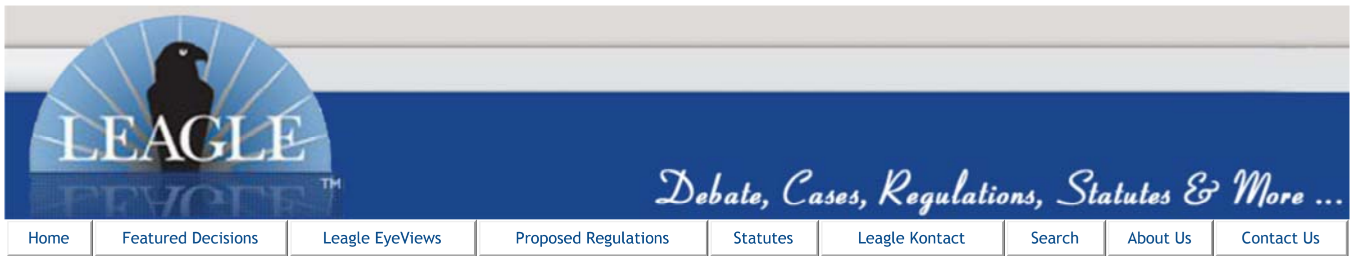

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BENSON v. PROSKAUER ROSE LLP

MYRA BENSON, Plaintiff and Respondent,

v.

PROSKAUER ROSE LLP, Defendant and Appellant.

No. B218565.

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Proskauer Rose/**Harold M. Brody** dqg#**George Samuel Cleaver** iru#Ghihqgdqw#dqg# Dsshoodqw1

Pdu|dq#Kxud|/#Nqxwvhq/#Vplwk#&#Jruhq/**William W. Hale** dqg#**Mark S. Adams** iru# Sodlqwlii#dqg#Uhvsrqghqw1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

Defendant and appellant Proskauer Rose LLP (Proskauer) appeals a judgment following a jury verdict in favor of plaintiff and respondent Myra Benson (Benson). Proskauer also appeals an order denying its motion for judgment notwithstanding the verdict (JNOV).[1]

The essential issue presented is whether the jury returned inconsistent verdicts on two of Benson's claims.

We conclude the verdicts as to two of Benson's claims are irreconcilable so as to require reversal and a partial new trial on those claims.

FACTUAL AND PROCEDURAL BACKGROUND[2]

1. *Benson's previous employment.*

Benson's prior employer was the law firm Hogan & Hartson (Hogan). Hogan specified two grounds for terminating her employment: giving a dishonest reason for her absences from work, and unauthorized use of parking stickers.

Benson was angry at Hogan and threatened to sue the firm for sexual harassment.

2. *Benson obtains employment at Proskauer.*

After Benson was discharged from Hogan, she applied for a job at Proskauer. On the employment application, Benson falsely stated she left Hogan because her position had been moved to another office. Proskauer was unaware of the misrepresentation and hired Benson.

In August 2004, Benson commenced her employment in Proskauer's Century City office as a billing coordinator.

On June 30, 2006, the Friday before the Fourth of July holiday, Benson had an altercation with Beverly Haynes (Haynes), a co-worker in the accounting department. Haynes was Benson's co-worker, *not* a supervisor, manager or agent.

Haynes's version of the incident is that she noticed a loop of fabric visible from beneath the elasticized shoulder of Benson's peasant blouse. Haynes said, "you need to fix this" and reached out to tuck the loose material under the shoulder of the blouse. Benson then hit Haynes so hard with an open-ended slap that it raised visible marks on the side of Haynes's face.

Benson's account of the incident was somewhat different. According to Benson, while she was facing a window, she saw an unidentified hand reach around from behind. The hand pulled her blouse and bra out and down, exposing her breast. She heard something to the effect of, "you need to fix that." Benson reacted reflexively to the hand, calling out "stop" and swinging with her own hand. This reflexive action allowed her elastic to pop back into place and cover her breast.

