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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001656-MR

R.R.P.M., INC., D/B/A 44 AUTO MART — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 14-CI-005146

VICTOR HORTON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: R.R.P.M., Inc., d/b/a 44 Auto Mart ("44 Auto Mart") appeals the Jefferson Circuit Court's October 21, 2016, judgment, which was entered following a jury trial. The judgment provided damages to Victor Horton for humiliation, embarrassment, and mental anguish because of a racially hostile work environment.

In particular, 44 Auto Mart appeals the trial court's denial of its motions for directed verdict, denial of its Kentucky Rules of Civil Procedure (CR) 59.05 motion for a new trial based on newly discovered evidence, and lastly, maintains the jury instructions were in error.

After careful review, we affirm.

BACKGROUND

In 2014, Horton filed a complaint in Jefferson Circuit Court, pursuant to the Kentucky Civil Rights Act, against his former employer, 44 Auto Mart, alleging discrimination, hostile work environment, wrongful termination or constructive discharge, and wrongful denial of promotion because of his race and national origin. In January 2016, Horton amended his complaint and removed the claim of wrongful termination or constructive discharge.

Horton is of Peruvian descent with dark-colored skin and black hair. However, he was born in the United States and is a citizen. Horton was hired by 44 Auto Mart as a car salesman in January 2013. He stopped working there in July 2014 and took a job with another auto dealership.

A three-day jury trial commenced on October 18, 2016. Horton testified at the trial as well as his witnesses: Troy Baldridge, Ronald Sakal, and Kim Grinestaff. Regarding the allegation of a hostile work environment, Horton testified that his managers and coworkers daily used racial slurs against Hispanics.

Some comments were directed against Hispanics in general and some were directed against him. The derogatory comments about Hispanic customers were made in Horton's presence. He testified that when he heard these statements, he felt humiliated and angry. Horton also believed the comments interfered with his ability to do his job. Further, he declared that he had trouble sleeping and that he worried every day when he went to work.

Horton kept a journal detailing the most egregious incidents of racial harassment occurring at 44 Auto Mart. He claimed that the incidents were so frequent and common that he could not keep track of all of them. Horton read examples from his journal to the jury. Further, in April 2014, Horton surreptitiously recorded conversations at the car dealership. Three recordings were admitted into evidence and played aloud to the jury.

The testimony of Horton's other witnesses supported his claim of a hostile work environment. Baldridge worked with Horton for five months. He claimed that one employee referred to Horton, in his presence, as a "dirty Mexican." Sakal, another co-worker, stated that Horton did not get the same leads as the other sales persons and was ignored by management. Sakal also noted that Horton complained to him that he was referred to as "Taco Bell." Sakal heard a manager state that he did not like foreigners. Grinestaff was the office manager while Horton worked at 44 Auto Mart. She affirmed that, for the entirety of his

employment, Horton complained that he was racially harassed by the other employees and managers. Grinestaff said that Horton complained once or twice a week to her. She testified that the harassment had a serious and negative impact on Horton.

When Horton's case concluded, 44 Auto Mart moved for a directed verdict. It argued that the evidence presented had not established the alleged harassment was sufficiently severe or pervasive. The trial court denied the motion stating that the jury could make the decision.

To counter Horton's claims, 44 Auto Mart pointed out that Horton's three witnesses had all been terminated by 44 Auto Mart. It called the following witnesses: Barry Davis, Danny Proctor, Bryan McGrail, and Brian Stratton. Davis testified that everyone liked Horton and that the employees joked with one another at work. He indicated that Horton took part in the teasing. Davis maintained that Proctor never complained to him or anyone else about the work environment.

Proctor, Horton's direct supervisor, stated unequivocally that he never called Horton a "Mexican" although customers mistook Horton as Mexican. Proctor continued that Horton never protested about having too many Hispanic clients. Another employee, McGrail, stated that he never heard racial slurs directed at Horton although the customers sometimes referred to him as "Mexican." And he said that Horton never complained to him about harassment.

