Filed 7/11/17 Allyn v. Fallbrook Union Elementary School Dist. CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ELAINE ALLYN, Plaintiff and Appellant v. FALLBROOK UNION ELEMENTARY SCHOOL DISTRICT, Defendant and Appellant.	D068325 (Super. Ct. No. 37-2012-00054069-CU-WT-NC)

APPEALS from a judgment and orders of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Judgment, order denying motion for judgment notwithstanding the verdict, and order denying motion for attorney fees affirmed.

Artiano, Shinoff & Holtz, Artiano Shinoff, Daniel R. Shinoff and Paul V. Carelli IV for Defendant and Appellant.

Williams Iagmin, Jon R. Williams; Curran & Curran, Michael D. Curran and Susan M. Curran for Plaintiff and Appellant.

The Fallbrook Union Elementary School District (the District) appeals from a jury verdict awarding $1,194,000 to former employee Elaine Allyn. The jury found that the District retaliated against Allyn in violation of former Labor Code section 1102.5, subdivision (c),[1] by terminating her employment as Director of Educational Technology after she objected to reducing the retention time of the District's e-mail system. Former section 1102.5, subdivision (c) prohibits retaliating against an employee for refusing to participate in an activity that would result in a violation of state or federal law.

In its appeal, the District contends that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV), as the verdict is not supported by substantial evidence. Specifically, the District contends that the evidence does not support a finding that Allyn refused to participate in any activity that was unlawful under state or federal law when she objected to reducing the e-mail retention time and thus the District could not have retaliated against her in violation of former section 1102.5, subdivision (c). The District also argues that the trial court erred in denying its motion for new trial to the extent that motion was premised on alleged misconduct by Allyn's counsel during trial.

In Allyn's appeal, she challenges the trial court's order denying her motion for attorney fees.

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1 Unless otherwise indicated, all further statutory references are to the Labor Code.

We conclude that both the District's appeal and Allyn's appeal lack merit. Accordingly, we affirm the judgment and the order denying the JNOV motion, and we affirm the order denying Allyn's motion for attorney fees.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Allyn, who was hired by the District in 1994, was its Director of Educational Technology. During the 2011-2012 school year, the senior management of the District was comprised of the following people: Superintendent Candace Singh; Assistant Superintendent of Educational Services Eric Forseth; Assistant Superintendent of Human Resources Dennis Bixler; and Associate Superintendent of Business Services Ray Proctor. These senior managers were sometimes referred to as the "cabinet."

Before the events giving rise to this lawsuit, it was Allyn's practice to electronically store the District's e-mails for a period of three years. Specifically, Allyn performed a daily backup of the contents of the District's e-mail server to an e-mail archive server, which retained the e-mails for three years. The e-mail server also stored e-mails for up to a year unless a user purged an item from the "trash" file, in which case the e-mail would be deleted from the e-mail server after seven days.

According to Allyn, in July or August 2011, Proctor spoke to her about a problem in deleting his e-mail "trash" file. During that conversation, Allyn informed Proctor that the District stored e-mail on an e-mail archive server. Referring to the e-mail archive server, Proctor said "I want it wiped." Allyn told Proctor that she would not delete the

e-mail archive server because she believed it was against the law, and she would only do so if she first received a legal opinion.[2]

On September 22, 2011, Singh, Proctor, Allyn and a technician from Allyn's department attended a meeting to discuss the District's e-mail retention practices. According to Allyn, Singh stated during the meeting that she wanted to reduce the District's e-mail retention period to three months. Allyn informed Singh that the current practice was to retain e-mails for three years and she believed applicable laws required the District to have a retention policy in place. According to Allyn, Singh stated at the conclusion of the meeting that the District would change to a three-month retention period for e-mails, and Singh would rewrite the District's current policy to reflect that change.[3]

Shortly after the meeting, Allyn sent two e-mails to Proctor and Singh on the subject of e-mail retention. One e-mail attached a copy of a document dated May 2008, which set forth the District's current e-mail retention practice, under which e-mail was archived for a three-year period. Allyn's second e-mail provided hyperlinks to websites that Allyn believed to provide relevant information about the laws governing the

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[2] At trial, Proctor denied that he had ever demanded that Allyn delete the e-mail archive server.

[3] In contrast to Allyn's testimony, the other attendees of the September 22, 2011 meeting testified that no decision was made at the meeting regarding the District's e-mail retention policy.

District's e-mail retention practices, specifically the Federal Rules of Civil Procedure and the California Public Records Act (Gov. Code, § 6250 et seq.).

According to Allyn, Singh stopped her in the hallway in October 2011 to ask if she had taken care of reducing the District's e-mail retention period. Allyn replied that she had not done so because she was waiting for Singh to write a new policy. In mid-November 2011, Singh again stopped Allyn in the hallway to ask whether the e-mail retention period had been reduced. Allyn again stated that she was waiting for Singh to write a new policy. Singh told Allyn, "You are now bordering on insubordination."[4]

After the second conversation with Singh, Allyn took action to reduce the District's e-mail retention period. Specifically, on November 30, 2011, Allyn directed an engineer from an outside company that provided network services to the District to shut off and delete the District's e-mail archive server. After the e-mail archive server was shut off and deleted, the District's e-mails continued to be retained on the e-mail server for one year unless a user permanently deleted an e-mail that was already in the "trash" file, in which case that e-mail would no longer be recoverable.

