STATE OF MICHIGAN

COURT OF APPEALS

SANDRA SEABROOK,

Plaintiff-Appellee,

v

DELTA FINANCIAL CORPORATION AND STEVE KUEHL,

Defendants-Appellants.

UNPUBLISHED
October 3, 2000

No. 210261
Oakland Circuit Court
LC No. 95-503725-CL

Before: Whitbeck, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendants Delta Financial Corporation and Steve Kuehl appeal as of right from the amended judgment awarding plaintiff Sandra Seabrook $117,958.55 in this sexual harassment case under the Civil Rights Act, (CRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*.[1] They challenge the jury verdict and many of the trial court's rulings preceding that verdict.[2] We affirm.

I. Basic Facts

Seabrook alleged that Kuehl sexually harassed her for the two and one-half years she worked for him, which made her workplace hostile, and that he fired her because she refused to have sex with him. The evidence that supports and contradicts those allegations is quite lengthy. Suffice it to say that Seabrook testified at trial that she endured sexual comments and what she considered to be inappropriate touching almost every week while she worked for Delta, a business in the mortgage industry, despite her protests. These comments and touches escalated at visits to Delta's new building

[1] The trial court dismissed Seabrook's additional claim for intentional infliction of emotional distress before trial and, therefore, it is not relevant to this appeal.

[2] Because Kuehl is Delta's sole owner and officer, and was held liable on a theory of respondeat superior, this opinion refers to defendants collectively as Kuehl.

site, Shooper's Restaurant, and the Moose Preserve Restaurant; in each case, Seabrook claimed, Kuehl grabbed her and forcibly kissed her.

Seabrook said that the situation worsened about a week before she stopped working at Delta. She was working late on a Friday night when Kuehl entered her office, he pulled a chair behind hers and started rubbing her neck and shoulders. According to Seabrook, "he told me I knew what I would have to do to keep my job, and the Holiday Inn was just up the street." Seabrook asked him to stop and told him that she did not "appreciate that comment, and it wasn't going to happen." One week later, despite a record of promotions and good performance reviews, Kuehl called her into a meeting where he began to criticize her for mistakes she had made in the recent past and required her to pay for those mistakes with a personal check at that time. She said that he ended the meeting by saying, "You're fired. I want your corporate card and your key, and I'll make sure you never got [sic] a job in this town again making this kind of money that I pay you."

Kuehl flatly denied engaging in any inappropriate or harassing conduct and stated that Seabrook was lying about the comments and touching. He also suggested that some of the comments she recalled as having a sexual nature, specifically comments concerning trips to the St. Christopher hotel and other motels, were benign and business-related. For instance, Kuehl claimed that one of the motels was simply a landmark for an overnight delivery drop-box. He conceded that he had given Seabrook good performance reviews, but only because he overlooked her reputation for being manipulative, unprofessional, and a liar. Furthermore, even though he had mentioned that he was considering firing Seabrook to another employee the day before Seabrook left Delta, Kuehl claimed that he did not fire her. Rather, he claimed, Seabrook resigned.

The other testimony at trial did not establish, conclusively, whether Seabrook or Kuehl's version of the events was the most credible. Some former Delta employees thought that Seabrook was flirtatious with Kuehl and could not recall observing any of the allegedly harassing conduct or did not construe the conduct as sexual. However, other employees recalled comments or actions they thought inappropriate and of a sexual nature. Additionally, Seabrook's mother confirmed Seabrook's mental and physical deterioration, including a twenty-pound weight loss Seabrook suffered during the last few months of her employment, and other problems she experienced following her termination. Ultimately, the jury resolved this factual dispute between Seabrook and Kuehl in Seabrook's favor.

II. Evidentiary Issues

A. Standard Of Review

Kuehl first argues on appeal that the trial court erred in allowing Seabrook to introduce evidence that he had made sexual advances toward another former Delta employee, Felicia Starr, on the same night and at the same place he allegedly made sexual advances toward Seabrook. He also contends that the trial court erred in excluding evidence of Seabrook's own sexual conduct. This Court reviews evidentiary issues for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996).

