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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| CAROLE M. ARBUCKLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CALIFORNIA BOARD OF CHIROPRACTIC EXAMINERS et al.,<br><br>Defendants and Appellants. | C066238<br><br>(Super. Ct. No. 03AS00948) |

In *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963 (*Arbuckle I*), our Supreme Court held that plaintiff Carole Arbuckle could pursue her whistleblower suit[1] against defendant State Board of Chiropractic Examiners (Board) and its former executive director, defendant Jeanine R. "Kim" Smith, despite adverse administrative findings by the State Personnel Board (SPB)'s executive officer and without first pursuing further administrative remedies. The Board and Smith (collectively the Board, except as indicated) now appeal from a judgment after a substantial jury verdict in favor of Arbuckle.

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[1] This case involves the California Whistleblower Protection Act. (Gov. Code, § 8547 et seq., "WPA".)

The Board's principal contention is that Arbuckle was barred from prosecuting this civil suit by the doctrines of res judicata and collateral estoppel, a claim that unabashedly disregards the holding of *Arbuckle I*. The Board also purports to challenge the sufficiency of the evidence of liability and damages, but these contentions are both forfeited and lack merit. Accordingly, we shall affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

We begin with a summary of *Arbuckle I* to provide context. Then we describe the trial evidence, the jury argument and verdict, and posttrial proceedings.

*Arbuckle I*

We quote liberally from *Arbuckle I*:

> "[Arbuckle] alleged the following.
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> "She was hired as an office assistant by the [Board] and was eventually promoted to management services technician. At the [Board], which issues licenses to chiropractors practicing in the state, Arbuckle's duties related to 'cashiering and license renewal,' although she was also involved in issuing citations for unlicensed practice. On May 11, 2001, she received a telephonic inquiry from an outside caller concerning the license status of Dr. Sharon Ufberg, the chairperson of the [Board]. She verified for this caller that [Ufberg's] license had expired several months earlier. Fifteen minutes later, [Ufberg] contacted her, saying she forgot to pay her renewal fee. Later that day, [Ufberg] paid the fee. . . . During the next few months, [Arbuckle] issued numerous citations to other individuals for practicing under expired licenses, but when she inquired several times about issuing a citation to [Ufberg], [Smith], the executive director of the [Board], told her not to issue the citation.
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> "In the wake of these events, Arbuckle confronted a stressful work environment, including numerous indignities, disputes, and acts of favoritism. Some of these incidents were minor in themselves, but together they constituted a breakdown of trust and cooperation in the workplace, and in particular a breakdown in the relationship between her and [Smith]. Among other things, [Board] managers changed Arbuckle's duties, denied her requests for a modified work schedule and a light-duty assignment, cancelled her alternative work schedule, and transferred her to a different unit." (*Arbuckle I*, *supra*, 45 Cal.4th at pp. 968-969.)

> "On July 23, 2002, Arbuckle filed a complaint with the [SPB], alleging whistleblower retaliation in violation of the [WPA]. . . .
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> "On January 24, 2003, the executive officer of the [SPB] issued a 16-page 'Notice of Findings,' recommending dismissal of Arbuckle's complaint. . . .
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> "Under the regulations of the [SPB] that were then in effect [citation], a complaining employee who received adverse findings from the [SPB]'s executive officer could file a petition for a hearing before the board. . . .
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> "Arbuckle did not exercise this right. Instead, on February 21, 2003, she filed a damages action . . . against the [Board and Smith], claiming whistleblower retaliation in violation of [the WPA]. Arbuckle included a cause of action under Labor Code section 1102.5, which prohibits retaliation against an employee who reports a violation of state or federal law[.] . . . Defendants moved for summary judgment . . . arguing that Arbuckle had failed to exhaust her administrative and judicial remedies. The trial court denied the motion, but the Court of Appeal issued an alternative writ and stayed the proceedings in the trial court.
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> "The Court of Appeal held that Arbuckle had failed to exhaust both administrative and judicial remedies. The court stated that exhaustion of administrative and judicial remedies in this case required more than merely filing a complaint with the [SPB] and receiving the findings of its executive officer; Arbuckle also needed to complete the administrative process by petitioning the [SPB] for a hearing before an ALJ, and if this hearing request was denied, she then needed to seek a writ of mandate from the courts in an effort to have the [SPB]'s findings set aside. The Court of Appeal concluded that Arbuckle, by failing to take these steps, had in effect conceded her right to judicial review of the [SPB] findings, and the findings therefore had the same legal significance as a final judgment of a reviewing court. On that basis, the Court of Appeal held that the executive officer's specific finding that no retaliation occurred was binding in Arbuckle's later civil action[.]" (*Arbuckle I*, *supra*, 45 Cal.4th at pp. 969-971.)

The Supreme Court concluded Arbuckle did not need to proceed administratively beyond receiving the findings of the SPB's executive officer before filing her civil action. (*Arbuckle I*, *supra*, 45 Cal.4th at pp. 972-974.) The Supreme Court also held that because those findings would not collaterally estop Arbuckle's WPA claim, she had no need to seek a writ of mandate to overturn them. (*Arbuckle I*, *supra*, at pp. 974-978.)

*Facts at Trial*

Arbuckle's trial evidence was broadly consistent with the alleged facts as set out in *Arbuckle I*, quoted above. We describe Arbuckle's testimony, annotated with corroborative testimony, and the testimony of her damages expert. Then we describe some of the Board's evidence, mindful of the proper standard of review.[2]

*Arbuckle's Case*

Arbuckle testified she began working for the Board on February 26, 1998, after recovering from alcoholism and being unemployed and on disability since 1991, due to an automobile accident. She was hired through a disability program, and started as "an office assistant/receptionist." The office had not issued any licenses for six months, so Arbuckle fielded irate calls from chiropractors about the backlog. After her first month, she received the highest rating of "outstanding," and received the same rating the following month. After she became a regular employee, her October 26, 1998 probation report rated her as "outstanding" except in the area of administrative ability, which was not part of her duties, where she was rated as "standard," the next highest rating. She received raises in September of 1998 and 1999. A December 1999 evaluation rated her "excellent" in most categories and states she "worked hard to contribute" and "was promoted to cashiering duties and has done an excellent job." Arbuckle received a number of kind notes from chiropractors and others, thanking her for her work.[3]

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[2] "Under the often-enunciated rule, which is so often forgotten in the enthusiasm of advocacy, we look to the evidence accepted by the [trier of fact]." (*Findleton* v. *Taylor* (1962) 208 Cal.App.2d 651, 652; see *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [failure to state facts fairly forfeits evidentiary claims].) In its enthusiasm, the Board forgets this rule.

[3] Louise Phillips, who worked at the Board for 14 years, testified Arbuckle was an "exceptional employee" who helped others and was a fast learner. Lisa Rowell, who had interviewed Arbuckle, found her "Very professional," capable of handling "pretty ugly calls," and "very enthusiastic[.]"

On March 29, 2000, Arbuckle was promoted to "office technician," shortly before Smith became the executive director. On March 8, 2001, Smith approved another raise for Arbuckle, who by then was performing continuing education audits. Because this was "mindless" work with no prospect for advancement, Arbuckle took a promotional exam to become a "personnel specialist," and by February 2001, she had applied to become a "staff services analyst" (SSA) and had interviewed with other state agencies. Smith arranged for Arbuckle to be given "citation desk" duties in addition to her cashiering duties, under Cathy Hayes, an enforcement employee. Arbuckle's new duties included issuing citations for chiropractors who failed to renew their licenses. A week later, Hayes told Arbuckle she would become an SSA, and that "they could put this promotion in place immediately." Because Arbuckle was due for a merit salary raise in April, she asked for a delay on the promotion, to maximize her salary, which Hayes agreed to.

On May 11, 2001, Arbuckle received a call from a person identifying herself as a patient of the Board chair, Ufberg. Arbuckle confirmed that Ufberg's "license became invalid at midnight December 31st of 2000, and she went into forfeiture status on March 3rd of 2001." Arbuckle gave the caller her standard advice, that if she had received disability payments--which the caller had--she might have to pay them back, and advised the caller to contact Ufberg.

