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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIC DICKINSON,

Plaintiff and Respondent,

v.

ALLSTATE INSURANCE COMPANY,

Defendant and Appellant.

ERIC DICKINSON,

Plaintiff and Appellant,

v.

ALLSTATE INSURANCE COMPANY
et al.,

Defendants and Respondents.

G045033

(Consol. with G045295)

(Super. Ct. No. 30-2009-00310856)

O P I N I O N

Appeal from the judgment and postjudgment orders of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed in part, reversed in part and remanded for further proceedings.

Ballard Spahr, Naomi Young, Lawrence J. Gartner and John R. Carrigan, Jr., for Defendant and Appellant Allstate Insurance Company and Defendants and Respondents Allstate Insurance Company and Eric Jentgen.

Law Offices of Renuka V. Jain and Renuka V. Jain for Plaintiff and Respondent and Plaintiff and Appellant Eric Dickinson.

* * *

INTRODUCTION

Allstate Insurance Company appeals from an order denying its motion for judgment notwithstanding the verdict in an action based on the Fair Employment and Housing Act (FEHA). Allstate's former employee, Eric Dickinson, sued Allstate and his immediate supervisor, Eric Jentgen, for disability discrimination. Allstate on its side asserted it terminated Dickinson's employment because he falsified company documents, not because of a disability. The jury returned special verdicts in Dickinson's favor on two of eight FEHA causes of action alleged in the complaint. The court denied Allstate's subsequent motion for judgment notwithstanding the verdict (JNOV) on these two claims.

Dickinson cross-appeals from the trial court's subsequent attorney fee and cost awards as too small. He also cross-appeals from the posttrial entry of a judgment omitting Jentgen from a defamation claim.

On the appeal, we reverse in part and affirm in part. The jury found in Dickinson's favor on two exclusively FEHA causes of action: failure to accommodate and failure to engage in the interactive process. An essential element of a lawsuit under the FEHA is exhaustion of administrative remedies. There is no evidence in this record that Dickinson received the necessary right-to-sue letter from the Department of Fair Employment and Housing (DFEH). The trial court should have granted Allstate's motion for JNOV on this issue.

The jury also found that Allstate did not terminate Dickinson because of his disability. The two FEHA causes of action on which Dickinson prevailed were based on events that happened while he was still employed. Dickinson's evidence of economic damages, however, was based solely on lost wages and benefits after termination. He presented no evidence of economic damages stemming from failure to accommodate or a failure to engage in the interactive process while he was employed. The court should have granted Allstate's motion for JNOV on the issue of economic damages.

Dickinson's claim that he was disabled, which Allstate challenged by motion for JNOV and on appeal, was supported by substantial evidence. The court correctly denied Allstate's motion on that ground. But Dickinson failed to present any evidence at trial of a reasonable and available accommodation for his disability, an essential element of a cause of action for failure to engage in the interactive process. The motion for JNOV on this cause of action should have been granted on this basis as well.

On the cross-appeal, we affirm the trial court's modification of the judgment to delete Jentgen. The court correctly interpreted an ambiguous verdict to limit liability on Dickinson's cause of action for coerced self-publication to Allstate, as Dickinson's and Jentgen's employer. As to the issue of attorney fees, Dickinson cannot recover fees under the FEHA, because judgment should be entered in Allstate's favor on all the FEHA claims. We return the case to the trial court for a determination of costs based on the applicable Code of Civil Procedure statutes.

FACTS

Allstate employed Dickinson as a field claims adjuster, a person the insurer assigns to inspect damaged vehicles and arrange for their repair.¹ Before 2008, Dickinson and two other field adjusters covered a large territory in Southern California.

¹ Dickinson actually worked for Encompass Insurance, a subsidiary or brand name of Allstate. The insurance company defendant was usually referred to during trial as "Allstate," and we will continue that practice in this opinion.

The work required a great deal of driving to inspect damaged cars, either at body shops or at customers' homes. Field adjusters were expected to process three or four vehicles per day, usually at a different location for each one.

Dickinson was "grandfathered" into the Allstate workforce when Allstate bought the auto insurance lines of CNA Insurance. At the time of his termination in May 2009, he had worked for Allstate for 25 years.

In August 2004, Dickinson suffered a stroke; while hospitalized for the stroke, he had a heart attack. He did not return to work until early January 2005. Dickinson testified that the stroke left him with weakness on his left side, a limp in his left leg, and slurred speech.

While Dickinson was recuperating from his heart attack and stroke, his doctor wrote a letter to his supervisor (not Jentgen) supporting Dickinson's request for permission to take some required training classes online at home, while he was on medical leave. The letter, dated October 25, 2004, explained that Dickinson did not want to fall behind on his training. The letter referred to nonspecific "medical problems," and the only accommodation mentioned was taking the training courses at home during Dickinson's leave. Dickinson gave this letter to his supervisor.

Dickinson testified that his supervisor refused his request to take the training classes during his leave, so he obtained another letter from his physician, dated December 13, 2004, to support his request. This letter explained that the medical problems were hospitalizations during the previous August and September for stroke, renal failure, and heart attack. The letter continued, "Any anxiety or undue stress can be detrimental to Mr. Dickinson's health." Dickinson gave this letter to his supervisor.

