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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CLARA NEWTON,

Plaintiff and Appellant,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY et al.,

Defendants and Respondents.

E051405

(Super.Ct.No. RIC432834)

OPINION

APPEAL from the Superior Court of Riverside County. Franz E. Miller, Judge.
(Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of
the Cal. Const.) Affirmed.

Mesisca, Riley & Kreitenberg, Dennis P. Riley, Rena E. Kreitenberg and Steven
C. DeVore for Plaintiff and Appellant.

Paul, Plevin, Sullivan & Connaughton, Fred M. Plevin and Michael J. Etchepare
for Defendants and Respondents.

Plaintiff and appellant Clara Newton, a 67-year-old certified Spanish language court interpreter,¹ sued defendant and respondent Superior Court of Riverside County (hereafter RCSC or the court) for age discrimination in hiring and sued defendant and respondent Carol Waterhouse-Tejada (hereafter Tejada), a budget analyst for the court, for fraud. She appeals a judgment entered following a jury trial. She contends that the court erred in denying her motion for new trial, her motion for judgment notwithstanding the verdict, and her motion to amend the complaint to conform to proof. She also contends that the court erroneously modified a standard jury instruction, erred in denying her motion to tax costs, and erred in sustaining a demurrer to two additional causes of action alleged in her fourth amended complaint. We will affirm the judgment.

BACKGROUND AND PROCEDURAL HISTORY

This case arises in the context of the Trial Court Interpreter Employment and Labor Relations Act (Gov. Code, § 71800 et seq.; hereafter the Interpreter Act or the Act), which was enacted in 2002 to facilitate a transition from the existing practice in California trial courts to engage the services of interpreters as independent contractors to a new system in which interpreters would be court employees. (Gov. Code, § 71800; Stats. 2002, ch. 1047, § 1 (Sen. Bill No. 371);² Stats. 2003, ch. 257, § 7; see Historical and Statutory Notes, West's Ann. Gov. Code, foll. § 71800.) (All further statutory

¹ Newton was 67 when the complaint was filed.

² The witnesses generally referred to the Interpreter Act as S.B. 371.

citations refer to the Government Code unless another code is specified.) The Interpreter Act provided for a transition period not to exceed two years. (§ 71801, subd. (i).) During the transition period, trial courts were required to create a new employee classification entitled “court interpreter pro tempore” (CIPT). (§§ 71803, subd. (a), 71805, subd. (a).) Beginning July 1, 2003, the Interpreter Act required trial courts to appoint CIPT’s, rather than independent contractors, except under specified circumstances. One such circumstance, which is pertinent in this case, applied to court interpreters who were over the age of 60 on January 1, 2003. (§ 71802, subd. (b)(2); hereafter section 71802(b)(2).) Individuals who met the criteria of section 71802(b)(2) could continue to provide interpreting services if they so requested in writing before June 1, 2003. (*Ibid.*) Interpreters who chose that option are referred to by the parties as “opt-outs.”

The Act also permitted the courts to continue using independent contractors who did not qualify as opt-outs under section 71802(b)(2). The courts could use non-opt-out independent contractors only if the court had assigned all available CIPT’s and opt-outs but still needed additional interpreters. If a non-opt-out independent contractor worked more than 45 days in a year, the interpreter was entitled to apply for employment as a CIPT and could not be refused except for cause. (§ 71802, subd. (c)(2).) The parties sometimes refer to this class of interpreter as “45-day interpreters.”

The Interpreter Act created regions for purposes of implementation. RCSC is in Region 4. (§ 71807, subd. (a)(4).)

Newton, who was born on July 1, 1937, was 65 years old on January 1, 2003, and chose to remain an independent contractor pursuant to section 71802(b)(2). She continued working as an interpreter in the court in Indio for some time, but her services were ultimately terminated. She filed suit, asserting multiple causes of action against RCSC and four individual defendants.³

RCSC and the individual defendants successfully demurred to a number of Newton's causes of action. Newton's second amended complaint, filed on February 17, 2006, included a cause of action for fraud and deceit against the individual defendants. Their demurrer to that cause of action was sustained without leave to amend on April 24, 2006, and a judgment of dismissal was entered on November 30, 2007. On October 13, 2006, Newton filed a third amended complaint against RCSC, alleging age discrimination and breach of contract. RCSC's motion for summary judgment on the third amended complaint was granted. Newton appealed from both the order sustaining the demurrer without leave to amend and the summary judgment. (*Newton v. Superior Court of Riverside County* (Jan. 27, 2009, E044076) [nonpub. opn.] [at p. 4].) We affirmed the judgments as to some causes of action but reversed as to Newton's cause of action against RCSC for age discrimination and as to her cause of action against Tejada for fraud. We affirmed the order sustaining the demurrer as to the other individual defendants. (*Id.* [at p. 23].)

³ Tejada, Maggie Martinez, Jana Douglass and Joan Moody.

