UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: CV 14-00792-AB (PJWx)	Date: January 23, 2017

Title: *Yowan Yang v.* [redacted], *et al.*

Present: The Honorable **ANDRÉ BIROTTE JR., United States District Judge**

Carla Badirian	N/A
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Appearing	None Appearing

Proceedings: **[In Chambers] Order Denying Defendant's Renewed Motion for Judgment As Matter of Law and Motion for New Trial [316, 319]**

Before the Court are Defendant [redacted]'s Renewed Motion for Judgment as a Matter of Law ("RJMOL") and Motion for a New Trial ("MNT"). (Dkt. Nos. 316, 319.) Defendant brings its RJMOL under Federal Rules of Civil Procedure Rule 50(b) and its Motion for a New Trial under Rule 59. Fed. R. Civ. P. 50(b), 59. As to its RJMOL, Defendant asks the Court to enter judgment in its favor because, according to Defendant, no reasonable jury could have found for Plaintiff on his claims for wrongful termination, violation of California Civil Code Section 43, violation California Civil Code Section 52.1, and negligent infliction of emotional distress. As to its MNT, Defendant asks the Court to order a new trial on the grounds that the verdict went against the weight of the evidence, the jury instructions prejudiced Defendant, the special verdict form contained legal errors, Plaintiff's counsel committed prejudicial misconduct, and the damage award was excessive. Defendant also asks that the Court reverse or reduce the jury's award for punitive damages. The Court heard oral arguments from the parties on August 22, 2016 and took the matter under submission. Having considered the papers filed in support of and in opposition to the instant motions as well as counsel's oral argument, the Court **DENIES** Defendant's motions for the following reasons.

I. FACTUAL AND PROCEDURAL HISTORY

This case arose from Defendant's termination of Plaintiff's employment following Plaintiff's physical altercation with his former co-worker, Cy Tymony, who Defendant terminated concurrent with Plaintiff. Harry Cometa authorized Plaintiff's termination, and other of Defendant's officers declined to rescind it. The case progressed to a jury trial that commenced March 8, 2016. (Dkt. No. 238, Minutes of Jury Trial – 1st Day.) At trial, five of Plaintiff's original six claims were at issue: (1) wrongful termination in violation of public policy; (2) violation of California Civil Code section 43; (3) violation of California Civil Code section 52.1; (4) negligent infliction of emotional distress; and (5) negligent supervision and retention. (Dkt. No. 219, Joint Pretrial Conference Order at 3–11.)

After the jury began its deliberations, but before the jury returned its verdict, Defendant moved for judgment as a matter of law under Federal Rules of Civil Procedure Rule 50(a), thereby preserving its right to renew the motion pursuant to Rule 50(b). (Dkt. No. 246, Minutes of Jury Trial – 5th Day; Dkt. No. 335, Tr. of Trial Proceedings at 1191:23.) Defendant's Rule 50(a) motion was based on four grounds: (1) Plaintiff's claim for negligent retention and supervision fails because Plaintiff did not present evidence that Mr. Tymony was unfit to perform the work for which he was hired; (2) Plaintiff's claims for violation of California Civil Code sections 43 and 52.1 fail because Plaintiff did not show that Mr. Tymony acted in the course and scope of his employment or that Defendant ratified Mr. Tymony's conduct; (3) Plaintiff's claim for wrongful termination fails because the underlying sections 43 and 52.1 claims fail; and (4) Plaintiff's claim for negligent infliction of emotional distress fails because the other claims fail. The Court denied Defendant's Rule 50(a) motion, concluding that the motion was not duplicative of Defendant's motion for summary judgment but that the proceedings had not shown that Defendant was entitled to judgment as a matter of law. (Trial Tr. at 1191:20–24.)

On March 17, 2016, the jury returned its unanimous verdict, finding for Plaintiff on four of his five claims. (Dkt. No. 301, Final J. on Jury Verdict ("Judgment") at 1.) The jury made the following findings:

> *As to the wrongful termination claim*, the jury found that Defendant's failure to provide a safe workplace or the incident in which Plaintiff was the victim of workplace violence was a substantial motivating reason for Plaintiff's termination and that the termination was a substantial factor in causing Plaintiff's harm. (Dkt. No. 261, Special Verdict Form ("SVF") at 2.)

As to the section 43 claim, the jury found that Defendant, through the acts of its employee Cy Tymony, acting in the course and scope of his employment, violated Plaintiff's right to be free from bodily restraint or harm or personal insult on July 24, 2012 and that Defendant's conduct was a substantial factor in causing Plaintiff's harm. (SVF at 3.)

As to the section 52.1 claim, the jury found that Defendant, through the acts of its employee Cy Tymony, acting in the course and scope of his employment, acted violently against Plaintiff, preventing him from exercising or interfering with his right to a safe workplace or right of protection from bodily restraint or harm or personal insult and that Defendant's conduct was a substantial factor in causing Plaintiff's harm. (SVF at 4.)

As to the negligent infliction of emotional distress claim, the jury found that Defendant negligently caused Plaintiff serious emotional distress and that Defendant's negligence was a substantial factor in causing Plaintiff's serious emotional distress. (SVF at 5.)

As to the negligent supervision and retention claim, the jury found that Defendant supervised and retained Cy Tymony as an employee but that he was not unfit to perform the work for which he was hired. (SVF at 6.)

As to the parties' comparative fault, the jury found that Defendant's negligence caused 75% of Plaintiff's harm and Plaintiff's own negligence caused the remaining 25% of his harm. (SVF at 9.)

As to damages, the jury awarded Plaintiff the following amounts: $193,540 in past loss of earnings; $700,000 in future loss of earnings; $950,000 in past emotional and psychological harm; and $550,000 in future emotional and psychological harm for a combined total of $2,393,540 in damages.[1] (SVF at 9.)

As to punitive damages, the jury found that Defendant's employees Harry Cometa and Cy Tymony acted with malice, oppression, or fraud and that one or more of Defendant's officers, directors, or managing agents knew of the conduct and adopted or approved it after it occurred. (SVF at 11.) Consequently, the jury awarded punitive damages to Plaintiff in the

[1] The jury found that Plaintiff did not fail to use reasonable efforts to mitigate his damages. (SVF at 10.)

amount of $5,000,000. (Dkt. No. 265, Special Verdict Form – Phase II at 2.)

On June 9, 2016, Defendant filed the instant RMJOL, (Dkt. No. 316), and MNT, (Dkt. No. 319). Plaintiff timely opposed both motions on July 1, 2016, (Dkt. Nos. 327–28), and Defendant timely replied on July 21, 2016, (Dkt. Nos. 331–32). The Court heard oral argument on both motions on August 22, 2016 and now considers the motions on their procedural and substantive merits. (Dkt. No. 337.)

II. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant first seeks an order under Rule 50(b) entering judgment as a matter of law in its favor. In so moving, Defendant purports to renew the motion that it brought at the close of evidence under Rule 50(a). (*See* Tr. at 1186.) For the following reasons, the motion is **DENIED**.

a. Legal Standard

Under the Federal Rules of Civil Procedure, a Rule 50(b) motion is not a freestanding motion for judgment as a matter of law, but rather is a renewed Rule 50(a) motion. *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). A valid Rule 50(a) motion requires that the moving party bring the motion before the case is submitted to the jury. *Id.* Once the court has denied or deferred ruling on the Rule 50(a) motion, and after the jury returns a verdict against the moving party, the Federal Rules provide that the movant may renew its motion under Rule 50(b). *Id.* Without exception, the movant "cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion." *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (citing Fed. R. Civ. P. 50 advisory committee's notes to the 1991 amendments ("A post trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.")); *accord* Fed. R. Civ. P. 50 advisory committee's notes to the 2006 amendments ("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion.").

In ruling on a Rule 50 motion, the court draws all inferences in the light most favorable to the non-moving party and must not engage in any weighing of evidence or determinations of credibility. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *accord Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006). Moreover, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe," *Reeves*, 530 U.S. at 151, and "may not substitute its view of the evidence for that of the jury," *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). Instead, the court must give deference to all of the jury's

credibility findings that are consistent with the verdict. *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1468 n.8 (9th Cir. 1984). If, upon applying these principles, the only reasonable conclusion is contrary to the verdict rendered by the jury, then the court must grant the Rule 50(b) motion. *Josephs*, 443 F.3d at 1062.

In all cases, the court must uphold any jury's verdict that is supported by "substantial evidence." *S.E.C. v. Todd*, 642 F.3d 1207, 1215 (9th Cir. 2011). Substantial evidence is any evidence that adequately supports a jury's conclusions and verdict "even if it is also possible to draw a contrary conclusion from the same evidence." *Id.* (quoting *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007)). Put another way, where the non-moving party has presented any evidence sufficient to support the jury's conclusion, the Rule 50(b) motion should be denied. *Johnson*, 251 F.3d at 1227–28.

b. Discussion

At trial, Defendant premised its Rule 50(a) motion on the following grounds: As to Plaintiff's section 43 and section 52.1 claims, Defendant advanced just two arguments at trial: first, that Mr. Tymony was not acting in the course and scope of his employment during the July 24, 2012 altercation and, second, that Defendant did not ratify Mr. Tymony's conduct. (JMOL at 4:1–5:22.) As to the wrongful termination claim, Defendant argued that Plaintiff did not claim a violation of a constitutional provision but rather had only asserted statutory claims under section 43 and 52.1. (JMOL at 5:23–6:3.) Finally, as to the negligent infliction of emotional distress claim, Defendant argued that this claim should fail because it was based on the other failing claims. (JMOL at 6:4–6:11.) As discussed above, Defendant must limit the scope of its Rule 50(b) argument to the arguments that it raised in its preverdict Rule 50(a) motion. *See Freund*, 347 F.3d at 761. Accordingly, though Defendant filed fully eighteen additional pages of argument under Rule 50(b) as compared to its argument under Rule 50(a), the Court is bound to examine only those arguments that were previously raised and considered during trial. The motion is **DENIED** for the following reasons.

i. Section 43 and 52.1 Claims

In its Rule 50(b) motion, Defendant renews its argument that Plaintiff did not demonstrate ratification by Defendant of Mr. Tymony's assault on Plaintiff.[2] (Dkt. No. 316, RJMOL at 16–19.) Specifically, Defendant argues that it cannot have approved of Mr. Tymony's assaultive conduct because Defendant fired Mr. Tymony after his altercation with Plaintiff. (*Id.* at 18–19.) According to Defendant, Defendant "completely extinguishe[d] any further employment relationship" by terminating Mr.

[2] While Defendant argued in its Rule 50(a) motion that Mr. Tymony was not acting in the course and scope of his employment, Defendant does not renew that argument here.

Tymony "for his actions during the July 24th altercation with Yang." (*Id.*) Defendant argues that, having taken this measure,"[a]s a matter of law . . . , [redacted] cannot be found to have ratified Tymony's assault." (*Id.* at 19, 21.) The Court finds that Defendant has not carried its burden.

While it is true that "[t]he failure to discharge an employee who has committed misconduct may be evidence of ratification," (Dkt. No. 138, Order re Mot. for Summary J. at 17), Defendant cites no authority for the crux of its argument: that discharge absolutely *precludes* a finding of ratification. Such explicit authority is especially necessary to overturn the jury's finding in light of the other factors at play in Plaintiff's case which are: (1) Defendant's *concurrent* firing of Plaintiff along with Mr. Tymony and (2) Defendant's decision to not investigate whether Plaintiff was a victim of workplace violence. As to the first, while firing an assaulting employee might negate a finding of ratification in some cases, good sense counsels an entirely different interpretation when the employer fires not only the assaulting employee but also the assaulting employee's victim. In such a case, where victim and aggressor suffer an identical consequence, the causal connection between the assaultive conduct and the firing of the aggressor is lost, and it is not enough to say that firing of the aggressor precludes ratification. This is especially true when, turning to the second distinguishing factor, the employer refuses to investigate the parties' respective roles in the altercation. (*See, e.g.*, Trial Tr. at 482:5–8.)

With this background, and drawing all inferences in Plaintiff's favor, there was substantial evidence presented at trial to support the jury's conclusion that Defendant ratified the conduct by meting out identical punishments to assailant and victim and by firing Plaintiff without investigating whether he was a victim of workplace violence. Mr. Cometa testified that "[b]oth [Plaintiff's] and Mr. Tymony's reaction to each other is what got them terminated." (Trial Tr. at 441:1–2.) Mr. Cometa later testified, however, that profanity was "[n]ot an unreasonable response" where "someone has their life threatened [while] someone's hands go[ ] around their neck and their cubicle is destroyed." (Trial Tr. at 481:5–15.) In agreement, co-worker and witness to the assault Tony Medina testified that he was "shocked" when he learned that Mr. Yang was fired "[b]ecause he was attacked at work." (Trial Tr. at 203:6–8.) Finally, Mr. Cometa testified that he terminated Plaintiff with no knowledge of Mr. Tymony's physical attack against him or the verbal threats on his life. (Trial Tr. at 480.) Despite this, Mr. Cometa testified that his "termination decision was based solely on what [he] heard on the telephone] and that, he "did nothing else to find out what had occurred between Mr. Yang and Mr. Tymony" because he "didn't need to." (Trial Tr. at 481.) Accordingly, the Court will not disturb the jury's finding because the foregoing substantial evidence supports it.

