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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

STACI ELIZONDO,

Plaintiff and Appellant,

v.

CHARLES FREDERICK TUFFLI, JR., et al.,

Defendants and Respondents.

H039255
(Santa Clara County
Super. Ct. No. 1-09-CV-144325)

Plaintiff and appellant Staci Elizondo appeals from the judgment entered in favor of defendants Dr. Charles Tuffli Jr.¹ and Staff Resources (collectively defendants) after a jury trial, and from the trial court's order² sustaining defendant Staff Resources' demurrer to plaintiff's ninth cause of action brought under Labor Code section 1102.5, subdivision (b).³

On appeal, plaintiff claims that the court erred in sustaining the demurrer to her ninth cause of action; that the trial court abused its discretion in excluding certain evidence; and that lower court erred in denying her motion for a new trial, which was based on alleged juror misconduct. For reasons that follow we agree that the court erred in sustaining the demurrer to plaintiff's ninth cause of action, but find no prejudice to

¹ Plaintiff alleged causes of action against Dr. Tuffli as an individual and as a medical corporation.

² Orders sustaining a demurrer to a particular cause of action within a complaint are reviewable on appeal from the subsequent final judgment. (Code Civ. Pro. § 472c, subs. (b) & (c).)

³ All further statutory references are the Labor Code unless otherwise indicated.

plaintiff. Further, we conclude that plaintiff suffered no prejudice from the lower court's exclusion of certain evidence and disagree that the lower court erred in denying the motion for a new trial based on alleged juror misconduct.

Evidence Adduced at Trial

Plaintiff worked for Dr. Tuffli as a bookkeeper and medical biller. She claimed that on August 27, 2007, she was discussing the accounts with Dr. Tuffli when he told her that "if [she] screw[ed] up, [he was] going to kill [her]." According to plaintiff, the threat occurred in the early morning while she was alone with Dr. Tuffli. Plaintiff reported this threat to the police several days later on August 30. Plaintiff told the police that she did not want them to contact Dr. Tuffli; she testified that this was because she was afraid that the doctor would fire her. Plaintiff continued to work for Dr. Tuffli; she testified that was because she had a son to support.

According to plaintiff, she was frightened and upset by the incident. When the two other women who worked in Dr. Tuffli's office arrived for work that morning, plaintiff told them that the doctor had threatened her and had threatened to kill her. She said that she telephoned Staff Resources and left a message for Sarah St. Charles in which she explained that she had "an emergency" and asked that St. Charles telephone her.⁴ Plaintiff testified that St. Charles telephoned her later that day and they spoke for 13 minutes about the incident; plaintiff said that she confided in St. Charles that she was afraid for her safety and did not want St. Charles to tell Dr. Tuffli about the conversation because she was afraid of being fired. Plaintiff testified that St. Charles tried to calm her down, encouraged her to speak to Dr. Tuffli, and stated that she "would take care of it."

According to plaintiff, following the incident, her work relationship with Dr. Tuffli deteriorated. She telephoned St. Charles in January 2008 to report the negative

⁴ Human resources specialist St. Charles was plaintiff's contact at Staff Resources. Staff Resources provided human resources services—payroll and benefits for Dr. Tuffli.

work conditions and various incidents of verbal abuse by Dr. Tuffli; again she mentioned the death threat. St. Charles scheduled a meeting between plaintiff and Dr. Tuffli for January 8, 2008. During the course of this meeting, plaintiff repeated that Dr. Tuffli had threatened to kill her and revealed that she had made a police report regarding Dr. Tuffli's August 27, 2007 threat.

Plaintiff testified that St. Charles escorted her out of the building after she stood and watched her empty her desk and told her to never come back to the office. Plaintiff said she felt betrayed and humiliated by being escorted from the building in this manner. Plaintiff was paid for four days of administrative leave; thereafter, according to plaintiff, she had a mental breakdown due to the stress of the incident and began receiving medical treatment for the emotional crisis. Plaintiff was placed on disability by a Kaiser doctor on January 11, 2008, and was instructed not to return to work.⁵

Dr. Tuffli denied that he made any threat to plaintiff. Although plaintiff claimed that she told her coworkers about the threat, Joyce McPheeters, Dr. Tuffli's nurse since 1992, denied that plaintiff said anything about a threat even though they saw each other on a daily basis. McPheeters refuted plaintiff's claims that Dr. Tuffli slammed doors in anger on a daily basis, that he threw medical charts and yelled at his staff. McPheeters