Following remand, Newton filed a fourth amended complaint alleging age discrimination against RCSC, fraud against Tejada, and breach of an oral contract and promissory estoppel against RCSC. The trial court sustained RCSC's demurrer to the second and third causes of action (i.e., breach of oral contract and promissory estoppel) without leave to amend.

Following the trial, the jury returned defense verdicts on the age discrimination and fraud causes of action. Newton filed a motion for new trial and a motion for judgment notwithstanding the verdict, both of which were denied. Her motion to tax costs was also denied. Newton filed a timely notice of appeal, and a timely amended notice of appeal to include the order denying her motion to tax costs.

FACTS⁴

At the time the Interpreter Act came into effect, Newton had been working as a Spanish language interpreter in San Diego County and then at the court in Indio for over 20 years. She had been a certified interpreter since 1979. She was one of two interpreters working at the Indio courthouse who qualified to opt out of the transition

⁴ Newton's opening brief relates the evidence only in the light most favorable to her position. As defendants point out, her failure to describe the evidence in the light most favorable to the judgment permits us to find that she has forfeited any argument which is based on a claim of insufficiency of the evidence. (See *Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 571-572.) We will address Newton's contentions on their merits, but we will view the evidence in the light most favorable to defendants where substantial evidence review is called for. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) In this section, we will discuss the evidence as presented by both sides.

from independent contractor status to employee status. The second was Sarah Bensadoun.⁵

Around the same time, Maggie Martinez became the interpreter supervisor at the Indio court. According to Newton, Martinez treated her badly. Martinez removed her from traffic court, where she had worked for two to three years, for no reason and assigned her instead to fill in wherever an interpreter was needed. On one occasion, after Newton had worked a full day, Martinez told her she was needed to interpret at a preliminary hearing to be held that evening. Newton told her she could not do it, because she was tired after working all day and because she had to pick up her grandson at the bus station. When Newton attempted to leave for the day, a deputy sheriff intercepted her and told her he had been instructed to “take” her to the courtroom for the preliminary hearing. At that point, Martinez came out of the building and asked her to go to the courtroom. Ultimately, they agreed that Newton would pick up her grandson and return to the courthouse for the preliminary hearing. Finally, according to Newton, Martinez reacted “hysterically” to a minor dispute between Newton and another interpreter over their shared office space.

Early in 2004, Newton decided that she wanted to change her status from opt-out to CIPT. She had been uncomfortable for a while because of treatment she was getting

⁵ Although the parties refer to Newton and Bensadoun as the only two opt-outs, the record contains a reference to a third opt-out who was later hired by the court as a CIPT.

from Martinez, and Martinez had told her that if “somebody else comes and applies for a CIPT job . . . I’m going to take them and we are going to bump you from your job.”

Newton thought there was a real possibility that she was going to lose her job and that becoming an employee was the best way to protect herself. Newton asked Martinez for an application. Martinez said she did not have any and that it was the last day to apply in any event. (There was an open recruitment at the time, which apparently ended on January 30, 2004.) Newton wrote a letter to Tejada, who had been designated as the person in charge of implementing the Interpreter Act.⁶ She explained that she intended the letter to be an application for a CIPT position and provided the same information she would expect to provide in a job application. She spoke to Tejada after she submitted the letter. The conversation became heated, and Tejada hung up on her.

Newton sought the advice of the Court Certified Interpreters Association. The president of that association forwarded her concerns to Laura Ashcraft, an attorney employed by the AOC who was assigned to Region 4 to assist in implementing the Interpreter Act. Ashcraft told Newton she would contact Tejada on her behalf.

Tejada telephoned Newton on February 11, 2004 and told her that she would accept Newton’s letter as an application. However, according to Newton, Tejada talked her into withdrawing her application. According to Newton, she explained to Tejada that

⁶ Tejada, a fiscal analyst, was asked to be part of the Region 4 committee and to assist in implementing the new law in the Riverside County courts. Her function was to attend meetings with attorneys from the Administrative Office of the Courts (AOC), take notes and report back to her court. Her function was also to explain the new law to the interpreters and answer their questions. She frequently sought the guidance of the AOC.

she was concerned about being “bumped out of” her job and having no job. According to Newton, Tejada told her that she could lose her job under only two possible scenarios: if someone with more seniority than Newton “[came] in as an employee” and bumped Newton out of her job, or if the needs of the court or the assignments changed. Newton felt persuaded by Tejada’s explanation, but requested it in writing.

Tejada, on the other hand, testified that in or about January 2004, she had asked Maggie Martinez and another interpreter coordinator if they knew of any independent contractor interpreters who were going to apply for CIPT positions during the open recruitment that ended on January 30, 2004. Tejada, who was a fiscal analyst for RCSC, needed to know for budgetary reasons. Martinez told her that Newton and Sarah Bensadoun, the other opt-out at the Indio court, were going to apply for CIPT positions because they were concerned about losing their jobs if they did not become employees.