Arbuckle immediately told Smith about Ufberg's forfeited license, and the fact that a patient had called asking about it. Smith laughed, and Arbuckle returned to her desk. Then Ufberg called Arbuckle, "extremely, extremely upset," claiming she had paid her renewal fee and, "You lost my renewal.'" Ufberg admitted she had been practicing during the forfeiture period. Arbuckle told Ufberg to fax her canceled check. About 20 minutes later, Ufberg called, admitted she had not renewed, and asked how to cure the problem. Arbuckle told her to fill out a "restoration" declaration form, which Ufberg did that day, driving to Sacramento from the Bay Area.

Later, while Ufberg was in Smith's office, Arbuckle brought the form to her. When Arbuckle reminded Ufberg that she had told Arbuckle she had been practicing and could not bill for that work, Ufberg laughed and said, "Oh, it's no problem. I'll bill under Elliot"--Ufberg's husband and copractitioner. Arbuckle replied that that would be improper, Smith said, "Don't worry about it, Sharon[,]" and then Arbuckle left the room to renew Ufberg's license. After Ufberg left, Arbuckle noticed Ufberg had marked a box to declare that she had *not* practiced without a license. When Arbuckle reported this to Smith, Smith thought "it was just kind of funny, and she said, 'Don't worry about it, Carole.'"

Arbuckle was also concerned because at the April 2001 Board meeting, only four Board members--including Ufberg--were present, and Arbuckle thought that if Ufberg had been unlicensed at that time, no valid quorum existed.

Arbuckle did not receive the SSA promotion on June 30, 2001. On July 16, 2001, Arbuckle asked Hayes whether there would be any disciplinary action against Ufberg, and Hayes said, "Oh, we can't do that; she's board chairman." Two days later, Smith announced that the SSA position had not been approved. But Lavella Matthews received an SSA promotion that September, and Arbuckle testified--without objection--that "there was an SSA vacancy in June of 2001."[4]

On June 6, 2001, Arbuckle called the Governor's office to report that one of his appointees had served on the Board while not licensed. She called again on September 11, 2001, and gave more details. On September 28, 2001, when Arbuckle asked Smith

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[4] On cross-examination, Arbuckle testified she believed she first took an SSA eligibility test in October 2002. On appeal, the Board views this as a *concession* by Arbuckle that she *could not have been given* an SSA promotion in 2001. However, this views the trial record in the light most favorable to the Board, and ignores the evidence that an SSA position was promised to Arbuckle. (See fn. 2.)

whether Ufberg would be disciplined, Smith said, "Carole, let it lay." After that, Arbuckle again called the Governor's office.

Arbuckle had been handling weekly deposits for over a year, in amounts between $25,000 and $125,000. In October 2001, she made a $5 error when a chiropractor sent in a duplicate check, her first error with deposits. Smith became "irate" and "extremely upset" and publicly rebuked Arbuckle. Smith thereafter had Yvonne Van Dyck, a retired annuitant and friend of Smith's, review Arbuckle's deposits.[5] Smith also became distant and "more harsh" with Arbuckle.

On her next review by Smith, dated October 16, 2001, Arbuckle received only two "outstanding" ratings, and felt the "standard" rating for "relationships with people" would make it hard to find a new job. An addendum acknowledged that Arbuckle had taken on new citation duties, but faulted her attention to detail, specifying "typographical errors and incorrect information or data pertaining to citations and licensing functions." But there had never been any problems relating to citations or licensing, apart from the Ufberg matter.

Near the end of October 2001, when Arbuckle returned to work on a Monday after being off Friday, she found the prior week's deposit had not been locked up. Although

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[5] Rowell testified that, given the amounts involved, a $5 deposit error was trivial. Rowell had heard Smith tell Arbuckle not to worry about Ufberg's license, and heard Arbuckle question whether Ufberg practiced during forfeiture and should be cited. Smith then became "[r]ude and demeaning" toward Arbuckle, and told Rowell not to speak with Arbuckle, after which people in the office "stayed away from [Arbuckle,]" and it became a "very, very uncomfortable and a very unprofessional environment."

Phillips testified that after the Ufberg issue, although Arbuckle "did an excellent job in cashiering," Smith claimed she was not doing her job. Phillips heard Smith frequently calling Arbuckle out in a "not very nice" voice, and yelling at her in a "demeaning" way, which Smith had not done before.

Arbuckle was not responsible for this error, Smith blamed her for it, wrongly claiming it had been Arbuckle's job to ensure others followed procedures.[6]

Once Smith reprimanded Arbuckle "in front of everyone" for sending a letter, but when Van Dyck stepped forward to remind Smith that Van Dyck had sent the letter, not Arbuckle, and that Smith had personally approved the letter, Smith did not apologize. Arbuckle testified Rowell, her lead worker, changed her demeanor toward Arbuckle; "it was like all of a sudden in the office I had leprosy."

On October 25, 2001, Arbuckle sent an e-mail to the Employment Development Department (her second), asking whether Ufberg had billed during her forfeiture, but received no reply. When she reported this to Smith, Smith "for the second time" said, "Don't worry about it, Carole. It's not important."

In November 2001, Arbuckle's desk had been "gone through" and her documents about Ufberg were missing. This caused Arbuckle to lose concentration and become nervous.

On December 4, 2001, Ufberg came into the office, but when Arbuckle greeted her, Smith ran up and told Ufberg she did not have to speak to Arbuckle.

On December 17, 2001, Arbuckle saw Dr. Concepcion, because she had been having severe headaches. He recommended a new telephone headset for Arbuckle, but Smith denied Arbuckle's request for this accommodation.

On December 18, 2001, when Arbuckle was speaking to Jana Tuton, the deputy attorney general who worked with the Board on enforcement actions, Smith ran up and yelled, "'Are you on that citation issue again, Carole?'" After that, Tuton avoided Arbuckle; "she'd go around the other way."

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[6] Rowell testified the receptionist was responsible for securing the weekly deposit checks in Arbuckle's absence. Rebecca Rust testified that Smith blamed Arbuckle at one meeting for something the receptionist had done.

At one point a chiropractor called the office, irate that he had not received his license, and when Arbuckle found that there had been a mistake by another employee, she told the caller to fax a change of address form to her. Smith publicly yelled at Arbuckle for doing so, but later told her she had acted correctly. Yet Smith raised the incident repeatedly over the next several days and finally told Arbuckle she could not handle calls from chiropractors, which comprised most of her work.

On Friday, March 15, 2002, Smith called Arbuckle into a meeting and accused her of contacting the union, which Arbuckle denied. After Phillips was called in, Smith broke down crying and told them nobody could contact the union without checking with her. As the union shop steward, Arbuckle believed this order was invalid.

On Monday, March 18, 2002, Arbuckle sent Smith an e-mail summarizing Friday's meeting, and asking Smith to confirm her directives limiting union activities. Smith's March 21, 2002 reply e-mail was evasive, and claimed she had not spoken to Arbuckle in her capacity as shop steward, because Smith thought Arbuckle had "relinquished" that position.[7]

On April 11, 2002, Smith sent Arbuckle an e-mail stating they had to meet "to discuss an incident" the prior week regarding the "birthday club"--a celebratory pool in which Arbuckle did not wish to participate--"and other issues." But on Friday April 12, 2002, Smith reprimanded Arbuckle for not working the front desk, even though Matthews was supposed to work that desk, then Smith denied giving such an order. This was the last straw: Arbuckle went out on stress leave. Arbuckle saw Dr. Concepcion again, and did not return to work until May 31, 2002. While on leave, she completed

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[7] Phillips testified Smith became very upset after blaming Arbuckle for contacting the union when, in fact, *Phillips* had contacted the union, not Arbuckle. Phillips also testified Smith demanded that no one contact the union without checking with Smith first. Kim Ott, a Board witness, confirmed that Smith was upset and cried during the March 15, 2002 meeting.

probation, became a "permanent" "management services technician," or MST, and received a five percent raise.

