

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHRISTINE BREWER,

Plaintiff and Appellant,

v.

PREMIER GOLF PROPERTIES,

Defendant and Appellant.

D050686

(Super. Ct. No. GIE027293)

APPEALS from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed in part and reversed in part.

Law Office of David B. Sharp and David B. Sharp for Plaintiff and Appellant.

Law Office of Patrick F. O'Connor and Patrick F. O'Connor for Defendant and Appellant.

Christine Brewer, a longtime waitress employed at the Cottonwood Golf Club restaurant, quit her job in March 2005. Shortly thereafter, Brewer filed this action against her employer, Premier Golf Properties, LP, dba Cottonwood Golf Club (Cottonwood)

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II.C., III and IV.

alleging a cause of action for age discrimination (Gov. Code, § 12940), and seeking compensatory and punitive damages and attorney fees. Her original complaint also alleged causes of action for "meal break" and "rest break" violations (Lab. Code, § 226.7),¹ and her First Amended Complaint added a fourth cause of action alleging other violations of the Labor Code.

After the first phase of the bifurcated trial, the jury's special verdict on the age discrimination claim found in favor of Cottonwood. Brewer's cross-appeal asserts the trial court erroneously excluded certain exhibits at trial and those errors were prejudicial and require a new trial on her age discrimination claim.

The other claims decided during the first phase of the bifurcated trial involved alleged Labor Code violations. The jury returned special verdicts in favor of Brewer on most of her pleaded Labor Code violations, and awarded damages totaling less than \$1,000 for unpaid regular and overtime wages. The judgment also included approximately \$6,000 for unpaid meal and rest break wages (§ 226.7), \$4,000 as "pay stub penalties" (§ 226), and \$15,300 for "minimum wage" penalties (§ 1197.1). Cottonwood's appeal asserts the expiration of the statute of limitations barred the award of some of these penalties and Brewer's failure to exhaust her administrative remedies entirely bars her recovery of penalties.

The most significant monetary award was the punitive damages award. The jury, in a special verdict that accompanied the special verdicts exonerating Cottonwood of age

discrimination but finding Labor Code violations, issued a separate special verdict finding Cottonwood had acted with fraud, oppression or malice toward Brewer. A subsequent special verdict question was submitted to the jury to clarify the claim to which the malice finding applied. The jury answered that its malice conclusion was based on the Labor Code violations and not on the conduct underlying Brewer's age discrimination claim. The court then proceeded with the second phase of the trial to determine the amount of punitive damages, and the jury awarded \$195,000 as punitive damages. Cottonwood's appeal raises numerous challenges to the judgment, including that punitive damages are not available for the pleaded violations of the Labor Code.²

The trial court, by a posttrial order, also awarded a portion of the attorney fees and costs sought by Brewer. On appeal, both parties challenge this order.

¹ All statutory references are to the Labor Code unless otherwise specified.

² Cottonwood also asserts on appeal that (1) punitive damages may not be recovered because Brewer's complaint did not plead a claim for punitive damages in connection with her claims arising out of the violations of the Labor Code, (2) the jury's award was tainted by numerous procedural errors, (3) the factual finding underlying the punitive damages award was not supported by substantial evidence, and (4) the amount awarded was excessive in violation of due process. Because of our conclusions, we do not reach these issues. Additionally, after entry of judgment, the parties filed cross-motions for Judgment Notwithstanding the Verdict (JNOV) and/or for a new trial, and the court entered a conditional new trial order, granting Cottonwood a new trial unless Brewer elected to accept a reduced punitive damages award of \$75,000. Brewer's cross-appeal, insofar as she asserts the conditional new trial order is invalid for various reasons, is moot because of our conclusion that punitive damages are not recoverable for the pleaded Labor Code violations.

I

COMMON FACTUAL BACKGROUND³

Brewer, a longtime waitress at the Cottonwood Golf Course restaurant, worked the afternoon shift and was generally the only server. Her remuneration was composed of an hourly wage paid by Cottonwood and tips received from customers.

In July 2002 Cottonwood bought the golf course and related amenities. The golf course facilities were old and its patronage was declining, and Cottonwood sought to correct various management and accounting problems and to restore profitability to the business.

In December 2004 Cottonwood hired Mr. Longhauser as its food and beverage manager. He sought to change the ambience of the restaurant from a coffee shop atmosphere to a steakhouse atmosphere, and also opened a snack bar located on the golf course. After Cottonwood decided to change the restaurant's ambience, Brewer was offered the position at the newly created snack bar, which she accepted. However, around January 20, 2005, approximately eight days after starting at the snack bar, Brewer injured her back while performing her duties. Shortly after Brewer injured her back, Cottonwood abandoned the snack bar concept.

³ Brewer's briefs contain extensive citations to those passages of testimony supporting her claim that she was treated adversely based on her age. However, because the jury rejected her age discrimination claim, and we are required to consider the evidence most favorably to the jury's verdict, we largely omit description of the evidence relied on by Brewer to support her age-discrimination claim.

Brewer returned to work on February 1, 2005, and wanted to resume her former afternoon shift at the restaurant. Longhauser knew she did not want to work the morning shifts, which were less lucrative because of the nature of the clientele. However, newly hired waitresses were then working the afternoon shifts, and Longhauser therefore assigned Brewer to work the less lucrative morning shift. This shift required that she be at work at 6:30 a.m., and she was later assigned to report at 5:30 a.m. On March 8, 2005, Brewer renewed her request to be assigned to the afternoon shift, but Cottonwood denied the request because, "[b]ased on the current customer profiles, staff sales and levels of productivity," Cottonwood believed the overall profitability of the food and beverage business would be enhanced by retaining her assignment to the morning shift. A few weeks after her request for the afternoon shift was denied, Brewer resigned. Two months later, after obtaining a "right to sue" letter from the FEHA, Brewer filed this lawsuit.

II

COTTONWOOD'S APPEAL: THE UNDERLYING JUDGMENT

Cottonwood raises a series of challenges to the punitive damages award and to the damages and penalties awarded under various provisions of the Labor Code.

