Filed 4/24/18 Stepp v. Fidelity Nat'l. Title Group, Inc. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JESSICA A. STEPP, Plaintiff and Respondent, v. FIDELITY NATIONAL TITLE GROUP, INC. et al., Defendants and Appellants.	B270964 (Los Angeles County Super. Ct. No. BC517311) ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed on April 16, 2018, be modified as follows:

1. On page 3, at the end of the subheading "A. *The Evidence at Trial,*" add as footnote 3 the following footnote, which will require renumbering of all subsequent footnotes:

> [3]For purposes of our review, we state the facts in the light most favorable to the judgment. (*Singh v. Southland*

Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 345, fn. 1 (*Singh*).)

2. On page 9, lines 8 and 9 under Discussion, change the *Singh* citation to read as follows:

Singh, *supra*, 186 Cal.App.4th at pp. 366-367.

There is no change in the judgment.

PERLUSS, P. J. ZELON, J. FEUER, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 4/16/18 Stepp v. Fidelity Nat'l. Title Group, Inc. CA2/7 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JESSICA A. STEPP, Plaintiff and Respondent, v. FIDELITY NATIONAL TITLE GROUP, INC. et al., Defendants and Appellants.	B270964 (Los Angeles County Super. Ct. No. BC517311)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Postjudgment order reversed with directions, and appeal from judgment dismissed.

Loeb & Loeb, Michelle M. La Mar, Bernard R. Given II, Erin M. Smith; Greines, Martin, Stein & Richland, Robin Meadow and Laurie J. Hepler for Defendants and Appellants.

Law Offices of Victor L. George, Victor L. George, Wayne C. Smith; Esner, Chang & Boyer and Stuart B. Esner for Plaintiff and Respondent.

Jessica A. Stepp alleged that she was terminated by Fidelity National Title Group, Inc. and related entities (collectively Fidelity)[1] on the basis of her gender and pregnancies and in retaliation for her opposition to Fidelity's discriminatory practices, asserting claims for discrimination, harassment, retaliation, and intentional infliction of emotional distress. Stepp dismissed her sexual harassment cause of action during trial, and the jury returned a verdict in favor of Fidelity on her discrimination and retaliation causes of action, finding that neither discrimination nor retaliation was a "substantial motivating reason" for her termination. However, the jury found Fidelity liable for intentional infliction of emotional distress, and awarded Stepp a total of $1,173,849 in economic and noneconomic damages. Fidelity appeals from the judgment and from an order denying its motion for judgment notwithstanding the verdict.

Fidelity contends that workers' compensation provides the exclusive remedy for Stepp's claim for intentional infliction of emotional distress, and thus the trial court erred in denying its motion for judgment notwithstanding the verdict. We agree. We conclude that because the jury found there was no unlawful discrimination or retaliation, the exceptions to the exclusivity provisions for conduct that "'contravenes [a] fundamental public policy'" or "'exceeds the risks inherent in the employment relationship,'" as articulated by our Supreme Court in *Miklosy v.*

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[1] The appealing defendants are Fidelity National Title Group, Inc., Fidelity National Financial, Inc., and Fidelity National Law Group.

Regents of University of California (2008) 44 Cal.4th 876, 902, 903 (*Miklosy*), do not apply.

We reverse the denial of Fidelity's motion for judgment notwithstanding the verdict, and remand to the trial court to enter a judgment for Fidelity.[2]

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Evidence at Trial*

In May 2010 Fidelity hired Stepp as an in-house attorney. Stepp was pregnant at the time and had two young children. On her first day at work, Stepp told the manager of the office, John Henley, that she was pregnant and intended to take maternity leave in September 2010. Henley said that was "great," and that he was happy to have her there. Other attorneys in the office congratulated her. However, attorney John Rygh did not congratulate her; instead, he told her that he wished Stepp had informed him of her pregnancy when she interviewed for the job. Rygh asked Stepp whether she was sure she could handle the caseload while pregnant. Stepp responded that she gave birth to two children at her prior law firm, and assured Rygh that her pregnancy would not be an issue. Later in 2010 Rygh became the office manager.