When Benson refused to apologize by July 6, Haynes reported the incident to the assistant office manager, Amy Wishart. The office administrator, Hilary White (White), conducted an investigation. White interviewed Benson and Haynes, spoke to eyewitness JJ Norman, and received a voice mail message from another eyewitness, Markeida Newton, a Pitney Bowes employee who was no longer with that company. No one corroborated Benson's claim that her breast had been exposed.

Following White's investigation, Proskauer suspended Benson for two days without pay. Proskauer required Benson to apologize to Haynes before returning to work. Benson refused and insisted on a mutual apology. On July 17, 2006, Proskauer discharged Benson for workplace violence.

3. *EEOC proceedings.*

Benson filed a charge of discrimination with the EEOC, claiming that through June 30, 2006, she was sexually harassed by Haynes, an accounting clerk. The EEOC dismissed the charges.

4. *Benson files suit against Proskauer.*

On February 15, 2008, Benson filed suit against Proskauer alleging four claims under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900)[3]: violation of section 12940, subdivision (j) (hostile environment sexual harassment) (first cause of action); violation of section 12940, subdivision (a) (sex discrimination in that Benson allegedly was terminated based upon her sex) (second cause of action); violation of section 12940, subdivision (k) (failure to prevent discrimination and harassment) (third cause of action); and violation of section 12940, subdivision (h) (retaliation for opposing harassment) (fourth cause of action).[4]

5. *Trial.*

At trial the parties presented conflicting evidence as to whether Haynes had sexually harassed Benson and as to whether Benson had complained of sexual harassment.

a. *Plaintiff's case.*

Benson testified Haynes had sexually harassed her several times in the six months preceding the June 30, 2006 incident, and that she had reported the incidents to White, the office manager. According to Benson: Haynes told Benson her breasts were big and looked like cantaloupes; Haynes asked Benson to bare her breast, stating "Just show me one. Just let me see one." Haynes said she was a lesbian during the weekends, she described a swinger party she had attended and suggested that Benson also attend; when Benson was in the restroom, Haynes peeked over the top of the stall and laughed; Haynes tossed paper clips and ice chips at Benson's breasts; and Haynes cupped her hands within six inches of Benson's breasts while commenting how large they were.

Benson further testified she reported these incidents to White and that she observed White writing notes during those meetings.

b. *Defense case.*

Haynes denied that any incident of harassment described by Benson had ever occurred. With respect to the June 30, 2006 incident, Haynes explained that she merely sought to adjust a loop that she observed hanging from the shoulder of Benson's blouse.

Jeannette Norman, an eyewitness to said incident, testified that Benson's breast was never exposed. According to Norman, Haynes placed her left hand on Benson's left shoulder, and Benson then turned around and slapped Haynes. The slap left a red handprint on Haynes's face.

White denied Benson had ever complained to her about any harassment by Benson prior to the June 30, 2006 incident. No writings of any prior complaints by Benson were introduced into evidence.

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Although Benson claimed her colleague, Margaret Mundy, witnessed several incidents of harassment, Mundy denied those incidents occurred.

Bert Deixler, the then managing partner of Proskauer's Los Angeles office, testified he and Benson were friendly and they spoke every day. Although Benson felt close enough to Deixler to seek his advice after her son had a run-in with the police, she never said anything to him about being sexually harassed by Haynes or that Haynes had acted inappropriately toward her.

6. *Special verdicts.*

The jury returned a series of special verdicts.

On the first cause of action, hostile work environment sexual harassment (§ 12940, subd. (j)), question 1 asked: "Was Myra Benson subjected to unwanted harassing conduct because she was a woman?" The jury responded "*No.*" (Italics added.) The verdict form then directed the jury to proceed to question 9, in the next cause of action.

