NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SEE CONCURRING OPINION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED
Court of Appeal First App Dist
MAY - 5 1999
RON D. BARROW, CLERK
By ______ DEPUTY

DON ANDERSEN et al.,

Plaintiffs and Respondents,

v.

SAFEWAY, INC.,

Defendant and Appellant.

A080258

(Alameda County
Super. Ct. No. 755272-4)

The chief question in this case is whether an at-will employee subject to termination without cause can maintain a cause of action for promissory fraud against his employer on the basis of a broken promise not to relocate the employee to another worksite.

After a 10-day trial, the jury returned a special verdict finding appellant, Safeway, Inc., liable for promissory fraud and awarded respondent Don Andersen $429,137 in compensatory damages and $100,000 in punitive damages. Denying a pretrial motion for summary judgment[1] and two motions for nonsuit during trial, the trial court also denied posttrial motions for new trial and judgment notwithstanding the verdict. This timely appeal followed.

---

1 The summary judgment motion was denied because the court found triable issues of fact with respect to the tenth cause of action for intentional infliction of emotional distress. As to all other causes of action, however, the trial court granted summary adjudication in favor of Safeway.

RECEIVED
MAY 11 1999
By ______

FACTS

Respondent, Donald Andersen, was born in the North Coast area[2] to which he had unusually strong ties. His family immigrated to the area around the turn of the century and, except for military service in Viet Nam, he never left. Because of this family history, his deep love for the region, and for other personal and financial reasons, Andersen vowed he would never leave.

Andersen became a full-time stock clerk for Safeway in 1978 and was promoted to head clerk after just a few months on the job. Due to his outstanding performance, the store manager inquired whether he was interested in a managerial position. Explaining that he knew managers could be relocated and that he would never be willing to leave the North Coast, Andersen indicated he was willing to remain in a staff position.

Five years later Andersen was elevated to the position of second assistant manager of the Eureka store and three years after that was made first assistant manager of that store. During this period, and indeed at all subsequent times, Andersen's superiors consistently gave him superlative performance assessments. As a result of his exceptional performance and experience, Andersen was in 1987 made acting manager of the Safeway store in Arcata. Because of his successful efforts to "clean up" the store and improve employee morale, Jim Bible, who was then Safeway's retail operations manager for the North Coast region, suggested that Andersen attend the company's Retail Career Development Center ("RCDC"), which it used to prepare the ablest staff employees for management positions. When Andersen told Bible he had no interest in a managerial position because that might require him to relocate, Bible said "we can take care of that. You should go to RCDC." As a result of this conversation, Andersen began to question his assumption that a managerial position would necessarily expose him to relocation and felt "maybe there is a chance I can move up further."

---

2 Defined by respondent as the area around Humboldt Bay and including the towns of Ferndale, Fortuna, McKinleyville, Eureka and Arcata.

In July of 1987, after he had become assistant manager of the Fortuna store, Safeway invited Andersen to participate in the RCDC program. The invitation was canceled, however, when he reminded a representative of the program of his unwillingness to relocate. Later, Andersen told Rich Robinson, then Safeway's district manager: "I want to be perfectly clear I'm not moving, not going to relocate. . . . My home and my family is [*sic*] more important to me than the job. I don't want to be a store manager if it involves moving." Andersen told Robinson he didn't want to be "hassled" by what he described as Safeway's "bait and switch thing." Robinson replied that he would discuss the matter with his superiors. Andersen testified that Robinson got back to him at some time in 1988. "He said he had discussed my situation with the division manager [George Unti] and the retail operations manager [Jim Bible] and that what they had decided was that I couldn't go to RCDC if I was not willing to relocate; that that was a company policy, but they felt I would be an excellent store manager; so what they would do was next time there was an opening at one of the stores in that area they would put me in the store as an acting manager and then send me to RCDC, if I passed I would be made a permanent manager of that store." When Andersen reminded Robinson of his unwillingness to relocate, Robinson said that "was the way he had explained the situation to his superiors and that this was the compromise that they had come up with. . . . I would not be required to relocate."

Andersen believed Robinson but did not insist that the understanding be put in writing, explaining that "I am a pretty trusting person and up until the series of events that led to me being here today, I have never been sorry for being a trusting person."

Andersen testified that he would never have accepted a store manager position if it meant he might have to accept transfer out of the area and made this "completely clear" to Robinson, Bible and other superiors on repeated occasions, "because I didn't want to go back and forth, didn't want to be told one thing and have something else happen," as had earlier occurred. Andersen's recollection of Robinson's representation that he would not be required to relocate was very clear, "because it was a very important thing and not just

in my life, but my family's lives, because I had already taken my wife out to dinner on two or three occasions to celebrate something that didn't happen. I didn't want to do that again. I wanted to know exactly where I stood."

Late in 1988 Robinson left his position as district manager and was replaced by Don Dalrymple. Later that year, the manager of the McKinleyville store stepped down and was replaced by Joe Baker. When Andersen, who was then assistant manager of the Fortuna store, learned of this he contacted Rich Robinson, who was then working for Safeway in the Bay Area, to ask what was going on. Robinson said "I don't know why they're not fulfilling their promise, why they're not doing what they said they would do." Andersen then went to Dalrymple and "explained everything that had gone on in the past. I explained the promise that had been made to me . . . that I would be given the next available store in that area and that if I took that store I would not be required to relocate and that after I took over that store I would be sent to RCDC training . . . and if I passed I would become a permanent store manager on the North Coast and I wouldn't have to relocate; and I explained to him my reasons. I told him about the financial reasons. I told him about my family. I told him everything. And I can remember it very well because [of] the financial thing, specifically, I think he understood very well. He said 'you mean your house payments are $220 a month?'" Dalrymple said that "'Safeway shouldn't continue to promise you things they're not going to fulfill or not going to do them.' He was very adamant about it. 'If we tell somebody something, we have to stand behind it. I will see that you go to RCDC.'"

Shortly after this conversation, Andersen was invited to participate in a RCDC session in the San Francisco Bay Area. In June 1989 he was made store manager of the Fortuna store after Joe Baker abruptly left that position.

Andersen's tenure as store manager was highly successful. In 1992 he was named one of the top 20 store managers in the California Division, which included approximately 250 stores. However, during this period Safeway experienced labor problems stemming from its efforts to reduce wages and benefits in order to compete

more effectively against nonunion stores. The dispute ended when, confronted with the posssibility Safeway would close all its stores in the area, employees accepted a 10 percent cut in pay and a 25 percent reduction in health and welfare benefits.