A. The Underlying Proceedings

The Pleadings and Evidence

The factual basis for the damages and penalties awarded under the Labor Code statutes were based on Brewer's claims that Cottonwood violated the Labor Code in two distinct areas. First, Brewer's complaint alleged she was denied the meal breaks and rest breaks mandated by section 226.7. There is substantial evidence to support the jury's

finding in her favor on those claims. Brewer testified she was never provided those breaks, was never told she could take those breaks, and was specifically told she could not take those breaks. There were some days when she worked nine or 10 hours without a break.

Brewer's First Amended Complaint also alleged Cottonwood did not pay her the wages she earned for the hours she actually worked, and therefore (1) did not pay her wages at the required minimum wage rate, and (2) did not give her accurate itemized wage statements. There is substantial evidence to support the jury's finding in her favor on those claims. At trial, Mr. Conrad (Cottonwood's controller) conceded Cottonwood was required to pay employees for every minute of work. However, Brewer presented documentary evidence (in the form of her time sheets and spread sheets summarizing those timesheets) demonstrating that over the course of numerous pay periods Cottonwood had underpaid Brewer, both for the regular hours she worked and for the overtime she worked.⁴ Mr. Conrad conceded that, because Brewer was paid the minimum wage, if Cottonwood paid her for only a portion of the hours she actually worked on any given day, Cottonwood did not pay her the minimum wage for that day.

The Special Verdicts and Judgment

The jury found Cottonwood paid Brewer less than the minimum wage, Brewer was owed \$801.32 in unpaid wages, and she had not been paid the minimum wage for a

⁴ Those same spreadsheets also identified the corresponding days on which she was entitled to meal and rest breaks that, according to her testimony, she was not provided.

total of 62 pay periods. The jury also found Cottonwood had paid Brewer less than the legal overtime compensation, and Brewer was owed \$154.78 in unpaid overtime wages. The jury found Cottonwood had not provided Brewer with meal periods on 392 occasions, had not provided Brewer with rest periods on 491 occasions, and had on 68 occasions knowingly and intentionally failed accurately to set forth the total hours she worked on her itemized wage statements.

The jury, although finding that Cottonwood's adverse job action against Brewer was not based on her age, nevertheless returned a special verdict finding Cottonwood had acted with oppression, fraud or malice. The court, after lengthy consultations with counsel, elected to submit a supplemental special verdict to the jury to clarify the factual basis on which the jury's oppression, fraud or malice finding was premised.⁵ The supplemental special verdict returned by the jury stated that its malice conclusion was based on the Labor Code violations and not on the conduct underlying Brewer's age discrimination claim.

Over Cottonwood's objection, the jury then heard evidence solely related to Cottonwood's financial condition and considered the amount of punitive damages. The jury awarded \$195,000.

⁵ The parties and the court were concerned about potential inconsistencies among the special verdicts, including whether the finding of oppression, fraud or malice was based on the acts underlying Brewer's age discrimination claim, resolved adversely to Brewer, or whether it was based on the acts underlying Brewer's Labor Code claims.

The Judgment

The judgment, as entered by the court on February 1, 2007, based on the jury's special verdicts, incorporated the jury's awards for unpaid wages in the total amount of \$956.10 and punitive damages in the amount of \$195,000. The judgment also included (1) \$2,646 for wages due for meal period violations and \$3,314.25 for wages due for rest period violations (apparently under section 226.7); (2) \$4,000 as penalties pursuant to section 226; and (3) \$15,300 in penalties pursuant to section 1197.1.⁶ The court also incorporated a provision entitling Brewer to recover attorney fees and costs pursuant to section 218.5 and costs pursuant to Code of Civil Procedure section 1032.

Posttrial Motions

Brewer moved for an award under section 218.5 of costs in the amount of \$2,764.17 (as supplementary to those costs she claimed under Code Civ. Proc. § 1032) and attorney fees of \$149,160. The court denied her requested supplemental costs and awarded attorney fees in the total amount of \$64,710.

The parties filed cross-motions for JNOV or alternatively for a new trial. The court denied Brewer's motion in its entirety, and denied Cottonwood's JNOV motion.

⁶ Although the parties do not on appeal identify the genesis of the awards under sections 226, 226.7 and 1197.1, we surmise the court entered those amounts as a matter of law based on the factual determinations by the jury quantifying the number of meal and rest period violations, the number of minimum wage violations, and the number of inaccurate itemized wage statements provided by Cottonwood to Brewer. Cottonwood does not on appeal assert that, absent procedural impediments to the awards under those statutes, the court inaccurately calculated the additional wages and penalties to be levied under those statutes.

However, the court entered a conditional order on Cottonwood's new trial motion, ordering that Cottonwood's motion for new trial would be denied if Brewer consented to a reduced punitive damages award of \$75,000, but absent that consent, Cottonwood's new trial motion would be granted on the grounds of excessive damages. Brewer accepted the reduced punitive damages award without waiving her appellate rights. Both parties have appealed the judgment and orders.⁷

B. Punitive Damages

General Principles

There are two sets of guiding principles that inform our decision with regard to punitive damages. First, under California law, punitive damages are constrained generally by the restriction that they are ordinarily recoverable only in "an action for the breach of an obligation not arising from contract" where the requisite culpable conduct is also present. (Civ. Code, § 3294.) "The word 'contract' is used in this section in its ordinary sense to mean an agreement between the parties, not an obligation imposed by law despite the absence of any such agreement." (*Ward v. Taggart* (1959) 51 Cal.2d 736, 743.) Accordingly, when the cause of action is based on an agreement between the parties, rather than ex delicto obligations arising by law, punitive damages are ordinarily not recoverable, even where the defendant has violated his or her obligations maliciously

⁷ Cottonwood subsequently moved for relief under Code of Civil Procedure section 473, subdivision (d), asserting the judgment was void for lack of jurisdiction. The court denied that motion. We consider Cottonwood's appeal from the order denying section 473 relief in the companion appeal (*Brewer v. Premier Golf Properties*, D051841) heard concurrently with this appeal.

or in bad faith. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516.)