B. Starr Testimony

The testimony introduced at trial indicated that Kuehl unbuttoned Starr's blouse, kissed her, and asked her to go to the St. Christopher hotel with him while they were at Shooper's Restaurant on the same night he allegedly pushed Seabrook into the men's restroom at Shooper's and kissed her. He claims that this evidence was inadmissible because: (a) Seabrook was not aware of what occurred with Starr until after the conduct ceased and, therefore, it was not harassing to *her*; (b) it was irrelevant to her quid pro quo claim that he fired her because she would not have sex with him; (c) it occurred outside the workplace and, as a result, could not be relevant to her hostile *workplace* claim; and (d) this testimony was more prejudicial than probative and inadmissible under MRE 404(b). This last point is dispositive, so we address it first.

Kuehl contends that this evidence was inadmissible under MRE 404(b) because it was irrelevant and more prejudicial than probative in that it used his "bad" character for sexually harassing women to prove that he sexually harassed Seabrook. Seabrook, however, argues that the testimony regarding Starr was admissible to corroborate her testimony. The trial court merely concluded that this challenged evidence was "relevant, and more probative than prejudicial," demonstrating that MRE 404(b) provided the framework for it's analysis.

"Evidence of similar acts may be admissible as substantive evidence in a civil case under MRE 404(b)." *Tempo, Inc v Rapid Electric Sales & Service, Inc*, 132 Mich App 93, 99; 347 NW2d 728 (1984). MRE 404(b)(1), the rule specifically governing other acts evidence, states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Other acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered, Kuehl in this case. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A fourth factor articulated in *VanderVliet*, which does not fully conform to the idea of a test expressed in the preceding three factors, suggests that a party may request a limiting instruction under MRE 105 if the trial court decides to admit the challenged evidence. *Id*. at 75.

The evidence regarding Kuehl's advance toward Starr passed the first prong of admissibility, proper purpose, because Seabrook offered the evidence to corroborate her testimony. Corroboration, which means "to make more certain" or "confirm," is not typically articulated as a proper purpose

under MRE 404(b). *Random House Webster's College Dictionary* (2d ed). It is not, however, a uniformly improper purpose. See *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973). Seabrook never specifically indicated what this evidence was intended to corroborate. However, this challenged evidence naturally tended to corroborate Seabrook's claim that Kuehl had a sexual intent when he made allegedly offensive comments to her. Proof of intent is a proper purpose under MRE 404(b)(1).

The evidence also passed the second *VanderVliet* prong, logical relevance, because Kuehl's sexual intent was in dispute at trial. In fact, Kuehl's intent was critical to Seabrook's case because MCL 37.2202(c); MSA 3.548(202)(c) prohibits discrimination "on the basis of sex" and MCL 37.2103(i); MSA 3.548(103)(i) defines this sort of discrimination in terms of sexual conduct, e.g., sexual advances, favors, and verbal or physical acts. Other offensive, but not sexual, advances, favors, and verbal or physical acts would not be actionable under the statute. This sexual dimension was especially at issue in relation to the comments Kuehl admitted making but claimed were jokes or lacked a sexual or harassing character, such as the motels acting as landmarks for the drop-box. Kuehl's apparently overt sexual gestures to Starr (e.g., unbuttoning her shirt and kissing her) in conjunction with his decision to ask her to go to the St. Christopher hotel with him, tended to demonstrate that when he made highly similar offers to and inquiries of Seabrook about the St. Christopher and other hotels he had this same sexual purpose. Accordingly, this evidence was logically relevant to Seabrook's hostile workplace claim, which revolved, to a great extent, around whether these comments to her about the St. Christopher hotel related to office work or had a sexual nature.

The testimony regarding Starr was likely to prejudice Kuehl because it painted him in a poor light, which is a consideration under *VanderVliet's* third prong. However, it seems unlikely that this evidence was substantially more prejudicial than probative given its logical relevance. The Starr testimony also likely took on a smaller role in the jury's deliberation given that Seabrook testified to a number of instances of harassment directed at her alone. As a result, the trial court did not abuse its discretion when it determined that the evidence was not improperly prejudicial.

The trial court did limit the jury's consideration of all evidence of Kuehl's misconduct outside the workplace to whether it corroborated Seabrook's allegation of harassment in the workplace. Although Kuehl challenges the substance of this instruction in a separate issue on appeal, issuing this limiting instruction conformed with the fourth prong of *VanderVliet* by restricting the way the jury could use this evidence as proof of liability and, as a result, minimized its prejudicial effect. Accordingly, we conclude that the trial court did not abuse its discretion by admitting this evidence.