On May 8, 2002, Hayes notified Arbuckle that when she returned to work, she would work on continuing education, not resume her cashiering duties, and would be supervised by Hayes. On Saturday, May 10, 2002, Arbuckle sent Hayes a confirming e-mail. Later that day Arbuckle received notes from Smith advising of a "staffing reorganization[,]" that her "modified work schedule" was unavailable, that she did not need to report for work Monday as planned, and that she should liaise "medical-related" issues with Hayes.

On May 8, 2002, Arbuckle drank alcohol, and called her therapist, Dr. Marvin Todd, whom she began seeing after April 15, 2002, when she had been called at home and instructed to turn in her keycard.[8]

When Arbuckle returned to work on May 31, 2002, she could not enter until Smith and another employee let her in, causing her to arrive "One minute after seven." Later, Smith sent Arbuckle an e-mail stating she had not arrived until 7:15. Smith also said she would take away Arbuckle's flexible work schedule, but Arbuckle reminded her that this required 30 days notice.

On June 4, 2002, Hayes sent Arbuckle an email advising her of a meeting set for June 6, 2002, to discuss the "birthday club" problems referenced in Smith's April 11, 2002 e-mail, and shortly thereafter Hayes walked by Arbuckle's desk and said, "'I'll get you.'" Arbuckle worked the next day, June 5, 2002, but never returned thereafter, "Because I was fearful now that they were going to write me up. They wanted me out of

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[8] Todd, a psychotherapist with 30 years of experience, testified he treated Arbuckle for "acute stress disorder" caused by her working conditions, which gave her feelings of "devastation." He saw her 200 times over eight years, at $110 per hour. Arbuckle had overcome an abusive marriage, an alcoholic husband, and alcoholism, and her career was critical for her well-being.

the office[.]"[9] On June 12, 2002, Hayes terminated Arbuckle's alternate work schedule, effective July 15, 2002.

On June 17, 2002, Arbuckle filed her SPB complaint, and on July 23, 2002, amended it to include the Ufberg issue.[10]

Arbuckle sent a memo to Board member Jeffrey Steinhardt--dated April 26, 2002, but apparently not sent until after June 24, 2002--detailing her view of a cover-up by Smith and Hayes of the Ufberg matter, matters she had discussed with Steinhardt some unstated time previously.[11]

On June 26, 2002, Arbuckle sent a letter to the former Bureau of State Audits (now the California State Auditor's Office) detailing the Ufberg issue and Arbuckle's subsequent ill treatment, as well as other alleged Board problems. On July 8, 2002, Arbuckle sent a memorandum to State Senator Liz Figueroa, reporting Ufberg's activity, because Figueroa was the chair of a legislative committee with Board oversight.

Arbuckle's workers compensation stress claim was approved on July 17, 2003, whereupon leave credits she had used were reinstated, and she used those leave credits until she found another state job on December 3, 2003.

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[9] The Board's trial theory was that the meeting was not about the "birthday club" as such, but an incident of alleged "workplace violence" by Arbuckle against Ott, to whom Arbuckle allegedly forcefully complained about participating in the April "birthday club," consisting of Arbuckle and Smith. The Board does not explain how a verbal complaint, even if forceful, is "workplace violence," and the jury could rationally find this was a feeble and bogus effort to discredit Arbuckle.

[10] The trial court admonished the jury that SPB matters were not relevant except for a stipulation that the SPB found against Arbuckle on January 24, 2003, and this fact was relevant only to Todd's testimony about treating Arbuckle.

[11] Steinhardt testified he served on the Board for two terms, between 1994 and 2003, and had been reappointed to a fresh term as of the time of trial. He had breakfast with Ufberg and asked her if she had been unlicensed *as he had been told* by Arbuckle, but Ufberg "was very aggressive, argumentative and really did not respond." Ufberg and Steinhardt were the only Board members, due to a lack of appointments, and the Board lacked a quorum for a year.

Arbuckle testified that had she obtained the SSA promotion, she would have earned about $4,000 per month, approximately $1,000 more than her Board salary of $2,905. She believed that because she had advanced quickly, she would have continued to rise in rank until she retired at the age of 62, at the title of staff services manager, earning between $5,614 and $6,190. She returned to work at another agency at the salary of about $2,530-2,536, and after a year transferred to a third agency, with possibly a five percent increase. In 2006 she again changed agencies, lost the increase, and in April 2006 was making $2,955, about the same she had been making when she was at the Board. By the time of trial she was "capped out" as a personnel specialist, with a monthly salary of $4,067.

Economist John Hancock testified--without objection--that he calculated Arbuckle's economic damages two ways: 1) assuming she became a personnel specialist in February 2001 with another agency; and 2) assuming she received an SSA promotion at the Board. If she worked until age 66, she would have lost $528,501 under the first option and $592,042 under the second, reduced to present value; if she worked until 63, the figures were $382,120 and $469,771, respectively. Hancock's calculations were based on Arbuckle's information.

*The Board's Case*

We describe some of the evidence tendered on behalf of the Board, but we presume the jury discredited evidence unfavorable to Arbuckle. (See fn. 2, *ante*.)

Smith testified she had sought approval from the Department of Finance to add an SSA position, and considered Arbuckle a "competitive candidate," but Arbuckle was not promised the position, and the new SSA position was denied on October 11, 2001. Arbuckle was promoted to MST in October 2001, and Smith's report gave Arbuckle a "standard" rating for "relationships with people" because she was "aggressive" with employees and there had been complaints from chiropractors, although Smith conceded

some chiropractors were rude, vulgar, or abusive; in any event, Arbuckle did not protest the rating.

Either Hayes or Smith had discretion to cite a chiropractor.

Smith denied that Ufberg said she had been treating patients during the period of license forfeiture, or that she said she would bill through her husband's license.

Smith conceded she asked Phillips and Arbuckle why they did not speak to her first, during a period of "pretty tense" union issues, and conceded she began to cry, but denied making anti-union statements.

Smith approved Arbuckle's "permanent" status as an MST as of April 30, 2002, and approved a pay raise for Arbuckle in May 2002. After Arbuckle left on a second stress leave in June 2002, she was kept "on the books" of the Board until December 2003, when she obtained another job.

Smith testified the Board's legal counsel told her Ufberg's license forfeiture did not affect Ufberg's ability to sit on the Board, but Smith conceded she did not consult counsel until after Arbuckle filed her SPB complaint. Smith denied telling Arbuckle she was going to consult with counsel, but in a pretrial request for admissions, Smith stated she told Arbuckle not to issue a citation "'until [Smith] could consult with legal counsel regarding whether there were any issues created by the status of Dr. Ufberg's license, given that she was a board member.'"

Elliot Sclamberg, Ufberg's former husband and chiropractic partner, testified they were separated in 2001 and had "no business relationship" at that time. Ufberg had not treated any patients in the office during the period of her forfeiture. Nobody ever asked him if Ufberg practiced during that time, and he did not stop using her name in advertisements until 2002.

Ufberg testified she did not tell Arbuckle she had practiced during license forfeiture or intended to bill through her husband's license. Ufberg denied having lunch with Steinhardt or discussing her license with him. Ufberg denied practicing or using the

title “chiropractor” during forfeiture, but conceded owning part of her husband’s practice during that period. Ufberg also testified she *was* licensed--in New York--when she acted as Board chair.

*Argument, Verdicts and Posttrial Motions*

Arbuckle’s counsel argued for an award of $160,000 in economic damages for lost wages and benefits--explicitly disavowing Hancock’s larger numbers--plus $22,000 for Todd’s bills. Counsel also sought $500,000 for Arbuckle’s knowledge that the wrongdoing was unaddressed, plus “$500,000 for the year thinking [her career is] all collapsed; and $500,000 for the year of torture.”

The Board argued Arbuckle was a liar, had never been denied a promotion, and there was no retaliation because Smith did not know about Arbuckle’s alleged whistleblower claims, passed Arbuckle on probation *after* the Ufberg incident, and then gave her a raise. The Board attacked “false” assumptions relied on by Hancock, and argued that no malice by Smith was proven.

In reply, Arbuckle argued Ufberg and Smith knew Arbuckle had made a disclosure, based on Steinhardt’s testimony about his luncheon with Ufberg. Further, Smith became a wrongdoer when she did not seek legal counsel as she said she would and then tried to stifle Arbuckle through punishment. Arbuckle asked for $175,000 in economic damages and $1,500,000 in noneconomic damages.