Tejada spoke to Newton twice about her letter application. In the first conversation, Tejada said that she did not know if she could accept the letter as an application, but said she would find out. She did not tell Newton that “any pro tem could take [her] job,” as Newton contended. In the second conversation, on February 11, 2004, Newton told Tejada that she was concerned about being “bumped” by a CIPT. Tejada explained to Newton that opt-outs and CIPT’s were entitled to equal priority with respect to assignments under the Interpreter Act. Although she understood that Newton was concerned about losing her job, the only concern Newton raised and which Tejada addressed was that Newton feared that a CIPT could be given priority over her or could

even replace her. Tejada sought to assure her that under the Interpreter Act, Newton could be “bumped” from her assignment only if a CIPT with greater seniority wanted the assignment or if the court’s criteria for making assignments changed. She repeated that information in a follow-up memo to Newton. She was concerned that Newton was considering giving up her opt-out position based on faulty information.⁷ She intended the conversation and the memo as informational, not as a promise. Moreover, she did not intend to make any representation concerning Newton’s general job security, but simply to explain that she had equal priority with CIPT’s with respect to assignments. Around the same time she sent the memo to Newton, Tejada sent a similar explanatory memo to Sara Bensadoun.

The memo Tejada wrote to Newton was admitted into evidence as Exhibit 43. It states, in part:

“Prior to our conversation this morning, you stated you felt compelled to give up your opt-out status and become a CIPT [because] [y]ou were under the impression that you would lose your current interpreting assignment if you did not become an employee. Please be aware that this is not accurate.

⁷ Tejada viewed being an opt-out as advantageous. The advantages included being able to leave as soon as the opt-out’s work was done for the day, while employees had to remain until 5:00 p.m. even if they were no longer needed in a courtroom; being paid for an additional half day for any work performed beyond 5:15 p.m.; being paid mileage for travel; and being able to decline offered assignments.

“Pursuant to S.B. 371, interpreters with opt-out status are to receive equal priority in assignments as the CIPTs In more simple terms, [opt-outs] are to be treated like the CIPTs in regards to assignment frequency (# of days worked) and assignment location. In even more simple terms, that means that you can continue your current interpreting assignment in Indio until (1) a time when a CIPT or other opt-out with more seniority ‘bumps’ you from that assignment or (2) the criteria for giving out the assignments is changed and your assignment is affected as a result.”

In reliance on what she viewed as Tejada’s assurances that her job was safe, Newton decided to withdraw her application.

At the time of the conversation with Newton, Tejada was aware that Martinez wanted to discontinue using Newton’s services because Martinez viewed her as difficult and as not getting along well with the other interpreters. However, Martinez had told Tejada that she could *not* dispense with Newton’s services because Indio had a chronic shortage of interpreters. Tejada felt no obligation to tell Newton that her position might be at risk for reasons other than being “bumped” by a CIPT. Tejada’s only authority was to explain to Newton the effect of the Interpreter Act.⁸

In April 2004, Newton had a disagreement with another interpreter over the use of their shared office space. She wrote a note to the interpreter which Martinez considered threatening. In June 2004, Newton, who was upset about not getting her pay on time,

⁸ Newton ultimately admitted that she knew that the court could stop using her services if she “caused something to give them a reason” to do so.

yelled at an accounting employee. Martinez found Newton to be difficult, confrontational, negative and bossy. She often complained about her assignments, and had a bad attitude. Nevertheless, in June 2004, Martinez again told Tejada that although she would like to discontinue using Newton's services, the court needed her because of the shortage of interpreters.

Jana Douglass, who was the head of operations for the desert region of RCSC, became aware of the incident with the accounting department. Douglass was "pretty much tired of the disruption to the court caused by Ms. Newton." There had been at least two other incidents involving a "mild confrontation" over the way pay vouchers were being distributed. There were issues with assignments and refusal to accept assignments, issues with employees telling her that Newton was rude or pushy and in general, "unpleasantness and unprofessionalism" on Newton's part. Douglass was also aware of the incident with the note Newton had written to the other interpreter. Douglass was aware of the continuing shortage of interpreters in the desert region, but had to weigh the court's need for interpreters against the disruption Newton caused. She ultimately decided that terminating Newton's services was in the best interest of the smooth operation of the court. Newton's age played no role in her decision. She informed Newton on June 30, 2004 that her services were no longer required.

On July 2, 2004, Newton submitted an application for a CIPT position. Joan Moody, who processed the application, returned it to her with a form letter stating that the court was not recruiting at that time. There was no open recruitment, and the court's

policy was not to accept applications unless there was an open recruitment. An open recruitment began on August 1, 2004. Newton did not submit an application during the recruitment period.

Sara Bensadoun (who, as an opt-out, was necessarily over 60 years old) applied to become a CIPT after Newton was terminated, and was hired by the court. Another opt-out, Gerald Camacho, was also hired by the court. At no time during Tejada's discussions with Martinez, Joan Moody or Jana Douglass was Newton's age mentioned.

