Docket No. 10-15326

In the

United States Court of Appeals

For the

Ninth Circuit

VAN A. PENA,

Plaintiff-Appellant,

v.

TIMOTHY MEEKER, PATRICIA REES, HAL PETERSON, JENNIFER WEAR, DENISE SHELDON, JUDITH BJORNDAL, M.D. and NORM KRAMER,

Defendants-Appellees.

Appeal from a decision of the United States District Court for the Northern District of California, No. 00-CV-04009 · Honorable Claudia Wilken

BRIEF OF APPELLANT

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I. JURISDICTION.

This is an appeal of a final judgment entered upon a jury verdict, after the District Court granted partial summary judgment.

Appellant Van A. Pena brought suit in the District Court asserting claims under 42 U.S.C. § 1983 for violations of his First Amendment right to speak out about the patient abuse and gross medical negligence to which patients were being subjected at the Sonoma Developmental Center ("SDC").[1] The District Court had jurisdiction of those claims under 28 U.S.C. §§ 1331 & 1343.

The District entered final judgment in this case on January 14, 2010. DE#275, ER 1. Pena timely filed his Notice of Appeal on February 10, 2010, DE#23, and an Amended Notice of Appeal on February 11, 2010. DE# 279, ER 23. This Court has jurisdiction to hear this appeal of the District Court's judgment pursuant to 28 U.S.C. § 1292.

II. STATEMENT OF THE ISSUES.

A. Summary Judgement Rulings.

1. In *Garcetti v. Ceballos*, 216 S.Ct. 1951 (2006), the Supreme Court held that when a public employee speaks out as a concerned citizen about

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[1] SDC is a state facility run by the California of Developmental Services ("DDS"). It's mission is to care for developmentally disabled persons, who are so severely disabled that they cannot be "mainstreamed."

matters of public importance, the employee's speech is protected by the First Amendment. Conversely, the Supreme Court ruled that when an employee's speech is required as part of the employee's job duties, the employee's speech is not protected by the First Amendment. In this case, Pena submitted a memorandum on February 21, 2001, to SDC's Medical Director, Appellee Judith Bjorndal, notifying Bjorndal of a serious incident of medical malpractice that left a patient in a coma.[2] The Court granted summary judgment of this claim (and excluded all evidence of this memorandum from the jury), despite the fact that the overwhelming evidence showed that Pena was not required, as part of his job duties, to submit such a memorandum to Bjorndal. Did the District Court err in concluding that this memorandum was not speech protected by the First Amendment? [3]

2. The District Court granted summary judgment concerning Pena's formal report to the California Department of Health Services, Licensing & Certification ("DHS"), the state agency that licenses and monitors SDC. Pena had

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[2] This was just three weeks before Dr. Bjorndal put Pena on administrative leave and ultimately fired him

[3] Bjorndal and SDC's Executive Director, Timothy Meeker, testified at trial that this memorandum was not required as part of Pena's job duties. Pena asked the Court to reconsider her summary judgment ruling in light of Bjorndal and Meeker's trial testimony, but she refused to do so. ER 136 (TT 981:1-982:6)

complained to DHS that photographs documenting patient abuse were being removed from patient records in violation of DHS regulations and DHS agreed. The District Court granted summary judgment on the ground that Bjorndal said she was not aware of Pena's DHS complaint. The District Court did so in the face of substantial circumstantial evidence from which a reasonable jury could conclude that Bjorndal was aware of the Pena's DHS complaint, including Bjorndal's admission that the fact that it was Pena that was taking such photographs came up at a "big issue," just one week after DHS cited SDC for violating DHS regulations concerning the removal of photographs from patient records. Did the District Court err in granting summary judgment of this claim?

B. Evidentiary Rulings.

1. The District Court precluded testimony at trial concerning Pena's complaint to the DHS and DHS's conclusion that his complaint was substantiated. Did the District Court err in excluding this evidence, when it was relevant to Pena's claim that Bjorndal ordered him to stop taking photographs of suspicious patient injuries in order in order to prevent him from documenting and speaking out about patient abuse?

2. The District Court excluded the testimony of SDC Police Chief Edward Contreras's that, on the day that Pena reported an incident of serious

medical malpractice to SDC's Clinical Director Patty Rees, Rees told Meeker and Contreras that Pena had to be fired because his allegations exposed SDC to multiple lawsuits and Meeker then told Contreras to "dig up dirt" that Meeker could use to fire Pena. Just one week after the DHS cited SDC for the improper removal of photographs from patient records, Meeker and Bjorndal attended an Executive Team meeting in which Pena's taking photographs of patients came up as a "big deal." The very same day Bjorndal ordered Pena to stop taking photographs of patients. Did the District Court err in excluding Contreras's testimony when a reasonable jury could conclude that such evidence made it more likely than not that Meeker would have told Bjorndal about Pena's complaints about patient abuse and encouraged her to order Pena to stop taking photographs documenting potential patient abuse?

3. The District Court excluded articles published in the *Sonoma Index Tribune* about SDC's failure to investigate and remedy multiple incidents of patient abuse, as well as any testimony concerning the content of those articles, on the ground that Bjorndal could not remember reading those articles. Bjorndal admitted that she had lived for thirty years in the town where this paper was published, she subscribed to the paper, personally knew the editor, published her father's obituary in the paper, and that she had been interviewed and quoted by the

paper about the suspicious death of an SDC patient? Did the District Court err in precluding the news articles and testimony concerning the events described therein in the face of this evidence from which the jury could reasonable conclude that she Bjorndal was aware of those events?

C. Jury Instructions.

1. Pena asked the District Court to give the jury an instruction based upon the California Probate Code section 4564, which makes it clear a doctor cannot be penalized for refusing to perform a procedure that would serve no medical benefit for the patient, even if the patient requests that procedure. The District Court refused to give this instruction, despite the fact that the requested instruction was supported by law and the evidence. Did the District Court deny Pena a fair trial by refusing to give the requested instruction?