On September 28, 2005, nearly nine months after Dickinson had returned to work, once again covering a large territory, his supervisor sent him an e-mail inquiring about the state of his "ticker." Dickinson responded with a long e-mail explaining that he had "instant death syndrome" (similar, he said, to sudden infant death syndrome) and

that, while he was improving, he still had to be closely monitored. His recovery depended on “proper medication and exercise over time.” Dickinson was supposed to increase his cardio exercise, and he had a follow-up appointment in November. Dickinson’s supervisor e-mailed back, “Wow. So tell me, has your Dr. placed any restrictions on your work or driving? Also, has the Dr. said anything about a disability?”

In response to this inquiry, Dickinson asked his physician to write another letter explaining his condition, which he gave to the supervisor. This letter, dated November 2, 2005, and addressed “To Whom It May Concern,” again mentioned only an accommodation with respect to his training classes, stating that “[i]t is possible” that taking the training classes in addition to his normal workload would be too stressful for him in his current state of health.² Dickinson eventually fulfilled his training requirements in 2005 or 2006 by spending a week in Chicago taking classes, a week during which he did no field work.

In the spring of 2008, because of a slowdown in business, Allstate sent one of the three Southern California field adjusters to another territory and divided most of the remaining territory between the other two, one of whom was Dickinson. Accordingly he had to spend more time on the road between inspections, and he felt more rushed to complete his work, resulting in anxiety attacks. He also testified the increased driving caused numbness in his left leg and arm. He told Jentgen about these problems and asked to have his territory reduced. It was not.

Normally when an Allstate adjuster processed a damage claim, he or she called up the claim file on a laptop. A partially filled-out form would appear on the screen; the adjuster would then complete the form after inspecting the vehicle. When the additional information had been entered, the adjuster uploaded the form to the Allstate system, where it could be viewed by supervisors and processed further.

² The letter once again referred generally to “multiple active health issues.”

In Dickinson's case, however, he testified that because of a "glitch" in his laptop, which began sometime in October or November 2008, a completely blank form came up when he opened a file. He had to fill in the information that would normally already be visible. He testified this glitch did not bother him – he was able to manage it, although it took extra time to fill in the missing information – and he never tried to get his laptop fixed, for fear it would be taken away from him for some days and he would have to handwrite all his claim forms during that time.

In April 2008, Allstate instituted the Estimate Requirement Index (ERI) survey, designed to get customer feedback on the field claims adjusters. The surveyors (employed by a separate vendor) telephoned customers who had made claims and asked a series of questions about their experience with Allstate adjusters. The surveyors used the customer telephone numbers retrieved from the filled-out claim forms.

In early 2009, Jentgen, who had been Dickinson's immediate supervisor since April 2007, noticed he had received only one ERI survey result for Dickinson in the first eight weeks of the year. Upon further investigation, prompted by his own supervisor, Jentgen discovered that in 18 of 20 randomly selected claims Dickinson had handled in February 2009, the customer's contact telephone number Dickinson had filled in was off by one number – generally the last. This meant, of course, that when the people conducting the survey tried to telephone customers, they would get wrong numbers. Jentgen passed this information on to his supervisor, who forwarded it to Allstate's corporate security and human resources departments. Jentgen also communicated directly with corporate security regarding his findings. Jentgen's supervisor called the head of Allstate to alert him to the problem.³

³ Jentgen also prepared a memorandum for his boss in March 2009 recommending that Dickinson be fired for poor performance, for falsifying company records, and for insubordination. The memorandum was forwarded to human resources. It does not appear from the record that the memo played a part in corporate security's investigation and the decision regarding Dickinson's employment.

Dickinson met with a representative of the Allstate corporate security department at the end of March 2009 to tell his side of the story. He denied purposely entering false telephone numbers and asserted he was not even aware the phone numbers had any significance with respect to the survey. He also asserted that, in light of his consistently high marks in customer satisfaction over the years, he would have no reason to want to short-circuit any contact between Allstate and the people whose claims he had handled.

After corporate security conducted its investigation, the results were presented to a senior human resources manager, an assistant vice-president for employee relations, and the head of Allstate, Allan Robinson. Robinson decided, with the concurrence of the human resources manager and the assistant vice-president, to fire Dickinson immediately for falsifying corporate records. Robinson did not know Dickinson and was unaware of any claimed disability. Dickinson's employment was terminated on May 12, 2009, at a meeting attended by Jentgen and the local human resources representative.

Dickinson sued Allstate and Jentgen in October 2009 for disability discrimination, wrongful termination in violation of public policy, retaliation, failure to accommodate, failure to engage in the interactive process, age discrimination, gender discrimination, wrongful harassment, breach of implied contract, breach of the implied covenant of good faith, intentional infliction of emotional distress, and defamation. He alleged he had filed a claim with the DFEH and received a right-to-sue letter. He attached three different claim forms to the complaint as exhibits.

Dickinson's causes of action for age discrimination, gender discrimination, breach of implied contract, and breach of the implied covenant all fell to Allstate's motion for summary adjudication. The remaining claims were tried to a jury in October and November 2010.

Dickinson's damages expert, Susan Bleeker, testified regarding the value of Dickinson's lost wages and benefits from the time of his termination to the time of trial (past damages) and from trial to age 55 and to age 65 (future damages). She calculated the past lost wages as \$116,821, past lost health benefits as \$5,484 and the future lost wages to age 55 as \$207,017.