The jury found that Arbuckle made good faith communications to disclose an improper governmental activity and a condition threatening public safety, Smith subjected her to adverse employment actions and acted with malice, and Arbuckle suffered $175,000 in economic damages and $1,000,000 in noneconomic damages. After a bifurcated trial phase, the jury awarded punitive damages of $7,500 against Smith.

The trial court denied defense motions for a new trial and judgment notwithstanding the verdict--motions not in the appellate record.

The Board and Smith timely filed this appeal. The judgment was later amended to award Arbuckle costs of $4,748.99 and attorney fees of $925,295. No appeal was taken from the amended judgment.

## DISCUSSION

### I

### *Claim and Issue Preclusion*

The Board contends the trial court should have granted its motion for summary judgment and a subsequent pretrial motion based on claim preclusion (res judicata) and issue preclusion (collateral estoppel), because the SPB's adverse findings bar her WPA claim.[12] We disagree, procedurally and substantively.

*A. Forfeiture*

The Board asserts Arbuckle alleged the same purported *adverse actions* in her Labor Code and WPA claims, and therefore asserts they involve the same "primary right" and the same cause of action for purposes of res judicata, and also asserts they involve the same dispositive issues for purposes of collateral estoppel. (See fn. 15, *post*.) But the Board fails to quote or even summarize the statutory elements of Arbuckle's Labor Code claim and WPA claim.

The proponent of claim or issue preclusion bears the burden to show that requirements of those doctrines have been met, that is, the primary right or the litigated issues are the same in the current and prior cases. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*) [collateral estoppel]; *Vella v. Hudgins* (1977) 20 Cal.3d 251, 257 [res judicata].) By failing to explain the statutory bases for Arbuckle's claims, the Board has failed in its duty to provide a coherent argument, supported by authority, to

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[12] We agree with the Board that it may seek review of the denial of its motions in this appeal. (See *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833-836 [summary judgment ruling]; Code Civ. Proc. § 597 [res judicata defense].)

carry its position. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["appellant must present meaningful legal analysis supported by citations to authority"].) It has forfeited its claims of preclusion.

In any event, the Board's preclusion arguments are substantively baseless, as we explain immediately *post*.[13]

*B. Res Judicata*

After the matter was remanded in *Arbuckle I*, the Board and Smith moved for summary judgment, contending Arbuckle's Labor Code claim was barred by the failure to exhaust judicial remedies (by failing to have the SPB finding overturned), both claims were barred because no "adverse" actions were taken, and the WPA claim was "barred by res judicata" because it was based on the same facts as the Labor Code claim. The trial court granted summary adjudication on the Labor Code claim, but not the WPA claim.[14] At trial, the Board unsuccessfully asserted that summary adjudication of the Labor Code claim barred the WPA claim.

On appeal, the Board contends as follows:

> "The trial court correctly found that Arbuckle was not required to set aside the SPB's adverse findings before filing a civil action pursuant to the WPA. Had

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[13] It appears the Board may be tacitly seeking reconsideration of *Arbuckle I*, but any such reconsideration must be by our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Further, the Board's preclusion claims appear to be foreclosed by the "law of the case" doctrine. (See *Tally v. Ganahl* (1907) 151 Cal. 418, 421 [discussing doctrine]; *People v. Dutra* (2006) 145 Cal.App.4th 1359, 1364-1365 [same].) But because we dispose of the preclusion claims due to forfeiture for defective briefing *and* on the merits, and because the parties have not briefed "law of the case," we do not address that doctrine.

[14] The Board purports to describe the trial court's reasoning, but its record citations merely show the trial court's *ruling*. It was the Board's duty, as the appellant, to provide a record to support its claims. (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 498 (*Sutter*).)

> Arbuckle's civil action been limited to a claim for whistleblower retaliation pursuant to the WPA, the trial court's denial of summary adjudication of that claim would have been proper. Arbuckle, however, asserted whistleblower retaliation claims pursuant to the WPA *and* Labor Code section 1102.5. The final adjudication of the Labor Code section 1102.5 cause of action bars relitigation of the same cause of action pursuant to the WPA[.]"

To the extent that we understand the Board's argument, we disagree with it. Res judicata, or claim preclusion, does not apply here. Simply put, because this case is and has been ongoing since its inception, there have been no final judgments issued on which the application of the doctrine might be appropriately based.

"The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 334, p. 938 (*Witkin*).) Here, again, there is no "former" or "final" judgment on which to base res judicata. "[J]udgments are parceled out at the ration of one per lawsuit." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 110; see Code Civ. Proc., § 577.) An order based on fewer than all claims is *not* a final judgment. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744; 9 Witkin, *supra,* Appeal, § 96, pp. 158-159 [discussing rule].) There was no prior final judgment on the Labor Code claim, merely an order granting summary adjudication. (See 9 Witkin, *supra,* § 145, p. 220; Code Civ. Proc., § 437c, subd. (k).) For res judicata purposes, that order was not final, because it was subject to review. (See *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174 ["in California . . . the finality required to invoke the preclusive bar of res judicata is not achieved until an appeal from the trial court judgment has been exhausted"]; *Sharon v. Hill* (C.C.D. Cal. 1885) 26 Fed. 337, 345-347 [11 Sawy. 290] [discussing California law on this point]; Code Civ. Proc., § 1049 ["An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied"].) It was subject to review because Arbuckle could have filed a protective cross-appeal to try to revive her Labor

Code claim. (See, e.g., *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168 [reviewing summary adjudication of contract claim in cross-appeal after jury trial on tort claim].)[15]

*B. Collateral Estoppel*

The Board contends the SPB's findings dismissing Arbuckle's whistleblower complaint are entitled to collateral estoppel effect.

But again, there was no prior proceeding, because Arbuckle's civil suit has not yet reached its conclusion. (See *Lucido, supra,* 51 Cal.3d at p. 341 [referring to "prior" and "former" proceedings]; 7 Witkin, *supra*, § 413, p. 1053 [discussing rule].) And again, the Board fails to analyze the two statutory claims to show the same *issues* were litigated. (See 7 Witkin, *supra*, § 414, p. 1055.) In fact, the issues differed, specifically, the administrative steps Arbuckle was required to complete in order to obtain any recovery differed under the two statutes.

Generally, a plaintiff must plead and prove that she or he has exhausted applicable administrative remedies, or facts showing a legal excuse for not doing so. (See *Hood v. Hacienda La Puente Unified School Dist*. (1998) 65 Cal.App.4th 435, 439.) To prosecute her Labor Code claim, Arbuckle had to show she obtained a favorable administrative ruling. (See *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321-

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[15] The Board points to the rule that: "California courts employ the 'primary rights' theory to determine the scope of causes of action. [Citation.] Under this theory, there is only a single cause of action for the invasion of one primary right. In determining the primary right . . . , 'the significant factor . . . is the harm suffered.'" (*Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 904, disapproved on another point, *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 72.) The Board asserts that because the Labor Code and WPA claims each alleged the same adverse actions, they amounted to one cause of action. But the procedural limitations on one statutory scheme do not necessary apply to another, just because both protect the same primary right. And the proceedings after remand from *Arbuckle I* were not a "subsequent lawsuit," nor did Arbuckle improperly "split" a cause of action by pleading alternative legal theories. (Cf. *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896-897.)

322, 329-331.) But *Arbuckle I* held Arbuckle did not need to obtain favorable administrative findings to prosecute her WPA claim. (*Arbuckle I, supra,* 45 Cal.4th at pp. 971-978; see *Murray v. Alaska Airlines, Inc*. (2010) 50 Cal.4th 860, 877-878, fn. 8 [discussing *Arbuckle*].) Thus, summary adjudication on the Labor Code claim could be (and likely was) based on an issue irrelevant to the WPA claim. Thus the Board has not shown that the same issues were litigated and cannot demonstrate issue preclusion.

II

*Sufficiency of the Evidence*

*A. Standard of Review*

The bulk of the Board's briefing challenges the sufficiency of the evidence, although the Board at times couches its arguments as legal arguments. However, the Board disregards or overlooks two important appellate procedural rules.