2. The District Court refused to give the jury a clarifying instruction requested by Pena that was based upon *Colzalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003)[4], after the jury submitted questions to the Court suggesting that her instructions were vague and they were confused about what Pena had to prove. Did the District Court deny Pena a fair trial by refusing to give the

[4] *Colzalter* sets forth the three ways in which a plaintiff can prove retaliation. The jury's questions made clear that they were confused about what Pena had to do to prove retaliation.

requested supplemental instruction in response to the jury's obvious confusion about what was the law they were to apply in this case?

III. STATEMENT OF THE CASE

Pena filed his original complaint on October 31, 2000, alleging he had been placed on extended administrative leave and otherwise retaliated against due to his complaints about patient abuse at SDC. DE#1, ER 307. Pena filed a supplemental complaint on June 6, 2002, alleging that after he filed his original complaint he was fired in retaliation for his continuing efforts to document and expose SDC's failure to investigate and remedy patient abuse and because he filed his original suit. DE#35, ER 301.

On December 12, 2003, the District Court issued an order denying, in part, and granting, in part, defendants' first Motion for Summary Judgment. DE#147. The parties subsequently settled all claims except the termination claim against Bjorndal.

Pena appealed the order granting Bjorndal summary judgment and this Court reversed the District Court on all counts. ER 278. However, in light of the Supreme Court's decision in *Garcetti v. Ceballos*, 216 S.Ct. 1951 (2006), on August 28, 2006, this Court remanded the case to the District Court for further consideration. ER 276.

The District Court ordered further briefing "addressing *Garcetti*'s impact, if any, on the case." DE#160. The parties briefed the issue and on January 24, 2007, the District Court entered an order granting, in part, and denying, in part, Dr. Bjorndal's second motion for summary judgment. DE#182 ER 5. Bjorndal appealed the District Court order, but on October 28, 2008, this Court dismissed her appeal on the ground that her notice of appeal was not timely filed. ER 200.

A jury trial was conducted from November 16, 2009 through December 4, 2009. The trial resulted in a hung jury. The parties then agreed to accept less than a unanimous jury, stipulating that a decision by six of the eight jurors would be sufficient. On December 4, 2009, the jury returned a six to two verdict in favor of Bjorndal (DE#272) and the Clerk entered final judgment on January 14, 2010. DE#275, ER 1.

IV. STATEMENT OF FACTS.

Pena was employed as a physician by SDC from October 1991 to July 2001. ER 248 (Pena Decl. ¶ 2), 148 (TT 524:9-11). Throughout the time that Pena worked at SDC his performance was consistently rated as excellent. ER 149-53 (TT 527:9–531:19), 57-60 (Pl.Tr.Exhs #2 & #3).

Over time, Pena became concerned because a number of incidents of suspected patient abuse and suspicious deaths that he reported were not being

investigated. ER 248 (Pena Decl. ¶ 3), ER 153-54 (TT 531:2-532:9). Pena initially attempted to have his concerns addressed through the "chain of command." ER 248 (Pena Decl. ¶ 3). He filed "special incident reports" whenever he suspected patient abuse at SDC.[5] ER 248 (Pena Decl. ¶ 3), 154 (TT 532:10-18). However, when these incidents were not investigated, he contacted SDC's Police Chief Edward Contreras to follow-up and find out why these incidents were not being investigated. ER 248 (Pena Decl. ¶ 4), 221 (Contreras Depo. 97:12-19), 223 (Contreras Depo. 99:16-23). Pena also contacted the DDS Office of Special Investigations about incidents that he had reported that were not being investigated. ER 249 (Pena Decl. ¶ 7a). He also he contacted the SDC's Executive Director and Clinical Director concerning specific incidents of patient abuse. ER 249 (Pena Decl. ¶ 7b).

After it became clear that DDS was not taking any remedial action, Pena provided Chief Contreras with documentation to be forwarded to members of the California Legislature. ER 249 (Pena Decl. ¶ 5). Pena also met with Bill Lynch, the editor and publisher of the *Sonoma Index Tribune*. He shared with Mr. Lynch

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[5] Timothy Meeker, SDC's Executive Director, testified that an employee satisfied his duty to report patient abuse by filing a special incident report. He testified further if an employee took any additional steps, the employee was going beyond what was required for their own personal, ethical, professional or political reasons. ER 157-161(TT 268:14-272:18).

his concerns about patient abuse and gross medical negligence and the documentation he had of the incidents that were not being investigated ER 249 (Pena Decl. ¶ 6), 205 (Lynch Decl. ¶¶ 2 & 3).

The *Tribune* is the local newspaper in the area in which SDC was located and where Bjorndal had lived for thirty years. The *Tribune* published a series of articles and editorials about patient abuse and suspicious injuries and deaths at SDC. ER 205 (Lynch Decl. ¶¶ 3 & 4), 249 (Pena Decl. ¶6). Bjorndal herself was quoted concerning the suspicious death of a patient that was being investigated. ER 143-45 (TT 908:19-910:6),94.31 (Tribune 7/13/09 article, "SDC client death investigated").

As a result of the news articles and the material provided by Pena, State Senator Wes Chesbro and Assemblywoman Patricia Wiggins held public hearings, concerning patient abuse and medical care at the DDS regional centers, such as SDC. ER 205-06 (Lynch Decl. ¶5). These hearing culminated in a new statute requiring SDC to report any patient deaths or serious injuries to the Sonoma County Sheriff's Department, rather than merely investigate them in-house. Cal. Welfare & Institutions Code Section 4427.5.

