

**IN THE
MISSOURI SUPREME COURT**

APPEAL NO. SC88950

TRACY GILLILAND,

Appellant,

v.

MISSOURI ATHLETIC CLUB,

Respondent.

TRANSFERRED FROM THE MISSOURI COURT OF APPEALS EASTERN DISTRICT, AFTER

APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS

THE HONORABLE JIMMIE M. EDWARDS, DIVISION 19

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

The Tracy Gilliland (hereafter “Appellant” or “Appellant Gilliland”) appeal raises the important questions of whether the trial court’s grant of judgment notwithstanding the verdict on the issue of punitive damages was appropriate *after* the jury found by clear and convincing evidence Respondent MAC was liable for punitive damages during a bifurcated trial, pursuant to RSMo §510.263 (2000). This appeal also presents the issue of whether the attorneys’ fees awarded pursuant to the Missouri Human Rights Act (MHRA) RSMo §213.055 *et seq.* (2000) were arbitrary or demonstrated indifference to Appellant’s claim and thereby constitutes an abuse of the trial court’s discretion. Finally, this appeal addresses the trial court’s denial without comment of requested equitable relief and whether that decision constitutes a further abuse of discretion. On December 18, 2007, this Court entered an Order sustaining Appellant’s Application to Transfer.

STATEMENT OF FACTS

Appellant filed his petition with the Circuit Court of the City of St. Louis alleging, *inter alia*, violations of the Missouri Human Rights Act, RSMo §213.055 (Supp. 1996) *et seq.*, against Respondent Missouri Athletic Club (hereafter “Respondent” or “Respondent MAC”) for constructive discharge, punitive damages, and other matters not appealed. Pursuant to RSMo § 510.263, a bifurcated jury trial concluded on March 2, 2006, with the jury returning a verdict in favor of Appellant and against Respondent MAC in the amount of \$60,000.00, and finding Respondent MAC liable for punitive damages. The claims on appeal focus on the issue of punitive damages, and Appellant’s requests to amend or alter the judgment to provide more complete relief in the form of attorney fees and equitable relief.

Judgment was entered on March 8, 2006 (ROA 223-229). On April 3, 2006, Appellant filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial (ROA 232-238). Appellant’s Motion asserted that the trial court erroneously directed a verdict for Respondent MAC after the jury deliberated and concluded by “clear and convincing evidence” Respondent MAC’s behavior warranted an award of punitive damages to punish and deter similar conduct in the future. *Id.* On April 3, 2006, Appellant filed Motion to Amend or Alter the Judgment to Award Attorney Fees, or Alternatively, Plaintiff’s Motion for Attorneys Fees (ROA 248-287). Appellant’s Motion requested \$170,149.50 in attorneys’ fees (ROA 344), for 890.7 hours worked during the previous 41 months (ROA 262-274; 283-287). On April 3, 2006, Appellant filed a Motion to Amend or Alter the Judgment to Order Equitable and/or Injunctive Relief” (ROA 239-247). On June 8, 2006, the trial court entered “Order Granting, In Part, Plaintiff’s Motion for Attorney Fees, Plaintiff’s Memorandum of Costs for Taxing, and Denying Defendants’ Motion for Judgment

Notwithstanding the Verdict and all other post-trial motions (ROA 344-347) denying Appellant's Motion for a New Trial, awarding \$22,000.00 in attorney fees and denying Appellant's request for front pay and other equitable relief.

**A. FACTS RELEVANT TO APPELLANT'S CLAIM FOR PUNITIVE DAMAGES
BASED ON HOSTILE WORK ENVIRONMENT CONSTRUCTIVE DISCHARGE.**

Respondent MAC hired Appellant in December of 1999 to work as a server in its restaurant facilities (Trial Exhibit 14). During Appellant's employment with Respondent MAC, Manager Vincent Millen held the position of Operations Manager of Food and Beverage (TT 204). In that capacity, Manager Millen supervised Appellant and several other wait staff employees, was several levels above Appellant in the chain of command, and had the authority to discipline as well as terminate Appellant (TT 82). Additionally, during Appellant's employment, Manager Millen regularly subjected Appellant to continuous unwelcome physical touching which directly resulted in Appellant's constructive termination (Trial Exhibit 8). The unwelcome touching consistently occurred during working hours, within the MAC facility, and while Appellant performed work functions (TT 79-81). The unlawful acts were described as nipple tweaking (TT 79), repeated instances of simulated anal rape (TT 81), grabbing at Appellant's penis (TT 89), pinning Appellant against immobile objects while Manager Millen pressed his groin into Appellant's buttocks (TT 83-84, 89 and 176), pulling Appellant's head toward Manager Millen's groin (TT 106), and vulgar language, off-color jokes, suggestive comments, and computer pornography on Respondent MAC's premises (TT 90). Within an hour of Appellant submitting his

resignation, the following took place between Appellant and Manager Millen while Manager Millen held Appellant's resignation note in Manager Millen's hand:

Mr. Millen came up behind me, again pressing me into the register, the computer system this way, with his lower torso up against me. The statement that was made to me was, "Quit being such a hard ass"; and, "Oh, you do have a hard ass", trying to make a joke out of it at the same time while he's pressing up against me. . . I turned around, pushed him away; and, said, "I'm done", and that was the straw that broke the camel's back. "(TT 102).

The jury credited Appellant's evidence, and rejected Respondent MAC's claims that the above-described conduct did not occur (ROA 218). Specifically, Manager Millen testified at trial that he never touched Appellant or any other MAC employees beyond a "pat on the back" (TT 214). Contrary to Manager Millen's testimony describing only pats on the back, numerous of Respondent MAC's employees described several instances of inappropriate physical touching such as Manager Millen touching the breast of MAC employee Pam Evans (TT 84, 98). The touching of Ms. Evans occurred in the presence of Human Resources Director Christine Maurer and two other female human resources employees (TT 85). Appellant's coworker James Dawson testified that Manager Millen performed a "hip check" on him (TT 192) and that Manager Millen shoved Mr. Dawson into a corner (TT 194). Likewise, Manager Millen pushed Appellant's coworker Pat Rea out of an elevator at the MAC that generated a written complaint against Manager Millen (TT 215-218, Trial Exhibit 22). Additionally, Appellant's co-worker Charlotte Ferrell confirmed viewing a situation involving Appellant and Manager Millen (TT 176) that Appellant

described as unwelcome, simulated anal rape.

Appellant regularly complained about the conduct of Manager Millen to MAC management. Appellant asked Manager Millen to cease the conduct on each occasion (TT 79). Appellant approached his supervisor Betty Hines in effort to end the conduct (TT 62). Appellant also pointed out the conduct to Manager Millen's supervisor, Food and Beverage Director Brian Helms, asking him to "put a leash" on Manager Millen in a further effort to end the outrageous conduct (TT 81). Appellant informed Board of Governor member Jan Mangesldorf of the unwelcome conduct in an attempt to stop the behavior (TT 92-93, 94). Appellant testified he did not approach other, male Board of Governor members because "I have little respect for the Board of Governors after an incident that happened in the Missouri Athletic Club." (TT 94).

Appellant's reluctance to approach other members of the Board of Governors in presenting his complaint up the chain of command was based upon the fact that the Board of Governors had previously viewed a female dancer on the premises of the MAC (TT 95, 183-184). Appellant testified he did not approach MAC General Manager Larry Thompson, another link in the complaint process, "because he had his own sexual thing going on in the Club" (TT 94). The Trial Court ruled that this evidence of the ineffective complaint process at Respondent's facility was inadmissible during a bench conference. (TT 159). It is important to note that Manager Thompson acknowledged that the Board of Governors was a potential avenue of complaint for Appellant (TT 383, 384) or that Appellant could complain to him directly (TT 365). Human Resources Director Maurer testified, however, that she

instructed Appellant to bring complaints *only* to her; not to circumvent her authority (TT 390-391, Trial Exhibit 19). Specifically, Human Resources Director Maurer wrote on August 24, 2001, “When you go directly to me or even LT,¹ the resolution process becomes very inefficient.” (Trial Exhibit 19). General Manager Thompson testified that restricting Appellant’s ability to complain as done by Maurer would violate MAC policy (TT 365). Manager Thompson testified that Appellant could bring complaints to him or the president of the MAC (TT 383-84).

During the same time period the above occurred, Respondent MAC and its employees received sexual harassment training concerning their respective obligations to provide and maintain an appropriate working environment (TT 382-383; Trial Exhibit 7, 8). Respondent MAC’s policies provided that inappropriate touching - even accidentally - could result in a claim of sexual harassment and discipline (TT 236). Manager Millen acknowledged this fact and that it was memorialized in the MAC’s policy handbook. *Id.* All Respondent MAC’s managers were required to attend sexual harassment training provided by The Lowenbaum Partnership while, with respect to Appellant, ignored the most fundamental elements of their training (TT 218).

1. FACTS NOT ADMITTED REGARDING APPELLANT’S WORK ENVIRONMENT

¹ “LT” were the initials used to refer to Respondent MAC’s General Manager Larry Thompson.

The Court acknowledged that Appellant sought punitive damages due the nature of Respondent's treatment of Appellant and invited either party to request a bifurcated trial (TT 2). Respondent requested a bifurcated trial. *Id.* Appellant raised the issue of the appropriateness of punitive damages in his Trial Brief (ROA 178-180), in Appellant's Memorandum for the Submission of the Issue of Punitive Damages to the Jury (ROA 186-190), and corresponding Motion for the Submission of the Issue of Punitive Damages to the Jury (ROA 191-193).

Despite the Trial Court's awareness of the pending punitive damages issue, it erroneously prevented Appellant's counsel from presenting additional facts in support of its claims by specifying that such information could only be raised in the second phase of a bifurcated trial (TT 159, 184, 316-317, 327). Specifically, Appellant raised the ineffective complaint process existing at Respondent MAC due to a number of facts including - as described by the Court - "Mr. Thompson has his own sexual problems" (TT 159); the issue of the dancer that allegedly performed at Respondent's facility (TT 183); Brian Helms knowledge concerning the dancer and that such conduct would "never happen again" to which to Court noted such testimony "will not come in at this time" (TT 183-184); the issue allegedly involving Manager Thompson and a subordinate employee (TT 315-316); and the MAC Board of Governors alleged interface with a dancer (TT 326-327) all offered in Appellant's efforts to demonstrate an ineffective complaint process. Despite the jury being prevented from considering this information, the jury concluded the acts of Respondent MAC and its failure to intervene on Appellant's behalf warranted punitive damages (ROA

217). The trial court was aware of even more egregious and relevant facts that were blocked from the jury's consideration. These additional facts further demonstrated the ineffective complaint process at Respondent MAC's facility and further called into question the trial court's ruling that punitive damages were not warranted because Respondent MAC allegedly did not demonstrate reckless indifference to Appellant's rights. These additional facts not only demonstrated improper, but that such behavior was condoned and penetrated the highest level of Respondent MAC's management. Thus, the complaint process was impeded or made wholly ineffective, further warranting punitive damages.

Having considered the evidence, the jury concluded that Appellant established by "clear and convincing" evidence that the actions taken by Manager Millen and Respondent MAC's lack of any response, despite its knowledge of the conduct, warranted punitive damages (ROA 204, 217). In discussing its decision to deny Appellant punitive damages, the trial court stated that "as a legal matter that there was no evil motive by the Respondent with respect to the plaintiff's discharge. The Court finds that there was no reckless indifference by the defendant with respect to the plaintiff's discharge." (TT 513-514). The jury - as evidenced by its verdict - disagreed with the trial court.

**B. FACTS RELEVANT TO APPELLANT'S MOTION TO AMEND OR
ALTER THE JUDGMENT AND AWARD ATTORNEYS FEES**

Appellant filed a discrimination charge with the St. Louis Civil Rights Enforcement Agency on February 19, 2002, alleging, *inter alia*, that was amended on November 13, 2002, to add claims of sexual harassment by Manager Millen and constructive discharge from

MAC employment (ROA 40). Thereafter, on November 10, 2003, (ROA 19) Appellant filed his petition in the St. Louis City Circuit court seeking money damages, including damages for pain and suffering, lost wages, injunctive relief, and other relief due to violations of the MHRA. (ROA 19-41). Thereafter, Respondent's counsel² initially filed Motion to Transfer Case to Equity (ROA 44-46) one Summary Judgment Motion (ROA 63-70), one Motion to Dismiss (ROA 47-52), and numerous subsequent motions seeking dismissal or summary judgment in its favor concerning Appellant's claims through the date Respondent's prior counsel withdrew from further representation of Respondent MAC (ROA 71-79, 80-87, 995-104, 113-119). During the 40 months between filing of Appellant's Petition and withdrawal as attorneys of record, Respondents' prior counsel (The Lowenbaum Partnership) billed \$96,335.00, representing 535.24 hours of legal work defending the instant matter. (ROA 355). Measured at the same point in time as the withdrawal of The Lowenbaum Partnership on February 6, 2006 (ROA p. 141-143), Appellant's counsel had expended 377.5 hours (or, approximately 150 hours less than the Lowenbaum Partnership) (ROA 262-271)

² It should be noted that Defendants were originally represented by The Lowenbaum Partnership. The Lowenbaum Partnership withdrew as attorneys of record on February 6, 2006 (ROA 141-143). At the same time, Respondent MAC's substitute counsel, Peter Dunne, Esq. and Jessica Liss, Esq. of the law firm Rabbitt, Pitzer and Snodgrass, entered appearance along with Appellant's counsel Donald Murano, Esq. of The Murano Law Firm LLC.

in pursuing Appellant's claims. The Trial Court determined fees were appropriate, and concluded a reasonable fee was \$22,000.00, noting the amount of the jury award, and concluding the "hours expended were excessive given the relatively straightforward nature of the case" (ROA 357).

