STATE OF MICHIGAN

COURT OF APPEALS

SHARDA GARG,

Plaintiff-Appellee/Cross-Appellant,

v

MACOMB COUNTY COMMUNITY MENTAL HEALTH,

Defendant-Appellant/Cross-Appellee,

and

LIFE CONSULTATION CENTER,

Defendant.

UNPUBLISHED
March 29, 2002

No. 223829
Macomb Circuit Court
LC No. 95-003319-CK

Before: Griffin, P.J., and Meter and Kelly, JJ.

PER CURIAM.

Defendant-appellant ("defendant") appeals by right, and plaintiff cross-appeals, from a judgment for plaintiff entered after a jury trial. Plaintiff, a woman of Indian descent, was refused eighteen promotions between 1983 and 1997 in her job as a therapist with defendant, and she sued on theories of racial discrimination and retaliation. The jury rejected the racial discrimination claim but awarded plaintiff $250,000 on the retaliation claim. We affirm.

Plaintiff based her retaliation claim on two separate theories: (1) that she was retaliated against for her 1981 action of slugging a supervisor, Donald Habkirk, in opposition to sexual harassment; and (2) that she was retaliated against for her 1987 action of filing a racial discrimination grievance against another supervisor, Kent Cathcart. Defendant contends that the trial court should have granted its motion for a directed verdict or for a judgment notwithstanding the verdict ("JNOV") with regard to both of these theories because plaintiff failed to establish all the elements of a retaliation claim.

We review de novo a trial court's decision to deny a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). We "view

the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party." *Id.* "If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id.* at 260-261. Similarly,

> [a] trial court's ruling with respect to a motion for a directed verdict is reviewed de novo on appeal. *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000). In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id*. at 643-644. A directed verdict is appropriate only when no factual questions exist on which reasonable minds could differ. *Id*. at 644. Neither the trial court nor this Court may substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99, 550 NW2d 817 (1996). [*Wickens v Oakwood Healthcare System*, 242 Mich App 385, 388-389; 619 NW2d 7 (2000), vacated in part on other grounds 465 Mich 53 (2001).]
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> MCL 37.2701, a section of the civil rights act, states, in relevant part:
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> > Two or more persons shall not conspire to, or a person shall not:
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> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

In *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997), this Court stated:

> To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Plaintiff sufficiently established a jury question with regard to these elements by way of her evidence, concerning the slugging incident, that (1) she had observed Habkirk pulling an employee's bra strap while walking behind her and pulling an employee's underwear elastic while seated behind her; (2) around the same time, in 1981, plaintiff was walking along a hallway when she felt somebody touching her back; (3) she turned around and swung at this person; (4) the person was Habkirk, one of her supervisors; (5) after the slugging incident, Habkirk became cold toward her; (6) a coworker told her that Habkirk did not like her; (7) plaintiff did not receive the first available promotion, in 1983, after the slugging incident, despite being qualified for the position; (8) plaintiff was denied eighteen total promotions between 1983 and 1997, despite being qualified for the positions; (9) individuals less qualified than plaintiff received promotions while plaintiff did not; and (10) Habkirk remained in her chain of command throughout the years.

Viewing this evidence in the light most favorable to plaintiff, we conclude that reasonable jurors could differ with regard to whether plaintiff sufficiently established the elements of a retaliation claim. Indeed, reasonable jurors could conclude that plaintiff, by slugging Habkirk, sufficiently "raise[d] the specter" that she opposed a violation of the civil rights act. *Mitan v Neiman Marcus,* 240 Mich App 679, 682; 613 NW2d 415 (2000); see also *McLemore v Detroit Receiving Hosp & University Medical Center,* 196 Mich App 391, 396; 493 NW2d 441 (1992). Moreover, the different treatment plaintiff received after the slugging incident sufficed to establish causation. As noted in *McLemore, supra* at 396, a plaintiff may prove a retaliation claim using solely circumstantial evidence, and we may not second-guess the jurors' decisions. See *Wickens, supra* at 389. The trial court properly denied defendant's motion for a directed verdict or JNOV with regard to the slugging theory.

With regard to the second retaliation theory, plaintiff sufficiently established the elements of a retaliation claim by way of her evidence that (1) plaintiff filed a grievance alleging racial discrimination in June 1987; (2) Cathcart, a supervisor, knew about the grievance; (3) after filing the grievance, plaintiff failed to receive the next promotion that she sought, posted in December 1988, despite being qualified for the position; (4) plaintiff failed to receive seven total promotions between 1989 and 1997, despite being qualified for the positions; (5) individuals less qualified than plaintiff received promotions while plaintiff did not; (6) in 1994, plaintiff was transferred to a windowless office from which she could hear noises emanating from the adjacent bathroom, while persons more senior to plaintiff received better offices; (7) in 1996, Cathcart made a statement disparaging to blacks; (8) Cathcart made another comment disparaging to Indians; (9) Cathcart reprimanded plaintiff but not others for minor infractions; (10) Cathcart ignored plaintiff in staff meetings and treated her poorly in the hallways; (11) in 1984 or 1985, Cathcart used the word "n-----" in referring to blacks; and (12) Cathcart remained in plaintiff's chain of command throughout the years.

Viewing this evidence in the light most favorable to plaintiff, we again conclude that reasonable jurors could differ with regard to whether plaintiff sufficiently established the elements of a retaliation claim. Defendant contends that plaintiff failed to demonstrate a causal connection between the adverse employment actions and the discrimination grievance because the first denial of a promotion occurred over 1½ years after the grievance. We agree with defendant that in discussing causation in retaliation cases, the case law emphasizes temporal proximity. See, e.g., *Howard v Canteen Corp,* 192 Mich App 427, 434; 481 NW2d 718 (1992), overruled in part on other grounds by *Rafferty v Markovitz*, 461 Mich 265 (1999), and *McLemore, supra* at 397. However, one must keep in mind that according to her testimony, plaintiff was denied *the first promotion that she sought* after the filing of the grievance. Accordingly, viewing the evidence in the light most favorable to plaintiff, reasonable jurors could have concluded that a causal connection existed. The trial court properly denied defendant's motion for a directed verdict or JNOV with regard to the grievance theory.