LEGAL ANALYSIS

1.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING NEWTON'S MOTION FOR NEW TRIAL

Newton moved for a new trial on both causes of action. She contended that the fraud verdict was contrary to the evidence, that instructional error infected the verdicts on both counts and that the trial court erred in denying her motion to amend the complaint according to proof with respect to the age discrimination claim. She raises the same contentions on appeal, contending that the trial court abused its discretion in denying the new trial motion.

The Trial Court's Finding That the Fraud Verdict Was Supported By the Evidence Was Not an Abuse of Discretion.

Newton contends first that the jury's fraud verdict is contrary to the evidence because Tejada's admissions at trial established that she concealed from Newton the fact

that RCSC had already decided to terminate her services when Tejada told her that RCSC would continue to use her services if she remained an opt-out and because Tejada intentionally misrepresented that Newton's job was secure, even though she knew that RCSC intended to terminate Newton's services.

A trial court may not grant a new trial motion based on the contention that the verdict is contrary to the evidence "unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.) Although the moving party is entitled to the trial court's independent assessment of the evidence, including the credibility of witnesses, the weight to be accorded to the evidence and the inferences to be drawn from the evidence, the court has "wide latitude" in deciding such a motion, and an order denying a new trial motion will be disturbed "only upon a showing of manifest and unmistakable abuse." (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Dept. of Veterans Affairs* (1998) 67 Cal.App.4th 743, 751; see *Green v. Soule* (1904) 145 Cal. 96, 102-103.)

Here, the trial court found that "the jury was entirely justified in finding no fraud, either by way of misrepresentation or concealment, and the court would find the same" There can be no abuse of discretion in such a finding unless the evidence in support of Newton's claims was so compelling that no rational trier of fact could have

rejected it.⁹ Although Newton insists that the evidence supports only her interpretation, we disagree.

First, as to the theory of fraud by concealment, Newton contends that the evidence conclusively establishes that Tejada knew that Newton's services were going to be terminated when Tejada told her that she could continue in her current assignment unless someone with more seniority "bumped" her. Not only does the evidence not compel that conclusion, it is actually to the contrary: Tejada testified that before her conversation with Newton, Martinez had told Tejada that she would *like* to discontinue using Newton's services but that she could not do so because of the shortage of interpreters. Martinez told her that again later and said that Newton was "working satisfactorily." There was no evidence that any decision to terminate Newton's services had been made, and the portions of the record Newton cites in support of her contention do not establish that it was even arguable that the decision had already been made.

As to the intentional misrepresentation theory, Newton contends that Tejada admitted to making a false representation that Newton's job was secure. This is not true. Tejada testified that she understood that Newton was concerned about losing her job, but

⁹ A plaintiff's motion for new trial based on the insufficiency of the evidence is in effect a claim that the defense verdict was not supported by sufficient evidence. Where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

the sole concern Newton raised with her was the possibility of losing her assignment to a CIPT. And, as the information liaison with respect to the new Interpreter Act, Tejada's only authority was to explain the effect of the new law. Tejada's memo refers to "assignments" and not to Newton's "job" or her "position." This evidence unquestionably supports the conclusion that even if Newton understood Tejada to be saying that her position with the court was secure, Tejada meant only that her current assignment was secure, except in the circumstances Tejada outlined. Newton has cited no evidence which compels a difference inference. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Moreover, Newton ultimately admitted that she knew her services could be terminated if she gave the court cause to do so. From this, a rational trier of fact could conclude that Newton was well aware that her services could be terminated for reasons other than the ones Tejada referred to in her memo.

Because Any Instructional Error as to the Fraud Claim Was Not Prejudicial, the Trial Court Did Not Abuse Its Discretion In Denying the New Trial Motion.

Newton contends that the court gave erroneous instructions relating to the element of reliance.¹⁰ She does not quote the instructions given, nor does she cite to any portion of the record where the disputed instructions appear. An appellant must both provide a record which adequately shows the error complained of *and* must cite to the record in

¹⁰ The elements of fraud are (1) a misrepresentation or concealment of a material fact, a false promise, or any act "fitted to deceive" (Civ. Code, § 1572); (2) knowledge of falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

support of his or her arguments. (Cal. Rules of Court, rule 8.204(a)(1); *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Consequently, we need not address this contention.¹¹

We note, however, that as the defendants have pointed out, because the jury found that Tejada did not make a false representation, conceal material facts or make a false promise, the jury did not need to determine whether Newton justifiably relied on Tejada's statements or deception. Consequently, no conceivable prejudice resulted from any error in the disputed instructions, and the trial court did not abuse its discretion in denying the new trial motion. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832-833.)

The Instruction Requiring the Jury to Find That Newton Applied for an Available Position Is a Correct Statement of the Law.

