

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-000857-MR  
AND  
NO. 2005-CA-001078-MR

CUSTOM TOOL AND  
MANUFACTURING COMPANY;  
RODNEY N. CUNNINGHAM

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM ANDERSON CIRCUIT COURT  
v. HONORABLE CHARLES R. HICKMAN, JUDGE  
ACTION NO. 99-CI-00248

SANDRA FULLER;  
JOHNSON, TRUE &  
GUARNIERI, LLP

APPELLEES/CROSS-APPELLANTS

OPINION  
AFFIRMING

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BEFORE: TAYLOR JUDGE; ROSENBLUM,<sup>1</sup> SENIOR JUDGE; MILLER,<sup>2</sup> SPECIAL  
JUDGE.

MILLER, SPECIAL JUDGE: Custom Tool and Manufacturing Co. and  
Rodney N. Cunningham appeal from a judgment of the Anderson

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<sup>1</sup> Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Circuit Court entered upon a jury verdict adjudging the appellants liable to appellee Sandra Fuller upon various claims associated with an incident in which Cunningham, Fuller's employer, called Fuller into his office and showed her pornographic videos. Fuller cross-appeals alleging insufficiency of damages. For the reasons stated below, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### Parties

Custom Tool is a tool and dye and manufacturing company headquartered in Anderson County, Kentucky. The company was founded by Cunningham and he and his wife own all of the stock in the company. Cunningham is the President and Secretary/Treasurer of the Company, and his wife is the Vice President. Cunningham is the sole member of the Board of Directors.

Fuller began working for Custom Tool in May or June of 1988. Initially she was hired as a quality control employee in the Wire Harness Division. About 18 months following her employment, she was promoted to plant manager of the division. As plant manager, she reported directly to Cunningham.

### Fuller's Version of Events

According to Fuller, from the time of her hiring it was common to hear jokes and comments of a sexual nature on Custom Tool premises, though during his time she did not personally experience any direct sexual harassment. However, upon becoming manager of the wire harness plant, she began to have more frequent and direct contact with Cunningham and began experiencing individualized harassment.

According to Fuller, the harassment involved inappropriate sexual comments. Among these were an occasion when she was kneeling down getting something off of a low shelf and Cunningham commented that "he liked women in that position"; an occasion when she was walking in front of Cunningham and he commented "the view is really good from back here"; that Cunningham constantly commented on the way she dressed, and when she would wear shorts he would ask "where do your legs stop"; that when she was leaning over her desk working on a project, Cunningham would ask if she could bend over farther; that when they were alone he would often raise the subject of pornographic videos; and that when he would personally deliver her paycheck he would make "sexually charged" comments. Fuller testified that while the foregoing made her feel uncomfortable, she dealt with them by changing the subject back to work related matters.

On March 11, 1999, Cunningham telephoned Fuller at approximately 4:00 p.m. and asked if she could stop by his office on her way home from work. Fuller arrived as requested and Cunningham asked her to wait around for a few minutes. As the last employee was leaving, Cunningham asked her to lock the building door on her way out.

Cunningham then shut the door of his office, turned to Fuller, and began telling her that he had been having dreams about her, and that he had a pornographic video which he wanted her to watch because it had a performer in it which he believed resembled her. Fuller testified that his comments shocked her. Cunningham then picked up the VCR remote control and started playing a pornographic video. It initially depicted a woman masturbating before progressing to oral sex involving another performer.

Fuller stated that she did not believe the person in the movie resembled her, but Cunningham kept insisting that it did. Cunningham then ejected the first video and put in a second video which was cued to a scene depicting an interracial couple engaging in sex. As he played this video, Cunningham instructed Fuller to come over to the edge of his desk.

Cunningham then leaned back in his chair, rubbed the outside of his pants in the groin area and made an up and down motion as if he were masturbating. While doing so, Cunningham

told Fuller that he gets excited while watching these videos. Fuller exclaimed "gross," and said she needed to leave. Cunningham, however, kept insisting that she stay and watch more of the videos as he began fast-forwarding to different scenes.

