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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROSARIO CONTRERAS-VELAZQUEZ, Plaintiff and Respondent, v. FAMILY HEALTH CENTERS OF SAN DIEGO, INC., Defendant and Appellant.	D071083 (Super. Ct. No. 37-2014-00026469-CU-WT-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Mulvaney Barry Beatty Linn & Mayers, Patrick L. Prindle and John A. Mayers for Defendant and Appellant.

Hogue & Belong, Jeffrey L. Hogue, Tyler J. Belong and Brett M. Gunther for Plaintiff and Respondent.

I

INTRODUCTION

Family Health Centers of San Diego, Inc. (Family Health) appeals from an order granting Rosario Contreras-Velazquez's motion for new trial on the ground of insufficiency of the evidence. Velazquez sued Family Health, alleging disability discrimination under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] and related causes of action. Although the jury found in Family Health's favor on all of Velazquez's causes of action, the court found there was insufficient evidence to support the jury's verdicts as to her causes of action for failure to accommodate (§ 12940, subd. (m)), failure to engage in the interactive process (§ 12940, subd. (n)), and failure to prevent discrimination (§ 12940, subd. (k)). Consequently, the court ordered a new trial on these claims.

Family Health contends we must reverse the order because the motion's supporting papers were not timely filed. We conclude the motion's supporting papers were timely filed in compliance with the court's electronic filing requirements.

Family Health also contends we must reverse the court's order because the court did not supply an adequate statement of reasons for its decision. We conclude the court's statement of reasons was adequate because it provided a substantial basis for the court's order and was sufficiently precise to permit meaningful appellate review.

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1 Further statutory references are to the Government Code unless otherwise stated.

Finally, Family Health contends we must reverse the order because there was substantial evidence to support the jury's verdict on the challenged claims and Velazquez failed to meet her burden of proving the claims. Applying the appropriate standard of review, we conclude there is sufficient evidence to support the court's decision to grant a new trial. We, therefore, affirm the order.

II

BACKGROUND[2]

A

Family Health operates community clinics. Velazquez worked for Family Health in its medical records department when she suffered a work-related repetitive strain injury to her right upper extremity. Following surgery to treat the injury, she developed complex regional pain syndrome. She also developed stiffness and pain in her right shoulder, sometimes referred to as a frozen shoulder, as well as restrictive inflammation in the tendon sheath of her right hand, which prevented her from being able to fully extend her fingers. While she received treatment for her injury and its complications, her

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2 The trial below encompassed many more claims and issues than are presented in this appeal. We focus our summary on the evidence pertinent to the appellate issues.

In addition, the summary does not include evidence from one of the Family Health's human resources employees responsible for engaging in the interactive process with Velazquez. This employee was apparently unavailable for trial and a video of her deposition testimony was played to the jury. The court later marked a transcript of the video as an exhibit. Neither the video nor the transcript was included in the appellate record.

doctor imposed various work restrictions, at least some of which Family Health accommodated with temporary light duty work.

Before her injury and its complications became permanent and stationary, Velazquez applied for and obtained an entry-level appointment technician position in Family Health's call center. Velazquez had the requisite skills and experience for the position. Although the position required repetitive hand use to check boxes and make selections from the computer system's drop-down menus, Family Health believed Velazquez could perform the duties of the position using a computer mouse with her left hand.

After a week and a half in the position, Velazquez's condition worsened. Velazquez asked her supervisor for a roller mouse. A few days later, her supervisor provided her with the roller mouse, but the mouse was defective. Velazquez informed her supervisor of the defect and her supervisor said she would try to get a replacement, but Velazquez never received one.

Meanwhile, Velazquez saw her doctor, who prepared a report indicating Velazquez complained of pain on both sides, she did not feel able to do her usual job duties, and she wanted to be taken completely off work because of significant discomfort. Nonetheless, the report indicated she could return to modified work with four restrictions: (1) "Limited use of right upper extremity"; (2) "Repetitive hand, wrist and keyboard work limited to 10 minutes per hour"; (3) "No overhead lifting or reaching with the right upper extremity"; and (4) "No forceful pushing and pulling with the right upper extremity." The report also indicated Velazquez was "eventually going to wind up with some fairly

profound limitations in the long run" and Family Health should contact her doctor to discuss her work status because "whatever they have her doing at work is just aggravating everything, which is going to be to nobody's advantage."