After 10 days of testimony, the jury returned a special verdict. It found in Allstate's favor on the causes of action for emotional distress, defamation, harassment, and all those based on harassment and wrongful discharge.⁴ The jury found in Dickinson's favor on the remaining two FEHA causes of action: failure to accommodate and failure to engage in the interactive process. On these two causes of action, the jury awarded Dickinson \$122,305 in lost earnings for past economic loss and \$207,017 in lost earnings for future economic loss.⁵ It also awarded him \$10,000 in emotional distress damages.

The jury also found in Dickinson's favor on a cause of action for "coerced self-publication," based on evidence that Dickinson had to tell potential employers he had been fired for falsifying company documents.⁶ The jury awarded Dickinson \$1,000 for past damages and \$1,000 for future damages on this claim. After a subsequent hearing on the form of the judgment, the court entered the judgment only against Allstate on that claim.

The trial court denied Allstate's motion for JNOV on the two FEHA causes of action on which Dickinson prevailed. Pursuant to a posttrial motion, the court

⁴ The jury found that Allstate did not discharge Dickinson in violation of the FEHA, did not discharge him for requesting reasonable accommodation, did not harass him because he was disabled, and did not discharge him because of his physical condition.

⁵ The jury evidently chose the calculations to age 55 rather than age 65. The past economic loss of \$122,305 appears to be composed of lost wages (\$116,821) and lost health benefits (\$5,484).

⁶ "Were Allstate and/or Eric Jentgen responsible for Plaintiff Eric Dickinson's coerced self-publication to potential future employers? That Plaintiff Eric Dickinson intentionally falsified company documents[?]" This was the sole question posed to the jury, which answered "yes."

awarded Dickinson's counsel \$567,220.57 in attorney fees. It allowed \$84,864.47 in costs.

Allstate appealed from the denial of its motion for JNOV on the two FEHA causes decided adversely to it and from the subsequent award of attorney fees and costs. Dickinson cross-appealed on the grounds that his counsel did not get a large enough attorney fee award and that he should have received more money for costs. He also appealed from the elimination of Jentgen from the judgment on the self-publication claim.

DISCUSSION

I. Allstate's Appeal

Allstate identified several issues in its motion for JNOV for our review. Allstate argued its motion should have been granted because Dickinson did not show: (1) he had exhausted his remedies before bringing a civil suit; (2) there was an available accommodation for his disability; (3) there were damages attributable to the FEHA claims upon which he prevailed; and (4) he was disabled under the FEHA.

“The trial court’s power to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. [Citation.] ‘A motion for judgment notwithstanding the verdict may 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 in support.’ [Citations.] On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury’s verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo. [Citation.]” (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138; see also *Brennan v. Townsend & O’Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1345.)

With respect to the FEHA causes of action that were tried, the jury determined, in effect, that Allstate did not terminate Dickinson because of his disability or because of his request for accommodation. Allstate prevailed on all of the causes of action relating to termination, as well as on the harassment claims. The jury found Allstate liable under the FEHA only for two causes of action based on what happened to Dickinson while he was still working – failure to engage in the interactive process and failure to accommodate.

A. Exhausting Administrative Remedies

Among the employment practices prohibited by the FEHA are failing to make reasonable accommodation for an employee’s known physical disability and failing to engage in an interactive process to determine a reasonable accommodation. (Gov. Code, § 12940, subs. (m)-(n).) An employee aggrieved by an employer’s action that violates the FEHA must file a written charge with the DFEH within one year of the alleged unlawful practice. (Gov. Code, § 12960, subs. (b), (d).) The charge consists of a verified complaint, in writing, stating the particulars of the unlawful practice and including the names and addresses of those persons who allegedly committed it. (Gov. Code, § 12960, subd. (b).) The DFEH can then either pursue the matter itself (Gov. Code, § 12930, subd. (h)) or notify the complainant – at the latest within 150 days of filing the complaint – that the department will not be taking any further steps. (Gov. Code § 12965, subd. (b).) If it takes this latter course, the department must at the same time inform the employee of his or her right to request a right-to-sue notice. (*Ibid.*)⁷ A civil action permitted by the right-to sue notice must be filed within one year of its date. (*Ibid.*)

“[T]he rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the

⁷ The employee can also request and obtain an immediate right-to-sue letter, waiving a DFEH investigation. (Cal. Code Regs., tit. 2, § 10005.)

courts will act. . . . [¶] The rule . . . is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding on all courts.” (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292-293.)

There is no right-to-sue letter in the record before us, and Dickinson does not dispute that no such letter was ever presented at trial.⁸ In fact, he steadfastly resisted being required to provide one. His DFEH claim forms were not trial exhibits. There was also no trial testimony regarding either the claim forms or the right-to-sue letter.⁹

The issue before us is which party bears the burden on exhaustion of administrative remedies. Is it part of the plaintiff’s case-in-chief and therefore Dickinson’s burden to show he received a right-to-sue letter? Or is the lack of the letter an affirmative defense, “new matter,” with the burden on Allstate?