Appellant testified that loss of his employment at the MAC resulted in a period of unemployment, lost benefits of employment, emotional distress (TT 109, 116-123) and continuing decreased earnings due to lesser hourly wage at his current employment (TT 21). At the time of trial, the jury determined that the damages Plaintiff had incurred as a result of his constructive discharge were \$60,000.00 (ROA 218). Appellant thereafter moved the trial court to award Appellant front pay to address the difference in wages and benefits which continue to cause Appellant's damages to accrue (ROA 288-293) which the trial court denied without discussion.

POINTS RELIED ON

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT PUNITIVE DAMAGES BECAUSE THE JURY FOUND RESPONDENT MAC LIABLE FOR PUNITIVE DAMAGES DURING A BIFURCATED TRIAL IN THAT CLEAR AND CONVINCING EVIDENCE ESTABLISHED PUNITIVE DAMAGES WERE WARRANTED BECAUSE OF RESPONDENT MAC'S EVIL MOTIVE OR RECKLESS INDIFFERENCE TO APPELLANT'S RIGHTS.

Brady v. Curators of the University of Missouri, 213 S.W. 3d 101 (Mo.App. E.D. 2006)

H.S. v. Board of Regents, Southeast Missouri State University. 967 S.W.2d 665 (Mo.

App. E.D. 1998)

Hoyt v. GE Capital Mortgage Services, Inc., 193 S.W.3d 315(Mo. App. E.D. 2006)

Kolstad v. Am. Dental Ass'n., 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999)

II . THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEYS FEES BECAUSE APPELLANT PREVAILED ON HIS MISSOURI HUMAN RIGHTS ACT CLAIM BUT RECEIVED ONLY A FRACTION OF THE REQUESTED ATTORNEY'S FEES IN THAT THE AMOUNT OF ATTORNEY'S FEES AWARDED WAS ARBITRARY AND DEMONSTRATED INDIFFERENCE TO THE APPROPRIATE FACTORS TO CONSIDER IN AWARDING FEES.

Brady v. Curators of the University of Missouri, 213 S.W. 3d 101 (Mo.App. E.D. 2006)

Hutchings v. Roling, 193 S.W.3d 334 (Mo. App. E.D. 2006)

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)

Williams v. Finance Plaza, Inc., 78 S.W.3d 175, 185 (Mo.App. 2002)

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM FOR EQUITABLE RELIEF BECAUSE APPELLANT ESTABLISHED THAT A MAKE WHOLE REMEDY WAS NOT PROVIDED BY THE JURY'S VERDICT FOR CONSTRUCTIVE DISCHARGE IN THAT ONLY PAST DAMAGES WERE AWARDED AND APPELLANT'S FUTURE DAMAGES FROM HIS CONSTRUCTIVE DISCHARGE CONTINUE.

Baker v. John Morrell & Co., 382 F.3d 816 (8th Cir. 2004)

Brady v. Curators of the University of Missouri, 213 S.W. 3d 101 (Mo.App. E.D. 2006)

Pollock v. Wettereau, 11 S.W.3d 754, 767 (Mo. App. 1998)

United Paperworkers Int'l Union Local 274 v. Champion Int'l Corp., 81 F.3d 798 (8th Cir. 1996)

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT PUNITIVE DAMAGES BECAUSE THE JURY FOUND RESPONDENT MAC LIABLE FOR PUNITIVE DAMAGES DURING A BIFURCATED TRIAL IN THAT CLEAR AND CONVINCING EVIDENCE ESTABLISHED PUNITIVE DAMAGES WERE WARRANTED BECAUSE OF RESPONDENT MAC'S EVIL MOTIVE OR RECKLESS INDIFFERENCE TO APPELLANT'S RIGHTS.

Whether there is sufficient evidence for an award of punitive damages is a question of law. *Hoyt v. GE Capital Mortgage Services, Inc.*, 193 S.W.3d 315, 322 (Mo. App. E.D. 2006). The Court reviews the evidence presented to determine whether, as a matter of law, it was sufficient to submit the claim for punitive damages. *Id.* In doing so, the appellate court views the evidence and all reasonable inferences in *the light most favorable to submissibility*. *Id.* (emphasis supplied). A submissible case 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 is, that it was highly probable – that the defendant’s conduct was outrageous because of evil motive or reckless indifference. *Id.*

Missouri law holds that there is a presumption in favor of reversing a trial court’s judgment sustaining a motion for directed verdict, unless the facts and inferences therefrom are so strongly against the plaintiff as to leave no room for reasonable minds to differ. *Schumacher v. Barker*, 948 S.W.2d 166, 168 (Mo. App. 1997). In the instant matter, the reasonable minds of the jury concluded the record contained clear and convincing evidence of Respondent MAC’s complete indifference to or conscious disregard for the rights of its employees. The jury, charged with determining by “clear and convincing” evidence whether Respondent MAC demonstrated reckless indifference to Appellant’s rights, found sufficient evidence. The trial judge, however, disagreed. Under such circumstances and where the facts suggest an incorrect legal conclusion³ resulted in the trial court directing a verdict on this issue, Appellant respectfully suggests that the ruling on punitive damages must be reversed and the matter remanded to resume trial proceedings solely on the issue of the amount of punitive damages to award. Further, Appellant should be granted wide latitude to introduce all evidence relevant to punitive damages including but not limited to the ineffective complaint procedure existing at Respondent MAC’s facility. Significantly, Respondent

³ A discussed fully below, Appellant submits that the court’s analysis of the Respondent MAC’s vicarious liability for that conduct of its manager as well as its own failure to act was legally incorrect.

MAC maintained throughout trial that the actions supporting Appellant's claim of hostile work environment harassment that resulted in constructive discharge *never occurred*, while the Jury believed the conduct occurred and that punitive damages should be assessed against Respondent MAC for its reckless indifference to Appellant's rights.

It is important to remember the integral role the right to jury trial plays in the civil justice system. Article I, Section 22 of the Missouri constitution provides that "the right of trial by jury as heretofore enjoyed shall remain *inviolated*; . . ." "Quite simply, the words of the provision is intended to guarantee a right, not to restrict a right. The choice of words, particularly the use of the words "remain inviolated," is a more emphatic statement of the right than the simply stated guarantee written some 30 years earlier as the [Seventh] amendment to the United States Constitution that ". . .the right of trial by jury shall be preserved. . ." *State ex rel. Diehl v. O'Malley*, 95 F.3d 82, 84 (Mo. banc 2003)(emphasis supplied). The right to jury trial has been described as "[a] right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. City of New York*, 315 U.S. 752, 752-53, 62 S.Ct. 854 (1942); accord *Kampouris v. St. Louis Symphony Soc'y*, 210 F.3d 845, 849 (8th Cir. 2000). In general, the determination of punitive damages is primarily for the jury. *Bishop v. Cummines*, 870 S.W.2d 922, 923 (Mo. App. 1994). Appellant's right to jury trial to determine his injuries and assess his damages was denied, depriving him of a fundamental right to a complete damage award as determined by a jury of his peers.

In directing a verdict for Respondent MAC on the jury verdict for punitive damages,

the trial court reasoned that, “[t]his Court finds as a legal matter that there was no evil motive by the defendant with respect to plaintiff’s discharge. The Court finds that there was no reckless indifference by the defendant with respect to plaintiff’s discharge” (TF 513-514). Appellant maintains that these conclusions conflict not only with the facts necessarily believed by the jury, but also with Missouri and Federal decisions and create unacceptable policy.

Missouri appellate courts have affirmed awards of punitive damages in Missouri Human Rights Act claims where the plaintiff has shown that the employer or management personnel acted with reckless disregard to a plaintiff’s rights. In the instant case, Manager Millen’s outrageous conduct occurred in plain view of Respondent MAC management on Respondent’s premises, during work without being halted. Specifically, Missouri appellate courts have upheld awards of punitive damages assessed against an employer for the acts of its employees. *See H.S. v. Board of Regents, Southeast Missouri State University*, 967 S.W.2d 665, 672 (Mo. App. E.D. 1998), and *Brady* at 108-09. “In examining the issue of punitive damages, we found that, under Missouri law, a plaintiff is entitled to punitive damages award if he shows that the defendant’s conduct toward him was outrageous because of the defendant’s evil motive or reckless indifference to the right of others”. *Id.*

A. Respondent MAC is Directly Liable for Punitive Damages Because of its Reckless Indifference to Appellant’s Rights

Appellant submits that when the evidence presented at trial is considered according to the appropriate standard, Appellant established – by clear and convincing evidence - reckless

indifference by Respondent MAC to Appellant's rights warranting punitive damages. The trial court here as well as Respondent MAC reasoned that a principal is not liable for the acts of its agent when the acts are not within the scope of employment in the context of a claim for hostile work environment constructive discharge brought pursuant to the Missouri Human Rights Act. This standard ignores the prior opinions of Missouri courts which find punitive damages appropriate when reckless indifference to a plaintiff's rights is established. See *H.S. v. Board of Regents*, at 672 (Mo. App. E.D. 1998), and *Brady* at 108-09. Here, reckless indifference was proven by "clear and convincing evidence" through Respondent MAC's knowledge of the outrageous conduct directed at Appellant, its inaction in failing to act to stop the conduct, its inaction in failing to investigate Appellant's complaints or follow its policy that prohibited such conduct, and finally in denying that the conduct occurred at trial. Succinctly put, Respondent MAC is ***directly liable*** for punitive damages because of its reckless indifference to Appellant's rights, without engaging in the flawed analysis of the Trial Court which relied on inapplicable principles of vicarious liability. *Id.*

Of particular relevance here, is U.S. Supreme Court precedent discussing the circumstances in which an award of punitive damages against a defendant employer are appropriate stemming from the acts of a managerial employee. The Supreme Court has specified that, in the context of an award of punitive damages, that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n.*, 527 U.S. 526, 535, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999).

B. U.S. Supreme Court Standard – Employer’s Vicarious Liability for Management Personnel Harassment

The U.S. Supreme Court developed an analytical framework to determine whether a prevailing civil rights plaintiff is entitled to punitive damages. *See Kolstad* 527 U.S. at 536, 119 S.Ct. 2118. This framework requires the court to consider whether the plaintiff established the following: (1) that the employer acted with the requisite mental state, *i.e.* that the employer acted “in the face of a perceived risk that its actions will violate federal law,” *Id.*; (2) that liability may be imputed to the defendant employer by showing that the employees who discriminated against the plaintiff are managerial agents acting within the scope of their employment, *Id.* at 539; and (3) even if the plaintiff establishes that the employer’s managerial agents recklessly disregarded her federally protected rights, that the employer failed to engage in good faith efforts to implement an anti-discrimination policy, *Id.*

Specifically, the Court in *Kolstad* adopted the Restatement of Agency's limitations on the application of vicarious liability for punitive damages, which provide that liability may only be imputed to the principal if:

- 1) he authorized the wrongful act;
- 2) the agent was unfit and the principal was reckless in employing him;
- 3) the agent was acting in a managerial capacity and within the scope of his employment; or
- 4) the principal or a managerial agent ratified the wrongful acts.

Id. at 542.

In short, the Supreme Court rejected the theory that an employer is vicariously liable for punitive damages based solely on the employee's apparent authority or acts committed within the scope of his employment. Instead, the Supreme Court held that the employer must be culpable in some degree in order to have the employee's knowledge and acts imputed to it for punitive damage liability. Here, both factors three and four establish Respondent MAC should be held vicariously liable for punitive damages. Respondent MAC is liable vicariously under prong three because Manager Millen directed the outrageous conduct at Appellant at work, during working hours, and it is reasonable to conclude that his managerial authority, in part or in total, assisted him in perpetrating the conduct. Respondent MAC is liable vicariously under prong four because it ratified the wrongful acts of Manager Millen through its knowledge of the conduct and refusal to take action to end it. Thus, even under a theory of vicarious liability, Respondent MAC is liable for punitive damages contrary to the reasoning of the Trial Court.

Significantly, the Supreme Court also has specified extremely narrow circumstances -- ***none of which are present here*** - in which an award of punitive damages against an employer would not be appropriate, including where: 1) the employer is unaware of the relevant federal prohibition; 2) the employer discriminates in the belief that the discrimination is lawful; 3) the underlying theory of discrimination may be novel or poorly recognized; 4) the "employer may reasonably believe that its discrimination satisfies a bona fide occupational defense." *Kolstad* at 536-37. The U.S. Supreme Court concluded that this

framework struck the correct balance of providing redress and encouraging the avoidance of harm. *Id.* at 545. As discussed in this brief, and as a review of the evidence establishes, none of these factors apply to the instant situation because Respondent MAC denied that any of the complained of conduct occurred, and also because Respondent MAC was aware of the prohibition concerning the outrageous conduct that drove Appellant from his job, even promulgating a policy prohibiting “accidental” touching. Thus, no basis exists for Respondent MAC to avoid punitive damages liability for its reckless indifference to Appellant’s rights.