Although we might agree that this evidence was not relevant to every issue at trial, particularly the quid pro quo claim, evidence irrelevant to one issue in trial may be relevant to other matters and, therefore, admissible. *VanderVliet*, *supra* at 73. Further, even if the trial court erred in admitting this evidence, the error was likely harmless because, as the discussion of the prejudice prong under the *VanderVliet* analysis suggests, there were substantial amounts of properly-admitted testimony from Seabrook and another former Delta employee, Richard Craven, that established Kuehl's liability. Thus, the trial court's decision was not inconsistent with "substantial justice" and does not require reversing the jury's verdict. MCR 2.613(A).

C. Seabrook's Sexual History

Kuehl contends that the trial court erred in granting Seabrook's motion in limine to exclude evidence that she had sex with Randy Thomas in a car in a parking lot in early 1990 while they were on a date and that she was sexually aggressive toward him. Although this incident occurred before Seabrook went to work for Delta, Kuehl claims that this evidence would have been relevant because it portrayed Seabrook as a very different person. Kuehl also contends that this evidence was relevant to show "welcomeness," meaning that his on-the-job sexual advances toward her were welcome and not "unwanted" under MCL 37.2103(i); MSA 3.548(103)(i). See generally *Grow v WA Thomas Co*, 236 Mich App 696, 706; 601 NW2d 426 (1999) (a plaintiff's conduct may be relevant as one factor among all the circumstances to determine if the defendant's "comments or conduct were 'unwelcome'"). Kuehl's argument also suggests that this evidence was relevant to proving that Seabrook did not suffer damages from Kuehl's offensive behavior because she was somehow accustomed to this sort of behavior.

Seabrook simply argued that this evidence was irrelevant and prejudicial. The trial court agreed and ruled the evidence inadmissible because

> [f]irst, Mr. Thomas was not Defendants' employee at the time of the incident. Second, the incident is too remote in time from Defendant KUEHL's [sic] alleged conduct toward Plaintiff to be relevant to either her sexual harassment or her mental anguish/emotional distress claims.

The trial court, however, did not exclude any testimony regarding Seabrook's sexual conduct toward Kuehl.

We agree with Seabrook and the trial court. The primary defect in this evidence, which the trial court properly identified, is that it is not logically relevant to any issue in dispute at trial. See MRE 401; *VanderVliet*, *supra* at 52, 74-75. This evidence says nothing about whether Seabrook was sexually provocative at any time she was around Kuehl or her coworkers. The evidence does not clarify – to any extent – whether she gave Kuehl the impression, either directly or indirectly, that she welcomed his sexual advances. We also note that Kuehl never admitted that he made a sexual advance toward Seabrook. As a result, whether she consented to or "welcomed" the advances was not a part of his defense at trial.

What, **if** any, relevance this evidence had to Seabrook's mental state or emotional damages from Kuehl's conduct toward her is not evident. Kuehl implicitly asks us to assume that Thomas was completely accurate in describing Seabrook as sexually aggressive and that the inference that she had a bad character because she was promiscuous was appropriate. However, even if we were to make this sort of unwarranted assumption, it stands to reason that a person who engages in *consensual* sexual relations during a date might still have a negative reaction to *unwanted* sexual advances from another person at another time. Consensual sexual conduct in a purely social context does *not* lead to the reasonable belief that such conduct is welcome in the workplace. Because this 1990 incident is

completely unconnected to Kuehl and Seabrook's employment or personal relationship, the trial court properly excluded the evidence as irrelevant. MRE 402.

Moreover, the foreign case law Kuehl cites does not indicate that the trial court erred. In each case, the defendant observed the sexually provocative behavior or dress, or knew about it from other employees. In this case, there is no evidence that Kuehl knew about the incident between Thomas and Seabrook while Seabrook was working for him. As a result, it was impossible for him to form a reasonable belief that his advances were welcome when he made those advances.

