation for its retaliatory firing of Albarracin. When Albarracin didn't return to work on November 18, 2015, the day after her personal leave expired, Financial treated her absence as "job abandonment." Financial claimed Albarracin didn't notify the company or its leave administrator that she wanted to extend her leave or provide appropriate certification to justify a leave extension. But there was evidence that, less than a week before Albarracin's leave was set to expire, Albarracin submitted a leave extension request. And, on November 12, 2015, Financial's leave administrator told Albarracin that she had until November 28, 2015 to submit certification supporting that request. Based on this evidence, the jury could find that the company's stated reason for firing Albarracin was false and designed to hide its retaliatory intent in firing her—i.e., because she complained that Wilson had sexually harassed her. (See *Cloud*, *supra*, 76 Cal.App.4th at p. 912 [providing a false explanation for a retaliatory or discriminatory termination supports a finding of malice or oppression]; *Colucci v. T-Mobile USA, Inc.* (2020) 48 Cal.App.5th 442, 456 (*Colucci*) [employer's use of a false explanation to justify wrongful termination supports finding that employer's "conduct was malicious or oppressive"].)

The Fidelity defendants contend insufficient evidence supports the jury's finding because the company's conduct in investigating Albarracin's sexual harassment complaint and terminating her employment was, at worst, "negligent," "shoddy," "inept," "overzealous," "callous," or "legally erroneous." According to the Fidelity defendants, such conduct does not support a finding of "malice" or "oppression" necessary to justify a punitive

damages award. This argument is misguided for a couple of reasons.

First, the Fidelity defendants ignore that the jury found them liable for intentional infliction of emotional distress, a finding the Fidelity defendants do not challenge on appeal. That means the jury found the company's conduct in investigating Albarracin's sexual harassment complaint and terminating her employment was "outrageous," or so " ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' [Citation.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051.) The jury also found that the company "intend[ed] to cause [Albarracin] emotional distress" or acted "with reckless disregard of the probability that [Albarracin] would suffer emotional distress." (See *id.* at p. 1051 [intentional infliction of emotional distress requires the jury to find the defendant intended to injure the plaintiff or that the defendant engaged in the challenged conduct with the realization that injury will result].) The jury, therefore, rejected the Fidelity defendants' position that their conduct was merely negligent, shoddy, inept, callous, or overzealous. Because they do not challenge the jury's finding of liability, the Fidelity defendants cannot recharacterize their conduct as falling below the threshold for intentional infliction of emotional distress. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894–895, fn. 10 [an appellant waives any argument that could have been, but was not, raised in its opening brief].)

Second, the Fidelity defendants' reliance on decisions reversing punitive damages awards against insurance companies is misplaced. (See *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566; *Tomaselli v. Transamerica Ins. Co.* (1994) 25

Cal.App.4th 1269.) In *Patrick* and *Tomaselli*, the insurance companies denied their policyholders' claims in bad faith. (*Patrick*, at p. 1570; *Tomaselli*, at p. 1279.) Each company's conduct in denying its policyholders' claims was found to be negligent, unreasonable, inept, callous, or overzealous. (*Patrick,* at p. 1576; *Tomaselli*, at p. 1288.) Importantly, and unlike in this case, the juries in *Patrick* and *Tomaselli* never made any findings that the companies intended to harm, or acted with reckless disregard of the probability that their conduct would harm, the policyholders. (*Patrick*, at pp. 1575–1576; *Tomaselli*, at pp. 1286–1288.) Nor was there substantial evidence in *Patrick* or *Tomaselli* to support a finding that the insurance company acted with malice or oppression when it denied the policyholders' claims in bad faith. (*Patrick*, at pp. 1575–1576; *Tomaselli*, at pp. 1286–1288.) *Patrick* and *Tomaselli*, therefore, do not support the Fidelity defendants' argument that Financial's conduct in investigating Albarracin's sexual harassment complaint and terminating her employment fell below the standards for malice or oppression.