ii. Wrongful Termination Claim

As to Plaintiff's wrongful termination claim, Defendant makes two arguments: first, that Plaintiff did not engage in prior protected conduct; and second, that Plaintiff did not show a retaliatory causal nexus between the protected conduct and his termination. (RJMOL at 3–11.) These, however, are not arguments that Defendant advanced in its Rule 50(a) motion. (*See* Dkt. No. 250, Mot. for J. as a Matter of Law ("JMOL") at 5:23–6:3.) At trial, Defendant argued merely that Plaintiff's wrongful termination claim should fail because his section 43 and 52.1 claims fail. Specifically, the sole basis for Defendant's motion, articulated in just three sentences, was that Plaintiff had not claimed any constitutional violation but rather had claimed only statutory violations under sections 43 and 52.1.[3] Accordingly, the Court does not consider Defendant's Rule 50(b) challenge as to wrongful termination because it exceeds the scope of Defendant's motion at trial under Rule 50(a). *See Freund*, 347 F.3d at 761.

iii. Negligent Infliction of Emotional Distress Claim

Defendant argues that negligent infliction of emotional distress (NIED) is a derivative claim that fails because Plaintiff's claims for violations of sections 43 and 52.1 and for wrongful termination fail. (RJMOL at 21–24.) As to the NIED claim based on violations of sections 43 and 52.1, Defendant argues that the NIED claim fails because there was no ratification. (RJMOL at 22.) The Court rejects this argument because the Court has already found that substantial evidence supports the jury's finding of ratification for the reasons described above. (*See* Discussion, Part II.b.i.) As to the NIED claim based on wrongful termination, Defendant argues that Plaintiff did not engage in prior protected conduct and that NIED for wrongful termination is covered under the workers' compensation exclusivity rule. (RJMOL at 22–24.) Neither of these is an argument that Defendant made in its Rule 50(a) motion. Accordingly, the Court cannot and does not consider them here.

For these reasons, the Court must uphold the jury's conclusion that Defendant is liable for violations of sections 43 and 52.1, wrongful termination in violation of public policy, and NIED and **DENIES** Defendant's Renewed Motion for Judgment as a Matter of Law.

---

[3] While Defendant stated in its motion that "Plaintiff himself admitted that he did not complain about anyone to management, including about Cy Tymony," Defendant so stated only to argue that Mr. Tymony was not prone to outbursts. (JMOL at 5.) Nowhere in Defendant's motion did Defendant offer any argument regarding Plaintiff's prior protected conduct. Rather, Defendant offered the foregoing statement strictly to support its argument, which Defendant did not renew in this Motion, that Mr. Tymony was not acting in the course and scope of his employment.

III. MOTION FOR A NEW TRIAL

The Court now considers Defendant's Motion for a New Trial. (Dkt. No. 319, MNT.) The Court will first discuss the applicable legal standard before analyzing the five grounds on which Defendant makes its Motion. As discussed below, these arguments are unavailing, and Defendant's Motion is **DENIED**.

a. Legal Standard

Under Federal Rules of Civil Procedure Rule 59(a), the court may grant a new trial to any party on all or part of the issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Thus, Rule 59(a) does not enumerate the grounds that support the extraordinary relief of a new trial. *Id.* It is generally accepted, however, that a new trial is warranted (1) where the verdict goes against the "clear weight of the evidence," (2) where "the damages are excessive," or (3) where, "for other reasons, the trial was not fair to the party moving." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). As to the first ground, a verdict goes against the clear weight of the evidence only when the evidence is so unbalanced "as to amount to a manifest miscarriage of justice." *Turnbull v. Am. Broad. Cos.*, Case No. CV 03-3554 SJO (FMOx) (C.D. Cal. Mar. 7, 2005); *accord E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997) (stating that a new trial may be granted "only if the verdict is against the great weight of the evidence or it is quite clear that the jury has reached a seriously erroneous result"). As to the second ground of excessive damages, a court "must uphold a jury's damages award unless the amount is 'clearly not supported by the evidence, or only based on speculation or guesswork.'" *Guy v. City of San Diego*, 608 F.3d 582, 585 (9th Cir. 2010) (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986)). As to the third ground of fairness to the movant, the court's role is to "determine whether the verdict is consistent with the evidence after considering all the events of trial. The judge must review the evidence, view all the evidence as a whole, and weigh the relative strengths and weaknesses of the evidence." *Kim v. BMW Fin. Servs. NA*, 142 F. Supp. 3d 935, 946 (C.D. Cal. 2015) (citation omitted).

The Court "may not grant a new trial simply because it would have arrived at a different verdict." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (citation omitted). Rather, the court "must uphold a jury verdict if it is supported by substantial evidence." *Guy v. City of San Diego*, 608 F.3d 582, 585 (9th Cir. 2010). Evidence is substantial where it is "adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). Indeed, the court "must attempt to reconcile the jury's findings, by exegesis if necessary, . . . before [it is] free to disregard the jury's special verdict and [order] a new trial." *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963)

(citations omitted). In all cases, it is the court's duty "to reconcile the jury's special verdict responses on any reasonable theory consistent with the evidence." *Guy*, 608 F.3d at 586 (quoting *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987)).

b. Discussion

Defendant's motion is based on five arguments: (1) that the verdict was against the weight of the evidence; (2) that the jury instructions contained incorrect statements of law; (3) that the special verdict form was incorrect; (4) that Plaintiff's counsel committed misconduct; and (5) that the jury awarded excessive damages and punitive damages. (MNT at 3–25.) Because these arguments are unavailing, the Court **DENIES** Defendant's Motion for the following reasons.

i. Verdict Against the Weight of Evidence Argument

Defendant first argues that the Court should grant a new trial because the jury's verdict is against the weight of the evidence. (*Id.* at 3–8.) Specifically, Defendant states that insufficient evidence supported the jury's finding for Plaintiff on four claims for the following reasons: (1) as to the wrongful termination claim, there was insufficient evidence that Plaintiff engaged in a prior protected activity, (*id.* at 3–5); (2) as to the section 43 and section 52.1 claims, there was insufficient evidence that Defendant ratified the conduct at issue, (*id.* at 5–6); and (3) as to the negligent infliction of emotional distress claim, there was insufficient evidence to support this claim because it was based on the three failing claims, (*id.* at 6–8). The Court addresses each argument in turn.

1. No Protected Activity Argument

As to the wrongful termination claim, Defendant argues that the jury's finding for Plaintiff went against the weight of the evidence, which demonstrated that Plaintiff did not engage in any prior protected activity. For support, Defendant argues that Plaintiff did not complain to Defendant about Mr. Tymony's behavior prior to Plaintiff's termination by Mr. Medina. (*Id.* at 4–5.) The Court disagrees that this requires a new trial.

To prevail on a claim for wrongful termination in violation of public policy, a plaintiff must prove the following elements: "(1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (Dkt. No. 138, Order re Mot. for Summary J. ("Order") at 10 (citing *Yau v. Santa Margarita Ford, Inc.*, 229 Cal. App. 4th 144, 154 (Cal. Ct. App. 2014)).) In Plaintiff's case, the only element at issue is the third, which requires Plaintiff to show that a public policy violation substantially motivated his termination. Under California law, there

exists "an explicit public policy requiring employers to take reasonable steps to provide a safe and secure workplace" for their employees. *City of Palo Alto v. Serv. Emps. Int'l Union*, 77 Cal. App. 4th 327, 336–37 (Cal. Ct. App. 1999). "Such responsibility appears to include the duty to adequately address potential workplace violence." *Id.* at 337. Accordingly, the Court stated in its Order re Summary Judgment as to the wrongful termination claim that "the Court is at minimum still faced with a material factual dispute as to whether [redacted] had reason to know [that] Mr. Tymony's intimidating behavior could eventual[ly] jeopardize the workplace safety of others in light of the aforementioned events." (Order at 15.)