Rojon Hasker, who had replaced Dalrymple as district manager and was at that time Andersen's immediate superior, testified that Andersen was not involved in the labor dispute and remained highly regarded by employees, who gave him a much higher rating than those received by other store managers in the North Coast area. During this period Andersen also continued to receive exceptionally high ratings from his superiors, and was awarded periodic pay raises.

In August 1994, shortly after he received the highest evaluation given any of the 17 store managers in his area, Andersen was told by Hasker that he would have to relocate to a store in San Francisco, San Jose or Monterey. According to Andersen, Hasker "said that the decision had been made to replace all the North Coast store managers, that the North Coast was very important to Safeway because they had achieved these wage concessions and after the contentious labor negotiations they needed new blood to make that area as successful as possible."[3] Andersen responded with disbelief and anger. He reminded Hasker of Safeway's promise not to relocate him and explained that his opposition to relocation was at this point stronger than ever due to the facts that "my father passed away, my mother was in a rest home in Fortuna. My mother-in-law was 80 years old alive alone in Eureka, [and] had no other family around but us. My daughter had a little boy three or four years old my wife watched part of the time[,] [and there was] no other family anywhere else."

After listening to Andersen, Hasker handed him a written severance agreement. When Andersen asked if he could step down to an assistant manager or clerk's position Hasker said she could not allow that without approval of her superiors. After consulting

---

3 Actually, two North Coast store managers, Joe Perry and Steve Nordstrum, were not transferred, but Hasker admitted during her testimony that she failed to tell Andersen that Perry would not be transferred.

her superiors she told Andersen his only options were to transfer, take the severance or step down to a clerk's position, but that becoming an assistant manager "wasn't an option." According to Andersen, "It was pretty much a closed conversation. There was no what about this or that. It was, those are the choices."

A day or two later Andersen was told he had been assigned a specific store in Carmel Valley and that he would be allowed time to visit the store and investigate the housing market in that area. After visiting Carmel, Andersen concluded he could not afford to live there. He was given only a few days in which to make his decision.

At about this time, a news article in the *Eureka Times Standard* quoted a statement by Debra Lambert, Safeway's Director of Public Affairs, denying that the transfer of local Safeway store managers was related to the labor negotiations that ended in pay and benefit cuts. This upset Andersen, because the reason he had been given for the transfer "was that because of our close involvement with these recent labor negotiations it was felt they needed new blood to make the area as successful as they wanted." Safeway's public statement "basically contradicted the reason I was given by Rojon Hasker, the reason I was given for our removal." When he asked Hasker about the discrepancy she refused to provide any explanation. Andersen's distress increased when he learned that Joe Perry, the manager of the Fortuna store, was actually not being transferred, and that Hasker had mislead him about this.

Andersen left Safeway a few days later. As a result his income was reduced by half and he felt he would be unable to retire until age 65, rather than at 55, as would have been possible if he remained at Safeway.

Andersen's testimony regarding Safeway's promise not to relocate him was corroborated by Rich Robinson, who was then district manager. Robinson confirmed Andersen's repeated statements that he would never relocate and his unwillingness to accept promotion to a management position without a reliable assurance that this would not happen. Robinson testified that Andersen was highly regarded by many in the company who wanted him moved into a managerial position. This was specifically the

view of Jim Bible, retail operations manager, who told Robinson "that he had never seen the Arcata store look as good as it did and that Don did a good job and he would have an opportunity to be promoted." Andersen's superiors were all aware, however, of the reason Andersen would not accept promotion to management. Robinson also corroborated Andersen's testimony that he never initiated the idea of moving into management and that the idea was periodically proposed by the company and then withdrawn when, predictably, Andersen reiterated his well known unwillingness to risk the possibility of relocation. Robinson also stated that Andersen "could have said he would relocate and not relocate and go to RCDC, but he was emphatic that he would not relocate, so, I mean, he was right up front with it."

Robinson related a conversation with Bible in which the latter said that Andersen's unwillingness to relocate was not a real problem because "if Mr. Andersen became a store manager . . . he would not in the future be required to relocate outside of the Eureka area." Thus, according to Robinson, the solution was to exempt Andersen from the relocation requirement if he successfully completed the RCDC course and accepted a managerial position in the Eureka area. As district manager, Robinson was the person who told Andersen that if he did this he would not be required to relocate. On cross-examination Robinson testified he was authorized to make this representation by Bible, and that "there is no way I would say that on my own, absolutely not."

Jim Bible, who had been retired for many years, testified in behalf of Safeway. He said he could not remember authorizing Robinson to tell Andersen he would be considered for promotion to store manager in the North Coast area despite his unwillingness to relocate from that area. Bible was also unable to remember a conversation with any Safeway manager who said he or she had made a promise to Andersen that he would never be relocated if he agreed to become a store manager. Bible stated that willingness to relocate is a "normal requirement at Safeway of attending [RCDC]" and moving into a management position.

John Cartales, who had been employed by Safeway for 50 years, was senior vice president and division manager of Safeway at the time Andersen left the company, and it was he who made the decision to transfer Andersen and other North Coast store managers. The decision was made, he said, because the labor dispute had created tensions between most of the managers and their employees. Two of the six store managers in the area, who were in Crescent City and Fortuna, were not told to relocate because they had good relations with the employees in their respective stores. According to Cartales, however, "the resentment towards the new contract was leveled towards the four store managers in the area, and that was only common sense; they were the daily Safeway manager, the person that the employee could see. They were the ones the anger was directed towards because, obviously, they looked at the store manager as the man in charge, so that would be reason number one." Reason number two was that "those store managers had developed a long term relationship with the employees in the store, were supportive of the employees in the store, compassionate towards the employees in the store. Common sense would say it would be very difficult for them not to be somewhat supportive of their employees' position regarding the new contract." Cartales conceded that the explanation for the relocations given to the press by Debra Lambert in behalf of Safeway—that they were unrelated to the labor dispute—was erroneous. He also testified that, while employed with the company, he had never been told that Andersen claimed Safeway had promised him he would never have to relocate out of the North Coast area. Cartales also stated that at the time he made the decision to relocate the four North Coast store managers he did not know Andersen had received the best evaluation given any store manager in the district.

Bob Henry, called as a witness by Safeway, was its retail operations manager in the Northern California division between 1988 and 1993, when Rich Robinson and Don Dalrymple were district managers in the North Coast area. He knew Robinson and Dalrymple both felt Andersen had management potential but was unwilling to relocate, which was ordinarily a condition of employment at that level. Henry testified that at

some point he authorized Robinson or Dalrymple to tell Andersen he could attend RCDC without committing to relocation and that "he could be considered for promotion to store manager in the North Coast area without committing to relocate," and "that he also could become a store manager in the North Coast if there were a store opening out there." Henry stated that, although he could not remember specifically, he was sure he had discussed this with his superior at the time, George Unti, and as well Safeway's human resources personnel. However, Henry could not remember whether Safeway had promised Andersen that he would never in the future have to relocate in order to maintain his position as a North Coast store manager. He never made such a promise nor did he ever authorize Robinson or anyone else to tell Andersen that he would not be required to relocate in the future if he accepted a managerial position in the North Coast. Henry was himself transferred by Safeway to Denver in 1993, and was therefore not involved in the decision to order the 1994 relocations from the North Coast of Andersen and others.