⁵ There was extensive testimony in this case regarding plaintiff's mental state. Experts on both sides disagreed as to her diagnosis. Plaintiff's expert Dr. James Missett concluded that plaintiff had Post Traumatic Stress Disorder (PTSD). Defendant's expert Dr. Mark Strassberg concluded that plaintiff had certain personality disorders that were present before she worked for Dr. Tuffli, and that she did not suffer from PTSD. Dr. Joanna Berg, who gave plaintiff several tests including the Rorschach test, the Minnesota Multiphasic Personality Inventory (MMPI-2), and the Millon Clinical Multiaxial Inventory (MCMI-III), concluded, based on the test results, that plaintiff was malingering. Specifically, she testified that she believed that malingering was "the only diagnosis that [she could] give based on the test results alone, that the three tests that [she] administered to her were invalid by her deliberate attempt - - that they revealed a lack of cooperation, that she is presenting in a context where she stands to gain by producing a very psychologically disturbed profile, and they're grossly exaggerated just as in the definition of malingering"

testified that she first learned of plaintiff's claim that Dr. Tuffli had threatened her the day that St. Charles came to the office for a meeting with plaintiff and Dr. Tuffli. McPheeters could not recall ever seeing plaintiff crying or hysterical or having any conversations in which plaintiff complained about Dr. Tuffli. Again, McPheeters refuted plaintiff's claim that she had had conversations with plaintiff in which she used obscenities to refer to Dr. Tuffli.

St. Charles testified that the first time she heard about Dr. Tuffli's alleged threat to plaintiff was in January 2008. She denied speaking to plaintiff on the telephone on August 27, 2007, and being told by plaintiff that Dr. Tuffli had threatened her. St. Charles stated that when plaintiff told her about the threat in January 2008, she arranged a meeting between Dr. Tuffli and plaintiff. At this meeting, in which plaintiff agreed to participate and was "anxious for it to happen," plaintiff revealed for the first time that she had filed a police report.⁶ In order to investigate plaintiff's claim, St. Charles placed plaintiff on administrative leave. St. Charles denied that she told plaintiff to clean out her desk and that she was being terminated. After the meeting, she walked with plaintiff out of the building because plaintiff needed some "TLC," as she was very upset.

Plaintiff testified that she received a letter from St. Charles around January 14, 2008. In the letter, St. Charles told plaintiff that Dr. Tuffli did not recall the incident and did not recall saying that he would kill plaintiff; and that none of Dr. Tuffli's other employees had any knowledge of the incident nor did they witness the incident or any similar incidents. St. Charles informed plaintiff that she was unable to obtain the police report and that the records office at the San Jose Police Department had informed her that plaintiff would need to obtain a copy and release it to Staff Resources. The letter

⁶ Some of St. Charles's testimony came from her deposition transcript and was read into the record by plaintiff's counsel.

concluded that based on the interviews with staff and the lack of eyewitnesses and the police report to refer to, St. Charles was unable to substantiate plaintiff's claim.

On December 28, 2011, plaintiff filed a third amended complaint (TAC), the operative pleading in this case, in which she alleged nine causes of action against Dr. Tuffli as an individual, Dr. Tuffli as a medical corporation, and Staff Resources: (1) Assault; (2) Battery; (3) Intentional Infliction of Emotional Distress (IIED); (4) Violation of Civil Code section 51.7; (5) Wrongful Termination in Violation of Public Policy; (6) Violation of section 6310; (7) Violation of section 232.5 subdivision (c); (8) Violation of Business and Professions Code section 17200; and (9) Violation of section 1102.5, subdivision (b). The ninth cause of action mirrored plaintiff's common law wrongful termination claim, her section 6310 claim and her section 232.5 claim. That is, all were based on her allegation that she was terminated/discharged from her employment.

Before the trial, the court sustained Staff Resources' demurrer, without leave to amend, to the ninth cause of action for violation of section 1102.5, subdivision (b).