Newton contends that the trial court erred in modifying CACI No. 2500 to require the jury to find that she applied for "an available position" as an element of her age discrimination claim.¹²

¹¹ We note as well that both parties have failed to comply with rule 8.204 of the California Rules of Court. That rule provides that in citing the record, parties must cite not only to the page but to the volume of the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).) The larger the record, the more important compliance with this rule becomes. Here, the appellant's appendix consists of eight volumes and the reporter's transcript of seven, yet the parties merely cite to page numbers without giving the volume number. We now put the parties and their attorneys on notice that in any future case in which they fail to comply with all of the rules pertaining to the form and content of briefs, we may exercise our prerogative to strike their briefs. (Cal. Rules of Court, rule 8.204(e).)

¹² Although Newton has again not cited any portion of the record in which the disputed instruction appears, it is nevertheless clear from the special verdict that the court
[footnote continued on next page]

CACI No. 2500 requires the jury to find that the plaintiff in a suit for discrimination in hiring applied for “a job,” rather than for “an available position.” However, courts have held that one element of a claim for discrimination in hiring is that the plaintiff was rejected for a job for which he or she was qualified and for which the employer was seeking applicants, i.e., an available position. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 149, both citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.) Accordingly, the modified instruction given by the court correctly stated the law.

Newton also contends that a position was available as a matter of law because, at the time Newton submitted her application to become a CIPT, RCSC was required, pursuant to section 71802, subdivision (e), to advertise that it was accepting applications and to offer her employment.

Section 71802, subdivision (e) provides: “A trial court that has appointed independent contractors pursuant to paragraph (1) of subdivision (b) or to subdivision (c) for a language pair on more than 60 court days or parts of court days in the prior 180 days shall provide public notice that the court is accepting applications for the position of court interpreter pro tempore for that language pair and shall offer employment to qualified

[footnote continued from previous page]

did require the jury to find that Newton applied for an available position before considering any other aspect of her age discrimination claim. Consequently, we will address this contention.

applicants.” Even if Newton is correct that RCSC was required by that statute to solicit applications and hire qualified applicants at the time she submitted her application, however, the evidence established that RCSC did *not* have an open recruitment period at that time. Tejada testified that Region 4 had determined that application periods were to be opened only every six months, regardless of when the court had reached the 60-day use of independent contractors. Consequently, even if RCSC was mistaken as to the effect of section 71802, subdivision (e), it is nevertheless a fact that no position was available at that time.

The Court Properly Denied Newton’s Motion to Amend the Complaint to Conform to Proof.

Following her testimony at trial, Newton sought leave to amend her complaint to conform to proof. The operative fourth amended complaint based its age discrimination claim solely on RCSC’s rejection of the application Newton submitted following the termination of her services as an independent contractor. She sought leave to amend the complaint to allege age discrimination based on the application she withdrew the previous February. The trial court denied leave to amend because it was undisputed that Newton voluntarily withdrew that application. Consequently, the court concluded, there was no adverse employment decision by RCSC. Newton now contends that this was an abuse of discretion.

A court’s decision to grant or deny leave to amend to conform to proof is reviewed for abuse of discretion. (Code Civ. Proc., § 473, subd. (a)(1); *Lincoln Property Co., N.C.*,

Inc. v. Travelers Indemnity Co. (2006) 137 Cal.App.4th 905, 916.) Leave to amend a complaint to conform to proof is normally liberally granted, as long as no prejudice to the opposing party results. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1047-1048.)

To establish a prima facie case of unlawful discrimination, the employee must show that “(1) he was a member of a protected class, (2) he was qualified for the position he sought . . . , (3) he suffered an adverse employment action, such as . . . denial of an available job, and (4) some other circumstance suggests discriminatory motive.” (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 355.) Newton contends that her voluntary withdrawal of her application constituted an “adverse employment action” as that term has been interpreted under the Fair Employment and Housing Act (§ 12900 et seq., hereafter the FEHA).

Newton does not cite any case which directly addresses this contention, and we have found none. However, California regulations interpreting the FEHA with respect to claims of discrimination in employment include the following provisions:

“[A]n employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the covered entity or, as defined in Section 7287.6(b), for the discriminatory actions of its employees where it is demonstrated that, as a result of any such discriminatory action, *the applicant or employee has suffered a loss of or has*

been denied an employment benefit.” (Cal. Code Regs., tit. 2, § 7286.6, subd. (b), italics added.)

“Except as otherwise provided in the [FEHA], [an ‘employment benefit’ means] any benefit of employment covered by the [FEHA], including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.” (Cal. Code Regs., tit. 2, § 7286.5, subd. (f).)

“[An applicant is any] individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, *‘Applicant’ is also an individual who can prove that he or she has been deterred from applying for a job by an employer’s or other covered entity’s alleged discriminatory practice. ‘Applicant’ does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.*” (Cal. Code Regs., tit. 2, § 7286.5, subd. (h), italics added.)

Because the regulations expressly define “applicant” as a person who can prove that he or she has been deterred from applying for a job by an employer’s alleged discriminatory practice, such a person can allege a claim for employment discrimination

under the FEHA. (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 383.) Similarly, the United States Supreme Court has held that a person who does not apply for a position because the employer's discriminatory practices discouraged him or her from doing so may obtain relief under Title VII of the federal Civil Rights Act (42 U.S.C. § 2000e et seq.). (*International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 365-368.)