First, the Board fails to pay proper deference to the jury's findings.

> "With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." (*Overton v. Vita-Food Corp*. (1949) 94 Cal.App.2d 367, 370 (*Overton*), partly quoted with approval by *Leff v. Gunter* (1983) 33 Cal.3d 508, 518.)

Second, although the Board makes arguments based on its interpretation of precedent, it does not head and argue any challenge to the jury instructions.

> "[W]here a party to a civil lawsuit claims a jury verdict is not supported by the evidence, but asserts no error in the jury instructions, the adequacy of the evidence must be measured against the instructions given the jury." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535 (*Null*).)

Because the Board does not challenge the instructions, we presume the jury was properly instructed on the law. (See *Loranger v. Jones* (2010) 184 Cal.App.4th 847, 858,

fn. 9 [failure to head and argue a point forfeits the claim of error]; *Opdyk v. California Horse Racing Bd*. (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4 [same].) Therefore, the Board's arguments based on its interpretation of statutes and precedent are *irrelevant* to the extent the Board asks us to measure the evidence against legal rules not set forth in the jury instructions. (*Null, supra,* 206 Cal.App.3d at p. 1535.)

*B. Improper Governmental Activities*

The Board contends Arbuckle never made any report of improper governmental activity by Ufberg or by Smith. We disagree.

The jury was instructed in part that Arbuckle had the burden to prove:

> "That plaintiff made a good-faith communication that disclosed or demonstrated an intention to disclose information that may evidence, 1, an improper governmental activity or, 2, a condition that may significantly threaten the health or safety of employees or the public, and that the disclosure or intention to disclose was made for the purpose of remedying that condition.
>
> "'Good faith' refers to an honesty of intention as reflected by the circumstances.
>
> "'Improper governmental activity' means any activity by a state agency or an employee that is undertaken in the performance of the employee's official duties whether or not that action is within the scope of her or her employment and, 1, is in violation of any state or federal law or regulation, including, but not limited to, a willful omission to perform a duty, or, 2, is economically wasteful or involves gross misconduct, incompetency or inefficiency[.]"

The Board construes the WPA to cover only *serious* and *actual* violations of the law. However, the jury was not so instructed. As noted *ante*, we measure the facts against the instructions. (See *Null, supra*, 206 Cal.App.3d at p. 1535.)

Further, the relevant statute covered "any activity" that violated "any" state law or regulation, "undertaken in the performance of the employee's duties, undertaken inside a state office, or, if undertaken outside a state office by the employee, directly relates to state government, whether or not that activity is within the scope of his or her employment[.]" (Former Gov. Code, § 8547.2, subd. (b); Stats. 1999, ch. 673, § 4, p.

4997.) Generally, "any" means *all* or *every*. (See *Emmolo v. Southern Pacific Co*. (1949) 91 Cal.App.2d 87, 91-92 ["the use of the word 'any' in the statute negatives the contention that the statute is restricted"].) Thus, the statutory protection is not limited to reports of "serious" violations, as the Board urges.

This broad reading of the WPA advances the statutory purpose. In 1999, the WPA was amended in part to reflect legislative findings that "state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution" and that "public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business." (Gov. Code, § 8547.1; Stats. 1999, ch. 673, § 3, p. 4997.) The WPA is a remedial statute, that is, a statute that "provide[s] a remedy, or improve[s] or facilitate[s] remedies already existing, for the enforcement of rights and the redress of injuries." (3 Sutherland, Statutory Construction (7th ed. 2008) Remedial Legislation, § 60:2, p. 264 (Sutherland); see *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 20-22 (*Shoemaker*) ["The whistleblower statute [former Gov. Code § 19683, a predecessor to the WPA] was a legislative expression intended to encourage and protect the reporting of unlawful governmental activities, and to effectively deter retaliation for such reporting. The Legislature clearly intended to afford an *additional* remedy to those already granted under other provisions of the law"].) "A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed." (*California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 347 (*Whitlow*); see *Sutherland, supra*, § 60:1, p. 250 [discussing rule].)

The statute also refers to a whistleblower's "good faith communication" of a suspected violation, showing that an *actual* violation need not be proven. (Former Gov. Code, § 8547.2, subd. (d); Stats. 1999, ch. 673, § 4, p. 4998; see *Mize-Kurzman v. Marin Community College Dist*. (2012) 202 Cal.App.4th 832, 850 (*Mize-Kurzman*) [generally, a whistleblower complaint is sufficient if "'the employee can voice a reasonable suspicion

that a violation of a constitutional, statutory, or regulatory provision has occurred"]; accord, *Devlyn v. Lassen Mun. Util. Dist.* (E.D. Cal. 2010) 737 F.Supp.2d 1116, 1124 [Lab. Code, § 1102.5 case, "Defendant's argument inappropriately [implies] that the person reporting the suspected violation must be correct in order to be protected. That is not what the statute requires. 'Reasonable cause' is the relevant standard"].)[16]

The Board contends at worst Ufberg made a "private" lapse, but did nothing wrong in her "official" capacity. The Board argues that the *chair* of a professional licensing board, required to be licensed upon appointment, need not maintain licensure during tenure. Putting aside the fact that the instructions did not cover this point, even if the Board were legally correct, that would not change Arbuckle's *good-faith belief* in wrongdoing. But we briefly examine the Board's claim on the merits.[17]

It is "unlawful for any person to practice chiropractic in this state without a license so to do." (Stats. 1983, ch. 533, § 1, p. 2304.) Licensees are sent annual renewal notices, and:

> "The failure, neglect or refusal of any person holding a license . . . to pay the annual fee during the time their license remains in force shall, after a period of 60 days from the last day of the month of their birth, automatically work a forfeiture of his or her license or certificate, and it shall not be restored except upon the written application therefor and the payment to the board of a fee of twice the annual amount of the renewal fee . . . ." (Stats. 2010, ch. 539, § 1.)

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[16] In a case involving the Fair Employment and Housing Act, our Supreme Court has cautioned: "A rule that permits an employer to retaliate against an employee with impunity whenever the employee's reasonable belief [of discriminatory conduct] turns out to be incorrect would significantly deter employees from opposing conduct they believe to be discriminatory." (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1043 (*Yanowitz*).)

[17] The Board also asserts Ufberg engaged in "unintentional, inadvertent voting on Board matters" during suspension. The jury was not required to share this benign view of Ufberg's actions.

The Board is composed of seven members, including five "licensee'" members. (Stats. 1976, ch. 263, § 1, p. 547.) By well-settled definition, a "licensee" is a person "who holds a license." (Black's Law Dict. (4th ed. 1968) p. 1070; see Ballentine's Law Dict. (3d ed. 1969) p. 736; Webster's New Collegiate Dict. (1973) p. 662.) The Board's regulations (from 1991 and to date) describe a license in forfeiture as an *expired* license. (See Cal. Code Regs., tit. 16, § 371(b) ["A license shall expire annually on the last day of the licensee's birth month"]; former Cal. Code Regs., tit. 16, § 355(c), Register 91, No. 21 (May 24, 1991) p. 52 ["Licenses . . . will henceforth expire on the last day of the birth month of the licensee"].)

The Board argues that because a Board member's term lasts for four years, any loss of eligibility after appointment would merely preclude reappointment, unless the Governor acted to remove the Board member "after receiving sufficient proof of the inability or misconduct of said member." (Stats. 1971, ch. 1755, § 3, p. 3785.)

We acknowledge that, in any given context, there may be differences between qualifications required for appointment and qualifications required to be maintained during tenure. (See, e.g., *People v. Bowen* (1991) 231 Cal.App.3d 783, 786-789 [discussing differences between appointment and tenure requirements for judges].) But given the statutes, regulations, and definitions that we describe *ante*, it cannot seriously be argued that Arbuckle's belief that Ufberg was required to maintain a valid license to continue to serve lawfully on the Board was *unreasonable*.