Allyn testified that she deleted the District's archive server at Singh's direction even though she believed that doing so was unlawful. When asked at trial to identify why she believed it was unlawful to delete the archive server, Allyn stated that she believed the California Public Records Act (Gov. Code, § 6250 et seq.) required that the

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4 Singh testified that she did not tell Allyn to delete the archive server and did not say that Allyn's conduct bordered on insubordination.

District have some sort of retention policy for e-mails, and that deleting the archive server violated that requirement.[5] At one point in her testimony, Allyn also mentioned the Federal Records Act (44 U.S.C.A. §§ 2901 et seq., 3101 et seq., 3301 et seq.) as a basis for her belief that it would be unlawful for the District to delete the archive server.[6]

The District terminated Allyn's employment in May 2012. The main factual dispute in this lawsuit concerns the reason for Allyn's termination. Allyn alleged, and the jury found, that Allyn was terminated in retaliation for her objection to reducing the

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[5] "The California Legislature in 1968, recognizing that 'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state' (Gov. Code, § 6250), enacted the California Public Records Act, which grants access to public records held by state and local agencies ([*id.*], § 6253, subd. (a)). The act broadly defines ' "[p]ublic records" ' as including 'any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency . . . .' ([*Id.*], § 6252, subd. (e).) The act has certain specific exemptions ([*id.*], §§ 6254-6254.30), but a public entity claiming an exemption must show that the requested information falls within the exemption (*id.*, § 6255, subd. (a))." (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66-67.) Accordingly, the California Public Records Act details what type of public records must be made available to the public and which categories of information may be withheld, but it "does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for disclosure." (*Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661, 668.)

[6] The Federal Records Act "is actually a series of statutes, which originated with the Federal Records Act of 1950, ch. 849, 64 Stat. 583, and the 1943 Disposal of Records Act, ch. 192, 57 Stat. 380. These acts were subsequently amended by the Government Records Disposal Amendments of 1970, 84 Stat. 320, the Federal Records Management Amendments of 1976, 90 Stat. 2723, and the National Archives and Records Administration Act of 1984, 98 Stat. 2280. *See* 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*" (*Armstrong v. Bush* (D.C. Cir. 1991) 924 F.2d 282, 284, fn. 1; see also *Judicial Watch, Inc. v. Kerry* (D.C. Cir. 2016) 844 F.3d 952, 953 ["The Federal Records Act 'governs the creation, management and disposal of federal records' "].)

retention period for the District's e-mail and her delay in deleting the e-mail archive server in the Fall of 2011. The District, in contrast, contended that Allyn was terminated because an outside investigator found evidence that Allyn had been accessing and reading e-mails from the District's senior management without permission, followed by an attempt to cover up her wrongful conduct by destroying evidence. Further, the District contended that Allyn was terminated because she failed to submit documentation on behalf of the District for the federal "E-Rate" subsidy program, causing the District to lose approximately $300,000 in subsidies for which it was otherwise eligible.[7]

Three days after her termination, Allyn filed a government tort claim against the District on May 10, 2012. Allyn then filed this lawsuit on May 31, 2012. The complaint originally included 12 causes of action. However, by the time the case was submitted to the jury, only one cause of action remained, namely Allyn's third cause of action brought under former section 1102.5, subdivision (c).[8] The version of section 1102.5,

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[7] Leading up to her termination, Allyn was first placed on paid administrative leave in February 2012 while the District investigated its suspicion that Allyn was accessing and reading senior management's e-mails. Based on the results of the investigation, Bixler issued notice of charges against Allyn on April 12, 2012, and a recommendation that Allyn be terminated from employment at the District. Specifically, the notice of charges accused Allyn of "hacking into the e-mail accounts of District administrators, lying about accessing these accounts, willfully destroying evidence of her wrongdoing and mishandling . . . the District's E-rate program." After Allyn was given an opportunity to request a hearing regarding the allegations against her, which she refused, the District's Governing Board voted on May 7, 2012, to terminate Allyn's employment.

[8] Although there were many causes of action at issue in the jury trial, for reasons that are not clear from the record Allyn brought motions for nonsuit and a motion for a directed verdict as to other causes of action, which the trial court granted, but did not

subdivision (c) in effect at the time of Allyn's termination stated that "[a]n employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."[9] (Former § 1102.5, subd. (c).)

After a lengthy trial, the jury returned a verdict in favor of Allyn. The jury was provided with an instruction that purported to set forth the required elements of a violation of former section 1102.5, subdivision (c). The jury was also provided a special verdict form, which it completed by answering "yes" to the following question on the special verdict form: "Did Defendant [District] retaliate against Ms. Allyn for raising objections to reducing the retention time of the District's e-mail system?" The jury also found that Allyn suffered damages of $1,046,000 for lost income and $148,000 for general damages. The trial court entered judgment against the District in the amount of $1,194,000 plus interest.

The District then filed a JNOV motion, which presented two independent arguments as to why insufficient evidence supported the jury's verdict that the District

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bring a motion as to the third cause of action, which alleged a violation of former section 1102.5, subdivision (c).

