STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER HUNTER,

Plaintiff-Appellant,

v

OUTBACK STEAKHOUSE OF FLORIDA, INC., and ROGER MCDANIEL,

Defendants-Appellees.

UNPUBLISHED
July 19, 2002

No. 230052
Wayne Circuit Court
LC No. 98-803041-NO

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of no cause for action and award of mediation sanctions in this sexual harassment case. We affirm in part and reverse in part.

Plaintiff first argues that the trial court erred in denying her motion for new trial. We disagree. On appeal, this Court reviews a trial court's decision whether to grant a new trial for an abuse of discretion. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

Pursuant to the Civil Rights Act, employers are prohibited from discriminating on the basis of sex. MCL 37.2102-37.2202. Discrimination on the basis of sex includes sexual harassment. MCL 37.2103(i). Pursuant to MCL 37.2103(i), there are two forms of sexual harassment:

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> *(i)* Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment.
>
> *(ii)* Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment.

> *(iii)* The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment. [MCL 37.2103(i).]

Sexual harassment that falls into subsection (i) or (ii) is referred to as quid pro quo harassment. *Champion v Nation Wide Security*, 450 Mich 702, 708; 545 NW2d 596 (1996). Sexual harassment that falls into subsection (iii) is referred to as hostile environment harassment. *Radtke v Everett*, 442 Mich 368, 380-381; 501 NW2d 155 (1993)

In this case, plaintiff pleaded both forms of sexual harassment when she alleged that defendants had the duty "To refrain from discriminating against Plaintiff with regard to the terms and conditions of her employment on account of her sex and/or creating a hostile environment and physically accosting Plaintiff." It is apparent in the context of the entire complaint, that the quid pro quo claim is based on subsection (ii) as plaintiff was already employed when the alleged discrimination occurred. Plaintiff specifically claimed that her supervisor, defendant Roger McDaniel, committed the alleged harassment.

The jury found that plaintiff was not "sexually harassed and/or constructively discharged because of an intimidating, hostile or offensive working environment." However, the jury did find that plaintiff was "sexually harassed and/or constructively discharged because of her gender." The jury also found plaintiff 's damages, both economic and non-economic, to be zero.

On appeal, plaintiff presents two arguments for why the trial court erred in denying her motion for new trial. First, plaintiff argues that the verdict was inconsistent. A trial court must make every effort to reconcile seemingly inconsistent verdicts. *Bean, supra.* at 31. If there is an interpretation of the evidence providing a logical explanation for the jury's findings, then the verdict is not inconsistent and is to be upheld. *Id.*

Plaintiff offers two arguments for why the jury's verdict is inconsistent. The first is that plaintiff "suffered damages simply by being discriminated against." In support of this argument, plaintiff cites *Freeman v Kelvinator, Inc,* 469 F Supp 999 (ED Mich, 1979) and *Balmer v Community House Ass'n of Birmingham*, 572 F Supp 1048 (ED Mich, 1983). However, these cases do not support the argument that upon a finding of discrimination, damages necessarily follow. Rather, *Freeman* simply holds that non-economic damages (i.e., damages for the "indignity and anguish of discrimination") may be recovered under MCL 37.2101 *et seq. Freeman, supra* at 1003-1004. *Balmer* merely cites to *Freeman* for this proposition. *Balmer, supra* at 1049. In regard to damages, MCL 37.2801 provides: (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both. . . . (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act." Based on this language, a finding of quid pro quo discrimination does not obviate proof of damages and causation.

Additionally, the elements of quid pro quo discrimination do not include damages. A party pursuing a claim under the second subsection of MCL 37.2103(i) must show two things: (1) that she was subject to any of the types of unwelcome sexual conduct described in the statute, and (2) that her employer or the employer's agent used her submission or rejection of the proscribed conduct as a factor in a decision affecting her employment. *Champion, supra* at 708-

709. Therefore, the jury verdict that plaintiff suffered discrimination, but did not suffer non-economic damages as a result, is not inconsistent.