Before beginning her maternity leave, Stepp spoke with Rygh about her need for a private place to pump breast milk after she returned from her leave. Her office was unsuitable because it

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[2] We do not reach Fidelity's alternative contention that most of the economic damages awarded by the jury are not properly recoverable.

had an interior window with no curtains. Stepp asked either to have curtains installed or to move to an available vacant interior office with no window, which was being used for storage. Rygh responded that it would be too expensive to install curtains and that he had other plans for the vacant office. Stepp later learned that Rygh was planning to move into the vacant office. Rygh told Stepp she had to figure out for herself where to pump milk. Rygh also stated that if Stepp took one day more leave than the law allowed, her job would not be waiting for her when she returned.

Stepp was scheduled to start her maternity leave on September 22, 2010. Rygh told Stepp she had to complete all pending substantive work before going on maternity leave because there was no one to cover for her while she was gone. Stepp wanted to begin her leave earlier, but felt pressure to complete her work. She worked until 6:00 p.m. on September 21, and went into labor at 9:00 p.m. that evening.

Around December 16, 2010 Stepp returned from her maternity leave. Another attorney in the office, Donald Erickson, asked Stepp if she had her tubes tied and if she had told her husband to keep his hands off her. These comments troubled her given the personal nature of the questions. By this time, Rygh had moved into Henley's former office, leaving the vacant office available. Rygh said to Stepp, "Well, I guess it looks like you've won; you got what you wanted." However, the office door did not have a working lock.

One day while Stepp was pumping milk in her new office with her breasts exposed, a man who came to water her plants walked in on her. Stepp was very upset by the incident, and asked Rygh to install a lock. Rygh said he would look into it, but later told Stepp it would be too expensive. Stepp offered to pay

for it herself. Rygh said he would follow up, but he did not. Stepp asked the maintenance department to install a lock, but she was told she needed Rygh's permission, which he never gave.

Stepp initially posted a sign on her office door stating, "privacy please." Rygh told Stepp he was afraid to enter her office because he did not know whether she was pumping milk, and requested she post a sign that explicitly said this. Stepp therefore posted a sign saying she was pumping milk. She felt uncomfortable and embarrassed having to tell her coworkers that she was pumping milk and was half undressed in her office. On a typical day Stepp pumped three times for about 15 minutes each time.

Stepp also felt uncomfortable storing her breast milk in a refrigerator that was used by other employees. Stepp found an unused refrigerator in the staff kitchen that was not plugged in, and asked Rygh if she could put it in her office so she did not have to store her milk in the shared refrigerator. Rygh initially responded that she could not use it because other attorneys would complain that she had a private refrigerator for her lunch. Stepp asked around the office whether anyone had a problem with her using the refrigerator, and no one objected. Rygh then allowed her to move the refrigerator to her office.

In 2011 Rygh assigned Stepp to a month-long trial in Orange County set for August in place of an attorney who was going on vacation. When the court postponed the trial to October, the original attorney agreed to take the case back, but Rygh refused. During the trial, Stepp shared a hotel room with another female attorney for one month, which made it hard for her to pump milk privately. Rygh declined her request for a private room for this purpose, although Stepp was aware that

male attorneys had trials during which they did not have to share rooms.

Stepp also testified that she carried a "substantially higher" case load than other attorneys, but acknowledged that one male attorney had the same or a higher number of significant cases than she did and another had about the same number.

In February 2012 Stepp suffered a miscarriage, and requested a medical leave. Rygh granted her request. When she returned to the office at the end of the month, Rygh stated something to the effect of, "In light of everything that's happened, do you think you're planning on having another baby?" Stepp considered the comment inappropriate, and she believed Rygh was annoyed she had taken another leave.

On March 28, 2012 Rygh decided to terminate Stepp's employment, but he did not inform Stepp of this decision until August 6, 2012. Rygh delayed terminating Stepp because Fidelity lost attorneys in the office, and Rygh needed her to help handle the caseload. Rygh testified Stepp had "performance issues." However, the firing of Stepp "wasn't carved in stone," and Fidelity might have kept her on "[i]f she had done a great job."

Fidelity listed the reason for Stepp's termination on a document entitled, "company initiated termination," as "unsatisfactory performance." However, Rygh testified this was not the reason for her termination; rather, the document should have said "at-will termination." Rygh also testified, "[Stepp] has many fine qualities as an attorney," and "I didn't tell her I'm firing [her] for poor performance." According to Stepp, Rygh told her that he was terminating her because she had not given him sufficient time to review one of the summary judgment motions

she was working on. Stepp had a very heavy caseload, and worked long hours before her termination.