We conclude that the introduction of this evidence is the plaintiff’s responsibility, as part of his case-in-chief. “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.) “Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the [DFEH] and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. [Citations.] The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. [Citations.]” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492; see also *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718,

⁸ Dickinson refers to a request for judicial notice that the court supposedly granted at some point. No citation to any appendix supports this reference, and we have been unable to find a request for judicial notice in the record.

⁹ The record does include one claim form because it was also an exhibit to a motion in limine, but it was not introduced at trial.

1724.) “[I]n the context of the FEHA, exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.” (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613.) As these authorities make clear, exhaustion of administrative remedies is a fact essential to a private claim for relief under the FEHA. (Cf. *Westinghouse Elect. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 37 [exhaustion of remedies part of plaintiff taxpayer’s case-in-chief in assessment action].) It follows that the burden of proof lies with Dickinson.¹⁰

Exhaustion of administrative remedies cannot be an affirmative defense – as Dickinson repeatedly told the trial court – because exhaustion is not “new matter,” even if the defendant includes it in an answer. (See Code Civ. Proc., § 431.30, subd. (b)(2).) “The mere fact that an answer contains an affirmative allegation does not mean per se that it is setting up ‘new matter.’ An averment in the answer contrary to what is alleged in the complaint is equivalent to a denial. [Citation.] The basic consideration is whether the matters of defense are responsive to the essential allegations of the complaint, i.e., whether they are contradicting elements of plaintiff’s cause of action or whether they tender a new issue, in which case the burden of proof is upon the defendant as to the allegation constituting such new matter. [Citation.] . . . ‘Whether a matter is new or not, must be determined by the matter itself, and not by the form in which it is pleaded – the test being whether it operates as a traverse or by way of confession and avoidance. A plea tendering no new issue, but controverting the original cause of action, is a mere traverse, and as nothing new is involved in it, to call it new matter would be a misapplication of terms. . . .’ [Citation] . . . [¶] . . . ‘If the answer, either directly or by necessary implication, admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that,

¹⁰ Courts will shift the burden of proof when the evidence is peculiarly within the control of the party without the burden. (See, e.g., *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 35-36; *Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal.3d 55, 70-71.) In this case, however, the right-to-sue letter was peculiarly within Dickinson’s control, so this exception does not apply.

notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter. But if those facts only show that some essential allegation of the complaint is not true, then such facts are not new matter, but only a traverse.’ [Citation.]” (*Cahill Bros., Inc. v. Clementina Co.* (1962) 208 Cal.App.2d 367, 385-386.)

Far from being “new matter” – placing the burden of proof on Allstate – exhaustion of administrative remedies is an “essential allegation” of a complaint based on the FEHA. The absence of allegations that a plaintiff-employee exhausted administrative remedies is grounds for demurrer. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 333 [university employee failed to exhaust administrative remedies; demurrer sustained without leave to amend]; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 325 [analogous federal law]; *Myers v. Mobil Oil Corp.* (1985) 172 Cal.App.3d 1059, 1061, 1063 [motion for judgment on the pleadings]; *Logan v. Southern Cal. Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 122-124 [failure to obtain administrative writ review; demurrer sustained]; cf. *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 382 [failure to exhaust administrative remedies available under the Insurance Code]; *Wright v. State of California* (2004) 122 Cal.App.4th 659, 671 [inmate failed to exhaust prison appeal process; demurrer sustained without leave to amend].)

Some courts have regarded exhaustion of administrative remedies as jurisdictional in the fullest sense, that is, reviewable no matter when it was first raised. (See, e.g., *Sampsell v. Superior Court* (1948) 32 Cal.2d 763, 773 [issue of subject matter jurisdiction cannot be waived]; *People v. Coit Ranch, Inc.* (1962) 204 Cal.App.2d 52, 56-57 [issue raised for first time after trial but before judgment]; *Jacobs v. Retail Clerks Union, Local 1222* (1975) 49 Cal.App.3d 959, 963 [issue raised for first time in motion for new trial]; see also *Campbell v. Regents of University of California, supra*, 35 Cal.4th at p. 322, fn. 2.) More recently, however, courts have been unwilling to consider

exhaustion sacrosanct to that degree, concerned that “it would be grossly unfair to allow a defendant to ignore this potential procedural defense at a time when facts and memories were fresh and put a plaintiff to the time and expense of a full trial, knowing it could assert the failure to exhaust administrative remedies if it received an adverse jury verdict.” (*Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222; see *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 134-135; *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 896-899.) These courts have held that the defendant may forfeit the issue if it is not raised in a timely fashion.

We need not address this issue. There is no question in this case of Allstate’s lying in wait to raise failure to exhaust remedies and thus forfeiting its right to a ruling on this defect. Dickinson alleged in his complaint that he had received a right-to-sue letter, so Allstate could not demur on that ground. Allstate raised the issue at trial at the earliest practicable moment, when it sought a directed verdict after Dickinson rested. Dickinson could have asked to reopen his case to present this evidence. (See *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1337 [denial of request to reopen accompanied by offer of proof reversible error]; see also *Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 641 [employee allowed to reopen case to prove excuse for failure to exhaust remedies].) Instead, he simply asserted it was Allstate’s burden to prove he had *not* exhausted his remedies. The issue surfaced again during the discussion of jury instructions, and once again Dickinson asserted this was an affirmative defense. Allstate raised the issue yet again in its motion for JNOV, which the court also denied. Allstate has not forfeited its right to raise this issue.