On the next cause of action, failure to prevent discrimination and harassment (§ 12940, subd. (k)), question 9 asked: "Was Myra Benson subjected to sexual harassment?" The jury responded "*Yes.*" (Italics added.) The jury went on to find Proskauer or its agents or supervisors had knowledge Benson was subjected to sexual harassment (question 10), that Proskauer failed to take all reasonable steps to prevent harassment from occurring (question 11), and that Proskauer's failure to prevent sexual harassment was a substantial factor in causing harm to Benson (question 12).

On said cause of action, the jury awarded Benson damages as follows: $70,000 for past economic loss, including lost earnings, $70,000 for future economic loss including lost earnings and lost earning capacity, $60,000 for past noneconomic loss including mental suffering, and zero for future noneconomic loss, for a total of $200,000.

The jury resolved the second and fourth causes of action, relating to employment termination, in favor of Proskauer, upholding the firm's termination of Benson for workplace violence. On the second cause of action, disparate treatment (§ 12940, subd. (a)), the jury determined Benson's gender was *not* a motivating reason for Proskauer's decision to discharge her. On the fourth cause of action, retaliation (§ 12940, subd. (h)), the jury determined Benson's opposition to sex discrimination or sexual harassment was *not* a motivating reason for Proskauer's decision to discharge her.[5]

The jury further found one or more officers, directors or managing agents of Proskauer, while acting on behalf of Proskauer, engaged in conduct constituting oppression, fraud or malice.[6]

With respect to Proskauer's partial affirmative defense of after acquired evidence, the jury found Benson misrepresented the reason she left her prior employer on Proskauer's employment application, but said misconduct was not sufficiently severe that Proskauer would have discharged her on that basis had it been aware of the misrepresentation.

7. *Proskauer promptly alerts the trial court of the inconsistent verdicts.*

As soon as the jury was polled and sent home to return the next day, Proskauer alerted the trial court of the discrepancy between the jury's responses to questions 1 and 9. The trial court observed that questions 1 and 9 were different in that question 1 used the term "woman" while question 9 referred to "sexual harassment." The trial court stated, "clearly, [the jury] found that she was sexually harassed." Proskauer's counsel responded, "[o]n what grounds, Your Honor?" The trial court then stated the ambiguous verdicts "may be the basis for a motion for new trial or other post trial motion."

8. *Punitive damages phase.*

In the punitive damages phase of the trial, the jury returned a verdict awarding Benson zero damages.

9. *Entry of judgment.*

On May 27, 2009, the trial court entered judgment on the special verdicts, awarding Benson $200,000 in damages. The judgment also provided for Benson to recover "attorney fees pursuant to statute per noticed motion in the amount of $____," as well as prejudgment interest on past economic damages.

10. *Postjudgment motions and orders.*

Proskauer filed a motion for JNOV, arguing the verdict on Benson's failure to prevent harassment claim (third cause of action) could not stand because the jury could not legally find for Benson on that claim once it had determined that no hostile environment harassment had occurred (first cause of action).

Proskauer also filed a motion for new trial, contending, inter alia, the jury's verdicts on the hostile environment claim and the failure to prevent harassment claim were inconsistent and against law.

On July 27, 2009, the trial court heard and denied the post-trial motions. With respect to the motion for JNOV, it ruled the "special verdict reveals that the jury found evidence of harassment. In *Trujillo* [*v. North County Transit Dist.* (1998) 63 Cal.App.4th 280 (*Trujillo*)], the jury found that while the employer violated Section 12940 (failure of employer to take reasonable steps necessary to prevent discrimination and harassment from occurring), it did not find that there was any kind of harassment. The *Trujillo* decision held that the jury's special verdict was too inconsistent to be enforced. . . . *In Trujillo, the jury found no underlying misconduct, whereas the instant jury found that misconduct existed.*" (Italics added.)

The trial court likewise denied the motion for new trial, finding "substantial evidence supports the verdict."