B. *Trial Court Proceedings*

On August 6, 2013 Stepp filed her original complaint. On March 20, 2014 Stepp filed her operative second amended complaint, alleging causes of action against Fidelity for (1) harassment in violation of the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.); (2) employment discrimination based on gender, pregnancy, physical disability, and medical condition, in violation of FEHA; (3) retaliation for opposing discriminatory practices in violation of FEHA and public policy; (4) failure to accommodate Stepp's physical disability and medical condition in violation of FEHA; and (5) intentional infliction of emotional distress. The trial court sustained Fidelity's demurrer to the fourth cause of action without leave to amend.

On November 13, 2015 the jury trial began. After Stepp rested, she dismissed her sexual harassment claim. The jury returned a special verdict finding for Fidelity on the causes of action for discrimination and retaliation. The jury found that Stepp's pregnancies, maternity leaves, concerns for future pregnancies, and gender were not a substantial motivating reason for the termination of her employment.[3] Regarding

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[3] On Stepp's pregnancy discrimination claim, the jury responded "No" to the question: "Were Jessica Stepp's pregnancies, pregnancy leaves or Defendant Fidelity's concerns for future pregnancies a substantial motivating reason for Defendant Fidelity's termination of Jessica Stepp?" On Stepp's gender discrimination claim, the jury similarly answered "No" to

retaliation, the jury found that Stepp did not oppose any discriminatory practices, and answered "No" to the question, "Was Jessica Stepp's opposition to Defendant Fidelity's discriminatory practices a substantial motivating reason for Defendant Fidelity's decision to terminate Jessica Stepp?" However, the jury found that Fidelity's conduct was outrageous, and found it liable for intentional infliction of emotional distress.[4] The jury found Stepp was entitled to damages in the total amount of $1,173,849, including past and future economic loss, mental suffering, and emotional distress.

On December 24, 2015 the trial court entered a judgment on the special verdict, awarding Stepp $1,173,849 in damages. On January 8, 2016 Fidelity filed a motion for judgment notwithstanding the verdict, or alternatively to vacate the judgment and enter a new judgment (Code Civ. Proc., § 663). Fidelity argued that it was entitled to judgment notwithstanding the verdict because the workers' compensation exclusivity provisions precluded liability for intentional infliction of emotional distress. In the alternative, Fidelity argued that the jury improperly awarded Stepp economic damages that did not

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the question, "Was Jessica Stepp's gender (female) a substantial motivating reason for Defendant Fidelity's termination of Jessica Stepp?"

[4] The jury responded "Yes" to the following questions: "Was Defendant Fidelity's conduct outrageous?"; "Did Defendant Fidelity intend to cause Jessica Stepp emotional distress?"; "Did Jessica Stepp suffer severe emotional distress?"; and "Was Defendant Fidelity's conduct a substantial factor in causing Jessica Stepp's severe emotional distress?"

arise from her emotional distress, and that only $26,000 for past medical expenses was recoverable.

At the hearing on the motion, the trial court noted that intentional infliction of emotional distress requires a finding of outrageous conduct beyond the bounds of decency, and found that this type of conduct necessarily is beyond the normal scope of the employment relationship. The court concluded that the exclusivity provisions were therefore inapplicable, and denied the motion for judgment notwithstanding the verdict. The court also denied the request for a corrected judgment limiting economic damages to $26,000.

Fidelity timely appealed from both the judgment and the order denying its motion for judgment notwithstanding the verdict.

DISCUSSION

A. *Standard of Review*

Fidelity appeals from the trial court's order denying its motion for judgment notwithstanding the verdict. "Generally, an appellate court reviews a trial court's ruling on such a motion for sufficiency of the evidence supporting the verdict. [Citation.] However, review is de novo '[i]f the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions.' [Citation.]" (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1045; accord, *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 366-367 (*Singh*) [reversing denial of motion for judgment notwithstanding the verdict as to claim for intentional infliction of emotional distress, finding the claim was barred by the workers' compensation

exclusivity provisions]; *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 718-719 [affirming grant of motion for judgment notwithstanding the verdict as to claim for intentional infliction of emotional distress and other claims based on the workers' compensation exclusivity provisions].)