Fuller got up to leave, and as she turned toward the door Cunningham physically restrained her by placing his arm around her waist. Fuller immediately pulled away from him and said "stop." Fuller described the physical contact as "a forcible pull against her will" which was unwelcomed and threatening.

Fuller demanded that Cunningham open the door, but before he did so, he suggested that the two of them take an overnight trip together, which she perceived to be a proposition for sex. Fuller again demanded that Cunningham open the door, and he finally did so.

Once outside, Cunningham began making excuses for why he did what he had done by saying that his mother had been sick and he had been under a lot of stress because his business was struggling. He also stated that he and his wife had been having the best sex of their marriage and he could not understand why he did what he had just done.

Fuller went home that evening and discussed the incident with her husband. He asked her if she wanted him to call Cunningham and she said she would handle it herself.

Fuller attempted to return to work on her next regular workday, which was March 15, 1999. She woke up at approximately 4:30 a.m. that morning as she always had to get ready for work, but when she opened her closet and saw her Custom Tool work shirts, she was physically unable to put them on as she felt she had Cunningham's name printed across her chest. However, she did go to work that day. After she arrived at work, all she could think about was what had occurred on March 11, and she feared that Cunningham would walk in or call at anytime and that she had no control over the situation. Specifically, she indicated that she felt she was at Cunningham's mercy.

Fuller discussed the incident with Wanda Lay, who was her office manager. While doing so, Fuller described herself as crying, having difficulty talking, and being emotionally out of control. Fuller testified that she was also concerned that people would not believe her because Cunningham always made sure the two of them were in a one on one circumstance when he would make sexually suggestive comments and when he behaved as he did on March 11. Because Fuller believed that Cunningham would again try to offer some excuse for his behavior, she decided she could better protect herself if she were able to record his comments so she purchased a tape recorder. Ultimately, Fuller concluded that she simply could no longer work at Custom tool if she were unable to have a work-related conversation with her

boss without having to worry about him making harassing and unwelcome comments and her having to record him for her own protection and proof.

#### Cunningham's Version of Events

According to Cunningham, prior to March 11, 1999, he and Fuller had shared in sexual-related jokes and had had conversations about pornographic videos, and Fuller had been receptive to this. He denied that he had made any comments such as "he liked women in that position"; "the view is great from here"; or ever propositioned her for sex.

It is uncontested that in the spring of 1998 he and Fuller attended a wire harness conference in El Paso, Texas. During that visit, he and Fuller walked into Mexico and on the way back to the hotel, the two went into an adult video store and together viewed pornographic videos in a booth. Later that night they watched a basketball game in his hotel room.

Based upon their prior sexual-joking; conversations regarding pornographic videos; and his understanding of Fuller's receptiveness to such matters, Cunningham did not believe Fuller would be offended by his playing her the videos on March 11, and, indeed, did not believe it was unwelcome.

Cunningham agrees generally with the events of March 11. However, he maintains that he first asked Fuller if she wanted to view the videos for the purpose of seeing the actress

that supposedly looked like her, and she responded that she did. As such, Cunningham believes that Fuller acquiesced in watching the videos.

Cunningham also denies Fuller's claims that he at anytime locked his office door, attempted to block her access to the door, placed his hands upon her at anytime, or propositioned her to take an overnight trip. He also maintains that at no time did she appear upset by the events as they were happening or as they left the office immediately afterwards.

#### Trial Proceedings

On November 24, 1999, Fuller filed a Complaint against Custom Tool and Cunningham in Anderson Circuit Court. The Complaint alleged seven causes of action: Sexual Harassment and Hostile Work Environment in violation of the Kentucky Civil Rights Act; Gender Discrimination in violation of the Kentucky Civil Rights Act; Assault; Battery; Wrongful Discharge; Tort of Outrage; and Intentional Infliction of Emotional Distress.<sup>3</sup>

On December 20, 1999, Cunningham and Custom Tool filed an answer to Fuller's Complaint, in which they also asserted a Counterclaim as follows: that they had been damaged by Fuller's dereliction of her duties as plant manager with respect to quoting, bidding and handling inventory for various jobs; that

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<sup>3</sup> We note that the tort of outrage and the tort of intentional infliction of emotional distress are the same tort.



they had been damaged by her failure to timely return her company car; defamation; and intentional infliction of emotional distress.

