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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VIRGINIA CABALUNA,

Plaintiff and Appellant,

v.

HOAG MEMORIAL HOSPITAL
PRESBYTERIAN,

Defendant and Respondent.

G048402

(Super. Ct. No. 30-2011-00526421)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael Brenner, Retired Judge of the Orange County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const. Affirmed.

Amezcuca-Moll & Associates, Rosemary Amezcuca-Moll and Sarah J. Nowels for Plaintiff and Appellant.

Godes & Preis, James N. Godes, Robert M. Dato and Oliver B. Dreger for Defendant and Respondent.

Hoag Hospital (Hoag) terminated its longtime employee, nurse Virginia Cabaluna, for an incident of abusive conduct toward a lower-ranking employee. Cabaluna sued Hoag for wrongful termination in violation of public policy, asserting Hoag's true motivation for terminating her was age discrimination. Cabaluna claimed Hoag "trumped up" the "abuse" incident as a pretext for her firing. Cabaluna also alleged Hoag breached an implied covenant not to terminate her without good cause.

After the trial court granted nonsuit for Hoag as to the implied covenant claim and excluded certain testimony by two of Cabaluna's witnesses, the jury returned a defense verdict on the remaining counts. On appeal, Cabaluna cites the nonsuit and two evidentiary rulings as grounds for reversal. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of her termination, Cabaluna was a 28-year employee with Hoag, and the charge nurse in its dialysis unit. Four times during the last 15 years of her employment, Cabaluna executed a form acknowledging her employment was "at-will" and could be terminated by either Hoag or Cabaluna herself "at any time, without notice."

Hoag fired Cabaluna in 2009 for harassing a co-worker, Marilyn Dougher, on the basis of her religion. Cabaluna knew Dougher, a Jehovah's Witness, followed the religious practice of avoiding any celebration of birthdays or holidays. Nonetheless, on Dougher's birthday, Cabaluna conducted in the workplace a mocking birthday celebration for Dougher during which she gave Dougher a birthday cake and sang "Happy Birthday, Bitch." Dougher complained about the incident to her supervisor and Hoag fired Cabaluna. Hoag also offered testimony from another of Cabaluna's subordinates, Brigitte Gibbons. Gibbons described other past abusive behavior by Cabaluna and described her as an intimidating, "vindictive" supervisor.

In her ensuing wrongful termination lawsuit, Cabaluna alleged the real reason Hoag fired her was age discrimination. She also alleged Hoag breached an implied contract not to fire her except for cause.

In a pretrial motion, Hoag sought to preclude certain testimony Cabaluna intended to offer from a Hoag physician, Jerald Sigala. Earlier in the case, Sigala had signed a declaration Cabaluna submitted in opposition to Hoag's motion for summary judgment. In the declaration, Sigala described a conversation he had with a fellow Hoag physician, Martin Fee, in the aftermath of Cabaluna's firing, in which Fee relayed his impression that Hoag seemed to be terminating "senior" and "expensive" staff members as a cost cutting measure.¹ Hoag's in limine motion argued the trial court should bar Sigala from testifying as to Fee's comments on grounds of hearsay and lack of foundation. The trial court granted the motion.

At the conclusion of Cabaluna's case-in-chief, Hoag moved for nonsuit on the implied covenant claims (covenant to discharge only for cause, covenant of good faith and fair dealing). Hoag based its nonsuit motion on Cabaluna's repeated written acknowledgement of her "at will" employment status, arguing such a written acknowledgement precludes an implied covenant to the contrary. The trial court agreed and granted nonsuit for Hoag on both contractual claims.

The trial court made one additional evidentiary ruling at issue in this appeal. After Hoag concluded its case-in-chief, Cabaluna called Celia Andal, a longtime Hoag nurse, as a rebuttal witness. Cabaluna's attorney asked Andal questions designed to refute testimony by Hoag's witness, Gibbons, depicting Cabaluna as an intimidating,

¹ The pertinent parts of Sigala's declaration are as follows: ". . . Fee stated something along the lines of: 'There seems to be a pattern of tenured nurses being terminated in a short period of time.' [¶] . . . Fee went on to state that he was aware of several tenured nurses that had recently been terminated. [¶] . . . Fee stated that he was aware of others besides [Cabaluna] that were senior, long term staff and commented something to the effect of: 'It seems they are terminating the expensive staff.'"

“vindictive” supervisor who used inappropriate language, including the word “bitch,” with subordinates. Andal offered a contrasting view of Cabaluna’s workplace behavior, denying Cabaluna ever used profanity or treated subordinates unkindly. Cabaluna’s attorney then tried to broach the subject of Andal’s own experience with age discrimination at Hoag.

When questioned about her current age, Andal reported she was 65 years old and still working at Hoag. Cabaluna’s attorney then asked Andal: “At any time have you felt Hoag . . . has perhaps treated you differently as you’ve gotten older?” Hoag’s attorney promptly objected on grounds the question was “not proper rebuttal” and “352.” The trial court sustained the objection.