Velazquez provided a copy of the report to her supervisor, who told her to go home. Velazquez also provided a copy of the report to an employee in the human resources department (human resources representative), who placed Velazquez on an indefinite leave of absence.[3] The human resources representative told Velazquez she would review the work restrictions to see if there were any available positions suitable for Velazquez. She also suggested Velazquez go online and review the available position openings to see if there were any positions of interest to Velazquez.

Velazquez asked to return to the medical records position; however, the human resources representative told her the position no longer existed.[4] The human resources representative never considered whether Family Health could modify the appointment technician position to suit Velazquez and denied Velazquez requested a different mouse in order to be able to return to the position.

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3 The parties dispute most aspects of Velazquez's encounters with Family Health's human resources employees, including the identity of the employees with whom she discussed the prospect of reasonably accommodating her work restrictions, when and how the discussions occurred, and their content. Where necessary and consistent with our standard of review (see pt. III.C.1, *post*), we have resolved the conflicts in the light most favorable to the court's order based on the record provided.

4 Around the same time Velazquez was receiving treatment for her injury, Family Health converted its medical records from paper to electronic form and eliminated its medical records department.

When the human resources representative reviewed Velazquez's work restrictions, she interpreted the hand restrictions as applying to both hands. Despite the invitation in the doctor's report, the human resources representative never contacted Velazquez's doctor to discuss Velazquez's work status or to determine whether any modifications could be made to the appointment technician position to accommodate the hand restrictions. Instead, the human resources representative informed Velazquez there were no available positions compatible with the work restrictions. In addition, the human resources representative once again suggested Velazquez go online and review the available position openings to see if there were any Velazquez believed would be compatible with the work restrictions. At that point, the human resources representative considered the interactive process to be over and she recommended Family Health end Velazquez's employment.

Velazquez denied ever being asked to review available position openings. In addition, she claimed she repeatedly asked the human resources representative if Family Health could provide her with a working roller mouse or otherwise modify the appointment technician position to accommodate her, but received no meaningful response to these queries.

Velazquez remained on an indefinite leave of absence until her doctor determined her condition was permanent and stationary. The doctor's permanent and stationary report indicated Velazquez was precluded from performing tasks requiring repetitive or strenuous use of her right upper extremity, forceful gripping or grasping, or repetitive hand gripping or grasping for more than 15 minutes per hour. The doctor also imposed

permanent restrictions limiting keyboarding and hand or wrist work to 10 minutes per hour.

The doctor later acknowledged the work restrictions were vague because he did not specify whether the hand use restrictions applied to both hands or only to the right hand. He intended them to apply only to the right hand. He never treated Velazquez for an injury to her left hand and she denied ever complaining to him about any pain in her left hand.

Although the human resources representative reviewed the permanent and stationary report and other interim doctor's reports, she did not contact Velazquez to further engage in the interactive process because Velazquez's work restrictions did not appreciably change. After purportedly contacting Velazquez's nurse case manager for clarification, the human resources representative continued to interpret the restrictions as applying to both hands. Regardless, the human resources representative never considered returning Velazquez to the appointment technician position because the human resources representative knew the position had caused Velazquez's left hand pain and it was not Family Health's practice to place employees in positions that caused them pain.

Another human resources employee subsequently contacted Velazquez and informed her Family Health was ending her employment because she was not able to perform the essential function of her job, with or without accommodation. On that occasion and another a few weeks later, Velazquez told the human resources employee she did not want to leave Family Health's employment and asked if there were any other positions available to her. On both occasions, the human resources employee told her

there were no available positions compatible with her work restrictions, but she could keep looking on Family Health's website for appropriate positions.

B

Velazquez sued Family Health for physical disability discrimination—disparate treatment; physical disability discrimination—failure to accommodate; disability discrimination—failure to engage in the interactive process; hostile work environment; retaliation; failure to prevent harassment, retaliation, and discrimination; and wrongful termination in violation of public policy. The jury returned a special verdict against Velazquez and in favor of Family Health on all causes of action. As relevant to this appeal, the jury found Velazquez had a physical disability that limited her ability to use her right arm, right hand, and right wrist for certain work; Family Health knew of the disability; Family Health engaged in the interactive process with Velazquez; Family Health reasonably accommodated the disability; Velazquez was not able to perform her essential job duties with reasonable accommodation; and Family Health took reasonable steps to prevent discrimination against Velazquez.

C

Velazquez filed a motion for new trial in part on the ground there was insufficient evidence to support the jury's verdicts on several of her causes of action. The court granted the motion as to her causes of action for failure to accommodate, failure to engage in the interactive process, and failure to prevent discrimination. The court specified the following reasons for its decision:

"[Government] Code [section] 12940[, subdivision] (n) makes it unlawful for an employer 'to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.'

"And, [Government] Code [section] 12940[, subdivision] (m) makes it an unlawful employment practice '[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.'

"In arguing that it participated in a timely, good faith interactive process with [Velazquez], [Family Health] cites to: (1) [Velazquez's] testimony where, when informing her supervisor that the [roller] mouse did not work, she was told the supervisor would 'try to request another one'; (2) a report from [Velazquez's doctor] dated January 13, 2014, which prompted [Velazquez's supervisor] to tell [Velazquez] to stay home; (3) [Velazquez] being told by [a human resources employee] to 'sign here' and to take any future report from [Velazquez's doctor] to [Velazquez's supervisor]; (4) [the human resources representative] telling [Velazquez] in the middle of December she should see a doctor; (5) [the human resources representative] stating there was no way to modify the position at the Call Center because it required the use of a mouse; (6) [Velazquez] giving a copy of [her doctor's] January 2014 progress report to [her supervisor]; (7) a conversation with [the human resources representative] in January 2014 where

[Velazquez] requested a working mouse; and (8) [Velazquez's supervisor] discussing [Velazquez's doctor's] February 18, 2014 report with [Velazquez].

" 'The "interactive process" required by the FEHA is an informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively. [Citation.]' [Citation.]

"[Velazquez's doctor] confirmed at trial that his treatment of [Velazquez], which included assessing work restrictions, was with respect to the right arm and hand and not the left. [Citations.] [Velazquez's doctor] was not aware of all of [Family Health's] job descriptions, does not recall any discussions with [Family Health] regarding [Velazquez's] work restrictions, and did not have any conversations with [the human resources representative]. [Citations.] Although [one of the doctor's reports] referenced a complaint by [Velazquez] that she was having pain on both sides, three of the four restrictions for a modified work plan clearly only related to the right side. And, with respect to the second restriction ('[r]epetitive hand, wrist and keyboard work limited to 10 minutes per hour'), there was no evidence that anyone acting on behalf of [Family Health] ever contacted [Velazquez's doctor] to inquire as to whether the reference to 'hand" (in the singular) meant a limitation as to both hands or only the right hand.

"[Velazquez] had previously requested her supervisor provide her with a [roller] mouse that she could use with her left hand. [Citations.] She was provided with a [roller] mouse but it was defective. [Citation.] Although [Velazquez] requested a working mouse and the supervisor told her she would 'try to request another one,' there

was no evidence that [Family Health] ever provided [Velazquez] with a working [roller] mouse that she could use with her left hand. [Citation.]

"At trial, [the human resources representative] testified that she informed [Velazquez] that she could look for open positions within the company by using its computers. [Citations.] Although [the human resources representative] testified that she would 'look to see if [Family Health] had any jobs that would work for her injury,' [citation] there was no evidence she ever did.

"[Family Health] argued *Scotch* [*v. Art Institute of California–Orange County, Inc.* (2009) 173 Cal.App.4th 986 (*Scotch*)] to suggest [Velazquez] did not meet her burden. Under *Scotch*, a plaintiff is not required to identify a reasonable accommodation at the time of the interactive process but that a plaintiff must be able to identify a reasonable accommodation at trial. Here, the weight of the evidence demonstrated that at the time of the 'interactive process,' [Velazquez] had requested a reasonable accommodation (a working [roller] mouse she could use with her left hand).

"It is not only the right, but the duty of the trial court to grant a new trial when, in its opinion, the court believes the weight of the evidence to be contrary to the finding of the jury. [Citation.]

"[Velazquez] has met her burden on this motion.

"The weight of the evidence in this case was that (1) [Family Health] failed to participate in a timely, good faith interactive process with [Velazquez] to determine whether reasonable accommodation could be made; (2) [Velazquez] was able to perform

essential job duties with reasonable accommodation for the physical disability; and (3) [Family Health] failed to provide reasonable accommodation for [Velazquez].