In light of SDC's failure to investigate the numerous incidents of patient abuse and medical negligence that he had reported, as well as its apparent attempts

to cover-up such incidents, Pena made a formal complaint to DHS, the state agency responsible for licensing and monitoring SDC. ER 249-50 (Pena Decl. ¶¶ 7 & 8). The essence of Pena's complaint was that SDC was attempting to cover-up patient abuse and neglect by removing from patient records photographs taken of the suspicious patient injuries. ER 249-50 (Pena Decl., ¶¶ 7 & 8).

On October 18, 2000, DHS issued the findings of the investigation concerning Pena's complaint. ER 250 (Pena Decl. ¶ 9). DHS concluded:

> **The complaint allegation was validated during the onsite visit, and a violation(s) of the regulation(s) is issued to the facility. The complaint is substantiated.**

ER 250 (Pena Decl. ¶ 9), 263 (Pena Decl., Exh. 4).

Just one week later, the fact that Pena was the person taking photographs of patients "came up as a big issue" in an Executive Committee meeting, attended by Bjorndal. ER 231-32 (Bjorndal Depo. 57:15- 58:25), 185 (TT 184:15-20). As a result, Bjorndal met with Pena ER, 185 (TT 184:21-24), and instructed Pena to stop taking photographs of patients. ER 250 (Pena Decl. ¶ 10), 188-90 (TT 203:24-205:8), 155 (TT 539:3-11). Bjorndal confirmed this meeting the very same day, in her October 25, 2000 memorandum to Pena. ER 251 (Pena Decl. ¶ 11), 261 (Pena Decl. Exh. 5), 156 (TT 540:5-18), 67 (Pl.Tr.Exh. 7).

Bjorndal claimed she only told Pena not to take photographs of patients without their consent, but had to admit that very few SDC patients were capable of giving consent and she did not tell Pena how to go about getting their consent. ER 186-87 (TT 185:23-186:20). Moreover, Chief Contreras testified that patient consent was not required when taking photographs to document patient abuse. ER 141-42 (TT 837:12-838:13).

Bjorndal later cited her October 25, 2010 memorandum in the formal notice of Pena's termination, as a "prior disciplinary action," ER 251 (Pena Decl. ¶ 11), 273 (Pena Decl. Exh. 7, Section VI). However, she admitted at trial that Pena was following SDC's policy by photographing suspicious patient injuries. ER 190 (TT 205:1-4).

On February 21, 2001, Pena personally gave Bjorndal a memorandum concerning a patient who had been administered drugs, which were counter-indicated for her condition, that caused a seizure which reduced the patient to a vegetative state. ER 251 (Pena Decl. ¶ 12), 268 (Pena Decl. Exh. 6). The intent of the memorandum was to put Bjorndal on notice of an incident of serious malpractice that had severely compromised the safety and quality of life of one of SDC's patients. ER 251 (Pena Decl. ¶ 12) Three weeks later, Bjorndal put Pena on administrative leave and subsequently fired him. ER 270(Pena Decl. Exh. 7).

Bjorndal has asserted that she fired Pena because he allegedly issued a Do Not Resuscitate Order ("DNR"), in contravention of a patient's "Advanced Directive"[6] that the patient did not want a DNR issued in her case.[7] The evidence that Pena presented in opposition to the first motion for summary judgment, in the original appeal of this case, and at trial established:

1. that all the doctors involved, including Bjorndal, agreed that a DNR order was medically appropriate because (1) cardiopulmonary resuscitation ("CPR") would provide no medical benefit to the patient given the advance state of her renal failure, (2) CPR had no reasonable chance of keeping the patient alive and (3) CPR could cause her trauma, including pain, broken ribs, and damage to her organs. ER196-197 (TT 11:25-12:10), 191-92 (TT 224:22-225:23), 165 (TT

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[6] SDC has a formal policy concerning advance directives, which requires a determination that the patient issuing an advance directive be mentally competent to do so, has been provided the information necessary to make an informed decision, and requires that a copy of the advance directive to be placed as the top page in the patient's medical chart so care providers are aware of the advance directive. ER 170-71 (TT 109:15-110:4), 165-66 (TT 340:24-341:12). Dr. Gathman, the SDC Chairman of the Bioethics Committee, testified that during the entire fifteen years he had been at SDC only two patients were found to be capable of issuing an Advance Directive. ER 171 (TT 110:5-9).

[7] Pena's DNR order was rescinded by Bjorndal within three hours and a half after it was issued and Bjorndal admitted at trial that the patient was not denied any medical care as a result of the DNR order. ER 193 (TT 228:8-20). The patient then died nine days later of renal failure. ER 193 (TT 228:21-25).

340:1-5), 140 (TT 797:4-9);

2. that no Advance Directive against a DNR, as defined by SDC's own policies, was documented in the patient's medical records, ER 167 (TT 343:5-13), 137 (TT 1039:10-13);

3. that SDC's own records stated the patient was mentally incapable of giving informed consent for an Advanced Directive, ER 72 (Pl.Tr.Exh 13 ("Due to her developmental delay ... the Medical Director will act on her behalf for any consents needed while on GAC."), or understanding her rights concerning an Advanced Directive, ER 70 (Pl.Tr.Exh. 10)("Rights read and not understood."); and,

4. that the patient's only family member, her sister, had repeatedly told SDC that she did not want CPR, or other extraordinary measures taken to extend her sister's life artificially.[8] ER 65 (Pl.Tr.Exh 5)("Should my sister Elizabeth become seriously ill, where there is no hope of recovery, I do not want unusual efforts to prolong life. I want for her what I want for myself, to be made comfortable and free from pain."); 66 (Pl.Tr.Exh 6)(I spoke with sister - she does not want CPR or aggressive management for her sister."), 68 (Pl.Tr.Exh

[8] SDC's own policy concerning end of life decisions states that when a patient is unable to provide informed consent, the wishes of involved family members are to be given "primary" consideration. ER 169 (TT 107:8-22).