However, as noted above, the regulations also provide that a person who voluntarily withdraws an application for employment without intimidation or coercion from the employer is *not* an applicant and thus has no claim for discrimination under the FEHA. (Cal. Code Regs., tit. 2, § 7286.5, subd. (h).) Here, Newton's position was that she withdrew her application because Tejada made fraudulent representations and/or false promises; she did not contend that she did so because she was intimidated or coerced, and there is no evidence she was intimidated or coerced. Consequently, the trial court correctly concluded that any claim for damages based on Newton's withdrawal of her application necessarily rested on her allegations of fraud, and the court did not abuse its discretion in denying Newton's motion for leave to amend the complaint to conform to proof.

2.

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGMENT

NOTWITHSTANDING THE VERDICT

Newton contends that the court erred in denying her motion for judgment notwithstanding the verdict (JNOV) on her fraud claim because “all of the evidence” establishes that Tejada intended to mislead her into believing her position was secure and that she had the same job security as a CIPT, when Tejada knew this was not the case and knew that RCSC had already made the decision to terminate her services, and because the evidence “proves as a matter of law” that Tejada intended to defraud her.

We review an order denying a JNOV motion to determine whether the jury’s verdict is supported by substantial evidence. If it is, the motion was properly denied. (*Dell’Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 554-555.) Under a substantial evidence standard of review, we view the evidence in the light most favorable to the jury’s verdict. We do not weigh the evidence, and we resolve all conflicts and draw all reasonable inferences in support of the verdict. (*Bickel v. City of Piedmont, supra*, 16 Cal.4th at p. 1053.)

As we have previously discussed, substantial evidence supports the jury’s verdict that Tejada did not commit fraud under any of Newton’s theories. Accordingly, the trial court properly denied the JNOV motion.

3.

THE DEMURRER WAS PROPERLY SUSTAINED

Introduction

RCSC demurred to the second and third causes of action in the fourth amended complaint, for breach of an oral contract and for promissory estoppel. The trial court sustained the demurrer without leave to amend on the ground that neither cause of action was brought in a “pre-litigated [*sic*] government claim,” as required by section 905.7.¹³ Newton contends that the demurrer was improperly sustained because her government claim contained facts sufficient to apprise RCSC of the basis for her claim.

“[S]ection 945.4 provides that ‘no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with . . . Section 910 . . . until a written claim therefore has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board’ Section 910, in turn, requires that the claim state the ‘date, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted’ and provide ‘[a] general description of the . . . injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.’” (*Stockett v.*

¹³ Section 905.7 provides: “All claims against a judicial branch entity for money or damages based upon an express contract or for an injury for which the judicial branch entity is liable shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part.”

Association of Cal. Water Agencies Joint Powers Ins. Authority (2004) 34 Cal.4th 441, 445, fns. omitted (*Stockett*).¹⁴

“The purpose of these statutes is ‘to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.’ [Citation.] Consequently, a claim need not contain the detail and specificity required of a pleading, but need only ‘fairly describe what [the] entity is alleged to have done.’ [Citations.] As the purpose of the claim is to give the government entity notice sufficient for it to investigate and evaluate the claim, not to eliminate meritorious actions [citation], the claims statute ‘should not be applied to snare the unwary where its purpose has been satisfied’ [citation].” (*Stockett, supra*, 34 Cal.4th at p. 446.) Accordingly, it is sufficient that “the facts underlying each cause of action in the complaint” are “fairly reflected” in the government claim. (*Id.* at p. 447.)

¹⁴ Section 910 provides in full: “A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following:

“(a) The name and post office address of the claimant.

“(b) The post office address to which the person presenting the claim desires notice to be sent.

“(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

“(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.

“(e) The name or names of the public employee or employees causing the injury, damage, or loss, if known.

“(f) The amount claimed if it totals less than ten thousand dollars (\$10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars (\$10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case.”

RCSC contends that Newton's causes of action for breach of oral contract and promissory estoppel were demurrable because those causes of action were not "separately stated" in her government code claim. RCSC relies on *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899 (Fourth Dist., Div. Two), contending that in that case, we held that a government claim must set forth all *legal* and factual bases which will be asserted in a subsequent lawsuit if the government claim is rejected. That is not what the case holds. In that case, the plaintiff's government claim alleged that she had sustained personal injuries. Her subsequent complaint alleged both personal injuries and breach of contract. Because the *facts* underlying the breach of contract claim were not stated in the government claim, we held that summary judgment was properly granted on that cause of action. (*Id.* at pp. 919-921.)