Debra Lambert, who was Safeway's Public Affairs Director for Northern California in 1994, was called by the plaintiff and testified as an adverse witness. (Evid. Code, § 776.) She testified that when she gave a statement to the *Eureka Times Standard* that the relocation of the four Eureka area store managers had nothing to do with the labor dispute she knew the statement was untrue. The company made this statement "in order to protect the managers themselves, the reputations within the community, the fact they had been there a very long time. They were good store managers and we did not want to impact their privacy with respect to the situation." Even though Lambert told the press that the transfers were a "routine management change," she was not aware of any other occasion on which Safeway had ordered an involuntary transfer of a North Coast store manager.

The special verdict states the findings of the jury: that Safeway made a promise to Andersen as to a material matter; that at the time it made the promise Safeway did not intend to perform it; that the promise was made with an intent to defraud Andersen; that at the time he acted Andersen was not aware of Safeway's intention not to perform the

promise; that Andersen acted in reliance on the promise; that such reliance was justified; that reliance on the promise caused Andersen damage; and that the total amount of such damage was $429,137. The jury also specifically found "by clear and convincing evidence" that "there was fraud in the conduct on which [it] base[d] [its] finding of liability." Thereafter, the jury heard evidence (all introduced on stipulation) and after hearing the arguments of counsel and receiving instructions from the court, awarded punitive damages in the amount of $100,000.

DISCUSSION

Safeway advances five arguments on appeal. First, that promissory estoppel is an "untenable" theory of liability where, as here, the putative promisee is an at-will employee; two, that it was error to exclude evidence of Andersen's at-will status; three, that the evidence was insufficient to support the judgment in critical particulars; four, that the court applied an improper measure of damages; and, five, that punitive damages were improper.

Except for the contentions relating to the sufficiency of the evidence, Safeway's arguments present purely legal claims as to which we exercise independent review and are not bound by the trial court's determination. (*Hill* v. *City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.) The arguments that the evidence was insufficient as to certain matters are considered under the substantial evidence rule. The presumption being in favor of the judgment, we will not disturb the verdict of the jury or the findings of the trial court unless there is no substantial supporting evidence. We consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment. (9 Witkin, California Procedure (4th ed.) Appeal, § 359, and cases there cited.)

We address Safeway's five arguments in turn.

I.

An At-Will Employee Can Maintain a Cause of Action for Promissory Fraud Against an Employer

Safeway's chief claim, which as will be seen applies to many of the arguments it advances on this appeal, is that Andersen was erroneously allowed to present the jury an "untenable legal theory," because an employer cannot be liable for making unilateral changes in the conditions of work of an at-will employee. This claim is based on a series of cases which assertedly stand for the proposition that "'an employer's right to terminate an employee at will necessarily and logically includes what may be viewed as a lesser-included right to insist upon prospective changes in the terms of that employment as condition of continued employment.'" (*DiGiacinto* v. *Ameriko-Omserv Corp.* (1997) 59 Cal.App.4th 629, 636-637, quoting *Stieber* v. *Journal Pub. Co.* (1995) 120 N.M. 270, 901 P.2d 201, 204; accord, *Scott* v. *Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 464-465; *Camp* v. *Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 639-640; see also, *Shapiro* v. *Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467, 482, disapproved on other grounds in *Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d at 654, 688, 700, fn. 42.)

One of the problems with this argument is that the principle Safeway relies upon has only been applied in suits to enforce a contract of employment. Safeway cites no case applying this principle in a promissory fraud case or indeed in any tort action, and we are aware of none. For example, *DiGiacinto*, the main case Safeway discusses, involved a letter agreement between an employee and his employer providing for a wage rate of $23.97 per hour and also stating that "[l]ength of employment is not guaranteed and may be voluntarily terminated at any time by either party, with or without cause . . . ." The employer subsequently notified the employee that his wage was being reduced to $18 per hour. After continuing on the job for nearly a year, the employee sued to enforce the contractual provision for an hourly wage of $23.97. The trial court ruled for the plaintiff, finding that though he was an at-will employee and the defendant had good cause to

reduce his wages, the at-will contract did not contemplate the unilateral reduction of wages, only for termination. The Court of Appeal reversed, holding that under the law governing at-will employment, the employer's letter to the employee notifying him of the reduction of his wages constituted a notice of termination of the original contract and the offer of a new contract on different terms, and that staying on the job under those new terms for nearly a year before commencing suit, the employee accepted the new terms. Not only is *DiGiacinto* a contract, not a tort case, but it is factually distinguishable, as Andersen did not accept the change in the terms of his agreement by continuing to work for Safeway after he received notice.

Scott v. *Pacific Gas & Electric Co., supra*, 11 Cal.4th 454, is also clearly inapposite. There two employees of a public utility ran an outside consulting business. When it learned of this the utility suspended and demoted them. The employees sued, claiming breach of an implied contract not to demote without good cause. The trial court entered judgment for the plaintiffs on a jury verdict finding breach of such a contract and awarding substantial damages. Division Three of this court reversed on the grounds that courts should not recognize such agreements for reasons of law and policy. The Supreme Court reversed and directed reinstatement of the judgment of the trial court. Holding that courts may enforce implied-in-fact contracts not to demote without good cause, the Supreme Court found that the evidence supporting an implied contract not to demote was not merely substantial but compelling. The court also observed that the rule allowing a trier of fact to find than an implied contract existed between an employer and employee, limiting the former's right to arbitrarily discharge, also applies where an employee is disciplined, as by suspension or demotion, but not terminated. In the course of explaining this idea, the court stated that "[t]here is of course, a strong common law presumption that an employee may be demoted at will. Since it is presumed that an employee may be discharged at will (Lab. Code, § 2922), the at-will presumption would surely apply to lesser quantums of discipline as well." (*Id.*, at pp. 464-465.) Safeway emphasizes these two sentences without mention of the one that follows: "But the employer's right to

demote, like the right to discharge, is not absolute." (*Id.* at p. 465.) The court then goes on to illustrate some of the many exceptions to the presumption favoring the employer, ending with the statement that "[w]e perceive no reason . . . why the presumption that an employer has the right to demote an employee at will may not also be rebutted by evidence of a contractual agreement, express or implied, to limit the employer's power of demotion." (*Ibid.*) By the same token, there is no reason an employer's right to transfer at-will, which is no more absolute than the right to demote, may not also be rebutted by evidence of a promise not to do so.

Camp v. *Jeffer, Mangels, Butler & Marmaro, supra*, 35 Cal.App.4th 620, the third in the trilogy Safeway relies on, is no more helpful to its cause. Safeway relies on this case for the proposition that "at-will employees cannot justifiably rely on employer promises that extend for indefinite durations." In *Camp* a husband and wife, who had both been fired by a law firm, sued the firm, alleging breach of an implied-in-fact contract, breach of the covenant of good faith and fair dealing, wrongful termination in violation of public policy, and, with respect to the wife only, misrepresentation. The trial court granted summary adjudication in favor of the law firm on each claim and the Court of Appeal affirmed. The aspect of *Camp* that Safeway claims is relevant to the present case relates to the wife's misrepresentation claim. Mrs. Camp alleged that the firm falsely told her it would find her another acceptable position within the firm and that the firm had no intention of carrying out that promise. She further alleged that that the firm falsely stated at one point that no other positions were available. Mrs. Camp assertedly relied on these statements to her detriment by not seeking employment with a different employer. (*Id.*, at p. 639.) The Court of Appeal concluded that Mrs. Camp failed to establish justifiable reliance. "In essence, her misrepresentation claim asserts nothing more than that she interpreted the alleged misrepresentations as a promise of continued employment. However, a promise to find an employee another position does not create a justifiable expectation that the employee will be continuously employed. Such a promise still allows for the possibility—consistent with at-will status—that the employee will be

discharged with or without cause after the promise is made. . . . Because the alleged misrepresentations did not create a reasonable expectation of employment for any specific period, Mrs. Camp could not justifiably rely on those statements in deciding to forego seeking employment with another employer." (*Id.*, at p. 640.)

Unlike Mrs. Camp, Andersen does not rely simply on his interpretation of the promise not to relocate. Andersen's claim is not merely that Safeway promised to promote him to a managerial position without risk of transfer, which was corroborated by the Safeway official who made the representation, but that it actually placed him in such a position knowing he would not have accepted it unless that risk were eliminated. That act, which was in partial fulfillment of the alleged promise, was among the factors that justify Andersen's reliance on the promise not to order him to relocate in the future. The fact that Andersen remained an at-will employee, and therefore had to accept the risk that he might be terminated without cause at any time, does not mean he could not reasonably rely on a promise not to relocate. Apparently because his job performance had consistently been considered outstanding by Safeway, Andersen was willing to accept the risk of termination. He was, however, unwilling to accept the risk of relocation, which he considered a much more likely possibility if he accepted a management position. The evidence supports the jury's implied finding that he would not have accepted the management position in the absence of the promise not to relocate, and that such reliance on the promise not to relocate was reasonable in the circumstances.

Shapiro v. *Wells Fargo Realty Advisors, supra,* 152 Cal.App.3d 467, is not inconsistent with the finding of justifiable reliance in this case, as Safeway suggests. There a former officer of a real estate advisory firm sued his former employer for, among other things, breach of an implied-in-fact contract. A stock option agreement entered into by the parties expressly defined the employment relationship as at-will and expressly reserved the employer's right to discharge the employee at any time, with or without cause. The trial court sustained the employer's demurrer without leave to amend and the Court of Appeal affirmed. The Court of Appeal agreed that "'[t]he presumption that an

employment contract is intended to be terminable at will is subject, like any presumption, to contrary evidence. . . . [which] may take the form of an agreement, express or implied, that the employment will continue for some fixed period of time . . . .'" (*Id.*, at p. 481, quoting *Pugh* v. *See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 324-325.) However, the court also noted, there was an express contract defining the employment relationship as at-will, and "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results." (*Id.*, at p. 482.) We do not have such a conflict in the present case. Moreover, putting aside the fact that this is not a suit on a contract, as was *Shapiro*, but involves an element of deceit, a promise not to relocate an employee is not even logically inconsistent with at-will status. The fact that an at-will employee accepts the risk he or she will be terminated, even without cause, does not render it ipso facto unreasonable for that employee to rely upon a promise to eliminate the different risk of relocation, which can materialize only if there is no termination.

The four cases just described do not, as Safeway claims, "make a promissory fraud claim by an at-will employee untenable." The cited cases say nothing at all about the propriety of a fraud claim by an employee against an employer.

We agree with Andersen that this case is more like *Lazar* v. *Superior Court* (1996) 12 Cal.4th 631, which does involve a promissory fraud claim against an employer, than any of the cases Safeway relies upon. Lazar, who had been terminated from his management position, sued his former employer for various causes of action, including fraudulent inducement of an employment contract. He claimed that the employer induced him to relocate from New York to Los Angeles with his family, relinquish a secure job where he had worked all his life, based on verbal representations of continued employment, the company's strong financial position, and pay raises, all of which were false and which the employer's agents knew to be false when making them. Lazar further alleged that, after two years of exemplary performance, he was terminated and unable to find comparable employment. The trial court sustained the defendant's demurrer without

leave to amend as to all causes of action, except the breach of contract claim and the claim under Labor Code section 970 (false representations to induce relocation). The Court of Appeal issued a writ of mandate directing the superior court to vacate its order, insofar as it sustained the defendant's demurrers to causes of action for wrongful termination in violation of public policy, fraud and deceit, negligent misrepresentation, and intentional infliction of emotional distress, and to overrule the demurrers to those causes of action.

The Supreme Court affirmed, holding that Lazar adequately pled a cause of action for promissory fraud. The court explained that "'[p]romissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract. 'If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.' [Citations.] Recovery, however, may be limited by the rule against double recovery of tort and contract compensatory damages.' [Citation.]" (*Id.*, at p. 638.)

The misrepresentations alleged in *Lazar* were not made in the course of terminating the employee, but preceded and were separate from it. The Supreme Court held that an employer's misrepresentation to an employee that is not aimed at effecting termination, but is instead designed to induce the employee to alter detrimentally his or her position in some other respect, might form a basis for a valid fraud claim even in the context of a wrongful termination. The court declared that the action for "promissory fraud," an existing protection against improper termination, remains viable in the employment context. Use of this fraud theory is precluded, the court stated, only in

situations in which the employer's misrepresentation is indistinguishable from an ordinary constructive wrongful discharge. (*Id.*, at pp. 638-643.)