8)(Discussed with Elizabeth's sister. She states she wants DNR."), 69 (Pl.Tr.Exh 9)("Sister Jeannie called both this AM and yesterday morning to discuss Elizabeth's condition, if we are keeping her free of pain, how responsive she is, etc. She was assured we are doing all we could to keep Elizabeth comfortable.").

The patient died nine days later of complications from her renal failure. ER 79 (Pl.Tr.Exh.24).

V. SUMMARY OF ARGUMENT

As a result of Dr. Van Pena's insistence upon documenting and exposing the gross negligence and abuse to which patients at SDC were being subjected:

1. SDC was fined $40,000.00 for a single incident of patient abuse,

2. SDC lost over $35 million dollars in federal funding for failing to investigate and remedy patient abuse, and

3. the California Legislature held public hearings concerning patient abuse at state regional developmental centers and passed a statute requiring SDC and all DDS developmental centers to report any serious patient injuries or deaths to local law enforcement agencies to be investigated by those agencies.

When Pena finally got his day in Court, however, the jury was prevented from learning about these facts. The jury was prevented from learning these facts

by the District Court's summary judgment, *in limine*, and evidentiary rulings. In addition, the District Court prevented Pena from presenting evidence to the jury of the following:

1. Just three weeks prior to being put on the administrative leave, which culminated in his termination, Pena presented Judith Bjorndal, the SDC Medical Director, with a memorandum putting her on notice of a serious act of medical malpractice that resulted in a patient suffering a seizure that left her in a coma until the day she died.

2. Just one week before Bjorndal ordered Pena to stop taking photographs of patients, DHS, the state agency responsible for licensing and monitoring SDC's activities, investigated a formal complaint filed by Pena that photographs were being removed from the patients' medical records.[9] DHS notified SDC that its investigation substantiated the complaint and cited SDC for violating its regulations.[10]

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[9] Pena had taken the photographs and put the photographs in the patients' medical records so the potential patient abuse would be documented and could be properly investigated.

[10] Within a week of SDC being cited by the Department of Health, Bjorndal was informed that Pena had been taking photographs of patients and putting those photographs in the patients' records. That same day, she instructed Pena to stop taking such photographs, then later cited this instruction as part of the basis for firing Pena.

3. Chief Edward Contreras, the SDC Police Chief, testified in his deposition, and would have testified at trial, that Timothy Meeker, SDC's Executive Director who hired Bjorndal and was her immediate supervisor, instructed Chief Contreras to "dig up dirt" that Meeker could use to fire Pena, after SDC's Clinical Director Patty Rees, Rees told Meeker and Contreras that Pena had to be fired because his allegations exposed SDC to multiple lawsuits.

4. The *Sonoma Index Tribune,* the local newspaper *to which Bjorndal subscribed,* published a series of articles and editorials about patient abuse and suspicious injuries and deaths at SDC. In those articles, the newspaper reported the $40,000.00 fine, the loss of over $35 million dollars in federal funding, the fact that the California Legislature held public hearings about patient abuse at SDC and the statute it passed, and quoted Bjorndal concerning the death of a patient that was being investigated.[11]

In addition, the District Court refused to give proper and necessary jury instructions requested by Pena, jury instructions that were critical to the jury's understanding of the law to be applied in this case. Pena requested an instruction

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[11] Based upon the District Court's *in limine* rulings, these news articles were excluded solely based upon Bjorndal's testimony that she "did not recall" reading these articles, despite the fact that she subscribed to the newspaper, published her father's obituary in that paper, personally knew the editor, and was interviewed and quoted in an article the suspicious death of a patient.

based upon the Probate Code provision that provides that a physician is not required to perform procedures that would provide no benefit to a patient, even if the patient requests the procedure – a critical issue in this case because one of the pretexts asserted for Pena's termination was that he refused to perform CPR on a patient for whom every doctor involved, including Bjorndal, testified CPR would provide no medical benefit and could cause the patient unnecessary pain, broken ribs and damage to her internal organs.

Moreover, on three separate occasions, the jury sent the Court questions, indicating that the jury instructions that they had been given, concerning what Pena had to prove, were confusing and requesting clarification. Although the Court admitted that the clarifying instruction that Pena proposed, based upon this Court's decision in *Colzalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003), was legally correct, she refused to give that clarifying instruction.

The District Court's summary judgment, *in limine*, and evidentiary rulings, as well as her refusal to give necessary and proper jury instructions, denied Pena a fair trial. Accordingly, Pena asks this Court to reverse the final judgment in this case and to remand this case to the District Court with instructions to give Pena a new trial.

VI. ARGUMENT

A. SUMMARY JUDGMENT RULINGS.

1. Standard of Review.

An order granting summary judgment is reviewed *de novo* "drawing all reasonable inferences supported by the evidence in favor of the non-moving party." *Brodheim v. Cry*, 584 F.3d 1262, 1267 (9th Cir. 2009)*; Bodett v. Coxcom, Inc.* 366 F.3d 736,742 (9th Cir. 2004); *Villarimo v. Aloha Island Air, Inc.* 281 F3d. 1054, 1061 (9th Cir. 2002). As this Court explained in *Ceballos v. Garcetti* 361 F.3d 1168, 1171 (9th Cir. 2004), *rev'd on other grounds*, "disputed facts must be resolved in [the non-moving party]'s favor and all inferences that may be drawn must be drawn in his favor."

2. Pena's February 21st Memo Is Speech Protected by the First Amendment.[12]

Citing *Garcetti v. Ceballos,* 126 S.Ct. 1951 (2006), the District Court held that Pena's February 21, 2001 memorandum to Bjorndal was not protected by the First Amendment. However, the District Court fundamentally misconstrued

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[12] As discussed above, Pena submitted this memorandum just three weeks before Bjorndal put him on the administrative leave that ultimately led to his termination. By granting summary judgment and excluding all testimony concerning this memorandum, the Court denied Pena the opportunity to prove retaliation in one of three ways outlined in *Colzalter, supra,* 320 F.3d at 377("proximity in time").