This is consistent with *Stockett*. In *Stockett*, the court held that new legal theories for liability may be pleaded if the facts underlying those theories are "fairly reflected" in the government claim, because the purpose of a government claim is simply "'to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.' [Citation.]" (*Stockett, supra*, 34 Cal.4th at p. 446.) Consequently, the claim need only "'fairly describe what [the] entity is alleged to have done.' [Citations.]" (*Ibid.*) "Only where there has been a 'complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim' have courts generally found the complaint barred. [Citation.] Where the

complaint merely elaborates or adds further detail to a claim, *but is predicated on the same fundamental actions or failures to act by the defendants, courts have generally found [that] the claim fairly reflects the facts pled in the complaint.* [Citation.]” (*Id.* at p. 447, italics added.)

The Government Claim Did Not Allege Facts Constituting Breach of Contract.

In her fourth amended complaint, Newton alleged breach of an oral contract against RCSC based on statements Tejada allegedly made during a telephone conversation on February 11, 2004. The facts necessary to support that cause of action are fairly reflected in the government claim Newton submitted before filing suit. In the government claim, she set forth the facts underlying her contention that she was subjected to discrimination because of her age. She also stated that after being informed by Maggie Martinez that she might lose her current assignment if a CIPT wanted her assignment, she spoke to Tejada “to confirm the accuracy of Ms. Martinez’s statements.” She stated that Tejada “simply stated that Ms. Martinez was correct and hung up the phone” on her. Newton then described the memorandum Tejada wrote her, which Newton described as “representing that Ms. Newton would not lose her ‘current interpreting assignment if [she] did not become an employee’” and that she would not lose her current assignment to a CIPT except under specified conditions. In reliance on those representations, she stated, she chose to retain her opt-out status. She attached a copy of Tejada’s memo, which begins, “The purpose of this memorandum is to review the details of the telephone

conversation that we had this morning regarding your desire to maintain your opt-out status”

This is sufficient to put RCSC on notice that Newton contended that Tejada made representations both orally during their telephone conversation and in writing in the follow-up memo. However, the government claim does not include any facts suggesting that Newton considered Tejada’s representations to constitute a contract, either written or oral. A contract is an agreement to do or not to do a certain thing. (Civ. Code, § 1549.) It must be supported by sufficient consideration. (Civ. Code, § 1550.) Consideration may consist of a benefit conferred upon the promisor, to which the promisor is not legally entitled, or of prejudice suffered as an inducement to the promisor. (Civ. Code, § 1605.) “It is not enough, however, to confer a benefit or suffer prejudice for there to be consideration. . . . [Rather,] the benefit or prejudice ““must actually be bargained for as the exchange for the promise.”” (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 421; see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 275 (*Fontenot*) [discussing distinction between breach of contract and promissory estoppel].) No facts are stated in Newton’s government claim which give notice that Newton claimed that she and Tejada reached an agreement based on any bargained-for benefit or prejudice. Rather, the claim says that Tejada made certain representations and that Newton relied on them, to her detriment. As we discuss below, this may support a claim for promissory estoppel, but it is not sufficient to put RCSC on notice that Newton contended that she

entered into a contract with Tejada. Consequently, the demurrer was properly sustained as to the second cause of action on the ground stated by the trial court.

The Fourth Amended Complaint Does Not Allege a Claim of Promissory Estoppel.

“In California, under the doctrine of promissory estoppel, ‘A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . .’ [Citations.]

Promissory estoppel is ‘a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.’” (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) Newton’s government claim stated that Tejada had made representations to her concerning the security of her interpreting assignment and that in reliance on those representations, Newton withdrew her application for employment. This is sufficient to give notice to RCSC that Newton claimed that she relied on what Newton understood to be a gratuitous promise and that she acted in reliance on that alleged promise.

That is not, however, what the third cause of action in Newton’s fourth amended complaint alleges. Rather, it alleges that on February 11, 2004, RCSC, through its agent Tejada, “persuaded and convinced” Newton to “forgo employee CIPT status by making [an] offer/promise to [Newton] of job security and continued uninterrupted assignments *in exchange for [Newton] withdrawing her CIPT application. . . . The offer/promise of*

job security and uninterrupted future interpreting assignments . . . was conditioned on and required that [Newton], in exchange for this offer/promise, withdraw her current application for CIPT status. [¶] . . . [¶] . . . [Newton] accepted the offer and in reliance on the promise, authorized Tejada to discard the CIPT application.” The complaint further alleges that Tejada made this offer at the behest of RCSC “because there was concern that if Opt Outs became employees, it would cost the trial court more money in the form of benefits for employees versus independent contractors” who did not receive employee benefits.

The purpose of the doctrine of promissory estoppel is “to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee’s performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable.’ [Citation.] Accordingly, a plaintiff cannot state a claim for promissory estoppel when the promise was given in return for proper consideration. The claim instead must be pleaded as one for breach of the bargained-for contract.”
(*Fontenot, supra*, 198 Cal.App.4th at p. 275.)