The two remaining causes of action, wrongful termination in violation of public policy (age discrimination) and intentional infliction of emotional distress, went to the jury. The jury returned a special verdict stating it found age was not a motivating factor in Hoag’s decision to fire Cabaluna. That finding precluded the jury’s consideration of the claim for intentional infliction of emotional distress.

Subsequently, Cabaluna moved for a new trial, arguing the trial court erred in excluding Sigala’s testimony concerning Fee’s comments about Hoag’s apparent “pattern” of firing “expensive” staff, and in granting nonsuit as to the implied covenant not to fire except for cause. The trial court denied the new trial motion and Cabaluna filed an appeal from that order.

DISCUSSION

1. Appealability and Applicable Standards of Review

Cabaluna filed her notice of appeal from a nonappealable order. “An order denying a motion for new trial is nonappealable. [Citation.]” (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) That error, however, is not fatal to her appeal. Because it is clear from her opening brief Cabaluna

intended to appeal from the judgment, and Hoag admits it was not misled by the error, we construe the notice of appeal as from the underlying judgment. (*Id.* at p. 22.)

In considering the issues on appeal, we apply two different standards of review. We review the grant of nonsuit under the de novo standard of review. (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1060.) As for the trial court's evidentiary rulings, we apply the deferential abuse of discretion standard. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) "[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion." [Citation.] "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.)

2. *The Trial Court Properly Granted Nonsuit*

Cabaluna contends the trial court erred in granting nonsuit on the claim for breach of an implied covenant to terminate only for cause.² Essentially, Cabaluna argues the trial court wrongly found an express written agreement for at-will employment where none existed. Cabaluna also contends the evidence of an implied covenant for cause-only termination was sufficient to allow the issue of breach to go to the jury. Both arguments lack merit.

Hoag moved for nonsuit on the ground Cabaluna agreed in writing to at-will employment and such a written agreement precludes an implied covenant to the contrary. The written agreement in issue was the "Acknowledgement of Receipt of Employee Handbook," a tear-out page contained within Hoag's employee handbook, which Cabaluna signed four times during the last 15 years of her employment.

In 1994, 1998, 2004, and 2007, Cabaluna signed, dated, and returned to Hoag the following written acknowledgement: "This is to acknowledge I have received a

² Cabaluna does not contest the grant of nonsuit as to the implied covenant of good faith and fair dealing.

copy of *Charting Your Course*. I understand this employee handbook contains important information about [Hoag's] general personnel policies, compliance program, code of conduct and my privileges and obligations as an employee. [¶] *As an at-will employer, it is understood that either Hoag . . . or I can terminate employment at any time, without notice.* [¶] I will familiarize myself with the material in the handbook, and I understand I am governed by its contents. I understand that I have the responsibility to report any activities that may not be in accordance with the law or Hoag's compliance program. I further understand Hoag . . . may change, rescind or add to any policies, benefits or practices described in the handbook, *other than the employment-at-will policy*, at its sole and absolute discretion with or without prior notice.” (Italics added.)

On appeal, Cabaluna argues the trial court erred in finding this acknowledgement was an agreement of at-will employment. Cabaluna concedes “an express written agreement of at-will employment” precludes an implied contract to the contrary (citing *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 (*Dore*)), but she contends the rule does not apply here because the acknowledgment is not a contract. Instead, she characterizes the acknowledgment as a mere “Tear-Away Page” from the employee handbook, and argues such “handbook disclaimers” are “not dispositive” on the issue of whether employment was at-will. (Bold and italic emphasis omitted.) Cabaluna contends this “Tear-Away Page”/“handbook disclaimer” is simply evidence of the employer's intent, to be weighed against other evidence of an implied contrary understanding, and, thus, no basis for granting nonsuit.

Cabaluna bases her argument on what she sees as the “critical” “distinction between express contracts and handbook provisions,” as recognized by the California Supreme Court in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340, footnote 10 (*Guz*). The high court in *Guz* noted that while “at-will provisions in personnel handbooks, manuals, or memoranda do not bar, or necessarily overcome, other evidence of the employer's contrary intent,” “an at-will provision in an *express written*

agreement, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding. [Citations.]” (*Guz, supra*, 24 Cal.4th at pp. 339-340, fn. 10; see also *Dore, supra*, 39 Cal.4th at p. 389.)

Cabaluna offers two bases for finding the acknowledgement here was not an at-will contract. First, she points out the acknowledgment did not “contain[] the words ‘I agree.’” Cabaluna asserts the form “indicates that ‘it is *understood*’ and ‘[t]his is to *acknowledge*,’ however, no express agreement can be found[.]” (Bold deleted.) Essentially, Cabaluna insists on magic words. She argues: “[T]he language should state in no uncertain terms, ‘I agree.’ Absent such language, no contract exists.” She fails to cite any authority for that argument.

Cabaluna’s second basis for finding the acknowledgment was not a contract is the fact the tear-away page was “part of the handbook”: it was “physically attached to the handbook and sandwiched in between an introduction from the president of Hoag and the table of contents.” Again, Cabaluna offers no case law supporting her assertion a page designed to be torn from a handbook cannot be used to form a contract.