Thereafter, Fuller filed an Amended Complaint reasserting all of her original claims and, in addition, adding an additional claim for Retaliation in violation of the Kentucky Civil Rights Act based upon the appellants' counterclaim.

Trial was held on September 20 - September 23, 2004. The trial court entered a directed verdict dismissing appellants' counterclaims against Fuller. Upon Fuller's claims, the jury returned a verdict as follows:

1. Sexual Harassment - Hostile Work Environment; verdict in favor of Fuller; damages - \$100.00.<sup>4</sup>
2. Constructive Discharge - verdict in favor of Fuller; damages - \$5,088.73.
3. Retaliation - verdict in favor of Fuller; damages - \$0.00.
4. Assault and Battery - verdict in favor of Cunningham and Custom Tool.
5. Outrageous Conduct - verdict in favor of Fuller; damages - \$100.00.<sup>5</sup>
6. Punitive Damages (in connection with outrageous conduct verdict) - \$10,000.00.

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<sup>4</sup> The jury had originally returned a verdict of \$0.00 damages, but the jury was instructed to return to the jury room and award some amount of damages.

<sup>5</sup> The jury had originally returned a verdict of \$0.00 damages, but the jury was instructed to return to the jury room and award some amount of damages.

Post-verdict Fuller filed a motion for an award of attorney fees. On October 20, 2004, the trial court entered judgment in accordance with the jury verdict. The judgment also awarded Fuller attorney fees and litigation expenses of \$59,518.89. The parties filed motions to alter, amend, or vacate in accordance with Kentucky Rules of Civil Procedure (CR) 59, which were denied. These appeals followed.

APPEAL NO. 2005-CA-000857-MR

We first consider the issues raised by Custom Tool and Cunningham in their appeal.

ENTITLEMENT TO SUMMARY JUDGMENT

The appellants first contend that they were entitled to summary judgment upon Fuller's claims of Sexual Harassment - Hostile Work Environment; Gender Discrimination; Assault; Wrongful Discharge; Tort of Outrage; and Intentional Infliction of Emotional Distress. In other words, all claims originally asserted by Fuller except the Assault and Battery claims.

As the appellants prevailed upon the Assault and Battery counts, their claims to summary judgment on those issues are moot.

The standard for summary judgments in Kentucky is well-known. One element of the analysis is whether "as a matter of law, it appears that it would be impossible for the

respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky.1991) (quoting Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky.1985)). In using the word "impossible" in Steelvest, the Supreme Court has acknowledged that it "is used in a practical sense, not in an absolute sense." Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992).

Now that the trial has been held and the verdict rendered, in retrospect, we now know that it was not impossible for Fuller to have prevailed upon her claims of Sexual Harassment - Hostile Work Environment; Gender Discrimination; Assault; Wrongful Discharge; Tort of Outrage; and Intentional Infliction of Emotional Distress. Fuller prevailed with a favorable verdict on all of these claims.

Hence, from our advantage of hindsight, we know that the appellants were not entitled to summary judgment on these counts because it was not impossible for Fuller to prevail at trial.

#### ENTITLEMENT TO DIRECTED VERDICT

The appellants argue that they were entitled to a directed verdict upon all claims in which the jury returned an

adverse verdict.<sup>6</sup> We first set forth our standard of review upon denial of a directed verdict. We then review the individual claims.

#### Standard of Review

When reviewing a jury verdict, the appellate court is restricted to determining whether the trial judge erred in failing to grant a motion for directed verdict. The reviewing court must consider all evidence favoring the prevailing party as true and is not at liberty to determine the credibility or weight which should be given to the evidence. Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459 (Ky.1990). The reviewing court must draw all reasonable inferences in favor of the claimant, refrain from questioning the credibility of the claimant, and from assessing the weight which should be given to any particular item of evidence. United Parcel Service Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999). The appellate court is required to consider the evidence in the strongest light possible in favor of the opposing party. Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985). After completion of the evidentiary review, the decision must be affirmed unless the