The Appellate Court here did not acknowledge the settled Federal precedent that exists in the context of claims for civil rights violations in determining Respondent MAC’s punitive damages liability, but rather relied on *Flood ex rel. Oakley v. Holzwarth*, 182 S.W.3d 673, 680 (Mo.App. S.D. 2005) and *Noah v. Ziehl*, 759 S.W.2d 905, 911 (Mo.App. E.D. 1998) to conclude that Respondent MAC is not liable for its manager’s outrageous conduct and its own failure to act and stop the outrageous conduct despite its knowledge of the conduct and Appellant’s complaints. The Appellate Court’s reliance on *Flood* and *Noah* for determining vicarious liability is a significant departure from the analysis that other Missouri Courts of Appeal and the U.S. Supreme Court’s rulings have established is an appropriate analysis. *Kolstad* at 541, and *Pollock v. Wettereau*, 11 S.W.3d 754, 767 (Mo. App. 1998). The court’s decision also conflicts with other Missouri appellate court precedent, which hold that a principal is liable for the conduct of all of its officers and employees. *Cohen v. Express Financial Services, Inc.*, 145 S.W.3d 857, 866 (Mo. App. W.D.

2004)(citing *Brown v. New Plaza Pontiac*, 719 S.W.2d 468, 473 (Mo.App. 1986). Appellant maintains that these non-employment law, vicarious liability cases should not control the determination of Respondent MAC's punitive damages liability. Further, should the Court find it necessary to apply vicarious liability principles in determining Respondent MAC's punitive damages liability, the framework established in *Kolstad* should be used to impose liability as discussed above.

At least one reason that the appellate court's departure from federal precedent regarding vicarious liability is significant in connection with claims brought pursuant to the MHRA is that the *Kolstad* analysis references the U.S. Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998) - cases which discuss the circumstances in which an employer may raise certain affirmative defenses to claims of strict liability for discrimination. These cases are recognized in the Missouri Commission on Human Rights regulations and Missouri appellate court precedent. 8 CSR 60-3.040(17)(c) and (d)(1-5), and *Pollock* at 767. Additionally, and as a practical matter, a decision that liability for punitive damages would only attach where a manager was acting in the "scope of employment" would likely insulate all employers from liability for punitive damages in unlawful harassment cases regardless of its knowledge of such unlawful harassment, its failure to act to stop the harassment, or its policies (or lack thereof) for addressing such conduct.

The heart of the issue presented is whether Appellant Gilliland presented sufficient evidence to establish his right to an award of punitive damages against Respondent MAC

that a jury of his peers found warranted by “clear and convincing” evidence. Here, in addition to the jury’s verdict by “clear and convincing evidence”, the Trial Court essentially conceded that the conduct at issue demonstrated evil motive or reckless indifference to the rights of others (TT 514). The Trial Court, however, believed that the wrong party was being held responsible for that conduct – Respondent MAC instead of Manager Millen. Appellant respectfully submits that this reasoning was incorrect, as the well-settled law in this area is that an employer is vicariously liable for the actions of its supervisory employees. Further, the jury instruction upon which the verdict was granted was solely against Respondent MAC (ROA 217). As addressed in *Faragher* and *Ellerth*, employers may be held liable for the sexual harassment of an employee that results in a tangible employment action. The Federal Courts have recognized that a constructive discharge, such as the constructive discharge at issue in this case, is a type of tangible employment action that prevents an employer from raising any affirmative defense to liability. *Pa. State Police v. Suders*, 542 U.S. 129, 140-41 (2004). Here, the outrageous conduct directed at Appellant resulted in his constructive discharge, actions that culminated with the incident that occurred, on or about, August 2, 2002, in which Appellant was physically pinned against a computer terminal by Manager Millen while being told to drop his complaint and stop being such a “hard ass.” Moreover, it should be recalled that Respondent was previously successful in having Manager Millen removed as an individual defendant from Appellant’s MHRA claims prior to this Court’s ruling in *Brady*. (ROA 125-128).

Federal courts reviewing awards of punitive damages in civil rights claims have

sustained punitive damages awards based on the unlawful harassment of a plaintiff/employee focusing on whether the evidence established the defendant/employer acted with reckless indifference to the plaintiff's rights. *Beard v. Flying J, Inc.*, 116 F.Supp.2d 1077, 1093 (S.D.Iowa 2000)(award of punitive damages affirmed where supervisory employee directed harassing conduct at plaintiff, denied engaging in the conduct, acknowledged awareness of employer policy prohibiting the conduct, all of which the court concluded helped demonstrate reckless indifference by the defendant/employer); *LUU v. Seagate Technology, Inc.*, 2001 WL 920013 (D.Minn. 2001)(award of punitive damages affirmed where harassing conduct resulted in constructive discharge of plaintiff and the employer failed to follow its policy prohibiting such conduct when it became aware, demonstrating defendant/employer's reckless indifference for plaintiff's rights); *Flockhart v. Iowa Beef Processors, Inc.*, 192 F.Supp.2d 947, 977-78 (N.D.Iowa 2001)(award of punitive damages affirmed where manager was the harasser, higher level management representatives ignored plaintiff's complaints, the employer failed to investigate the complaints, and the employer failed to document the complaints demonstrating a reckless indifference to the plaintiff's rights); *Storlie v. Rainbow Foods Group, Inc.*, 2002 WL 46997 (D.Minn. 2002)(award of punitive damages against employer affirmed where employer ignored repeated complaints of plaintiff regarding harassment, no discipline was issued to the offending managerial employee, a cursory investigation was conducted, and no documentation of the complaints was maintained establishing a reckless indifference to plaintiff's rights by the employer/defendant).

Moreover, Appellant's request for new trial to determine the *amount* of punitive damages should be considered in light of the fact that the jury was explicitly instructed of the high standard of proof under Jury Instruction No. 3: "the evidence has clearly and convincingly established the propositions of fact required for the recovery of punitive damages" (ROA 204). Here, the jury found the Respondents' conduct "was outrageous because of defendants' evil motive or reckless indifference to the rights of others" (ROA 207). Further, the jury found the evidence established that the "exclusive reason" Appellant resigned his employment was the hostile work environment to which he was subjected (ROA 213). Notwithstanding the high burden of proof on Appellant, the jury returned verdict in Appellant's favor and concluded that "defendant Missouri Athletic Club is liable for punitive damages." (ROA 217).

Punitive damages are not only appropriate in the instant case, but also essential to provide an adequate remedy for Appellant. Punitive damages have long been recognized as one of many forms of relief provided under RSMo. Section 213.010 et seq. (2006) which contains the relevant provisions of the Missouri Human Rights Act (MHRA). *See Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) and *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d. 1051, 1062 (8th Cir. 1993). Under circumstances such as those presented here, including management's participation in the inappropriate conduct, management's repeated failure to take effective action to stop such conduct, and management's denial of the offensive behavior which was rejected by the jury- such evidence is sufficient to support the award of punitive damages. *Brady* at 108-09; *Rowe v. Hussmann Corp.*, 381 F.3d 775, 783-

84 (8th Cir. 2004). Moreover, reckless indifference warranting punitive damages was demonstrated to be present at every level of MAC management: the reckless and/or conscious indifference of the Human Resources Director Maurer; Food and Beverage Director Helms failure to stop the harassment of Appellant by Manager Millen that occurred in his presence; Manager Millen's repeated, explicit and notorious acts of harassment in view of other management staff and numerous subordinate employees; and other alleged conduct by the MAC's General Manager and Board of Governors which gutted the effectiveness of any alternative complaint procedure and set the tone for the inappropriate conduct Appellant experienced. On these facts, the jury disbelieved Respondent MAC's witnesses and concluded that Appellant established by clear and convincing evidence the inappropriate conduct occurred. Such conduct requires an award of punitive damages to not only punish Respondent MAC but also deter such conduct in the future, particularly when the same management employees remain in the employ of Respondent MAC.

Importantly, the Missouri Supreme Court has stated that under the authority of Rule 78.01 and 78.02, as interpreted by *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. banc 1985), an appellate court has authority to grant a new trial on any issue, including the issue of punitive damages, if the court believes the evidence warrants. *Id.* at 110. While no reported cases have been located that remand for trial only on the issue of the amount of punitive damages, other Missouri courts have found it appropriate to remand matters for trial only on the issue of damages. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737, 750 (Mo. App. 1993). Appellant respectfully submits that this case must be

remanded for trial, solely to determine the amount of punitive damages a newly impaneled jury should award. Further, Appellant should be given the opportunity to provide all necessary background facts, as discussed above, as to how the prior jury determined punitive damages were proper. *See* ps. 6 through 12 *supra*.

II. THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES BECAUSE APPELLANT PREVAILED ON HIS MISSOURI HUMAN RIGHTS ACT CLAIM BUT RECEIVED ONLY A FRACTION OF THE REQUESTED ATTORNEY'S FEES IN THAT THE AMOUNT OF ATTORNEY'S FEES AWARDED WAS ARBITRARY AND DEMONSTRATED INDIFFERENCE TO THE APPROPRIATE FACTORS TO CONSIDER IN AWARDING FEES.

Under the Missouri Human Rights Act (MHRA), Chapter 213 et seq., prevailing parties are entitled to attorney's fees at the trial court's discretion. *Brady* at 115. "A prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances." *Christianburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 417 (1978). Here, the trial court exercised its discretion and awarded fees, but abused its discretion in determining the amount of fees to award.

The standard of review on appeal regarding the issue of attorney's fees is abuse of discretion. *H.S. v. Board of Regents* at 674. It is often said, that a trial court's award of attorney's fees under the MHRA is entitled to substantial deference in light of that court's superior knowledge and understanding of the litigation. *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F. 3d 818, 823 (6th Cir. 2000). A court abuses its discretion where there

is no evidence to support the attorney's fee award. *Goralnik v. United Fire and Casualty Co.*, 240 S.W.3d 203, 213 (Mo.App. 2007). Appellant has found few cases discussing what will cause a reviewing court to conclude that an abuse of discretion occurred in determining an amount of attorney fees to award, but Appellant respectfully submits that a failure to consider all relevant factors and misapplication of factors analyzed can fairly be characterized as not based on any evidence.

The appropriate factors to consider in exercising discretion in awarding attorney fees were cited by the trial court before determining the amount of fees to award Appellant's counsel. However, only two of those factors were discussed. Appellant respectfully maintains that the court's determination of the amount of fees to award was arbitrary and demonstrated an indifference to Appellant's claim for fees. As cited by the trial, the relevant factors for determining the amount of attorney's fees to award pursuant to a Missouri statute that authorizes an award of attorney's fees include: 1) the rates customarily charged by attorneys involved in the case and by other attorneys in the community for similar services; 2) the number of hours reasonably expended on the litigation; 3) the nature and character of the services rendered; 4) the degree of professional ability required; 5) the nature and importance of the subject matter; 6) the amount involved or the result obtained; and 7) the vigor of the opposition. *Hutchings v. Roling*, 193 S.W.3d 334 (Mo. App. E.D. 2006). The trial court, however, failed to discuss all of the relevant factors.

Appellant respectfully submits that a straightforward consideration of all of these factors - contrary to the conclusion of the Trial Court - supports awarding Appellant the

attorneys' fees petitioned for in this matter. Missouri courts have recognized the importance of considering all relevant factors in making an award of fees – analysis which did not occur in this case. *See, Washington v. Jones*, 154 S.W.3d 346, 352 (Mo.App. 2005)(discussing importance of written findings, conclusions and “reason or basis thereof” for award of attorney fees made pursuant to Section 536.087 RSMo (2000)). Moreover, in light of the award of compensatory damages and the jury’s determination that punitive damages were warranted, Appellant respectfully submits that the results obtained here were “excellent,” especially when it is remembered that Respondent’s position was that the complained of conduct never occurred. *Moore v. City of Park Hills*, 945 S.W.2d 1, 3 (Mo. App. 1997)(noting that achieving excellent results in litigation supports an award of a fully compensable legal fee) *see also Lippman v. Bridgecrest Estates Unit 1 Owners Association, Inc.*, 4 S.W.3d 596, 598 (Mo. App. 1999).

The determination of reasonable attorneys’ fees is in the sound discretion of the trial court and shall not be reversed unless the amount is arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration. *Brady* at ps. 114-115. Clearly, mathematical ratios should be disregarded in determining what is reasonable fee. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 11(1983)(U.S. Supreme Court agrees with lower court’s “rejection of a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested”). According to

the analysis performed by the trial court, the single, overriding consideration appears to have been that awarding a complete fee was not appropriate because it would have exceeded the compensatory damages award to Appellant. That result occurs with frequency and has been affirmed by Missouri Courts considering awards of fees that exceed – sometimes by several multiples – the amount of damages awarded. *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 187 (Mo. App. 2002)(affirming award of attorney fees that exceeded **four times** the damages awarded); *See also City of Riverside v. Rivera*, 106 S.Ct. 2682 (1986)(U.S. Supreme Court rejects that attorney fees cannot be awarded beyond the amount of damages, and affirmed an award of fees in the amount of \$245,456.25 which were some **seven times greater** than the compensatory and punitive damages award). Further, the position that a court cannot or should not award fees that exceed the amount of damages has been discussed by other courts considering awards of attorney fees in civil rights case, noting that such situations will occur. *See Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566 (1992)(noting that an award of even nominal damages for vindication of a plaintiff’s rights can support an award of fees); *see, also Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001)(in discussing who is a “prevailing party” for award of attorney fees, Court noted that “defendants’ potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits.”) Appellant respectfully submits that the Trial Court’s focus on this single factor causes the determination of the amount of attorney fees to be capricious and therefore an abuse of

discretion. The trial court's bald denial of equitable relief and improperly directing verdict on the issue of punitive damages, unquestionably decreased the monetary "success" in the instant case. Thus, Appellant maintains that it is circular and improper reasoning for the Trial Court to then cite Appellant's "limited" success as a basis for denying a full award of attorney fees.