During the trial, the court granted Dr. Tuffli's motion for nonsuit as to the first and second causes of action (assault and battery). The motion was granted as to all the defendants. The court granted Staff Resources' motion for nonsuit as to the third cause of action (IIED) and defendants' motion for nonsuit to the claim for punitive damages. The court granted plaintiff's request to dismiss the third cause of action (IIED) against Dr. Tuffli. Accordingly, the case went to the jury on four causes of action—violation of Civil Code section 51.7 against Dr. Tuffli (fourth cause of action), wrongful termination in violation of public policy (fifth cause of action), violation of section 6310 (sixth cause of action), and violation of section 232.5, subdivision (c) against Dr. Tuffli and Staff Resources.

The jury returned special verdict forms and found as follows.

As to the fourth cause of action—violation of Civil Code section 51.7 against Dr. Tuffli—the jury found that Dr. Tuffli did not intentionally threaten violence against plaintiff. As to the fifth cause of action—wrongful termination in violation of public policy—the jury found that plaintiff was employed by Dr. Tuffli and Staff Resources, but that plaintiff was not discharged. As to the sixth cause of action—violation of section 6310, the jury found that plaintiff made a bona fide written or oral complaint of unsafe working conditions to the police or Staff Resources, but neither Dr. Tuffli nor Staff Resources terminated plaintiff’s employment. As to the seventh cause of action—violation of section 232.5 subdivisions (a) and (c)—the jury found that plaintiff disclosed to the police and/or one or more of defendants’ employees a matter of health or safety concerning defendants’ workplace, but that the defendants did not discharge plaintiff.

After the jury verdicts, the court decided the eighth cause of action for violation of Business and Professions Code section 17200 in favor of all defendants.

Discussion

Demurrer

Regarding the ninth cause of action for violation of section 1102.5, subdivision (b), the court determined that plaintiff was required to exhaust administrative remedies with the Labor Commissioner under section 98.7, subdivision (a), and that she had failed so to do. As noted, the court sustained the demurrer to the ninth cause of action without leave to amend. In making the determination that exhaustion of administrative remedies was a prerequisite, the court made no mention of *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320 (*Lloyd*),⁷ and instead relied on *Campbell v.*

⁷ In *Lloyd, supra*, 172 Cal.App.4th 320, Division Three of the Court of Appeal, Second Appellate District concluded that former section 98.7 (Stats. 2002, ch. 664, § 158) did *not* require a plaintiff to exhaust administrative remedies with the Labor Commissioner before pursuing a claim under section 1102.5. (*Lloyd, supra*, at p. 323.)

Regents of University of California (2005) 35 Cal.4th 311 (*Campbell*) and several federal cases.

Standard of Review

After a demurrer is sustained without leave to amend, the standard of review is de novo. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) In performing our independent review of the pleading, we assume the truth of all facts properly pleaded by the plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) “We also accept as true all facts that may be implied or inferred from those expressly alleged.” (*Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 925.) Further, “we give the complaint a reasonable interpretation, and read it in context.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) “If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Id.* at p. 1081.)

In essence, plaintiff contends that she was not required to exhaust administrative remedies with the Labor Commissioner under section 98.7 prior to bringing her claim for violation of section 1102.5 against defendants.

Defendants counter that there is an exhaustion requirement in section 98.7; they argue that the trial court was correct in sustaining their demurrer to plaintiff’s ninth cause of action.

For reasons that we shall explain, we believe that plaintiff has the better argument, but that under her proposed amendment to the complaint no liability exists.⁸

In general, section 1102.5 has been described as “a whistleblower statute, the purpose of which is to ‘encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.’ [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287.) At the time plaintiff was employed by defendants, and continuing through the time that the trial court ruled on defendant’s demurrer, former section 1102.5, subdivision (b) provided that “[a]n employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.” (Stats. 2003, ch. 484, § 2.) In sustaining Staff Resources’ demurrer to plaintiff’s claim for violation of former section 1102.5, subdivision (b) without leave to amend, as noted, the lower court determined that plaintiff was required to exhaust her administrative remedies with the Labor Commissioner pursuant to section 98.7, subdivision (a). Plaintiff did not allege in the operative pleading that she had exhausted administrative remedies with the Labor Commissioner.

“[T]he rule of exhaustion of administrative remedies is well established in California jurisprudence” (*Campbell, supra*, 35 Cal.4th at p. 321.) “ ‘In brief, the 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 courts will act.’