In sum, the record contains substantial evidence from which the jury could have found it highly probable that the Fidelity defendants acted with malice or oppression in how they handled Albarracin's sexual harassment complaint and terminated her employment.

2. Constitutionality of the Punitive Damages Award

The Fidelity defendants next contend that, even if the jury properly awarded Albarracin punitive damages, the amount of that award is unconstitutionally excessive because it is nearly eight times the amount of the compensatory damages award. The Fidelity defendants ask us to reduce the punitive damages award

from $1,950,000 to $250,000, the same amount as the compensatory damages award. We conclude the punitive damages award passes constitutional muster.

2.1. Applicable Law and Standard of Review

Courts may impose punitive damages to further a state's interest in punishing and deterring unlawful conduct. (*State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 (*State Farm*).) But the Fourteenth Amendment's due process clause places limitations on the amount of punitive damages awards, prohibiting the imposition of grossly excessive or arbitrary punishments on tortfeasors. (*Ibid.*; see also *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712 (*Roby*) [the due process clause restricts the amount of punitive damages courts may award].) " '[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " (*State Farm,* at pp. 416–417.)

In *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 (*Gore*), the United States Supreme Court outlined three "guideposts" that courts should use to determine whether a punitive damages award is excessive under the due process clause: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (*Id.* at p. 575; see also *State Farm*, *supra*, 538 U.S. at p. 418; *Roby*, *supra*, 47 Cal.4th at p. 712.)

We review the constitutionality of a punitive damages award de novo. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*).) Nevertheless, we review "findings of historical fact" for substantial evidence. (*Ibid.*)

2.2. Reprehensibility

The most important of the three *Gore* guideposts "is the degree of reprehensibility of the defendant's conduct." (*Roby*, *supra*, 47 Cal.4th at p. 713.) When evaluating this factor, courts should "consider whether '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' [Citation.]" (*Ibid.*)

As a preliminary matter, the Fidelity defendants contend Albarracin waived application of the first two reprehensibility factors because, during closing argument, Albarracin's counsel told the jury that he didn't "necessarily believe [those factors] appl[y] to" this case, and ultimately discussed only the third, fourth, and fifth factors. This argument lacks merit.

As the California Supreme Court explained in *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, "[t]he *Gore* guideposts are framed neither as rules of trial procedure nor as model jury instructions. Rather, recognizing that postverdict judicial review is an essential step in a state's ultimate determination of the amount of a punitive damages award [citation], *Gore* prescribes a set of rules for *reviewing courts* to apply in order to ensure that the state ultimately does not impose an award whose size exceeds constitutional limits [citation]." (*Id.*

at p. 375, italics added.) When evaluating the constitutionality of a punitive damages award, the reviewing court's job is to identify the constitutional ceiling for such damages, not to determine whether the amount of the damages is the most reasonable under the facts of the case. (*Simon*, *supra*, 35 Cal.4th at p. 1188.) In other words, the *Gore* guideposts do not "regulat[e] the jury's decisionmaking process." (*Nickerson*, at p. 375.) Indeed, a reviewing court's application of the *Gore* factors in determining whether a punitive damages award is constitutional may sometimes be based on evidence or arguments not before the jury. (*Ibid.*) We therefore decline to find Albarracin waived application of any of the *Gore* guideposts, including the reprehensibility factors, to our analysis of the constitutionality of the punitive damages award.

Looking to the first reprehensibility factor, the injury caused by Financial's conduct was not purely economic. Albarracin suffered emotional harm as a result of Financial's failure to investigate her sexual harassment complaint and its termination of her employment. Albarracin described experiencing severe stress and anxiety immediately after her encounter with Wilson and throughout the period Financial was supposed to be investigating her sexual harassment complaint. Albarracin also provided medical documentation showing she was treated by a psychiatrist for those symptoms. As the *Roby* court explained, emotional harm constitutes "physical harm" insofar as it "affected [the plaintiff's] emotional and mental health, rather than being a purely economic harm." (*Roby*, *supra*, 47 Cal.4th at p. 713; see also *State Farm*, *supra*, 538 U.S. at p. 419.) This factor increases the reprehensibility of Financial's conduct.