11. *Appeal.*

On August 24, 2009, Proskauer filed a timely notice of appeal from the judgment and from the order denying its motion for JNOV.

12. *Attorney fees.*

As indicated, the judgment included a provision for statutory attorney fees to Benson, to be sought pursuant to noticed motion. Benson thereafter filed a motion for attorney fees. On August 25, 2009, the trial court awarded Benson attorney fees in the sum of $305,538.40.

On September 17, 2009, Proskauer filed a separate notice of appeal from that postjudgment order. The instant notice of appeal, filed August 24, 2009, appeal does not encompass the August 25, 2009 attorney fee award.

CONTENTIONS

Proskauer contends: a claim of failure to prevent harassment is a derivative claim that cannot succeed absent a finding that plaintiff was subjected to harassment in violation of the FEHA; the jury's determination that Benson had not been harassed because she is a woman made it legally impossible for Benson to prevail on her claim of failure to prevent sexual harassment; even assuming the trial court did not err in denying the motion for JNOV, it erred in denying the motion for new trial because the jury returned inconsistent hostile environment harassment and failure to prevent harassment verdicts.

DISCUSSION

1. *General principles.*

a. *Special verdicts.*

A "`special verdict's correctness must be analyzed as a matter of law.' [Citations.] Other principles governing review of a claim of inconsistency in a verdict depend on the type of verdict rendered. When a special verdict is involved as here, a reviewing court does not imply findings in favor of the prevailing party. [Citations.] This rule stems from the nature of a special verdict and its `"recognized pitfalls,"' namely, that it requires the jury to resolve all of the controverted issues in the case, unlike a general verdict which merely implies findings on all issues in one party's favor. [Citations.] Under these circumstances, `"`[t]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings . . . .'"' [Citations.]" (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678.)

b. *Inconsistent verdicts.*

A verdict "`should be interpreted so as to uphold it and to give it the effect intended by the jury, as well as one consistent with the law and the evidence.'" (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1223.) Verdicts "are deemed inconsistent *when they are `beyond possibility of reconciliation under any possible application of the evidence and instructions.*' [Citation.] `If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them.' [Citation.] Where the jury's findings are so inconsistent that they are incapable of being reconciled and it is impossible to tell how a material issue is determined, the decision is `"against law"' within the meaning of Code of Civil Procedure section 657. [Citation.] `"*The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence....*" [Citations.] An inconsistent verdict may arise from an inconsistency between or among answers within a special verdict [citation] or irreconcilable findings. [Citation.] Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law. [Citation.] *The appellate court is not permitted to choose between inconsistent answers.*' [Citation.]" (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 716, italics added.)

c. *Dealing with an inconsistent verdict at the trial court level.*

In the instant case, the trial court was not without a remedy. "`[I]n dealing with a potentially defective special verdict[,] [i]f the jury has not been discharged, the trial judge should request the jury to correct or clarify a potentially ambiguous or inconsistent verdict. [Citations.]" (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 91.)

Further, Code of Civil Procedure section 619, enacted in 1872, states: "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out."

2. *Pertinent statutory provisions.*

The first cause of action against Proskauer, alleging *sexual harassment based on a hostile work environment,* was based on section 12940, subdivision (j)(1). That portion of the statute makes it an unlawful employment practice "[f]or an employer . . . *because of . . . sex* . . . to harass an employee . . . . Harassment of an employee, . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. . . . . An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment." (§ 12940, subd. (j)(1), italics added.)

For purposes of subdivision (j)(1), "`harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (§ 12940, subd. (j)(4)(C).)