Here, rather than alleging reliance on a promise made without consideration, the third cause of action alleges a bargained-for exchange of benefits, i.e., if Newton would withdraw her CIPT application and thus save RCSC money, RCSC would guarantee her continued work as an independent contractor unless specified events occurred. Consequently, it states a claim for breach of contract, not for promissory estoppel. And,

as noted above, because the government claim does *not* state facts sufficient to notify RCSC that Newton claimed that she entered into a contract with Tejada, the third cause of action cannot be amended to state a viable claim for breach of contract. Accordingly, the trial court properly sustained the demurrer to the third cause of action without leave to amend.¹⁵

4.

THE COURT PROPERLY DENIED NEWTON'S MOTION TO TAX COSTS

After the defendants filed their memorandum of costs, in the total amount of \$36,648, Newton filed a motion to tax costs. She challenged a number of items, and the trial court taxed certain items, reducing the cost award to \$33,616.55. On appeal, Newton contends that the trial court abused its discretion in awarding defendants expert witness fees, in the amount of \$20,317, as costs. She contends that the award was an abuse of discretion because defendants' settlement offer pursuant to section 998 of the

¹⁵ In reviewing an order sustaining a demurrer, the appellate court determines independently whether the complaint adequately states a cause of action under any legal theory. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We do not review the reasons for the trial court's ruling; if the ruling is correct on any theory, even one not mentioned by the trial court, and even if the trial court made its ruling for the wrong reason, it will be affirmed. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 637-638.) If the trial court sustained the demurrer without leave to amend, we decide whether there is a reasonable possibility that the plaintiff could cure the defect with an amendment. If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion. The plaintiff has the burden of proving that an amendment would cure the defect. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

Code of Civil Procedure was not made in good faith and because the experts, who did not testify at trial, were not reasonably necessary to defendants' case.

Expert witness fees may not ordinarily be awarded as costs, unless the expert was ordered by the court. (Code Civ. Proc., § 1033.5, subs. (a)(9), (b)(1).) If the defendant makes a good-faith offer of settlement before trial as provided in section 998 of the Code of Civil Procedure (section 998) and the plaintiff does not accept the offer and fails to obtain a more favorable verdict, the trial court may, in its discretion, require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses which were reasonably necessary for trial preparation or during trial, or both. (§ 998, subd. (c)(1).)

The settlement offer must be made in good faith, and may not be merely a token, i.e., an offer so disproportionate to the amount the plaintiff has demanded in damages that it is unreasonable to believe that it will be accepted. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 116.) Where the offeror did obtain a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing that the offer was reasonable. The burden is on the offeree to prove otherwise. (*Id.* at p. 117.)

Here, defendants made an offer pursuant to section 998 to settle for \$15,000. Newton contends that the offer was unreasonably low because at the time it was made, more than two years into the litigation process, she had already incurred substantial legal fees and substantial losses as a result of her loss of work. She contends that it was therefore not objectively reasonable to believe that she would settle for \$15,000. She

does not, however, offer any evidence that defendants knew of her financial arrangements with her attorneys or that they knew what amount she was claiming as damages. Consequently, we cannot say that the trial court abused its discretion in finding, implicitly or explicitly, that the section 998 offer was made in good faith.

The cases Newton cites do not persuade us otherwise. In *Wear v. Calderon* (1981) 121 Cal.App.3d 818, the defendant offered to settle for \$1. The court held that the offer did not serve the purpose of section 998—to encourage the settlement of litigation without trial (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262)—because there was no chance that the plaintiff would settle for such a nominal amount. (*Wear v. Calderon*, at p. 821.) In *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, a settlement offer of \$2,500 was deemed unreasonably low in light of the plaintiff's demand for \$10 million. (*Id.* at pp. 62-63.) Here, in contrast, we cannot say as a matter of law that \$15,000 was such a nominal amount that defendants could not have realistically expected Newton to accept it. Nor can we say that it was unreasonably low in light of defendants' exposure. The evidence in support of Newton's claim of age discrimination was speculative at best, and her claim that Tejada promised her job security is simply untenable. Tejada's memorandum clearly addressed Newton's equality with CIPT's in her priority for a specific assignment and said nothing whatsoever about Newton's so-called job security. Consequently, defendants had good reason to believe that they would prevail at trial. (See *Santantonio v. Westinghouse Broadcasting Co.*, *supra*, 25 Cal.App.4th at pp. 117-118 [settlement offer was reasonable in light of

substantial evidence favoring the defendants and the defendants had good reason to believe they would prevail].)

Newton also contends that the award was improper because the defense experts did not testify at trial. However, fees of experts retained to assist in trial preparation may properly be awarded as costs if their assistance was reasonably necessary, even if the experts did not testify at trial. (*Santantonio v. Westinghouse Broadcasting Co.*, *supra*, 25 Cal.App.4th at pp. 123-124; *Evers v. Cornelson* (1984) 163 Cal.App.3d 310, 317-318.) The determination of allowable costs, including expert witness fees, is within the trial court's discretion. (*Ibid.*) Here, defendants explained in detail the purpose for which each expert was retained, and we cannot say as a matter of law that the trial court erred in finding that defendants' experts were reasonably necessary to their trial preparation.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.