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<sup>6</sup> While the appellants moved for a directed verdict at the close of Fuller's case, she alleges that the directed verdict issue is not preserved because the appellants did not move for a directed verdict at the close of all the evidence. While it is well settled that a criminal defendant in a criminal case must move for a directed verdict at the close of the Commonwealth's case in order to preserve sufficiency of the evidence as an issue for appeal, see Baker v. Commonwealth, 973 S.W.2d 54 (Ky. 1998), we are unable to locate corresponding authority that such is required in a civil case. We will accordingly address the appellants directed verdict arguments on the merits.

verdict rendered is "'palpably or flagrantly' against the weight of the evidence so as 'to indicate it was reached as a result of passion or prejudice.'" Lewis v. Bledsoe Surface Mining Co. at 461-462 (Ky. 1990).

#### Sexual Harassment - Hostile Work Environment

This claim arises under the Kentucky Civil Rights Act. Kentucky Revised Statutes (KRS) 344.010 et seq. Under the Kentucky Civil Rights Act, it is unlawful for an employer, on the basis of sex, to "discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment ... [or] to limit, segregate, or classify employees in any way which would ... tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee." KRS 344.040. The Kentucky Act is similar to Title VII of the 1964 federal Civil Rights Act 42 U.S.C. § 2000e-2(a)(1), and should be interpreted consistently with federal law. Meyers v. Chapman Printing, 840 S.W.2d 814, 821 (Ky. 1992).

A sexual harassment claim can be brought based upon a hostile or abusive work environment. Meritor Saving Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). For sexual harassment to be actionable under the Meritor standard, it must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive

working environment. Meritor, 477 U.S. at 67, 106 S.Ct. at 2405, 91 L.Ed.2d at 60; Harris v. Forklift Systems, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); Faragher v. City of Boca Raton, 524 U.S. 775, 784-86, 118 S.Ct. 2275, 2282-83, 141 L.Ed.2d 662, 675 (1998); Meyers, 840 S.W.2d at 821. In other words, hostile environment discrimination exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Williams v. General Motors Corp., 187 F.3d 553, 560 (6th Cir.1999)( citing Harris, 510 U.S. at 21, 114 S.Ct. 367 (citations and quotation marks omitted)).

Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." Carrero v. New York City Housing Authority, 890 F.2d 569, 577 (2d Cir.1989). As stated by the United States Supreme Court in Harris v. Forklift Systems, the harassment must also be both objectively and subjectively offensive as determined by "looking at all the circumstances." 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295, 302; Faragher, 524 U.S. at 786-87, 118 S.Ct. at 2283, 141 L.Ed.2d at 676; Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-82, 118 S.Ct. 998, 1002-03, 140 L.Ed.2d 201, 208 (1998)( quoting Harris).

These circumstances may include "the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23, 114 S.Ct. at 371; Ammerman v. The Board of Education of Nicholas County, 30 S.W.3d 793 (Ky. 2000).

In general, an isolated incident of sexual misconduct is not actionable under Title VII. Clark Cty. School District v. Breeden, 121 S.Ct. 1508, 1510 (2001) (citing Faragher, 524 U.S. at 788); Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 482 (3d Cir. 1997). In exceptional cases, however, an isolated incident may be actionable under Title VII if it is extremely serious such that it alters the terms and conditions of employment to create a hostile or abusive work environment. See Meritor, 477 U.S. at 67. In other words, a single incident may support a claim for hostile work environment sexual harassment if the incident is "of such a nature and occurs in such circumstances that it may reasonably be said to characterize the atmosphere in which a plaintiff must work. . . ." LaRose v. Philadelphia Newspapers, Inc., 21 F.Supp.2d 492 (E.D.Pa. 1998). For example, a single incident of physical assault or offensive touching has been held to be sufficiently severe to support a hostile work environment claim. See e.g., Grozdanich v. Leisure Hills Health Center, Inc., 25 F.Supp.2d 953, 969-70 (D.Minn.