Additionally, that Kuehl argues this evidence related to Seabrook's "sexual predisposition" indicates that he intended to use it to prove that she had an unsavory character and acted in conformity with that character around Kuehl. MRE 404(b)(1) explicitly excludes evidence that revolves around a "character to conduct" theory. See generally *People v Engelman*, 434 Mich 204, 211; 453 NW2d 656 (1990) ("Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts."). Therefore, although the trial court did not cite MRE 404(b) as the basis for its decision, it also reached the right result on this evidentiary issue under this specific rule of evidence and we also affirm its decision on this basis. See *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

Almost as a side note, Kuehl also claims that the trial court's ruling was overly broad and limited evidence of Seabrook's sexual conduct while employed at Delta. However, he neither made an offer of proof, MRE 103(a)(2), concerning this allegedly proper evidence excluded under the ruling nor does he identify on appeal what other evidence he would have introduced at trial but for the ruling. Therefore, not only is his argument that the ruling was overbroad speculative, it is not preserved for appeal. MRE 103(a).

III. JNOV

A. Standard Of Review

Kuehl claims that the trial court erroneously denied his motion for judgment notwithstanding the verdict (JNOV) because there was insufficient evidence adduced at trial from which the jury could conclude that he had subjected Seabrook to a hostile work environment.[3] This Court reviews a trial court's decision with regard to a motion for JNOV for an abuse of discretion. *Rice v ISI Manufacturing, Inc*, 207 Mich App 634, 636; 525 NW2d 533 (1994).

B. Legal Standard For JNOV

[3] Kuehl does not specifically frame this issue in terms of whether the trial court erred in denying the motion for JNOV. However, he raised the sufficiency argument in this context. Viewing his argument in this way does not alter its essential nature.

"A judgment notwithstanding the verdict is proper where insufficient evidence is presented to create an issue for the jury. It is improper where reasonable minds could differ on issues of fact." *Michigan Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 186; 466 NW2d 717 (1991). When deciding such a motion, the trial court must view the evidence in the light most favorable to the nonmoving party, *id.*, and this Court must do the same on appeal, *Terzano v Wayne Co*, 216 Mich App 522, 526; 549 NW2d 606 (1996).

C. Creation Of A Hostile Work Environment

A prima facie case of sexual harassment leading to a hostile work environment consists of five elements:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended to or did in fact substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Koester v City of Novi*, 213 Mich App 653, 666; 540 NW2d 765 (1995) ("*Koester I*"), rev'd in part on other grounds 458 Mich 1 (1998) ("*Koester II*"), citing *Radtke v Everett*, 442 Mich 368, 382, 382-383; 501 NW2d 155 (1993).]

Kuehl's argument focuses on the sufficiency of the evidence of the fourth element contending that the unwanted sexual advances Seabrook alleged that he committed did not actually create a hostile, intimidating, or offensive work environment. MCL 37.2103(i)(iii); MSA 3.548(103)(i)(iii). To support his argument, he points to the testimony of former female Delta employees who stated that they did not witness any sexual harassment or perceive their workplace as hostile. Furthermore, he notes that the harassment did not prevent Seabrook from being promoted and praised for her work.

Kuehl's argument boils down to credibility: most witnesses at trial testified that they did not see any sexually offensive conduct at Delta. Although Seabrook stated that she experienced sexual harassment that occurred when no one was around, Kuehl points out that the only person who corroborated her story, Richard Craven, was inherently incredible because he was connected to other litigation against Kuehl. Therefore, Kuehl suggests that without corroboration from a credible witness, the jury unreasonably believed Seabrook's testimony that he made these advances despite her protests, that the advances made her work environment offensive, and that they caused her to lose weight and suffer emotionally.

Despite this compact argument, we cannot reject Seabrook and Craven's testimony quite so easily. Kuehl may have found Seabrook and Craven patently unbelievable, but the jury was not obligated to view the evidence solely from his perspective. Because "the jury is the sole arbiter of witness credibility," it was entitled to listen and then accept or reject any of the evidence it received in light of the way it found the facts of the case. *Franzel v Kerr Manufacturing Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999). That there was hotly contested evidence supporting each party's claim or

defense only demonstrates that there was sufficient evidence to submit to the jury so that it could determine the facts of the case. See *Jamison v Lloyd*, 51 Mich App 570, 576; 215 NW2d 763 (1974).