Plaintiff's second argument is that she suffered economic damages because of unemployment. Plaintiff's argument is premised on the assumption that plaintiff was constructively discharged. However, the verdict form asks: "Was the Plaintiff, Jennifer Hunter, sexually harassed and/or constructively discharged because of her gender?" The jury answered "Yes." Based on this language, it is possible that the jury found that plaintiff was sexually harassed, but not constructively discharged, and thus, suffered no economic loss caused by the loss of employment. Therefore, the jury verdict of zero economic damages was not inconsistent with the rest of the verdict. Even if the jury did find that plaintiff was constructively discharged, it could also have found that plaintiff suffered zero economic damages as a result. As the trial court and defendant Outback point out, the jury was instructed on failure to mitigate and it is possible that they found that plaintiff's failure to mitigate resulted in zero damages.

Plaintiff also argues that the verdict was against the great weight of the evidence. A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990), aff'd 438 Mich 347 (1991). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp,* 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. *Arrington v Detroit Osteopathic Hosp (On Remand),* 196 Mich App 544, 560; 493 NW2d 492 (1992).

The jury's finding that plaintiff suffered zero damages is not against the great weight of the evidence. As discussed above, the verdict form permits the interpretation that the jury found that plaintiff did not suffer constructive discharge due to the "and/or" language in the question. The evidence supports the verdict that plaintiff did not suffer constructive discharge or economic damages associated therewith. Constructive discharge occurs where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign. *Champion, supra* at 710. In that case, the employee is treated as if the employer had actually fired them. *Id.*

In this case, the evidence supports a finding that defendant McDaniel's conduct was not so severe that a reasonable person in plaintiff's place would feel compelled to resign. The most significant evidence is that plaintiff herself did not immediately resign after she was allegedly harassed and assaulted. Plaintiff testified that defendant McDaniel harassed her by making sexually explicit comments about plaintiff and other women daily and assaulted her by poking her in the butt with a screwdriver, sticking his tongue in her ear, and ultimately grabbing her face and kissing it on July 5, 1997. However, plaintiff continued to work until July 19, 1997, and an additional twelve hours thereafter. Another Outback waitress, Barbara Roll, testified that plaintiff complained to her about defendant McDaniel's kiss and "She said something to the fact she was going to quit Outback and she was going to sue." Before quitting, plaintiff either called work indicating that she would not work a shift or failed to show up for her shift on more than one occasion. Eventually she called and indicated that she would not be returning to work at Outback. Although plaintiff testified that she indicated when she quit, she quit because of defendant McDaniel, this testimony was contradicted by the testimony of the manager, Dan

Booth, who stated that he was not notified by plaintiff of defendant McDaniel's conduct. This evidence does not show that defendant McDaniel's conduct was so severe that a reasonable person would feel compelled to resign. Even under a subjective standard, plaintiff 's statements and actions show that she resigned at her leisure and not based on an abrupt resolve due to severe sexual harassment.

Assuming, however, that the jury did find constructive discharge and that the evidence supports such a finding, plaintiff also argues that the evidence shows economic damage. However, plaintiff cites no specific evidence nor does she cite to the lower court record to show plaintiff 's loss from the time of the alleged discharge to the time she found other employment. The appellant may not merely announce his position and leave it to this court to discern and rationalize the basis for her claims. *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998). Facts included in an appellant's argument must be supported by specific page references to the transcript. MCR 7.212(C)(7).

In regard to non-economic damages for sexual harassment, the evidence supports the verdict that plaintiff suffered none. Plaintiff testified that she suffered emotional harm as a result of the alleged sexual harassment. However, after suffering the alleged sexual harassment, plaintiff voluntarily returned, for social purposes, to defendant Outback where the harassment occurred and where defendant McDaniel was still employed, and did not appear distressed. Based on this evidence, the jury could have found that plaintiff did not suffer the emotional distress claimed. Therefore, the trial court did not err in denying plaintiff 's motion for new trial because (1) the jury verdict was not inconsistent and (2) the jury verdict was not against the great weight of the evidence.