1998) (holding that a reasonable jury could find that an isolated incident of sexual assault created a hostile work environment). See also Todd v. Ortho Biotech, Inc., 138 F.3d 733,736 (8th Cir.1998) (single attempted rape at national sales meeting held sufficiently severe misconduct to be actionable); Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464 (7th Cir.1990) (single incident where supervisor picked up plaintiff and forced her face against his crotch impliedly considered to create hostile environment); Fall v. Indiana University Bd. of Trustees, 12 F.Supp.2d 870, 879 (N.D.Ind.1998) (single assault, involving a groping of intimate areas, may create hostile environment).

To establish a hostile work environment claim created by a supervisor, an employee must prove "(1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment affected a term, condition, or privilege of employment." Hocevar v. Purdue Frederick Co., 223 F.3d 721, 736 (8th Cir. 2000) (Applying Title VII).

Again, we view the evidence on this issue in the light most favorable to Fuller. While the March 11, 1999, incident was the culminating event, this is not a case of a single isolated event. Previous incidents included when Fuller was kneeling and Cunningham commented that "he likes women in that



position; the incident when Fuller was walking in front of Cunningham and he commented "the view is good from here"; the incident when he had suggested that they get a motel room together; the incidents when he had raised the issue of pornographic videos; and the incident when he took her to an adult video store in El Paso, Texas.

The March 11, 1999, incident can only be characterized as a "serious" or "severe" episode. As previously recounted, on that occasion Cunningham played a video of a woman masturbating and engaging in oral sex and told Fuller that the performer looked like her; played a second video involving interracial oral sex; made a gesture simulating masturbation; locked the office door during this time; stood between the door and Fuller; placed his hands on Fuller; and propositioned her to go on an overnight trip.

Based upon the particularly egregious conduct of March 11, 1999, in combination with the lesser incidents prior to that, we will not disturb the jury's findings that Cunningham's conduct created an intimidating, hostile, or offensive work environment.

In connection with this argument the appellants contend that they were entitled to prevail on this claim based upon their defense that following the March 11, 1999, incident the company had responded properly by investigating the incident

and requiring Cunningham to attend sexual harassment sensitivity training. We note, however, that the appellants did not seek to have the jury instructed upon this defense, and, accordingly, the jury did not have the opportunity to weigh the merits of the defense in its deliberations. By failing to request an instruction on the defense, we deem the matter as waived.

Lastly, in connection with this argument the appellants contend that liability for this claim may not be placed upon Cunningham individually. However, the judgment does not impose individual liability upon Cunningham for this claim but, rather, places liability upon the company only. This issue is accordingly moot.

#### Constructive Discharge

The appellants allege that they were entitled to a directed verdict upon Fuller's constructive discharge claim.

"The commonly accepted standard for constructive discharge is whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign."

Northeast Health Management, Inc. v. Cotton, 56 S.W.3d 440, 445 (Ky. App. 2001) (internal quotation marks omitted); Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 807 (Ky. 2004). Constructive discharge presents a question of fact that, in jury trials, should be decided by the jury and

not the trial court. Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir.1987) Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 807 (Ky. 2004).

Viewing the evidence introduced at trial in the light most favorable to Fuller, we conclude that she produced evidence of constructive discharge upon which reasonable jurors could find for her under the above standard. We have previously discussed the conduct engaged in by Cunningham both prior to and on March 11, 1999. In addition, Fuller testified regarding her inability to continue working under Cunningham. This was evidence sufficient to sustain the jury's verdict of constructive discharge.

#### Retaliation

The appellants contend that they were entitled to a directed verdict upon Fuller's Retaliation claim. KRS 344.280 provides, in relevant part, that

It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:

(1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter; . . . .

After filing her complaint, the appellants filed a counterclaim alleging to the effect that they had been damaged by Fuller's dereliction of her duties as plant manager with respect to quoting, bidding and handling inventory for various jobs; that they had been damaged by her failure to timely return her company car; defamation; and intentional infliction of emotional distress.

Fuller argued that the counterclaims were brought in retaliation for her having filed a lawsuit under the Civil Rights Act. A reasonable jury could have inferred and concluded that the appellants were motivated in filing their counterclaim against Fuller to retaliate against her for filing a Civil Rights lawsuit against them. We also note that Fuller was granted a directed verdict upon all of these claims, and that the appellants did not appeal the dismissal of those claims. We accordingly will not disturb the jury's verdict on this claim.