Stratton, another witness, was a co-worker and social friend of Horton. He expressed that Horton never mentioned or complained to him about harassment. At the end of its witnesses' testimony, 44 Auto Mart again moved for a directed verdict, which was denied by the trial court.

The jury found for Horton on the claim of a racially hostile work environment and awarded him $65,000.00 in damages. 44 Auto Mart filed a notice of appeal on October 31, 2016.

On the day the judgment was entered, October 21, 2016, 44 Auto Mart discovered a 2013 Facebook post by Horton in which he used a racial epithet. Thus, on the same day it filed its notice of appeal, it also filed a CR 59.05 motion for a new trial based on newly discovered evidence. The trial court denied the motion for a new trial on December 12, 2016. On December 13, 2016, 44 Auto Mart amended its notice of appeal and appealed the denial of the motion for the new trial, too.

ANALYSIS

44 Auto Mart appeals both decisions contending that the trial court erred in denying the motions for directed verdict and a new trial, and provided incorrect jury instructions. 44 Auto Mart asks that the trial court be reversed, and the matter remanded. Horton counters that 44 Auto Mart's brief should be stricken for failure to comply with CR 76.12(4)(c)(v); that 44 Auto Mart's directed verdict

motion and new trial motion were properly denied; and, that the jury instructions were appropriate.

This case implicates the Kentucky Civil Rights Act, codified in Kentucky Revised Statutes (KRS) Chapter 344, which is the equivalent of the Federal Civil Rights Act and other pertinent federal laws. KRS 344.020(1)(a). The Federal Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e–2(a)(1). The Kentucky Civil Rights Act tracks the Federal Civil Rights Act but expressly provides broader relief than found on the face of the federal statute, "including damages for humiliation, personal indignity and other intangible injuries." *Mitchell v. Seaboard System Railroad*, 883 F.2d 451, 454 (6th Cir. 1989).

Under the Act, discrimination is defined as "any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter." KRS 344.010(5). The purpose of the

Act is "[t]o safeguard all individuals within the state from discrimination[,]" for various reasons including race. KRS 344.020(1)(b).

Procedural issues

To begin, we address Horton's contention that 44 Auto Mart's brief should be stricken for failure to comply with the civil rules. Horton points out that the civil rules require that the Appellant's brief "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." CR 76.12(4)(c)(v). Horton asserts that because 44 Auto Mart did not comply with this rule, it should be stricken.

A review of the record shows that motions for a directed verdict were made by 44 Auto Mart at the close of both plaintiff and its own cases. We believe, based on these motions, the issue is preserved for our review. Again, regarding the motion for a new trial, a motion was made and orally denied by the trial court. But when the circuit clerk was unable to locate the denial of the motion on a videotape, the trial court entered a written order denying the motion. Again, this order preserves the issue.

An appellate court has the discretion to dismiss an appeal for non-compliance with CR 76.12. *Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479, 482 (Ky. App. 2005). But we have wide latitude to determine the proper

remedy for a litigant's failure to follow the rules of appellate procedure, which includes ignoring the deficiency and proceeding with review. *See Vander Boegh v. Bank of Oklahoma, N.A.*, 394 S.W.3d 917, 921–22 (Ky. App. 2013) (citations omitted). Further, since 1986, Kentucky has adopted a policy of substantial compliance rather than strict compliance regarding precisely this issue. *See, e.g.*, *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986). Here, it is obvious to the Court that these issues have been preserved and no harm or prejudice has been established. Hence, our policy of substantial compliance permits the 44 Auto Mart's appeal being heard.

Nonetheless, the issue of the jury instructions is more complicated since 44 Auto Mart did not mention that issue in the appellate prehearing statement. While the objection to the jury instructions was proffered at trial, it was not listed in the prehearing statement. This Court has previously stated that the failure to raise an issue in the prehearing statement precludes our review of that issue. *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004). As pointed out by 44 Auto Mart, it did not properly preserve this issue. CR 76.03(8) explains: "[a] party shall be limited on appeal to issues in the prehearing statement . . . ." However, the Court of Appeals retains the authority to reverse a trial court's judgment on an unpreserved issue if it finds palpable error therein. CR 61.02.

Wright v. House of Imports, Inc., 381 S.W.3d 209, 212 (Ky. 2012). Hence, we will consider the jury instructions claim of error under the palpable error standard.

Directed Verdict

44 Auto Mart argues that as a matter of law, the alleged discriminatory conduct toward Horton was not sufficiently severe or pervasive enough to constitute a racially hostile work environment, and therefore, the trial court should have granted its motion for a directed verdict. Before addressing the substantive portion of its argument, we observe Horton's procedural argument that since 44 Auto Mart failed to move for a judgment notwithstanding the verdict ("JNOV") under Kentucky law, it has waived the right to have the judgment set aside.

It is accurate that if a party fails to move for a directed verdict at the close of all the evidence, Kentucky courts consistently hold that parties are precluded from obtaining a JNOV. *Myers v. City of Louisville*, 590 S.W.2d 348, 349 (Ky. App. 1979). Here, the cases cited by Horton – *Russell County Feed Mill, Inc. v. Kimbler*, 520 S.W.2d 309 (Ky. 1975); *Flynn v. Songer*, 399 S.W.2d 491 (Ky. 1966); and, *Royal Crown Bottling Co. v. Smith*, 303 S.W.2d 270 (Ky. 1957) – all stand for the proposition that notwithstanding the motions for directed verdicts without a motion for JNOV, a party cannot have a judgment set aside. But under case law, including a case cited by Horton, *Flynn*, while a party who does not

make a JNOV motion cannot seek to set aside the judgment, it may still appeal a directed verdict and ask for a new trial. *Flynn v. Songer*, 399 S.W.2d 491, 493 (Ky. 1966). Accordingly, 44 Auto Mart may appeal the denial of the directed verdict and seek a new trial.

Turning to the issue of whether the motion for directed verdict was proper, we examine the standard for granting of a motion for a directed verdict by a trial court. It is well-established that when a trial court considers either a motion for a directed verdict or a motion for JNOV, it "is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion." *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985). "Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence." *Id.* "And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Id*. (Internal citation omitted).

Further, "[w]here there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts." *Rothwell v. Singleton*, 257 S.W.3d 121, 124 (Ky. App. 2008) (citing *Gibbs v. Wickersham*, 133 S.W.3d 494, 495-96 (Ky. App. 2004)). Lastly, a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. *Id*. In

the case at bar, the trial court, drawing all reasonable inferences and viewing the evidence in the light most favorable to Horton, denied the directed verdict motions.

It follows, therefore, when engaging in appellate review of a ruling on a motion for directed verdict, "the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party[.]" *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992). The appellate court must keep in mind that "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). And an appellate court may only reverse the denial of a directed verdict if it determines after reviewing the evidence in favor of the prevailing party that the verdict is palpably or flagrantly against the evidence and/or reached as a result of passion or prejudice. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990).

Additionally, the party making "[a] motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Association By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) (citing *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944)). Significantly, as previously noted, if there is conflicting evidence, it is the responsibility of the

jury, the trier of fact, to resolve the conflict. Therefore, when a directed verdict motion is made, "the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved to the trier of fact." *Hornung*, 754 S.W.2d at 860 (citing *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952)).

In sum, to review the trial court's actions, we must see whether the trial court favored the party against whom the motion was made including all inferences reasonably drawn from the evidence. Second, we must affirm the trial court's denial of the motion if evidence was provided from which reasonable inferences could be drawn by a jury weighing the evidence and its credibility in favor of the party presenting the evidence. And the "motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968). Therefore, "a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman*, 967 S.W.2d at 18. Consequently, we may not disturb the trial court's ruling unless the decision is clearly erroneous. *Peters v. Wooten*, 297 S.W.3d 55, 65 (Ky. App. 2009) (citing *Bierman*, 967 S.W.2d at 18).