"In making this ruling, the Court acknowledges that it found [the former human resources manager's] and [the human resources representative's] testimony to not be credible."

III

DISCUSSION

A

Family Health contends we must reverse the order granting Velazquez's motion for a new trial because she did not timely file her supporting memorandum of points and authorities. The record does not support this contention.

A party moving for a new trial must file and serve its supporting memorandum of points and authorities within 10 days of the filing of its notice of motion. (Code Civ. Proc., § 659a; Cal. Rules of Court, rule 3.1600(a).) Applying this rule, the parties agree Velazquez was required to file her memorandum of points and authorities on June 27, 2016. The record shows she submitted the memorandum to the court's electronic filing vendor on June 27, 2016, at 4:59 p.m. Although the superior court issued a notice confirming it received the memorandum on June 27, 2016, the court did not file stamp the memorandum until the following day at 8:00 a.m. Family Health argues the file stamp establishes the court did not actually receive the memorandum until after the close of business on June 27, 2016, and, consequently, the memorandum was untimely.

However, the "Electronic Filing Requirements of the San Diego Superior Court-Civil Division" provide, "Any document filed electronically shall be considered as filed with the Clerk of the Superior Court when it is first transmitted to the [court's electronic filing] vendor and the transmission is completed, except that any document filed on a day that the court is not open for business, or after 5:00 p.m. (Pacific Time) on a day the court is open for business, shall be deemed to have been filed on the next court day." (Some capitalization & boldface omitted.) Because Velazquez completed the transmission of her memorandum of points and authorities to the court's electronic filing vendor before 5:00 p.m. on June 27, 2016, the memorandum was deemed to have been filed on that day, even if it was not actually received by the court until after 5:00 p.m. Accordingly, we conclude Family Health has not established the memorandum was untimely.

B

Family Health next contends we must reverse the order because the court did not provide an adequate statement of the reasons for its decision. More particularly, Family Health contends the order was deficient because it did not analyze the findings in the jury's special verdict.

"Section 657 requires the trial court to 'specify the ground or grounds upon which [a new trial] is granted and the court's reason or reasons for granting the new trial upon each ground stated.' The requirement of a written statement of reasons encourages careful deliberation by the trial court and creates an adequate record for appellate review. [Citations.] If the ground for a new trial concerns insufficiency of the evidence, the trial court must briefly recite the respect in which the evidence is inadequate, and identify the

evidence that convinces the court that the jury should have reached a different verdict. [Citation.] The content of a specification of reasons will necessarily vary according to the circumstances of each case." (*Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1227; accord, *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 370.)

" 'It is helpful if the court declares what witnesses it believed, what testimony was to be disregarded or the value of any impeachment.' [Citation.] Nonetheless, a trial judge does not need to specifically cite pages, lines in testimony, or extensively describe a witness's testimony in a fully compliant order. [Citation.] Nor must the judge write a statement of reasons that states the weight and inferences to be drawn from ' "each item of evidence supporting, or impeaching, the judgment." ' " (*Montoya v. Barragan*, *supra*, 220 Cal.App.4th at p. 1227.) A statement of reasons is adequate if it supplies a substantial basis for the order and is sufficiently precise to permit meaningful appellate review. (*Scala v. Jerry Witt & Sons, Inc.*, *supra*, 3 Cal.3d at p. 366; *Romero v. Riggs* (1994) 24 Cal.App.4th 117, 124.)

Under this standard, the court's statement of reasons is adequate in this case because the statement includes a recitation of the governing law, a brief summary of the evidence relied upon by Family Health to show Family Health had engaged in the interactive process with Velazquez, and a summary and analysis of Velazquez's countervailing evidence, including a finding that two of Family Health's key witnesses were not credible. While the statement did not include a point-by-point refutation of the jury's findings, the statement more than adequately directs our attention to the aspects of

the record supporting the court's order. "No more is reasonably or sensibly to be required of a trial court." (*Romero v. Riggs*, *supra*, 24 Cal.App.4th at p. 124.)

C

1

Having concluded the court's statement of reasons was procedurally adequate, we turn now to the merits of the court's order. "The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of '[e]xcessive ... damages' or '[i]nsufficiency of the evidence,' [Code of Civil Procedure] section 657 provides: '[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence ... or upon the ground of excessive or inadequate damages, ... *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons*.' (Italics added.) Thus, [the California Supreme Court has] held that an order granting a new trial under [Code of Civil Procedure] section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached ....' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' [Citation.]