Ceballos in reaching that conclusion. Pena's February 21st memorandum is entitled to First Amendment protection because he was not required to submit that memorandum to Bjorndal as part of his job duties. Instead, he did so as a concerned citizen who was trying to bring to light the abuse and gross negligence to which the patients at SDC were being subjected, patients who could not speak for themselves.

In *Ceballos*, the Supreme Court held that the disposition memorandum written by Richard Ceballos, a Los Angeles County Deputy District Attorney, was not entitled to First Amendment protection, because Ceballos was required to write that memorandum as part of his job duties as the "calendar deputy." *Id,* 126 S.Ct. at 1960. ("Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do.") As the calendar deputy, it was Ceballos's job to prepare the disposition memo *in every case* providing his recommendation whether or not the particular case should be prosecuted. Therefore, his memorandum was written pursuant to his job duties and not as a concerned citizen.

Unlike the disposition memo in *Ceballos*, Pena was not required to submit his February 21st memorandum to Bjorndal as part of his job. ER 251 (Pena Decl. ¶ 12), 145 (TT 910:8-19), 146 (TT 911:25-912:5), 157-161 (TT 268:14-272:18).

This was something he *chose* to do because SDC's had repeatedly failed to investigate incidents of patient abuse that Pena had reported through SDC's "incident reporting" system. ER 251 (Pena Decl. ¶ 12). Pena drafted the February 21st memorandum and submitted it directly to Bjorndal, because as a citizen and a member of the medical profession he felt compelled to step outside the normal "reporting chain," which had proved to be totally ineffective in the past. ER 251 (Pena Decl. ¶ 12).

Bjorndal argued in her summary judgment motion that Pena was required to report any incident of suspected patient abuse, and, therefore, Pena's February 21st memorandum was not protected by the First Amendment. However, in *Ceballos*, the Supreme Court expressly rejected "the suggestion that employers can restrict employee rights by creating excessively broad job descriptions." *Ceballos,* 126 S.Ct. at 1961, *see also* 126 S.Ct. at 1968 (Souter dissent). While at the summary judgment stage Bjorndal convinced the Court to adopt an "excessively broad" description of Pena's job duties in order to deny his attempts to expose patient abuse First Amendment protection, at trial Bjordal admitted that Pena was not required to submit this memorandum to her as part of his job. ER 145 (TT 910:8-19), 146 (TT 911:25-912:5).

What Bjorndal failed to inform the Court in her summary judgment motion is that SDC had had a written policy that required that all incidents of patient abuse "must be reported through the Incident Reporting (IR) System process for investigation by SDC police and Special Investigator(s)." DefsTr.Exh112. As Meeker, SDC's Executive Director and the author of this policy, explained, once an employee files an incident report, the employee has satisfied his duty to report patient abuse – the employee was not required to follow up with the SDC police department, the DDS special investigator's office, or the employee's supervisor, as Pena did. Finally, he testified that if an employee took any steps to expose patient abuse beyond filing a special incident report, the employee was going beyond what was required for their own personal, ethical, professional or political reasons. ER 157-61 (TT 268:14-272:18).

Pena testified that throughout the time that he was a physician at SDC he filled out the "special incident forms" whenever he suspected patient abuse. ER 215 (Pena Depo. 181:5-10). However, on February 21, 2001, he went beyond the scope of his official duties to bring to light SDC's failure to investigate and remedy patient abuse after his early reports were not investigated and remedial action was not taken. Pena contacted Bjorndal directly with his concerns about this patient and the fact that she had been given the wrong medications that put her

in a coma. By doing so, Pena went beyond what was required by his job and pressed these issues as a concerned citizen and member of the medical community, completely separate and apart from the reports he was required to make pursuant to his duties as an employee of SDC. ER 251 (Pena Decl. ¶. 12) 145 (TT 910:8-19) 146 (911:25-912:5), 157-6 (TT 268:14-272:18). Accordingly, his February 21st memo to Bjorndal is entitled to First Amendment protection.

To deny Pena's February 21st memorandum to Bjorndal First Amendment protection would be to deny, not only Pena's right to speak out about matters of public importance, but would also deny the public, and the extremely vulnerable patients at SDC, the benefit of his view of what was happening within SDC. *Ceballos, supra,* 547 U.S. 419-20 (Government employees are "the members of a community most likely to have informed and definite opinions" about the operation of public agencies.); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 572 (1968), *San Diego v. Roe*, 543 U.S. 77, 82, (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it"); *United States v. Treasury Employees*, 513 U.S. 454, 470 (1995) ("The large-scale

disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

Pena's February 21st memorandum is entitled to First Amendment protection because it went beyond what he was required to do "pursuant to his official duties" as an employee of SDC. It is entitled to First Amendment protection because he prepared and submitted the memo as a concerned citizen trying to bring to light SDC's failure to prevent, investigate and remedy patient abuse and neglect. *Ceballos,* 126 S.Ct. 1960. The District Court denied Pena a fair trial by granting summary judgment of this claim and excluding all evidence of Pena's February 21st memorandum.[13]

3. Pena's Complaint to the California Department of Health Services Was Protected Activity.

By granting summary judgment and excluding evidence concerning Pena's DHS complaint, the Court denied Pena the opportunity to establish that his termination was in retaliation for his protected activities, i.e. by presenting evidence that Bjorndal had expressed opposition to his documenting patient abuse with photographs. *Colzalter, supra,* 320 F.3d at 377. As discussed above, Pena

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[13] *See* ER (TT 981:1-24) for Pena's offer of proof preserving this evidentiary issue for appeal.

made a formal complaint to DHS, the state agency responsible for licensing and monitoring SDC. *See* ER 250 (Pena Decl., ¶ 8). The essence of Pena's complaint to DHS was that SDC was attempting to cover-up patient abuse and neglect by removing from patient records photographs taken of the suspicious patient injuries. ER 250 (Pena Decl., ¶8). On October 18, 2000, the DHS issued its report in which it found that Pena's complaint was substantiated and cited SDC for violating DHS regulations. ER 250 (Pena Decl., ¶ 9), 263 (Pena Decl., Exh. 4).