Appellant submits that the bedrock consideration Missouri courts have found appropriate is the most important consideration here: the number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley* at 433. From Appellant's perspective there is no reason given the facts of this case or the considerations that Missouri courts have directed courts to consider to deviate from this basic starting point. Significantly, the balance of the relevant factors for determining an award of fees weighs in favor of a complete award of attorneys' fees. First, the result obtained was excellent, but admittedly distorted because the jury's award of punitive damages was denied by the trial court. Had punitive damages been awarded the "amount involved" would likely be significantly greater, thereby weighing in favor of a complete award of attorneys' fees. Next, the number of hours reasonably expended as verified in the affidavits of Appellant's counsel supports the claim for attorneys' fees made here. As presented to the Trial Court, the amount of time expended by defense counsel as compared with the time expended by Plaintiff's counsel *after three years of litigation* was amazingly similar; though the hours expended by Plaintiff's counsel were less when compared with defendants' counsel on the same date. In discussing reasonableness, the trial court compared apples with oranges – comparing the total number

of hours expended by plaintiff's counsel with only the amount of hours expended by Respondent MAC's prior counsel one month before trial. The total amount of hours expended by *both* of Respondent MAC's groups of attorneys was never revealed despite Plaintiff's requests for this information in response to the allegation that Plaintiff's claimed fees were unreasonable and excessive. Thus, the trial court's conclusion concerning reasonableness is based on faulty reasoning and incomplete facts.

Respondent MAC has also taken issue with the fact that Appellant did not prevail on every claim brought. Appellant submits that this consideration should not control the determination of reasonable attorneys fees and in any event arguably weighs in favor of a complete award here. Missouri courts have said that if the plaintiff's claims for relief are based on different facts and legal theories and counsel's work on one claim is unrelated to his work on another claim, the unrelated claims must be treated as if they have been raised in separate lawsuits, and therefore, no fee may be awarded for services on the unsuccessful and unrelated claims. *Williams v. Finance Plaza, Inc.* at 185. Conversely, if the claims for relief have a common core of facts and are based on related legal theories and much of counsel's time is devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis, such a lawsuit cannot be viewed as a series of distinct claims. *Id.* Moreover, when a plaintiff's claim are related and they have obtained excellent results overall, their counsel should recover a fully compensatory fee that should not be reduced simply because the plaintiff did not prevail on every litigated claim.

Hutchings at 353. To the extent that Respondent MAC's argument regarding the reasonableness of Appellant's claimed fees is viewed as an attack on the amount of time spent by Appellant in pursuing his claims, it should be rejected. "A defendant who litigates tenaciously cannot be heard to complain about the time that the plaintiff necessarily spent overcoming defendant's vigorous defense. *Williams v. Finance Plaza, Inc.* at 187. It cannot be seriously disputed that Respondent MAC tenaciously defended this matter, maintaining to the end that the complained of conduct never occurred, filing extensive and multiple summary judgment motions, and serving literally hundreds of interrogatories on Appellant Gilliland.

Finally, Appellant respectfully submits that the trial court erred by arbitrarily arriving at the amount of \$22,000.00 for almost 600 hours of legal work performed over 42 months. Appellant submits that the amount was arbitrary because it is impossible to discern how the figure was calculated. The amount awarded equates to an attorney hourly rate of \$27.50 for the time expended in pursuit of Appellant's claims. Such an award also indicates a complete indifference to Appellant's claim for attorney fees. Here, it should be noted that the trial court did not become involved in the litigation until February 2, 2006, (ROA 9) when it was assigned to Division 19 by Honorable Judge John Riley – approximately one month prior to trial. Thus, Appellant respectfully submits that the trial court's familiarity with the litigation is entitled to less deference than might ordinarily be the case, and casts doubt on the trial court's conclusion that the matter presented "straightforward" issues. Moreover, the statement that the issues were "straightforward" is belied by the basic fact that Respondent

MAC denied that the conduct complained of by Appellant ever occurred. As such, this court should revisit the award of fees and award an appropriate fee, or remand the matter to the trial court with directions to reconsider the amount of fees awarded in light of *all* the appropriate considerations required by Missouri law.

Appellant petitioned the trial court for attorney fees in the amount of \$170,149.50, and was awarded \$22,000.00. Thus, the trial court's award denied Appellant's counsel \$148,149.50 in attorney fees. On appeal, Appellant filed Amended Petition for Attorney Fees with the Appellate Court on September 11, 2007, in the amount of \$37,629.50 for attorney fees incurred which was denied. Appellant will file Second Amended Motion for Attorneys' Fees on Appeal with the submission of this case to the Missouri Supreme Court. Thus, as of the date of filing Appellant's Substitute Brief, attorneys' fees in the amount of \$185,779.00 have been incurred in pursuit of Appellant's claims, but remain unpaid. This matter should be remanded to the trial court with directions to make a full award of attorneys fees, based upon the verified fee petition filed by Appellant's counsel.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM FOR EQUITABLE RELIEF BECAUSE APPELLANT ESTABLISHED THAT A MAKE WHOLE REMEDY WAS NOT PROVIDED BY THE JURY'S VERDICT FOR CONSTRUCTIVE DISCHARGE IN THAT ONLY PRIOR DAMAGES WERE AWARDED AND APPELLANT'S DAMAGES FROM HIS CONSTRUCTIVE DISCHARGE CONTINUE.

On April 3, 2006, Appellant filed Post-trial Motion to Amend or Alter the Judgment to Order Equitable and/or Injunctive Relief (ROA 239-247). Appellant requested the trial court award both front pay to make Appellant whole for his losses, and enter an injunction requiring monitoring of the Respondent's workplace to ensure that the violations of the MHRA were not repeated, especially since the same management remained in place at the MAC. Appellant testified that he remained unemployed for a period of eight months due to his severe depression which equated to \$10,000 to \$15,000 in lost income had he not been constructively discharged from employment at Respondent MAC (TT 119). The evidence of lost earning capacity was estimated at \$7,000 per year between Respondent MAC and Appellant's subsequent employer Red Lobster (ROA 247). No evidence was presented by Respondent MAC that contradicted or in any way cast doubt on the lost wage and benefit numbers introduced by Appellant. Through the motion for equitable relief, Appellant was seeking lost future wages for a period of 10 years, or \$ 70,000 in lost future wage differential. The trial court denied Appellant's requests for equitable relief without discussion (ROA 344-347).

A trial court's decision to award front pay and its decision as to the amount of front pay are subject to review only for abuse of discretion. *Brady* at p. 113-114. Front pay is decided by the court, not the jury. *Id.* Reinstatement is the preferred remedy for unlawful employment discrimination, and front pay is the disfavored alternative, available only when reinstatement is impracticable or impossible, which is the case presented here.

Courts have found that awards of front pay are appropriate in circumstances where the

employee has been constructively discharged, but it would not be appropriate to return the Plaintiff to work at the previous employer. *Baker v. John Morrell & Co.*, 382 F.3d 816 (8th Cir. 2004); *see also United Paperworkers Int'l Union Local 274 v. Champion Int'l Corp.*, 81 F.3d 798, 805 (8th Cir. 1996) (“substantial hostility above that normally incident to litigation is a sound basis for denying reinstatement”). It should be noted that in the *United Paperworkers* case, the trial court initially granted front pay for the remainder of Plaintiff’s working life; here front pay for a period of ten years is being requested. Equitable relief is appropriate according to Respondent MAC’s own actions - Respondent MAC attempted to have this matter transferred to the equity division of the St. Louis City Circuit Court in response to Appellant's petition in January 2004 and the mix of legal and equitable claims brought (ROA 44-46, 105). Thus, the Trial Court’s bald denial of this integral part of Appellant’s damages demonstrates an abuse of discretion. *Pollock* at 771-72 (finding abuse of discretion of trial court (in a judge-tried case) where court denied portion of plaintiff’s “make whole relief,” and made no findings concerning such denial).

Based on the foregoing and the evidence of additional, ongoing damages suffered by Appellant a \$60,000.00 verdict failed to make Appellant whole for his damages resulting from the unlawful conduct that resulted in Appellant’s constructive discharge from Respondent MAC. This Court should remand this matter for further trial court proceedings to determine the amount of equitable relief – in the form of front pay – necessary to make Appellant whole. In light of the evidence presented, Appellant moved the trial court and requests this court direct that front pay should be awarded Appellant for a period of 10 years;

that Respondent MAC should also be ordered to provide Appellant with retirement credit or years of service for 10 years into the future from August 18, 2002 (the date of Appellant's constructive discharge); and Respondent MAC should be ordered to offer health insurance benefits to Appellant at its current employee rate for the same 10-year period or compensate Appellant for the value of such benefits. Further, Respondent MAC should be required to conduct additional training of its personnel to prevent similar outrageous conduct in the future.

CONCLUSION

Wherefore, for the above stated reasons, the Appellant requests that this matter be remanded for jury trial solely on the proper amount of punitive damages. Further, because the Trial Court's award of attorney's fees was arbitrary, or failed to identify or consider the appropriate factors in its award of fees, an award of reasonable attorney fees should be made or this matter returned to the trial court with specific instructions on this issue. Finally, because Appellant's damages continue to accrue as a result of his unlawful constructive discharge the granting of equitable relief should be remanded for further trial court consideration, and any other remedy deemed proper by this court.

Respectfully Submitted,



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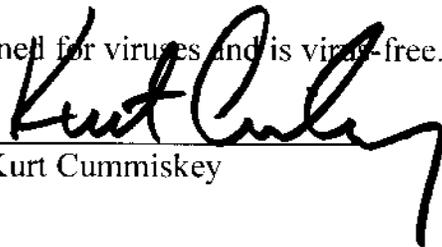
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Attorneys for Appellant Tracy Gilliland

CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Supreme Court Rule 84.06(c), certifies that: 1) this brief includes the information required by Rule 55.03; 2) this brief complies with the limitations contained in Rule 84.06(b); and, 3) this brief contains 9,836 words, as calculated by the Word Perfect software used to prepare this brief.

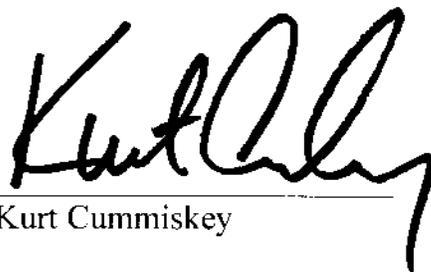
The undersigned also certifies, pursuant to Supreme Court Rule 84.06(g), that the cd rom filed with Appellant's brief has been scanned for viruses and is virus-free.


Kurt Cummiskey

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of February, 2008, served the foregoing upon opposing counsel for Respondent by depositing a copy in the U.S. mail, postage paid to the following:

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Kurt Cummiskey

**IN THE
MISSOURI SUPREME COURT**

TRACY GILLILAND)	APPEAL NO. SC88950
)	
Appellant,)	
)	
v.)	
)	
MISSOURI ATHLETIC CLUB et al.)	
)	
Respondent.)	

**APPELLANT'S TABLE OF CONTENTS
TO THE APPENDIX IN SUPPORT OF THE APPELLANT'S BRIEF**

COMES NOW Appellant, and pursuant to Supreme Court Rule 84.04(h), and files the following attached documents described in this Table of Contents:

Appendix Page	Document
A2-A8	Judgment and Final Order of trial court
A9-A12	Order Granting, In Part, Plaintiff's Motion for Attorney Fees, Plaintiff's Memorandum of Costs for Taxing, and Denying Defendants' Motion for Judgment Notwithstanding the Verdict
A13-A17	<i>Storlie v. Rainbow Foods Groups, Inc.</i> , 2002 WL 46997 (D.Minn. 2002)
A18-A29	<i>Luu v. Seagate Technology, Inc.</i> , 2001 WL 920013 (D. Minn. 2001)

STATE OF MISSOURI }
CITY OF ST. LOUIS } SS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

FILED
MAR 8 2006
MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

TRACY GILLILAND

Plaintiff(s).

vs.

Missouri Athletic Club and
VINCENT MILLEN

Defendant(s).

Cause No. 032-10685
Division No. 19

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MAR 15 2006
2006 JUN 16 PM 3:50
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CLERK

JUDGMENT

This action came before this Court and a Jury. The parties appeared in person and by their respective attorneys. The issues have been duly tried and the Jury rendered its verdict(s).

VERDICT A - Constructive Discharge

Whereas, on the claim of Plaintiff TRACY Gilliland for
Plaintiff/Defendant
(personal injuries), (~~property damages~~), against Defendant
Missouri Athletic Club [the Jury found in
Plaintiff/Defendant
favor of the (Plaintiff), (~~Defendant~~)] (~~and only the Jury assessed the percentages of fault as follows:~~)

_____ %
_____ %

_____	_____ %
_____	_____ %
_____	_____ %
	100%

The Jury found the total damages of (Plaintiff) (~~Defendant~~), disregarding any fault on the part of (Plaintiff) (~~Defendant~~), to be \$ 60,000 Dollars and 00 Cents.