[9] After Allyn's termination from the District in 2012, section 1102.5, subdivision (c) was amended by the Legislature. (Stats. 2013, ch. 781, § 4.1.) "In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise . . . ." (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 955.) As the Legislature provided no indication that the amendments to section 1102.5, subdivision (c) were to operate retroactively, we apply the version of the statute in effect in 2012 (Stats. 2003, ch. 484, § 2), and our statutory citations refer to that version of section 1102.5.

violated former section 1102.5, subdivision (c).[10] First, the District argued that there was nothing *unlawful* about the District's directive that Allyn reduce the e-mail retention period and delete the e-mail archive server, and therefore the District did not retaliate against Allyn for refusing to participate in an act that would violate state or federal law. Second, the District argued that based on the undisputed evidence, Allyn did not *refuse* to perform the directive to reduce the e-mail retention period or to delete the e-mail archive server. Instead, although she initially expressed her *disagreement* with the decision and *delayed* in taking action, she ultimately *complied* with the directive.

After holding a hearing, the trial court denied the JNOV motion. The trial court provided no explanation for its ruling other than a general explanation that it had concluded "after viewing the evidence in the light most favorable to Plaintiff, that substantial evidence supports the verdict."

The District also filed a motion for new trial, which was based in part on the District's argument that Allyn's counsel committed misconduct during trial. The trial court denied the motion.

Allyn sought an award of attorney fees based on section 218.5. The motion was denied.

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10 Although Allyn suggests in her appellate brief that the third cause of action was pled *generally* under former section 1102.5, including subdivision (b), rather than *exclusively* under subdivision (c), the record does not support that position. At the hearing on the JNOV motion the trial court asked, "So this was pled under (c), wasn't it?" Counsel for Allyn replied, "That's correct. We haven't made an assertion of (b)." Further, the only specific subdivision of former section 1102.5 identified in the complaint as a legal basis for the third cause of action is subdivision (c).

This matter is before us on appeals filed by the District and by Allyn. Specifically, the District filed a notice of appeal from the judgment and from the order denying the JNOV motion. Allyn filed an appeal from the order denying her motion for attorney fees.

II.

DISCUSSION OF THE DISTRICT'S APPEAL

The District challenges two of the trial court's rulings on appeal. First, it argues that the trial court erred in denying its JNOV motion. Second, it argues that the trial court erred in denying the motion for new trial. We will first consider the argument challenging the ruling on the JNOV motion.

A. *The District's Challenge to the Denial of the JNOV Motion*

1. *Legal Standards Applicable to a JNOV Motion*

" 'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict.' . . . On appeal, we review the motion de novo. '[W]e determine whether substantial evidence supported the verdict, viewing the evidence in the light most favorable to the party who obtained the verdict. . . . We resolve all conflicts in the evidence and draw all reasonable inferences in favor of the verdict, and do not weigh the evidence or judge the credibility of witnesses.' " (*Linear Technology Corp. v. Tokyo Electron, Ltd.* (2011) 200 Cal.App.4th 1527, 1532, citations omitted.)

2. *The District's Contention That Insufficient Evidence Supports a Finding That Allyn Refused to Participate in an Unlawful Activity in Violation of Former Section 1102.5, Subdivision (c)*

The District contends that the JNOV motion should have been granted because insufficient evidence supported the jury's verdict finding that the District violated former section 1102.5, subdivision (c).

Under former section 1102.5 subdivision (c), "[a]n employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Former § 1102.5, subd. (c).) Allyn's theory at trial was that the District violated this provision when it terminated her in retaliation for refusing to (1) reduce the District's e-mail retention period and (2) delete the e-mail archive server.

The District contends that based on the facts presented at trial, Allyn did not establish a violation of former section 1102.5 subdivision (c) for two reasons. First, as a matter of law, the District contends that Allyn has not established that the directive to reduce the District's e-mail retention and delete the e-mail archive server was unlawful under any state or federal law or regulation. Second, the District contends that even assuming the directive was unlawful, Allyn did not *refuse* to carry it out. Instead, she merely expressed her disagreement with the directive and delayed in implementing it, but she eventually complied.

3. *The District's Substantial Evidence Argument Must Be Measured by the Legal Standards Set Forth in the Jury Instructions*

As an initial matter, before turning to our analysis of whether substantial evidence supports the verdict, we must decide the threshold question of whether for the purposes of reviewing the ruling on the JNOV motion, the sufficiency of the evidence to support the verdict is measured against (1) the legal standards set forth in the jury instructions; or (2) the legal standards set forth in the statutory language of former section 1102.5, subdivision (c). Allyn contends that under the doctrine of invited error, because the District agreed to the content of the jury instructions and participated in drafting them, the sufficiency of the evidence to support the jury's verdict must be measured against the standards set forth in the jury instructions. The District, in contrast, argues that the statute, as pled in the complaint, provides the applicable standards for assessing the sufficiency of the evidence to support the verdict, regardless of how the jury was instructed.