The District Court granted summary judgment of this claim on the ground that Pena allegedly failed to present evidence that Bjorndal knew about his complaint to the DHS. ER (DE#182). However, Pena presented circumstantial evidence that created a genuine issue of material fact concerning whether or not Bjorndal was aware of Pena's complaint to DHS, despite her testimony that she did not recall ever being told about it. For instance, Bjorndal admitted in her deposition that the fact that Pena was the one taking photographs of patients came up as a "big issue" in an Executive Committee meeting. ER 231-32 (Bjorndal Depo. 57:17-19, 58:21-24), 185 (TT 184:15-20). Bjorndal attended Executive Team meetings every morning with Timothy Meeker, SDC's Executive Director, in which the "hot issues of the day were discussed." ER 241 (Meeker Depo. 131:17-25), 164 (TT 279:8-19).

As a result, she met with Pena on October 25, 2000, ER 185 (TT 184:21-24), and instructed Pena to stop taking photographs of patient injuries. ER 250-51 (Pena Decl.¶ 10 & 11), 218 (Pena Depo. 508:4-7). Bjorndal confirmed this meeting the same day in her October 25, 2000 memo to Pena. ER 263 (Pena Decl. Exh. 4). This was just one week after DHS issued the results of its investigation of Pena's complaint that the photographs he had taken of patient injuries were being taken out of patient records. ER 250 (Pena Decl.¶ 9), 263 (Pena Decl. Exh. 4).

Based upon this evidence, a jury could reasonably conclude that Bjorndal was aware of the DHS investigation and conclusions concerning Pena's DHS complaint that photographs of patient injuries were being illegally removed from patient records. Moreover, a jury could reasonably conclude based upon this evidence that Bjorndal told Pena to stop taking photographs to prevent him from continuing to document patient abuse. The District Court should not have granted summary judgment of this claim, nor excluded evidence of Pena's DHS complaint and the DHS conclusion that his complaint was substantiated.[14]

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[14] *See* ER 162-63 (TT 277:24-278:14 for an example of the Court's exclusion of this evidence and 135 (TT 980:13:25) for Pena's offer of proof preserving this evidentiary issue for appeal.

B. EVIDENTIARY RULINGS.

1. Standard of Review.

A district court's rulings on the admissibility of evidence is reviewed for abuse of discretion. *Ortiz v. Bank of America Nat'l Trust & Savings Assoc.*, 852 F.3d 383, 389 (9th Cir. 1987); *Boyd v. City and County of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009); *Enquist v. Oregon Dep't of Agriculture*, 478 F.3d 985, 1008 (9th Cir. 2007). However, when the district court fails to make explicit findings regarding the reasons for its evidentiary rulings, the district court ruling is reviewed *de novo*. *Enquist*, 478 F.3d at 1008-1009.

2. The Exclusion of Contreras's Testimony.[15]

Chief Contreras testified in his deposition, and would have testified at trial, that SDC Executive Director, Timothy Meeker, instructed Chief Contreras to "dig up dirt" that Meeker could use to fire Pena. ER 291 (Contreras depo. 26:2-25). This occurred in a meeting in which Meeker and were advised by SDC Clinical Director, Patty Rees, that Pena had to be fired because he was making allegations that were dangerous to the facility and could expose the facility to multiple lawsuits. ER 292 (Contreras depo. 34:11-24).

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[15] *See* ER134 (TT 979:6-20), for Pena's offer of proof preserving this evidentiary issue for appeal.

As discussed above, on October 18, 2000, DHS cited SDC concerning the removal of photographs from patients' medical records. ER 250 (Pena Decl. ¶9), 263 (Pena Decl. Exh. 4). Meeker admitted at trial that in response to this "Licensing – Correction," he issued a directive in October, 2000, to all Program Managers concerning the removal of photographs from patient records. ER162 (TT 277:11-23).

Also, as discussed above, Bjorndal attended "Executive Team Meetings" every morning at 8:15 a.m. with Meeker, in which the "hot issues of the day" were discussed. ER 241 (Meeker Depo.131:17-25), 164 (TT 279:8-19). Bjorndal testified, in her deposition and at trial, that the fact that Pena was the one taking photographs of patient came up as "a big issue" during one of these meetings with Meeker. ER 185 (TT 184:15-20). As a result, Bjorndal met with Pena, ER 185 (TT 184:21-24), and told him to stop taking photographs of patient injuries. ER 250-51 (Pena Decl.¶ 10 & 11), 188-90 (TT 203:24-205:4), 155 (TT 539:3-11).

In light of the confluence of events in October, 2000, as well as Meeker's role therein, Chief Contreras's testimony concerning the earlier conversation between Meeker and Rees and Meeker's order for Contreras to "dig up dirt" that Meeker could use to fire Pena was relevant to a material issue in this case and should not have been excluded. Fed. R. Evid. 401 ("'Relevant evidence' means

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Fed. R. Evid. 402 (all relevant evidence is generally admissible). Contreras's testimony was circumstantial evidence which the jury should have been allowed to consider in determining whether it was more likely than not that Meeker would have warned Bjorndal about Pena's protected activities and encouraged her to order Pena to stop taking photographs of patient injuries in response to the DHS citation. Chief Contreras's testimony provides a critical piece evidence concerning Bjorndal's motive for telling Pena to stop taking photographs of patients and, eventually, for firing him after he continued to document and expose problems at SDC.