The *Lazar* court rejected the employer's legal contention that, because the employment relationship is "fundamentally contractual" (*Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d 654, 696; see also, *Hunter* v. *Up-Right, Inc.* (1993) 6 Cal.4th 1174), employees should be limited to contract damages for employment terminations. The court stated that the concern in *Foley*—not to create "potential tort recovery in every [discharge] case—does not weigh heavily here, where plaintiff alleges a traditional fraud cause of action." (*Lazar, supra*, at pp. 644-645.) "Our decision in *Foley* does not provide authority for exempting employers from ordinary fraud rules that apply to Californians generally. . . . Contrary to defendant's arguments, fraudulent inducement of contract—as the very phrase suggests—is not a context where the 'traditional separation of tort and contract law' [citations] obtains. To the contrary, this area of the law traditionally has involved both contract and tort principles and procedures. For example, it has long been the rule that where a contract is secured through fraudulent representations, the injured party may elect to affirm the contract and sue for fraud. [Citations.]" (12 Cal.4th at p. 645.) Emphasizing the strength of the evidence that Lazar's reliance on the employer's misrepresentations was both reasonable and detrimental, the court concluded that he "may proceed with his claim for fraud in the inducement of employment contract, properly seeking damages for 'all the detriment proximately caused thereby' (Civ. Code, § 3333), as well as appropriate exemplary damages (Civ. Code, § 3294)." (*Id.*, a p. 649.)

Safeway claims *Lazar* is completely irrelevant: "[B]ecause it did not deal with an at-will employment, *Lazar* did not address the illogic of permitting an at-will employee, who has no promise of a job at all, to sue on a purported promise that his job would perpetually be in a specific locale." Safeway misses the point of *Lazar* because of its unwillingness to acknowledge the significance of the distinction between fraud in the inducement of an employment contract and the breach of such a contract. The fact that

Lazar may have been an at-will employee (which is not at all clear from the opinion)[4] seems to us irrelevant to the validity of his fraud claim, which was based on misrepresentations and acts that occurred prior to employment and termination. If an employee is fraudulently induced to enter into an employment contract, *and suffers damages as a result*, we do not understand why it should matter whether the contract contemplated an at-will relationship. The fact that a plaintiff could have been terminated without cause certainly does not license the employer to injuriously defraud him.[5]

The misrepresentation alleged by Andersen—that if he left his job and accepted a management position he would be exempt from Safeway's transfer policy—is analogous to the misrepresentations made to induce Lazar to leave his position in New York and accept employment in Los Angeles. The fraud common to both situations is unrelated to the at-will nature of the new employment. Safeway is in effect asking us to hold that an employee cannot maintain a claim of promissory fraud relating to the inducement of a

---

4 The opinion's discussion of the law does not refer at all to whether Lazar was an at-will employee, apparently because it did not deem the issue material. The only language in the opinion relating to this issue is the court's recitation of Lazar's allegation that the defendant employer "secretly intended to treat [him] as if he were an 'at will' employee, subject to termination without cause," (*Lazar* v. *Superior Court, supra*, 12 Cal.4th at p. 636) which implies he did not regard himself as an at-will employee. It was undisputed, however, that Lazar did not have a written employment contract. And "Labor Code section 2922 establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination. This presumption may, however, be overcome by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on 'good cause.' [Citations.]" (*Foley* v. *Interactive Data Corp., surpa,* 47 Cal.3d 654, 677.) So far as appears from the opinion in *Lazar*, the trial court never made any finding as to whether under an implied contract, Lazar was not an at-will employee.

5 For this reason, we conclude that Andersen's ability to maintain his cause of action for promissory fraud is unimpaired by the fact that in 1990 he signed a "Non-Qualified Stock Option Agreement" with Safeway which, among other things, provided that "Nothing in this Agreement or in the [stock option] Plan shall confer upon the Employee any right to continue in the employ of the Company, a Parent Corporation or any Subsidiary or shall interfere with or restrict in any way the rights of the Company and its Subsidiaries, which are hereby expressly reserved, to discharge the Employee at any time for any reason whatsoever, with or without cause."

contract of employment if that contract contemplates an at-will employment relationship. Such a holding would conflict not only with *Lazar*, but with the recent opinion of the Ninth Circuit in *Meade* v. *Cedarapids, Inc.* (9th Cir. 1999) 164 F.3d 1218, which holds that at-will employees can justifiably rely on misrepresentations analogous to those made in this case and maintain causes of action for fraud.

II.

Evidence Andersen Was an At-Will Employee Was Not Erroneously Excluded

Safeway's next argument—that the trial court erred by excluding evidence of the at-will nature of his employment—lacks merit because it turns on the correctness of the argument we have just rejected.

Safeway claims that because Andersen was erroneously permitted "to plead and prove the untenable promissory fraud theory, Safeway, playing the hand it was dealt, planned to show the jury the theory's incongruity. It intended to do so with evidence that Andersen was an at-will employee and thus could have been terminated at any time without cause, *i.e.*, Andersen wanted to hold Safeway liable for offering him a lateral transfer to Carmel Valley rather than firing him. The trial judge, however, compounded the earlier error by barring Safeway from introducing any evidence that Andersen was an at-will employee."

As earlier explained, the focus of Andersen's fraud claim was not termination but the misrepresentation that he would not be transferred if he accepted a managerial position, as he did in justifiable reliance on that promise and to his detriment. The at-will nature of employment in that position, as we have said, is not relevant to this fraud claim. Exclusion of the evidence that Andersen was an at-will employee was therefore not error.

III.

The Evidence is Sufficient to Support the Judgment

Safeway claims the evidence is insufficient to establish the elements of a promise, fraudulent intent, justifiable or detrimental reliance and damages. As earlier noted, we

review these claims under an indulgent standard of review. "The test . . . is not whether there is substantial conflict, but rather there was *substantial evidence in favor of the respondent.* If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed. In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.* 'Of course, all of the evidence must be examined, but it is not weighed. All of the evidence favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.'" (9 Witkin, California Procedure, *supra*, Appeal, § 364, p. 414, quoting *Estate of Teel* (1944) 25 Cal.2d 520, 527, and citing numerous other cases [italics in original].) Considered in light of the foregoing settled principle, we cannot say that the evidence in this case is insufficient in any material respect.

A.

Safeway's claim that the evidence is insufficient to establish that an actionable promise was made to Andersen is based on brief portions of the testimony of Andersen and Rich Robinson on cross-examination suggesting that the alleged agreement was too vague and indefinite to establish an enforceable oral promise. (See *Conrad* v. *Bank of America* (1996) 45 Cal.App.4th 133, 156.) Andersen conceded that if the store he managed was closed or his performance was deficient Safeway might require him to transfer from the North Coast area or to another North Coast store. Robinson stated that, despite the promise made to Andersen, he never told him he could remain a store manager in the North Coast area "regardless of business circumstances." Robinson allowed that if "the store performance was poor because [Andersen] just couldn't handle that volume" Safeway "possibly" could "ask" him to relocate.

