IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE

DELISE DIAZ,

Appellant-Respondent,

v.

AUTOZONERS, LLC, d/b/a AUTOZONE, et al.,

Respondents-Appellants.

DOCKET NUMBER WD77861
(Consolidated with WD77867)

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: November 10, 2015

APPEAL FROM

The Circuit Court of Jackson County, Missouri
The Honorable James F. Kanatzar, Judge

JUDGES

Division Three: Mitchell, P.J., and Hardwick and Gabbert, JJ. CONCURRING.

ATTORNEYS

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

DELISE DIAZ,	)	
	)	
Appellant-Respondent,	)	
v.	)	
	)	**OPINION FILED:**
	)	**November 10, 2015**
AUTOZONERS, LLC, d/b/a AUTOZONE, et al.,	)	
	)	
	)	
Respondents-Appellants.	)	

WD77861 (Consolidated with WD77867) **Jackson County**

Before Division Three Judges: Karen King Mitchell, Presiding Judge, and Lisa White Hardwick and Anthony Rex Gabbert, Judges

Delise Diaz filed suit under the Missouri Human Rights Act (MHRA) against AutoZoners, LLC, and AutoZone, Inc. (collectively "Defendants"), alleging that sexual harassment engaged in by two customers of the AutoZone store where Diaz worked created a hostile work environment and that Defendants retaliated against Diaz when she complained of the harassing conduct. A jury found in favor of Diaz and against both Defendants on her hostile work environment claim, but it found in favor of both Defendants on Diaz's retaliation claim. The jury awarded Diaz $75,000 in compensatory damages, $1,000,000 in punitive damages against AutoZoners, LLC, and $1,500,000 in punitive damages against AutoZone, Inc. The trial court awarded Diaz $243,826.25 in attorneys' fees and assessed costs against Defendants in the amount of $10,075.05. Defendants appeal the denial of their motion for judgment notwithstanding the verdict, or alternatively, their motions for new trial and remittitur. Diaz cross appeals the trial court's denial of her post-trial request to amend the judgment for additional attorneys' fees and costs incurred in responding to Defendants' post-trial motions.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Division Three holds:

1. There are two different legal theories under which an employer may be held liable when an employee is subjected to sexual harassment in the workplace: vicarious liability when

the harasser is a supervisor of the plaintiff or direct liability premised on negligence when the harasser is a third party (e.g., co-employee, customer, etc.) if the employer knew or should have known of the harassment and failed to remedy it.

2. When an employer's liability is vicarious, the employer may raise a "good faith" defense to punitive damages by proving that the discriminatory employment decisions of managerial agents are contrary to the employer's good-faith efforts to comply with Title VII.

3. But, because reasonableness rather than good faith is the standard by which negligence is to be determined, the "good faith" defense to punitive damages is unavailable in third-party harassment actions premised on negligence.

4. Because Diaz has raised her claim based upon a negligence theory, the sole questions pertaining to liability are whether the Defendants knew of the harassment and, if so, whether they responded promptly and effectively; and if there is liability for compensatory damages, whether the heightened mental state is present to support an award of punitive damages.

5. The MHRA defines "employer" as any person employing six or more persons within the state, and any person directly acting in the interest of an employer.

6. "Person" for purposes of the "directly acting in the interest of an employer" provision of the MHRA, is defined to include both individuals and corporations. Courts have held that the plain and unambiguous language under this definition of employer imposes individual liability in the event of discriminatory conduct, but only when the individuals directly oversaw or were actively involved in the discriminatory conduct.

7. In cases involving multiple alleged employers under the MMWL, Missouri courts have utilized several factors, known as the economic realities test, to ascertain whether a particular work relationship qualifies as an employer-employee relationship.

8. A modified version of this test is required for purposes of the MHRA. Under the modified version, the court should consider the following factors: (1) who was responsible for establishing policies and training employees concerning harassment; (2) who was responsible for receiving, investigating, and responding to harassment complaints; and (3) who had the power to discipline employees who may have failed to comply with anti-harassment policies.

9. The provision of guidelines and training manuals, in and of itself, does not make an entity an employer under the MHRA because the provision of such documents does not establish that the entity either directly oversaw or was actively involved in the discrimination.

10. In Missouri, two separate corporations are regarded as wholly distinct legal entities, even if one partly or wholly owns the other. The parent-subsidiary separation should be ignored with caution and only when the circumstances clearly justify it.

11. Here, Diaz failed to demonstrate that AutoZone, Inc., was her employer under the MHRA.

12. A party alleging sexual harassment must establish that: (1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment; (3) the harassment was based on her sex; (4) this harassment affected a term, condition, or privilege of employment in a manner sufficiently severe to create an abusive work environment and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.