The third cause of action pled Proskauer *failed to prevent discrimination and harassment,* pursuant to section 12940, subdivision (k). This portion of the statute makes it an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

3. *Proskauer is not entitled to JNOV on the third cause of action, relating to its alleged failure to prevent harassment.*

Proskauer contends that in view of the jury's finding on the first cause of action that Benson was *not* subjected to a hostile work environment because she was a woman (§ 12940, subd. (j)(1)), it is entitled to JNOV on the third cause of action, wherein Benson pled Proskauer failed to prevent discrimination and harassment from occurring. Proskauer reasons the impact of the jury's finding on the hostile environment claim that Benson had *not* been harassed because she was a woman, is that Proskauer cannot be held liable for failing to prevent harassment which the jury concluded had not occurred. In other words, Benson's claim that Proskauer is liable for failing to prevent harassment is meritless because the foundational predicate of liability for *failure to prevent* harassment is that the harassment *actually* occurred.

Proskauer's JNOV argument relies primarily on *Trujillo, supra,* 63 Cal.App.4th 280. However, as we shall explain, that decision is clearly distinguishable. In *Trujillo,* an action for employment discrimination and harassment, the jury found by a special verdict that the defendants (the employer, the employer's development board and the plaintiffs' supervisor) "had committed no discriminatory, racially harassing, or retaliatory conduct, nor had they inflicted severe emotional distress on plaintiffs, nor slandered plaintiff Rendon. However, the jury found defendants had violated section 12940, subdivision (i) [currently subdivision (k)] by failing to take all reasonable steps necessary to prevent discrimination and harassment from occurring," and awarded damages to the plaintiffs. (*Trujillo, supra,* 63 Cal.App.4th at p. 283.) The lower court granted a motion for JNOV on the basis that the only finding of liability, i.e., failure to prevent employment discrimination and harassment, "was not backed up by any related finding that these plaintiffs had actually suffered any such employment discrimination and/or harassment." (*Id.* at p. 282.)

The reviewing court affirmed the grant of JNOV, stating "we are satisfied that the jury's special verdict is too inconsistent to be enforced. [Citation.] The trial court correctly interpreted the verdict as not including an essential foundational predicate of harassment or discrimination, as required by the statutory scheme to support a finding of violation of . . . section 12940, subdivision [(k)]," for failure to prevent harassment or discrimination. (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

Trujillo is plainly distinguishable because there, the jury found no discriminatory or harassing conduct had occurred. (*Trujillo, supra,* 63 Cal.App.4th at p. 283.) Consequently, the defendants therein could not be held liable for failing to prevent discrimination and harassment from occurring.

Here, although the jury found on question 1 (hostile work environment harassment) that Benson was *not* subjected to unwarranted harassing conduct because she was a woman, it found to the contrary on question 9 (employer's duty to prevent discrimination and harassment), wherein it determined Benson was subjected to sexual harassment. Based on the latter finding, the jury held Proskauer liable for failing to prevent harassment. Given the jury's determination with respect to question 9 that Benson was subjected to sexual harassment, Proskauer is not entitled to JNOV on Benson's cause of action for failure to prevent discrimination and harassment. (§ 12940, subd. (k).)

4. *Proskauer is entitled to a new trial on the first and third causes of action.*

We conclude that although Proskauer is not entitled to a JNOV on the failure to prevent harassment claim (§ 12940, subd. (k)), in view of the inconsistency between the jury's findings on question 1 and question 9, Proskauer is entitled to a new trial on both the hostile environment (§ 12940, subd. (j)(1) and failure to prevent harassment (12940, subd. (k))

claims. The jury's inconsistent findings on questions 1 and 9 cannot be rationally reconciled.

Here, the jury resolved the first cause of action, sexual harassment based on a hostile and abusive working environment, in favor of Proskauer. (§ 12940, subd. (j)(1).) Pursuant to section 12940, subdivision (j)(1), an employer is prohibited from harassing an employee "because of . . . sex," and harassment of an employee by a co-worker is "unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (*Ibid.*)

Benson's theory of the case was that she suffered sexual harassment based on a hostile work environment. Benson claimed she was repeatedly subjected to sexual harassment by Haynes, that she repeatedly notified White, the office manager, so that Proskauer was aware of the harassment, and yet Proskauer did nothing. However, on question 1, the jury expressly rejected Benson's claim of a hostile work environment — it found Benson was *not* subjected to sexual harassment. (§ 12940, subd. (j)(1)[7]

In contrast, on question 9, on the claim of failure to prevent harassment (§ 12940, subd. (k)), the jury found Benson was subjected to sexual harassment, and further found, on question 11, that Proskauer failed to take all reasonable steps necessary to prevent harassment from occurring.