Plaintiff next argues that the trial court erred in entering a judgment of no cause of action against defendant Outback. We agree. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings. MCR 2.514(B). This Court reviews questions of law de novo. Whether the trial court properly entered a judgment is a question of law which is reviewed de novo. *Best Financial v Lake States,* 245 Mich App 383, 385; 628 NW2d 76 (2001).

On July 27, 2000, the trial court issued an opinion on the issue of whether the jury verdict was one of no cause of action against defendant Outback. The trial court determined that *Radtke, supra* at 368, provides that a corporation is not liable if it is not given notice of sexual harassment or hostile work environment created by its employees or supervisors. Because the jury found that plaintiff did not notify defendant Outback of the sexual harassment or hostile work environment, the trial court determined that defendant Outback cannot be liable and the verdict against defendant Outback is one of no cause of action. The trial court entered a judgment of no cause of action on all of plaintiff 's claims and an award of costs and attorney fees pursuant to the mediation rule.

As discussed above, plaintiff pleaded both quid pro quo and hostile environment sexual harassment. The jury found that plaintiff was not "sexually harassed and/or constructively discharged because of an intimidating, hostile or offensive working environment." However, the jury did find that plaintiff was "sexually harassed and/or constructively discharged because of her gender." Because there are only two types of sexual harassment, and the jury was instructed on only those two forms, the jury verdict, as written, requires us to assume that the jury found that plaintiff suffered quid pro quo harassment. It is also illogical to conclude that the jury meant

that plaintiff suffered only constructive discharge but not sexual harassment because the jury was not instructed on any other type of harassment (e.g., nonsexual). Additionally, plaintiff claimed only that defendant McDaniel harassed her. Therefore, defendant Outback's argument that the jury verdict, as written, does not implicate defendant McDaniel is without merit. The jury also found that defendant McDaniel was an employee or supervisor at the time the sexual harassment occurred. Thus, the only question is whether defendant Outback is vicariously liable for the quid pro quo harassment that the jury found plaintiff suffered at the hands of defendant McDaniel.

The trial court erroneously relied on *Radtke* in determining that defendant Outback was not liable for the sexual harassment of plaintiff by defendant McDaniel. The Court in *Radtke* pointed out that in hostile work environment claims, an employer may avoid liability if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment. *Radtke, supra* at 396. *Radtke* held that if the employer itself discriminated against the plaintiff, the respondeat superior analysis was unnecessary. *Id.* at 397. *Radtke* does not apply to this case because the jury did not find a hostile work environment nor was defendant McDaniel found to have been plaintiff 's employer.

In *Chambers v Trettco, Inc*, 463 Mich 297, 311, 313; 614 NW2d 910 (2000), the Michigan Supreme Court held that in cases of quid pro quo harassment, the employer is strictly liable. The Court explained:

> Whichever category of sexual harassment is at issue, it is always necessary to determine the extent of the employer's vicarious liability when harassment is committed by an agent. Because the Civil Rights Act expressly defined "employer" to include agents, we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees. Vicarious liability exists in the case of quid pro quo harassment because the quid pro quo harasser, by definition, uses the power of the employer to alter the terms and conditions of employment. [*Id.* at 311, citing *Champion, supra* at 708.]

Therefore, the trial court erred in finding that defendant Outback was not strictly liable for defendant McDaniel's actions.

Defendant Outback argues that the trial court did not err in entering a judgment of no cause of action because plaintiff failed to make a prima facie case of discrimination as the jury found the plaintiff did not suffer damages. This argument is unpersuasive because damages are not an element to quid pro quo harassment. A party pursuing a claim under the second subsection of MCL 37.2103(i) must show two things: (1) that she was subject to any of the types of unwelcome sexual conduct described in the statute, and (2) that her employer or the employer's agent used her submission or rejection of the proscribed conduct as a factor in a decision affecting her employment. *Champion, supra* at 708-709. Thus, a finding of zero damages does not preclude a finding of liability for sexual harassment. For these reasons, the trial court erred in entering a judgment of no cause of action against defendant Outback.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder