IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE

WILLIAM McGHEE,

Respondent,

v.

SCHREIBER FOODS, INC.,

Appellant.

DOCKET NUMBER WD78744

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: August 9, 2016

The Circuit Court of Henry County, Missouri
The Honorable James K. Journey, Judge

JUDGES

Division Two: Karen King Mitchell, Presiding Judge, and Cynthia L. Martin and Gary D. Witt, Judges

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ATTORNEYS

Martin M. Meyers and Kevin A. Jones, Kansas City, MO
Kirk Rahm and Gayle McVay, Warrensburg, MO

Attorneys for Respondent,

Todd A. Johnson and Nicole L. Hutson
Springfield, MO

Attorneys for Appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

WILLIAM McGHEE,	)	
	)	
Respondent,	)	
v.	)	**OPINION FILED:**
	)	**August 9, 2016**
SCHREIBER FOODS, INC.,	)	
	)	
Appellant.	)	

WD78744 Henry County

Before Division Two Judges: Karen King Mitchell, Presiding Judge, and Cynthia L. Martin and Gary D. Witt, Judges

William McGhee filed suit under the Missouri Human Rights Act (MHRA) against Schreiber Foods, Inc., alleging age discrimination in his termination from employment. A jury found in favor of McGhee, and the trial court entered a judgment totaling $1,170,030.45 in damages, costs, and attorneys' fees. Schreiber appeals the trial court's denial of its motions for judgment notwithstanding the verdict, new trial, and remittitur.

AFFIRMED.

Division Two holds:

1. Generally, trial courts enjoy considerable discretion in the admission or exclusion of evidence, and we will only reverse a decision of the trial court upon a finding of an abuse of discretion. We will not find an abuse of discretion unless the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. Our standard of review for a trial court's denial of a motion for new trial is the same as the standard for the admission or rejection of evidence: for abuse of discretion.

2. The standards of review for denial of a motion for directed verdict and denial of a motion for judgment notwithstanding the verdict are essentially the same. When reviewing a circuit court's denial of a motion for judgment notwithstanding the verdict, this court

must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability. We view the evidence in the light most favorable to the jury's verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict. This court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion.

3. Under the MHRA, it is an unlawful employment practice for an employer to discharge any individual because of such individual's age. The MHRA defines "age" as "forty or more years but less than seventy years." In reviewing a case brought under the MHRA, appellate courts look to Missouri law, but also are guided by federal employment discrimination cases to the extent they are consistent with Missouri law. However, the MHRA is not identical to the federal standards and could offer greater protection against discrimination than that offered under Title VII. In particular, under the MHRA a plaintiff must show that his age was a "contributing factor" in the discriminatory act, while the federal cases apply the more stringent "motivating factor" standard.

4. Instances of disparate treatment, that is, when the employee has been treated differently from other employees, can support a claim of discrimination under the MHRA. But where the plaintiff attempts to prove his case based upon disparate treatment, the plaintiff bears the burden of establishing that the employees are similarly situated in all relevant respects. In such "disparate treatment" claims, the relevance of evidence as to the treatment of coworkers depends on whether those coworkers were otherwise similarly situated to the plaintiff. In determining whether coworkers were similarly situated, courts analyze factors including whether the same supervisor imposed the discipline, whether the coworkers were subject to the same standards, whether they engaged in conduct of similar seriousness, and similar factors.

5. Where the employer's policy allows employees to appeal termination decisions to a peer review panel, but also requires the plant manager to review all decisions of the review panel to ensure completeness, consistency, and fairness of all terminations, the plant manager had final authority over all terminations that were appealed for purposes of employees being similarly situated. The issue is not only who proposed the discipline but who was "responsible" for the decision.

6. Where younger employees appealed their termination for violation of company policy to the plant manager, and the plant manager decreased the level of violation to one not involving termination, but could provide no evidence for a lower-level violation having occurred, the jury could find that the plant manager knew that an offense requiring termination had occurred but chose to show leniency to the younger employees that was not shown to older employees.

7. The trial court is not bound by an employer's peer review panel decision that a younger employee had not committed a violation of policy for purposes of determining whether the younger and older employee were treated differently for similar violations.

Moreover, the peer review panel did not have access to prior employee disciplinary appeals, while the plant manager—the final decision maker—did.

8. The passage of time, especially if paired with other changes in personnel or policy, can cause alleged violations of policy to be too remote for purposes of determining whether similarly situated employees were treated differently. But where no relevant policy had changed in the twenty-six-month period between the two incidents at issue, and the same plant manager, HR manager, and supervisor were in place at the time of both incidents, we cannot say that the passage of twenty-six months between the incidents, without more, renders the incidents so remote that the employees are not similarly situated.

9. The fact that a different policy was technically in place when two policy violations took place does not necessarily render the two employees not similarly situated. The issue is what conduct the policy forbade and whether the employees engaged in such similar conduct. So long as the new policy proscribes the same conduct as the prior version, and both employees engaged in sufficiently similar conduct, it does not matter that the two policies are not worded identically.