At trial, it was Dickinson’s burden to show either that he complied with the statute or that his noncompliance was excused for some reason. (See *Grant v. Comp USA, Inc.*, *supra*, 109 Cal.App.4th at p. 650 [plaintiff’s lack of right-to-sue letter excused after DFEH failed to issue letter within one year of filing complaint as required by Government Code section 12965, subdivision (b)]; *Holland v. Union Pacific Railroad*

Co. (2007) 154 Cal.App.4th 940, 945, 947 [DFEH misled plaintiff regarding timeliness of filing]; see also Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2012) ¶ 16:253, p. 16-37 (rev. #1, 2012) [“[P]laintiffs bear the burden of pleading and proving timely filing of a sufficient complaint with the DFEH and obtaining a right-to-sue letter.”]) Dickinson failed to present any evidence at all on this issue, despite being alerted to it several times during trial.¹¹ In fact, Dickinson brought a motion in limine to exclude any evidence regarding his administrative complaint with the DFEH or a right-to-sue letter.¹² Asserting now that Allstate had the burden of proving he did not exhaust his administrative remedies places him in the odd position of recognizing that he has to plead exhaustion, but denying he has to prove it. That position does not hold up. Allstate’s motion for JNOV should have been granted on this issue. (*See Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 575 [motion for JNOV properly granted on one issue].)

¹¹ Dickinson asserted that Allstate admitted he had received a right-to-sue letter during the pretrial argument regarding his motion in limine to exclude references to the letter. We can find no such admission in the record. At best, Allstate’s counsel acknowledged during the argument that Dickinson had *requested* a right-to-sue letter from the DFEH, but not that he had obtained one. Dickinson presented no authority for the idea that a pretrial discussion during a motion in limine hearing is a substitute for evidence at trial.

¹² We note *Grant* provided Dickinson with a possible means to satisfy his burden of showing he exhausted his administrative remedies without producing a right-to-sue letter. In *Grant*, the court found the plaintiff exhausted her administrative remedies under the FEHA despite her failure to obtain a valid right-to-sue letter because more than one year elapsed from the time she filed her administrative complaint with the DFEH and the time she filed her judicial complaint. The *Grant* court explained the evidence showed the plaintiff exhausted her administrative remedies because Government Code section 12965 made the plaintiff’s right to receive a right-to-sue letter unconditional one year after she filed her administrative complaint and therefore the DFEH had a ministerial duty to issue her one even in the absence of a request. (*Grant, supra*, 109 Cal.App.4th 637, 648-650.)

Here, Dickinson argues it was undisputed he requested an immediate right-to-sue letter from the DFEH. Assuming Dickinson had an unconditional right to an immediate right-to-sue letter equivalent to the unconditional right recognized in *Grant*, Dickinson would have exhausted his administrative remedies by requesting an immediate right-to-sue letter. Dickinson, however, failed and refused to present any evidence or authority showing he had an unconditional right to receive a right-to-sue letter before he filed his judicial complaint. As of October 7, 2011, the DFEH adopted regulations providing an employee with an unconditional right to waive a DFEH investigation and obtain an immediate right-to-sue letter. (Cal. Code Regs., tit. 2, §§ 10004, subd. (d), 10005; see also *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1526-1529.) Dickinson, however, provided no authority showing he had an equivalent right before the DFEH adopted these regulations and nonetheless presented no admissible evidence showing he requested an immediate right-to-sue letter. Argument by Dickinson’s counsel is not evidence.

B. Failing to Engage in Interactive Process

Government Code section 12940, subdivision (n), requires an employer to “engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition.” This process need not be a formal one. Its purpose is to identify a reasonable accommodation that will enable an employee to perform effectively. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195.) Both employer and employee are responsible for participating in the process. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 266.)

“To prevail on a claim under [Government Code] section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because “[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have . . .”¹³ [Citation.] However, . . . once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced.” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018 (*Scotch*).

Dickinson failed to present any evidence of an accommodation that was both available and reasonable.¹³ Having failed to show that an interactive process would

¹³ Dickinson testified that he had asked on two occasions to be a damage evaluator or reinspector, the first time in 2005 and the second time in 2007. There was no evidence that he made either request in connection with his disability; instead, he saw it as a professional goal. Dickinson also testified that a damage evaluator position would be a promotion for him and that it involved a lot of driving and flying.

have led to a reasonable accommodation, Dickinson failed to show any damages from the alleged failure. As we stated in *Scotch, supra*, “How was [the employee] damaged by any failure by [the employer] to engage in the interactive process in good faith? The FEHA has a remedial rather than punitive purpose. [Citations.] Unless, after litigation and full discovery, [the employee] identifies a reasonable accommodation that was objectively available during the interactive process he has suffered no remedial injury from any violation of [Government Code] section 12940, subdivision (n).” (*Scotch, supra*, 173 Cal.App.4th at p. 1019.)

Dickinson argued in opposition that it was Allstate’s initial burden to show that a requested accommodation was “unreasonable.” This argument entirely ignores the rule articulated in *Scotch*. Once Dickinson presented evidence of a reasonable and available accommodation, the burden would have shifted to Allstate to show unreasonableness. Because Dickinson never made the initial showing, however, the burden never shifted to Allstate.