Further, MCL 37.2103(i)(iii); MSA 3.548(103)(i)(iii) states that sexual harassment is actionable when "[s]uch conduct or communication has the purpose or effect of substantially interfering with an individual's employment" without requiring the plaintiff to prove an adverse employment action. Compare MCL 37.2103(i)(i); MSA 3.548(103)(i)(i) (discrimination in the form of sexual harassment occurs when "[s]ubmission to or rejection of" the harassment "is used as a factor in decisions affecting" the plaintiff's employment). This Court, citing *Harris v Forklift Systems, Inc*, 510 US 17, 21; 114 S Ct 367; 126 L Ed 2d 295 (1993), addressed this very issue in *Chambers v Trettco, Inc*, 232 Mich App 560; 591 NW2d 413 (1998), vacated on other grounds ___ Mich ___ (2000).[4] The *Chambers* Court stated that a plaintiff who alleges sexual harassment that caused a hostile or offensive work environment need not "suffer economic harm or tangible discrimination" as long as "the terms of plaintiff's employment were clearly affected," meaning that the harassment directed at the plaintiff "was severe or pervasive and created an intimidating, hostile, or offensive work environment." *Id*. at 564-565. *Radtke, supra*, the definitive modern statement on sexual harassment law in Michigan, did not impose an economic loss or adverse employment action requirement to this cause of action. *Id*. at 385, 398. Thus, good job performance reviews and promotions do not automatically bar recovery for a hostile workplace claim.

Credibility and economic loss aside, the critical issue is whether there was sufficient evidence that Kuehl's actions were sufficiently pervasive and severe to create a hostile or offensive work environment. Seabrook testified directly that his actions were offensive to her and occurred through her entire course of employment at Delta, affecting her physical and emotional well-being. When viewed in the light most favorable to Seabrook, Kuehl's persistent comments, kisses, and touches minimally created a factual question for the jury to resolve regarding whether those actions were sexual harassment.

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[4] We are aware that the Supreme Court recently vacated this Court's opinion in *Chambers* and remanded for reconsideration of the hostile work environment claim. See *Chambers v Trettco, Inc*, __ Mich __; __ NW2d __ (2000). We are, however, certain that the Supreme Court's decision does not affect our analysis in this case because its opinion did not address whether a plaintiff in a sexual harassment case alleging a hostile work environment must prove an adverse employment action to sustain her burden of proof. Rather, the Supreme Court in *Chambers* addressed how a plaintiff alleging that the employer's agent harassed her must prove that the actual employer was at fault to some degree in order to establish vicarious liability. See majority slip op at 15-16. In *Chambers*, proving vicarious liability was somewhat of a challenge for the plaintiff because the employer's agent, not the employer, committed the harassment. *Id*. at 2-5. As a result, the plaintiff had to prove that her employer failed to remedy the hostile environment after adequate notice of the harassment. *Id*. at 21. In this case, we do not struggle with whether Delta can be held vicariously liable for Kuehl's harassment because Kuehl, the harasser, was Delta's sole owner and officer and employed Seabrook.

Although Kuehl implicitly suggests that this conduct was not actionable because, if it existed, it did not draw the attention of other Delta employees, much less affect them, his argument does not undermine the sufficiency of the evidence. *Radtke* itself involved sexual harassment against a single employee and, as in this case, the allegedly harassing activity occurred in private. *Id*. at 374-375. The reasonable person standard, as clarified in *Radtke*, does not take into consideration any particular group's viewpoint on harassment. *Id*. at 389-394. Consequently, the opinions of Seabrook's coworkers' on whether Kuehl harassed her hold no appreciable legal weight because the jury must look at his alleged conduct from the perspective of a reasonable person. The evidence is sufficient as long as a reasonable person would find that the alleged conduct created a hostile or offensive work environment. *Id*. In this case, a reasonable person could conclude that public and private comments of a sexual nature combined with unwanted touching and kissing in private for two years created a hostile or offensive work environment at Delta for Seabrook. Therefore, we conclude that the trial court did not err in denying the motion for JNOV on this count.

IV. Directed Verdict

A. Standard Of Review

Kuehl argues that the trial court erred in denying his motion for a directed verdict in which he contended that Seabrook failed to provide sufficient evidence of her quid pro quo claim.[5] This Court reviews a trial court's decision on a motion for a directed verdict in a civil case de novo. *Berryman v K mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992).

B. Legal Standard For A Directed Verdict

"When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997) (citations omitted).