The question whether the workers' compensation exclusivity provisions apply is a question of law where, as here, the material facts concerning application of the exclusivity provisions are undisputed. (*People ex rel. Alzayat v. Hebb* (2017) 18 Cal.App.5th 801, 811-812 ["When the facts are not in dispute, the question of whether a cause of action is barred by the workers' compensation exclusivity rule is also a question of law we review de novo"]; *Melendrez v. Ameron Internat. Corp.* (2015) 240 Cal.App.4th 632, 639 ["'When there is no real dispute as to the facts, the question of whether an injury was suffered in the course of employment is one of law . . ."].)

If an appellate court determines that the motion for judgment notwithstanding the verdict should have been granted, the court must order entry of judgment in favor of the moving party. (Code Civ. Proc., § 629, subd. (c); *Singh*, *supra*, 186 Cal.App.4th at p. 367.)

B. *Workers' Compensation Exclusivity Provisions*

Workers' compensation provides the exclusive remedy against an employer for an injury sustained by an employee arising out of and in the course of the employment. (Lab. Code, §§ 3600, subd. (a), 3601, subd. (a), 3602, subd. (a); *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th

800, 812-813 (*Vacanti*).)[5] The workers' compensation exclusivity provisions generally preclude a civil action against an employer for physical or emotional injury resulting from wrongful conduct in the workplace. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754; *Yau v. Allen* (2014) 229 Cal.App.4th 144, 161 (*Yau*); *Singh*, *supra*, 186 Cal.App.4th at pp. 365-366.)

The workers' compensation exclusivity provisions are based on the presumed "'"compensation bargain"'" in which "'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' [Citation.]" (*Vacanti*, *supra*, 24 Cal.4th at p. 811; accord, *American Cargo Express, Inc. v. Superior Court* (2017) 16 Cal.App.5th 145, 154.)

If the employer's conduct is a normal part of the employment relationship, such as discipline, criticism of work practices, negotiation of grievances, and termination, the exclusivity provisions generally apply. (*Shoemaker v. Myers*

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[5] Labor Code section 3600, subdivision (a), states that workers' compensation provides the exclusive remedy for any injury sustained by an employee "arising out of and in the course of the employment" where the enumerated "conditions of compensation" are present, with specified exceptions not at issue here. The conditions of compensation include, among others, that both the employer and employee were subject to the workers' compensation law at the time of injury and the injury was proximately caused by the employment. Stepp does not dispute that the conditions of compensation are present in this case.

(1990) 52 Cal.3d 1, 20 (*Shoemaker*) ["we conclude that both the act of termination and the acts leading up to termination necessarily arise out of and occur during and in the course of the employment"]; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160 (*Cole*) ["demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances" are subject to exclusivity provisions].) Even if the employer's conduct is "'manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability,'" the exclusivity provisions apply. (*Shoemaker*, *supra*, at p. 15; accord, *Miklosy*, *supra*, 44 Cal.4th at p. 902 [even if the conduct is "'intentional, unfair or outrageous,'" the exclusivity provisions apply]; *Yau*, *supra*, 229 Cal.App.4th at p. 161 [same].)

C. *Exceptions to the Workers' Compensation Exclusivity Provisions*

Our Supreme Court has carved out exceptions to the workers' compensation exclusivity provisions for civil actions where an employer's conduct "'contravenes [a] fundamental public policy'" or "'exceeds the risks inherent in the employment relationship.'" (*Miklosy*, *supra*, 44 Cal.4th at p. 902; *Livitsanos v. Superior Court*, *supra*, 2 Cal.4th at p. 754.) The court in *Miklosy* clarified that conduct that "'contravenes [a] fundamental public policy'" refers specifically to a claim for wrongful termination in violation of public policy brought under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, commonly referred to as a "*Tameny* action." (*Miklosy*, *supra*, at pp. 902-903.)

In *Miklosy*, the plaintiffs alleged that the defendants had terminated or constructively terminated their employment in retaliation for their disclosure of safety concerns about a project

on which they were working. The plaintiffs alleged causes of action against their supervisors and the Regents of the University of California for retaliation in violation of the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.), wrongful termination and constructive wrongful termination in violation of public policy, and intentional infliction of emotional distress. (*Miklosy*, *supra*, 44 Cal.4th at p. 884.)