3. Exclusion of Testimony Concerning the Content of Articles from the *Sonoma Index Tribune*.[16]

During the summer of 2000, when Bjorndal was being recruited to become SDC's Medical Director, through the time she fired Pena, the *Sonoma Index Tribune* ran a series of articles and editorials about SDC's failure to prevent and investigate patient abuse. ER 94.1-94.33. These articles and editorials publicized events that flowed from Pena's protected activities and provide the context within

[16] *See* ER 134-35 (TT 979:21-980:12) for Pena's offer of proof preserving this evidentiary issue for appeal.

which Bjorndal retaliated against Pena aas a result of his protected activities. Without this circumstantial evidence the jury was left to evaluate Pena's claims in a vacuum.

The evidentiary standard that the Court set during the pretrial conference was that Pena had to establish that Bjorndal had read a document before Pena could introduce to the jury what was in that document. ER198-99 (10/29/09 transcript 23:3-23 & 24:6-27:2, concerning medical reports). The Court then applied this same standard during the trial to news articles, excluding questions and testimony concerning the news articles unless the witness admitted reading the articles. ER 173 (TT 159:15-20), 175 (TT 161:23-24), 176 (TT 162:8-9), 183 (TT 174:12-3), 184 (TT 175:9-10). Given the Court's repeated comments to the effect that "if she hasn't seen them, we aren't going to go into it," Bjorndal repeatedly hid behind a convenient lack of memory. ER175 (TT 161:14), 176 (TT 162:25), 177(TT 163:4-5, 10, 22), 178 (TT 164:4, 14, 20, 21-25), 179 (TT 165:1-4), 180 (TT 166:5-9, 15-19), 182 (TT 168:4-9), 183(TT 169:22-23), 183(TT 174:16-21). In effect, these news articles were excluded solely based upon Bjorndal's testimony that she "did not recall" reading these articles, despite the fact that she lived in Sonoma for thirty years, subscribed to the *Sonoma Index Tribune* which was her local newspaper, published her father's obituary in that paper, personally

knew the editor, and was interviewed and quoted in an article about the suspicious death of a patient. ER 172-73 (TT 158:18-159:7), 142-45 (TT 908:19-910:6), 94.31 (Tribune 7\13\01 article). These admissions by Bjorndal were sufficient evidence from which the jury should have been allowed to decide whether or not Bjorndal's convenient lack of recall was credible. Moreover, even if it were credible that she could not remember these articles and the events they described nine years later, they should not have been excluded on that basis. The standard that the Court should have applied was whether or not it was believable that she would not have read them and been familiar with the events they described at the time she fired Pena. By excluding evidence from which the jury could have concluded that Bjorndal was aware of the licensing, funding and public relations problems that SDC was experiencing as a result of Pena's reports of patient abuse, the Court forced the jury to decide Pena's retaliation claim in a vacuum. The exclusion of this evidence denied Pena a fair trial.

C. JURY INSTRUCTIONS.

1. Standard of Review.

A district court's formulation of civil jury instructions is reviewed for abuse of discretion. *Fikes v. Cleghorn*, 47 F.3d 1011, 1013 (9th Cir. 1995). Where, however, the jury instructions are an incorrect statement of the law, they are

reviewed *de novo*. *Clem v. Lomelli*, 566 F.3d 1177, 1180 (9th Cir. 2009). Jury instructions must correctly state the law, fairly and adequately cover the issues presented, and must not be misleading. *Clem*, 566 F.3d at 1181; *Fikes*, 47 F.3d at 1013. Each party is entitled to an instruction on his or her theory of the case if the requested instruction is supported by law and has foundation in the evidence. *Clem*, 566 F.3d at 1181. A district court commits error when it rejects proposed jury instructions that are properly supported by law and evidence. *Clem*, 566 F.3d at 1181. Prejudicial error results when the jury instructions, taken as a whole, do not fairly and correctly cover the applicable law. *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001). The same standard of review applies to supplemental jury instructions given in response to a jury's question. *United States v. Castillo*, 866 F.2d 1071, 1085 (9th Cir. 1987).

2. The Court's Refusal to Give the Probate Code Instruction.

At Bjorndal's request, the Court included in her final instructions the following statement: "Developmentally disabled persons residing in a state hospital have the right to give or withhold consent for treatment and procedures, unless a judicial order or other law provides for another person to make these decisions for the patient." ER DE# 259 (8:18-21). In turn, Pena requested the following instruction: "With regard to a person's end of life health care decisions,

a doctor is not required or authorized to provide health care contrary to generally accepted health care standards." ER138 (DE#255). This language was taken directly from the relevant state statute Cal. Prob. Code §4564. This instruction was necessary to balance the instruction that the Court gave concerning a patient's right to give or withhold consent. This instruction was necessary to put the jury on notice of a doctor's countervailing right to refuse to perform a procedure, even if a patient requested the procedure, where the procedure would not provide the patient any medical benefit, but could cause the patient harm.[17] The Court refused to give the instruction requested by Pena. ER 131-33 (TT 973:25-975:24).

Two of the reasons Bjorndal asserted for Pena's termination was that he allegedly refused to (1) rescind his DNR order and (2) do CPR on Elizabeth, because CPR would provide her no medical benefit and only cause her harm. ER 194-95 (TT 243:8-244:14). Bjorndal reiterated these reasons for Pena's termination in her report to the National Practitioner's Data Bank. ER 89 (Pl.Tr.Exh#46)("failed to provide medically reasonable and/or necessary items or services."), 93 (Pl.Tr.Exh#47))("refused to rescind his DNR the order and refused

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[17] *See also* Cal. Bus. & Prof. Code § 2056; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32 (a doctor's advocacy for medically appropriate care for a patient is not conduct taken "pursuant to his official duties" for which an employer may discipline the doctor).

to participate in resuscitative efforts."). Bjorndal admitted that where ever "resuscitative efforts" or "medically reasonable and/or necessary items or services" were listed concerning Pena, she was referring to CPR. ER 195 (TT 244:5-13), 168 (TT 401:2-16). In the face of these accusations, and the Court's statement about a patient's right to give or withhold consent, Pena was entitled to an instruction concerning his right to refuse to perform a procedure contrary to the generally accepted standard that a doctor should not do a procedure that will provide the patient no medical benefit and only cause the patient harm.[18] The Court's failure to give this instruction denied Pena a fair trial.