Here, Plaintiff's theory of the case at trial fell squarely within the Court's statement of the law at the summary judgment stage, and the weight of the evidence supports it. (*See* Order at 11 ("The public policy under this claim is workplace safety.).) Specifically, Plaintiff argued during its case in chief that Defendant failed to provide a safe and secure workplace for its employees and that Plaintiff's termination was a direct consequence of events that transpired as a result of this failure. The clear weight of the evidence at trial did not disprove this theory of liability, which the Court adopted at summary judgment. Rather, evidence demonstrated that management observed Mr. Tymony's outbursts at meetings and received complaints from employees who testified that Mr. Tymony was "going to go off one day" and had created "a serious issue that should be addressed." (Trial Tr. at 196–200, 275–282.) Taken together, this evidence comprised notice of a threat that the jury justifiably found required redress.

At the same time, Defendant fails to adduce evidence that it acted to address Mr. Tymony's behavior prior to the incident for which Plaintiff was terminated. Instead, Defendant argues that "none of these incidents involved any workplace violence or even suggested to Yang that Tymony's presence made the workplace unsafe." (Reply MNT at 2.) But Defendant cites no authority that predicates Defendant's duty to provide a safe workplace on a prior act of workplace violence. Indeed, this duty is statutory and obligates employers to "take reasonable steps" to prevent such an occurrence before it transpires. *City of Palo Alto*, 77 Cal. App. 4th at 336–37. Moreover, at the summary judgment stage, the Court rejected the argument that Plaintiff's failure to complain about Mr. Tymony was dispositive. (Order at 14–15 (finding a triable issue even though "Plaintiff never, on his own, affirmatively complained to [redacted] about Mr. Tymony's behaviour" and Plaintiff "testified that he had no reason to believe that Mr. Tymony would be physically violent").) Accordingly, Defendant has not shown clear evidence that the jury ignored the weight of the evidence, and a new trial is not warranted.

2. No Ratification Argument

As to the section 43 and section 52.1 claims, Defendant argues that the jury's findings for Plaintiff went against the weight of the evidence, which showed that

Defendant did not ratify the conduct at issue. Specifically, Defendant argues that a ratification finding is precluded as a matter of law by its termination of Mr. Tymony and by the jury's rejection of Plaintiff's negligent retention and supervision claim. (MNT at 6.) The Court takes up each argument in turn.

As to Defendant's argument regarding Mr. Tymony's termination, the Court has already rejected this point as part of Defendant's motion under Rule 50(b). *See*, *supra*, Renewed Mot. for J. as a Matter of Law, Part II.b.i. While Rule 50(b)'s substantial evidence standard differs from Rule 59's weight of the evidence standard, the outcome in this case is the same because Defendant's argument that the termination of Mr. Tymony precludes a ratification finding is purely legal. (*See, e.g.*, RJMOL at 19, 21 ("As a matter of law . . . , [redacted] cannot be found to have ratified Tymony's assault."). Because the authority that Defendant cites for this position is distinguishable for the reasons stated above, and the Court again finds no authority on point, a new trial is not warranted on this ground.

As to the jury's finding on Plaintiff's negligent retention and supervision claim, the Court does not apprehend a connection between that claim and the ratification issue. The negligent retention and supervision claim concerns events prior to Mr. Tymony's termination, whereas the ratification finding concerns events that followed the altercation between Mr. Tymony and Plaintiff. Accordingly, this argument also fails, and a new trial is not warranted.

3. Dependent NIED Claim Argument

As to the negligent infliction of emotional distress claim, Defendant argues that Plaintiff's NIED claim fails because it is based on Plaintiff's other claims, all of which fail. (MNT at 7 ("Because the claims upon which Yang bases his other claims fail, his NIED claim fails as well.").) As to Defendant's argument regarding the four other claims on which the jury found for Plaintiff, Defendant repeats arguments that the Court has rejected in ruling both on Defendant's Motion for Summary Judgment and Defendant's RJMOL. Because the Court has addressed these arguments and has found that the underlying claims do not fail, Defendant's argument as to this part is moot and does not warrant a new trial.

Defendant also argues that a new trial is warranted because the NIED finding cannot be based on the negligent retention and supervision claim, on which the jury found against Plaintiff. (MNT at 7.) While the Court agrees in principle, Defendant provides no argument or evidence tending to show that the jury's NIED verdict was based on the conduct underlying the failing negligent retention and supervision claim. Accordingly, Defendant has not shown that the NIED verdict was against the weight of the evidence, and no new trial is warranted.

ii. Jury Instructions Argument

Defendant argues next that the jury was improperly instructed in six instances warranting a new trial. (MNT at 8–15.) Inadequate or erroneous jury instructions may be grounds for a new trial. *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990). In the case of an erroneous instruction, the burden "shifts to the [nonmoving party] to demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013) (quoting *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009)). The Ninth Circuit "will reverse the judgment unless the error is more probably than not harmless." *Gulliford v. Pierce Cty.*, 136 F.3d 1345, 1350 (9th Cir. 1998) (quoting *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996)). "[P]rejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered." *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1092 (9th Cir. 2007).

1. Ratification Instruction

Defendant argues first that the Court erred by rejecting its proposed ratification instruction. (MNT at 9.) Defendant's proposed instruction tracked the California Civil Jury Instructions ("CACI") Instruction 3710 for ratification. (CACI 3710.) Plaintiff's proposed instruction, which the Court adopted, differed as to the first prong: Whereas CACI 3710 would have required the jury to find that Mr. Tymony intended to act on Defendant's behalf, Plaintiff's instruction required the jury to find instead that Mr. Tymony acted in the course and scope of his employment. (*Compare* Dkt. No. 221, Joint Proposed Disputed Instructions, Pl.'s Proposed Instruction No. 27, Ratification *with* CACI 3710.) Otherwise, the given instruction tracked CACI 3710 as follows:

> Yowan Yang claims that [redacted] is responsible for the harm cause by Cy Tymony's conduct because it approved that conduct after it occurred. If you find that Cy Tymony harmed Yowan Yang, you must decide whether [redacted] approved that conduct. To establish his claim, Yowan Yang must prove all of the following: (1) That [disputed prong]; (2) That [redacted] learned of Cy Tymony's conduct after it occurred; and 3. That [redacted] approved Cy Tymony's conduct. Approval can be shown through words, or it can be inferred from a person's conduct.

(Dkt. No. 247, Concluding Jury Instruction No. 22, Ratification (tracking CACI 3710 except as to the disputed prong).)