The *Miklosy* court found that the plaintiffs' claims for damages under the whistleblower statute and *Tameny* were barred by statute. (*Miklosy*, *supra*, 44 Cal.4th at pp. 898, 900-901.) As to the plaintiffs' claim for intentional infliction of emotional distress, the court held that, because the plaintiffs' claims under *Tameny* were barred, the exception to exclusivity for conduct that "'contravenes fundamental public policy'" did not apply. (*Miklosy*, *supra*, at p. 902.) The court held further that the plaintiffs' claim for intentional infliction of emotional distress did not fall within the exception for conduct that "'exceeds the risks inherent in the employment relationship'" because the conduct at issue, termination and constructive termination, occurred "in the normal course of the employer-employee relationship," even though the plaintiff alleged the defendants engaged in "'outrageous conduct.'" (*Ibid*.)

In reaching its holding, the Supreme Court relied on its earlier opinion in *Shoemaker* that the plaintiff's claim for intentional infliction of emotional distress in a whistleblower retaliation case was barred by the exclusivity provisions of the workers' compensation law. (*Miklosy*, *supra*, 44 Cal.4th at p. 902.) In *Shoemaker*, the plaintiff alleged that he made a report disclosing illegal practices by his employer, resulting in his supervisors threatening, intimidating, and harassing him, and

ultimately terminating him. (*Shoemaker*, *supra*, 52 Cal.3d at pp. 7-8.) The court found that the plaintiff's claim for whistleblower retaliation was not subject to the exclusivity provisions because the whistleblower statute created a statutory exception to the workers' compensation exclusivity provisions, and therefore "such conduct lies well outside the compensation bargain." (*Id.* at p. 23.)

However, the court found the plaintiff's claim for intentional infliction of emotional distress based on the same conduct did not fall within an exception to the exclusivity provisions, holding, "To the extent plaintiff purports to allege any distinct cause of action, not dependent upon the violation of an express statute or violation of fundamental public policy, but rather directed at the *intentional, malicious* aspects of defendants' conduct ("'to cause [plaintiff] as much grief as possible'"), then plaintiff has alleged no more than the plaintiff in *Cole* . . . , i.e., that the employer's conduct caused him to suffer personal injury resulting in physical disability. *Cole* therefore controls. The kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions." (*Shoemaker*, *supra*, 52 Cal.3d at p. 25; see also *Cole*, *supra*, 43 Cal.3d at pp. 152, 161 [holding that the plaintiff's claim for harassment by his supervisors to punish him for his union activities, including falsely charging him with dishonesty, holding a "'kangaroo' proceeding" to hear the charges, demoting him, and assigning him to humiliating menial duties, was barred by the workers' compensation exclusivity provisions, noting that "[s]ome

harassment by superiors when there is a clash of personality or values is not uncommon"].)

Following *Miklosy*, the Courts of Appeal have attempted to define the type of intentional conduct that falls within an exception to the exclusivity provisions. Some courts have read *Miklosy* as carving narrow exceptions to exclusivity, barring claims for intentional infliction of emotional distress based on even extreme harassing conduct. (See *Yau*, *supra*, 229 Cal.App.4th at p. 161 [claim for intentional infliction of emotional distress based on supervisors falsely accusing the plaintiff of fraud and insisting he sign fraudulent documents to cover up their own criminal conduct fell within the exclusivity provisions because the exceptions to exclusivity do not "allow a "'distinct cause of action, not dependent upon the violation of an express statute or violation of fundamental public policy"'"];[6] *Singh*,

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[6] Division One of the Fourth District in *Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75 (*Light*) disagreed with Division Three's opinion in *Yau*, finding that "*Yau* reads *Miklosy* too narrowly" by interpreting it to allow only a single exception to the exclusivity provisions for conduct that contravenes public policy. (*Light*, *supra*, at pp. 99-100.) As the court in *Light* noted, *Yau* did not consider whether the alleged conduct fell within the second exception for conduct that ""exceeds the risks inherent in the employment relationship."" (*Id*. at p. 100.) However, in *Light* the plaintiff based her claim for intentional infliction of emotional distress on conduct that violated FEHA; in *Yau*, the plaintiff could not state a FEHA cause of action because he failed to exhaust his administrative remedies. (See *Light*, *supra*, at pp. 100-101; *Yau*, *supra*, 229 Cal.App.4th at p. 160, fn. 1.) In this case, we consider facts similar to those in *Yau* in that Stepp has not proven unlawful discrimination or retaliation under FEHA.