Second, because the claims on which Brewer recovered involved violations of statutorily imposed obligations that accreted to the employment contract between Cottonwood and Brewer, the availability of damages may also be constrained by the so-called "new right-exclusive remedy" doctrine. As explained in *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 912, that doctrine provides that "[w]here a statute *creates* new rights and obligations not previously existing in the common law, the express statutory remedy is deemed to be the exclusive remedy available for statutory violations, unless it is inadequate." (Italics added; accord, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 79 [in such situations "the statutory remedy is exclusive"]; cf., *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 900.) However, when the statute merely *recognizes* a cause of action (because the claim had a preexisting common law analogue), then "all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." (*Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826 (*Turnbull*).)

Analysis

We are convinced, both by application of the "new right-exclusive remedy" doctrine and under more general principles that bar punitive damages awards absent breach of an obligation not arising from contract, punitive damages are not recoverable when liability is premised solely on the employer's violation of the Labor Code statutes

that regulate meal and rest breaks, pay stubs, and minimum wage laws.

We agree with Cottonwood's contention, which Brewer does not dispute on appeal, that the Labor Code statutes regulating pay stubs (§ 226) and minimum wages (§ 1197.1) create new rights and obligations not previously existing in the common law. Moreover, those same statutes provide express statutory remedies, including penalties for the violation of those statutes that are punitive in nature, that are available when an employer has violated those provisions. Section 226, subdivision (e), provides that any employee "suffering injury as a result of a knowing and intentional failure by an employer to comply with [the pay stub requirements] is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees." Similarly, section 1197.1, subdivision (a) provides that any employer who pays or causes to be paid to any employee a wage less than the minimum wage "shall be subject to a civil penalty as follows: [¶] (1) For any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid[;] [¶] (2) For each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed." Here, Brewer sought and recovered the maximum \$4,000 penalty available for Cottonwood's pay stub violations, and the judgment contained an additional penalty

of \$15,300 pursuant to section 1197.1 for the overtime violations. We are not persuaded by Brewer's argument that the remedies set forth in the statutory scheme were not intended to be the exclusive remedy available for statutory violations,⁸ and Brewer does not articulate any basis for concluding those penalties are so inadequate that other remedies should be permitted.

Similarly, the regulations requiring employers to provide meal breaks (§ 512) and rest breaks (Cal. Code Regs., tit. 8, § 11090, subd. 12(A)), and providing numerous forms of remedies for their violation, also appear to have created new rights and obligations not

⁸ On appeal, Brewer notes that when an employer violates the "pay stub" requirements of section 226, subdivision (a), section 226.3 states that "[t]he civil penalties provided for in this section are in addition to any other penalty provided by law." Relying on this language, Brewer asserts the Legislature showed it intended to allow punitive damages for pay stub violations. However, because Brewer did not recover section 226.3 penalties, that section appears to have no application to any issue presented in this case. Moreover, even if Brewer had obtained section 226.3 penalties, that section merely provides for civil penalties *in addition to the penalties under section 226* that Brewer recovered here, and we construe the language of section 226.3 as designed to insure that the recovery of any penalties under section 226.3 would not preclude the other *statutory* penalties available for wage stub violations. For the same reasons, we believe Brewer's reliance on section 1197.1, subdivision (h), which similarly provides that "[t]he civil penalties provided for in this section are in addition to any other penalty provided by law," is misplaced. An employee who has not received the minimum wage is entitled to recover the amounts unlawfully withheld (§ 1194), plus additional amounts as penalties and liquidated damages where culpable conduct is shown (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 325-326 ["waiting time" penalties under section 203 available where employer failed to pay minimum wage]; § 1194.2 [liquidated damages award]), and the additional civil penalties under section 1197.1 "are in addition to any other penalty provided by law" for failure to pay minimum wages. We thus construe section 1197.1's language as having the same purpose as section 226.3's identical language: to insure that the recovery of any civil penalties under section 1197.1 would not preclude the other *statutory* penalties available for minimum wage violations. Section 1197.1 does not appear to have any relevance to whether *punitive* damages under Civil Code section 3294 are available for Labor Code violations.

previously existing in the common law, and the statutory scheme provides "a comprehensive and detailed remedial scheme for its enforcement." (*Rojo v. Kliger*, *supra*, 52 Cal.3d at p. 79.) Those remedies include an award in the nature of liquidated damages under section 226.7 (cf. *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1112 [because "damages [from missed meal and rest breaks] are obscure and difficult to prove, the Legislature may select an amount of compensation [for the violation] without converting that remedy into a penalty" for statute of limitations purposes]), injunctive relief (see generally § 1194.5), and potential statutory penalties (see § 558).⁹ We are convinced that, because the meal and rest break provisions of the Labor Code "established a new and comprehensive set of rights and remedies for [employees] . . . [and] [n]o such specialized rights and remedies existed at common law . . . the remedy provided in the statute 'is exclusive of all others unless the statutory remedy is inadequate.' [Quoting *Turnbull*, *supra*, 219 Cal.App.3d at p. 827.]" (*De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, *supra*, 94 Cal.App.4th at p. 916.)

Brewer argues that *Turnbull* and *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, among other cases, have concluded that "[w]hen a statute

⁹ To the extent section 226.7 imposes a requirement to compensate the employee with "premium wage[s] intended to compensate employees" for the missed meal or rest breaks (*Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at p. 1114), and the employer failed to pay the employee the additional compensation required by section 226.7, the additional penalties applicable for "pay stub" violations or other defaults in the payment of wages due (such as the "waiting time" penalties under section 203) are arguably triggered.

recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears" (*Commodore*, at p. 215; *Turnbull*, *supra*, 219 Cal.App.3d at p. 826), regardless of whether the right embodied in the statute had a common law analogue that would have supported a cause of action for which punitive damages were recoverable. Neither case supports Brewer's argument. The language contained in *Turnbull* was dicta, because that court ultimately concluded the statute in issue there *did* limit the plaintiff to the prescribed statutory remedies. (*Turnbull*, at p. 827.) *Commodore* is equally inapposite. In *Commodore*, the court evaluated whether an employee, who alleged he was discharged because of his race, could recover punitive damages even though such damages were not identified as a recoverable damage under California's Fair Employment and housing Act (FEHA). *Commodore* concluded punitive damages were recoverable, based in part on the absence of any statutory delineation of the remedies available in civil suits, but more importantly because the common law already recognized a tort cause of action for wrongful discharge in violation of public policy that supported recovery of punitive damages, including wrongful discharge based on racial animus. (*Commodore*, at pp. 219-221.) Because the FEHA expressly disclaimed an intent to repeal any California laws relating to racial discrimination that encompass the common law remedies available for racial discrimination in California (*Rojo v. Kliger*, *supra*, 52 Cal.3d at pp. 73-75), *Commodore* stands for the limited proposition that when a statute embodies a right whose common law analogue would have supported a cause of action for which punitive damages were recoverable, the

statute will not be deemed to have eliminated the existing available remedies unless a contrary legislative intent appears.¹⁰

We are also convinced that, even were the remedies provided by the statutory scheme not the exclusive remedies for the new rights, punitive damages would nevertheless be unavailable because punitive damages are ordinarily limited to actions "for the breach of an obligation not arising from contract" (Civ. Code, § 3294), and Brewer's claims for unpaid wages and unprovided meal/rest breaks arise from rights based on her employment contract. Brewer argues, without citation to relevant authority, that Cottonwood's breach of its statutory obligations under the Labor Code is a "breach of an obligation not arising from contract," thereby supporting the award of punitive damages. However, in analogous situations, the courts have recognized that, when a statute imposes additional obligations on an underlying contractual relationship, a breach of the statutory obligation is a breach of contract that will not support tort damages

¹⁰ Other cases upholding the right to recover punitive damages are in accord. For example, although the court in *Greenberg v. Western Turf Assn.* (1903) 140 Cal. 357 held a claim filed under a statute guaranteeing access to public accommodations free from racial discrimination could support punitive damages, the statute there did have a common law analogue--"the common law doctrine that a business affected with a public interest must serve all customers on reasonable terms without discrimination" (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 489-490)--the same analogue relied on in *Commodore* to support a punitive damages award. Similarly, the court in *Lowe v. Yolo County etc. Water Co.* (1908) 8 Cal.App. 167, approving the potential recovery of exemplary damages on a claim the defendant violated his obligation under a statute to provide irrigation water, noted the right sued upon--to obtain water--was (like the right to be free from racial discrimination) not a right "aris[ing] from the statute, but [was] created rather by the constitution" (*id.* at p. 174), and the deprivation of that right could be actionable in tort. (*Id.* at pp. 174-175.)

beyond those contained in the statute.¹¹ (See, e.g., *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 187-192 [breach of Consumer Warranty law obligations is breach of contract and does not support tort damages for emotional distress].)

We apprehend the Labor Code provisions governing meal and rest breaks, minimum wages, and accurate pay stubs constitute statutory obligations imposed only when the parties have entered into an employment contract and are obligations *arising from* the employment contract. The breach of an obligation arising out of an employment contract, even when the obligation is implied in law, permits contractual damages but does not support tort recoveries. (Cf. *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 700.) Although Brewer relies on language from *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1147 to assert prompt payment of wages involves sufficiently fundamental public policies that the willful failure to make such payments will support punitive damages, the court in *Gould* expressly recognized that,

¹¹ Although *Story v. Gateway Chevrolet Co.* (1965) 237 Cal.App.2d 705 appears at first glance to have reached a different result, because the action sought rescission of a sales contract for violating Civil Code section 2982's required disclosures in a conditional sales contract and the court upheld a punitive damages award, a close reading shows the court's ruling on punitive damages was not tethered to the conduct violating the statutory provisions. To the contrary, the court specifically noted that "[a]ppellant's contention [that punitive damages under section 3294 may not be awarded for failure to comply with the statutory obligations] might have merit if all that was involved here was an innocent failure on the part of appellants to conform their contract to the requirements of the statute." (*Story*, at p. 710.) However, the court then approved punitive damages by describing *additional* conduct by the appellants that sounded in fraud, assault, conversion and trespass (*id.* at pp. 710-711), any one of which would support punitive damages.

although a claim for wrongful *discharge* in violation of public policy would state a tort claim, a claim seeking tort recoveries based on the allegation the employer *otherwise* breached the employment contract agreement was barred by *Foley*. (*Gould*, at p. 1155.)

Conclusion

We conclude the Labor Code violations for which Cottonwood was found liable do not support punitive damages under Civil Code section 3294, and therefore we reverse the award.

C. The Trial Court's Award of Damages and Penalties Under the Labor Code

Cottonwood asserts that for two reasons the award for premium wages under section 226.7, and penalties under sections 226 and 1197.1, must be reversed. First, Cottonwood asserts the award of some of the penalties was void because the statute of limitations barred collection of penalties for conduct more than one year before Brewer's lawsuit was filed. Second, Cottonwood asserts the award of all of the penalties and premium wages was void because Brewer did not exhaust her administrative remedies.¹²

¹² Cottonwood also appears to assert the component of the trial court's award for meal and rest break wages under section 226.7 must be reversed because the court miscalculated the meal/rest break award under that section. Cottonwood asserts the trial court awarded one additional hour of pay for each meal break or rest break that Brewer was denied, but section 226.7 provides for one additional hour of pay for each day the break was not provided, regardless of how many rest or meal breaks the worker missed on that day. However, Cottonwood does not identify where this claim was raised below, and our independent review of the record on appeal has not uncovered any mention of this claim below. A party may not raise a new theory of defense for the first time on appeal when that theory depends on factual issues not tendered or resolved below. (Cf. *McDonald's Corp. v. Board of Supervisors* (1998) 63 Cal.App.4th 612, 618.) The section 226.7 award rested on the jury's findings that Cottonwood had not provided Brewer with meal periods on 392 work days and had not provided Brewer with rest periods on 491

The Statute of Limitations Claim

An action seeking statutory penalties is subject to the one-year statute of limitations under Code of Civil Procedure section 340, subdivision (a), unless the statute imposing the penalty provides otherwise. (Cf. *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, 229.) Cottonwood appears to argue the trial court did not have jurisdiction to award penalties, at least insofar as the judgment included penalties for violations occurring more than one year prior to the June 1, 2005, filing date of Brewer's complaint, and this aspect of the judgment is therefore void and must be stricken. (*Id.* at p. 233 [trial court correctly struck allegations seeking waiting time penalties under section 203 occurring more than one year before date complaint was filed].)

