

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN PELAK-REGGIO,

Plaintiff-Appellee,

v

UNIVERSAL HEALTH MANAGEMENT,
L.L.P.,

Defendant-Appellant,

and

TOTAL HEALTH CARE, INC.,

Defendant.

UNPUBLISHED

October 25, 2002

No. 228108

Wayne Circuit Court

LC No. 98-800828-CZ

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals from a judgment of the circuit court entered in accordance with a jury verdict in plaintiff's favor on plaintiff's claims of constructive discharge due to racial discrimination and a hostile work environment. We affirm.

Plaintiff was employed by defendant Total Health Care and later its management company, Universal Health Care until February 1998, when she resigned her employment, citing racial discrimination as the cause for decision to quit. Thereafter, she filed the instant action alleging intentional discrimination and a hostile work environment. The jury found in favor of plaintiff on both theories and awarded her \$19,000 in back pay and \$150,000 in emotional distress damages on both counts, for a total non-economic damage award of \$300,000. In ruling on defendant's motion for judgment notwithstanding the verdict, new trial and remittitur, the trial court set aside the second \$19,000 back pay award as being duplicative, but otherwise denied relief.

Defendant first argues that the trial court erred in denying a judgment NOV because there was insufficient evidence to support the jury's verdict. We disagree. This Court explained the standard of review for this issue in *Howard v Canteen Corp*, 192 Mich App 427, 431; 481 NW2d 718 (1992), overruled in part on other grounds in *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999):

When deciding motions for directed verdict and judgment notwithstanding the verdict, the trial court must view the evidence in a light most favorable to the nonmoving party. Relief is required where insufficient evidence is presented to create an issue for the jury. Conversely, relief is not required where reasonable minds could differ on issues of fact. We will not disturb the trial court's decision unless there has been a clear abuse of discretion.

Plaintiff cites the following incidents as evidence of racial discrimination by her supervisor, Sandra Spears:

1) Statements by Spears to others that she wanted to hire someone white so she could get rid of plaintiff;

2) A statement by Spears to a co-worker, Dorothy Robertson, that she did not want plaintiff attending the Michigan Minority Business Council event because it was a mostly black event and plaintiff would feel uncomfortable there;

3) A statement by Spears to another co-worker, Barbara Dukes, that Spears did not want plaintiff to work at the Booker T. Washington Business Association dinner because it was a black event and she did not think plaintiff would fit the image;

4) A statement by Spears describing plaintiff and another employee, Gary Francis, who is also white, as "lazy-ass white people";

5) That Spears asked Dukes if Dukes "saw the appearance on that dumb white bitch's face" when Spears had announced that Dukes would be getting a position that plaintiff desired;

6) That Spears said to Dukes that she "didn't want Kathy's . . . white ass" to go near Eric Humphries, a new African-American employee;

7) A statement by Spears that "Ken had taken care of every white woman at Universal Health Management, most were incompetent, and she'll be damned if she took care of any";

8) A statement by Spears to Dukes that "I didn't believe that you were into anything black, since you seem into white people";

9) Another statement by Spears that "she did not want that damned white-assed Kathy presenting the wrong image" to the Michigan Minority Business Council event.

Although it could be argued that the first item does not necessarily reflect racial discrimination, we agree with plaintiff that the jury could conclude from the other items that Spears harbored ill-will towards plaintiff because of her race and that Spears acted on her prejudice in a discriminatory and hostile manner.

Plaintiff further lists the following examples of hostile actions or discriminatory conduct by Spears directed at plaintiff:

1) Spears threatened to take away plaintiff's only major account, the City of Detroit, because of plaintiff's race;

- 2) Spears had an African-American co-worker offer tickets to an event to plaintiff's contact at the City of Detroit, undermining plaintiff's relationship with that contact person;
- 3) On-going petty accusations by Spears of plaintiff doing something wrong on the job;
- 4) Spears asking a co-worker in front of plaintiff whether she knew of a white female who would like a position with defendant so that Spears could replace plaintiff;
- 5) Loudly berating plaintiff in front of co-workers over a comp time request;
- 6) Offering Dukes a position that plaintiff desired in a manner calculated to humiliate plaintiff (a precursor to the event described above regarding a comment about the expression on plaintiff's face)¹;
- 7) That Spears would openly give account leads to African-American sales representatives, while giving none to plaintiff, claiming that there were no leads;
- 8) Harassment by Spears on August 5, 1997, which lead to plaintiff suffering a mental breakdown.