supra, 186 Cal App.4th at pp. 367-368 [claim for intentional infliction of emotional distress based on supervisors berating and humiliating the plaintiff, insulting him with profanities, slamming his laptop computer closed onto his hand, grabbing his lapels, and threatening him if he did not sign a release was "offensive and clearly inappropriate," but conduct was subject to the exclusivity provisions because it was encompassed within the compensation bargain]; see also *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 824-825, 832-833 [upholding claim for constructive wrongful termination in violation of public policy based on the employer's failure to reimburse the plaintiff for mileage although his driving was so extensive that his payments for gasoline and vehicle maintenance left him insufficient money to sustain himself, but finding under *Miklosy* that his claim for intentional infliction of emotional distress based on the same conduct was subject to the exclusivity provisions].)

By contrast, the Court of Appeal in *Light* reversed the trial court's grant of summary judgment in favor of the plaintiff's former employer and supervisors, finding that the plaintiff's claim for intentional infliction of emotional distress based on discrimination and retaliation in violation of FEHA was not preempted by the workers' compensation law because the conduct exceeded the risks inherent in the employment relationship and fell outside the "compensation bargain." (*Light*, *supra*, 14 Cal.App.5th at p. 101; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 288 (*Nazir*) [reversing trial court's grant of summary judgment for defendants on plaintiff's claims for unlawful disability discrimination, harassment, and retaliation under FEHA and for intentional infliction of

emotional distress, finding that "[n]either discrimination nor harassment is a normal incident of employment"].[7])

The court in *Light* looked to cases predating *Miklosy* that found that claims for intentional infliction of emotional distress based on unlawful discrimination, retaliation, or harassment in violation of FEHA fell within an exception to the exclusivity provisions, finding that "neither *Miklosy* nor the authorities on which it relies considered the much larger body of case law supporting the proposition that conduct in violation of FEHA is not part of the employment relationship or the compensation bargain at the heart of the workers' compensation system." (*Light*, *supra*, 14 Cal.App.5th at p. 100; see *Accardi v. Superior Court*, *supra*, 17 Cal.App.4th at p. 352 ["a claim for emotional and psychological damage, arising out of employment, is not barred [under exclusivity provisions] where the distress is engendered by an employer's illegal discriminatory practices"]; *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1363 [claim for intentional infliction of emotional distress was "'founded upon actions that are outside the normal part of the employment environment'" where the plaintiff could allege she suffered emotional distress because of pattern of unlawful discrimination and harassment based on sexual orientation]; *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1492 [intentional infliction of emotional distress claim based on unlawful disability discrimination falls within exception to

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7 *Nazir* was decided after *Miklosy*, but the court did not cite *Miklosy* in its ruling, instead relying on cases predating *Miklosy*, including *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 352. (*Nazir*, *supra*, 178 Cal.App.4th at p. 288.)

exclusivity provisions because disability discrimination "is not a normal risk of the employment bargain"].)

In reviewing this case law, the court in *Light* concluded, "In sum, absent further guidance from our Supreme Court, we are unwilling to abandon the long-standing view that unlawful discrimination and retaliation in violation of FEHA falls outside the compensation bargain and therefore claims of intentional infliction of emotional distress based on such discrimination and retaliation are not subject to workers' compensation exclusivity." (*Light*, *supra*, 14 Cal.App.5th at p. 101.)

However, Stepp has failed to prove *unlawful* discrimination or retaliation by Fidelity, and thus her claim for intentional infliction of emotional distress based on the same conduct does not fall outside of the workers' compensation exclusivity provisions.

D. *Fidelity Did Not Waive the Exclusivity Provisions as an Affirmative Defense*

Stepp contends Fidelity waived the workers' compensation exclusivity provisions as an affirmative defense by failing to raise the defense until after the trial court entered the judgment. She argues that she was therefore not on notice of the need to present evidence at trial showing that Fidelity's conduct fell within an exception to the exclusivity provisions.

A defendant who claims protection from a civil suit based on the workers' compensation exclusivity provisions "bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96; accord, *Popejoy v. Hannon*

(1951) 37 Cal.2d 159, 173; *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 265.)