Cabaluna fails to establish the trial court erred in concluding she signed a contract of at-will employment. Cabaluna signed, dated, and returned to her employer a written acknowledgment she “understood” she was an at-will employee, terminable “at any time, without notice.” Like the trial court, we conclude this signed acknowledgment was a “clear and unambiguous” agreement to at-will employment, which precluded an implied covenant to the contrary. (See *Dore, supra*, 39 Cal.4th at p. 389.) On that basis, the trial court properly granted nonsuit on the implied covenant claim.

Our conclusion Cabaluna signed a written at-will employment contract bars consideration of Cabaluna’s other, evidence-based challenge to the nonsuit. There is no reason to consider the sufficiency of Cabaluna’s evidence of an implied covenant that cannot be established as a matter of law. (See *Guz, supra*, 24 Cal.4th at p. 340, fn. 10

[“an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding”].)

3. The Trial Court Did Not Abuse Its Discretion in Excluding Sigala’s Hearsay Testimony

Cabaluna contends the trial court abused its discretion in excluding Sigala’s testimony concerning hearsay statements his colleague, Fee, made in response to Cabaluna’s firing. The excluded testimony would have informed the jury of Fee’s observation that senior, “expensive” nurses were being terminated and “it seems” the terminations were being done as a cost cutting measure. Cabaluna argues the testimony “was pivotal in proving” Hoag’s discriminatory intent, and was admissible under either of two “admissions” exceptions to the hearsay rule. (See Evid. Code, §§ 1220, 1222; all further statutory references are to the Evidence Code.) The argument lacks merit.

Cabaluna asserts Fee’s hearsay statements were admissible under the exception for admissions of a party opponent (§ 1220)³ and the exception for authorized admissions.⁴ The problem is Cabaluna did not offer evidence to meet the foundational requirements for showing either of these hearsay exceptions applied. The only evidence Cabaluna cites in her brief is a single statement by Sigala in his declaration. Sigala asserted the following “fact,” unaccompanied by any foundation for his knowledge: “Fee

³ Section 1220 provides: “Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.”

⁴ Section 1222 provides: “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.”

was a member of the Board of Directors of HOAG during the time these conversations took place.”

Aside from this conclusory statement, Cabaluna offered no evidence Fee was in fact a member of Hoag’s board of directors when he made his remarks to Sigala. Not only did Cabaluna fail to establish Fee was a party to the lawsuit “in either his individual or representative capacity,” qualifying his remarks as party admissions (§ 1220), but Cabaluna also failed to establish Fee was *authorized* to speak for Hoag on the subject matter of the hearsay statements (§ 1222).

The authorized admission exception to the hearsay rule “has been interpreted in California as only applying to high-ranking organizational agents who have actual authority to speak on behalf of the organization.” (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1203.) “[T]he determination [whether an employee is authorized to speak for the employer on the subject matter] requires an examination of the nature of the employee’s usual and customary authority, the nature of the statement in relation to that authority, and the particular relevance or purpose of the statement.” (*O’Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 570.) Cabaluna made no showing at all as to these factors.

Additionally, we find it significant Fee was not unavailable as a witness. Hoag points out Cabaluna never deposed Fee and did not put him on her witness list. Hoag did subpoena Fee for trial, though it did not call him. Consequently, when the trial court made its in limine ruling excluding Sigala’s testimony concerning Fee’s hearsay statements, Cabaluna could have chosen to call Fee as a witness in her case-in-chief. Having failed to do so, she can hardly argue on appeal the exclusion of his hearsay statements requires reversal.

Because Cabaluna failed to make the necessary preliminary showing any hearsay exception applied, the trial court did not abuse its discretion in excluding the evidence of Fee’s hearsay statements.

4. *The Trial Court Did Not Abuse its Discretion in Limiting Andal's Rebuttal Testimony*

Finally, Cabaluna contends the trial court abused its discretion in excluding certain testimony of her rebuttal witness, Andal. The trial court prevented Andal from testifying as to her own experience of age discrimination by Hoag, sustaining Hoag's objections to the testimony on grounds of "improper rebuttal" and section 352 (too time consuming, more prejudicial than probative). Cabaluna argues this evidentiary ruling severely hampered her proof of age discrimination because Andal would have provided powerful "me too" evidence, citing *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 767 (*Johnson*). Again, Cabaluna's argument lacks merit.

"The scope of rebuttal evidence is within the trial court's discretion, and on appeal its ruling will not be disturbed absent "palpable abuse." [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1088.) None appears here.

The question Cabaluna's attorney put to Andal about whether Hoag had discriminated against her based on age was a new matter, beyond the scope of either party's case-in-chief. Until that point in the trial, Cabaluna had not introduced evidence of age discrimination against Andal or anyone other than Cabaluna herself. If Cabaluna wanted to prove age discrimination based on "me too" evidence under *Johnson, supra*, 173 Cal.App.4th at page 767, she should have done so in her case-in-chief. The trial court did not abuse its discretion in rejecting such a new, time consuming inquiry in rebuttal. (See *Id.*, at pp. 766-767 [admissibility of "me too" evidence hinges on a variety of factors, including similarity of the situations, and involves a prove-up of relevance].)

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.