13. Sexual harassment creates a hostile work environment when sexual conduct either creates an intimidating, hostile, or offensive work environment *or* has the purpose or effect of unreasonably interfering with an individual's work performance. In order to meet this standard, the conduct must be sufficient to create a hostile work environment, both as it was subjectively viewed by the plaintiff and as it would be objectively viewed by a reasonable person. Once evidence of improper conduct and subjective offense is introduced, it is up to the jury to determine if the conduct rose to the level of being abusive.

14. Diaz testified to conduct that includes repeated harassment that bordered on sexual assault, which the jury could have concluded was ignored when reported to AutoZoners, LLC. Accordingly, the jury was entitled to conclude, as it did, that the conduct created an intimidating, hostile or offensive working environment, meeting the standard for this element.

15. Diaz testified that she saw a doctor, either while she was at, or days after being transferred from, the store location where she had been harrassed. Her doctor prescribed antidepressants due to the stress caused by the harassment. She also testified that she experienced bouts of crying, sickness, headaches, and hair loss, and that her daughter walked into Diaz's room to find her cutting herself. These subjective manifestations were sufficient for the jury to conclude that Diaz was negatively affected by the hostile workplace environment.

16. An employer knew or should have known of sexual harassment if information about the harassment came to the attention of someone who: (a) has under the terms of his employment, or (b) is reasonably believed to have a duty to pass on the information to someone within the company who has the power to do something about it.

17. There was sufficient evidence to support a finding that Diaz timely informed AutoZoners, LLC, of the harassing conduct as it occurred. Diaz reported harassment to a fellow manager, Shane Williams, as early as April of 2010, soon after the conduct began. And she continued to report every incident of unwanted physical contact to Williams.

AutoZoners, LLC's regional human resources manager at the time of the conduct testified that employees were told that they could report harassment to "anyone in management," which includes "commercial sales manager[s]," such as Williams. If the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable. Additionally, Williams was eventually terminated for his failure to report this conduct to higher management, reflecting that AutoZoners, LLC, believed Williams had a duty to report the conduct to higher management. This was sufficient for the jury to conclude that Williams was an employee who was authorized to receive complaints of harassment, thus providing notice to AutoZoners, LLC.

18. Diaz also reported the harassment to Brent George, the store manager, immediately following the first inappropriate physical touching, and following each event thereafter. And when she did report this harassment, George repeatedly told Diaz that he would, or Diaz should, "talk to Shane [Williams]," because the issues were with commercial customers.

19. Williams did nothing to help prevent the unwanted harassment, and in fact there is evidence that he sometimes encouraged it. George, despite knowing of physical harassment as early as November 2010, did not report anything to human resources until January 2011. And even then, George only told human resources that some customers had made "rude" comments. When Diaz, dissatisfied with the lack of response by management, took it upon herself to contact human resources, it took multiple contacts, and months, before an investigation was initiated. By the time AutoZoners, LLC, transferred Diaz to another store, finally effectively remedying the situation, it had been over a year since Diaz first reported unwanted harassment, and at least five months since she had reported inappropriate physical touching to the store manager. From this, the jury reasonably could have concluded that AutoZoners, LLC, did not take proper remedial action.

20. Where, as here, the claim alleges a discriminatory hostile work environment caused by a third party, an employer's liability is not based on an application of respondeat superior.

21. Rather, liability is imposed when the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment. In other words, liability is imposed where the employer has violated its own, independent duty under the MHRA to maintain a work environment free from discrimination based upon any of its employees' protected classifications.

22. Because Diaz's claim was premised on negligence, the court committed no error in failing to include vicarious liability language in the verdict-directors.

23. Intangible damages, such as pain, suffering, embarrassment, emotional distress, and humiliation do not lend themselves to precise calculation. Fair and reasonable compensation is the ultimate goal in awarding damages.

24. In a challenge to a compensatory damage award, we disregard all evidence and inferences that conflict with the verdict, and we will reverse the jury's verdict for insufficient evidence only if there is a complete absence of probative facts to support the jury's conclusion.

25. Diaz's testimony that she: suffered very bad headaches, was constantly sick, experienced a great deal of stress and anxiety, lost patches of hair, had difficulty sleeping and eating, attempted to cut herself, became very angry, and had a doctor place her on antidepressant medication, was sufficient to justify the $75,000 compensatory damage award.

26. Diaz testified that she lived in dread of going to work, and attributed the problems listed above to the harassment that she was experiencing at work. Her doctor agreed. Defendants attributed the problems to other factors, and had the opportunity to make that argument to the jury. The jury was within its right to credit Diaz's evidence over Defendants' contrary explanation.