Here, the Court adopted Plaintiff's modification of the CACI instruction in order to harmonize the facts and theory of the case. The Court's omission of the intent element is

supported by the law, which provides that the Court need "not instruct[] that ratification depends on a finding that the employee acted on behalf of the employer." *Ventura v. ABM Indus. Inc.*, 212 Cal. App. 4th 258, 272 (Cal. Ct. App. 2012) (holding that ratification instruction excluding employee intent element was not erroneous and instead "correctly stated the law"). Defendant's challenge to the given instruction, however, does not turn on the omitted CACI language. Indeed, Defendant does not offer any argument as to whether Mr. Tymony's intent to act on behalf of [redacted] was a necessary element.

Defendant argues, rather, that Plaintiff used the modified prong to improperly state that Defendant's liability turned on whether Mr. Tymony's assault was within the course and scope of Mr. Tymony's employment. (MNT at 9.) This argument by Defendant is specious in light of the given instruction's remaining text. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) ("In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered."). The given instruction explicitly required the jury to find that Defendant approved Mr. Tymony's conduct through Defendant's own words or subsequent conduct. (Concluding Jury Instruction No. 22.) Thus, Plaintiff could not credibly argue that Defendant was liable so long as Mr. Tymony committed his assault within the scope of his employment; the Court's given instruction left in tact the critical element that Defendant must have approved the conduct through either affirmative speech or affirmative conduct.[4] This is the essence of ratification, and the instruction reflected it. Because the instruction did not misstate the law, and because Defendant suffered no prejudice, no new trial is warranted.

2. Section 43 and Section 52.1 Instructions

Defendant argues next that the Court erred by rejecting its proposed section 43 and section 52.1 instructions. (MNT at 10–11.) Specifically, Defendant objects to the inclusion of the phrases "including Tymony" in the section 43 instruction and "through the conduct of Cy Tymony" in the section 52.1 instruction. (*Id.*) In both instructions, reference to Mr. Tymony was necessary because Plaintiff proceeded on a ratification theory that Mr. Tymony's conduct violated the statute and that Defendant joined in the violation by ratifying Mr. Tymony's violative conduct. The ratification instruction instructed the jury on what was required to impute liability for Mr. Tymony's conduct to Defendant.[5] (Concluding Jury Instruction No. 22.) Defendant's claim that the instruction

[4] Additionally, the Court's modified instruction placed the additional hurdle of showing that Mr. Tymony's assault was committed within the course and scope of his employment. Thus, the departure from CACI 3710 inured not to Plaintiff's benefit but to Defendant's.

[5] Defendant's argument that the cause of action instructions did not specifically reference

called for the assignment of liability based solely on Mr. Tymony's conduct is further unfounded because both instructions required a positive finding "[t]hat [redacted]'s conduct was a substantial factor in causing Yowan Yang's harm." (Concluding Jury Instruction Nos. 25–26.) For these reasons, the reference to Mr. Tymony was not error.

3. Causation Instruction

Defendant argues next that the Court erred by refusing its proposed causation instruction. (MNT at 11–12.) Defendant states that this instruction was necessary because ratification was required in order for liability to attach to Defendant and because Defendant could only be liable for harm that it caused Plaintiff. (*Id.* at 11.) Specifically, Defendant's instruction read in part, "Yowan Yang may only recover damages for injuries that were caused by [redacted]'s actions. Under the law, a defendant's conduct 'caused' plaintiff's loss or harm if that conduct was a substantial factor in bringing it about." (Dkt. No. 210, Further Supplemental Disputed Jury Instructions Proposed By Def. [redacted], Inc., Disputed Def.'s Proposed Jury Instruction No. 37 – Recovery is Limited to Damages Proximately Caused by [redacted] at 9.) The Court rejected this instruction because it is redundant of the cause of action instructions requiring the jury to find that Defendant's own affirmative conduct either caused or was a substantial factor in causing Plaintiff's harm. (*See* Concluding Jury Instruction Nos. 23, 25–27.) Defendant cites no authority to the contrary, and the Court finds none. Because each instruction required the jury to find that Defendant's conduct substantially caused Plaintiff's injury, it was not error to reject Defendant's duplicative proposed instruction.

4. Duty To Mitigate Instruction

Defendant argues next that the Court erred by refusing Defendants proposed supplemental instruction regarding Plaintiff's duty to mitigate damages. (MNT at 12.) Specifically, Defendant states that it was error to not instruct the jury that Plaintiff "cannot recover for any periods of time during which he was not ready, willing and able to have performed the requirements of employment or for any periods when the employee chose not to work." (*Id.*) This elaboration was unnecessary in light of the parties' agreed-upon mitigation instruction, taken from the Ninth Circuit 5.3 and CACI 3962 model instructions. (Dkt. No. 208, Agreed Upon [Proposed] Jury Instructions at

---

the ratification instruction is specious because at no point did Defendant propose a cause of action instruction that made reference to the ratification instruction. Such argument is effectively waived. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (holding that a challenge concerning a relinquished known right is waived and unreviewable). Moreover, the ratification instruction clearly applied to all "harm caused by Cy Tymony's conduct." (Concluding Jury Instruction No. 22.) Thus, it is without question that the ratification instruction applied to the section 43 and section 52.1 claims.

34.) The agreed-upon instruction instructed the jury that "[t]he plaintiff has a duty to use reasonable efforts to mitigate damages" and that Defendant had to prove by a preponderance of the evidence both " [t]hat the plaintiff failed to use reasonable efforts to mitigate damages; and [t]he amount by which damages would have been mitigated." (Concluding Jury Instruction No. 36.) Defendant's proposed supplemental mitigation instruction amounted to impermissible argument where the agreed-upon instruction's requirement that plaintiff's mitigation efforts be "reasonable" alone sufficed. Defendant cites no authority to the contrary, and the Court finds none. Because Defendant's supplemental mitigation instruction was unnecessary, the Court properly rejected it and no new trial is warranted.

5. Business Judgment Rule Instruction

Finally, Defendant argues that the Court erred by refusing to instruct the jury as to the business judgment rule. (MNT at 12–14.) For support, Defendant points to its "Disputed Defendant's Proposed Jury Instruction No. 72 – Unreasonableness, Arbitrariness, or Unfairness Is Not An Issue" instruction contained in its "Further Supplemental Disputed Jury Instructions Proposed By Defendant [redacted], Inc." (Dkt. No. 210 at 62.) This instruction is argumentative and redundant in light of the elements enumerated in the cause of action and ratification instructions. (*See* Concluding Jury Instruction Nos. 22–23, 25–27.) These instructions required the jury to find that Defendant committed affirmative violations of law by its own conduct or by ratifying the conduct of Mr. Tymony. (*Id.*) While reversible error has been found for failure to instruct as to the business judgment rule, *see Veronese v. Lucasfilm Ltd.*, 212 Cal. App. 4th 1, 20–24 (Cal. Ct. App. 2012), the totality of the instructions "made plain for the jury that its only task was to determine whether [Plaintiff]'s termination was unlawful, as opposed to [un]wise, or mistaken, or cosmically unfair," *Steffens v. Regus Grp., PLC*, Case No. CV 08-1494-LAB (BLMx), 2013 WL 4499112, *11 (S.D. Cal. Aug. 19, 2013).