This threshold issue is important because there is a wide divergence between the legal standards set forth in the statute and those set forth in the jury instructions. Former section 1102.5, subdivision (c) makes it illegal for an employer to retaliate against an employee for "*refusing to participate* in an activity *that would result in* a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Former § 1102.5, subd. (c), italics.) However, the jury was instructed neither that the statute required a *refusal* to participate, nor that it required that the activity at issue would *actually result in* a violation of law. Specifically, instead of

stating that Allyn was required to prove that she was terminated for "refusing to participate" (former § 1102.5, subd. (c)), the jury was instructed that Allyn was required to prove she was terminated for "*rais*[*ing*] *an objection* to reducing the District's e-mail retention time." (Italics added.) Further, instead of stating that Allyn was required to prove that reducing the e-mail retention time would "result in" a violation of law (*ibid.*), the jury was instructed that Allyn was required to prove that "[*s*]*he believed* that reducing the District's e-mail retention time would violate state and federal rules or regulations . . . ."[11] (Italics added.)

Case law establishes that "where 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, italics added.) This rule applies here

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11 The full instruction provided to the jury on the requirements for the unlawful retaliation claim was as follows:

"Elaine Allyn claims that [the District] discharged her in retaliation for her refusal to participate in what she perceived to be an unlawful act. In order to establish this claim, Elaine Allyn must prove all of the following:

"1. That Elaine Allyn was an employee of [the District];

"2. That Elaine Allyn raised an objection to reducing the District's e-mail retention time;

"3. She believed that reducing the District's e-mail retention time would violate state and federal rules or regulations;

"4. That [the District] discharged Elaine Allyn;

"5. That Elaine Allyn's raising an objection to reducing the District's e-mail retention time was a motivating reason for [the District's] decision to discharge Elaine Allyn;

"6. That Elaine Allyn was harmed; and

"7. That [the District's] conduct was a substantial factor in causing Elaine Allyn's harm."

because the District does not, and as a matter of law, *cannot* base its appeal on a claim of error in the jury instructions. Indeed, because the District proposed the relevant jury instructions, the doctrine of invited error *estops* the District from seeking a reversal of the judgment based on a claim that evidence is insufficient under the legal standards *different* from those set forth in the jury instructions.

"The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) "It has been said that the invited error doctrine 'applies "with particular force in the area of jury instructions . . ." ' [citation], and numerous cases have held that a party who requests, or acquiesces in, a particular jury instruction cannot appeal the giving of that instruction." (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000; see also *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1090 [" 'It is an elementary principle of appellate law that "[a] party may not complain of the giving of instructions which he has requested." ' "].) As particularly relevant here, in *Jentick v. Pacific Gas & Electric Co.* (1941) 18 Cal.2d 117, 120, the defendant appealed from a verdict as well as an order denying a JNOV motion. The court explained that the defendant's challenge to the sufficiency of the evidence to support the verdict must be reviewed according to the legal standards set forth in the jury instructions, as the defendant proposed those instructions. "It is incumbent upon counsel to propose instructions that do not mislead a jury into bringing in an improper verdict. Whether deliberate or not, defendant's action was responsible for the erroneous instruction and verdict. Defendant must therefore accept

them as correct." (*Id*. at p. 122.) Similarly, as explained in *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 675, "[a]bsent instructional error, which [defendant] does not argue, for an appellate court to review a verdict under a rule of law on which the jury was not instructed would allow reversal of a judgment on a jury verdict . . . , even though neither the jury nor the court committed error." Therefore, in such an instance, "[w]e review the sufficiency of the evidence to support a verdict under the law stated in the instructions given, rather than under some other law on which the jury was not instructed." (*Id*. at pp. 674-675.)

Here, as we will explain, the record makes clear that the jury instructions at issue were proposed by counsel for the District, and therefore the doctrine of invited error applies, and the District cannot premise its appeal on legal standards different from those set forth in the jury instructions.

During a conference on jury instructions, the parties and the trial court discussed the appropriate instruction for the unlawful retaliation cause of action, referring to a form CACI instruction with bracketed language that covered several different situations, depending on the subdivision of section 1102.5 under which the lawsuit was brought. Counsel for the District expressly requested that the language requiring that Allyn prove she *refused* to engage in the reduction of the e-mail retention period be omitted, and that instead the instruction state that Allyn was required to prove that she "raised objections." With regard to the issue of whether Allyn had to show that what the District was asking her to do was *actually unlawful*, or only that she *believed* it was unlawful, counsel for Allyn represented that the law required only that Allyn "ha[d] a good faith reasonable

belief that [it] would be illegal." Counsel for the District did not dispute this characterization of the law, and proposed an instruction stating that Allyn was required to prove that she "reasonably believe[d]" that reducing the e-mail retention time would violate the law. After additional discussion, counsel for the District inexplicably dropped the *reasonableness* portion of language he had suggested, proposing that the jury simply be instructed that Allyn must prove that "[s]he believed" reducing the e-mail retention period would violate the law.

On both issues, the trial court ended up instructing the jury with the language suggested by counsel for the District. Thus, based on the District's own proposal, the jury was instructed that Allyn was required to prove that she "raised an objection," was terminated for "raising an objection" and that "she believed" it would be unlawful to reduce the e-mail retention period.

In sum because the District proposed the jury instruction at issue here, the doctrine of invited error applies, and therefore the District may not claim on appeal that the controlling law against which the sufficiency of the evidence is judged is *different* from the law with which the jury was instructed and on which it based its verdict. In reviewing the District's contention that the JNOV motion should have been granted on the ground that insufficient evidence supports the verdict, we accordingly apply the legal standards set forth in the jury instructions.