WHEREFORE, it is hereby ordered and adjudged that Plaintiff Tracy Gilliland

have and recover of:

<u>Missouri Athletic Club</u>	\$ <u>60,000.00</u>
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____

VERDICT

A - Constructive Discharge

Whereas, on the claim of Plaintiff Tracy Gilliland for

Plaintiff/Defendant

Defendant Missouri Athletic Club

~~(personal injuries, sickness or damages)~~, against

Punitive Damages

✓ [the Jury found in

Plaintiff/Defendant favor of the (Plaintiff) (~~Defendant~~), and/or the Jury assessed the percentages of fault as follows:

_____	_____ %
_____	_____ %
_____	_____ %
_____	_____ %
_____	_____ %
	100%

_____ %
 _____ %
 _____ %
 100%

The Jury found the total damages of (Plaintiff), (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be \$ _____ Dollars and _____ Cents.

WHEREFORE, it is hereby ordered and adjudged that ⁰⁸ Judgment Notwithstanding the Verdict be granted Defendant Missouri Athletic Club.

have and recover of _____
 \$ _____
 \$ _____
 \$ _____
 \$ _____
 \$ _____

VERDICT A - sexual harassment

Whereas, on the claim of Plaintiff Tracy Gilliland for (personal injuries), (~~property damages~~), against Defendants Missouri Athletic Club

Plaintiff/Defendant [the Jury found in favor of the Plaintiff, (Defendant)] (~~and the jury assessed the percentages of fault as follows~~)

_____ %
 _____ %
 _____ %
 _____ %
 _____ %
 100%

_____ %
 _____ %
 _____ %
 100%

The Jury found the total damages of (Plaintiff), (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be \$ _____ Dollars and _____ Cents.

WHEREFORE, it is hereby ordered and adjudged that Judgment be entered
in favor of Defendant Missouri Athletic Club

have and recover of: _____
 \$ _____
 \$ _____
 \$ _____
 \$ _____
 \$ _____

VERDICT A RACE DISCRIMINATION

Whereas, on the claim of Plaintiff Tracy Gilliland for
 Plaintiff/Defendant Defendant Missouri Athletic Club
 (personal injuries), (~~property damages~~), against _____ [the Jury found in
 Plaintiff/Defendant

favor of the (~~Plaintiff~~), (Defendant)) (~~and/or the Jury assessed the percentages of fault as follows:~~)

_____ %
 _____ %
 _____ %
 _____ %
 _____ %
 100%

_____	_____ %
_____	_____ %
_____	_____ %
	100%

The Jury found the total damages of (Plaintiff), (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be \$ _____ Dollars and _____ Cents.

WHEREFORE, it is hereby ordered and adjudged that Judgment be entered
in favor of Defendant Missouri Athletic Club.

have and recover of: _____

_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____

VERDICT B

Whereas, on the claim of Plaintiff Tracy Gilliland for
 (personal injuries), (~~property damages~~), against Defendant Vincent
Milken (the Jury found in
 favor of the ~~(Plaintiff)~~, (Defendant)) (~~and/or, the Jury assessed the percentages of fault as follows:~~)

_____	_____ %
_____	_____ %
_____	_____ %
_____	_____ %
_____	_____ %
	100%

_____	_____	_____ %
_____	_____	_____ %
_____	_____	_____ %

100%

The Jury found the total damages of (Plaintiff), (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be \$ _____ Dollars and _____ Cents.

WHEREFORE, it is hereby ordered and adjudged that Judgment be entered
in favor of Defendant Vincent Miller

have and recover of: _____

_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____

VERDICT _____

Whereas, on the claim of _____ for
Plaintiff/Defendant
(personal injuries), (property damages), against _____

_____ (the Jury found in
favor of the (Plaintiff), (Defendant)) (and/or) [the Jury assessed the percentages of fault as follows:]

_____	_____ %
_____	_____ %
_____	_____ %
_____	_____ %
_____	_____ %

100%

The Jury found the total damages of (Plaintiff), (~~Defendant~~), disregarding any fault on the part of (Plaintiff), (~~Defendant~~), to be \$ 60,000 Dollars and 00 Cents.

WHEREFORE, it is hereby ordered and adjudged that Plaintiff TRACY GILLILAND

have and recover of:

Defendant Missouri Athletic Club \$ 60,000.00

\$ _____

\$ _____

\$ _____

\$ _____

\$ _____

\$ _____

\$ _____

[Cost of this action to be taxed against the (~~Plaintiff~~), (~~Defendant~~) or (Missouri Athletic Club)]

Kurt Culy #43850
Attorney for Plaintiff, Bar#
3803 Connecticut - Ste 100, STL, MO 63116
Address
314/988 8828; 314/762.0791 - fax
Phone #

John A. Munne #31482
Attorney for Defendant, Bar#
100 S. 4th St. #400
Address ST LOUIS MO 63102
314-421-5545
Phone #



SEAL of the CIRCUIT COURT

SO ORDERED:

[Signature]

Judge, Division No. 19

Judge No. 31010

IN TESTIMONY WHEREOF, I Have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 2nd day of March, 20 06.

MARIANO V. FAVAZZA
Circuit Clerk

By [Signature]
Deputy Clerk

[] see attached supplemental judgment form(s) which is/are made a part hereto.

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
JUN 8 2006
MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

ENTERED

JUN 9 2006

MLM

TRACY GILLILAND)

Plaintiff,)

vs.)

MISSOURI ATHLETIC CLUB, and)
VINCENT MILLEN)

Defendants.)

Cause No. 032-10695

Division No. 19

ORDER

The Court has before it Plaintiff's Post Trial Motion To Amend Or Alter The Judgment To Award Attorney Fees or, Alternatively, Plaintiff's Motion For Attorney's Fees; and Defendant Missouri Athletic Club's Motion For Judgment Notwithstanding The Verdict, and other post-trial motions. The Court now rules as follows.

Plaintiff's Motion. On March 2, 2006, a jury rendered a verdict for Plaintiff on his claim of constructive discharge. Judgment was entered on March 8, 2006. Thereafter, Plaintiff filed this motion to amend the judgment to award attorneys' fees in the amount of \$170,149.50¹. Defendant objects to Plaintiff's request for attorneys' fees stating they are excessive and unreasonable based on the limited success of Plaintiff's case.

¹ Mr. Cumiskey stated he expended 622.2 hours at \$185/hour on this case; Mr. Murano stated he expended 268.50 hours on the litigation at \$205/hour. The total claimed by both attorneys is 890.7 hours expended and combined fees of \$170,149.50. The Court also notes that defense counsel expended 535.24 hours on the case at rates ranging from \$120.00 to \$250.00/ hour, for a billable total of \$96,335.00

The trial court is considered an expert on the subject of attorney's fees, and may fix the amount of attorney's fees without the aid of evidence. Nelson v. Hotchkiss, 601 S.W.2d 14, 21 (Mo. banc 1980). Further, the trial court is presumed to know the character of the services rendered in duration, zeal and ability, and the setting of the fee is within the court's sound discretion. Ordinarily, a litigant is expected to bear the cost of his or her own attorney's fees. This is the American Rule. However, an exception is made where a statute allows a party to recover attorney fees. Williams v. Finance Plaza, Inc., 78 S.W.3d 175, 184 (Mo. App. W.D. 2002). The Missouri Human Rights Act is such a statute. See RSMo. § 213.111(2)(2006). A recent opinion from the Eastern District Court of Appeals summarizes the relevant factors to be considered by a trial court when determining the amount of attorney's fees under a statute that authorizes an award of reasonable attorney fees. The factors include 1) the rates customarily charged by the attorneys involved in the case and by other attorneys in the community for similar services; 2) the number of hours reasonably expended on the litigation; 3) the nature and character of the services rendered; 4) the degree of professional ability required; 5) the nature and importance of the subject matter; 6) the amount involved or the result obtained; and 7) the vigor of the opposition. Hutchings v. Roling, 2006 WL 851824 (Mo. App. E.D.)²; Nos. ED 85999, ED 86019 (April 4, 2006), citing Williams v. Finance Plaza, Inc., at 185, 187, and Union Center Redevel. Corp. v. Leslie, 733 S.W.2d 6, 9 (Mo. App. 1987).

The Court, having considered each of the above factors, believes an award of attorneys' fees to Plaintiff is appropriate in this case. The Court has examined Plaintiff's counsels' itemized

² Though this opinion has not been released for publication as of this writing, the summary and authorities cited therein are sound.

billing records, counsels' affidavits and other records submitted and concludes that reasonable attorneys' fees of \$22,000 is warranted. The Court notes that Plaintiff was the prevailing party on only his claim of constructive discharge, for which the jury awarded Plaintiff only \$60,000, but returned verdicts in favor of Defendants on Plaintiff's sexual harassment and race discrimination claims. Moreover, the Court believes the hours expended were excessive given the relatively straightforward nature of the case.

Plaintiff's Memorandum Of Costs For Taxing. Defendants' objection to the Fee for Expert Witness of \$2,200 and Mediation Fees of \$770 is sustained. The expert witness fee was a sanction imposed on Plaintiff for failure to appear for an independent medical examination and is not now recoverable as cost. Mediation fees are traditionally shared, and so it shall be here.

Defendants' Motion. The Court has considered Defendants' motion for judgment notwithstanding the verdict and denies said motion.

All other post-trial motions are hereby denied.

THEREFORE, it is Ordered and Decreed that Plaintiff's Post-Trial Motion To Amend Or Alter The Judgment To Award Attorney Fees or, Alternatively, Plaintiff's Motion For Attorney's Fees is hereby granted. Plaintiff is awarded \$22,000 in attorneys' fees. Plaintiff's request for expert witness and mediation fees are denied. Defendant Missouri Athletic Club's Motion For Judgment Notwithstanding The Verdict is hereby denied. All other post-trial motions are also denied.

SO ORDERED:


Jimmie M. Edwards, Judge

Dated: June 8, 2006

cc: Kurt Cumiskey
Donald K. Murano
Attorneys for Plaintiff

Peter J. Dunne
Attorney for Defendant

Storlie v. Rainbow Foods Group, Inc.
Not Reported in F.Supp.2d, 2002 WL 46997
D.Minn.,2002.
January 09, 2002 (Approx. 3 pages)

Not Reported in F.Supp.2d, 2002 WL 46997 (D.Minn.)

Only the Westlaw citation is currently available.

United States District Court, D. Minnesota.
Aimee L. STORLIE, Plaintiff,
v.

RAINBOW FOODS GROUP, INC., a Nevada corporation, d/b/a Rainbow Foods, and
John Albert Martinson, Defendants.
No. CIV. 00-1817DDAFLN.
Jan. 9, 2002.

Nichols, Kaster & Anderson, by Donald H. Nichols and Paul J. Lukas, Minneapolis, for
Plaintiff.

Rider, Bennett, Egan & Arundel, LLP, by John D. Thompson and Piper L. Kenney,
Minneapolis, for Defendant Rainbow Foods Group, Inc.

ORDER ON DEFENDANT RAINBOW FOODS GROUP'S MOTION FOR
JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL OR FOR
REMITTITUR AND ON PLAINTIFF'S MOTION TO TREBLE DAMAGES

ALSOP, Senior J.

*1 This is an employment discrimination case. Plaintiff Aimee Storlie ("Storlie") alleged, *inter alia*, that her former employer, Defendant Rainbow Foods Group, Inc. ("Rainbow"), was liable to her for sexual harassment committed by another former Rainbow employee, Defendant John Martinson ("Martinson"). This Court denied Rainbow's motion for summary judgment on Storlie's federal and state statutory sexual harassment claims. *Pierce v. Rainbow Foods Group, Inc.*, 158 F.Supp.2d 969 (D.Minn.2001). Those claims were tried to a jury, which returned a verdict against Rainbow in the amount of \$12,000.^{FN1} The same jury then heard evidence on the issue of punitive damages and found Rainbow liable for punitive damages in the amount of \$60,000.

FN1. The jury also found Martinson liable to Storlie for assault and battery under state law. Martinson has not challenged that result, and Martinson has not taken a position with respect to Rainbow's post-trial motions.

Both parties have filed post-trial motions. Rainbow has moved for judgment as a matter of law with respect to both liability and punitive damages. A party is entitled to judgment as a matter of law if that party "has been fully heard on an issue and there is no

legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Fed.R.Civ.P. 50(a). Rainbow contends that Storlie's sexual harassment claims are time barred ^{FN2} and that the evidence does not support the jury's finding with respect to punitive damages. In the alternative, Rainbow has moved for a new trial on the issue of punitive damages or for a remittitur of the punitive damages award pursuant to Fed.R.Civ.P. 59, arguing that the jury's award was excessive as a matter of law. A new trial or remittitur is appropriate if the damages are so grossly excessive as to shock the conscience of the court. *Foster v. Time Warner Entm't Co., LP*, 250 F.3d 1189, 1194 (8th Cir.2001). Storlie resists Rainbow's motions and requests a multiplication of the jury's compensatory damages award pursuant to the Minnesota Human Rights Act, Minn.Stat. § 363.071 Subd. 2. ^{FN3} For the reasons stated in this Order, the Court will deny Rainbow's motions in their entirety and will deny Storlie's request for a multiplication of compensatory damages. The Court also will order Rainbow to pay a civil penalty to the State of Minnesota in accordance with Minnesota law.

FN2. Rainbow also argues that Storlie's claim for punitive damages is time barred. A claim for punitive damages does not state a separate cause of action, however, and the timeliness of such a claim is dependent upon the timeliness of the cause of action providing a predicate for the imposition of punitive damages.

FN3. Storlie also has requested attorney fees and costs, and the Court will consider that request in a separate order.