And even if we agreed with the Board's legal assertion that the relevant statutes merely required Ufberg to be licensed at the time of appointment but not thereafter, an assertion the trial court rejected, that would not change the fact that Ufberg acted improperly by allowing her license to lapse and continuing to *practice*, acts at best reflecting "inefficiency," if not "a willful omission to perform a duty" required by law, as provided by the jury instructions. And such misconduct might well have led the

Governor to remove her from the Board. Thus, there was ample cause to believe Ufberg's actions while she was the as Board chair reflected *public* wrongdoing.

The Board argues Smith did nothing wrong because it was her discretionary decision whether to cite a chiropractor, not Arbuckle's. (Cf. *MacDonald v. State of California* (1991) 230 Cal.App.3d 319, 330 ["the predominant character of licensing is discretionary"].) But the jury had ample evidence on which to find Arbuckle had a good faith belief Smith's exercise of discretion was based on favoritism, due to Ufberg's status as Board chair. Discretion must be exercised based on the legal principles applicable to its exercise, not for arbitrary reasons such as privilege or rank. (See *Common Cause of California v. Board of Supervisors* (1989) 49 Cal.3d 432, 442 [mandamus will lie to compel official to exercise discretion "under a proper interpretation of the applicable law"]; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298 ["The scope of discretion always resides in the particular law being applied," and "The legal principles that govern the subject of discretionary action vary greatly with context"].) The Board cites no contrary authority.[18]

*C. Protected Disclosures*

In several sub-claims overlapping with each other and with the prior claims, the Board contends Arbuckle's reports were not "protected" disclosures. The Board contends they were "not protected because they were made pursuant to Arbuckle's citation duties" and "Arbuckle's reports are nothing more than disagreements with Smith

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[18] Indeed, in a case upholding chiropractic licenses issued after examinations were held in violation of an anonymous-grading requirement, our Supreme Court emphasized that "There is no evidence that favoritism was shown to any particular individual or that the fact that the identity of the applicant was known to the examiner resulted in partiality in any case." (*Aylward v. State Bd. of Chiropractic Examiners* (1948) 31 Cal.2d 833, 841.) This illustrates that favoritism in public affairs is not to be tolerated.

or implementation of Board policies and procedures" and involved "internal personnel or administrative matters" confided to "employer-employee management."[19]

But because the jury was not instructed on any of these claimed limitations, they are irrelevant for purposes of this appeal. (See *Null*, *supra*, 206 Cal.App.3d at p. 1535.)

Moreover, although purely internal matters or "'debatable differences of opinion concerning policy matters'" may not be protected, such limitation extends to and only to "policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like," not "policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 852-855 [discussing Lab. Code, § 1102.5 and Ed. Code, § 87160, et seq., distinguishing the federal rule in whistleblower cases].)

The Board's claim that Arbuckle's report about Ufberg to Smith was not a protected disclosure, because it was part of Arbuckle's job duties to report problems with chiropractic licenses, is partly based on federal cases interpreting a different, federal whistleblower law. (See, e.g., *Huffman* v. *OPM* (Fed. Cir. 2001) 263 F.3d 1341 (*Huffman*).) The Board never quotes or even describes the federal law, and therefore fails to show that cases interpreting it are persuasive on the particular WPA issues relevant to this case. (See *In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.)

The Board also reasons that effective January 1, 2000, the WPA was amended to redefine "protected disclosures" to mean "any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) any improper

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[19] The Board replicates its claims that the violations must be both actual and serious, claims we have already rejected. The Board also claims "past invalid Board actions could be easily rectified, retroactively, through valid Board ratification." This jaw-dropping claim is forfeited for lack of authority or coherent argument. (See *In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.)

governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition." (Former Gov. Code, § 8547.2, subd. (d); Stats. 1999, ch. 673, § 4, p. 4998.) Effective January 1, 2010, *after* the events at issue, the statutory definition was amended to include "any communication based on, or when carrying out, job duties[.]" (Stats. 2009, ch. 452, § 5.) The Board reasons from this statutory change that, at the relevant times in this case, a disclosure in the course of an employee's job duties was *not* protected.

We conclude the 2010 amendment merely clarified the law, and did not remove an unstated restriction on protected disclosures, as the Board contends. (See *Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 856-858 [rejecting similar claim as to Lab. Code, § 1102.5, and rejecting *Huffman*, "it cannot categorically be stated that a report to a supervisor in the normal course of duties is not a protected disclosure"]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1312-1313 (*Colores*) [Lab. Code, § 1102.5 case, "plaintiff was employed by a governmental agency and she had every reason to expect that Avery would not sweep the information under the rug but rather would conduct an investigation into the matter"]; see also *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 825-827 [rejecting *Huffman* rule as inconsistent with California law].)

The Board's argument ignores the fact that the relevant statute refers to "*any* good faith communication" (emphasis added) and is not restricted to communications made *outside* an employee's job duties. Further, as we have already noted, the WPA is to be construed broadly, to effectuate its remedial purpose. (See *Shoemaker*, *supra*, 52 Cal.3d at pp. 20-22; *Whitlow*, *supra*, 58 Cal.App.3d at p. 347.)

The Board also characterizes Arbuckle's actions as "disclosures made in the context of internal or administrative matters" which should not be deemed "protected" by the WPA. Putting aside the point (once again) that this limitation was not reflected by

the instructions (see *Null, supra*, 206 Cal.App.3d at p. 1535), we reject it. The Board largely relies on two distinguishable decisions of this court.

In *Patten v. Grant Joint Union High School Dist*. (2005) 134 Cal.App.4th 1378 (*Patten*), we interpreted Labor Code section 1102.5 to conclude that three particular claimed disclosures by a school principal were not protected disclosures: Two were about conduct by teachers passed on for possible personnel action; the third was a request for more security. We held the former complaints were "internal personnel matters involving a superior and her employee, rather than the disclosure of a legal violation[,]" and the latter was "made in an exclusively internal administrative context" and did not "show any belief on Patten's part that she was disclosing a violation of state or federal law in any sort of whistleblowing context[.]" (*Patten, supra,* 134 Cal.App.4th at p. 1385.) In *Conn v. Western Placer Unified School Dist.* (2010) 186 Cal.App.4th 1163 (*Conn*), we interpreted statutes protecting whistleblower public school employees (Ed. Code, § 44110, et seq.). Following *Patten*, we held, "Conn's complaints about unruly first graders, the failure to perform an assessment before deciding to terminate her son's services, how a particular screening was performed, an error in her son's [Individual Education Plan], and the behavior of members of the special education team were done in the context of internal administrative or personnel actions, rather than in the context of legal violations. The evidence adduced at trial showed that in making her complaints Conn was attempting to secure special education services for her own children and certain students in her class, not 'blow the whistle.'" (*Conn, supra*, 186 Cal.App.4th at p. 1182.)

In contrast, Arbuckle was complaining about Ufberg's possible disqualification from office, her unlawful practice of chiropractic, and Smith's efforts to cover up Ufberg's conduct. Those were not "internal or administrative" matters, but suspected violations of law, and matters of public interest relating to the efficiency and legitimacy of the Board.

Again relying on federal precedent, the Board claims Arbuckle's reports to Smith about Smith's own wrongdoing are not protected. This limitation was not in the jury instructions (see *Null*, *supra*, 206 Cal.App.3d at p. 1535), and in any event, there was evidence from which the jury could rationally find that Smith was not yet a wrongdoer when Arbuckle initially pressed her to cite Ufberg, but only developed into a wrongdoer when she acted to cover up Ufberg's wrongdoing by punishing Arbuckle.[20]

In its reply brief, the Board argues reports of *publicly-known* facts are not protected. The Board's proposed limitation on liability was not in the jury instructions. (See *Null*, *supra*, 206 Cal.App.3d at p. 1535.) Further, this point is forfeited because it was not made in the opening brief, thereby depriving Arbuckle of the ability to reply. (See *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 808.)

*D. Adverse Actions*

The Board next contends Arbuckle did not suffer any adverse action.

The jury was instructed in part that it had to find that "Smith subjected the plaintiff to an action that materially affected the terms, conditions or privileges of her employment[.]"