44 Auto Mart provides an extensive discussion of federal and state law concerning the requirements for a party to establish that the discrimination was

severe and pervasive. It argues in a conclusory fashion that the discrimination was not severe or pervasive.

In the case at hand, for Horton to establish a *prima facie* case of racial discrimination, he must show that "(1) []he belonged to a protected group, (2) []he was subject to unwelcome harassment, (3) the harassment was based on race, (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) [44 Auto Mart] knew or should have known about the harassment and failed to act." *Williams v. CSX Transportation*, 643 F.3d 502, 511 (6th Cir. 2011) (citing *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1078–79 (6th Cir.1999)) (internal footnote omitted.) The only issue challenged by 44 Auto Mart was whether the discrimination was severe or pervasive.

To evaluate the conduct within a possible hostile work environment, the Court should consider the totality of the circumstances, including "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 v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993). A hostile work environment is one that is both objectively hostile to a reasonable person and subjectively hostile to the plaintiff. *Id.*

Horton had the ultimate burden of showing that 44 Auto Mart intentionally discriminated against him. *White v. Rainbo Baking Co.*, 765 S.W.2d 26, 29 (Ky. App. 1983). Further, in *Kirkwood*, our Court outlined the elements for establishing a *prima facie* showing of discriminatory treatment. *Kirkwood, v. Courier-Journal*, 858 S.W.2d 194, 198 (Ky. App. 1993). First, a person may demonstrate that he or she was afforded less favorable treatment than similarly situated employees of another race. *Id*. Second, a person may show that the manager responsible for the alleged discrimination engaged in such conduct while voicing numerous derogatory comments about the plaintiff's race in general and about the plaintiff in particular. *Id*.

Regarding pervasiveness, a review of the evidence shows that Horton, during his 18-month tenure at 44 Auto Mart, experienced racial harassment daily. Horton detailed nine specific incidences of harassment but testified that the incidents were so frequent and commonplace, he could not remember all of them. Grinestaff, a witness, corroborated this testimony. Regarding severity, Horton and his witnesses stated that he was repeatedly subjected to racially offensive insults and provided numerous examples including Hispanic customers being called "spic"; Mexican customers buying trucks for gardening businesses; referred to as "Taco Bell"; greeted with "what's up Mexico"; being told he could use his

recreational vehicle to sneak his Mexican buddies across the border; and many other examples.

Horton was humiliated by these actions and comments. He expressed subjectively feeling bad and having feelings of humiliation and anger toward his co-workers. Because Horton personally experienced the harassment, it interfered with his work.

Keeping in mind the standard of review, under the totality of the circumstances and looking at the evidence in the light most favorable to Horton, the trial court did not err in denying the motions for directed verdicts. Further, the jury's verdict awarding Horton $65,000 in damages was not in contradiction to the evidence that Horton was subjected to severe and frequent racial harassment during his employment with 44 Auto Mart.

Accordingly, the trial court did not err in denying the motions for directed verdict because the verdict was not palpably or flagrantly against the evidence or reached as a result of passion or prejudice.

New Trial

44 Auto Mart maintains that it should have been granted a new trial and so moved under CR 59.01. A party may move for a new trial upon the discovery of new evidence that is "material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." CR

59.01(g). In the case at bar, the ostensible newly discovered evidence was the statement of a former employee of 44 Auto Mart about a Facebook post by Horton.

The former employee spoke with the general manager, Johnson, on the day the judgment was entered. The former employee told the general manager, after Johnson informed him about the trial and the verdict, that Horton had used racial slurs including a racial epithet. Further, the former employee revealed that he had a copy of an April 2013 racially derogatory Facebook post penned by Horton.