Next, defendant argues that plaintiff's claims of retaliation with regard to denials of promotions occurring more than three years before her lawsuit should have been barred by the statute of limitations and that the trial court therefore should have granted defendant's motion for partial dismissal.[1] Defendant contends that the "continuing violations doctrine" cannot save

[1] We review de novo a trial court's decision with regard to a motion for summary disposition. (continued…)

these claims because each denial of a promotion was a discrete, identifiable act of potential discrimination that should have triggered plaintiff's awareness of the need to assert her rights or else risk losing them.

The Michigan Supreme Court discussed the continuing violations doctrine in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986). The *Sumner* Court discussed "subtheories" of the continuing violations doctrine. One involves "allegations that an employer has engaged in a continuous policy of discrimination" that has harmed or might harm both the plaintiff and other members of his class. *Id*. at 528. Another involves allegations of "a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period." *Id.*

In the instant case, plaintiff did not allege a policy that potentially affected other members of her class. Indeed, her claim was more analogous to the "series of events" theory mentioned in *Sumner*. See *Phinney v Perlmutter*, 222 Mich App 513, 546-547; 564 NW2d 532 (1997). *Sumner* set forth the following factors to be used in evaluating a claim under this theory:

> The Fifth Circuit Court of Appeals has aptly described the factors to be considered in determining whether a continuing course of discriminatory conduct exists:
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> "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" *Berry v LSU Board of Supervisors*, 715 F 2d 971, 981 (CA 5, 1983). [*Sumner*, *supra* at 538.]

Here, while plaintiff's denials of promotions arguably had a certain degree of permanence, the denials were extremely similar in type. Moreover, they were frequently recurring and very numerous. Under these circumstances, we conclude that plaintiff's claims sufficiently met the *Sumner* definition of "a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern. . . . ." *Id.* at 528. The trial court did not err in denying defendant's motion for partial dismissal.[2]

(…continued)

Miller v Purcell, 246 Mich App 244, 246; 631 NW2d 760 (2001).

[2] We acknowledge that the case of *Jones v Merchant's National Bank & Trust Co*, 42 F 3d 1054, 1058 (CA 7, 1994), cited by defendant, provides support for defendant's argument in this case. We note, however, that *Jones*, a federal case, is not absolutely binding on this Court. We additionally note that another case cited by defendant, *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 208; 493 NW2d 104 (1992), was overruled by the Supreme Court. See *Rasheed* (continued…)

On cross-appeal, plaintiff argues that the trial court should have ruled that interest on the total amount of plaintiff's damages began to run from the date of filing the complaint and not the date of the judgment, because none of the damages were "future damages" within the meaning of the statute awarding interest on future damages only from the date of judgment. This issue involves statutory construction and is therefore subject to de novo review. *Hinkle v Wayne County Clerk*, 245 Mich App 405, 413; 631 NW2d 27 (2001).

The jury awarded a lump sum of $250,000 to plaintiff. After trial, the parties disputed the amount of interest due on the award, because MCL 600.6013(1) allows for interest on "future damages" to accrue only from the date of the judgment and not from the date of filing the complaint. The trial court apportioned the damages as follows: $141,150 for future damages and $108,850 for past or present damages. The court awarded interest from the date of the complaint on the $108,850 and from the date of the judgment on the $141,250, concluding that because plaintiff alleged physical injuries, MCL 600.6013(1) mandated that interest run only from the date of the judgment on the future damages.

MCL 600.6013(1) states:

> Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in [MCL 600.6301].

MCL 600.6301 states:

> (a) "Future damages" means damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earnings, loss of earning capacity, loss of bodily function, and pain and suffering.
>
> (b) "Personal injury" means bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm.

A clear and unambiguous statute must be enforced as written. See *Sun Valley Food Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), and *Adrian School District v Michigan Public School Employees Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998). The plain language of MCL 600.6301 defines "future damages" as damages resulting from bodily harm, sickness, or disease. The instant plaintiff testified that she suffered from headaches and high blood pressure as a result of the alleged discrimination.[3] This clearly constituted "bodily harm, sickness, or disease." Therefore, the trial court correctly calculated the interest from the date of

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(…continued)

v Chrysler Corp, 445 Mich 109, 134-135; 517 NW2d 19 (1994).

[3] The jury was also instructed to award future damages for "physical pain and suffering."

the judgment on the future damages portion of the award.[4] We acknowledge that in *Phinney*, *supra* at 542, 562, and *Paulitch v Detroit Edison Co*, 208 Mich App 656, 661-663; 528 NW2d 200 (1995), this Court indicated that a plaintiff is entitled to prejudgment interest for future damages when the suit does not result from personal bodily injury. We find these cases sufficiently distinguishable from the instant case, however, because there was no indication in *Phinney* or *Paulitch* that the plaintiffs alleged physical manifestations resulting from discriminatory treatment.

Affirmed.

/s/ Richard Allen Griffin
/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly

[4] While it could be argued that *some* of plaintiff's damages that would accrue in the future were *purely* emotional and therefore did not fall within the definition of "future damages" in MCL 600.6301, plaintiff does not specifically address an apportionment issue or request alternative relief for apportionment on remand but merely argues that *none* of her damages fit within the MCL 600.6301 definition. Therefore, the issue of apportionment is deemed abandoned for purposes of appeal.