However, the statute of limitations is an affirmative defense that is waived if not timely interposed. (Cf. *In re Andrew V.* (1991) 232 Cal.App.3d 1286, 1291-1292.) Although Cottonwood correctly notes that a void judgment is subject to collateral attack at any time, including on appeal (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 831, fn. 18), Cottonwood has "confuse[d] errors in excess of jurisdiction with errors of substantive law which are within the court's jurisdiction. Collateral attack is proper to contest lack of personal or subject matter jurisdiction or the granting of relief which the court has *no power* to grant [citations]. Nonjurisdictional errors, however, are not appropriate procedural targets within this context." (*Armstrong v. Armstrong* (1976) 15

work days. Whether the jury's findings on the total number of work days may have involved overlapping work days is a factual issue not tendered or resolved below, and Cottonwood may therefore not assert this argument on appeal.

Cal.3d 942, 950, *italics added*.) Because expiration of the statute of limitations does not deprive the trial court of subject matter jurisdiction over the claim (*In re Andrew V.*, *supra*), and Cottonwood does not on appeal identify when (if ever) it timely raised the statute of limitations defense to the penalties, the defense was waived and the judgment awarding penalties was not in excess of the court's jurisdiction.

The Exhaustion of Administrative Remedies Claim

In this appeal, and in the related appeal (*Brewer v. Premier Golf Properties*, D051841), which we consider concurrently with this appeal, Cottonwood asserts Brewer could only seek the premium wages and penalties after first exhausting her administrative remedies, and her failure to exhaust those remedies deprived the court of jurisdiction to enter judgments for those amounts. Cottonwood argues the absence of jurisdiction rendered the judgment void and subject to collateral attack on appeal.

Brewer's alleged failure to exhaust her administrative remedies was not raised at any time prior to entry of the judgment and orders that are the subject of this appeal. For the reasons more extensively discussed in the companion appeal (see *Brewer v. Premier Golf Properties*, D051841 [nonpub. opn.] at pp. 8-12), we agree with the holding in *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133-136 that a party's failure to exhaust administrative remedies may not be raised for the first time in the appeal from the allegedly void judgment. Accordingly, we reject Cottonwood's claim that the underlying judgment must be vacated for the alleged failure by Brewer to exhaust her administrative remedies.

III

BREWER'S CROSS-APPEAL: THE UNDERLYING JUDGMENT

The jury found Cottonwood took an adverse employment action against Brewer but that the action was not based on her age. Brewer asserts that because the trial court excluded three exhibits proffered by Brewer as circumstantial evidence supporting her claim of age discrimination, this aspect of the judgment must be reversed, and a new trial on the age discrimination claim ordered. Brewer argues this evidentiary ruling was an abuse of discretion, and the error was sufficiently prejudicial to warrant a new trial. She also asserts the trial court erred when it denied her JNOV motion to add \$1,400 to the judgment as waiting time penalties under section 203, because Cottonwood conceded in closing argument the evidence showed it owed regular and overtime wages to Brewer.

A. The Evidentiary Claim

Factual Context

Mr. Longhauser, Cottonwood's new food and beverage manager, sought to change the ambience of the restaurant from a coffee shop atmosphere to a steakhouse atmosphere. Brewer, then age 63, was a long-term waitress at the restaurant and had worked the more lucrative afternoon shift.

The majority owner of Cottonwood, Mr. Gamboa, participated in weekly management meetings at which there were regular discussions about attracting high rollers and younger golfers to the golf course. Several witnesses testified Gamboa stated he wanted more "tits and ass" around the restaurant, did not want older servers working in the restaurant, and wanted younger, shapelier and prettier waitresses. However, other

witnesses denied Gamboa made such remarks. Shortly after Longhauser took charge, four younger waitresses were hired and began working in the restaurant.

After Brewer recovered from her back injury, she returned to work and asked to resume her afternoon shift, but she was instead assigned to the early and mid-morning shifts at the restaurant. The new waitresses were then staffing the afternoon shift.

The early shifts were burdensome because it required Brewer to awaken early, and the tips were poor. She complained but was required to staff the morning shift. In the following six weeks, she was "written up" for three different infractions. She had never received a write-up before. When her renewed request to work afternoon shifts was again denied, she resigned.

The Excluded Exhibits

The exhibits proffered by Brewer were copies of two printed promotional flyers and a television commercial. The flyers promoted a February 2005 event, sponsored by IAI (a poker apparel company), in which an afternoon golf tournament at the Cottonwood golf course was combined with an evening "Texas Hold'Em" poker tournament. Both flyers depicted an attractive young woman, wearing a T-shirt containing double entendre phrases relating to Texas Hold'Em, in a "come-hither" pose with text that played off the phrasing on the T-shirts.¹³ The television commercial, which aired approximately six

¹³ In one flyer, the T-shirt contained the phrase "I love to play," and the flyer was headed by the phrase, "Come Play With Me!" In the second flyer, the T-shirt contained the phrase "I got the nuts," and the flyer was headed by the phrase, "Do you have the nuts?" The sponsor of the tournament and producer of the flyers, IAI, was in the business of marketing poker-themed apparel.

months after Brewer resigned, was a 30-second spot promoting the Cottonwood golf course. In a five-second passage near the end of the ad, the voice-over stated, "So the next time you're thinking of swinging your clubs, swing them at Cottonwood" while several young women are shown riding swings suspended from trees (presumably on the golf course) wearing bikini tops and short skirts.

Cottonwood moved in limine to exclude the three proposed exhibits. Brewer opposed the motion, arguing the proffered exhibits were circumstantial evidence that Cottonwood wanted to appeal to the prurient interests of its male clientele and lure a younger group of players by presenting itself as a more provocative and alluring place, from which the jury could infer that Cottonwood's adverse job actions against Brewer were motivated by a desire to rid itself of an aging waitress who did not exhibit Cottonwood's more provocative image. The trial court, after hearing extensive argument, granted the motion to exclude the exhibits, under both Evidence Code section 352 and (as to the commercial) for lack of foundation.