Here, Fidelity expressly alleged workers' compensation exclusivity as an affirmative defense in its answer. While Stepp correctly points out that the issue of exclusivity was never raised during trial, Fidelity met its burden to prove the defense by presenting evidence at trial that it did not engage in unlawful discrimination, retaliation, or harassment under FEHA.[8] Stepp was placed on notice of Fidelity's assertion of exclusivity as an affirmative defense by its answer. Further, she was not prejudiced by Fidelity's failure to raise the issue again at trial because the same evidence she presented to prove her FEHA claims was the evidence necessary to prove an exception to the exclusivity provisions.

Accordingly, Fidelity did not waive its affirmative defense of workers' compensation exclusivity.

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[8] Stepp also argues that Fidelity failed to propose jury instructions on whether the exclusivity provisions apply, citing to CACI No. 2800 ("Employer's Affirmative Defense—Injury Covered by Workers' Compensation"). However, where there is no dispute as to whether the injury was incurred in the course and scope of employment and the conditions of compensation are present, as here, determination of whether an exception to the exclusivity provisions applies is a question of law for the court. (*People ex rel. Alzayat v. Hebb*, *supra*, 18 Cal.App.5th at pp. 811-812.) As the "Directions for Use" for CACI No. 2800 state, "This instruction is not intended for use if the plaintiff is suing under an exception to the workers' compensation exclusivity rule."

E. *The Exceptions to the Workers' Compensation Exclusivity Provisions Do Not Apply to Stepp's Claim for Intentional Infliction of Emotional Distress*

Stepp's cause of action for intentional infliction of emotional distress was based on the same conduct as her discrimination and retaliation causes of action, relating to her pregnancy, maternity leaves, breast milk pumping, work assignments, and termination. All the challenged conduct occurred in the workplace in the course of Stepp's employment. Workers' compensation therefore provides the exclusive remedy for Stepp's personal injuries unless an exception to the exclusivity provisions applies. (*Vacanti*, *supra*, 24 Cal.4th at pp. 811-812.)

Stepp relies on the line of authority holding that unlawful discrimination and retaliation exceed the risks inherent in the employment relationship, and thus claims for the intentional infliction of emotional distress based on the unlawful conduct fall within an exception to the exclusivity provisions. (See, e.g., *Light*, *supra*, 14 Cal.App.5th at p. 101; *Nazir*, *supra*, 178 Cal.App.4th at p. 288; *Fretland v. Humboldt*, *supra*, 69 Cal.App.4th at p. 1492; *Accardi v. Superior Court*, *supra*, 17 Cal.App.4th at p. 352.)[9]

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[9] Stepp also argues that she suffered "reputational harm" as a result of Fidelity's misrepresentation that she was terminated for cause, resulting in her inability to find a job after her termination. The exclusivity provisions do not apply to a defamation claim because reputational harm does not depend on a personal injury. (*Vacanti*, *supra*, 24 Cal.4th at p. 814; *Howland v. Balma* (1983) 143 Cal.App.3d 899, 904-905.) However, Stepp did not assert a claim for defamation nor did the jury make any factual findings that would support a defamation claim.

In each of these cases, however, the plaintiff had a viable claim for unlawful discrimination or retaliation. For example, as the court held in *Light*, "we are unwilling to abandon the long-standing view that *unlawful* discrimination and retaliation in violation of FEHA falls outside the compensation bargain." (*Light*, *supra*, 14 Cal.App.5th at p. 101, italics added.) In this case, by contrast, the jury found that there was no unlawful discrimination because Stepp's pregnancies, maternity leaves, and gender were not a substantial motivating reason for her termination.[10]

Stepp argues that the jury's finding that unlawful discrimination was not a substantial motivating reason for her termination does not compel the conclusion that there was no discriminatory conduct. She argues that, to the contrary, the jury's finding that Fidelity committed outrageous conduct causing severe emotional distress supports an inference the jury found this conduct was discriminatory. This argument fails for two reasons.