4. *Substantial Evidence Supports the Verdict When Measured by the Legal Standards in the Jury Instructions*

a. *The Evidence Supports a Finding That Allyn Believed the District Was Requiring Her to Perform an Unlawful Act*

In the District's first challenge to the sufficiency of the evidence to support the verdict, it contends that Allyn did not meet her burden under former section 1102.5, subdivision (c) to show that the action the District demanded of her "*would result in* a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Former § 1102.5, subd. (c), italics added.) According to the District, neither at trial nor on appeal can Allyn point to any law that would have been violated by reducing the District's e-mail retention and deleting the e-mail archive server.

However, as we have explained, in evaluating the sufficiency of the evidence, we look to the jury instruction on this issue. The jury was *not* instructed that the activity at issue *must actually be illegal*. Instead, the jury was instructed that Allyn must prove "[s]he believed" that the activity would violate the law.

Applying the legal standard in the jury instruction, substantial evidence supports a finding that Allyn believed that it would violate the law if the District were to reduce the e-mail retention period and delete the e-mail archive server without a new retention policy in place, as she was being asked to do. At trial Allyn testified that she believed doing either of those things would be against the law.[12] More specifically, when asked

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12 Specifically, Allyn gave the following testimony at trial during direct examination by counsel for the District:

"Q: . . . When Mr. Proctor initially . . . demanded you wipe it clean, take it

to identify what law she believed would be violated if she did what the District demanded, she identified the "California Public Record[s] Act" and "the Federal Records Act." Allyn also testified that she believed the California Public Records Act "says that you have to have a policy or procedure in place with a certain amount of time limit," and that when she was asked to delete the archive server, it would require her to violate the District's existing practice for retaining e-mail, "which would then, in turn, violate the Records Act." Based on this testimony, a jury could reasonably find that, as set forth in the jury instructions, Allyn "believed" that taking the actions that the District requested concerning the e-mail retention period would violate the law.

The District contends that Allyn could not *reasonably* have believed that it would violate the law to delete the e-mail archive server or reduce the e-mail retention period because the statutes she cited do not contain any relevant directives on that subject. However, the jury instructions do not contain a requirement that Allyn held a *reasonable* belief. The jury was instructed only that Allyn was required to prove that she "believed" the District was asking her to violate the law. As we have explained, for the purpose of

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down -- do you remember that?

"A: Yes.

"Q. Okay. And you told him that you couldn't do it --

"A: Yes.

"Q: --Why did you tell him that?

"A: Because I believe it's against the law.

"Q: And when Ms. Singh similarly directed you to take the retention down to three months?

"A: Yes.

"Q: And why did you refuse that directive?

"A: Same reason. I believed it was against the law."

our review of the sufficiency of the evidence, the District is bound by the legal standards in the jury instructions. Substantial evidence supports a finding that Allyn *believed* she was being asked to take illegal action.

b. *The Evidence Supports a Finding That Allyn Believed the District Was Requiring Her to Perform an Unlawful Act*

In its second challenge to the sufficiency of the evidence, the District contends that Allyn failed to meet her burden to show that the District retaliated against her "for refusing to participate in" an illegal activity. (Former § 1102.5, subd. (c).) According to the District, the record proves nothing more than that Allyn initially raised an objection but then ended up complying after Singh complained that she had not carried out the directive. However, this argument lacks merit when we apply the legal standards set forth in the jury instructions.

Although the statute refers to an employee who is terminated for "refus[ing] to participate in" an activity (former § 1102.5, subd. (c)), the jury was instructed -- at the District's *own* suggestion -- that Allyn must prove only that she "raised an objection" to reducing the e-mail retention policy, and that "raising an objection" was a motivating reason for her termination.

Applying the legal standard in the jury instruction, substantial evidence supports a finding that Allyn raised an objection to deleting the e-mail archive server and reducing the e-mail retention period. As Allyn testified, she told Proctor that she would not delete the archive server, and that she would require a legal opinion before doing so. Allyn also testified that she told Singh she did not agree with reducing the e-mail retention period to

three months if Singh did not draft a replacement e-mail retention policy before the change was accomplished. As Allyn described, she delayed in doing what was asked of her based on these objections, and when confronted by Singh, she again objected that she thought a new policy should be drafted before she took action. Allyn's testimony about her response to the District's directives provides substantial evidence to support a finding that Allyn *raised objections* to them.

Indeed, the District does not dispute that the evidence supports a finding that Allyn *raised objections*. Specifically, in the course of its argument that Allyn did not *refuse* to take action because she eventually did what was asked of her, the District concedes that "Allyn *initially objected* to reducing the e[-]mail retention time," and its argument heading states that ". . . Allyn did not *refuse* to delete the archive server, and only objected to it for a time." (Italics in original.) Similarly, during oral argument of this appeal, counsel for the District acknowledged that Allyn raised objections. In short, as the District recognizes, substantial evidence supports a finding that Allyn raised objections to reducing the e-mail retention period and deleting the e-mail archive server.