10. There is no magic number for the number of similarly situated employees a plaintiff must show in order to prove discrimination, and as few as one comparator can suffice. Here, McGhee offered evidence of a total of seven employees—four under the age of forty, and three over the age of fifty—similarly situated to each other except for their ages. Having committed similar violations of policy, the four employees under forty years old either initially received a lesser corrective action than their older peers, or subsequently had their corrective action reduced or rescinded entirely upon review. All corrective actions for the older employees were upheld on review. Any time a Schreiber witness referenced "gray areas" or "inconsistencies," those gray areas were routinely found to be reasons to reduce or rescind the punishments of younger employees. In contrast, any gray area or inconsistency served as a reason to uphold the more severe penalty for employees over age fifty. From this, the jury could have reasonably concluded that Schreiber treated McGhee unfavorably to similarly situated younger employees based on McGhee's age.

11. Additionally, the jury could have found that the reason provided for McGhee's termination was unworthy of credence. Evidence was presented that the employees who initially reported seeing McGhee committing a safety violation could not have seen what they reported from their vantage point. And there is a substantial dispute over whether anyone ever actually saw him commit the violation. Evidence that an employer's explanation for its decision is "unworthy of credence" is circumstantial evidence of discrimination.

12. The MHRA authorizes punitive damage awards if a plaintiff adduces clear and convincing proof of a culpable mental state, either from a wanton, willful, or outrageous act, or from reckless disregard for an act's consequences such that an evil motive may be inferred. A submissible case for punitive damages is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity that the defendant's conduct was outrageous

because of evil motive or reckless indifference. Whether there is sufficient evidence to support an award of punitive damages is a question of law. We view the evidence and all reasonable inferences in the light most favorable to submissibility and we disregard all evidence and inferences which are adverse thereto.

13. Punitive damages may be proven by circumstantial evidence, and there is no requirement of direct evidence of intentional misconduct, as most employment discrimination cases are inherently fact-based and necessarily rely on inferences rather than direct evidence. Moreover, the same evidence supporting the discrimination claim can also support a claim for punitive damages.

14. McGhee presented evidence that a fact-finder could reasonably have found to establish that, when it came to employees over the age of fifty, Schreiber had a pattern of strictly reading its policies to require termination for all conduct that could be construed as a violation. But when younger employees engaged in similar conduct, Schreiber either determined that it did not violate policy or sanctioned reducing the penalty to that of a lesser violation not requiring termination. Moreover, after younger employees' corrective actions were reduced by the plant manager after they had initially been charged with violations requiring termination, McGhee sent Schreiber an email again contesting his termination, thus giving Schreiber another opportunity to review the consistency of the decisions. Given this additional opportunity, Schreiber again affirmed McGhee's termination, showing conduct that a fact-finder could have determined reflected reckless disregard of dissimilar treatment based on age. Where the employer repeatedly fails to take effective action to stop the discriminatory conduct, the evidence is sufficient to support submission of punitive damages.

15. Section 510.263.6 allows the trial court to order remittitur of punitive damages based on the trial judge's assessment of the totality of the surrounding circumstances. Generally, the decision to award punitive damages is peculiarly committed to the jury and the trial court's discretion, and the appellate court will only interfere in extreme cases. On appellate review, an abuse of discretion is established when the punitive damages award is so disproportionate to the factors relevant to the size of the award that it reveals improper motives or a clear absence of the honest exercise of judgment. Only when the amount of punitive damages is manifestly unjust will an appellate court interfere with or reduce the size of the verdict.

16. No bright-line test exists to determine if a punitive-damage award is excessive, but Missouri courts have developed a nonexclusive list of factors to consider in reviewing punitive damage awards: (1) the degree of malice or outrageousness of the defendant's conduct, which has been deemed a critical factor; (2) aggravating and mitigating circumstances; (3) the defendant's financial status, as an indication of the amount of damages necessary to punish the defendant; (4) the character of both parties; (5) the injury suffered; (6) the defendant's standing or intelligence; (7) the age of the injured party; and (8) the relationship between the two parties.

17. Here, the jury awarded $300,000 in compensatory and $350,000 in punitive damages. Schreiber's inequitable treatment of similarly situated employees in violation of the MHRA, which this court has held justifies punitive damages, also constitutes outrageous conduct—the "critical factor"—and poor character. In Schreiber's favor, little evidence was presented as to its financial status. Moreover, McGhee is a convicted felon, who deliberately lied about this fact on his employment application with Schreiber. It appears that the jury took these factors into account, given the modest punitive damage award in comparison to the compensatory damages. Indeed, the punitive damages award, as a ratio to the compensatory damages, is exceptionally low when compared to other cases in which Missouri courts have upheld awards that were substantially more punitive. Nothing here leads to the conclusion that this is an extreme case, rendering the award so disproportionate to the factors relevant to the size of the award as to render the award manifestly unjust. The $350,000 award accomplished the purposes of punitive damages and was related to the wrongful act. The trial court did not err in failing to order remittitur of the jury's punitive damages award.

Opinion by: Karen King Mitchell, Judge August 9, 2016

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