Whether newly discovered evidence warrants a new trial lies within the sound discretion of the trial court and will only be overturned upon a demonstration that this discretion was abused. *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998). Hence, our standard of review on such issues is to ascertain whether the trial court abused its discretion in denying the motion. Further, "[t]he decision of the trial judge is presumptively correct." *Shortridge v. Rice*, 929 S.W.2d 194, 196 (Ky. App. 1996). And the decision of the trial court will not be reversed unless it is clearly erroneous. *Id.*

Besides the requirement that newly discovered evidence could not have been discovered with reasonable diligence, newly discovered evidence only supports a motion for new trial if it is "of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would

probably change the result if a new trial should be granted." *Commonwealth v. Harris*, 250 S.W.3d 637, 640-41 (Ky. 2008) (citations omitted).

The requirements were operationalized in *Meeks v. Ellis*, wherein the Court explained that newly discovered evidence under CR 59.02(g) "authorizes relief from a final judgment only if: '(1) the evidence was discovered after entry of judgment; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) the evidence, if introduced, would probably result in a different outcome.'" *Meeks v. Ellis*, 7 S.W.3d 391, 392-93 (Ky. App. 1999) (citations omitted).

We evaluate this "newly discovered" evidence under the provisos in *Meeks*. The first prong is easily answered – the Facebook post was reported to 44 Auto Mart personnel the day the judgment was entered. The second prong is more problematic for 44 Auto Mart. Was it diligent in discovering the evidence? Clearly, the former employee knew Horton since he worked at the same time as Horton and communicated with him on Facebook. Further, in trials it has become quite common for parties to search social media, including Facebook, for evidence. And Horton's Facebook post was communicated to two persons who testified at trial – Stratton and Baldridge. The fact that these two people testified at trial calls

into question the diligence of 44 Auto Mart's questioning of them and Horton, also.

Given the nature of the "newly discovered" evidence, we do not believe that the trial court's decision to deny the motion for a new trial was clearly erroneous since with diligence it appears it could have been discovered. Furthermore, the Supreme Court has held that newly discovered evidence that merely impeaches the credibility of a witness or is cumulative is generally disfavored as grounds for granting a new trial. *Foley v. Commonwealth*, 55 S.W.3d 809, 814 (Ky. 2000) (internal citations omitted) (see prong 3 in *Meeks*). The Facebook post only challenges Horton's credibility and is cumulative. 44 Auto Mart has already suggested that Horton went along with the racial teasing. Therefore, the newly discovered evidence is not the type that would implicate the grant of a new trial.

The fourth prong of *Meeks* requires the newly discovered evidence to be material. It is also important to note that on the first day of the trial, 44 Auto Mart proffered a motion *in limine* to exclude all references to racial slurs directed at African Americans. Apparently, there were numerous incidents of 44 Auto Mart management and staff referring to African American customers with derogatory or racial slurs. The trial court granted the motion. Although 44 Auto Mart argues that Horton's remarks can be distinguished from the excluded evidence, it is

somewhat disingenuous for 44 Auto Mart to now want to indict and seek a new trial based on one Facebook post. Further, given the motion *in limine* it is unlikely it would have been material.

Although the Facebook post itself uses an expression derived from a more noxious racial slur used against African Americans, it is only tangentially related to the issue of workplace harassment experienced by Horton as a person of Hispanic heritage.

Lastly, 44 Auto Mart has not established conclusively that the evidence, if introduced, would result in a different outcome. It's assertion that the outcome of the trial would have been different is merely speculative. It is far from clear that this Facebook post is compelling enough to result in a different verdict. Thus, we hold that the trial court's denial of the CR 59.01(g) motion was not clearly erroneous.

Jury Instructions

Both parties provided jury instructions to the trial court. The trial court used the instructions proffered by Horton. 44 Auto Mart objected to the use of these instructions arguing that its instructions better outlined the law regarding a hostile work environment.