3. The Court's Refusal to Give a Clarifying Instruction Based upon *Colzalter*.

In *Colzalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003), this Court reiterated the three ways a plaintiff can show that retaliation was a substantial or motivating factor behind a defendant's adverse employment action. *Id.* at 966, citing *Keyser v. Sacramento City Unified School District,* 265 F.3d 741 (9th Cir.2001).[19] The third way a plaintiff can establish retaliation is by introducing

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[18] To do so would violate the primary Hippocratic Oath ("Do no harm").

[19] As discussed above, the Court denied Pena the opportunity to rely on the first two methods by granting summary judgment concerning Pena's February 21, 2001 memorandum to Bjorndal (proximity) and Pena's DHS complaint (expressed opposition to protected activity).

evidence that "his employer's proffered explanations for the adverse action were false and pre-textual." *Colzalter, supra,* 320 F.3d at 377; *Keyser, supra,* 265 F.3d at 752. Moreover, as this Court went on to explain, a "reasonable fact-finder could also find that a pre-textual explanation . . . cast doubt upon other explanations that, standing alone, might appear to be true". *Colzalter, supra,* 320 F.3d at 978. In light of the Court's exclusion of evidence of Pena's February 21, 2001 memorandum and his DHS complaint, Pena was forced to rely entirely on this third method of establishing retaliation.[20]

The first question the jury sent to the Court while in deliberations, was "If even one of reason in the adverse action for firing Dr. Pena has merit, does that nullify Pena's full argument, meaning in order to find for the Plaintiff, is it necessary that every reason cited in the adverse action terminating Pena lacks merit?" ER 139 (11\24\09 jury note), 126 (TT 1148:15-20). In response to this question, Pena asked the Court to give the jury any one of three alternate answers, each based upon *Colzalter, supra*. ER 127-29 (DE#257), 123-26 (TT 1144:4-1147:25). The Court refused to give any of these requested instructions, even though she acknowledged that they were correct. ER 124 (TT 1145:23-25).

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[20] Pena explained at the pretrial conference, and in his opening and closing statements that this would be how he would prove his case.

Instead, the Court responded to the jury's question in a manner that totally prejudiced Pena's case by telling them their question "is not one of the questions you have been asked to answer." ER 126 (TT 1148:21-23). By answering the question in this fashion, over Pena's objection, ER 125 (TT 1147:5-25), the Court effectively told them to ignore the argument that Pena had advanced throughout the case based upon the evidence that the reasons Bjorndal gave for Pena's termination were false and merely a pretext to justify his termination.

Pena again requested that the Court give the jury a clarifying instruction based upon *Colzalter, supra,* when the jury asked a second question that arguably related to the reasons that Bjorndal had asserted for Pena's termination. ER 130 (Jury's 12/3/09, 9 a.m., questions). ER 103 (TT 1176:14-23). The Court refused to do so, over Pena's objection. ER 105 (TT 1178:2-14)(Pena's objection), 100 (the Court's written response).

Finally the jury informed the Court that her instruction on page 7 "seem vague". ER 102 (Jury's 12/3/09, 11:20 a.m. question). As Pena pointed out to the Court, the instruction on page 7 dealt with whether retaliation was "substantial or motivating factor" for Pena's termination, the very issue dealt with in *Colzalter, supra,* 320 F.3d at 377. Accordingly, Pena once again requested that the Court give a clarifying instruction based upon *Colzalter, supra,* but the Court refused.

ER 106-08 (TT 1183:11-1185:16). Instead, the Court abdicated its obligation to provide a proper instruction telling the jury they would have to rewrite their question, because she did not what they were referring to when they said her instructions on page 7 were vague. ER108.1 (TT 1189:2-15). They jury gave up and did not rephrase their question for the Court.

By refusing to give a proper and necessary clarifying instruction in light of the jury's repeated indication that they needed clarification, the Court denied Pena a fair trial.

VII. CONCLUSION.

For all the foregoing reasons, Appellant, Van A. Pena respectfully requests that the judgment appealed from be reversed, that the District Court's grant of partial summary judgment be reversed, and that this matter be remanded for a new trial.

RESPECTFULLY SUBMITTED,

June 7, 2010

/s/ Lawrence J. King
Lawrence J. King
Attorney for Plaintiff-Appellee
Van A. Pena, Ph.D., M.D.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 8,118 words.

RESPECTFULLY SUBMITTED,

June 7, 2010

/s/ Lawrence J. King
Lawrence J. King
Attorney for Plaintiff-Appellee
Van A. Pena, Ph.D., M.D.

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore

LAW OFFICE of
LAWRENCE J. KING

May 18, 2010

By Facsimile to 510-622-2270

Terry Senne, Esq.
Deputy Attorney General
Department of Justice
1515 Clay Street, Suite 2000
Oakland, CA 94612-1413

Re: *Pena v. Meeker, et al.* (Bjorndal)

Dear Mr. Senne:

This is to confirm that I have been granted a two week extension within which to file Appellant's Opening Brief. The new briefing schedule issued by the Ninth Circuit is as follows:

1. Appellant's Opening Brief is due June 7, 2010;

2. Appellee's Answering Brief is due July 7, 2010;

3. Appellant's optional Reply Brief is due fourteen thereafter.

If you have any questions, please feel free to give me a call.

Sincerely,

Lawrence J. King

p.s. Pursuant to the Clerk's instructions, this letter will be attached to Appellant's Opening Brief.

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