Analysis

A trial court is vested with discretion in deciding the relevance of items of evidence and its ruling will not be disturbed absent an abuse of discretion. (*People v. Green* (1980) 27 Cal.3d 1, 19, overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) Similarly, the trial court is vested with discretion in deciding whether the prejudicial impact of evidence outweighs its probative value, and a trial court may exclude evidence under Evidence Code section 352 (section 352) if it decides its probative value is outweighed by the probability that its admission will create a

substantial danger of undue prejudice, confusing the issues, misleading the jury, or require the undue consumption of time. (*People v. Champion* (1995) 9 Cal.4th 879, 913-914, disapproved on other grounds by *People v. Combs* (2004) 34 Cal.4th 821, 860.) The court's determination under section 352 will not be reversed on appeal absent a clear showing of abuse of discretion. (*People v. Siripongs* (1988) 45 Cal.3d 548, 574.)

Brewer has not clearly shown the trial court's evidentiary rulings were an abuse of discretion. The flyers' relevance was doubtful, because Cottonwood asserted that it was IAI (as sponsor of the tournament) that produced the flyers, and Brewer proffered no evidence that Cottonwood was in any way involved with deciding the form or content of those flyers. Although Brewer offered the flyers as circumstantial evidence that Cottonwood harbored a discriminatory animus against older women in favor of younger attractive women, she cites no law suggesting that an employer's animus can be shown by the conduct of, or statements made by, the employer's *customers*, and therefore the flyers had almost no probative value. Moreover, even assuming a weak inference could be drawn from the fact that Cottonwood permitted its facilities to be used by this customer, the trial court had ample grounds for concluding its de minimus probative value was substantially outweighed by the probability that its admission would confuse the issues, mislead the jury, or require the undue consumption of time. As Cottonwood pointed out at trial, if these flyers were admitted, Cottonwood would be required to produce counter evidence showing Cottonwood was the site for hundreds of tournaments each year, many of which were sponsored by charitable or other organizations that may have focused on attracting an older participant, and the trial court could have concluded collateral

inquiries (into whether this single IAI-sponsored tournament was or was not indicative of Cottonwood's overall pattern of conduct as to permit an inference of animus against older persons) would have so confused the issues and required an undue consumption of time that the flyers were excludable under section 352.¹⁴

Although the television commercial *was* apparently attributable to Cottonwood, thus obviating the relevance concern surrounding the flyers, the trial court nevertheless concluded the timing of the commercial (which aired seven months after the adverse employment action that eventually led Brewer to resign) diminished its probative value in this case, and there was no showing of when the commercial was originally created. Subsequent acts are not categorically excluded as circumstantial evidence of the presence of a discriminatory animus behind an earlier adverse job action (see, e.g., *Brown v. Trustees of Boston University* (1st Cir. 1989) 891 F.2d 337, 349-350), but the evidence is still subject to exclusion under section 352. (*Brown*, at p. 350 [although recognizing it would be "tremendous leap to infer from [later] remarks" that earlier adverse job action was motivated by gender bias, trial court "should not exclude evidence which a reasonable jury might find relevant unless its probative value is substantially outweighed

¹⁴ Introduction of these flyers might also have required the undue consumption of time by triggering collateral mini-trials on the meaning of terms such as "I got the nuts." While that phrase may have inflammatory sexual connotations to a juror uninitiated in the jargon of Texas Hold'Em, that phrase may also have a recognizable nonsexual meaning to patrons enmeshed in the Texas Hold'Em idioms, and expert testimony may have been required to defuse the potential prejudice to Cottonwood from the inflammatory insinuations of the flyers by explaining the nonsexual meanings of the inflammatory phrases.

by the danger of unfair prejudice"].) Here, Cottonwood asserted that, if the commercial was admitted, it would be required to (1) introduce numerous other commercials and print ads produced by Cottonwood during the same time period in which no similar young women were depicted, and (2) introduce innumerable advertisements by other companies that target the sports-viewing public to show the presence of attractive women was standard advertising practice rather than indicative of age bias by Cottonwood. The trial court could have concluded those extended collateral inquiries (into Cottonwood's overall campaign, as well as into the broader industry practices and standards) would have so confused the issues and required an undue consumption of time that the commercial was excludable under section 352. We cannot find the trial court's determination exceeds the bounds of reason, and therefore the ruling was not clearly an abuse of the trial court's discretion.

B. The JNOV Claim

Brewer sought the waiting time penalty under section 203 for the delay in the payment of her final wages.¹⁵ This claim apparently was based on the assertion that because Cottonwood had underpaid her in previous pay periods, Cottonwood had necessarily willfully failed to pay her the wages they owed her when she quit, thereby triggering the waiting time penalty of section 203. The jury found against Brewer on this

¹⁵ Section 203 provides: "If an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. . . ."

claim by returning a special verdict answering "no" to the question "Did [Cottonwood] willfully fail to pay the full amount of wages earned by [Brewer] on her last day of employment?"

Brewer's JNOV motion asserted that, because Cottonwood conceded in closing argument the evidence showed it owed approximately \$900 in regular and overtime wages to Brewer, she was entitled to JNOV as to the waiting time penalties. On appeal, she argues Cottonwood's concession during closing argument shows it was error to deny her JNOV motion to add \$1400 to the judgment as "waiting time penalties" under section 203.

The settled meaning of "willful," as used in section 203, is that an employer has intentionally failed or refused to perform an act required to be done. (See, e.g. *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7-8.) "[T]he employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due." (*Id.* at p. 7.)

However, *Barnhill* held an employer's failure to timely pay wages may not necessarily be willful for purposes of imposing a penalty if the employer's legal duty to pay the wages was unclear at the time of the discharge. (*Barnhill v. Robert Saunders & Co.*, *supra*, 125 Cal.App.3d at pp. 8-9 [when there is uncertainty the employer "should not be penalized for believing" it had fully compensated the employee and therefore employer's nonpayment of wages was not willful for purposes of section 203].) That holding is echoed in California Code of Regulations, title 8, section 13520, which provides, "A willful failure to pay wages within the meaning of [section 203] occurs

when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203."