The inconsistency between the jury's findings on question 1 and question 9 requires retrial of both the section 12940, subdivision (j) (sexual harassment/hostile work environment) and section 12940, subdivision (k) (failure to prevent harassment) claims.

a. *Benson's attempt to reconcile the jury's findings is unavailing.*

Benson attempts to reconcile the jury's findings as follows. Benson asserts that on question 1, the jury found "PROSKAUER ROSE, LLP did not harass Plaintiff," while on question 9 it found Proskauer liable for failing to investigate and prevent Haynes's ongoing sexual harassment of Benson.

The special verdicts speak for themselves. On question 1, the jury did not find Proskauer, the entity, did not harass Benson. Rather, on question 1, it determined Benson did not suffer sexual harassment. That finding is at odds with the finding on question 9 that Benson was subjected to sexual harassment.

b. *No merit to Benson's contention Proskauer is bound by the verdicts.*

Benson contends Proskauer cannot now seek to impeach the verdict that it embraced at trial. Benson asserts Proskauer "*did not ask the trial court to have the jury correct or clarify the verdict before it was discharged.* It chose, instead, as a deliberate trial tactic, to accept the benefit of the verdict and the jury's findings for use in arguing the punitive damages phase of the trial." (Italics added.) Benson quotes from Proskauer's argument to the jury in the punitive damages phase: "We take your findings of liability and the inadequacy of the steps that we took to prevent further harassment seriously and solemnly, and I urge you to conclude that no further punishment is required."

Benson's waiver argument is unsupported by the record. As set forth *ante,* in section 7 of the Factual and Procedural Background, Proskauer promptly sought clarification of the verdict, before the punitive damages phase of the trial. Leaving aside whether the defective verdict is even waivable, on this record there was no waiver by Proskauer.

5. *Scope of remand; only a limited new trial is required with respect to Proskauer's liability on the first and third causes of action pertaining to the hostile environment and failure to prevent sexual harassment claims.*

a. *General principles.*

A new trial may be granted "on all or part of the issues." (Code Civ. Proc., § 657.) It is "a firmly established principle of law that `[t]he appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial.' [Citation.] The underlying rationale is easy to discern: to require a complete retrial when an issue could be separately tried without prejudice to the litigants would unnecessarily add to the burden of already overcrowded court calendars and could be unduly harsh on the parties. [Citation.]" (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776.)

b. *No need to retry second and fourth causes of action.*

On the second cause of action, disparate treatment (§ 12940, subd. (a)), the jury determined Benson's gender was *not* a motivating reason for Proskauer's decision to discharge her. On the fourth cause of action, retaliation (§ 12940, subd. (h)), the jury determined Benson's opposition to sex discrimination or sexual harassment was *not* a motivating reason for Proskauer's decision to discharge her. Thus, with its verdicts on the second and fourth causes of action, the jury rejected Benson's claim she had been wrongfully discharged and it validated Proskauer's decision to terminate Benson for workplace violence.

The inconsistency between the verdicts on the first and third causes of action, relating to Benson's claims of sexual harassment, has no bearing on the verdicts on the second and

fourth causes of action, relating to Benson's termination. Therefore, there is no need to disturb the latter two verdicts.[8]

c. *No need to retry issue of punitive damages.*

The inconsistency between the verdicts on the first and third causes of action, relating to Benson's sexual harassment claims, also has no bearing on the issue of punitive damages.