Additionally, even if it were error to refuse Defendant's proposed instruction, Defendant was not prejudiced by its omission. An appeal to the business judgment of the employer turns on a theory of good faith. *FDIC v. Van Dellen*, Case No. CV 10-4915-DSF (SHx), 2012 WL 4815159, *6 (C.D. Cal. Oct. 5, 2012) (quoting *Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020, 1048 (Cal. Ct. App. 2009) (noting that a component of California's business judgment rule is "a judicial policy of deference to the exercise of good[]faith business judgment in management decisions"). Such a finding is fundamentally incompatible with the jury's finding here that Defendant acted with "oppression, malice, and/or fraud" and that Defendant knew of the oppressive, malicious, or fraudulent conduct and adopted or approved it after it occurred. (SVF at 11.) Thus, in light of the totality of the instructions, Defendant's additional instruction was unnecessary and in any event did not prejudice Defendant.

iii. Special Verdict Form Argument

Defendant also argues that errors in the special verdict form warrant a new trial. (MNT at 14–15.) Specifically, Defendant argues that it was error not to include the following question under both the section 43 and section 52.1 claims: "Did Defendant [redacted] learn of Cy Tymony's conduct after it occurred and approve his conduct?" (*Id.* at 14.) Defendant makes its challenge to the jointly proposed special verdict form, submitted by Defendant's counsel on March 11, 2016. (Dkt. No. 242.) After Defendant's counsel submitted the special verdict form, the Court noted the absence of a ratification question in the jointly proposed form. (Trial Tr. 962:21–963:1 ("I noted that there is no special question . . . about ratification. I assume, based on the special verdict form, that the parties have resolved their issues relative to ratification because it's not in this special verdict form.").) On the day following, Defendant's counsel stated that, despite having submitted the special verdict form at issue, a separate ratification question would "tie in better." (Trial Tr. 983:1.) Contrary to the positions that Defendant adopts here, Defense counsel stated that "the instructions do lay out ratification" and represented that the proposed ratification question's "sole purpose" would be to "walk[] the jury through . . . whether [redacted]'s conduct was a substantial factor in causing the harm" to Plaintiff. (Trial Tr. 980:1, 982:2–6.) In response, the Court stated that the "verbiage [of the jury instructions] is more than adequate to satisfy your concerns. And I don't believe that we need to ask the specific question . . . I don't think it assists the jury in deliberations [and] I don't think it's appropriate." (Trial Tr. 983:11–17.)

At trial, after jointly proposing the special verdict form that the Court substantially adopted, Defense counsel failed to articulate the necessity for the late addition. Indeed, Defense counsel stated that the ratification instruction properly instructed the jury, which informed the Court's correct determination that the additional question was unnecessary. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (referring to "the almost invariable assumption of the law that jurors follow their instructions"). Additionally, Defense counsel stated that the addition was necessary to assist the jury in determining whether [redacted]'s conduct was a substantial factor in Plaintiff's harm, a position that Defendant appears to have all but abandoned now. The Court's position, on the other hand, has not changed: The Court continues to agree with Defendant's stated position at trial that the addition duplicated the ratification instruction. Moreover, Defendant's concern that the jury would misunderstand the application of the ratification instruction lacks foundation. The ratification instruction states unequivocally that "Yowan Yang claims that [redacted] is responsible for the harm caused by Cy Tymony's conduct because it approved that conduct after it occurred." (Concluding Jury Instruction No. 22.) The instruction required of the jury that, "[i]f you find that Cy Tymony harmed Yowan Yang, you must decide whether [redacted] approved that conduct." (*Id.*) The instruction further directed that, "[t]o establish his claim, Yowan Yang must prove . . . [t]hat [redacted] approved Cy

Tymony's conduct." (*Id.*) The Court instructed the jury that "[i]n following my instructions, you must follow all of them and not single out some and ignore others; they are all important." (Concluding Jury Instruction No. 1.) As a matter of law, the Court and this Circuit "presume[] that jurors carefully follow the instructions given to them." *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1023 (9th Cir. 2000). Additionally, the jury made an affirmative finding of ratification as part of its punitive damages question. (SVF at 11.) While this question regarded punitive damages, it is difficult to see how the jury's conclusion would have been different as to the section 43 and section 52.1 claims as the underlying conduct is the same for both charges. Accordingly, in light of the foregoing, and because the Court finds no prejudice, the Court does not reconsider its stated position at trial.

iv. Plaintiff's Counsel Misconduct Argument

Next, Defendant argues that Plaintiff's counsel, Mr. James DeSimone, committed intentional misconduct necessitating a new trial. Specifically, Defendant complains that Plaintiff's counsel disparaged Defendant's counsel, Ms. Rebecca Aragon, during closing argument, "alleg[ing] that [redacted]'s counsel coached Harry Cometa and insinuat[ing] that she had instructed him to lie." (MNT at 16.) Mr. DeSimone responds that it was proper to argue that Ms. Aragon had coached Mr. Cometa in light of Mr. Cometa's "completely changed . . . testimony from deposition to trial, discussing a meeting with his superiors and an FAA representative that he did not mention once in deposition despite extensive questioning on the topic." (Dkt. No. 327, Pl.'s Opp'n to MNT at 12.) Defendant argues that the prejudicial impact of the attack on its counsel's credibility is foregone, stating that the statement "could only have the intended (and, as the verdict shows – achieved) effect of having the jury disregard both defense counsel's earlier evidentiary presentation and closing summation." (MNT at 17.) Defendant's argument is unavailing.

"To receive a new trial because of attorney misconduct in the civil context, defendants must meet a high standard: 'the moving party must demonstrate adverse counsel's misconduct . . . 'substantially interfered' with the moving party's interest.'" *S.E.C. v. Jasper*, 678 F.3d 1116, 1129 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1492 (2013) (quoting *Cal. Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1405 (9th Cir. 1995)). Moreover, it is not enough simply to show that misconduct occurred: Rather, "[t]o warrant reversal on grounds of attorney misconduct, the flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 516–17 (9th Cir. 2004) (quoting *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984)).