"The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits ... as an independent trier of fact.' [Citation.] Therefore, the trial court's

factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations.

"The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 411–412.)

2

The FEHA makes it "an unlawful employment practice 'to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee' unless the employer demonstrates doing so would impose an undue hardship. (§ 12940, subd. (m).) The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]

"The FEHA imposes an additional duty on the employer 'to engage in a timely, good faith, interactive process with the employee ... to determine effective reasonable accommodations ....' (§ 12940, subd. (n).) An employer's failure to engage in this

process is a separate FEHA violation." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192-1193; accord, *Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 969; *A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 463–464; *Scotch*, *supra*, 173 Cal.App.4th at pp. 1009–1010.) Noncompliance with either of these provisions may also derivatively violate the FEHA provision prohibiting an employer from failing "to take all reasonable steps necessary to prevent discrimination." (§ 12940, subd. (k); *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 28.)

Focusing on the time period after Family Health placed Velazquez in the appointment technician position, the court found there was insufficient evidence to support the jury's verdict Family Health had not violated these provisions. (See *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 985 (*Nadaf-Rahrov*) ["[T]he fact that an employer took some steps to work with an employee to identify reasonable accommodations does not absolve the employer of liability under section 12940[, subd.] (n). If the employer is responsible for a later breakdown in the process, it may be held liable."].) The court found the weight of the evidence showed Velazquez was qualified for and could perform the appointment technician position with reasonable accommodation, Velazquez requested a reasonable accommodation in the form of a working roller mouse she could use with her left hand, Family Health did not provide the requested reasonable accommodation, and Family Health did not engage in further efforts to determine whether there were other effective reasonable accommodations. There is substantial evidence to support the court's determination.

Regarding Velazquez's qualifications, the evidence showed Velazquez possessed the requisite education and experience for the appointment technician position and she could do any repetitive hand work with her left hand rather than her right hand. The evidence also showed she was doing the job for several days until the lack of a reasonable accommodation started causing her pain.

Regarding the existence of a reasonable accommodation, the evidence showed Velazquez could perform the job with her left hand if she had an operational roller mouse. (See *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 979 ["an employer may be held liable for failing to engage in the good faith interactive process only if a reasonable accommodation was available"].) Family Health provided her with a defective roller mouse and, when Velazquez pointed this out to Family Health, Family Health indicated it would try to get her a new mouse, but there is no evidence it did so. (*Id*., at p. 983 ["[W]here the employee requests a specific and available reasonable accommodation that the employer fails to provide, or where an employer participates in a good faith interactive process and identifies a reasonable accommodation but fails to provide it, a plaintiff may sue under section 12940[, subd.] (m)."].)

Regarding Family's Health's engagement in the interactive process, the evidence shows Family Health engaged in the process until Velazquez aggravated her injury working as an appointment technician. At that point, Family Health believed no further accommodations for the appointment technician position could reasonably and effectively be made because Family Health mistakenly believed Velazquez was restricted from using both of her hands repetitively. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at

p. 975 ["an employer is liable under section 12940[, subd.] (m) for failing to accommodate an employee only if the work environment could have been modified or adjusted in a manner that would have enabled the employee to perform the essential functions of the job"].) Family Health based its mistaken belief on limitations specified in admittedly vague doctor's reports, the import of which Family Health did not attempt to clarify with Velazquez's doctor despite language in one of the reports inviting a conversation between the doctor and Family Health to discuss Velazquez's limitations.

Although there is evidence Family Health accommodated Velazquez at times by providing light duty work and medical leaves of absence, these accommodations do not preclude liability. "The duty to reasonably accommodate a disabled employee is a continuing one that is not exhausted by one effort. [Citation.] 'A single failure to reasonably accommodate an employee may give rise to liability, despite other efforts at accommodation.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 722.)

Similarly, although there is evidence Family Health encouraged Velazquez to review its position openings and apply for any openings for which she believed she was qualified, this was not sufficient to satisfy Family Health's obligation to engage in the interactive process. "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of

offering such assistance or benefit to any other employees." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951.)

As there is substantial evidence to support the court's reasons for granting a new trial, we conclude the court did not abuse its discretion in doing so. We, therefore, affirm the order.

IV

DISPOSITION

The order is affirmed. Respondent is awarded her appeal costs.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.