With respect to the second factor, Financial demonstrated an indifference to, or reckless disregard for, Albarracin's health and safety. Albarracin repeatedly made it clear to Tucker and Harper that the prospect of continuing to work near Wilson caused her severe emotional distress, and she supported those claims with documents from her psychiatrist. The company refused to conduct a legitimate investigation of Albarracin's complaint, it ignored Albarracin's requests for an accommodation that would allow her to return to work, and it waited until it had an excuse to terminate her employment—i.e., her failure to return to work the day after her personal leave expired. This factor also increases the reprehensibility of Financial's conduct.

The third factor—financial vulnerability—is not present in this case. Albarracin did not request any damages for economic harm caused by Financial's conduct. And, in her respondent's brief, Albarracin acknowledges she could not claim financial harm based on Financial's conduct "because she was able to obtain new employment after [Financial] terminated her." Because Albarracin did not present evidence of financial vulnerability, this factor does not increase the reprehensibility of Financial's conduct. (See *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 987, fn. 11 [the third reprehensibility factor typically is not relevant where the plaintiff did not suffer any economic harm].)

As for the fourth factor, Albarracin did not present any evidence that Financial engaged in similar conduct in the past or that it had an organizational policy of retaliating against employees who engaged in protected activity under FEHA. Although Linda Hudson had complained that Wilson harassed her shortly before she left Financial, nothing in the record shows

Financial retaliated against Hudson or otherwise subjected her to any form of adverse employment action after she made the complaint.

There is evidence, however, of the fifth factor—that Albarracin's harm was the result of intentional trickery, malice or deceit. As we discussed above, Financial's tortious conduct leading up to, and including, its termination of Albarracin's employment was not accidental. Financial obviously intended to fire Albarracin. And despite assuring Albarracin that her complaint against Wilson would be taken seriously, Tucker and Harper refused to conduct a good-faith investigation of Albarracin's complaint or to provide her a workplace accommodation that would allow her to return to work.

In sum, three of the five reprehensibility factors are present in this case. Those factors—physical harm; indifference or reckless disregard; and intentional malice, trickery, or deceit—tip the scales toward Financial's conduct being more reprehensible than not since they reflect an intent to cause, or at least a reckless disregard that its conduct would cause, physical harm to Albarracin. Accordingly, we conclude the reprehensibility of Financial's conduct falls within the medium-high range.

2.3. Disparity Between Compensatory and Punitive Damages

Punitive damages must bear a " 'reasonable relationship' " to compensatory damages or the plaintiff's actual harm. (*Gore*, *supra*, 517 U.S. at pp. 580–581.) "Generally, California courts 'have adopted a broad range of permissible ratios—from as low as one to one to as high as 16 to 1—depending on the specific facts of each case.' [Citation.]" (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1313 (*Pfeifer*).) But there is no "bright-line

ratio which a punitive damages award cannot exceed." (*State Farm*, *supra*, 538 U.S. at p. 425.)

" '[D]ue process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than [it does] between punitive damages and a substantial compensatory award for emotional distress; the latter may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent.' " (*Roby*, *supra*, 47 Cal.4th at p. 718.) Thus, in evaluating whether a punitive damages award falls within constitutional limits, reviewing courts should look to whether the compensatory damages award is punitive in nature, such as a substantial award for emotional suffering cause only by economic harm. (*Pfeifer*, *supra*, 220 Cal.App.4th at p. 1313.)