First, a special verdict must include all "conclusions of fact" established by the evidence that are necessary to support a cause of action. (Code Civ. Proc., § 624; *Markow v. Rosner*, *supra*, 3 Cal.App.5th at p. 1047; *Vollaro v. Lispi* (2014) 224 Cal.App.4th

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[10] Stepp bases her argument that an exception to the exclusivity provisions applies based on Fidelity's discriminatory conduct, not on her claims for retaliation or sexual harassment. We will therefore focus only on Stepp's contention that Fidelity engaged in discriminatory conduct. However, the same analysis would apply to Stepp's claim for retaliation, for which the jury found in favor of Fidelity, and her claim for sexual harassment, which Stepp dismissed.

93, 98.) When a special verdict is used, "we will not imply findings in favor of the prevailing party," and the absence of a finding on a fact necessary to a cause of action precludes judgment for the plaintiff on that claim. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531 [reversing judgment for the plaintiff on her fraudulent misrepresentation claim because the special verdict did not contain a finding that the defendant made a misrepresentation]; accord, *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325-327 [reversing judgment on the plaintiff's medical battery claim where the special verdict required the jury to answer that the patient did not give his informed consent to a procedure but did not require the jury to answer whether the physician performed the procedure without any consent from the patient].)

Here, the jury found that Fidelity committed "outrageous" conduct that caused Stepp severe emotional distress, not that this was the result of discriminatory animus. We cannot infer a finding of discriminatory animus where the jury did not make this finding in the special verdict. (*Behr v. Redmond*, *supra*, 193 Cal.App.4th at p. 531.)

Second, even if the jury had found that Fidelity's conduct was intended to discriminate against Stepp on the basis of her gender or pregnancies, as our Supreme Court held in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, discriminatory comments and conduct, without a showing that the discrimination was a "substantial motivating factor" in the adverse employment decision, do not support a claim for unlawful discrimination. (*Id.* at p. 232.) As the court held, "We are mindful, however, that [Government Code] section 12940[, subdivision] (a) does not purport to outlaw discriminatory

thoughts, beliefs, or stray remarks that are unconnected to employment decisionmaking. Racist, sexist, or other biased comments in the workplace may give rise to a claim for unlawful harassment under a separate provision of the FEHA. [Citations.] But such comments alone do not support a [discrimination] claim under section 12940(a), nor do bigoted thoughts or beliefs by themselves. Were it otherwise, the causation requirement in section 12940(a) would be eviscerated. Section 12940(a) does not prohibit discrimination 'in the air.'" (*Ibid.*)

Here, the evidence at trial showed the type of harassing comments and conduct discussed in *Harris*, including Rygh's comments to Stepp regarding her pregnancies and whether she was planning on having another baby, Erickson's comments inquiring if she had her tubes tied, Rygh's failure to accommodate Stepp's need to have a private place to pump breast milk, and the delay in informing Stepp that she was going to be terminated. Although the jury found that Fidelity's conduct was "outrageous" and caused Stepp to suffer severe emotional distress, the jury did not find any *unlawful* discrimination, that is, that the conduct was a substantial motivating factor in the decision to terminate her employment. Absent a showing of unlawful discrimination, this conduct falls within the workers' compensation bargain, and the exclusivity provisions apply.

Indeed, the harassing behavior here is similar to the conduct our Supreme Court and the Courts of Appeal have found to fall within the workers' compensation exclusivity provisions in *Shoemaker* (harassment and threats in retaliation for reporting illegal conduct), *Cole* (harassment to punish the plaintiff for his union activities), *Yau* (false accusations of fraud and efforts to

force the plaintiff into a criminal conspiracy), and *Singh* (humiliation, assaults, and threats).

As our Supreme Court held in *Miklosy*, in finding the plaintiff's claim for intentional infliction of emotional distress was barred by the exclusivity provisions, "'[e]ven if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions.' [Citation.]" (*Miklosy*, *supra*, 44 Cal.4th at p. 902.)

Accordingly, we conclude that workers' compensation provides the exclusive remedy for Stepp's injury, and Fidelity is entitled to judgment notwithstanding the verdict. In light of our reversal of the denial of Fidelity's motion for judgment notwithstanding the verdict, Fidelity's appeal from the judgment is moot.

DISPOSITION

The order denying Fidelity's motion for judgment notwithstanding the verdict judgment is reversed with directions to enter judgment for Fidelity. Fidelity's appeal from the judgment is dismissed. Fidelity is entitled to recover its costs on appeal.

FEUER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.