The foregoing statements must be considered in the context of the entire testimony of both witnesses. Andersen repeatedly testified that, after consulting his own superiors, Robinson, the district manager, told him "I would not be required to relocate." Robinson

corroborated Andersen's testimony unequivocally. For example, when asked "was the promise that Mr. Andersen would become a store manager on the North Coast but that later he might be required to relocate, or was it that he could become a manager in a store in the North Coast and would not be required to relocate? Robinson responded: "Not required to relocate." Again, when asked "Your boss, Jim Bible, told you if Mr. Andersen became a store manager that he would not in the future be required to relocate outside of the Eureka area?" Robinson answered: "That was my understanding, yes, because he wouldn't relocate, flat wouldn't relocate." Robinson was then asked whether he told "Mr. Andersen, conveyed to him I should say, that Mr. Bible had told you that if Mr. Andersen agreed to become a store manager in the North Coast area that he would be allowed to remain there as a store manager in the future without being required to relocate in the future?" He answered: "That's right." Clearly, the specific finding of the jury that an enforceable promise was made to Andersen is supported by substantial evidence.

B.

Safeway's claim that the evidence of fraudulent intent is insufficient rests on the asserted absence of evidence that Safeway did not intend to perform its promise at the time it was made, which is an essential element of deceit. (Civ. Code, § 1710, subd. 4; *Tarmann* v. *State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 159.) Safeway emphasizes that Andersen was not ordered to relocate until after he had been a store manager for over five years, which it claims is "an inordinately long time to keep a promise if one never intended to keep it." Safeway also argues that when the alleged promise was made, in 1988, it was impossible to foresee "that competitive changes in the North Coast grocery business would lead to labor strife and the need for management changes in 1994." According to Safeway, "[s]uch changed circumstances are strong evidence of a good-faith basis for a party's failure to keep a promise."[6] These arguments,

---

6 *Magpali* v. *Farmers Group, Inc.* (1996) 48 Cal.App.4th 471 and *Edmunds* v. *Valley Circle Estates* (1993) 16 Cal.App.4th 1290, which Safeway relies upon in making this argument, were cases in which the trier of fact apparently used the defendant's inability to foresee changed

which are more properly addressed to the trier of fact, invite us to reweigh the evidence, which we cannot do. The many years during which Safeway complied with its promise certainly could have been used by the jury to conclude that it intended to comply at the time the promise was made. But the jury did not draw that conclusion. Moreover, the evidence permitted the jury to draw the very different conclusion that Bible, the retail operations manager who had the apparent authority to make the promise Robinson conveyed to Andersen in behalf of the company, knew it violated clear company policy and that more senior officials in the company were not likely to go along with such an unprecedented exception, particularly because Andersen, who presented himself as a "trusting person," was given nothing in writing.

C.

Safeway's argument that there is insufficient evidence that Andersen's reliance on Safeway's promise was either reasonable or detrimental does not require extended discussion. As to detriment, Safeway claims there is no evidence Andersen could not have been transferred if he had remained in a nonmanagerial position. This is a strange argument, because the assumption of almost all the witnesses, including those presented by Safeway, was that nonmanagerial staff are not subject to the same relocation policy applied to managers. If this assumption were false, Andersen's conduct would be irrational and his legal position easily undone at the outset; but Safeway's briefs contain no citation to any record evidence of the falsity of Andersen's belief that the company's relocation policy did not apply to nonmanagerial staff. Since it was never disputed, the jury was clearly entitled to assume the correctness of Andersen's belief that he would never have been ordered to relocate if he had remained in a nonmanagerial position.

Safeway's argument that Andersen's reliance was unreasonable consists of no more than the statement that "an at-will employee cannot justifiably rely on an

---

business circumstances as evidence of the absence of fraudulent intent, and the Court of Appeal affirmed this determination on the basis of the substantial evidence rule. The cases certainly do not suggest that a jury's failure to so credit evidence of this sort requires reversal under that rule.

employer's promise that extends for an indefinite duration." First of all, the duration of the promise was not, at least in Andersen's mind, "indefinite," as it covered the remaining years of his employment with the company. Andersen was 33 years old in 1989, when he first became a store manager, and testified that he intended to retire from the company when he was 55, which would be in 2011, 22 years later. In any event, as we have said, the fact Andersen was an at-will employee is irrelevant and whether it was reasonable for him to rely on compliance with the promise for a period of more than two decades was for the jury to decide. Evidence showed that the promise was made to Andersen by his district manager after consulting with his own superior, the retail operations manager for Northern California, who actually made the decision, apparently in behalf of the company. This evidence supports the jury's determination that Andersen reasonably relied on the promise when he accepted a managerial position.

D.

Safeway's final argument regarding the insufficiency of the evidence relates to damages. The argument is not that the evidence fails to support the *amount* of damages awarded to compensate Andersen for wage loss and pain and suffering—$429,137[7]—but that the evidence fails to support the award of *any* damages. Reiterating its view that by moving from one at-will position to another, Safeway insists Andersen suffered no injury for which damages could be awarded. We have already rejected this theory, which is based on the erroneous proposition that an at-will employee has no cause of action for promissory fraud against his employer, and find it unnecessary to address it again.

IV.

The Trial Court Did Not Adopt an Improper Measure of Damages

Safeway's argument that the trial court adopted an improper measure of damages consists of three contentions: First, that the jury erroneously assumed Andersen would have remained employed as an assistant store manager at Safeway until retirement at age

7 This was less than the amount Andersen sought, which was $501,732.

55 if he had not accepted a managerial position; second, that the measure of damages adopted by the trial court conflicts with that prescribed in *Lazar*; and, third, that the jury (and presumably the trial court as well) erroneously failed to deduct from the award the $144,000 Andersen was paid in excess of the amount he would have received as an assistant store manager. We reject all of these contentions.

A.

The first—that Andersen would not have remained at Safeway until retirement age—actually constitutes an objection to the sufficiency of the evidence, and we therefore employ a standard of review much more deferential to the verdict and judgment. Given the considerable evidence that Andersen was an outstanding employee and that he was highly valued by Safeway from the beginning of his employment to the end, we believe the jury was justified in calculating damages on the assumption Andersen would have remained a Safeway employee until retirement at age 55 if he had not accepted a managerial position, as he testified he intended.

B.