⁸ Leave to amend an original complaint is rarely denied, as amendment is liberally permitted and we prefer that disputes be resolved on their merits. However, “ ‘[l]eave to amend should be denied where the facts are not in dispute, and the nature of the plaintiff’s claim is clear, but, under the substantive law, no liability exists.’ [Citations.]” (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781.) The burden is “squarely on the plaintiff” to prove a reasonable possibility exists that a defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

[Citation.] The rule ‘is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts.’ [Citation.] . . . ‘Exhaustion of administrative remedies is “a jurisdictional prerequisite to resort to the courts.” [Citation].’ [Citation.]” (*Ibid.*, italics omitted.)

Section 1102.5 is silent on the issue of exhaustion of administrative remedies. Instead, the ostensible exhaustion requirement in this case arises from section 98.7, subdivision (a), which states in part: “Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation.”

Section 98.7 outlines the investigation and decision process by the Labor Commissioner. For example, section 98.7, subdivision (b) provides that “[e]ach complaint of unlawful discharge or discrimination shall be assigned to a discrimination complaint investigator who shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint.” The Labor Commissioner may hold an investigative hearing and may utilize subpoenas. (§ 98.7, subd. (b)) “If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney’s fees . . . and the posting of notices to employees.” (§ 98.7, subd. (c).) “If the Labor Commissioner determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint.” (§ 98.7, subd. (d)(1).) The complainant may then “bring an action in an appropriate court, which shall have jurisdiction to determine whether a violation occurred, and if so, to restrain the violation and order all appropriate relief to remedy the violation.” (§ 98.7, subd. (d)(1).) Further, section 98.7, subdivision (f) provides that “[t]he rights and remedies provided by

this section do not preclude an employee from pursuing any other rights and remedies under any other law.”

Effective January 1, 2014, after the trial court in this case issued its order on the demurrer, section 244 was added to the Labor Code (Stats. 2013, ch. 577, § 4) and section 98.7 was amended to add a new subdivision (g) (Stats. 2013, ch. 732, § 3). In particular, section 244, subdivision (a) provides that “[a]n individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy.” New subdivision (g) of section 98.7 provides that, “[i]n the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures.”

As we shall explain, we determine that under the law at the time of the ruling on the demurrer, which was prior to January 1, 2014, plaintiff was not required to exhaust administrative remedies pursuant to section 98.7 before filing suit under section 1102.5.

As noted *ante* in footnote 7, in *Lloyd, supra*, 172 Cal.App.4th 320, Division Three of the Court of Appeal, Second Appellate District concluded that former section 98.7 (Stats. 2002, ch. 664, § 158) did *not* require a plaintiff to exhaust administrative remedies with the Labor Commissioner before pursuing a claim under section 1102.5. (*Lloyd, supra*, at p. 323.) In reaching this determination, the *Lloyd* court set forth the following three reasons.

First, the *Lloyd* court placed emphasis on certain language in section 98.7. For example, under the former and current versions of section 98.7, subdivision (a) states that a person “*may file* a complaint with the division,” and subdivision (f) provides that “[*t*]he rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.” (Italics added.) The *Lloyd* court reasoned that “it would appear [former] Labor Code section 98.7 merely provides

the employee with an additional remedy, which the employee may choose to pursue.” (*Lloyd, supra*, 172 Cal.App.4th at p. 331.)

Second, the *Lloyd* court explained that “case law has recognized there is no requirement that a plaintiff proceed through the Labor Code administrative procedure in order to pursue a statutory cause of action. (*Daly v. Exxon Corp.* [(1997)] 55 Cal.App.4th [39,] 46 [suit under Lab. Code, § 6310 alleging retaliation for complaint of unsafe working conditions]; *Murray v. Oceanside Unified School Dist.* [(2000)] 79 Cal.App.4th [1338,] 1359 [suit under Lab. Code, former § 1102.1 relating to sexual orientation discrimination].)” (*Lloyd, supra*, 172 Cal.App.4th at pp. 331-332.) The *Lloyd* court found “no reason to differ with these decisions and to impose an administrative exhaustion requirement on plaintiffs seeking to sue for Labor Code violations.” (*Id.* at p. 332.)