As both of the District's challenges to the sufficiency of the evidence to support the verdict on the unlawful retaliation cause of action are without merit when judged against the legal standards set forth in the jury instructions, we conclude that the trial court properly denied the JNOV motion.

B. *The District's Challenge to the Denial of the Motion for a New Trial*

We next consider the District's contention that the trial court erred in denying its motion for a new trial.

Although the District raised more than one argument in its motion for a new trial, on appeal its sole contention is that the trial court should have granted a new trial on the ground that counsel for Allyn committed misconduct during trial by mentioning certain subjects in violation of the trial court's rulings.

1. *Applicable Legal Standards*

As relevant here, the trial court may grant a motion for a new trial when there has been "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial," if the irregularity "materially affect[s] the substantial rights of [the moving] party." (Code Civ. Proc., § 657, subd. 1.) "Attorney misconduct is an irregularity in the proceedings and a ground for a new trial." (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148 (*Garcia*).)

As a new trial is only available based on attorney misconduct when a party's substantial rights have been affected and "a miscarriage of justice" has occurred (Cal. Const., art. VI, § 13), to obtain a new trial on the ground of attorney misconduct, "it is not enough for a party to show attorney misconduct. In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial." (*Garcia, supra,* 204 Cal.App.4th at p. 159.)

"In *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 320-321 . . . , our Supreme Court set forth a list of factors bearing on whether attorney misconduct is prejudicial, and that list remains the go-to criteria. [Citation.] The list is: (1) the nature and seriousness of the misconduct; (2) the general atmosphere, including the judge's control of the trial;

(3) the likelihood of actual prejudice on the jury; and (4) the efficacy of objections or admonitions under all the circumstances." (*Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 568.) "[T]he ultimate decision for this court is to determine whether it is reasonably probable that plaintiff would have achieved a more favorable result in the absence of [the misconduct]." (*Garcia, supra,* 204 Cal.App.4th at pp. 160-161.)

"[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) However, as our Supreme Court has explained, at least on the issue of prejudice when attorney misconduct has been shown, "[i]n our review of [an] order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*Id*. at p. 872; see also *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296, fn. 16 [In *Decker*, "[t]he Supreme Court has held that the appropriate standard of review for a trial court's denial of a motion for new trial based on attorney misconduct is de novo, at least on the issue of prejudice."].)

2. *Alleged Misconduct Based on Violation of In Limine Rulings*

Several of the District's contentions concerning misconduct by counsel for Allyn focus on alleged violations of the trial court's ruling on a single motion in limine. Specifically, the District brought a motion in limine, in which it sought pursuant to Evidence Code section 352 to exclude evidence and testimony on certain subjects, which

it contended would be directed at "demoniz[ing] the District" and "casting a negative light of District personnel" by suggesting "alleged 'abuse of power' and 'breach of public trust' on the part of District administrator[s]." In the motion in limine, the District identified the five areas for which it sought an order "exclud[ing] reference to or argument."

> "A. Lawsuits/investigations into alleged impropriety in Bond sale/issuance by the Poway School District;
>
> "B. Southbay School Districts spending practices and relationships with contractors providing good/services to the school districts;
>
> "C. Allegations that wiping the District's archive system was an attempt to cover up financial improprieties based on alleged lawsuit/investigations at other school districts;
>
> "D. Allegations of impropriety in regards to funds spent on renovations of the Superintendent offices; and
>
> "E. Allegations of impropriety in regards to funds spent on computer and other electronic purchases for the Superintendent."

The trial court granted the motion in part, explaining: "I'm granting it as to there's going to be no talk about Poway bonds. There's going to be no talk about other district[s'] expenditures. As for the rest of the request, they're denied at this point in time. You all can make your motions at trial, if appropriate."[13]

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13 The trial court's ruling on the first two items was premised on a concession by counsel for Allyn that they would not elicit testimony on those issues.

The District points to more than one instance during trial in which counsel for Allyn purportedly violated the ruling on the motion in limine. We discuss each instance in turn.

a. *Counsel's Comment During Opening Statement*

The District first contends that counsel for Allyn violated the ruling on the motion in limine by making the following comments near the beginning of opening statement: "In order to tell this story properly, I need to take you back in time. We need to go back to the summer of 2011. Because in the summer of 2011, there w[ere] some very interesting things going on in the county offices of education. There were investigations and . . . ." At that point, counsel for the District objected based on "motion in limine." Counsel and the trial court then held a very lengthy discussion outside the presence of the jury, at which counsel for the District moved for a mistrial.

During the discussion, counsel for Allyn argued that the statement did not violate the ruling on the motion in limine because "what the court ruled was we couldn't talk about the Poway and Sweetwater financial issues," but the comments concerned "investigations that were going on concerning other administrators and misconduct with contractors." The trial court reviewed the transcript from the in limine hearing and confirmed what counsel for Allyn had explained, that the ruling covered only "Poway bonds" and "other district expenditures." Counsel for Allyn asserted that the statement at issue was "well within the parameters of [the trial court's] ruling," and pointed out that the statement was directed at the issues covered by the third portion of the in limine motion, which concerned "allegations that wiping the District's archive system was an

attempt to cover up financial improprieties based on alleged lawsuits or investigations at other school districts," but which the court had not granted, and upon which it had reserved ruling.