The Court disagrees that Mr. DeSimone's conduct warrants a new trial. While Mr. DeSimone's statements certainly were not becoming of an officer of the court, Defendant has not shown that the episode actually interfered with its interest. Defendant dedicated substantial energy to attacking Mr. DeSimone's intent in making the statement that he did. But the standard does not put counsel's intent at issue. Rather, the standard requires that Defendant demonstrate that the misconduct "substantially interfered with the moving party's interest." *Jasper*, 678 F.3d at 1129. Defendant's argument as to the effect of Mr. DeSimone's statement is limited to a parenthetical arguing merely that the verdict is per se evidence that Mr. DeSimone achieved his alleged intent of prejudicing Defendant and inflaming the jury. Plainly, a negative verdict is not sufficient to demonstrate that misconduct permeated the entire proceeding. *See Settlegood*, 371 F.3d at 516–17. Indeed, the underlying fact of Mr. Cometa's changed testimony persists irrespective of Mr. DeSimone's unnecessary comments, and Defendant has made no showing that it was the attack on Defense counsel rather than this changed testimony that affected the jury's conclusion. Accordingly, Mr. DeSimone's conduct, while indecorous, does not warrant a new trial.

v. Excessive Damages Argument

Defendant next argues that the damages awarded were excessive. Defendant addresses the economic damages (specifically, loss of earnings), the emotional and psychological damages, and punitive damages awards in turn. Generally, courts must defer to the jury's award of damages and uphold the award unless it is "clearly not supported by the evidence" or "only based on speculation or guesswork." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 1001 (9th Cir. 2006). In making its examination, the court must view the evidence in the light most favorable to the prevailing party, disturbing only those awards that it concludes are "grossly excessive or monstrous" or is "based on passion or prejudice." *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999) (en banc) (citing *L.A. Mem'l Coliseum Comm'n*, 791 F.2d at 1360). If an award is so egregious that it requires action, the court must grant a new trial on damages unless the prevailing party accepts a remittitur that the court considers justified. *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 603 (9th Cir. 1983).

1. Economic Damages – Loss of Earnings Award

As to economic damages, Defendant argues that the evidence does not support the jury's loss of past and future earnings awards in the amounts of $193,540 and $700,000, respectively, for the following reasons: first, Defendant argues that Plaintiff's expert Dr. Merati did not opine as to when Plaintiff should have been able to find comparable work; and second, Defendant argues that Lawndale facility where Plaintiff worked was shut down and all workers laid off in January 2014. (MNT at 17–18.)

Viewing the evidence in the light most favorable to Plaintiff, an award of $193,540 for lost past earnings and of $700,000 for lost future earnings is not "grossly excessive or monstrous." *Lambert*, 180 F.3d at 1011. As to lost past earnings, the jury's award reflects Dr. Merati's calculations and testimony precisely. (Tr. at 617.) "When a jury awards the exact amount of damages proposed by one party's expert, it 'is reasonable to infer that the damages award properly resulted from basic calculations based on evidence in the record.'" *Pena v. Meeker*, Case No. CV 00-4009 CW, 2014 WL 4684800, *8 (N.D. Cal. Sept. 18, 2014) (quoting *Melbye v. Accelerated Payment Techs., Inc.*, Case No. CV 10-2040 IEG (JMAx), 2012 WL 5944644, *6 (S.D. Cal. Nov. 27, 2012). The clear weight of the evidence did not demonstrate that the Lawndale facility's closure would have affected Plaintiff's past earnings because any hypothetical layoff that would have occurred as a result would not have been labeled "for cause." Moreover, the jury's conclusion that Plaintiff made reasonable, however unsuccessful, attempts to mitigate his damages indicates that the jury's belief that Plaintiff's "for cause" termination negatively impacted his job prospects. This conclusion cannot be against the clear weight of the evidence because Defendant's expert offered no testimony as to the "for cause" designation's effect. (Trial Tr. at 945–59.) As to lost future earnings, the jury again adopted the approach of Dr. Merati but departed downward from Plaintiff's work life expectancy. (Trial Tr. at 618, 1112.) For these reasons, the Court declines to disturb the amount awarded by the jury.

2. Emotional and Psychological Harm Award

As to the emotional and psychological harm award, Defendant argues that the evidence does not support the jury's award of $1,500,000 as compensation for Plaintiff's emotional and psychological distress. (MNT at 19–20.) Specifically, Defendant states that the award is excessive in light of Plaintiff's decision not to seek medical treatment for his emotional distress or depression and Plaintiff's nonspecific testimony at trial. (*Id.* at 19.) In support of its argument, Defendant points to other cases where juries awarded lower amounts for emotional distress. (*Id.* at 19–20.) Finally, Defendant argues that the award was the result of passion or prejudice after Plaintiff's counsel inflamed the jury during his closing argument and is so excessive that it must contain a punitive element. (*Id.* at 20.)

Viewing the evidence in the light most favorable to Plaintiff, an award of $1,500,000 for emotional and psychological harm is not "grossly excessive or monstrous." *Lambert*, 180 F.3d at 1011. Defendant's expert, Dr. James E. Rosenberg, testified that Plaintiff experienced "feelings of shame, loss of self-esteem not related to work, not having an income and in turn not feeling comfortable going out and dating, engaging in other usual activities." (Trial Tr. at 1034.) Dr. Rosenberg further observed that Plaintiff would feel the effects of the termination more acutely because of his culture

and that therefore these factors would be "significant for Mr. Yang more than for the average person." (Trial Tr. at 1034–35.) Dr. Rosenberg also opined that mental health problems are particularly stigmatizing in Plaintiff's culture, compounding the effect further. (*See, e.g.*, Trial Tr. at 1034–35.)

Plaintiff's expert, Dr. Anthony Reading, reported Plaintiff's experiencing "sleep problems, lack of self-worth, suicidal thoughts, depression, [lack of] energy, [lack of appetite] appetite, weight loss, [lack of] concentration." (Trial Tr. at 650.) Specifically, Dr. Reading stated that Plaintiff

> developed a constellation of symptoms and this is very important. So he developed a depressed mood, a difficulty deriving pleasure. So he felt numb. There was a lack of traction with customary activities from which one would derive enjoyment. His sleep was disturbed. His appetite was disturbed. His self-worth was dramatically impacted. His energy. And he also had suicidal thoughts. So he had a constellation of symptoms that were ongoing and these started as of the time of the termination and continued.

(Trial Tr. at 647–48.) Dr. Reading stated that these symptoms were sufficient to diagnose Plaintiff as having a major depressive disorder. (*Id.*) Dr. Reading also opined as to the amplifying effect that a sense of unfairness as to one's situation has on the symptoms that one experiences, reporting that Plaintiff's experience had caused him to be high in cynicism and ideas of persecution. (Trial Tr. at 651.)

As to Defendant's specific objections, the amount of the award is not against the weight of the evidence in light of Dr. Reading's testimony that Plaintiff had suffered psychiatric symptoms for three or four years and that, "the longer the duration of exposure to depression, the more difficult it may be to achieve a fuller recovery." (Trial Tr. at 654–55, 664–65.) Finally, as to comparative authority, the Court rejects Defendant's argument that Plaintiff's authority is irrelevant because it deals with different causes of action. Juries determine the award at issue here based on the plaintiffs' particular symptoms, which may be comparable irrespective of the originating offense. In light of Defendant's failure to demonstrate that the award is excessive, the Court must uphold it.