The issue is whether there was any evidence from which a trier of fact could have concluded that, at the time of the alleged violation (e.g. the date Brewer resigned and Cottonwood was required to pay her all wages then earned), Cottonwood was unaware it owed any amounts for wages beyond the amounts it paid her with her final check. Of course, when the employer is *in fact aware* its employees were not being fully compensated, the evidence will support a finding of willfulness. (See, e.g., *Armenta v. Osmose, Inc.*, *supra*, 135 Cal.App.4th at pp. 325-327; *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 781-783 [employer's legal obligation was clear and substantial evidence supported the lower court's finding that the employer had acted in bad faith].) However, if there is evidence that might support the finding Cottonwood did *not* know it had underpaid Brewer (but instead acted in good faith) when it issued Brewer her final check, Brewer is not entitled to JNOV on the waiting time penalty claim. (Cf. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201-1204.)

Our review of an order denying a motion for JNOV requires that we view the evidence most favorably to Cottonwood to determine if substantial evidence supported the judgment. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 49.) Although Brewer seeks JNOV on this issue, she cites nothing except the concession in closing argument that some amounts were due her, and omits any discussion of the

evidence that might support the finding Cottonwood did *not* know it had underpaid her (but had instead acted in good faith) when it paid Brewer her final check. We conclude Brewer "has waived this issue on appeal because of [her] failure to carry [her] burden of providing this court with a fair and complete summary of the evidence" on this issue. (*Id.* at p. 50.)

IV

THE APPEAL AND CROSS-APPEAL: ATTORNEY FEES AWARD

Both parties challenge the attorney fees award. Cottonwood contends (1) Brewer's failure to plead a specific and timely request for a fee award under section 218.5 bars any fee award; (2) any recovery for rest and meal break wages are not "wages" within the meaning of section 200 for purposes of section 218.5's attorney fees awards; (3) the award of any fees after the date of Cottonwood's Code of Civil Procedure section 998 offer (section 998 offer) is barred because Brewer recovered less than the amount tendered by the section 998 offer; and (4) the allocation of fees by the court when it disallowed some of Brewer's requested fees was erroneous as a matter of law or alternatively was an abuse of its discretion. Brewer agrees the fee award was an abuse of discretion, but for the opposite reason. Brewer contends the court should not have disallowed any portion of the requested attorney fees.¹⁶

¹⁶ Brewer's motion for attorney fees also sought (1) the additional attorney fees incurred in pursuing her attorney fee recovery, and (2) supplemental costs. The latter aspect of her motion noted the costs she was entitled to seek under Code of Civil Procedure section 1032 were less than the total costs she had incurred, and argued her additional costs (\$2,764.17 plus any costs she sought under section 1032 that might be

A. Factual and Procedural Background

Brewer's original complaint, alleging she was denied meal breaks and rest breaks, sought recovery of the amounts mandated under section 226.7 and included a request for attorney fees. Brewer's First Amended Complaint, which added her claims that Cottonwood had not paid her wages at the required minimum wage and had not given her accurate itemized wage statements, additionally alleged she was entitled to costs and attorney fees under sections 210, 218.5 and 226.

After the trial court entered judgment in Brewer's favor, and found she was entitled as the prevailing party to attorney fees, she filed her motion seeking nearly \$150,000 for attorney fees. Cottonwood raised numerous objections, including that (1) section 218.5 was an improper basis for an attorney fee award, and (2) attorney fees had to be allocated between Brewer's unsuccessful age discrimination claim and her remaining claims, and the award limited to those fees incurred pursuing the claims on which she prevailed. The court, after noting that one of Brewer's attorneys (Mr. Sharp) billed a total of \$82,290 and her second attorney (Mr. Brisebois) billed \$47,130 plus an

disallowed) were recoverable under the costs provisions of sections 218.5 and 1194 of the Labor Code. The court denied her request for these supplemental costs and, on appeal, she contends the ruling on her request for supplemental costs was error. However, Brewer cites no law suggesting the Labor Code *mandates* an award of those costs she sought as supplemental costs, and she does not articulate how the trial court's *discretionary* rejection of her requested supplemental costs was a clear abuse of its discretion. Accordingly, we do not further consider this claim on appeal. (Cf. *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) Insofar as Brewer claims on appeal that it was error to deny her the attorney fees she incurred in seeking her attorney fees award, we do not decide that issue because that argument may be resurrected in the trial court on remand.

additional \$19,740 for "trial work," disallowed an amount equivalent to the fees charged by Mr. Brisebois for acting as second chair at trial, thereby reducing the total amount for reasonable attorney fees for the entire representation through trial to the amount of \$129,420. The court then allocated one half of these fees to the services for the Labor Code claims and the other half to the unsuccessful age discrimination claim, and found a reasonable attorney fees award for the Labor Code claims on which Brewer prevailed to be \$64,710.

B. Analysis

Cottonwood first contends Brewer's failure to plead a specific and timely request for a fee award under section 218.5 bars any fee award. Section 218.5 provides that, "[i]n any action brought for the nonpayment of wages, . . . the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon initiation of the action." Although the precise thrust of Cottonwood's contention is murky, it appears Cottonwood contends the requisite "request[] [for] attorney's fees and costs upon initiation of the action" must specifically identify section 218.5 within the body of the complaint. Cottonwood cites no authority for this contention, and the plain language of the statute merely requires the plaintiff to "request[] attorney's fees and costs" when the action is initiated. Brewer did request attorney fees when her action was initiated by asserting (in connection with her meal break and rest break claims) she was seeking attorney fees for the violations, and by including a request for reasonable attorney fees and costs in her prayer. Moreover, when she amended her complaint to interject her claims based on the other Labor Code

violations, she likewise asserted a right to attorney fees, and specifically identified section 218.5 (as well as section 226) as a basis for collecting her attorney fees. These pleadings satisfy the statutory requirement that her complaint "requests attorney's fees and costs upon initiation of the action." (§ 218.5.)