Third, the *Lloyd* court observed that “construing [former] . . . section 98.7 to obligate a plaintiff to seek relief from the Labor Commissioner prior to filing suit for Labor Code violations flies in the face of the concerns underlying the Labor Code Private Attorneys General Act of 2004 (PAG Act) (Lab. Code, § 2698 et seq.).” (*Lloyd, supra*, 172 Cal.App.4th at p. 332.) The *Lloyd* court explained, “[T]he PAG Act was adopted to augment the enforcement abilities of the Labor Commissioner with a private attorney general system for labor law enforcement. ‘The Legislature declared its intent as follows: “(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies’ enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.” (Stats. 2003, ch. 906, § 1, italics added.)’ [Citation.] The PAG Act’s approach, enlisting aggrieved employees to augment the

Labor Commissioner’s enforcement of state labor law, undermines the notion that [former] . . . section 98.7 compels exhaustion of administrative remedies with the Labor Commissioner.” (*Lloyd, supra*, at p. 332.)

The trial court in this case made no mention of *Lloyd*, and instead relied on *Campbell* and several federal court cases.

Although *Campbell* provides general legal principles concerning the rule of exhaustion of administrative remedies, we do not believe *Campbell* dictates a result different from that reached in *Lloyd* concerning whether a plaintiff must exhaust administrative remedies with the Labor Commissioner before pursuing a section 1102.5 claim.

In *Campbell*, the California Supreme Court “address[ed] whether an employee of the Regents of the University of California (the Regents) must exhaust university *internal* administrative remedies before filing suit in superior court for retaliatory termination under either Government Code section 12653, subdivision (c), or Labor Code section 1102.5” (*Campbell, supra*, 35 Cal.4th at p. 317, italics added.) The court explained that “[t]he Regents may . . . exercise quasi-legislative powers,” and that “ ‘policies established by the Regents as matters of internal regulation may enjoy a status equivalent to that of state statutes.’ [Citations.]” (*Id.* at p. 320.) Thus, “[t]he Regents may create a policy for handling whistleblower claims under their power to organize and govern the University. Such a policy is treated as a statute in order to determine whether the exhaustion doctrine applies.” (*Id.* at p. 321.) The court determined that the Regents had “established [a policy] to handle complaints of retaliatory dismissal for whistleblowing in an orderly manner,” and that the policy may be treated “as equivalent to a statute in this action.” (*Id.* at p. 324.)

The California Supreme Court recognized that section 1102.5 was itself “silen[t] on the exhaustion requirement.” (*Campbell, supra*, 35 Cal.4th at p. 329.) The court cautioned, however, that “ ‘courts should not presume the Legislature in the enactment of

statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication.’ [Citation.]” (*Ibid.*) The court explained that, “absent a clear indication of legislative intent, [a court] should refrain from inferring a statutory exemption from our settled rule requiring exhaustion of administrative remedies.” (*Id.* at p. 333.) Ultimately, the court concluded that the plaintiff, a university employee, was required to exhaust university internal administrative remedies before filing suit in superior court. (*Id.* at pp. 317, 333.)

Campbell did not address the issue of whether the administrative remedies with the Labor Commissioner provided by former section 98.7 had to be exhausted before a plaintiff filed suit in superior court. On this point, *Lloyd* considered the specific statutory language of former section 98.7, including language concerning the ability of an employee to “pursu[e] any other rights and remedies under any other law” (§ 98.7, subd. (f)), and also considered the legislative intent of the PAG Act, in determining that exhaustion of administrative remedies is not required. We find *Lloyd* persuasive. Accordingly, we determine that plaintiff was not required to exhaust administrative remedies with the Labor Commissioner under former section 98.7 before filing suit on a claim for a violation of section 1102.5, subdivision (b).

The exhaustion of administrative remedies is not required when there is “a clear indication of legislative intent” that the exhaustion requirement not apply. (*Campbell, supra*, 35 Cal.4th at p. 333; see also *id.* at p. 329 [intention must clearly appear either by express declaration or by necessary implication].) For the reasons set forth in *Lloyd* regarding the particular language of former section 98.7 and the expressed intent of the Legislature regarding the PAG Act, we believe the Legislature has plainly indicated that the exhaustion requirement does not apply.

Recently, in *Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022 (*Satyadi*), Division Five of the Court of Appeal, First Appellate District, determined that the two new Labor Code provisions effective January 1, 2014—

section 98.7, subdivision (g) and section 244, subdivision (a)—*clarified*, and did not change, existing law that a person may bring a civil action for violation of section 1102.5 without first exhausting the administrative remedy provided by section 98.7. The *Satyadi* court concluded that the two new Labor Code provisions applied to the appeal pending before it, and that the trial court erred in sustaining a demurrer on the ground of failure to exhaust administrative remedies. (*Satyadi, supra*, at pp. 1024, 1032-1033.)