As indicated, the jury already has determined one or more officers, directors or managing agents of Proskauer, while acting on behalf of Proskauer, engaged in conduct constituting oppression, fraud or malice. Despite that finding, in the punitive damages phase of the trial, the jury exercised its prerogative in refusing to award any punitive damages.[9]

Irrespective of how the jury resolves the sexual harassment claims on remand, it is unnecessary to relitigate the jury's determination that Proskauer's conduct, although it amounted to oppression, fraud or malice, did not warrant the imposition of punitive damages.

d. *Remand for partial retrial of first and third causes of action, on the issue of Proskauer's liability on the hostile environment and failure to prevent harassment claims; if Benson prevails she is entitled to noneconomic damages of $60,000.*

In view of the above, the scope of the remand is extremely limited. The remand is limited to a retrial of Proskauer's liability on Benson's claims of hostile environment sexual harassment and failure to prevent sexual harassment. If Benson prevails on either or both of those claims, she is entitled to recover noneconomic damages of $60,000, as determined by the first jury. Benson cannot recover economic damages on her sexual harassment claims because the jury determined she was properly discharged by Proskauer.

As reflected in Benson's papers in opposition to the motion for JNOV and for new trial, Benson's counsel "argued to the jury that they should award $70,000 in back pay and approximately $20,000 for 2-3 years . . . for future wage loss." The jury accepted Benson's figures with respect to her claim of economic damages. In the special verdict, the jury awarded Benson $200,000 on her claim that Proskauer failed to prevent discrimination and harassment. The jury apportioned the $200,000 as follows: $70,000 for past economic loss and lost earnings; $70,000 for future economic loss, including lost earnings; $60,000 for past noneconomic loss, including mental suffering; and zero damages for future noneconomic loss, including mental suffering.

However, given the jury's findings Benson's termination was not retaliatory, and that Benson's gender was not a motivating reason for her termination, the jury credited Proskauer's position it properly discharged Benson for workplace violence. The jury's determination that Proskauer properly terminated Benson's employment precludes any recovery by Benson of economic damages for lost earnings. Therefore, if Benson prevails on remand on any of her sexual harassment claims, her recovery is limited to $60,000 in noneconomic damages which she suffered as a consequence of the alleged harassment.[10] Because Benson's noneconomic damages were fully and fairly litigated in the first trial, it is unnecessary on remand to relitigate the *amount* of her noneconomic damages.

In sum, if Benson prevails on remand on either or both of her sexual harassment claims, the trial court shall award her noneconomic damages of $60,000, "using the first jury's determination of [her noneconomic] damages in the earlier trial." (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 615 (*Stone*).)[11]

6. *The judgment's grant of attorney fees to Benson as the prevailing party must be vacated.*

As indicated, Proskauer filed a subsequent notice of appeal from the August 25, 2009 order awarding $305,538.40 in attorney fees to Benson. The August 25, 2009 order is not within the scope of the instant appeal from the judgment. However, the May 27, 2009 judgment contains a provision awarding attorney fees to Benson as the prevailing party, with the amount to be determined at a later date. Therefore, the instant appeal from the judgment embraces the provision in the judgment awarding attorney fees to Benson in a sum to be determined later. Accordingly, we have jurisdiction to address the issue of Benson's entitlement to attorney fees.

The resolution of this appeal eliminates Benson's status as prevailing party. Because we uphold the judgment insofar as it found for Proskauer on the disparate treatment and retaliation claims (second and fourth causes of action), and because the hostile environment sexual harassment and failure to prevent sexual harassment claims (first and third causes of action) must be retried, at this juncture Benson has not prevailed on any of her claims. At this stage, there is no basis for an award of attorney fees to Benson. Therefore, the provision in the judgment awarding statutory attorney fees to Benson must be vacated.

DISPOSITION

The judgment is affirmed insofar as it found for Proskauer on Benson's second and fourth causes of action. The provision in the judgment awarding statutory attorney fees to

Benson is vacated because the issue of attorney fees is premature. The judgment is reversed and the matter is remanded for a retrial solely as to Proskauer's liability on Benson's hostile environment and failure to prevent sexual harassment claims (first and third causes of action). In the event Benson prevails on either or both of these sexual harassment claims, the trial court shall award Benson noneconomic damages in the sum of $60,000. The parties shall bear their respective costs on appeal.

We concur:

CROSKEY, J.

KITCHING, J.

Footnotes

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1. The notice of appeal also specifies the order denying Proskauer's motion for new trial. Unlike an order granting a new trial (Code Civ. Proc., § 904.1, subd. (a)(4)), an order denying a new trial is not appealable. However, the denial of a motion for new trial is reviewable on the appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

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2. Given the inconsistent verdicts returned by the jury, we are unable to set forth the evidence in the light most favorable to the judgment. Instead, we summarize the respective positions of the parties.

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3. All further statutory references are to the Government Code, unless otherwise specified.

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4. The complaint also included claims against Haynes for assault, battery and sexual assault, as well as common law claims against Proskauer. However, before the case went to the jury, Benson dismissed all her claims against Haynes and her other claims against Proskauer. Thus, only the four FEHA claims specified above went to the jury.

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5. Given the jury's findings Benson's termination was not retaliatory, and that Benson's gender was not a motivating reason for her termination, the jury credited Proskauer's position it properly discharged Benson for workplace violence. We note that determination by the jury cannot be reconciled with the jury's award of damages on the failure to prevent harassment claim for past and future lost earnings.

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6. This finding required the issue of punitive damages to be addressed in the subsequent phase of the trial. In the later phase, the jury declined to impose any punitive damages.

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7. Therefore, on the first cause of action, the jury did not reach the issue of whether Proskauer, its agents, or supervisors, knew or should have known of the harassing conduct (question 5) and whether they failed to take immediate and appropriate corrective action (question 6).

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8. The jury's determinations, insofar as they have been upheld on appeal, are binding. Therefore, on retrial Benson is bound by the jury's determination that on Proskauer's employment application, Benson misrepresented the reason she left her prior employer (question 30). Further, the jury's having determined Benson's termination was not retaliatory (question 15) and was not motivated by her gender (question 18), it is now established that Proskauer properly discharged Benson for workplace violence and that Proskauer's reason was not pretextual.

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9. A plaintiff is never entitled to punitive damages as a matter of right, not even "`[u]pon the clearest proof of malice in fact.'" (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801; accord *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928, 930.) A plaintiff, "`upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, ...'" (*Brewer, supra,* at p. 801; accord *Sumpter, supra,* at p. 936.)

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10. As stated in Proskauer's supplemental letter brief, Benson's lost wages and damages resulting from her termination "are attributable only to her discharge — found to be entirely lawful — not the alleged hostile workplace environment she claims to have suffered."

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11. In *Stone,* an invitee sued a restaurant's owner, as well as the commercial landlord, after she slipped on a wet floor and fractured her ankle. The jury returned a six-figure damage award, finding the restaurant 65 percent liable, the landlord 19 percent liable, and the plaintiff herself 16 percent responsible. (*Stone, supra,* 163 Cal.App.4th at pp. 611-612.) On appeal, *Stone* ordered a retrial to determine whether the landlord breached its duty to inspect the restaurant property. The remand was "for retrial of the restaurant's and [landlord's] liability only. . . . After the jury determines [landlord's] responsibility, if any, for [plaintiff's] injuries, the trial court shall recalculate her damage award using the first jury's determination of [plaintiff's] total damages in the earlier trial." (*Id.* at p. 615.)

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- PEOPLE v. PREASMYER
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- U.S. v. BRADLEY
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- TOO MUCH MEDIA v. HALE
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