C. Causal Connection

A plaintiff who alleges that his or her "[s]ubmission to or rejection [sexual harassment] . . . is used as a factor in decisions affecting" his or her employment pleads a quid pro quo harassment claim. See MCL 37.2103(i)(ii); MSA 3.548(103)(i)(ii); *Champion v Nation Wide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996) ("*Champion II*"). A prima facie case of quid pro quo sexual harassment requires the plaintiff to prove that she or he is a member of a protected class, *Howard v*

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[5] Kuehl does not phrase this issue in terms of the court's decision to deny the motion for a directed verdict. However, as with the JNOV issue, it provides the correct legal context without effecting the legal argument in any appreciable way.

Canteen Corp, 192 Mich App 427, 431-432; 481 NW2d 718 (1991), overruled on other grounds by *Rafferty v Markovitz*, 461 Mich 265, 268-272; 602 NW2d 367 (1999), and

> (1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute [MCL 37.2103(i); MSA 3.548(103)(i)], and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment. [*Champion II, supra* at 708-709.]

"If the defendant employer asserts legitimate, nondiscriminatory reasons for its actions, the plaintiff must then show that the reasons asserted were a mere pretext for discrimination." *Howard, supra* at 432; see also *Slayton v Michigan Host, Inc*, 144 Mich App 535, 541-52; 376 NW2d 664 (1985).[6]

Whether Seabrook is a member of a protected class is not in dispute. Rather, Kuehl claims that even if the jury could understand any of his alleged comments as a demand that Seabrook have sex with him, the comments were too remote in time from her separation from Delta to conclude that her refusal to give in to the demand was causally connected to that separation. However, Seabrook testified that Kuehl approached her in her office about a week before he fired her and told her that she knew what she had to do to keep her job and "the Holiday Inn was just up the street." She allegedly rebuffed him at that time. When this testimony is viewed in the light most favorable to Seabrook along with Craven's testimony that the hotel remarks had a sexual connotation, the evidence regarding Kuehl's proposition to Starr that referred to the St. Christopher hotel, and the other evidence of harassment in this case, a reasonable jury would be able to conclude that it was "unwelcome sexual conduct." *Champion II, supra* at 708-709. That it occurred only one week before Kuehl allegedly fired her suggests that her final refusal to give in to his persistent demands affected his decision to fire her. The period of time that elapsed between the comment and the separation was within a reasonably acceptable range according to the case law related to violations of the CRA, if not specifically quid pro quo sexual harassment cases. See generally *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 802-805; 584 589 (1998), aff'd on relevant grounds 233 Mich App 560, 562 (1999) (summary disposition was inappropriate for age, weight, and race discrimination claims under the CRA; discriminatory comments occurred at least seven months before discharge); *Downey v Charlevoix Co Bd of Road Com'rs*, 227 Mich App 621, 624; 576 NW2d 712 (1998) (plaintiff's decedent in age discrimination case was fired two weeks after engaging in a fight with his supervisor when the defendant claimed it fired him for fighting).

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[6] Pretext rarely arises in the context of sexual harassment claims. *Howard* and *Slayton*, the only Michigan cases to mention "sexual harassment" and "pretext," refer to a plaintiff's obligation to prove pretext in a "sex discrimination" case. While that might ordinarily bring to mind disparate treatment cases in which a person claims that someone of the opposite sex was promoted/fired/hired, etc., over the plaintiff, sexual harassment is "[m]erely a subset of sexual discrimination." *Koester II, supra* at 11; see also MCL 37.2103(i); MSA 3.548(103)(i) (defining "discrimination because of sex" in terms of "sexual harassment"). Therefore, the burden shifting analysis, including the plaintiff's burden to show pretext, applies here.

Kuehl also contends that Seabrook's own testimony showed that if he fired her it was for legitimate, nondiscriminatory reasons and that she failed to show that those reasons were pretextual. However, Seabrook provided testimony by her coworkers that she was excellent at her job and written performance evaluations and notes commending her good work; even Kuehl testified that she performed well. That Kuehl only discovered Seabrook's mistakes after she refused his advances at the Moose Preserve and the office permit the inference that those mistakes were not the true motivation for her discharge and that he was searching for an excuse to fire her to disguise a discriminatory motive. Similarly, that he would threaten to prevent her from finding any other job in the industry indicates that he was much more personally offended by something (and the legitimate inference is that it was Seabrook's refusal to have sex with him) than if he was merely firing someone who was incompetent. Further, Seabrook's mistakes were evidently minor, not all resulted in a financial loss to Delta, and Seabrook cooperated in reimbursing the company for the relatively larger losses. A reasonable person could consider all of these factors in light of Kuehl's admission that he mentioned to another employee that he was considering firing Seabrook only one day before Seabrook left Delta and conclude that he did fire her and that the legitimate business reasons he articulated for firing her were pretextual. Thus, we conclude that the trial court did not err in denying the motion for a directed verdict and submitting these questions of fact to the jury.