However, in view of our determination under former law, we need not decide whether the Labor Code amendments effective January 1, 2014, which provide that exhaustion of administrative remedies is *not* required under section 98.7 (see §§ 244, subd. (a), 98.7, subd. (g)), apply to this case.

In sum, we conclude that the trial court erred in ruling that exhaustion of administrative remedies was required in sustaining defendants' demurrer to the ninth cause of action for violation of section 1102.5, subdivision (b).

“The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [Citations.]” (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384.) Here, we are concerned with the first element of the section 1102.5, subdivision (b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.)

In her TAC, plaintiff alleged that the adverse employment action that she suffered was that she was “terminated” by Dr. Tuffli. After deliberations, the jury returned several special verdicts. In answer to the question “Did Staff Resources, Inc., and Charles Tuffli terminate [plaintiff]” the jury answered “No.”

Defendants argue that even if plaintiff did not need to exhaust her administrative remedies, she would not have prevailed on her section 1102.5 claim because the jury found she was *not* terminated. Plaintiff counters that she could still have proven her retaliation claim by “establishing that the ‘administrative leave,’ or the manner in which it was imposed on her, itself constituted an adverse employment action.”

Plaintiff bears the burden to show not only that the trial court erred, but also that the error was prejudicial in that it resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802 (*Cassim*); *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.) “ ‘[A] “miscarriage of justice” should be declared only when the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ [Citation.]” (*Cassim, supra*, 33 Cal.4th at p. 800.)

As noted, former section 1102.5 states in relevant part: “(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.”

As discussed above, plaintiff tried all her claims on the theory that she was terminated/discharged in retaliation for making a police report about Dr. Tuffli’s threat. The jury found that plaintiff failed to prove her case in that regard. Plaintiff’s claim that she could still have proven her retaliation claim based on being placed on administrative leave suffers from a fatal flaw.

The activities of Staff Resources and Dr. Tuffli of which plaintiff now complains do not rise to the level of retaliation. Matters such as placing employees on administrative leave are personnel matters. An employer’s action “constitutes actionable retaliation only if it had a substantial and material adverse effect on the terms and

conditions of the plaintiff's employment.” (*Akers v. County of San Diego*, *supra*, 95 Cal.App.4th at p. 1455.) Negative performance evaluations, written warnings and even placing the plaintiff on administrative leave have been deemed insufficiently “adverse” as a matter of law. (See *Id.* at pp. 1454-1455; *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 510-512.)

We find scant authority for the proposition that placing an employee on administrative leave without more is an adverse employment action. The great weight of federal authority rejects the notion that placement on administrative leave during an internal investigation, without attendant discipline, amounts to an “adverse employment action.” (See, e.g., *Kuhn v. Washtenaw County* (6th Cir.2013) 709 F.3d 612, 625-626 [internal investigation into rape allegation was not adverse action]; *Brown v. City of Syracuse* (2d Cir.2012) 673 F.3d 141, 150 [paid administrative leave and loss of overtime pay not adverse action unless the employer takes actions beyond an employee's normal exposure to disciplinary policies]; *Joseph v. Leavitt* (2d Cir.2006) 465 F.3d 87, 91-92 [paid leave during internal affairs investigation and continuation on paid leave after criminal charges were dismissed were not adverse actions]; *Singletary v. Missouri Dept. of Corrections* (8th Cir.2005) 423 F.3d 886, 889, 891-892 [three months' paid leave pending internal affairs investigation and extension of employee's probationary period after return to work were not adverse actions]; *Peltier v. United States* (6th Cir.2004) 388 F.3d 984, 988-989 [paid leave during internal investigation, including greater scrutiny on female employee than on male, were not adverse actions]; *Breaux v. City of Garland* (5th Cir.2000) 205 F.3d 150, 157-158 [paid leave and investigation of police officer's misconduct based on purportedly false accusations]; *McInnis v. Town of Weston* (D.Conn.2005) 375 F.Supp.2d 70, 84-85 [internal investigation into police officer's handling of criminal investigations].)