Defendant argues that the items are, at best, mildly offensive and do not rise to the level of seriousness that would support a hostile work environment claim. See *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 314-316; 385 NW2d 778 (1986) (contemptible behavior did not rise to the level of severity and pervasiveness to establish a sexually hostile workplace claim). Certainly if any single incident is viewed in isolation, it may not represent the most egregious example of a racially hostile workplace. However, if the on-going incidents are considered as a whole, and when viewed in the light most favorable to plaintiff, the jury could reasonably conclude that the work environment was sufficiently hostile to warrant redress. We will not substitute our judgment for that of the jury.²

Next, defendant argues that, even if plaintiff were the subject of racial discrimination or a racially hostile work environment, there was insufficient evidence to establish that plaintiff was the subject of adverse work action as a result. We disagree.

Plaintiff cites the following examples of adverse work action:

- 1) Spears took away all of plaintiff's major accounts, except the City of Detroit, while Alyeese Brown, a new employee who is African-American, received two major accounts;

¹ Dukes testified that she reproached Spears on how she handled the matter and that the position did not, in fact, ever materialize. She also describes this incident as being the one from which she concluded that Spears was a racist.

² Although defendant frames that issue as there being insufficient evidence on both the intentional discrimination claim and the hostile work environment claim, virtually all of the argument is directed to the issue of the hostile work environment. Accordingly, we deem the argument that there was insufficient evidence of intentional discrimination to be abandoned.

2) Plaintiff was forced to train all the sales representatives (who were African-American) in customer service, while plaintiff received no training in sales (although she was new to sales);

3) Spears gave leads on new accounts to African-American sales representatives, but never gave leads to plaintiff;

4) Spears refused to inform or invite plaintiff to attend the Oakland County NAACP dinner and the Booker T. Washington golf outing because Spears did not want her attending because she was white, thus depriving plaintiff of a networking opportunity to develop new accounts;

5) Spears denied commissions to plaintiff on the United Airlines account, which plaintiff had worked on for five years, and instead gave the residuals to an African-American co-worker who had just been assigned the account;

6) Spears paid an African-American comp time for attending a weekend event, while denying plaintiff's request for comp time for attending the same event;

7) Spears gave plaintiff a smaller token reward for obtaining a new account than she gave an African-American co-worker for obtaining a new account.

With one or two exceptions, these items provide the basis for a rational trier of fact to conclude that plaintiff suffered negative employment action as the result of Spears' racial prejudice.³ That is, while any single example may be de minimus in nature, as a whole the jury could reasonably conclude that there was a pattern of racially motivated actions which reduced plaintiff's effectiveness and compensation as an employee.

Defendant next argues that there was insufficient evidence presented at trial from which the jury could conclude that plaintiff was constructively discharged. We disagree. First, plaintiff presented testimony of witnesses who heard Spears state she wanted to get rid of plaintiff. Second, the jury could conclude from the evidence that Spears' conduct caused plaintiff to suffer a nervous breakdown on August 5, 1997, plaintiff's last day of work.⁴ Plaintiff went on disability leave and eventually resigned her employment several months later, on February 4, 1998, without having returned to work. She cited Spears' racial discrimination as the reason for plaintiff being unable to continue her employment with defendant.

³ Defendant dismisses the comp time issue as being the result of the African-American employee submitting the request before a change in company policy regarding comp time, while plaintiff's request was submitted after. Additionally, we would agree with defendant that the fact that plaintiff received a coffee cup filled with candy in appreciation for landing a new account, while the co-worker received a more expensive bouquet of flowers hardly constitutes a major negative employment action (though a juror could view it as evidence of Spears' bias). However, it is for the jury, not this Court, to determine the weight to afford that evidence.

⁴ Plaintiff was, in fact, briefly hospitalized in a psychiatric unit following the August 5 incident, with a diagnosis of "brief depressive reaction" with references to "adjustment disorder with depressed mood" and "work stress."

Viewing the evidence in the light most favorable to plaintiff, a rational trier of fact could conclude that Spears' conduct towards plaintiff caused plaintiff to resign her employment and that plaintiff was compelled to resign. *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985).

