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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MATTHEW ERHART, Plaintiff - Appellee, v. BOFI FEDERAL BANK, Defendant - Appellant.	No. 23-3065 D.C. No. 3:15-cv-02287-BAS-NLS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted January 15, 2025
Pasadena, California

Before: GOULD, FRIEDLAND, and BENNETT, Circuit Judges.

BofI Federal Bank appeals the district court's denial of its renewed motion for judgment as a matter of law or for a new trial after a jury awarded Charles Matthew Erhart $1 million for his federal and state law claims of retaliation and $500,000 for his defamation claim. We review the denial of a renewed motion for judgment as a matter of law de novo, and we review for abuse of discretion the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

denial of a motion for a new trial and remittitur. *See Bell v. Williams*, 108 F.4th 809, 818, 830 (9th Cir. 2024). We affirm.

1. "Judgment as a matter of law is proper only when 'the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict.'" *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 455 (9th Cir. 2018) (quoting *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006)). In reviewing BofI's motion, we must view all evidence in the light most favorable to Erhart, draw all reasonable inferences in Erhart's favor, and disregard all evidence favorable to BofI that the jury was not required to believe. *Bell*, 108 F.4th at 818.

BofI argues that it is entitled to judgment as a matter of law on its same-action affirmative defense. *See* 49 U.S.C. § 42121(b)(2)(B)(ii); *Murray v. UBS Sec., LLC*, 601 U.S. 23, 38 (2024) (describing the burden-shifting framework under the Sarbanes-Oxley Act of 2002 ("SOX") used to determine "whether the employer would have 'retain[ed] an otherwise identical employee' who had not engaged in the protected activity" (alteration in original) (quoting *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020))).[1] We disagree. The jury reasonably

[1] Both parties agree that the same burden-shifting framework applies to Erhart's state law claims. *See Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 715 (2022) (noting that section 1102.5 claims contain a "nearly identical burden-shifting framework" to SOX claims); *Grant-Burton v. Covenant Care, Inc.*, 122 Cal. Rptr. 2d 204, 219 (Ct. App. 2002) (outlining a similar burden-shifting framework for wrongful termination in violation of public policy claims).

concluded that BofI did not meet its burden. The jury heard evidence that after BofI learned of Erhart's protected activity, BofI departed from its usual policies in handling his medical leave. BofI argues that it would have fired any employee that failed to return to work, citing its written policies. But BofI did not present any evidence that it had enforced those policies in practice by terminating other employees who similarly failed to return to work after their medical leave ended. Given the evidence that BofI treated Erhart's medical leave dissimilarly from other employees, the jury was not required to credit BofI's assertion that it would have terminated Erhart for job abandonment even in the absence of his whistleblowing activity.

2. BofI also challenges the jury's damages award for Erhart's retaliation claims, arguing that Erhart failed to show any injury tied to his termination and that the jury's $1 million award was grossly excessive. We reject both arguments.

First, there was sufficient evidence for a reasonable jury to find that Erhart suffered emotional distress and reputational harm from BofI's retaliatory conduct. *See Bell*, 108 F.4th at 834 ("[T]estimony alone can support compensatory damages for emotional distress and pain and suffering."). Erhart testified that he experienced several physical symptoms that he "attribute[d] to [BofI's] conduct," including difficulty breathing and sleeping, and vomiting. Erhart's mother testified that before "he lost his job," Erhart "was just very happy-go-lucky" and "very

confident," but that after his termination, he "just is not the same" and "doesn't carry the same confidence." Erhart also testified generally about his reputational harm and perceived impacts on his career from BofI's conduct.

Whether the testimony at trial supports the jury's $1 million award presents a closer issue, but we conclude that the district court did not abuse its discretion in denying remittitur. "The jury's verdict must be upheld unless the amount is 'grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.'" *Id.* at 830-31 (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1028 (9th Cir. 2008)).[2] In determining whether an award is grossly excessive, the "foremost priority" is the evidence presented at trial, though we may also consider awards in comparable cases. *Id.* at 832. Here, the evidence at trial—including Erhart's testimony of his physical symptoms and his mother's testimony of his changed personality—is sufficient to support the jury's $1 million award, and comparable cases reinforce that result. *See Passantino v.*

[2] Because the jury awarded damages for both state and federal claims, we also look to state law in considering the allowable damages. *See Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 437 (1996) ("[W]hen [state] substantive law governs a claim for relief, [state] law and decisions guide the allowable damages."); *see also Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011). California courts, like federal courts, entrust the jury "with vast discretion in determining the amount of damages to be awarded" and reverse only "where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice[.]" *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 64 (1974) (quotation marks omitted).

Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 504, 513 (9th Cir. 2000) (affirming the jury's $1 million award for emotional distress resulting from retaliation where the plaintiff testified that "she experienced substantial anxiety," along with "rashes, stomach problems, and other symptoms"); *Briley v. City of W. Covina*, 281 Cal. Rptr. 3d 59, 79-81 (Ct. App. 2021) (remitting a jury's award for noneconomic damages from retaliatory termination to $1 million where the plaintiff testified that his termination was "pretty devastating" and that he suffered "sleep-related issues").

3. BofI also argues that it is entitled to judgment as a matter of law or a new trial on Erhart's defamation claim because he did not present any evidence of harm from the defamatory statements about his competence. BofI forfeited this argument by failing to raise it in its Rule 50(a) motion. *See EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) ("[A] party cannot properly 'raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion.'" (quoting *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.2003))). And even if the argument were preserved, there was substantial evidence supporting the jury's finding that Erhart suffered reputational harm from BofI's CEO Gregory Garrabrants's statements that Erhart was incompetent.

4. Lastly, the district court did not abuse its discretion in admitting evidence

of BofI's lawsuits against Erhart's mother and former girlfriend. That evidence was relevant to BofI's retaliatory intent because the jury could infer from BofI's lawsuits that BofI harbored animus toward Erhart. *See Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003) (explaining that "[w]hether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the . . . surrounding circumstances" and noting that "[t]here is no set time beyond which acts cannot support an inference of retaliation").

The evidence of Erhart's emotional distress caused by those lawsuits, however, was not relevant. Nevertheless, "it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1159 (9th Cir. 2010) (alteration omitted) (quoting *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir 2005)). The jury was instructed several times that it could not award Erhart damages for any emotional distress caused by BofI's separate lawsuits. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (per curiam) ("[J]uries are presumed to follow the court's instructions."). BofI argues that the jury must have disregarded its instructions because the only evidence of Erhart's injury for his retaliation claims was his distress from the lawsuits against his mother and former girlfriend. But there was sufficient evidence to support the jury's award without considering the improper evidence.

AFFIRMED.