Background

According to the evidence adduced at trial, Rainbow received several complaints beginning in early 1996 about Martinson's behavior toward various female employees. Martinson received verbal warnings and written warnings in 1996 from Rainbow's store manager in response to complaints that Martinson was asking female cashiers for dates and making other unsolicited romantic advances toward female Rainbow employees. Kathy Pierce, another former Rainbow employee, testified that she was a target of Martinson's advances when she worked for Rainbow from 1997 to January 2000. Pierce testified that she repeatedly complained to her supervisors and to the store manager about Martinson's conduct, but Rainbow took no action to protect her from Martinson. Other female employees apparently also continued to complain to Rainbow about Martinson during the same time period. Rainbow did little to investigate these complaints, many of the complaints were not documented, and Martinson at no time received discipline from Rainbow more severe than a written warning.

*2 Storlie, who began working for Rainbow in September 1999, was another target of Martinson's advances. Storlie testified that Martinson regularly asked her to hug him and otherwise paid inappropriate attention to her while she was at work. Martinson cornered Storlie at work in May 2000 and forcibly kissed her. Storlie quit her job at Rainbow, and Rainbow terminated Martinson's employment, following that incident.

Statutes of Limitations

Storlie's claims for sexual harassment are based upon the Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* A plaintiff claiming an unfair discriminatory practice under the MHRA must file a lawsuit or an administrative charge "within one year after the occurrence of the practice." Minn.Stat. § 363.06 Subd. 3. A plaintiff under Title VII must file an administrative charge within three hundred days of the alleged discriminatory practice, 42 U.S.C. § 2000e-5(c). Storlie filed her Complaint alleging a MHRA violation on June 24, 2000, and filed a Title VII administrative charge on July 12, 2000.

Rainbow argues that Storlie's sexual harassment claims are time barred because there is no evidence that Martinson committed acts of sexual harassment within the applicable limitations periods or, even if he did, that Rainbow knew or should have known of such acts within the applicable limitations periods. This argument does not take all the evidence in the case into account. A sexual harassment plaintiff is entitled to bring a claim if any discriminatory act occurred within the limitations period. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 572 (8th Cir.1997) (Title VII); *Costilla v. State*, 571 N.W.2d 587, 593 (Minn.Ct.App.1997) (MHRA), *review denied* (Minn. Jan. 28, 1998). This Court earlier held that Martinson's assault on Storlie alone could constitute a discriminatory act under federal and state law, *Pierce*, 158 F.Supp.2d at 973, and that assault undisputedly occurred within the limitations periods applicable to Storlie's claims. A determination of a hostile work environment, furthermore, must be based on the totality of circumstances, *Madison v. IBP, Inc.*, 257 F.3d 780, 793 (8th Cir.2001) (Title VII); *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn.2001) (MHRA), which may include discrimination against or harassment of employees other than the plaintiff. *Madison*, 257 F.3d at 793. Contrary to Rainbow's suggestion, incidents of discrimination or harassment occurring outside the limitations periods are relevant to such a determination. *Kimzey*, 107 F.3d at 573. Given the history of complaints about Martinson and Martinson's assault of Storlie, a reasonable jury could have found that Storlie was subjected to a hostile work environment at Rainbow within the limitations periods applicable to her sexual harassment claims.

Punitive Damages-Sufficiency of Evidence

Rainbow puts forward a number of reasons for finding that it is not liable for punitive damages as a matter of law. Rainbow argues, first, that the actions of its agents were not sufficiently malicious or reckless to support an award of punitive damages. Rainbow also argues that its employees who received complaints about Martinson were not acting in a managerial capacity and that Rainbow made a good faith effort to comply with federal antidiscrimination laws, both of which in Rainbow's view are sufficient to insulate it from liability for punitive damages. The record does not support judgment for Rainbow as a matter of law on those grounds.

*3 In order to receive punitive damages in a sexual harassment case under federal law, the plaintiff must show that the defendant employer "acted with actual malice or deliberate indifference" to the plaintiff's federally protected rights. *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 618 (8th Cir.2000) (citation omitted). The terms "actual malice" and "deliberate indifference" "pertain to the employer's knowledge that it may be acting in violation of federal law." *Id.* (quoting *Kolstad v. Am. Dental Ass'n.*, 527

U.S. 526 (1999)). The parties disagree primarily in their characterizations of Rainbow's response to complaints about Martinson. Rainbow notes that Martinson received warnings following some complaints and eventually was terminated after assaulting Storlie. These facts, in Rainbow's view, are indistinguishable from *Dhyme v. Meiners Thriftway, Inc.*, 184 F.3d 983 (8th Cir.1999), in which the court held that an "excessive delay" in acting on the plaintiff's complaints, without more, could not render the defendant employer liable for punitive damages. *Id.* at 988. Storlie, on the other hand, relies on a line of cases upholding the submission of punitive damages to the jury when the defendant employer willfully ignored repeated complaints of sexual harassment. *See, e. g., Madison*, 257 F.3d at 795 (holding punitive damages appropriate when employer ignored, failed to investigate, and failed to document complaints); *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 844 (8th Cir.1998) (holding that an employer's "turning a blind eye to repeated complaints of misconduct" supported award of punitive damages).

Although the question is close in light of the plaintiff's heavy evidentiary burden, a reasonable jury could have found Rainbow to be deliberately indifferent to Storlie's rights. The employer in *Dhyme* made at least some response to each sexual harassment complaint it received and terminated the harassing employee once his propensity to harass other employees became apparent. 184 F.3d at 987. Rainbow, in contrast, kept no documentation of sexual harassment complaints against Martinson, conducted only a cursory investigation of those complaints, and did not credibly discipline Martinson after Martinson continued to harass female employees despite Rainbow's warnings. Those facts support a finding that Rainbow knew of its duty to protect its female employees from Martinson and yet deliberately failed to act.

The other grounds Rainbow cites for setting aside the jury's punitive damages award have less merit. Employees complained about Martinson to store supervisors and managers, and Rainbow's company policy authorized store supervisors and managers to receive such complaints. Rainbow's contention that those persons who were aware of the complaints about Martinson were too unimportant to act in a managerial capacity therefore is disingenuous. And the fact that Rainbow had a written sexual harassment policy in place provides no good faith defense to a punitive damages award when, as here, the employer cursorily investigated complaints, failed to discipline the harasser in accordance with the policy, and otherwise failed to implement the sexual harassment policy in practice. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir.2000).

Punitive Damages-Amount

*4 Rainbow argues that the jury's punitive damages award of \$60,000 is grossly excessive and thus in violation of Rainbow's constitutional right to due process as outlined in *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996). Rainbow's assertion that the constitution requires something less than a 5 to 1 ratio between punitive damages and compensatory damages is untenable in light of post-*BMW* cases upholding awards with significantly greater disparity. *See Ogden*, 214 F.3d at 1011 (citing cases). With respect to Rainbow's request for a new trial or a remittitur of the punitive damages award, the court must consider factors relevant to the reasonableness of the award, including the reprehensibility of the defendant's conduct and the ratio between the harm to the plaintiff and the size of the award. *Callantine v. Staff Builders, Inc.*, 271 F.3d 1124, 1134 (8th

Cir.2001). The award the jury made in this case is not so unreasonable as to require reduction. Rainbow tolerated, and thereby tacitly encouraged, Martinson's acts of sexual harassment against a number of women over a number of years. Storlie herself suffered no economic harm from Martinson's conduct, but the jury found that Storlie's actual damages nevertheless were more than nominal. If the harm to Storlie arising from her contacts with Martinson was worth \$12,000 in the jury's judgment, a punitive damages award of \$60,000 based on all the evidence is not disproportionate or unconscionable.

Minnesota Human Rights Act Damages

The Minnesota Human Rights Act permits a trial court to award a prevailing plaintiff in a sexual harassment case "compensatory damages in an amount up to three times the actual damages sustained." Minn.Stat. § 363.071 Subd. 2. The trial court has virtually unfettered discretion in deciding whether to multiply damages. *Phelps v. Commonwealth Land Title Co.*, 537 N.W.2d 271, 276 (Minn.1995), and multiple compensatory damages are not duplicative of punitive damages. *Id.* at 277. The jury's total award of compensatory and punitive damages in this case, however, fully satisfies the interests of justice as it stands, and Storlie's motion to treble damages will be denied.

Finally, although neither party addressed the issue in its motion papers, Minnesota law requires a party found to be in violation of the Minnesota Human Rights Act to pay a civil penalty to the state. Minn.Stat. § 363.071 Subd. 2. The Court finds that a civil penalty of \$1,000 is appropriately assessed against Rainbow on these facts.

For the foregoing reasons, the Court hereby ORDERS that:

1. Rainbow's motion for judgment as a matter of law on Storlie's statutory sexual harassment claims is DENIED;

2. Rainbow's motion for judgment as a matter of law on the issue of punitive damages is DENIED;

3. Rainbow's motion for a new trial or for a remittitur on the issue of punitive damages is DENIED;

4. Storlie's request to multiply the jury's award of compensatory damages pursuant to the Minnesota Human Rights Act is DENIED; and

*5 5. Rainbow shall pay \$1,000 to the general fund of the State of Minnesota in accordance with Minn.Stat. § 363.071 Subd. 2 as a civil penalty for violating the Minnesota Human Rights Act.

D.Minn.,2002.

Storlie v. Rainbow Foods Group, Inc.

Not Reported in F.Supp.2d, 2002 WL 46997 (D.Minn.)

END OF DOCUMENT

Luu v. Seagate Technology, Inc.
Not Reported in F.Supp.2d. 2001 WL 920013
D.Minn.,2001.
July 05, 2001 (Approx. 9 pages)

Not Reported in F.Supp.2d. 2001 WL 920013 (D.Minn.), 86 Fair Empl.Prac.Cas. (BNA) 595

United States District Court, D. Minnesota.
Ling Khiet LUU, Plaintiff,
v.
SEAGATE TECHNOLOGY, INC., Defendant.
No. 99-220 (JRT/FLN).
July 5, 2001.

Donald H. Nichols and Nicholas G.B. May, Nichols, Kaster & Anderson, Minneapolis, for plaintiff.

James F. Baldwin and H. Le Phan, Moss & Barnett, Minneapolis, for defendant.

MEMORANDUM OPINION AND ORDER FOR ENTRY OF JUDGMENT

TUNHEIM, District J.

*1 Plaintiff Ling Kheit Luu brought this action against her former employer defendant Seagate Technology claiming that she was unlawfully retaliated against for reporting what she perceived to be an incident of sexual harassment in violation of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17, and the Minnesota Human Rights Act ("MHRA"), Minn.Stat. §§ 363.01-363.20. Following a full trial, the jury returned a verdict in plaintiff's favor and awarded plaintiff \$31,922.39 in back pay, \$800,000 in compensatory emotional distress damages and \$1,100,000 in punitive damages. This matter is now before the Court on plaintiff's motion for entry of judgment for plaintiff in the amount of \$1,183,625.90.

BACKGROUND

On March 16, 1992, plaintiff was hired by defendant as an operator/assembler. A few months later she was promoted to lead operator and then to group leader. Throughout her employment with defendant, plaintiff was an exemplary employee. At trial, each management employee with knowledge of plaintiff's performance record agreed that plaintiff was a good worker, her work evaluations demonstrated that she performed at a level which exceeded expectations and that there were no complaints or evidence of employee misconduct until the incident giving rise to her termination occurred.

On October 19, 1998, plaintiff was working at her station when two male co-workers, Rith Seang ("Seang") and Mohammad Shaarawi ("Shaarawi"), approached her work area

and began talking. At least two other employees were present and overheard their conversation, including Abdulkadir Farah ("Farah") and Thu Ngo ("Ngo"). At some point in the conversation, Seang turned to plaintiff and said, "You do a blow job." Everyone present, other than plaintiff, began laughing. Plaintiff, a Vietnamese national whose English language skills are imperfect, was not sure what the statement actually meant, but she did comprehend that they were all laughing at her because of it.

When plaintiff asked her friend Shaarawi to explain what the term meant, Shaarawi did not respond because he and the others were engaged in uncontrollable laughter. In an attempt to get his attention and ask him again what the term "blow job" meant, plaintiff tapped Shaarawi on the arm. Again, Shaarawi failed to respond. After Shaarawi and Seang left the room, Farah explained to plaintiff the meaning of Seang's comment.

Believing that the statement constituted sexual harassment, plaintiff reported the incident to her manager Conrad Haak ("Haak") in compliance with the company's open-door policy for reporting sexual harassment. Haak agreed that the comment was inappropriate and recommended that plaintiff report the incident to Seang's manager, Antonio Holley ("Holley"). Plaintiff did so, and Holley also agreed that the comment was inappropriate. A meeting was then arranged between plaintiff, Shaarawi, Seang, Haak and Holley. During this meeting, Seang admitted to making the comment. Also, either during or shortly after this meeting, Shaarawi told Holley that plaintiff had hit him in the course of the incident.

*2 Holley thereafter reported the incident to Doug Engelke ("Engelke") in the human resources department. Engelke advised Holley and Haak to obtain written statements from the individuals involved. Later that same day, Holley, Haak and Engelke reported the incident to Kenneth Tapper ("Tapper"), a management employee with supervisory authority over Holley and Haak. Tapper told Haak to suspend plaintiff immediately while the incident was investigated further; however, Tapper did not similarly instruct Holley to suspend Seang. Pursuant to Tapper's instruction, Haak informed plaintiff that she was suspended from her employment while defendant completed an investigation. He then collected plaintiff's badge and escorted her off the premises.