The Fidelity defendants contend that because the jury awarded Albarracin compensatory damages for emotional distress only, the compensatory damages reflect its intent to punish Financial and, as a result, the punitive damages must be set at the same value. While a one-to-one ratio may be appropriate where there is "relatively low reprehensibility and a substantial award of noneconomic damages" (*Roby*, *supra*, 47 Cal.4th at p. 718), a much higher ratio may be appropriate where the compensatory damages award is not punitive or the amount of the award is not substantial (see *Simon*, *supra*, 35 Cal.4th at p. 1181–1183). For example, in *Simon*, the court concluded a 10-to-1 ratio between punitive and compensatory damages was the constitutional limit where the compensatory award was "quite small"—i.e., $5,000—and consisted of economic damages only, while the reprehensibility of the defendant's conduct was low—

i.e., only one of the five reprehensibility factors was present. (*Simon*, at p. 1189.)

Here, the circumstances supporting the award of emotional distress damages do not reflect the jury's intent to punish Financial. Emotional distress damages are often found to serve as punishment in cases where the plaintiff's emotional harm stemmed from a purely economic injury. (See *State Farm*, *supra*, 538 U.S. at p. 426 [compensatory damages for emotional distress caused by purely economic injury reflected jury's intent to punish the defendant]; see also *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 566–567 [noting that awards of emotional distress damages arising out of purely economic harm with no physical injuries tend to include a punitive element].) In this case, however, Albarracin presented evidence that she suffered serious emotional and psychological harm because of her encounter with, and Financial's failure to conduct a legitimate investigation of her sexual harassment complaint against, Wilson. Accordingly, the award of emotional distress damages reflects the jury's intent to compensate Albarracin for her suffering, not to punish Financial for its conduct. (See *Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 23 (*Nickerson II*) [emotional distress damages were not punitive because they were awarded to compensate the plaintiff for his emotional suffering].)

Further, the amount of emotional distress damages the jury awarded Albarracin was not considerably large. Contrast this case with *Roby*, where the jury awarded the plaintiff $1.3 million in emotional distress damages stemming from her workplace harassment and discrimination and wrongful termination. The Supreme Court concluded the jury intended to

punish the defendants based on the "substantial award" of damages for emotional distress and the relatively low reprehensibility of the defendants' conduct. (See *Roby*, *supra*, 47 Cal.4th at pp. 718–719; see also *Colucci*, *supra*, 48 Cal.App.5th at p. 459 [$1,020,042 compensatory damages award, which included $700,000 for "noneconomic harm and/or emotional distress," was "substantial" such that it reflected the jury's intent to punish the defendant].) The amount of emotional distress damages the jury awarded Albarracin, however, is less than one-fifth the amount awarded to the plaintiff in *Roby*.

Moreover, the jury didn't award Albarracin the full amount of emotional distress damages that she requested. During closing argument of the first phase of trial, Albarracin's counsel asked the jury to award Albarracin "a couple million dollars" in compensatory damages for the emotional distress she suffered as a result of her encounter with Wilson and Financial's failure to investigate her sexual harassment complaint. But the jury awarded Albarracin a much smaller amount—$250,000. Had the jury intended to punish Financial for its conduct, it could have awarded Albarracin a substantially larger amount of emotional distress damages.

2.4. Comparable Civil Penalties

The final *Gore* guidepost requires us to "consider 'the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases[.]' " (*Roby*, *supra*, 47 Cal.4th at p. 718.) " 'The rationale for this consideration is that, if the penalties for comparable misconduct are much less than a punitive damages award, the tortfeasor lacked fair notice that the wrongful conduct could entail a sizable punitive damages award.' [Citation.]" (*Grassilli v.*

Barr (2006) 142 Cal.App.4th 1260, 1290.) This guidepost has minimal utility, however, in cases where no comparable civil penalties exist. (See *Simon*, *supra*, 35 Cal.4th at pp. 1183–1184.)