Safeway's contention that the measure of damages used here conflicts with *Lazar* is based on the following language in that opinion: "[A]s to his *fraud* claim Lazar may properly seek damages for the costs of uprooting his family, expenses incurred in relocation, and the loss of security and income associated with his former employment in New York. On the facts as pled, however, Lazar must rely on his *contract* claim for recovery of any loss of income allegedly caused by wrongful termination of his employment with Rykoff." (*Lazar* v. *Superior Court, supra*, 12 Cal.4th at pp. 648-649, italics in original.) Resting on this language, Safeway says that if, as Andersen claims, "he had to be limited to the *Lazar* measure of fraud damages—and not allowed to collect lost-income damages which *Lazar* says are available only under a contract claim." Safeway misreads *Lazar*. First of all, Safeway conveniently overlooks the sentence immediately following the language it quotes, which recognizes the "overlap between damages recoverable in tort and damages recoverable in contract." (*Id.* at p. 649.)

Nowhere in *Lazar* does the Supreme Court suggest that damages for lost income are as a matter of law only available under a contract claim. In *Lazar* such damages could be awarded only under the contract claim because in that case the pleadings sought lost income damages only in connection with the claim for wrongful termination. The instant case does not involve a termination, either actual or constructive, and the sole claim presented was a tort claim. In connection with that claim, however, Andersen sought, among other things, damages for wages he established he lost as a result of Safeway's misrepresentation. It is elementary that "[t]he recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause . . . ." (Rest.2d, Torts § 549(1); 5 Witkin, Summary of California Law (9th ed.) Torts, § 718, and additional authorities there cited.) Furthermore, "[a] defrauded party need not prove an 'out-of-pocket' loss before seeking consequential damages." (*Las Palmas Associates* v. *Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1254, citing *Stout* v. *Turney* (1978) 22 Cal.3d 718, 729-730.) Nothing in *Lazar* or any other pertinent case[8] suggests

---

8 In its opening brief, Safeway seems to suggest that *Hunter* v. *Up-Right, Inc., supra*, 6 Cal.4th 1174 bars tort recovery for loss of income. We do not understand the basis for this view. With respect to *Hunter*, the *Lazar* court stated as follows: "Seizing upon language in *Hunter* indicating tort recovery is available only 'when the plaintiff's fraud damages cannot be said to result from [the] termination itself (*Hunter, supra*, 6 Cal.4th at p. 1178), [the employer] argues Lazar's damages resulted from his termination and that *Hunter*, therefore, bars any tort recovery. According to [the employer], *Hunter* stands for the general proposition that terminated employees should be limited to contract damages and, after *Hunter*, a terminated employee can obtain tort damages only by alleging the termination violated a fundamental public policy of the state." (12 Cal.4th at p. 640.) With this, the Supreme Court emphatically stated, "We disagree." (*Ibid.*) The *Lazar* court then went on to point out that "we expressly left open in *Hunter* the possibility 'that a misrepresentation *not* aimed at affecting termination of employment, but instead designed to induce the employee to alter detrimentally his or her position in some other respect, might form a basis for a valid fraud claim even in the context of a wrongful termination.' (*Hunter, supra*, 6 Cal.4th at p. 1185, italics in original.) The misrepresentations Lazar alleges were *not* aimed at effecting his termination, but, rather, at inducing him to accept [the employer's] offer of employment." (*Lazar, supra*, at p. 640, italics in original.)

The misrepresentation in the present case, like that in *Lazar*, was not aimed at inducing Andersen to termination his employment relationship with the company, and a termination claim

that recovery for the tort of promissory fraud cannot include damages from lost wages where, as here, the lost wages were the consequence of the defendant's misrepresentation. It is doubtless true that in employment cases damages for lost wages are more frequently awarded in connection with contract claims, but that does not mean they are necessarily "benefit-of-the-bargain" damages and therefore never obtainable as part of a tort recovery, which Safeway seems to be claiming by characterizing damages for lost wages as "contract damages."

C.

Safeway's final assault on damages relates to the failure of the jury and the court to deduct from the compensatory damage award the $144,000 paid to Andersen as store manager that was above the amount he would have received during that period if he had remained an assistant store manager.

This issue was raised prior to trial. The court asked Andersen's counsel to submit a brief explaining why the $144,000 should not be deducted, heard the arguments of counsel on this issue, and decided to let the jury decide whether that amount should be deducted from any economic damages it might award.

After telling the jury it could award "economic and non-economic damages," the trial judge instructed that "economic damages means objectively verifiable monetary losses, including out-of-pockets damages," and that such damages shall include "*the difference, if any between the value of that which plaintiff parted and the actual value of that which was received.*"

In their respective arguments to the jury, both counsel referred to the italicized portion of the instructions just quoted in connection with their competing contentions that the $144,000 should or should not be deducted from any economic damages awarded.

---

was never presented to the jury. The misrepresentation was, however, designed to induce Andersen to give up his secure position and to take a job that was insecure; it is in this manner that the present case is analogous to *Lazar*.

Counsel for Andersen defined the issue this way: "[T]he $144,000 question then is: In calculating damages, do you subtract from the damages, as the defense has calculated . . . the amount that Mr. Andersen got as a store manager in salary and fringe benefits that was higher than what he would have earned as an assistant manager?" He summed up his argument this way: "What Safeway was trying to accomplish by its false promise was to get Mr. Andersen to become a store manager, so they got something more from Mr. Andersen as a store manager than they got from him as assistant[ ] store manager. First of all, they got more hours. Mr. Andersen testified [that he worked] never less than 60 hours a week, and I think Mr. Andersen testified that [a] very normal schedule for him was getting in at 6:45 in the morning and staying till 6:15 at night, and that's just a little short of 12 hours, and that he did that six days a week, typically. . . . So Safeway got from Mr. Andersen that extra work, the extra responsibilities, the extra that was involved in being a store manager. Safeway gave to Mr. Andersen compensation for that extra which it determined. In other words, Safeway itself decided how much more work as a store manager are those duties worth compared to an assistant store manager's duties and Safeway decided its worth X amount more . . . ." Counsel argued that the "extra hours, the extra work, the extra effort" represented "the value of that which plaintiff parted, and that the $144,000 extra salary he received represented, in the words of the jury instruction, "the actual value of that which was received." "In other words," counsel stated, "you could, I suppose, say, take away the $144,000 from damages, but then you have to say, then we've got to give Mr. Andersen an extra 144,000 in damages for the extra work he did, because that's how much it was worth, Safeway decided that itself, so they cancel each other out." To deduct the $144,000 from damages, counsel suggested, would permit Safeway to receive the benefit of Andersen's years of extra work for nothing and unfairly penalize Andersen.