After extensive additional discussion, the trial court made a ruling as to what it would allow into evidence. "There's going to be no talk about investigations in other school districts . . . . You can ask your witnesses about what they might have heard someone say, but I don't want any talk about investigations in other school districts." In the course of the discussion, the trial court also stated -- without explaining its reasoning -- that it believed counsel for Allyn had violated the ruling on the motion in limine. Although counsel for Allyn disputed that characterization based on the transcript that had already been reviewed, the trial court disagreed and decided to address the situation by denying the motion for a mistrial but instructing the jury to disregard what counsel said about any investigation at the county offices of education.

Based on the above, we reject the District's contention that counsel for Allyn committed misconduct by making a comment during opening statement that contravened the trial court's in limine ruling. As the transcript of the in limine hearing makes clear, the trial court's in limine ruling covered only "Poway bonds" and "other district[s'] expenditures," and did not cover "alleged lawsuits/investigations at other school districts" to the extent that Allyn was attempting to prove that the District's knowledge of those investigations was the reason for the directive to reduce the District's own e-mail retention period.

Further, even were we to conclude that counsel's comment during opening statement was in violation of an in limine ruling and therefore constituted misconduct, the comment was so vague and undeveloped that the misconduct would not have caused any prejudice to the District. As the District explained its concern, mentioning alleged corruption at other districts would be irrelevant to the issue presented at trial, would unfairly prejudice the District by suggesting that corruption at school districts is a problem, and would consume undue time at trial to rebut those allegations concerning other districts. Counsel's brief mention of "investigations" "in the county offices of education" was not specific enough to suggest to the jury that other school districts were being investigated for any specific problems that might cause the jury to develop an unfair bias against all school districts, including the District.[14]

b. *Question During Trial Testimony of Allyn*

The District contends that counsel for Allyn also violated the court's ruling by eliciting the testimony from Allyn by asking, "Did you observe any transactions with any District contractors that caused you concern." Allyn answered "Yes" and explained that

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14 In its appellate briefing, the District contends that counsel for Allyn violated the ruling on the in limine motion by attempting to elicit testimony from Proctor with the following question: "And in the summer of 2011, did you become aware of the potential for your district to be investigated concerning bid and contractor practices?" The trial court sustained an objection, and Proctor did not answer the question. The District did not refer to this question as part of its new trial motion, and it does not explain in its appellate briefing how the question sought to improperly elicit information in violation of the ruling on the motion in limine or how the question caused prejudice to the District. We therefore conclude that the District has waived the argument and we do not consider it further.

contractors who had renovated schools in the District provided "a lot of gifts" to Proctor and the administrators, including tables at charity events. At the request of the District, the trial court struck the testimony.

Subsequently, after the trial court once again reviewed the reporter's transcript from the hearing on the in limine motions, the parties and the trial court discussed whether the testimony elicited about the contractors giving gifts to the District violated the ruling on the in limine motion we have discussed above. As the trial court observed, there was no violation of the in limine ruling because that ruling concerned conduct at *other* school districts, whereas the elicited testimony concerned conduct at the District. However, the trial court ruled, that *going forward*, it would not permit testimony about corruption or taking inducements at the District.

Based on the foregoing, we find no merit to the District's contention that counsel for Allyn committed misconduct in violation of the ruling on the in limine motion by eliciting testimony from Allyn about gifts to District administrators from contractors, as there was no relevant ruling in place at the time.

c. *Comments During Closing Argument*

The District contends that counsel for Allyn also violated the ruling on the in limine motion during closing argument. Specifically, the District refers to (1) counsel's statement that in the Summer of 2011, Proctor "was concerned about investigations coming into [the District,] and he was concerned about e[-]mails and other electronic evidence that could embarrass him, that could subject him to discipline"; and (2) counsel's comment "What motive did Mr. Proctor and Ms. Singh have to delete

evidence? Well, they had their financial misconduct. They had their concerns about an investigation. They had a significant motive."

Although the District did not object at the time and did not mention these comments as part of its motion for a new trial, on appeal it contends for the first time that these comments violated the ruling on the in limine motion because they "improperly implied to jurors that there was misconduct at *other* school districts." We disagree. Neither of the statements to which the District refers make any mention of misconduct or investigations at other districts. Indeed, the statements are best understood as a reference to testimony from Allyn that she heard Proctor mention a concern about a *potential investigation in the District*, causing him to comment that "we needed to make sure our house was clean."[15]

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15 The following testimony was elicited at trial concerning a potential investigation at the District:

"[Counsel for Allyn]: Was there a cabinet meeting in the Summer of 2011 where Mr. Proctor warned other cabinet members about the potential for investigation in Fallbrook?

"[Allyn:] Yes. I was at that meeting

"[Counsel for Allyn:] Can you tell us what he said?"

"[Allyn:] He had come back from another meeting and was concerned and said we needed to make sure our house was clean.

"[Counsel for Allyn:] Did he say anything else?

"[Allyn:] He talked a little bit about his concerns as to why, but he basically said we needed to make sure our house was clean."

3. *Alleged Misconduct Based on Evidentiary Ruling During Trial Regarding Teacher Union Complaints*

Finally, in addition to arguing that counsel committed misconduct by violating the trial court's ruling on the in limine motion, the District points to one additional instance of conduct by counsel for Allyn that it claims constituted prejudicial misconduct.