#### Outrageous Conduct

The appellants contend that they were entitled to a directed verdict upon Fuller's outrageous conduct claim. The elements of this claim are as follows: 1) The wrongdoer's conduct must be intentional or reckless; 2) The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; 3) There must be a causal connection between the wrongdoer's conduct and

the emotional distress; and 4) The emotional distress must be severe. Kroger Co. v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1996) citing Craft v. Rice, 671 S.W.2d 247, 249 (Ky. 1984). It is for the court to decide whether the conduct complained of can reasonably be regarded as so extreme and outrageous as to permit recovery, bearing in mind that people are expected to withstand bad manners, petty insults, unkind words and minor indignities. See Whittington v. Whittington, 766 S.W.2d 73, 74 (Ky.App.1989) (citing comment h to Restatement (Second) of Torts § 46); Kroger, 920 S.W.2d 61, 65.

The conduct at issue here is the March 11, 1999, incident. Again, that incident involved, as previously recounted, Cunningham playing a video of a woman masturbating and engaging in oral sex and telling Fuller that the performer looked like her; playing a second video involving interracial oral sex; making a gesture simulating masturbation; locking the office door during this time; standing between the door and Fuller; placing his hands on Fuller; and propositioning her to go on an overnight trip.

We believe that the foregoing conduct can reasonably be regarded as so extreme and outrageous as to permit recovery.

Moreover, Fuller testified as to her level of emotional distress over the incident, and presented the testimony of her husband and co-workers in support of same. We

note in particular that she was sufficiently upset over the incident to quit her well-paying job as manager of the wire harness plant. As such, we will not disturb the jury's verdict on this claim.

#### Punitive Damages

The jury's award of \$10,000.00 in punitive damages is supported solely by its verdict on the outrageous conduct verdict. And the appellants' argument in opposition to the award, as we construe their brief, is limited to the legitimacy of the outrageous conduct verdict. They make no argument that the punitive damage award was excessive or was unconstitutional under the BMW of N. Amer., Inc. v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), line of cases. See also Sand Hill energy, Inc. v. Smith, 142 S.W.3d 153 (Ky. 2004). We accordingly will limit our review to the issue as raised by the appellants.

As previously discussed, we will not disturb the outrageous conduct verdict. As the appellant's argument is founded upon the premise that the outrageous conduct was improper, neither will we disturb the punitive damages verdict.

#### FURTHER JURY DELIBERATIONS OF DAMAGES

When the jury returned its initial verdict, though it had found in favor of Fuller on her claims of Sexual Harassment - Hostile Work Environment; Constructive Discharge; Retaliation;

and Outrageous Conduct, it returned a verdict of \$0.00 damages on each of these claims.

Fuller objected to the zero damage award on the Sexual Harassment - Hostile Work Environment and Outrageous Conduct claims, but not on the other two claims. The trial court instructed the jury to return to the jury room and award "some" amount of damages on the Sexual Harassment - Hostile Work Environment and Outrageous Conduct claims. The jury did so, and awarded \$100.00 on each claim.

The appellants contend that the trial court erred by permitting the jury to further deliberate on the Sexual Harassment - Hostile Work Environment and Outrageous Conduct claims. We disagree.

"[I]n any case where the verdict is incomplete, ambiguous, inconsistent, irregular or otherwise defective the proper procedure should be that the jury be sent back to complete or correct the verdict. . . . This is in accordance with the basic principle of the Rules of Civil Procedure that the trial court should be given the opportunity to correct upon the trial any errors capable of correction by it, so as to avoid the necessity of new trials." Smith v. Crenshaw, 344 S.W.2d 393, 395 (Ky. 1961).

The Sexual Harassment - Hostile Work Environment instruction required the jury, as an element of the claim, to

determine that the sexual harassing conduct had "caused injury to the plaintiff's psychological well-being." Similarly, the instruction for the Outrageous Conduct claim required the jury to determine that Fuller "did in fact suffer severe emotional distress." Hence, for each of these claims the jury determined that Fuller had suffered an injury. The jury having so determined, the verdict was inconsistent for failing to award her some damages for those injuries.