In her argument to the jury, counsel for Safeway stressed that "the rationale for making that [$144,000] deduction is that the out-of-pocket loss measure of damages requires that you take the value of that which Mr. Andersen gave up, which [we're]

assuming is a relatively secure position as assistant store manager for Safeway, minus the value of that which he received. What he received was a store manager position for a period of five years and then thereafter he left his employment because Safeway required that he relocate. [¶] So in order to properly account for the damages . . . [the] additional compensation that Mr. Andersen received as store manager needs to be subtracted from the amount of damages, if any, that you think Safeway should pay here. Because what we're trying to do here is place Mr. Andersen back . . . into the same position he would have been in had he not relied on the promise he claims were made to him by Safeway."

On appeal, Safeway claims that the failure of the jury to deduct the $144,000 from the economic damages awarded Andersen, and indeed the submission of this issue to the jury, erroneously allowed Andersen to advance "the *Lazar contract* theory 'for recovery of any loss of income allegedly caused by the wrongful termination of [] employment,' though Andersen's *contract* claims had all been dismissed because he was an at-will employee." (Italics in original.) According to Safeway, this "flies in the face of the California Supreme Court's holding in *Hunter* v. *Up-Right, Inc.* that tort recovery in employment cases is available only if the plaintiff's damages 'cannot be said to result from termination itself.'" We have already rejected this argument. As previously explained, an at-will employee can maintain a promissory fraud claim against an employer in circumstances such as those presented here and, if he succeeds in establishing that claim, is entitled to an award of consequential damages. That is all that happened in this case. The jury did no more than make a determination regarding an "objectively verifiable monetary loss" resulting from Safeway's fraud. Its refusal to deduct the $144,000 from the economic damages it determined to be the consequence of the fraud, presumably for the reason urged by Andersen's counsel in closing argument, offends no principle articulated either in *Hunter* or *Lazar*. Safeway has not shown, and on appeal has not even tried to show, that the amount specified here did not fall within the definition of economic damages given the jury without objection. Safeway's complaint does not really relate to the amount of damages awarded in this case but the award of any

damages at all, because it refuses to concede that it is possible for an employee to suffer a compensable injury as a result of a move from one at-will position to another at-will position, a view which, as we have said, is indifferent to the relocation issue that is at the heart of the fraud claim in this case.

V.

Punitive Damages Were Legally Justified

Safeway's final argument relates to the $100,000 award of punitive damages. Such damages may be awarded only in actions where it has been shown that the defendant's conduct was outrageous, for the purpose of punishing him and deterring him and others from such conduct in the future. (See, e.g., *Acadia, California, Ltd.* v. *Herbert* (1960) 54 Cal.2d 328, 337; *Fletcher* v. *Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376.) The general rule is stated as follows in Civil Code section 3294, subdivision (a): "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Challenges to punitive damages awards ordinarily involve a factual claim that the evidence is insufficient to show that the defendant acted maliciously with an "intent to vex, annoy or injure." (See *Gombos* v. *Ashe* (1958) 158 Cal.App.2d 517, 527, disapproved on another point in *Taylor* v. *Supeiror Court* (1979) 24 Cal.3d 890, 900.) That is not, however, the claim here. By failing in its briefs to claim that the evidence it acted maliciously is insufficient to support an award of punitive damages, Safeway has waived that issue on appeal. (Eisenberg, Horvitz & Wiener, Cal. Prac. Guide: Civil Appeals & Writs (TRG 1998) ¶ 8.17.1, 8.17.2, pp. 8-4 – 8-5.)

Safeway's argument that the $100,000 award of punitive damages should be reversed is based on the law, not the facts, and consists of no more than yet another restatement of its contention that an at-will employee induced by an employer to move to another at-will position has no cause of action for promissory fraud even if the

inducement is fraudulent. According to Safeway, "the infection of Andersen's untenable legal theory flowed all the way into its final phase." Safeway's argument, which is set forth in one short paragraph in its opening brief, is as follows: "Of course, the jury did not know that Safeway could have fired Andersen rather than offering him a transfer to Carmel. Thus, the only 'example' offered by this [punitive] award is the perverse one -- be kind to your at-will employees, and you will be punished for it." Safeway's closing brief merely reemphasizes "the adjudicated fact that [Andersen] was an at-will employee," and reiterates that, "[a]llowed to consider that fact, no reasonable jury could have awarded punitive (or any) damages in this case." (Fn. omitted.)

Safeway's contentions that as an at-will employee Andersen does not have a cause of action for promissory fraud, and that it was error to exclude evidence of his at-will status—the only bases upon which it challenges the punitive damages award—have, of course, been rejected. We must therefore also reject its purely legal challenge to that award.

For the foregoing reasons, the judgment is affirmed. Andersen shall be awarded his costs on this appeal.

____
Kline, P. J.

I CONCUR:

____
Ruvolo, J.

COPY

Andersen et al. v. *Safeway, Inc.*, No. A080258

Concurring opinion of Haerle, J.

I concur in the conclusions reached by the majority except that, regarding the first issue they discuss (maj. opn., pp. 11-19), I would reach the same conclusion they do but via an alternate route.

As the majority outline, there is clearly substantial evidence of an implied if not express agreement between the parties that, as and when he was promoted to store manager, Andersen would not be required to transfer out of the North Coast region. This evidence consists of the testimony of both Andersen himself and his former district manager at Safeway, Robinson. Indeed, that evidence was partially confirmed by the testimony of Henry, a witness called by Safeway and Robinson's superior during the relevant time period.

It seems obvious to me that such an agreement necessarily has a collateral term to it, namely, that Andersen would not be terminated if he were to decline a transfer out of the region. Indeed, without such a collateral term, the implied "no transfer" agreement would be illusory.

It is clear under today's California employment law that an employer may, by its actions, conduct and statements easily convert what is otherwise a "pure" at will employment relationship into something more than that. (See, e.g., *Pugh* v. *See's Candy, Inc.* (1981) 116 Cal.App.3d 311, 324-330; *Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654, 676-682.) I think the evidence is much more than "substantial" that exactly that happened here: as of his promotion to store manager in 1989, Andersen had a modified employment at will relationship, the modification being that he could not be terminated by Safeway for resisting or declining an involuntary transfer.

I agree with the majority that this result is not affected one whit by the fact that, the year after he became a store manager, Andersen signed a stock option

agreement with Safeway. All that document says is that "[n]othing *in this Agreement or in the . . . Plan* . . . shall interfere with or restrict in any way the rights of the Company . . ., which are hereby expressly reserved, to discharge the Employee at any time for any reason whatsoever, with or without cause." (Emphasis supplied.) Patently, such boilerplate "rights reserved to the employer" terminology cannot affect modifications of the at will relationship long since granted by the same employer. This is especially so in view of Andersen's testimony that he reiterated the prior understandings he had reached with Robinson with the latter's successors as district manager, Dalrymple and Hasker.

Other than this, I agree with the majority's opinion.

____

Haerle, J.