During trial, counsel for Allyn asked the trial court whether he could question Proctor about complaints about Proctor made by the teachers union concerning finances and reporting. The trial court ruled that the evidence would not be admissible, stating "We're not going to get into what union members may or may [not] have said about him."

In violation of that ruling, counsel for Allyn asked Proctor, ". . . are you aware of the teachers union over the past several years making complaints?" The District interposed an objection before Proctor could answer. At a discussion outside the presence of the jury, counsel for Allyn apologized to the trial court and stated that he misunderstood the evidentiary ruling excluding the evidence.

We conclude that even assuming for the sake of analysis that counsel committed misconduct by attempting to elicit testimony in violation of the trial court's ruling, the District has not established prejudice for the purposes of a new trial motion. Because the question was extremely broad, it did not point the jury to any specific type of teacher union complaint. The question was simply whether the witness was "aware of the teachers union over the past several years making complaints?" Due to an objection, the witness did not answer. Based solely on the question by itself, a juror would have no idea of the type of complaint at issue, or whether it involved a complaint of improper or

illegal conduct rather than run-of-the-mill complaints that a union would be expected to raise in representing its members. Further, although the trial court's ruling was specifically directed to excluding evidence of union complaints about Proctor, nothing in the question indicated that counsel was asking about complaints directed at Proctor rather than simply union complaints in general. Moreover, even if the jury inferred from the question that there must have been some teacher union complaints that concerned Proctor, that evidence would be so far removed from the central issue presented at trial, which was whether the District retaliated against Allyn for her resistance to changing the District's e-mail retention practices, that there is no reasonable probability that it would have affected the outcome of the trial.

In sum, we conclude that the District has not established that the trial court erred in denying its motion for a new trial based on alleged misconduct by counsel for Allyn.

III.

DISCUSSION OF ALLYN'S APPEAL

After judgment was entered, Allyn filed a motion for attorney fees, in which she sought fees in the amount of $791,750. The trial court denied the fee motion. Allyn challenges that ruling on appeal.

The sole statutory authority that Allyn identified in her fee motion to support her request for fees was section 218.5, subdivision (a). Under that provision, "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the

initiation of the action." (*Ibid*.) Allyn argued in the trial court that the award for lost income qualifies as an award based on a claim for "nonpayment of wages" within the meaning of section 218.5, subdivision (a).[16]

The trial court denied the fee motion on the ground that section 218.5, subdivision (a) does not apply to a quasi-municipal corporations such as a public school district. As we will explain, we agree with the trial court's analysis and conclude that the fee motion was properly denied.[17]

Although the statutory basis for Allyn's fee motion was section 218.5, subdivision (a), the Labor Code establishes in section 220, subdivision (b) that section 218.5 is not applicable to the payment of wages of employees directly employed by a public school district. Specifically, section 220, subdivision (b) states: "Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation." A public school district such as the District is an "other municipal corporation" within the meaning of section 220, subdivision (b). (*Gateway Community Charters v. Spiess* (2017) 9 Cal.App.5th 499, 507 [contrasting charter school corporation

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16 As we have explained, on the special verdict form the jury found that Allyn suffered damages of $1,046,000 for "[p]ast/present/future lost income" and $148,000 for "[g]eneral [d]amages," and based on these findings, the trial court entered judgment against the District in the amount of $1,194,000 plus interest.

17 Because we conclude that section 218.5 does not apply here in that the District is a quasi-municipal corporation, we need not and do not consider whether Allyn's lawsuit was an "action brought for the nonpayment of wages" within the meaning of section 218.5, subdivision (a).

with the "quasi-municipal districts that have been deemed to qualify as 'other municipal corporations' (for purposes of § 220[, subd.](b)), i.e., public school districts, hospital districts, and water storage districts"]; *Division of Labor Law Enforcement v. El Camino Hosp. Dist.* (1970) 8 Cal.App.3d Supp. 30, 36 [" 'the term "other municipal corporation," as used in . . . section 220, means public corporations or quasi-municipal corporations' "]; *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 ["local school districts are deemed to be agencies of the state for the administration of the school system and have been described as quasi-municipal corporations"].)

Therefore, because Allyn was a direct employee of the District, and the District is an "other municipal corporation" within the meaning of section 220, subdivision (b), Allyn may not recover attorney fees under section 218.5, subdivision (a). (See *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal.App.4th 1326, 1336-1337 [§ 218.5 "does not apply to public employers such as the [community college district defendant],

which is a 'municipal corporation' for purposes of the Labor Code and, therefore, exempt from a fee award"].)[18]

DISPOSITION

The judgment, the order denying the JNOV motion, and the order denying Allyn's motion for attorney fees are affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

DATO, J.

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18 On appeal, Allyn attempts to avoid the fact that an award of fees under section 218.5, subdivision (a) is not available to a direct employee of a school district who brings a claim for nonpayment of wages, by pointing out that she was awarded *general damages* as well as lost wages. However, this argument fails because Allyn has cited no authority under which she could recover attorney fees *other than* section 218.5, subdivision (a), and that provision applies *only* to claims for nonpayment of wages, not to claims seeking general damages.