The appellants rely upon Cooper v. Fultz, 812 S.W.2d 497 (Ky. 1991) (overruled on other grounds in Sand Hill Energy, Inc. v. Ford Motor Company, 83 S.W.3d 483 (Ky. 2002)) and Miller v. Swift, 42 S.W.3d 599 (Ky. 2001), for the proposition that the verdicts were complete and, accordingly, Fuller's remedy was to file a motion for a new trial.

We are persuaded that Cooper and Miller, however, are distinguishable. Cooper and Miller concern whether it is inconsistent to return a verdict for medical expenses and yet fail to award damages for pain and suffering.

As stated in Miller "Miller's argument presupposes legal inconsistency when a jury awards damages for medical expenses and lost wages, but awards no damages to compensate the plaintiff for pain and suffering. The law in Kentucky, however, does not require a jury to award damages for pain and suffering in every case in which it awards medical expenses." Miller



noted that there was evidence that the plaintiff had not suffered additional pain and suffering as a result of the automobile accident at issue in the case, and thus the jury's award of zero damages was supported by the evidence.

In our view, Cooper and Miller are limited to holding that it is not necessarily inconsistent for a jury to make an award for medical expenses and at the same time award \$0.00 for pain and suffering. As noted above, however, both the Sexual Harassment - Hostile Work environment instruction and the Outrageous Conduct instructions contained an emotional harm component as an element to recovery. Hence, the damages verdicts were necessarily inconsistent with the liability verdicts. It follows that the trial court properly instructed the jury to deliberate further on the damage award for these claims.

#### ATTORNEY FEES

The trial court awarded Fuller attorney fees and other litigation expenses of \$59,518.89 as requested. The appellants contend that this award is excessive.

KRS 344.450 provides that "[a]ny person injured by any act in violation of the provisions of [The Kentucky Civil Rights Act] shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's

order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter."

The acceptable method of calculating a reasonable attorney fee under KRS 344.450 was discussed in Meyers v. Chapman Printing Company, Inc., 840 S.W.2d 814 (Ky. 1992). "[T]he court should not undertake to adopt some arbitrary proportionate relationship between the amount of attorney fees awarded and the amount of damages awarded." Id. at 824-26. Instead, an attorney fee should be calculated by multiplying counsel's reasonable hours with a reasonable hourly rate to produce a "lodestar" figure, which may then be adjusted due to special factors in a particular case, such as the results obtained by counsel. Id. at 826.

When a statute authorizes the payment of attorney's fees, our standard of review is to determine whether the court abused its discretion. King v. Grecco, 111 S.W.3d 877, 883 (Ky.App. 2002). The only requirement for a court is that the award be "reasonable." Id. An attorney fee cannot be fixed with arithmetical accuracy. The factors to be considered are well summarized in Axton v. Vance, 207 Ky. 580, 269 S.W. 534, 536-537 (1925). Briefly stated, they are: (a) Amount and character of services rendered; (b) Labor, time, and trouble involved; (c) Nature and importance of the litigation or

business in which the services were rendered; (d) Responsibility imposed; (e) The amount of money or the value of property affected by the controversy, or involved in the employment; (f) Skill and experience called for in the performance of the services; (g) The professional character and standing of the attorneys; and (h) The results secured. See also Boden v. Boden, 268 S.W.2d 632, 633 (Ky. 1954).

In the Final Order and Judgment, the trial court addressed the issue of attorney fees as follows:

The plaintiff's Motion for Attorneys' Fees and other litigation expenses is granted.

The Court has reviewed the number of hours expended by the plaintiff's attorneys concerning this matter and finds them to be reasonable and necessary. The Court specifically notes that no fees are being sought for the plaintiff's original attorney[.] The Court further notes that the plaintiff's attorneys have not included any hour for certain tasks, e.g., the preparation and filing of the motion for fees, and that they have carefully reviewed their time records to delete some 22.7 hours of time spent on this case, as well as not billing for certain associate and paralegal time. The Court also notes, and has personally observed, that there was a careful division of labor between plaintiff's two attorneys in terms of each assuming responsibility for separate tasks, thus avoiding any unnecessary duplication of effort.