Putting aside the Board's disregard of the broad scope of this instruction, while "mere oral or written criticism" or a benign "transfer into a comparable position" do not suffice to show an adverse action, "Where an employer . . . [eliminates] a reasonable potential for promotion or materially delaying the promotion, there is a legally tenable basis for a jury to find the employer substantially and materially adversely affected the terms and conditions of the plaintiff's employment." (*Akers v. County of San Diego*

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[20] As we detailed *ante*, although Smith had admitted telling Arbuckle not to cite Ufberg until Smith could consult with counsel, at trial Smith testified that she did not consult with counsel until *after* Arbuckle filed her SPB complaint, which was after suffering adverse treatment. From this evidence, the jury could infer that Smith was trying to cover up Ufberg's wrongdoing instead of treating Arbuckle's claim properly. (See *Colores*, *supra*, 105 Cal.App.4th. at pp. 1312-1313.)

(2002) 95 Cal.App.4th 1441, 1456-1457 [Lab. Code, § 1102.5 case], approved on this point by *Yanowitz*, *supra*, 36 Cal.4th at pp. 1036, 1049-1055; cf. *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 [applying rule, but finding no material change in employment conditions]; *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386-388, 390-397 [similar holding].)

Here, we must view the totality of the evidence, not weigh each claimed adverse act in isolation, as the Board suggests. (See *Yanowitz*, *supra*, 36 Cal.4th at pp. 1055-1056 ["Contrary to L'Oreal's assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries"].) Nor does the fact that Arbuckle retained her title and pay preclude a finding of an adverse action. (See *Patten*, *supra*, 134 Cal.App.4th at pp. 1389-1390.)

Viewing the evidence in favor of Arbuckle, Smith materially worsened her working conditions and prospects for advancement. In addition to cancelling the promised promotion and stripping her of more desirable duties, Smith made Arbuckle's work environment intolerable, by criticizing her for trivial things and things that Arbuckle had not done, being openly rude and demeaning, and causing other employees to shun Arbuckle. In short, viewing the record in the light most favorable to the verdict, as we must, the evidence amply supports the finding of adverse action.[21]

*E. Nexus*

The Board contends no substantial evidence shows a "nexus" or causal link between Arbuckle's disclosures and Smith's actions, because the evidence does not show that Smith knew about Arbuckle's disclosures. We disagree.

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[21] The Board relies in part on the SPB's findings regarding the alleged adverse actions. However, because *Arbuckle I* held that such findings were not a bar to Arbuckle's civil suit based on the WPA, the SPB's findings are not relevant to this appeal.

Although there may not have been direct evidence that Smith knew Arbuckle had complained to persons *outside the Board*, Smith knew that Arbuckle had complained many times *to Smith* about Ufberg's license issue. The record shows Smith and Ufberg spoke to each other, after which Smith's behavior towards Arbuckle abruptly changed. And Smith attempted to lull Arbuckle into silence, by claiming she would raise the Ufberg issue with legal counsel. (See fn. 20, *ante*.)

Retaliation may be proven by circumstantial evidence. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138 [a Lab. Code, § 1102.5 case].) This includes the temporal proximity between a disclosure and adverse treatment. (See *id*. at pp. 140-141 [based on employer's "sudden change of position" toward employee after disclosure, a jury could infer the proffered reasons for termination were pretextual]; see also *Keyser v. Sacramento City Unified Sch. Dist.* (9th Cir. 2001) 265 F.3d 741, 751-752 [similar proximity rule in case involving claimed retaliation for exercise of free speech rights].)

The Board asserts "temporal proximity alone" between an alleged adverse action and an employee's disclosure "is insufficient to support an inference of retaliation." The sole authority cited by the Board does not support this proposition. *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968 (*Coszalter*), involving alleged retaliation for the exercise of free speech rights, emphasized that, "Retaliation often follows quickly upon the act that offended the retaliator, but this is not always so. For a variety of reasons, some retaliators prefer to take their time: They may wait until the victim is especially vulnerable or until an especially hurtful action becomes possible. Or they may wait until they think the lapse of time disguises their true motivation." (*Coszalter, supra,* 320 F.3d at pp. 977-978 [held, "three to eight months is easily within the time range that supports an inference of retaliation"].) *Coszalter* did not hold that temporal proximity cannot suffice.

There is authority, not cited by the Board, indicating that where temporal proximity is the *sole* theory of causation, the connection between the protected activity

and the retaliatory action must be "'very close[.]'" (*Clark County Sch. Dist. v. Breeden* (2001) 532 U.S. 268, 273-274 [149 L.Ed.2d 509, 515] [alleged retaliation for complaint of sexual harassment].) Here, the evidence shows that Arbuckle's working conditions *immediately* worsened after she raised issues about Ufberg to Smith. The temporal connection could not have been closer.

Accordingly, the jury could logically ascribe Smith's abrupt change of treatment of Arbuckle to Arbuckle's persistence in pressing the Ufberg issues, that is, that the *cause* of the change of treatment was Arbuckle's whistleblowing actions.[22]

*F. Malice*

The Board contends no substantial evidence shows Smith acted with malice, because Arbuckle had to prove actual "ill will and hatred." We disagree.

First, the jury instructions did not require a finding of actual ill will and hatred, but also permitted liability if the jury found that Smith's "despicable" conduct was done with a "conscious disregard for the rights and safety of others." As we have noted *ante*, the Board brings no challenge to these (or any other) instructions.

Second, the Board's view of the law underlying the instruction is not accurate. (Civ. Code, § 3294, subd. (c)(1) ["'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff *or* despicable conduct which is carried on by the

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[22] The Board makes a stray observation that Smith did not single Arbuckle out because she treated other employees badly. The record citations supplied show Smith spoke harshly to Phillips at times and did not like Rowell. This does not show Smith treated *everyone* badly, and more importantly, does not weaken the evidence that she *abruptly changed* her treatment of Arbuckle. The Board also repeatedly asserts that there was no proof Smith *understood* that she had done something wrong. However, the jury could find Smith knew Ufberg deserved a citation, declined to cite her because of her status, and punished Arbuckle to keep her quiet about it. The jury could also find that Ufberg told Smith about Arbuckle's disclosures to Steinhardt, after Steinhardt mentioned them at a lunch Ufberg denied attending, and could rationally find that that lunch took place when Arbuckle was still working at the Board and suffering under Smith's continued abusive retaliatory actions.

defendant with a willful and conscious disregard of the rights or safety of others[,]" emphasis added].) Even the one case relied on by the Board, a prior decision of this court, has been misread by the Board. In that case, although we emphasized that the essence of malice is "evil motive," we also held that "*conscious disregard of safety* [is] an appropriate description of the *animus malus* which may justify an exemplary damage award when nondeliberate injury is alleged." (*G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 31-32.) Thus, the jury was properly instructed that Smith's "conscious disregard" of Arbuckle's rights sufficed. (Civ. Code, § 3294, subd. (c)(1).)

And while mere wrongful termination does not show malice, we have contrasted that situation with one involving "'a program of unwarranted criticism of plaintiff's job performance to justify plaintiff's demotion.'" (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 716-717, quoting *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1403, disapproved on another ground in *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 574, fn. 4; see also *Rulon-Miller v. International Business Machines Corp*. (1984) 162 Cal.App.3d 241, 255 ["The combination of statements and conduct would under any reasoned view tend to humiliate and degrade respondent"], disapproved on other grounds in *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 688, 700, fn. 42 and *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 350-351; *Meyer v. Byron Jackson, Inc*. (1984) 161 Cal.App.3d 402, 413-415 [retaliation for workers' compensation claim].)

The evidence, viewed in favor of the verdict, shows Smith engaged in a protracted pattern of unwarranted criticism and abuse of Arbuckle, conduct the jury *could* find was "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people" as instructed.

The Board points to evidence that Smith allowed Arbuckle to become a permanent MST with concomitant raise, and purportedly acted "to support Arbuckle's ability to successfully compete for promotion to the SSA classification." But the jury was not

required to *credit* that evidence, given other evidence that Smith abruptly cancelled Arbuckle's expected SSA promotion; the evidence was for the jury to weigh. The jury could rationally find that Smith was not so foolish as to take patently tangible adverse actions against Arbuckle, such as denying her permanent status or a raise, but acted to make her working conditions intolerable to force her to leave, as occurred. We will not reweigh the evidence supporting a finding of malice.