27. Punitive damages require clear and convincing proof of a culpable mental state, either from a wanton, willful, or outrageous act, or from reckless disregard for an act's consequences such that an evil motive may be inferred.

28. Because Diaz brought her claim as a negligence action, the *Kolstad* "good faith" defense is inapplicable to the question of whether she made a submissible case for punitive damages because reasonableness rather than good faith is the standard by which negligence is to be determined.

29. Under the MHRA, a submissible case for punitive damages is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity that the defendant's conduct was outrageous because of evil motive or reckless indifference. Reckless disregard can be shown by evidence that an employer knew of the harassment and failed to adequately remedy the situation, or by evidence of the failure to properly investigate complaints of discrimination.

30. Recklessness and outrageousness may be inferred from evidence of an employee's repeated complaints to supervisors falling on deaf ears. Where the employer knows of abusive conduct, repeatedly fails to take effective action to stop the conduct, and defends or makes excuses for the conduct, the evidence is sufficient to support submission of punitive damages.

31. Here, Diaz repeatedly complained to both Williams and George and claimed that both individuals witnessed incidents of harassment; Williams repeatedly brushed off Diaz's complaints, and excused the customers' conduct. Though George reported that Diaz was having problems with some customers, he failed to report the nature of Diaz's complaints and told Brown that Diaz was the source of a lot of "drama" in his store. This evidence was sufficient to submit the issue of punitive damages to the jury.

32. In determining whether a punitive damage award is "grossly excessive," we generally consider the following factors: (1) the degree of reprehensibility of the conduct at issue; (2) the ratio of actual harm to punitive damages; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. Only the first two factors, however, are relevant in an MHRA case.

33. To determine reprehensibility, we consider whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an insolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

34. There was sufficient evidence from which the jury could have found that AutoZoners, LLC, acted with reckless disregard for its employees' well-being by failing to remedy a hostile work environment, of which it was aware, in favor of maintaining commercial sales accounts or by not taking Diaz's complaints seriously.

35. While few awards exceeding a single digit ratio between punitive damages and compensatory damages will satisfy due process, greater ratios may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.

36. Where the defendant's conduct was economically motivated and the defendant is a large corporation, or where the defendant is particularly recalcitrant, it very well may be that a large award is the only means by which to sufficiently ensure that its illegal conduct will be deterred.

37. In light of these factors, we cannot say that the punitive damage award against AutoZoners, LLC, was arbitrary so as to violate AutoZoners, LLC's right to due process.

38. Section 510.265.1 provides that "No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant."

39. The "net amount of the judgment" is not limited to the amount of compensatory damages but instead includes all monetary awards to the plaintiff provided for in the judgment, such as attorneys' fees.

40. Here, in the judgment, Diaz was awarded $75,000 in compensatory damages, $243,826.25 in attorneys' fees, and $10,075.05 in costs, for a total award of $328,901.30. Five times this amount is well over the $1,000,000 punitive damage award Diaz received against AutoZoners, LLC. Thus, the punitive damage award against AutoZoners, LLC, did not exceed the statutory cap.

41. The MHRA allows a court to award court costs and reasonable attorneys' fees to the prevailing party. The reasons for awarding attorneys' fees are: (1) to fully make the

plaintiff whole by compensating him or her for the costs of bringing suit and (2) to deflect that discrimination may result in nominal or small monetary damages.

42. Courts have set forth a number of factors to be used in determining the appropriate amount of fees to award: (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.

43. The determination of reasonable attorneys' fees is in the sound discretion of the trial court and shall not be reversed unless the amount awarded is arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration. When dealing with an award of attorneys' fees, the trial court is considered an expert and may make an award at its discretion.

44. If the plaintiff's claims for relief are based on different legal theories and facts and counsel's work on one claim is unrelated to his work on another claim, the unrelated claims must be treated as if they had been raised in separate lawsuits, and, therefore, no fee may be awarded for services on the unsuccessful and unrelated claims. But 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.

45. Here, where Diaz obtained a significant judgment, but dismissed three of the original defendants and was unsuccessful on her retaliation claim, neither party has shown that the trial court abused its discretion in awarding attorneys' fees, by reducing the overall request by eleven percent.

46. Nevertheless, we remand to the trial court to review its award in light of our decision to reverse the judgment against Autozone, Inc., which substantially reduced the overall judgment, and to determine an appropriate award for attorneys' fees incurred on appeal.

Opinion by: Karen King Mitchell, Presiding Judge November 10, 2015

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