Finally, the Court finds that the hourly rates sought for the plaintiff's attorneys, J. Guthrie True and David J. Guarnieri, are reasonable. The rate of \$300.00 per hour

for Mr. True is reasonable given the nature and extent of his experience. The rate of \$200.00 per hour for Mr. Guarnieri is reasonable given the nature and extent of his experience. Moreover, in finding that these hourly rates are appropriate, the Court has taken into consideration the difficulty of prosecuting a civil rights/sexual harassment case in Anderson County, Kentucky. This is the first occasion in this Court's memory when a plaintiff has obtained a verdict in a civil rights/sexual harassment case in Anderson County. Moreover, this case was prosecuted by an out-of-county plaintiff against a local business and businessman. The plaintiff's attorneys assumed considerable risk in attempting to prosecute a case involving claims of sexual harassment under such circumstances.

The trial court was in the best position to observe Fuller's attorneys, to assess their competency, and to determine the value of their services to Fuller. The trial court's analysis as set forth above demonstrates that it carefully reviewed the relevant factors in establishing a reasonable attorney fee. We also note that Fuller prevailed upon the majority of her claims, including her Civil Rights claim, and that the additional litigation expenses associated with the other claims was negligible because the evidence necessary to prosecute those claims was redundant with the Civil Rights claim. Considering the pertinent factors, we find no abuse of discretion in the award of attorney fees.

In her cross-appeal Fuller argues that “[b]ased upon the evidence presented at trial concerning the appellants’ conduct and the attendant effects this conduct had on Fuller, the zero awards for humiliation and emotional distress on the issues of Constructive Discharge and Retaliation and the \$100.00 awards for humiliation and emotional distress on the Sexual Harassment/Hostile Work Environment and the Outrageous Conduct claims are grossly inadequate and clearly given in disregard of the evidence.”

In Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984),<sup>7</sup> our Supreme Court set forth the test for a trial court to follow when reviewing an award of actual damages for excessiveness or inadequacy:

When presented with a motion for a new trial on grounds of excessive damages, the trial court is charged with the responsibility of deciding whether the jury's award appears “to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.” CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.

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<sup>7</sup> Davis was overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002). Sand Hill was subsequently vacated by Ford Motor Co. v. Estate of Smith, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

Id. at 932. See also Miller v. Swift, 42 S.W.3d 599, 601 (Ky. 2001).

The Court went on to state the appropriate standard for appellate review on the issue of excessive or inadequate damages:

Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous.

Davis, 672 S.W.2d at 932, quoting Prater v. Arnett, 648 S.W.2d 82, 86 (Ky. App.1983); see also Burgess v. Taylor, 44 S.W.3d 806, 813 (Ky.App.2001).

In summary, we may only reverse the trial's court order if we find that it was clearly erroneous. Bayless v. Boyer, 180 S.W.3d 439, 444 (Ky. 2005). We also note that "the action of the trial judge is presumptively correct and the appellate court will not hastily substitute its judgment for that of the trial judge, who monitored the trial and was able to grasp those inevitable intangibles which are inherent in the decision making process of our system." Prater, 648 S.W.2d at 86.

Here, we cannot conclude that the trial court abused its discretion in denying Fuller a new trial upon her claims of

Constructive Discharge, Retaliation, Sexual Harassment/Hostile Work Environment, and the Outrageous Conduct.

While admittedly the evidence was contradictory, we know of no objective test to determine the extent of one's emotional distress that results from a civil wrong such as occurred here. We believe the matter is best left to a jury of twelve ordinary citizens to evaluate. As such, we conclude that the circuit court did not err in declining to set the verdict aside and grant a new trial on the issue of damages as requested by Fuller.

CONCLUSION

For the foregoing reasons the judgment of the Anderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-  
APPELLEES:

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BRIEF FOR APPELLEES/CROSS-  
APPELLANTS:

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