Dickinson never presented any evidence of an objectively available accommodation for his disability. He testified he asked to have his territory reduced, but he presented no evidence that this accommodation was either reasonable or available. He therefore failed to present the evidence necessary to prevail on a cause of action for failure to engage in the interactive process, and Allstate’s motion for JNOV on this claim should have been granted.

There was no evidence that the position of damage evaluator was available during the time Dickinson was disabled or that he was qualified for the position. Moreover, an employer is not required to promote an employee in order to accommodate him or her. (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972.) In light of Dickinson’s testimony about the ill effect prolonged driving had on him, it does not appear likely that damage evaluator would have been an accommodation for him even if the position were available.

The jury’s special verdict on failure to engage in the interactive process did not include a finding that a reasonable accommodation existed. “When a special verdict is used and there is no general verdict, we will not imply findings in favor of the prevailing party.” (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531.) As plaintiff, Dickinson bore the “responsibility for submitting a verdict form sufficient to support [his] causes of action. [Citation.] If [he] chose not to include a proposed factual finding essential to one of [his] claims, it is not incumbent on [Allstate], as the defendant, to make sure the omission is cured.” (*Id.* at pp. 531-532, fn. omitted.)

C. Economic Damages

The jury was instructed, per CACI Nos. 3902, 3903, and 3903C,¹⁴ regarding economic damages as follows: “The damages claimed by plaintiff Eric Dickinson for the harm caused by Allstate or Eric Jentgen fall into two categories called economic damages and non-economic damages. You will be asked on the verdict form to state the two categories of damages separately. [¶] The following are the specific items of economic damages claimed by plaintiff Eric Dickinson. [¶] Past and future lost earnings. [¶] To recover for past lost earnings, plaintiff Eric Dickinson must prove the amount of wages that he has lost to date. [¶] To recover damages for future lost earnings, plaintiff Eric Dickinson must prove the amount of wages he will be reasonably certain to lose in the future as a result of the injury.” The jury awarded Dickinson \$122,305 for past economic damages and \$207,017 for future economic damages. It made a separate award of \$10,000 for noneconomic damages, presumably for emotional distress.

Dickinson failed to present any evidence of economic damages, that is, “wages . . . he . . . lost to date [of trial],” or “wages he will be reasonably certain to lose in the future,” attributable either to a failure to accommodate his disability or to a failure to engage in the interactive process, the only two FEHA claims on which the jury found in his favor. As stated above, damages for failing to engage in the interactive process must be based on the employee’s identification of an available and reasonable accommodation. Likewise, failing to accommodate Dickinson’s disability while he was working did not result in lost wages or benefits, the only type of economic damages as to which Dickinson presented evidence and as to which the jury was instructed. (Cf. *A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 462 [plaintiff who was not terminated

¹⁴ The directions for use note for CACI No. 3903C states that “[t]his instruction is not intended for use in employment cases.”

awarded \$12,000 for past lost wages for failing to accommodate; evidence of missed work days owing to injury].)

The evidence of Dickinson's economic damages consisted solely of damages for lost wages and benefits, past and future, after termination. But Dickinson never lost any wages or benefits. He never took a sick day. He was paid up to the time of termination, and he was not wrongfully terminated. He was therefore not entitled to these types of economic damages. The court should have granted Allstate's motion for JNOV on this issue. (Cf. *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 237 [failure to produce evidence of property's value at trial grounds for granting motion for JNOV for failure to prove essential element].)

Dickinson argued Allstate waived its objections to this issue by failing to move for a new trial on excessive damages. Dickinson misinterprets Allstate's argument. Allstate was not asserting the damages were excessive, as in too much; it was asserting they were awarded when they should not have been. This issue was properly before the court on a motion for JNOV.

Dickinson also argued Allstate waived this objection by consenting to the special verdict. This argument too is without merit. At the time the special verdict was prepared and presented to the jury, neither Allstate nor Dickinson could have known what the outcome would be. If the jury had found in Dickinson's favor on one or more of the wrongful termination claims, the jury could have appropriately awarded economic damages based on lost wages and benefits, and the special verdict allowed for just such an award. As it turned out, however, the jury found in Allstate's favor on the termination claims, so he had no posttermination lost wages and benefits.

If Dickinson wanted economic damages for all of his claims – even those that did not involve termination – it was his task to give the jury supporting evidence. No evidence supported an award of economic damages for events taking place while he was employed. The court should have granted Allstate's motion for JNOV on this issue.

D. Evidence of Disability

Allstate argued here and in its motion for JNOV that the evidence did not support a finding of disability under the FEHA. In light of our resolution of other issues, we need not address this one.

II. Dickinson's Cross-Appeal

Dickinson's cross-appeal encompasses two main issues. First, he appeals from the judgment entered on the cause of action for self-publication, on which he prevailed. The court entered judgment against Allstate alone. Dickinson asserts that judgment should have been entered against Jentgen personally as well. The second issue is attorney fees and costs. Dickinson asserts that both the attorney fee and the cost awards should have been higher. We address each in turn.

A. Judgment on Self-Publication Cause of Action

The special verdict included two kinds of defamation claims: libel, based on an e-mail sent by Jentgen to other field adjusters, and self-publication, based on Dickinson's "coerced" explanation to potential employers that he had falsified company documents. The verdict form for the libel claim asked, "Did Allstate and Eric Jentgen make the following statement to persons other than Plaintiff Eric Dickinson?" The verdict form for the self-publication claim asked, "Were Allstate and/or Jentgen responsible for Plaintiff Eric Dickinson's coerced self-publication to potential future employers?"

The jury returned findings in Allstate's favor on the libel claim and a finding in favor of Dickinson on the self-publication claim, awarding Dickinson \$2,000

on the latter claim.¹⁵ At a posttrial hearing, Allstate asked to have the judgment entered only against Allstate on the ground that Allstate, not Jentgen personally, was responsible for firing Dickinson, and so only Allstate, not Jentgen personally, could be responsible for self-publication regarding the reason Dickinson was fired. The court agreed and entered judgment accordingly. Dickinson appealed this ruling, arguing that Jentgen should be personally liable, along with Allstate, for the \$2,000 in damages Dickinson obtained on the self-publication claim.

“On appeal, a judgment of the trial court is presumed to be correct. [Citation.] Accordingly, if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court’s reasoning. [Citations.] All intendments and presumptions are made to support the judgment on matters as to which the record is silent. [Citation.]” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

The ‘and/or’ formula in the special verdict on self-publication rendered the verdict ambiguous. Did the jury mean only Allstate, only Jentgen, or both of them were responsible for the self-publication? “If the verdict is ambiguous the party adversely affected should request a more formal and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient verdict.” [Citations.] But where no objection is made before the jury is discharged, it falls to ‘the trial judge to interpret the verdict from its language

¹⁵ The jury instructions on these two causes of action were extremely confusing. The jury was instructed first on the libel claim and asked to concentrate on the “statement” from Jentgen’s July 2009 memo: “There have been instances in which the phone numbers and inspection types have been changed to avoid what adjusters have perceived could be a ‘bad’ survey. The company has zero tolerance for this behavior, so we need to make sure this is not happening.” The jury was then asked to consider a series of issues and make findings about “the statement.” Then, without an indication that a new cause of action (coerced self-publication) was under discussion, the jury was asked to consider that “Plaintiff Eric Dickinson claims that Allstate and Eric Jentgen are responsible for his harm even though Allstate and Eric Jentgen did not communicate the statement to anyone other than Plaintiff Eric Dickinson.” Nothing informed the jury that a new or different “statement” was at issue: the statement to potential employers “[t]hat Plaintiff Eric Dickinson intentionally falsified company documents.” Although the jury was instructed that defendants were not liable if “their statement” was true, the only “statement” the court identified in the instructions was the one from the July 2009 memo. The jury made no findings about the truth of either statement.

considered in connection with the pleadings, evidence and instructions.’ [Citations] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation.” (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457.) “Waiver is not found where the record indicates that the failure to object was not the result of a desire to reap a ‘technical advantage’ or engage in a ‘litigious strategy.’ [Citations.]” (*Id.* at p. 456, fn. 2.)¹⁶ We review a special verdict’s correctness de novo, as a matter of law. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.)

An original defamer is liable for republication of a libelous statement – even republication by the person defamed – if the repetition of the false statement was reasonably to be expected. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 281.) A plaintiff with a “strong compulsion” to disclose defamatory statements can recover from the defendant, although ordinarily a defendant is not liable if the plaintiff voluntarily repeats the statements to others. (*McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 796.) The circumstances creating the strong compulsion must be known to the original defamer at the time he communicates it to the person defamed. (*Id.* at pp. 797-798.) One such circumstance might be when “a job seeker must tell a prospective employer what is in his personnel file in order to explain away a negative job reference.” (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1287.)

Dickinson’s self-publication claim against Jentgen seems to rest on Jentgen’s report to his superiors, which set in motion the investigation about the altered phone numbers, and on the memorandum he wrote to his immediate boss recommending termination of Dickinson’s employment, in part for falsifying company records. Dickinson presented no evidence that, at either of these times, Jentgen could have known

¹⁶ At the hearing on the form of the judgment, the trial court observed, “As so often occurs, something gets overlooked. It [the verdict form] probably should have identified each of them.”

what the outcome of his report or the memorandum would be. Jentgen was certainly in no position to fire Dickinson himself, and, so far as he could have known at the time, Dickinson might have been able to explain away the discrepancies to the higher-ups, or he might have been let off with something short of termination. Although Jentgen himself was firmly persuaded of Dickinson's guilt and thought he should be fired, no evidence presented at trial suggested Jentgen had any influence over the people who ultimately decided to terminate Dickinson's employment. The ultimate outcome – the circumstances that would create the strong compulsion to publish – was in other hands than his.

In addition, no evidence suggested that Dickinson had any “negative job reference” attributable to Jentgen to explain away.¹⁷ Without this evidence, Dickinson had no claim against Jentgen for coerced self-publication. (See *Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373; see also *Anthoine v. North Central Counties Consortium* (E.D.Cal. 2008) 571 F.Supp.2d 1173, 1194 [applying California law], reversed in part on other grounds in *Anthoine v. North Central Counties Consortium* (9th Cir. 2010) 605 F.3d 740.)

The court did not err in entering judgment against Allstate alone on the self-publication cause of action.