V. Jury Instructions

A. Preservation And Standard Of Review

Kuehl challenges the trial court's limiting instruction to the jury concerning his conduct at Shooper's Restaurant and the Moose Preserve Restaurant as only relevant to corroborating evidence of harassment in the workplace. He also claims that the trial court erred in refusing to give his nonstandard instructions, which we describe in additional detail below.

A party must object to or request a jury instruction before the jury begins its deliberations in order to preserve that issue for appeal. MCR 2.516(C); *Mina v General Star Indemnity Co*, 218 Mich App 678, 680; 555 NW2d 1 (1996). The transcripts do not make clear when, if ever, Kuehl objected to the limiting instruction related to the testimony surrounding his conduct at Shooper's and the Moose Preserve before the jury left to deliberate. As a result, this issue is not preserved for appeal and we do not address it. The other instructional issue concerning Kuehl's proposed nonstandard instruction is preserved for appeal because the record reflects that Kuehl raised this issue before the jury retired to deliberate.

This Court reviews a trial court's decision to grant or deny a request for nonstandard jury instructions for an abuse of discretion. MCR 2.516(D)(4); *Houston v Grand Trunk WR Co*, 159 Mich App 602, 608; 407 NW2d 52 (1987).

B. Kuehl's Suggested Instruction

Kuehl asked the trial court to instruct the jury "that merely annoying vulgar language does not constitute sexual harassment under the law." The record suggests that the trial court ruled that it would not give the instruction because it believed "that the instructions that the Court gave were adequate to

cover the total situation of this case." On appeal, Kuehl argues that the trial court should have issued the instruction because it is consistent with the law and was the only way to constrain the jury's determination of what constituted sexual harassment. Kuehl neither cites *any* authority for this proposition nor does he identify which of the harassing comments he allegedly made to Seabrook constituted "merely annoying vulgar language." As this Court said in *Prince v McDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999):

> It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court. See *In re JS & SM*, 231 Mich App 92, 98; 585 NW2d 326 (1998); *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned. *Schellenberg v Rochester Elks*, 228 Mich App 20, 49; 577 NW2d 163 (1998).

Even if we reach the merits of this issue, we cannot afford Kuehl relief from the verdict on this basis. "Additional instructions when given must be modeled as nearly as practicable after the style of the SJI, and must be concise, understandable, conversational, unslanted, and nonargumentative." MCR 2.516(D)(4). It virtually goes without saying that the requested jury instructions must also be "applicable and accurately state the law." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 713-714; 550 NW2d 797 (1996), aff'd on other grounds 457 Mich 593 (1998). However, it is not at all clear that the proposed instruction in this case accurately stated the law. *Id*. at 713-714. MCL 37.2103(i); MSA 3.548(103)(i) prohibits unwelcome "verbal . . . conduct or communication of a sexual nature" and leaves it to the plaintiff to prove that the statements were a condition of employment, or interfered with employment by creating a hostile or offensive environment. See MCL 37.2103(i)(i), (ii), (iii); MSA 3.548(103)(i)(i), (ii), (iii). The statute does not indicate, in any way, that the Legislature intended to protect employers who use what may be common language to discriminate if the plaintiff can show that the language in fact was harassing or posed a condition of employment.

Although not every offensive statement is actionable, the jury may still consider what may seem like less offensive statements as part of the larger circumstances to determine if there was harassment. As our Supreme Court said in *Radtke, supra* at 394:

> [W]hether a hostile work environment existed shall be determined by whether a reasonable person, *in the totality of circumstances*, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. [Emphasis added.]

Likewise, in *Quinto v Cross & Peters Co*, 451 Mich 358, 368-372; 547 NW2d 314 (1996), the Supreme Court commented that, in order to raise a question of fact regarding comment-based harassment, a plaintiff must point to specific comments "that would permit the conclusion that there was such conduct or communication of a type or severity that a reasonable person could find that a hostile work environment existed." "Vulgar" and "annoying" comments can be offensive and may reveal the

declarant's discriminatory attitude, which is precisely why they are "vulgar" and "annoying" and, therefore, admissible in this lawsuit.