Defendant next argues that, even if plaintiff has otherwise established her claim, defendant is not liable because there is insufficient evidence to establish that it had actual or constructive knowledge of Spears' improper conduct. See, e.g., *Chambers v Tretco, Inc*, 463 Mich 297, 312; 614 NW2d 910 (2000) (for employer to be liable on a hostile work environment claim there must be a showing that the employer failed to take prompt and adequate remedial action upon notice of the hostile work environment). However, there was evidence that CEO Ken Rimmer became aware of the issues in the office prior to plaintiff's resignation. Dorothy Robertson testified that she had informed Rimmer of the "racial things" Spears had done towards plaintiff. Further, Spears wrote, at Rimmer's direction, a file memo following the August 5, 1997, incident which acknowledged that plaintiff believed Spears' actions towards plaintiff were racially motivated. Moreover, while on disability leave, plaintiff filed a grievance with Rimmer in which she explicitly stated that she suffered a nervous breakdown on August 5 as a result of Spears' harassment of plaintiff and that plaintiff believed that race was a significant factor behind Spears' harassment of her.⁵ In her letter of resignation, plaintiff cites the handling of the grievance as a factor in her decision to resign.

When the facts are viewed in the light most favorable to plaintiff, it was reasonable for the jury to conclude that the employer was on notice before plaintiff's resignation of the allegations of racial discrimination and harassment by Spears towards plaintiff and failed to take prompt remedial action.

Next, defendant argues that the trial court erred in denying remittitur on the emotional distress damages because the award was duplicative and excessive. We disagree. We will reverse a trial court's decision on remittitur only if there was an abuse of discretion. *Jenkins, supra* at 798. A court will substitute its judgment for that of the jury only if the verdict was secured by improper methods, prejudice or sympathy, or where it is so excessive as to shock the judicial conscience. *Id.*

First, defendant argues that the trial court should have determined that the \$150,000 verdict for emotional distress on each count was duplicative just as it found the \$19,000 back pay award on both counts to be duplicative. The trial court adequately dealt with this issue in rejecting defendant's remittitur motion. The jury was asked to find the amount of economic loss on both claims because either claim alone would support a full award of back pay and the trial court would have to know the jury's determination of the economic loss in the event that it found for plaintiff on just one of the two claims. However, the trial court was satisfied that the jury was properly directed to allocate all of the non-economic damages between the two claims and, therefore, the total award represents the jury's finding of the total amount of the non-economic

⁵ Rimmer responded with a brief letter indicating that he disagreed with plaintiff's interpretation of the facts. Similarly, Rimmer's written acceptance of plaintiff's resignation indicated that he disagreed with plaintiff's accusations. However, Rimmer testified that he did not at the time of the grievance or the resignation investigate plaintiff's accusations of racial discrimination.

damages and not the total damages stated twice (once for each claim). The trial court's analysis is reasonable and we are not persuaded that it represents an abuse of discretion.

Defendant also argues that the total non-economic damage award, \$300,000, is excessive. Defendant, however, points to no evidence of improper methods to procure the verdict, or to prejudice or sympathy beyond a brief and unsubstantiated attack on one of plaintiff's witnesses. As for shocking our conscience, we note that in *Jenkins, supra*, this Court upheld a verdict where approximately \$500,000 represented non-economic damages. Similarly, in *Wilson v General Motors Corp*, 183 Mich App 21; 454 NW2d 405 (1990), the jury awarded \$750,000 in non-economic damages, which the trial court remitted to \$375,000. Accordingly, we cannot say that the damage award in the case at bar is wholly outside the range of damages seen in other cases. Once again, we are not persuaded that the trial court abused its discretion.

Finally, defendant argues that the award of attorney fees constitutes an improper "windfall" to plaintiff. We disagree. Defendant argues that the trial court should not have awarded an attorney fee under the Civil Rights Act in light of the fact that plaintiff's counsel was paid under a contingent fee. This argument was rejected in *Grow v W A Thomas Co*, 236 Mich App 696, 715; 601 NW2d 426 (1999).⁶

Affirmed. Plaintiff may tax costs.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly

⁶ For that matter, even if we accept defendant's argument that collecting both the contingent fee and the attorney fee award represents a windfall to plaintiff's counsel, that at best presents a compelling reason to conclude that plaintiff, rather than her attorneys, should collect the attorney fee award as reimbursement against the contingent fee that was paid. However, that is an issue between plaintiff and her attorney and is of no concern to defendant (or to this Court in this appeal) for the resolution of this issue.