As discussed earlier, 44 Auto Mart's appeal of the issue of jury instructions was not included in its prehearing statement, and therefore, our review

is for palpable error under CR 61.02: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

The trial court instructed the jury using the following instructions:

> You will find for the Plaintiff, Victor Horton, on his claim for a hostile work environment against the Defendant, 44 Auto Mart, if you are satisfied form the evidence of all the following:
>
> 1. That Victor Horton is of Hispanic descent in terms of his race, ethnicity, and or natural origin;
> and
> 2. That Victor Horton, because of his Hispanic race, ethnicity and/or national origin, was subjected to demeaning and derogatory comments and insults spoken by employees and/or managers of 44 Auto Mart;
> and
> 3. That such conduct had the purpose or effect of creating an intimidating, hostile, or offensive work environment;
> and
> 4. That such conduct was so severe or pervasive that it would have had the purpose or effect of creating an intimidating, hostile or offensive work environment for a reasonable Hispanic employee;
> and
> 5. That Victor Horton suffered emotional and or mental distress, humiliation, and anguish as a result of such conduct.

Initially, 44 Auto Mart cites the instructions from *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky. 2005), as much more

substantive than the instructions given. The instructions in *Lumpkins* were as follows:

> You will find for the Plaintiffs, Brandon Lumpkins, Jason Starks and Kenneth Ryan Anthony, under this Instruction, if you are satisfied from the evidence that in the course of the Plaintiffs' employment with the Defendant City of Louisville, the Plaintiffs were subjected to racial harassment by the Defendant City of Louisville, by and through its agents, severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive, and that the Plaintiffs subjectively regarded as hostile or abusive. In determining whether the work environment was hostile or abusive, you may consider any of the following factors:
> a. the frequency of the conduct or behavior;
> b. the severity of the conduct or behavior;
> c. whether the conduct or behavior was physically threatening or humiliating; OR
> d. whether the conduct or behavior unreasonably interfered with the Plaintiffs' work performance.

Id. at 604-05.

44 Auto Mart maintains that these instructions were much better because the instructions clarify that the discrimination must be severe, pervasive, and more than episodic. It also suggests that these jury instructions are better because factors are provided for a jury to ascertain whether certain conduct was severe or pervasive.

The instructions provided by Horton use a "bare bones" approach. Interestingly, the instructions given in *Lumpkins* followed the "bare bones" rule,

too. *Id*. at 605. Such jury instructions are favored in Kentucky. *See Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 824 (Ky. 1992); *Rogers v. Kasdan*, 612 S.W.2d 133, 136 (Ky. 1981); and *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 228 (Ky. 2005).

Here, the instructions provided by Horton conveyed the standard enunciated in *Harris v. Forklift Systems, Inc.*, that the hostile work environment discrimination must be severe or pervasive although they do not use the word "episodic." *Lumpkins*, 157 S.W.3d at 605. 44 Auto Mart claims that the instructions are faulty because they do not include the word "episodic." But because the concept of "bare bones" instructions permits the instructions to be "fleshed out" in closing argument, we believe that Horton's counsel when articulating that the harassment was "severe" or "pervasive" argued that the racial intimidation and hostility occurred more than one or two times. *See Rogers v. Kasdan*, 612 S.W.2d 133 (Ky. 1981). Clearly the evidence in the record documents numerous episodes. Therefore, we conclude that the trial court did not abuse its discretion in using these jury instructions matter or for that matter did the use of these instructions result in 44 Auto Mart experiencing manifest injustice. Indeed, the tendered jury instructions were an accurate reflection of the law concerning hostile work environment.

CONCLUSION

We affirm the decision of the Jefferson Circuit Court denying the motions for directed verdicts, denying the motion for a new trial, and observe no palpable error in the jury instructions.

ALL CONCUR.

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