*G. Damages*

The Board contends the economic and noneconomic damage awards are not supported by substantial evidence. These contentions are forfeited both by the Board's failure to supply us with an adequate record, and by its failure to state the facts fairly.

The record shows that the Board raised excessive damages in its new trial motion, a prerequisite to raising such claims on appeal. (See *Schroeder v. Auto Driveaway Co*. (1974) 11 Cal.3d 908, 918-919.) "[W]here the ascertainment of the amount of damage requires resolution of conflicts in the evidence or depends on the credibility of witnesses, the award may not be challenged for inadequacy or excessiveness for the first time on appeal. To permit a party to do so without a motion for new trial would unnecessarily burden reviewing courts with issues which can and should be resolved at the trial court level." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., Inc*. (1977) 66 Cal.App.3d 101, 122 (*Glendale*); see *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759 [similar].) But the Board failed to include the new trial motion in the record. Without an adequate record, we are unable to verify that the excessive damages issues now raised were presented to the trial court as required. (See *Glendale*, *supra*, 66 Cal.App.3d at p. 122.)

One court made the following pertinent observation:

> "[T]he specific points that appellant raises in regard to the calculation of damages by the trial court relate to asserted factual errors in those calculations. Appellant's motion for new trial raised none of the issues discussed on appeal

> concerning the asserted exclusion of certain facts from the calculation of gross profits. Although a motion for new trial is not a prerequisite to raising a legal issue regarding the proper measure of damages, it is a necessary predicate to appeal when the claimed error relates to a conflict over facts. [Citation.] Since appellant did not claim error in his motion for new trial in regard to the factual assumptions relied upon by the trial court in its calculations regarding lost profits, he may not raise the issue on appeal." (*Baker v. Pratt* (1986) 176 Cal.App.3d 370, 382 (*Baker*).)

We agree with *Baker* that "specific" factual points raised on appeal must have been tendered to the trial court in the first instance. In this case, we do not know what "specific" factual issues--if any--were raised in the new trial motion. It was the Board's burden, as the appellant, to present an adequate record. (*Sutter*, *supra*, 171 Cal.App.4th at p. 498.) Because the Board failed to show it raised in its new trial motion the specific factual damages issues now pressed on appeal, we deem them to be forfeited.

Moreover, as we explain, the Board does not present fair claims, based on the facts and argument, about either the economic or noneconomic damages awards.

The Board asserts the economic damage award is flawed because Arbuckle's economic expert, Hancock, relied on four "false" assumptions, which are: (1) Arbuckle was "denied promotion to the SSA classification;" (2) Arbuckle turned down a job in another agency "because Smith promised her" the SSA promotion; (3) "Arbuckle would have been promoted every year or two, until she reached the level of Staff Services Manager II;" and (4) "Arbuckle would have worked until age 63 or 66" although she "testified she planned to retire at age 62."

But, as we noted earlier, Arbuckle's counsel *explicitly disavowed* Hancock's calculations during argument, and the economic award of $175,000 was far below the minimum damages proposed by Hancock. Therefore Hancock's reasoning played no role in the verdict; instead, because the verdict tracked Arbuckle's counsel's argument, we

must presume the jury accepted Arbuckle's counsel's reasoning. (See *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 505-506 (*Seffert*).)

However, the Board fails to discuss Arbuckle's counsel's reasoning. "Instead of a fair and sincere effort to show that the [trier of fact] was wrong, appellant's brief is a mere challenge to respondents to prove that the [trier of fact] was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift [its] responsibility in this manner." (*Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.) Accordingly, the point is forfeited for lack of fair argument.[23]

In any event, it appears that substantial evidence supports the economic damages award of $175,000. (See *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 531-532 ["We will uphold a verdict if it is within the range of possibilities supported by" evidence].)

Arbuckle's counsel suggested that the jury award $22,000 to cover Dr. Todd's bills (200 visits at $110 per hour). Taking $22,000 from the $175,000 verdict leaves $153,000. Arbuckle's counsel argued Arbuckle's lost wages exceeded this amount: First, the loss of the SSA promotion cost Arbuckle $1,000 per month from July 2001 through June 2002 when she could not return to work, or $12,000. Second, for 18 months, through December 2003, Arbuckle was unemployed, but would have earned about $72,000 as an SSA, bringing her total lost wages to $84,000 to that point. Third, she lost at least $1,000 per month for the next six years, or $72,000, bringing her total lost wages to at least $*156,000*. The Board does not mention, far less dispute, Arbuckle's counsel's reasoning as to the consequences from the denial of the SSA promotion, or

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[23] Even in the reply brief, the Board argues "Arbuckle's economic damages flow from the false assumptions she provided to her economist." This is incorrect.

fairly address the evidence supporting the claims.[24] Therefore, the Board fails in its duty as the appellant to demonstrate that the jury could not rationally award lost wages of $*153,000*, plus $22,000 for Todd's billings.

As for noneconomic damages, the Board argues "Arbuckle presented no evidence of any significant or enduring emotional distress linked to actions by Smith to justify the $1,000,000 in emotional distress damages." This, too, amounts to an invitation to reweigh the evidence. We again decline the invitation. (See *Overton*, *supra*, 94 Cal.App.2d at p. 370.)

The Board characterizes Dr. Todd's testimony as showing Arbuckle's emotional distress was "temporary and insignificant" and in part that her stress was related to "litigation, her attorney, and preparation for trial."

Taking the last point first, the Board provides no authority for the proposition that litigation-related stress is not compensable where, as here, the litigation is necessary to achieve the sought-after remedy, and we are aware of none.

As for the Board's contention that Arbuckle's distress was "temporary and insignificant," this fails to view Arbuckle's testimony about Smith's abusive workplace treatment of her, corroborated by several witnesses, in the light favorable to the verdict. Nor was the jury required to view Arbuckle's need to see Dr. Todd 200 times over several years to be a reflection of "temporary and insignificant" distress.

Further, Arbuckle had overcome personal hardships to work at the Board, but remained fragile, as indicated in part by her consumption of alcohol due to her stress.

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[24] The Board reiterates its claim that no SSA promotion was denied to Arbuckle (see fn. 4, *ante*), but this claim inappropriately views the evidence in the light most favorable to the Board. (See *Overton*, *supra*, 94 Cal.App.2d at p. 370.)

Arbuckle was entitled to a noneconomic damage award sufficient to make *her* whole for the emotional suffering caused by Smith, not merely an award sufficient to make a "reasonable" plaintiff whole. (See *Taylor v. Pole* (1940) 16 Cal.2d 668, 669-673 [instruction improperly precluded jury from considering whether accident exacerbated plaintiff's pre-existing "hysteria"].) "[T]here is no rule by which either expert or laymen may measure the precise degree, if any, to which a pre-existing pathological condition has been aggravated . . . . The mental elements which must be taken into account with other elements in determining a just admeasurement of compensatory relief afford no definite or certain criterion by which the amount to be assigned to the one item or the other may be ascertained. [Citation.] From the very necessities and uncertainties of the situation, the segregation of the items which combine to form the full measure of actual injury is a matter for the exercise by the jury of its unbiased judgment, and in assessing the damages it is accorded a 'wide latitude' and an 'elastic discretion'." (*Id.*, at pp. 672-673; see *Young v. Bank of America* (1983) 141 Cal.App.3d 108, 114 [injury includes ""fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea""].)

Accordingly, even setting aside the Board's failure to show it preserved the claim of excessive noneconomic damages, viewing the evidence in the light favorable to Arbuckle, the Board has not demonstrated that the award was arbitrary or "shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert*, *supra*, 56 Cal.2d at p. 507; see *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078-1080 [applying *Seffert* and similar cases].)

## DISPOSITION

The judgment is affirmed. The Board, but not Smith individually, shall pay Arbuckle's costs of this appeal, including reasonable attorney fees as provided by statute. (Gov. Code, § 8547.8, subd. (c); Cal. Rules of Court, rule 8.278.)

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.