Engelke conducted an investigation in which he interviewed plaintiff, Shaarawi, Seang and Ngo about the events that transpired on October 19, 1998. Based on these interviews, he concluded that plaintiff had violated defendant's "zero-tolerance" policy against violence in the workplace. He also determined that Seang had violated defendant's sexual harassment policy. Engelke reported these results to Tapper, who determined that plaintiff's employment should be terminated. Plaintiff was formally discharged on October 22, 1998, about three days after she first reported the incident. The stated reason for plaintiff's termination was her violation of defendant's "zero tolerance" policy against violence in the workplace. Meanwhile, the employee who made the sexually offensive comment to plaintiff was not discharged despite Engelke's determination that he had violated the company's purported "zero tolerance" policy against sexual harassment. Instead, he received a one week suspension without pay.

Plaintiff thereafter filed this lawsuit, asserting claims of sexual harassment and retaliation under Title VII and the Minnesota Human Rights Act. On June 28, 2000, the Court granted defendant's motion for summary judgment as to plaintiff's sexual harassment claim but denied the motion in all other respects. Plaintiff's retaliation claim under both statutes was tried to a jury on December 11, 12, 13, 18 and 19. On December 20, 2000, the jury returned a verdict in plaintiff's favor, awarding her \$31,933.39 in back pay, \$800,000 in compensatory emotional distress damages and \$1,100,000 in punitive damages.

On January 30, 2001, plaintiff's counsel informed the Court that the parties were unable to reach agreement on plaintiff's damages under the governing statutes and that a separate motion on this issue was required. The Court held a telephone conference on February 1, 2001 to establish a briefing schedule for plaintiff's motion. Based on these pleadings and the arguments of counsel, which were heard on March 27, 2001, the Court now issues its ruling.^{FN1}

FN1. The Court refrained from issuing its Order while the parties tried again to mediate damages in this case, however, no settlement was reached at a June 14, 2001 mediation.

ANALYSIS

I. Damages under Title VII and the MHRA

Under Title VII, a complaining party who prevails in her claim for unlawful intentional discrimination may recover "compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 2000e-5(g)^{FN2} of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(a). Although compensatory and punitive damages are recoverable, Title VII statutorily caps these damages according to size of the employer. *See* 42 U.S.C. § 1981a(b)(3).

FN2. 42 U.S.C. § 2000e-5(g)(1) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, ... or any other equitable relief as the court deems appropriate.

*3 Under the MHRA, a plaintiff may recover the following damages for violations of the Act:

... compensatory damages in an amount up to three times the actual damages sustained. In all cases, the [] judge may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees, in addition to punitive damages in an amount not more than \$8,500. Punitive damages shall be awarded pursuant to section 549.20.

Minn.Stat. § 363.071.

In this case, plaintiff brought her claims under both Title VII and the MHRA. Because of this, plaintiff claims she is not limited to the statutory caps under Title VII. Citing *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir.1997), *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 509-10 (9th Cir.2000) and *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1136, 1349-50 (D.C.Cir.1999) as precedential support, plaintiff argues that the Court can allocate damages, where applicable, between the two statutes.

In *Kimzey*, the plaintiff brought suit against her employer for sexual harassment and constructive discharge in violation of both Title VII and the Missouri Human Rights Act. 107 F.3d at 570. A jury returned a verdict in plaintiff's favor, awarding her \$35,000 in compensatory damages, \$1.00 in back pay and \$50,000,000 in punitive damages, which the district court later reduced to \$5,000,000. *Id.* On appeal, the Eighth Circuit rejected defendant's argument that the district court should have limited plaintiff's punitive damage award to the \$300,000 cap under Title VII. *Id.* at 575-76. Noting that the standards for punitive damages under Title VII and the state anti-discrimination statute were the same and that the jury instructions provided no indication under which statute damages were submitted to the jury, the Eighth Circuit found no reason why the district court could not allocate these damages under the state statute:

There is no language in Title VII indicating that its upper limit is to be placed on awards under state anti-discrimination statutes, and Wal-Mart points to no legislative history showing this intent. State law cannot be displaced by federal law without the clear intent of Congress ... and evidence of such intent is missing here. Wal-Mart's argument that the award under state law can be no larger than \$300,000 thus fails.

Id. at 576. Other federal circuit courts have reached the same conclusion. In *Passantino*, the Ninth Circuit affirmed the district court's allocation of \$1 million in compensatory damages to the state law claim. 212 F.3d at 509-10. As in *Kimzey*, the court concluded that "[i]n the absence of a contrary directive, such as a statutory mandate that damages be allocated to one claim rather than another, the district court had authority to allocate the damages to either claim. *Id.* at 509; see also *Martini*, 178 F.3d at 1349-50 (affirming district court's damage award beyond Title VII's statutory maximum where standards of liability under both statutes are the same).

*4 Despite the holdings in these cases, defendant claims that plaintiff's compensatory and punitive damage awards are limited to the \$300,000 cap under Title VII.^{FN3} Specifically, defendant contends that the MHRA's exclusivity provision, Minn.Stat. § 363.11, precludes plaintiff's recovery under the MHRA. Section 363.11 provides:

FN3. Given defendant's argument, the Court presumes that Scagate Technology employs "more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 1981a(b)(3)(D) (capping damages at \$300,000 for employers with more than 500 employees).

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of

the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance, national origin, sexual orientation, or familial status; but, as to acts declared unfair by section 363.03, the procedure herein provided shall, while pending, be exclusive.

(Emphasis added.) As support, defendant relies on two Minnesota Supreme Court decisions interpreting § 363.11, *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn.1990) and *Williams v. St. Paul Ramsey Med. Ctr. Inc.*, 551 N.W.2d 483 (Minn.1996). In *Wirig*, the plaintiff sued her former employer, alleging, among other claims, a sexual harassment claim under the MHRA and a common law battery claim.^{FN4} 461 N.W.2d at 377. In construing § 363.11, the Minnesota Supreme Court held that the exclusivity provision did not preempt plaintiff's common law battery claim. *See id.* at 379. The court, however, limited plaintiff's recovery to the MHRA claim out of concern that permitting plaintiff to recover damages under both legal theories would be a double recovery for the same harm. *See id.* In *Williams*, the court held that the MHRA's exclusivity provision barred plaintiff's separate retaliation claim under Minnesota's Whistleblower Act. 551 N.W.2d at 486.

FN4. The jury awarded plaintiff \$30,000 in compensatory damages, \$7,100 in future damages and \$5,000 in punitive damages on her harassment claim and \$14,000 in compensatory damages and \$100,000 in punitive damages on her battery claim.

Defendant's reliance on § 363.11 is misplaced. *Wirig* and *Williams*, as well as other cases interpreting the preemptive scope of § 363.11, *see Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736 (Minn.1997), *Thompson v. Olsten Kimberly QualityCare, Inc.*, 980 F.Supp. 1035 (D.Minn.1997); *Wise v. Digital Equip. Corp.*, 1994 WL 664973 (Minn.Ct.App. Nov. 29, 1994); *Huffman v. Pepsi-Cola Bottling Co.*, 1995 WL 434467 (Minn.Ct.App. July 25, 1995), all involve whether the MHRA's exclusivity provision abrogates either a common law claim or a state statutory claim. *See Wirig*, 461 N.W.2d at 377-79 (common law battery); *Williams*, 551 N.W.2d at 483-86 (Minn.Stat. § 181.932, subd. 1(a), the Minnesota Whistleblower Act); *Thompson*, 980 F.Supp. at 1039 (negligent supervision and retention); *Wise*, 1994 WL 664973 at *2 (same); *Huffman*, 1995 WL 434467 at *5 (same).

The analogous argument in this case would be that § 363.11 preempts plaintiff's federal claim, a construction which, for obvious reasons, cannot be sustained. *See Durr v. American National Prop. & Casualty Co.*, 1999-CA-00482-SCT, 2001 WL 769611 at *4 (Miss. June 15, 2000) (rejecting plaintiffs' argument that state law preempts federal law on the basis that such an assertion is against "general principles of law"). Perhaps in recognition of this constructional dilemma, defendant argues that § 363.11 bars plaintiff's MHRA claim while her Title VII claim is pending. However, as the above discussion and a plain reading of § 363.11 reveal, application of § 363.11 would render plaintiff's MHRA claim exclusive, not the other way around.

*5 At the motion hearing, it became more clear that defendant's argument has less to do with § 363.11 *per se* and more to do with the Minnesota Supreme Court's second

holding in *Wirig* concerning plaintiff's double recovery for the same harm and election of remedies. Specifically, defendant maintains that plaintiff elected to present this case to the jury under the standards of Title VII and as such, she is now limited to recover damages under that statute. The Court disagrees. As Instruction No. 12 makes clear, plaintiff's retaliation claim was presented to the jury under both statutes. It is well-established that the standards of liability for retaliation under both Title VII and the MHRA are the same. *Scott v. County of Ramsey*, 180 F.3d 913, 917 (8th Cir.1999); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn.1983).

Moreover, the double recovery concern raised in *Wirig* is inapplicable here where the express terms of § 2000e-7 protect a state law's "prerogative to provide greater remedies for employment discrimination than those Congress has afforded under Title VII." *Martini*, 178 F.3d at 1349-50.^{FN5} For these reasons, the Court finds this case on all fours with *Kimzey*, *Passantino* and *Martini* and concludes that the Court may allocate damages, where applicable, between the two statutes.

FN5. 42 U.S.C. § 2000e-7, entitled, "Effect of State Laws," provides, in relevant part, that "[n]othing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law"

A. Backpay

There are no statutory limitations under either Title VII or the MHRA for backpay. In fact, Title VII expressly provides that a backpay award is excluded from the compensatory damages subject to the statutory caps. *See* 42 U.S.C. § 1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interests on backpay, or any other type of relief authorized under section 2000e-5(g) of the Civil Rights Act of 1964"). Under the MHRA, the Court has the discretion to award three times the amount of backpay, however, plaintiff asks only for the actual amount awarded by the jury. Defendant does not appear to dispute this request. The Court thus sustains the jury's award of \$31,922.39 in wage and benefit loss.

B. Front Pay

Plaintiff seeks five years of front pay in the amount of \$51,703.51.^{FN6} Defendant claims that a front pay award is not warranted, however, if the Court finds otherwise, defendant alternatively contends that such damages should be limited to two years.

FN6. At trial, the parties agreed that in light of *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir.1999) and *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir.1997), the issue of front pay would be submitted to the Court, not the jury.

Most courts, including the Eighth Circuit, have held that front pay is a viable equitable remedy to be awarded in the district court's discretion when reinstatement is impractical or impossible. *See Kramer v. Logan County School Dist.*, 157 F.3d 620, 625-26 (8th Cir.1998); *Martini*, 178 F.3d at 1348-49; *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir.1999); *see also Rivera v. Baccarat, Inc.*, 34 F.Supp.2d 870, 878 (S.D.N.Y.1999); *Bizelli v. Parker Amchem*, 17 F.Supp.2d 949, 954 n.2 (E.D.Mo.1998). As an equitable remedy, front pay is not subject to the statutory caps of Title VII. *See*

Pollard v. E.I. du Pont de Nemours & Co., 121 S.Ct. 1946, 1952 (2001) (holding that an award of front pay in lieu of reinstatement is not limited by § 1981a); Kramer, 157 F.3d at 626.

*6 As an initial matter, the Court finds that reinstatement is not an option given the polarization that defendant's treatment of plaintiff and the ensuing litigation have created between the parties. See Cowan v. Strafford R-VI School Dist., 140 F.3d 1153, 1160 (8th Cir.1998) (affirming trial court's determination that working relationship between plaintiff and defendant was so badly damaged as to make reinstatement impossible); Webner v. Titan Distrib., Inc., 101 F.Supp.2d 1215, 1235 (N.D.Iowa 2000) (listing "degree of hostility or animosity between the parties" as a relevant factor in determining whether reinstatement is an inappropriate remedy).

Having determined that reinstatement is not a viable option in this case, the Court next determines whether an award of front pay is warranted. Numerous factors weigh in favor of awarding plaintiff front pay. See Webner, 101 F.Supp.2d at 1236 (enumerating multiple factors for assessing front pay determination).^{FN7} The evidence reveals that plaintiff worked for defendant from 1992 until 1998. This relatively lengthy period of employment suggests that, absent the discrimination, plaintiff would have remained with defendant indefinitely. See *id.* at 1236-37 (noting that relative longevity of plaintiff's employment with defendant and likelihood that plaintiff would have remained with employer absent the discrimination weighs in favor of a front pay award). Indeed, the factual record in this case contains particularly compelling evidence that plaintiff would likely have remained in her position at Seagate for a substantial period of time. At trial, plaintiff's brother testified about the importance their culture places on long-term employment. Additionally, plaintiff's work record reveals that throughout her employment with defendant, she was an exemplary employee who performed her duties above expectations. Thus, although a plaintiff's at-will employment status is generally subject to speculation, the degree of speculation is significantly reduced under the particular facts and circumstances of this case.

FN7. These factors include:

- 1) the plaintiff's age;
- 2) the length of time the plaintiff was employed by the defendant employer;
- 3) the likelihood the employment would have continued absent the discrimination;
- 4) the length of time it will take the plaintiff, using reasonable effort, to secure comparable employment;
- 5) the plaintiff's work and life expectancy;
- 6) the plaintiff's status as an at-will employee;
- 7) the length of time other employees typically held the position lost;

- 8) the plaintiff's ability to work;
- 9) the plaintiff's ability to work for the defendant-employer;
- 10) the employee's efforts to mitigate damages; and
- 11) the amount of any liquidated or punitive damages award made to the plaintiff.