We note that in *Dahlia v. Rodriguez* (9th Cir.2013) 735 F.3d 1060 (*Dahlia*), the Ninth Circuit en banc concluded that, “under some circumstances, placement on

administrative leave can constitute an adverse employment action.” (*Id.* at p. 1078.) While *Dahlia* lends support to plaintiff’s theory that she could have proven that being placed on administrative leave was an adverse employment action, we find it is not persuasive for several reasons. The plaintiff in *Dahlia* alleged additional employment impacts that, “if proved,” would contribute to the establishment of an adverse employment action. (*Id.* at p. 1079.)⁹ In this case, as a matter of law, placing plaintiff on administrative leave caused her no injury; it did not have a substantial and material adverse effect on the terms and conditions of plaintiff’s employment.

As a result, any error by the trial court in sustaining the demurrer was harmless. (Cal. Const., Art. VI, § 13; see *Cassim, supra*, 33 Cal.4th at p. 800 [a miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error].)

Exclusion of Evidence

In limine, defendant Staff Resources moved to exclude any and all statements by a Rosemary Kitchens on the ground that any statements would be hearsay.¹⁰

The evidence that plaintiff sought to introduce were notes that St. Charles had made of her interview of Kitchens as part of her investigation into the alleged threat. In pertinent part the notes reflect that Kitchens told St. Charles “Staci did tell her he said it” and Kitchens told plaintiff “he probably didn’t even remember or say it.” The lower court granted defendant Staff Resources’ motion in limine to exclude these statements.

⁹ While *Dahlia* was decided at the pleading stage, here plaintiff would have to produce evidence to support her allegations, yet she cannot produce such evidence. In fact, plaintiff’s own witness James Cawood testified that Sarah St. Charles *should* have placed plaintiff on administrative leave and let her know she could remain on leave with pay while she, St. Charles, conducted an investigation into plaintiff’s claim that Dr. Tuffli had threatened to kill her.

¹⁰ It appears that Ms. Kitchens was Dr. Tuffli’s former employee; she now lives in Ireland and was not expected to testify at trial.

In so doing, the court ruled that interview notes St. Charles had made at the time she was interviewing Kitchens could not come in to evidence, but counsel could “talk to her about that.”

Plaintiff’s counsel revisited the issue during the trial and asked the court to reconsider its ruling. Counsel argued that the interview notes did not contain hearsay and they were admissible under Evidence Code sections 1202 and 1235.¹¹ The court stated that its ruling would stand.

Plaintiff argues that the lower court abused its discretion in excluding Kitchens statements to St. Charles as contained in the interview notes.

Article VI, section 13 of the California Constitution provides that “[n]o judgment shall be set aside, or a new trial granted, in any cause, on the ground . . . of the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”

This constitutional requirement is reiterated in Evidence Code section 354, which provides in part: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, *by reason of the erroneous exclusion of evidence* unless the court which passes upon the effect of the error or errors is of the opinion that

¹¹ Evidence Code section 1202 provides “Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.” Evidence Code section 1235 provides, “Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.”

the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means” (Italics added.)

The California Supreme Court has interpreted the “miscarriage of justice” phrase as prohibiting a reversal unless there is “a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) In this context, a reasonable probability “does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.” (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

In this case, the exclusion of evidence regarding what Kitchens told St. Charles, even if erroneous, could not have affected the outcome of the trial because the jury decided that the threat was never made by Dr. Tuffli. All of plaintiff’s arguments in essence are that if the jury had been aware of Kitchen’s statements in the interview notes, they would have come to a different conclusion. We are not persuaded. The jury was aware that plaintiff made a report to the police about the threat; they so found in their special verdict on the seventh cause of action. They were also aware from St. Charles’s notes that were admitted into evidence (without any reference to what Kitchens had said) that in her notes St. Charles had recorded that she asked McPheeters whether plaintiff had told her about the threat and McPheeters said, “she may have.” On cross-examination by plaintiff’s counsel McPheeters confirmed that was what she told St. Charles during the interview. Further, the jury heard the testimony of plaintiff’s mother, from which they could infer that plaintiff told her of Dr. Tuffli’s threat, and the testimony of Leon Castellanos—plaintiff’s ex-partner that—plaintiff told him about the threat. We fail to see how evidence that plaintiff told yet another person about the threat would have made a difference in the outcome.

In sum, we see no reasonable probability that in the absence of the assumed error, a result more favorable to plaintiff would have been reached.

Alleged Juror Misconduct and Denial of New Trial Motion

Plaintiff moved for a new trial based on, among other things, juror misconduct. Plaintiff submitted two juror declarations showing that a female juror said something about being on disability and employment at the beginning of deliberations.

The lower court denied the new trial motion, finding that the facts underlying the alleged misconduct did not establish misconduct.

In essence, plaintiff argues the trial court committed reversible error by denying her motion for a new trial on the ground of juror misconduct.

Juror misconduct is grounds for granting a new trial. (Code Civ. Proc., § 657, subd. (2).) If misconduct is established, a presumption of prejudice arises. (*People v. Gamache* (2010) 48 Cal.4th 347, 397.) “However, the presumption is not conclusive; it may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court’s examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.” (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417.) Reversal is not justified unless the misconduct “prevented either party from having a fair trial.” (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507.)

In reviewing the denial of a motion for a new trial on the basis of juror misconduct, “[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court’s independent determination.” (*People v. Nesler* (1997) 16 Cal.4th 561, 582; *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 625-626.)

In ruling on a request for a new trial arising from juror misconduct, the trial court undertakes a three-step inquiry. (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160.) First, it must determine whether the affidavits supporting the motion are admissible. (Evid. Code, § 1150; *People v. Dorsey* (1995) 34 Cal.App.4th 694, 703.) Here the lower court found that they were.¹² Second, if the evidence is admissible, the trial court must determine whether the moving party has presented facts to establish misconduct. (*People v. Dorsey, supra*, at p. 703; see also *Donovan v. Poway Unified School Dist., supra*, 167 Cal.App.4th at p. 625.) Here the lower court found that the facts did not establish misconduct. Third, once misconduct is established, the trial court must determine whether the misconduct is prejudicial. (*Whitlock v. Foster Wheeler, LLC, supra*, at p. 160.)

On appeal, plaintiff asserts that during the first ten to thirty minutes of jury deliberations, a female juror interjected “an extraneous and incorrect statement of the law”—that is, that “because Plaintiff was placed on disability, she could not have been terminated.”

It is true that the introduction of “extraneous law [to] a jury room—i.e., a statement of law not given to the jury in the instruction by the court—” can constitute juror misconduct. (*Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, 1349-1350; see also *In re Stankewitz* (1985) 40 Cal.3d 391, 397.) However, *Young* and *Stankewitz* are distinguishable. In each of those cases, a juror “described his own outside experience as a police officer on a question of law” and “erroneously instructed his fellow jurors” as to the governing law. (*Young v. Brunicardi, supra*, at p. 1351 [comparing facts to *Stankewitz*].) Here, there is no suggestion that the juror who made the statement purported to rely on her professional experience.

¹² Similar to the lower court we assume the jurors’ declarations were admissible.

“The jury system is an institution that is . . . fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated[,] . . . [or] few verdicts would be proof against challenge.” (*People v. Marshall* (1990) 50 Cal.3d 907, 950.) The comments at issue were “general statement[s] about the law that [find their] source in everyday life and experience”; they do not rise to the level of misconduct. (*Ibid.*)

More importantly, the two juror affidavits that were submitted to the court show that the statements that two of the jurors heard were “If you are on disability you can’t be working[.]” and “In order to collect disability you cannot be employed at the same time, she could no longer be employed.”¹³ One statement implies that one may not work while on disability, the other statement categorically states that a person cannot receive disability if he or she is employed. Neither statement can be read to support the conclusion that because plaintiff was on disability she could not have been terminated. Plaintiff’s position on appeal, and in the lower court, is based on drawing unreasonable inferences or conclusions from her own evidence. Neither of the statements foreclosed the possibility that plaintiff had been terminated. Both statements presuppose that the absence of work is a prerequisite to obtaining disability benefits; logically both

¹³ In his affidavit one juror goes on to say that he did not know that it was “impossible to be on admin leave and disability at the same time.” Again, this supports a conclusion that if plaintiff was on disability she was not on administrative leave--rather she had been terminated. In short, the alleged statements by the female juror logically lead to the conclusion that plaintiff was terminated and not to the diametrically opposite conclusion that because she was on administrative leave/disability she was not terminated.

statements imply or state that one can obtain disability only if one is not working and a person who is not working could have been terminated.

In sum, here, we need not decide prejudice, because plaintiff has failed to meet her burden of establishing misconduct; the lower court was correct in determining that the facts did not establish misconduct, and therefore, did not err in denying the new trial motion on the ground of alleged juror misconduct.

Disposition

The judgment is affirmed. Defendants are awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.