At the time *Roby* was decided, section 12970 authorized the California Fair Employment and Housing Commission to assess a fine of up to $150,000 against an employer found to violate FEHA if the plaintiff pursued her claims administratively before the commission. (*Roby*, *supra*, 47 Cal.4th at pp. 718–719.) In 2013, before Albarracin's FEHA claims arose, the California Legislature eliminated the Fair Employment and Housing Commission, repealed section 12970, and did not replace the civil penalty authorized by section 12970 with a comparable one. (See Sen. Bill No. 1038 (2011-2012 Reg. Sess.) §§ 28, 35–54.) The Fidelity defendants point to the $25,000 civil penalty that may be assessed against a defendant in a case brought by the Department of Fair Housing and Employment, where the defendant is found to have denied the victim a right provided for by Civil Code section 51.7, otherwise known as the Ralph Civil Rights Act of 1976. (See § 12965, subd. (c).) None of the circumstances warranting imposition of a civil penalty under section 12965 exist in this case, however. (See § 12965; Civ. Code, § 51.7.)

Because the parties have not identified any civil penalty that could be imposed in a comparable case, the third *Gore* guidepost is not relevant in determining whether the punitive damages award in this case exceeds the constitutional limit. (See *Nickerson II*, *supra*, 5 Cal.App.5th at p. 23 [the third *Gore* guidepost is not relevant where there are no comparable civil penalties].)

2.5. Financial's Wealth

The Fidelity defendants argue the court erred in relying on Financial's wealth to uphold the punitive damages award in this case. Specifically, the Fidelity defendants contend that Financial's wealth, by itself, cannot justify an otherwise excessive award. While we agree that wealth alone cannot be used to determine the constitutionality of a punitive damages award, the court properly relied on Financial's wealth in evaluating whether the punitive damages award passed constitutional muster.

A defendant's wealth cannot be used "as ' "an open ended basis for inflating awards" ' " or to "replace reprehensibility as a constraining principle." (*Simon*, *supra*, 35 Cal.4th at p. 1186.) Nevertheless, the defendant's wealth "is an essential factor in fixing an amount that is sufficient to serve [the] goals [of deterring wrongful behavior] without exceeding the necessary level of punishment." (*Id.* at p. 1185.) " '[O]bviously, the function of deterrence ... will not be served if the wealth of the defendant allows [it] to absorb the award with little or no discomfort.' [Citation.]" (*Ibid.*) "Because a court reviewing the jury's award for due process compliance may consider what level of punishment is necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents, the defendant's financial condition remains a legitimate consideration in setting punitive damages." (*Ibid.*)

Here, the parties presented evidence that the Fidelity defendants made $662 million in after-tax profit in 2017. The Fidelity defendants do not dispute that this figure represents the company's financial condition for purposes of setting an appropriate punitive damages award. The ratio between Albarracin's punitive damages award and Financial's wealth is,

therefore, miniscule. Specifically, the $1,950,000 award is less one-third of one percent of Financial's after-tax profit in 2017. This factor clearly does not weigh in favor of finding the punitive damages award in this case is unconstitutionally excessive. (See *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967 [a punitive damages award less than 3.2 percent of the defendant's nearly $60 million net worth "would not amount to much more than a slap on the wrist"]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1701 ["A multiplier of 5 to 10 percent of net worth may be necessary to deter a very wealthy wrongdoer."].)

2.6. Conclusion

Based on our analysis of the *Gore* guideposts, we conclude the $1,950,000 punitive damages award in this case passes constitutional muster. Specifically, the nearly eight-to-one ratio between punitive and compensatory damages is justified by the following factors: (1) the medium-high level of reprehensibility of Financial's conduct; (2) the non-punitive nature of the compensatory damages award; (3) the compensatory damages award is several times smaller than such awards in cases limiting the ratio between punitive and compensatory damages to the low single digits (see *Roby*, *supra*, 47 Cal.4th at pp. 718–719; *Colucci*, *supra*, 48 Cal.App.5th at p. 459); and (4) the miniscule ratio between the amount of the punitive damages award and the company's wealth.[8]

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[8] Because we affirm the punitive damages award without any reduction, we need not address the Fidelity defendants' argument that the case should be remanded for recalculation of Albarracin's attorneys' fees.

DISPOSITION

The judgment and challenged orders are affirmed. Albarracin shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.