Id. at 1236.

Plaintiff also properly mitigated her damages. See Excel Corp. v. Bosley, 165 F.3d 635, 639 (8th Cir.1999) (“A Title VII claimant seeking either back pay or front pay damages has a duty to mitigate those damages by exercising reasonable diligence to locate other suitable employment and maintain a suitable job once it is located”); Webner, 101 F.Supp.2d at 1237 (evidence that plaintiff reasonably sought to gain other employment weighs in favor of front pay). As plaintiff's Exhibit 17 demonstrates, plaintiff secured other employment just over a month after her termination and continues to work at the present time. Exhibit 17 also reveals that plaintiff has not received, nor is she currently receiving, the same salary she received while working for defendant. While the pay differential is gradually diminishing, the fact that a differential still exists supports a front pay award. Based on these factors, the Court finds that a front pay award is appropriate.

*7 Once a court determines that front pay is warranted, the Court must then calculate the actual award. The steps for calculating a front pay award include 1) determining the proper duration; and 2) estimating the loss yearly income less mitigating damages. Webner, 101 F.Supp.2d at 1238-39. As previously mentioned, plaintiff requests a front pay award of five years, while defendant argues the duration of the award should be limited to two years. Upon review of the relevant case law, the facts of this case, and the arguments of counsel, the Court concludes that three years of front pay under plaintiff's method of computation “strike[s] the proper balance between the need to make plaintiff ‘whole’ and the need to avoid excessive front pay awards.” *Id.* at 1238. An award of one additional year from defendant's proposed duration properly accounts for the particularly compelling evidence presented in this case that plaintiff had every intention to remain working for defendant, given the emphasis her culture places on long-term employment. The Court also finds that computing the award according to plaintiff's annual income approach, as opposed to defendant's hourly wage approach, is not “unduly speculative.” Barbour v. Merrill, 48 F.3d, 1270, 1280 (D.C.Cir.1995). It is significant that the Court's calculation is based on the same approach and evidence adopted by the jury in awarding plaintiff's back pay award. See Kim v. Nash Finch Co., 123 F.3d 1046, 1065 (8th Cir.1997) (approving the district court's calculation of front pay based on the same evidence that the jury awarded the back pay award). The Court thus awards plaintiff \$31,022.28 in front pay.

C. Compensatory Damages

The jury awarded plaintiff \$800,000 in emotional distress damages. While there is a cap on the amount of compensatory damages a plaintiff may recover under Title VII, see

42 U.S.C. § 1981a(b)(3), this cap is not applicable to the MHRA, and as previously discussed, the Court can award such damages under the MHRA rather than Title VII. The MHRA authorizes the trebling of compensatory emotional distress damages. *See* Minn.Stat. § 363.071, subd. 2 (allowing for the recovery of “compensatory damages in an amount up to three times the actual damages sustained”); *see also Jones v. Yellow Freight Sys., Inc.*, No. C9-00-79, 2000 WL 105167 at *8 (Minn.Ct.App. Aug. 1, 2000) (upholding trial court’s trebling of compensatory damages for past mental anguish/suffering and economic loss due to sexual harassment and hostile work environment). Despite the availability of trebled damages, plaintiff requests only the amount awarded by the jury. Defendant contests the jury’s award on the basis that it is excessive and is the product of jury sympathy and prejudice.

Compensatory emotional distress damages are “highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms.” *Webner*, 101 F.Supp.2d at 1225; *Jenkins v. McLean Hotels, Inc.*, 859 F.2d 598, 600 (8th Cir.1988); *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 n. 3 (8th Cir.1987). A verdict should be set aside as excessive only where the amount of damages “shocks the conscience.” *Morse v. Southern Union Co.*, 174 F.3d 917, 925 (8th Cir.1999); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1061 (8th Cir.1993). In determining whether the verdict amount is excessive, the trial court must consider all the evidence, including the parties’ demeanors, and the circumstances of trial. *Peoples Bank & Trusts Co. v. Globe Int’l Publ’g, Inc.*, 978 F.2d 1065, 1070 (8th Cir.1992).

*8 Medical or other expert evidence is not required to prove emotional distress damages. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir.1997). Rather, “a plaintiff’s own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff’s burden in this regard.” *Id.* (quoting *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir.1996)); *see also Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir.1986). Additionally, the Eighth Circuit has approved of corroborating testimony by a plaintiff’s family members to support emotional distress damages. *See Foster v. Time Warner Entm’t Co.*, 250 F.3d 1189, 1196 (8th Cir.2001) (testimony of plaintiff’s husband supported evidence of plaintiff’s emotional distress); *Morse*, 174 F.3d at 925; *Kim*, 123 F.3d at 1065 (corroboration by family members sufficient).

The record amply supports the jury’s award of \$800,000 for plaintiff’s emotional distress damages. At trial, the jury heard testimony from plaintiff’s brother and plaintiff herself concerning the loss of reputation and shame plaintiff experienced, and still experiences, as a result of her termination. Plaintiff’s brother testified to the striking changes he witnessed in his sister’s personality. (Nichols Aff. Ex. 2.) He testified that prior to her termination, plaintiff was a hard working, happy, kind and generous person who enjoyed helping her family and socializing with friends. *Id.* After her termination, he testified that plaintiff would “isolate herself in her room, [often times locking the door] and try not to talk to anybody else.” *Id.* (quoting Tr. at 390). When asked about the importance of maintaining employment in his culture and the loss of respect and shame an individual and family members experience when a person is terminated, he responded:

People want to stay in the company as long as they can. That's their goal. If for some reason they get terminated, or got fired, people will look at that person, might think differently. Say, why she-I mean this bad thing that that person did in a company, that they get terminated. People always think of the bad way first in our culture.

Id. (quoting Tr. at 391).

Plaintiff herself testified that despite all her previous life experiences, including having her brothers sent to concentration camps, escaping from Vietnam and living on an island for over a year without adequate food, water and clothing, her termination was the most traumatic event of her life because it resulted in the loss of her reputation and dignity. Plaintiff's shame was so great that she could not bring herself to tell her family of her termination. She explained that, in her culture, losing a job brings a shame upon the terminated employee and the employee's family. Plaintiff's shame and cultural obligations also led her to end a special relationship she had with a man in Taiwan as a result of the events.

*9 Defendant claims that this award far exceeds the average recovery for emotional distress damages. But as the testimony above demonstrates, this was not an average case. The Court cannot overlook the unique factual circumstances of this case and the tremendous impact these events have had on this particular plaintiff's life. *See Hopkins v. McBane*, 427 N.W.2d 85, 95 (N.D.1988) (considering cultural factors in affirming trial court's compensatory damage award for mental anguish, grief and loss of companionship). Many of the emotions and demeanor of the witnesses, particularly those of plaintiff and her family, cannot be adequately captured on the trial court record. However, the twelve individual members of the jury were present in the courtroom and did hear and witness all these events. In deliberations, the jury took all these factors into consideration in evaluating the degree of shame and embarrassment experienced by plaintiff and in determining the appropriate amount of damages that would adequately compensate plaintiff for her harm. It is for these reasons that a jury's determination for compensatory damages is best left to the "sound discretion of the jury," *Webner*, 101 F.Supp.2d at 1225; *Jenkins*, 859 F.2d at 600, and it is for these reasons that this Court will not disturb that determination. Other courts have upheld compensatory damage awards of similar amounts. *See Jones*, 2000 WL 1052167 at *8 (upholding trial court's award of \$630,000 of trebled compensatory damages under the MHRA); *Passantino*, 212 F.3d at 513-14 (upholding jury's \$1 million compensatory emotional distress damage award). Thus, for all the above-stated reasons, the Court sustains the jury's award of \$800,000 in compensatory emotional distress damages.

D. Punitive Damages

Under Title VII, punitive damages may be awarded if a plaintiff demonstrates that defendant "engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).^{FN8} Based on this standard, the jury awarded plaintiff \$1.1 million in punitive damages against defendant.

FN8. Because punitive damages under the MIRA must be proved by clear and convincing evidence, see Minn.Stat. § 549.20, a standard which was not presented to the jury, plaintiff's recovery for punitive damages is limited to Title VII.

Plaintiff argues that the evidence at trial supported a punitive damages award against defendant and asks the Court to award her \$300,000 in punitive damages under the Title VII cap. See 42 U.S.C. § 1981a(b)(3). Defendant maintains that the facts of this case do not support an award of punitive damages against defendant as a matter of law. Specifically, defendant claims the record conclusively shows that defendant's termination of plaintiff was based on its reasonable good faith belief that she violated the zero tolerance policy prohibiting violence in the workplace and that plaintiff cannot set forth any evidence which would place defendant's motivations in doubt as to the reason for her termination.

The controlling authority for assessing the sufficiency of a punitive damage award under Title VII is *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). In *Kolstad*, the Court rejected an interpretation of § 1981a which would have required a plaintiff to demonstrate "egregious" conduct by an employer before punitive damages could be assessed. *Id.* at 535. Instead, the Court adopted "the view that § 1981a provides for punitive awards based solely on an employer's state of mind The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* Thus, an employer who "discriminate[s] in the face of a perceived risk that its actions will violate federal law [may] be liable in punitive damages. *Id.* at 536.

*10 The Court also made clear that vicarious liability will be imposed where employee[s] who serve in managerial capacities commit the wrong while acting in the scope of their employment. *Id.* at 543. However, an employer may escape vicarious liability for the discriminatory actions of its managerial agents where the employer makes "good faith efforts" to comply with the requirements of federal law. *Id.* at 545.

Guided by the standards in *Kolstad*, the Court finds that the record contains sufficient evidence to support the jury's finding that defendant acted with reckless indifference to plaintiff's federally protected rights. On the day of the incident, management and supervisory employees learned from plaintiff that another employee had made a highly offensive sexual comment to her. Plaintiff reported this incident based on her reasonable belief that the comment constituted sexual harassment and in full compliance with defendant's written policy encouraging employees to report such incidents to upper management. There was testimony presented at trial that management personnel who were responsible for handling and responding to plaintiff's complaint of sexual harassment knew of these written policies and received workplace training concerning these policies. Yet, upon reporting the incident, plaintiff found herself suspended from her job that same day, while employee Seang, who made the comment to plaintiff, was permitted to return to work. A few days later, plaintiff was terminated from her job, while Seang received a one-week suspension.

These facts, and the inferences which can be drawn from them, more than adequately support a jury's finding that management employees, acting within the scope of their employment, had knowledge of Title VII's proscriptions, yet acted "in the face of a perceived risk that [their] actions [would] violate federal law." *Kolstad*, 527 U.S. at 536; *Ogden v. Wax Works*, 214 F.3d 999, 1010 (8th Cir.2000). While defendant claims to have terminated plaintiff for violating its zero tolerance policy against violence in the workplace, the jury obviously disbelieved defendant that this was the true motivation for plaintiff's termination.^{EN9}

^{EN9}. At trial, plaintiff presented evidence of prior incidents of workplace violence that involved similar physical contact with other employees. Yet, in neither instance were the employees terminated for violating the zero tolerance policy against violence in the workplace. This evidence supports the jury's disbelief of defendant's stated reason for terminating plaintiff, and further supports the inference that management acted with the intent to retaliate against plaintiff for reporting an incident of sexual harassment.

Although defendant maintained written policies, this evidence is insufficient in the face of substantial evidence that the policies were not followed in actual practice. See *Foster*, 250 F.3d at 1197 ("The mere existence of a policy is not enough to establish good faith if there is evidence that managerial employees disregarded it in making employment decisions and issues a conflicting policy."); *Ogden*, 214 F.3d at 1010 ("Plainly, [pointing to a written sexual harassment policy, and policy of encouraging employees with grievances to contact the home office] does not suffice, as a matter of law, to establish 'good faith efforts' in the face of substantial evidence that the company 'minimized' [plaintiff's] complaints; performed a cursory investigation which focused upon [plaintiff's] performance, rather than [the supervisor's] conduct; and forced [plaintiff] to resign while imposing no discipline upon [the supervisor] for his behavior."); *Kimzey*, 107 F.3d at 579 (Heaney, J. concurring and dissenting) (stating that defendant's response to plaintiff's complaint of sexual harassment "essentially punished the wrong party and condoned the illegal behavior.").

*11 Based on this record, the Court holds that there is substantial evidence from which a reasonable jury could find defendant liable for punitive damages under the established standards of *Kolstad*. The Court accordingly awards plaintiff \$300,000 in punitive damages, the maximum statutory amount permitted under Title VII. This amount is reasonable and sufficient to deter future similar conduct, and is entirely consistent with other Eighth Circuit decisions which have approved similar punitive damage awards to deter employment discrimination. See *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067-68 (8th Cir.1997) (\$300,000 punitive damage award is an adequate sanction to prevent retaliation in violation of Title VII); *Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir.1999) (upholding trial court's \$400,000 punitive damage award); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 578 (8th Cir.1997) (awarding \$350,000 in punitive damages); *Denesha v. Farmers Ins. Exchange*, 161 F.3d 491, 505 (8th Cir.1998) (\$700,000 in punitive damages); *EEOC v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir.1998) (\$380,000 in punitive damages).