3. Excessive Punitive Damages Argument

Finally, as to the punitive damages award, Defendant argues that the evidence does not support the jury's award of $5,000,000 as punishment for Defendant's conduct. (MNT at 20–25.) Specifically, Defendant reasons that Plaintiff did not show that Defendant acted with malice, oppression, or fraud either through the actions of Harry Cometa or by ratifying the assault by Mr. Tymony and because the award is

unconstitutional under the relevant legal tests. (*Id.*) The Court will address each objection in turn.

a. Malice, Oppression, or Fraud Objection

As to this part, the entire text of Defendant's objection is as follows: "Yang failed to present sufficient evidence to establish [redacted] acted with any oppression, fraud or malice, as this case involved nothing more than an employer immediately discharging both employees engaged in a disruptive workplace altercation at work, for which the jury found Yang was himself 25% at fault." (MNT at 20:18–22.) The Court will be similarly concise in its analysis.

Liability for punitive damages attaches to an employer based on the acts of an employee when the employer

> had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

Cal. Civ. Code § 3294(b). "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behaviour by an employee in the performance of his job duties. The issue commonly arises where the employer or its managing agent is charged with . . . failing to investigate . . . the errant employee once such misconduct became known." *Coll. Hosp., Inc. v. Superior Court*, 8 Cal. 4th 704, 726 (Cal. 1994) (in bank).

The Court finds substantial evidence to support the jury's conclusion that Defendant acted with malice, oppression, or fraud. Here, the jury heard evidence that Harry Cometa had knowledge of a dispute requiring security presence yet terminated Plaintiff without an investigation and refused to reconsider the matter after learning the extent of the altercation. (*See, e.g.*, Tr. at 482–84.) The jury also heard that Janice Raleigh, Robert Woods, and John Burns declined to investigate the altercation despite knowing that Mr. Cometa did not investigate and that Mr. Tymony attacked Plaintiff per the FAA spot report, Plaintiff's email correspondence, and Zitnay's candid assessment that Plaintiff "was a complete victim." (*See, e.g.*, Tr. at 1277–78.) In light of the

applicable standard and of the evidence presented at trial, the jury's conclusion does not go against the clear weight of the evidence.

b. Constitutionality of Award Argument

As to whether the amount awarded is constitutional, Defendant argues that $5,000,000 is impermissible under the Supreme Court's three-factor test to determine whether an award is excessive. (MNT at 20–25.) The factors, which the Supreme Court first termed "guideposts" in *BMW of North America, Inc. v. Gore* ("*Gore*"), 517 U.S. 599, 575 (1996), counsel this Court to examine: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered as a result of the conduct and the amount of the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. In applying the *Gore* factors, the Supreme Court in *State Farm Mutual Auto Insurance Co. v. Campbell* ("*Campbell*"), 538 U.S. 408, 425 (2003), stopped short of imposing a "bright line ration" but explained that "[s]ingle-digit multipliers [of punitive to compensatory damages] are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution." Specifically, the Supreme Court pointed to the "long legislative history, dating back over 700 years and going forward to today, providing for double, treble, or quadruple damages to deter and punish," calling these ratios "not binding [but certainly] instructive." *Id.* The Court examines the *Gore* factors with this backdrop in mind.

First, as to the conduct's reprehensibility, Defendant argues that the conduct shows low reprehensibility. The Supreme Court recognizes this factor as "the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. Courts assess reprehensibility according to the following subfactors, including whether:

> [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Roby v. McKesson Corp., 47 Cal. 4th 686, 713 (Cal. 2009) (quoting *Campbell*, 538 U.S. at 419).

The Court disagrees with Defendant and finds substantial evidence to support a finding of reprehensibility based on the reprehensibility subfactors. As to physical harm, which encompasses psychological harm, *Roby*, 47 Cal. 4th at 713, the jury heard Dr. Rosenberg, Defendant's psychological expert, testify that Plaintiff experienced "feelings

of shame, loss of self-esteem not related to work, not having an income and in turn not feeling comfortable going out and dating, engaging in other usual activities" and that these factors "significant for Mr. Yang more than for the average person," especially because mental health problems are particularly stigmatizing in Plaintiff's culture. (*See, e.g.*, Trial Tr. at 1034–35.) As to indifference or reckless disregard, the jury heard repeatedly that, at various stages, Defendant acted with knowledge of Plaintiff's injury, refusing to rescind the termination, recharacterize the termination's "for cause" designation, or investigate the altercation. (*See, e.g.*, Trial Tr. at 1277–78.) As to Plaintiff's financial vulnerability, the jury heard that Plaintiff relied on the income from his employment with Defendant as his only source of income. (*See, e.g.*, Trial Tr. at 778.) As to whether the conduct was repeated or isolated, the jury heard evidence that Defendant failed to respond to numerous pieces of evidence that Plaintiff was a victim. (*See, e.g.*, Trial Tr. at 281, 331–37, 1277–78.) Finally, as to whether the conduct was intentional or mere accident, Defendant concedes that "a finding of wrongful termination requires some intentional (as opposed to accidental) conduct." (MNT at 23.) Thus, all subfactors weighing toward a finding of reprehensibility, the first *Gore* factor is satisfied.

The second *Gore* factor compares the actual or potential harm that Defendant caused Plaintiff to suffer, on the one hand, with the amount of the punitive damages awarded to Plaintiff, on the other. 517 U.S. at 575. In cases with low reprehensibility of conduct and a substantial award of noneconomic damages for emotional distress, the Supreme Court counsels that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. In *Roby*, for example, the court enforced a one-to-one ratio where the damages for emotional distress were high enough to suggest a punitive element in light of the low reprehensibility of the conduct at issue. 47 Cal. 4th at 718. *Roby* is distinguishable. Here, the jury awarded noneconomic damages of $1,500,000, a not insignificant amount. Unlike in *Roby*, however, there is nothing in this case to suggest that the jury's award contains a punitive element because the reprehensibility of Defendant's conduct, as described above, was not low. Indeed, evidence presented at trial could reasonably support a finding of reprehensibility as to every one of the subfactors. In light of these distinguishable characteristics, a ratio of approximately two-to-one, the disparity in this case, is not excessive.

Finally, the third *Gore* factor looks to the civil penalties awarded in comparable cases. 517 U.S. at 575. Defendant's sole objection consists of a comparison of the jury's award of $5,000,000 to the California Civil Code's civil penalty of $25,000 for actions brought by a state or city attorney under section 52.1. (MNT at 25.) The Court agrees with Plaintiff that Defendant's reliance on this argument is misplaced. First, the $25,000 limit governs only those awards that are against municipal or state defendants and thus is plainly inapplicable to this case. Furthermore, any number of unrelated public policy

considerations motivated the legislature's imposition of the limit as to government employers, whose liabilities would fall to taxpayers to fund. Finally, the jury's punitive damages award was not limited to Defendant's liability for section 52.1 violations but also encompassed the other claims on which the jury found for Plaintiff. Accordingly, Defendant's sole argument as to this factor is unavailing.

Each of Defendant's arguments as to the *Gore* factors having failed, the Court rejects Defendant's challenge as to the constitutionality of the jury's punitive damages award.

IV. CONCLUSION

For the foregoing reasons, Defendant's motions are **DENIED**.

IT IS SO ORDERED.