Cottonwood next argues that, although Brewer requested attorney fees in connection with her claim for rest and meal break wages, compensation for denied rest and meal breaks does not qualify as "wages" for purposes of section 218.5 attorney fee awards. This predicate is the springboard for two separate arguments. First, Cottonwood appears to argue that if Brewer's recovery for rest and meal break wages are not wages within the meaning of section 200, her recovery for rest and meal break wages would not qualify her as a party who prevailed in an "action brought for the nonpayment of wages," as required for an attorney fee award under section 218.5. Second, if Brewer's claim for rest and meal break wages are not wages within the meaning of section 218.5, her request at the initiation of the action in connection with her claim for rest and meal break wages cannot be construed as a timely request for fees within the meaning of section 218.5. We are not persuaded by Cottonwood's arguments because we reject the predicate on which the arguments rest. In *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th 1094, the court held that the entitlement to compensation for missed meal and rest breaks are "premium wages" intended to provide additional compensation to the employee (*id.* at p. 1114), rather than a "penalty," noting the employee "is entitled [under section 226.7] to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's

immediate entitlement to payment of wages or for overtime." (*Id.* at p. 1108.) Because it is now settled that compensation for missed meal and rest breaks are wages, the foundation for Cottonwood's arguments evaporates and the arguments therefore fall.¹⁷

Cottonwood claims that its section 998 offer bars the award of any attorney fees incurred after that date because, after eliminating the punitive damage award from the judgment, Brewer recovered less than the \$30,000 tendered by Cottonwood's August 29, 2006, section 998 offer. Although Brewer recovered damages, penalties and interest of only \$27,599.62, that amount must be augmented by all "pre-offer costs" to which Brewer was entitled before assessing whether she received a more favorable recovery than Cottonwood's section 998 offer. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103,

¹⁷ Cottonwood appears to assert that, because the attorney fee order was entered before *Murphy* was decided, and there was uncertainty (at the time the attorney fee order was entered) whether meal and rest break recoveries were penalties to which other attorney fee statutes might apply or wages to which section 218.5 applies, *Murphy* must be disregarded on the issue of whether section 218.5 supports the attorney fee award here. Cottonwood's argument, made without citation to any authority, relies on the unstated assertion that *Murphy* cannot be given retroactive application. As a general rule, judicial decisions are to be given retroactive effect (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 442) absent special considerations of fairness and public policy requiring a decision be given only prospective application. Cottonwood presents no argument suggesting there are any special considerations requiring that *Murphy* be accorded only prospective application. Moreover, although Cottonwood argues Brewer relied on the wrong attorney fee statute, Cottonwood does not suggest how the award would have differed had Brewer relied on the statutes Cottonwood asserts *were* applicable. Accordingly, Cottonwood's argument contains the seeds of its own demise by de facto conceding any purported error in identifying the statutory basis for the award was harmless error. (See, e.g., *Pinney v. Phillips* (1991) 230 Cal.App.3d 1570, 1590 [a legally correct order entered for wrong reason is entitled to be affirmed because where, "as here, the trial court reached the proper decision, it is of no consequence that the theory on which the court reached its conclusion may have been flawed"].)

1108-1113.) Because Brewer need only demonstrate that she incurred recoverable costs (which arguably includes attorney fees) (*ibid.*) of less than \$2,400 prior to August 29, 2006, to demonstrate her recovery was more favorable than Cottonwood's section 998 offer, the elimination of the punitive damages component of the judgment does not ipso facto deprive Brewer of postoffer costs. On remand, the trial court must determine whether Brewer's recoverable pre-offer costs, when combined with her recoveries for damages, penalties and interest, exceeded the amount of Cottonwood's section 998 offer.

Both parties assert that, assuming Brewer was entitled to attorney fees and some or all of those fees are not barred by Cottonwood's section 998 offer, the court abused its discretion in the amount of the award.¹⁸ We do not evaluate this issue because, considering our determination that the judgment must be reduced to eliminate all punitive damages, the milieu in which the trial court determined a reasonable attorney fee award has been significantly altered. An attorney fee award under a statute is committed to the sound discretion of the trial court. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) Although the starting point for determining fees is the lodestar method, in which the trial court determines a lodestar or touchstone figure based on the hours spent by counsel on the litigation and a reasonable hourly fee, the trial court may then augment or reduce the fee based on a variety of factors, and limited success is among the factors

¹⁸ Cottonwood asserts the amount awarded was an abuse of discretion because the award was calculated before the court had ruled on the new trial and JNOV motions, and Brewer asserts the amount awarded was an abuse of discretion because the court should not have disallowed the fees requested for the trial services of Mr. Brisebois, who acted as a second chair at trial.

the court should consider as a basis for awarding a reduced fee. Accordingly, when many of the hours expended were in pursuit of unsuccessful claims (*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1345) or where the plaintiff failed to obtain a substantial part of the relief he or she sought (*Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1308-1316), the court has discretion to reduce the lodestar fee to arrive at a reasonable figure that encourages litigation of meritorious claims without encouraging litigation of claims that have little value. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1171-1172.)

We have determined Brewer may not recover punitive damages for the Labor Code violations, thereby significantly altering the degree of success she obtained at trial, and we believe it is necessary and appropriate to remand the attorney fee issue to the trial court because of the change of circumstances. (*Harman v. City and County of San Francisco, supra*, 136 Cal.App.4th at pp. 1316-1317.) We express no opinion regarding how the trial court's discretion on attorney fees should be exercised in this case. The court may reconsider the lodestar figure applying the proper standards of reasonableness, and may consider whether to reduce the award to reflect the limited nature of the relief obtained as to those claims on which she prevailed in comparison with the scope of the litigation as a whole. (*Ibid.*)

DISPOSITION

The judgment, insofar as it includes an award of punitive damages, is reversed, and the trial court shall on remand enter a new judgment striking the award of punitive damages. The award of attorney fees is reversed and remanded with instructions to

reconsider the award of attorney fees in accordance with this opinion. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.