B. Attorney Fees and Costs

Government Code section 12965, subdivision (b), permits a prevailing party in an action filed after the issuance of a right-to-sue notice to recover reasonable attorney fees. In light of Dickinson's failure to prevail on any of his FEHA claims, an award of attorney fees pursuant to this section must be reversed.

¹⁷ Allstate's human resources manager testified that departing employees can arrange for information to be accessible to future employers through an 800 number. The only information obtainable from that source is dates of employment, position, and, if the employee authorizes it, salary. Allstate releases no other information regarding its former employees.

The trial court must also recalculate the cost award, which is now governed by Code of Civil Procedure sections 1032 and 1033.5. For example, these sections do not permit an award for expert witness fees, as would be allowed under the FEHA. (See Gov. Code, § 12965, subd. (b).)

DISPOSITION

The order denying the motion for judgment notwithstanding the verdict on the two FEHA causes of action is reversed, and the trial court is directed to enter judgment in favor of defendants on these two causes of action. The judgment in Dickinson's favor and against Allstate alone on the self-publication cause of action is affirmed. The posttrial order awarding attorney fees to Dickinson is reversed. The trial court is directed to recalculate the award of costs pursuant to Civil Procedure Code sections 1032 and 1033. Allstate is to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

I CONCUR:

ARONSON, J.

MOORE, J., Dissenting.

I respectfully dissent. Whether or not exhausting administrative remedies in a case brought under the Fair Employment and Housing Act (FEHA) is a jurisdictional requirement or merely a precondition to bringing a civil action has been the subject of much debate. I agree with the cases stating the exhaustion requirement is merely a precondition to bringing civil suit on an employee's FEHA claims. (*Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 644.)

It seems obvious Dickinson's counsel did not appreciate plaintiff's burden regarding the exhaustion of administrative remedies issue. Not only were there many opportunities before and during the trial for introduction of a right-to-sue letter, another opportunity was presented during the motion for judgment notwithstanding the verdict. When asked about the absence of a right-to-sue letter at oral argument on appeal, counsel responded, "That's not one of our main points."

It appears to me that, despite Dickinson's not introducing a right-to-sue letter, sufficient evidence that he exhausted his administrative remedies was before the court. Dickinson's FEHA complaint was attached his to superior court complaint, and it was attached to one of Allstate's pretrial motions as well. His FEHA complaint states: "I wish to pursue this matter in court." It also states, in print on the FEHA form: "I understand it is the Department of Fair Employment and Housing's policy to not process or reopen a complaint once the complaint has been closed on the basis of 'Complainant Elected Court Action.'"

Thus, despite the absence of a right-to-sue letter in the record, there does exist sufficient evidence to demonstrate plaintiff was not pursuing his administrative rights at the same time he was prosecuting his claim in superior court. After all, Dickinson informed the Department of Fair Employment and Housing (DFEH) of his

intent to pursue the matter in court, and the DFEH informed him it would not even process an administrative action when a complainant elected court action.

Regardless of the presence of actual evidence in the record that Dickinson exhausted his administrative remedies, this court may also presume that a right-to-sue letter was issued. The DFEH has a ministerial duty to issue a right-to-sue notice one year after the employee files his administrative complaint. (Gov. Code, § 12965, subd. (b).) Dickinson's FEHA complaint is dated August 13, 2009, and his trial in superior court did not commence until more than a year later, on October 28, 2010.

To reverse a jury verdict under these circumstances is to place form over substance. While it would be my preference to find the record sufficient and affirm, at the very least, this matter should be remanded to the superior court to give plaintiff yet another opportunity to request introduction of his right-to-sue letter into evidence.

Regarding another issue, the majority states Dickinson never presented any evidence of an objectively available accommodation for his disability. It also states he failed to present any evidence of economic damages attributable either to a failure to accommodate his disability or to a failure to engage in the interactive process. (Maj. opn., *ante*, pp. 17-18.)

But the record is replete with evidence that undue stress was detrimental to his health. The letter from Dr. Hunter is a prime example. Dickinson testified he asked his supervisor for a reduction in territory and workload because he was driving more and accomplishing less due to his physical condition or panic attacks. He also testified his territory expanded and his new assignments increased due to staffing issues at Allstate.

I do not find the verdict to be inconsistent. The jury could have reasonably concluded Allstate fired him for performance difficulties, while at the same time concluding both that Dickinson identified being placed in less stressful situations as a

reasonable accommodation, and that, had Allstate placed him in fewer situations involving undue stress, he could have met his performance requirements.

Nonetheless, there is a principled position for a finding the verdict is inconsistent. One example of a possible inconsistency is on the wrongful discharge page of the special verdict wherein the jury checked “No” to the question: “Were acts prohibited under the California Fair Employment and Housing Act a motivating reason for Allstate’s decision to discharge Plaintiff Eric Dickinson?” At the same time, the jury awarded damages for past and future lost earnings.

“A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. [Citation.]” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.) As an appellate court, we are not permitted to choose between inconsistent answers. “The proper remedy for an inconsistent special verdict is a new trial. [Citation.]” (*Id.* at p. 358.)

Accordingly, it is my opinion the judgment should be affirmed. An acceptable alternative is that the matter should be remanded for a new trial.

MOORE, J.