Even the federal case law on which Kuehl relied in the trial court, *Rabidue v Osceola Refining Co*, 895 F2d 611, 620 (CA 6, 1986), to show that vulgarities common in the workplace cannot be considered actionable does not "accurately state the law" any longer. See *Harris, supra* at 19-23 (rejecting the *Rabidue* requirement that the offensive conduct result in an injury as long as offensive conduct negatively alters working conditions). In contrast, the standard jury instruction on sexual harassment, SJI2d 105.10, which the trial court read to the jury, accurately reflected the law, closely tracking the elements identified in the statute itself and allowing the jury to determine when verbal conduct and comments are unwelcome and sexual in nature. See MCL 37.2103(i); MSA 3.548(103)(i). Accordingly, we conclude that the trial court discharged its duty to instruct the jury on the law and did not abuse its discretion by omitting the proposed nonstandard instruction.

VI. Summary Disposition

A. Preservation And Standard Of Review

Kuehl claims that by going to school and working part-time rather than obtaining a full-time job in the mortgage industry after she left Delta, Seabrook failed to mitigate her damages. He first raised this issue in his motion for partial summary disposition under MCR 2.116(C)(10). Aside from her substantive arguments, Seabrook claims that Kuehl failed to preserve this partial summary disposition issue for appeal because he did not provide this Court with a copy of the summary disposition hearing transcript. To preserve this issue for appeal, Kuehl simply had to raise this issue in the trial court, which he did. See *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987). Furthermore, we now have a sufficient record from which to conduct review, so we see no impediment to reviewing the merits of this issue.

We review the trial court's decision on the motion for partial summary disposition de novo. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. Legal Standard

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 320-321; 575 NW2d 324 (1998). According to *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998), this Court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt. Only if there is no factual dispute remaining can the trial court properly grant summary disposition. See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999). However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute. MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

C. Seabrook's Efforts To Mitigate Her Damages

The trial court correctly denied summary disposition on this issue because the record available at the time of the hearing on the motion included evidence that Seabrook had taken steps, which could be construed as reasonable, to find a new job after Kuehl allegedly fired her. *Morris v Clawson Tank Co*, 459 Mich 256, 264-265; 587 NW2d 253 (1998) specifically contradicts Kuehl's argument that Seabrook's efforts to find a new job were unreasonable because she did not look for a job in the mortgage or finance industry. Pursuant to *Morris*, Seabrook was only obligated to make "reasonable [efforts] under the circumstances" to find a job and the job she searched for did not have to be "reasonably similar." *Id*. at 264-266, 269. She did not have to accept a "demeaning, particularly inconvenient, or otherwise unacceptable" job. *Id*. at 265. She did not have take work in a different field or at a lower level. *Id*., quoting *Ford Motor Co v EEOC*, 458 US 219, 231-232; 102 S Ct 3057; 73 L Ed 2d 721 (1982). Nor did her efforts to mitigate her damages need to be successful or substantial, only reasonable. *Id*. at 264-265.

Whether her efforts to mitigate her damages were reasonable, including her decision to go to school and work part-time in different jobs after Kuehl allegedly threatened to prevent her from finding work in the mortgage industry was a question of fact for the jury. See *Rasheed v Chrysler Corp*, 445 Mich 109, 124, 133; 517 NW2d 19 (1994). By the time of the motion for partial summary disposition, Seabrook produced evidence that she tried to mitigate her damages by looking for a new job without turning down an unconditional offer of reinstatement or an offer of a new job of a "like nature." See *id*. at 132-133; see also *Morris, supra* at 265-266. She also introduced evidence that when she left Delta she was depressed, allegedly as a direct result of Kuehl's harassment, affecting her ability to find a new job.

Contrary to Kuehl's consistent suggestions, factual questions existed concerning Seabrook's potential employment following her separation from Delta. Particularly, there was a significant dispute in the record concerning whether other businesses had actually offered her a job or if those businesses' employees, who already knew Seabrook, had merely mentioned the possibility of employment in a casual or "joking" manner. Also, these other potential jobs were for entry-level loan processors, rather than management-level positions working with closing mortgages, and Kuehl did not provide any specific evidence concerning the terms of the jobs, including wages, hours, or benefits. Thus, the record did not resolve whether these jobs, even if offered, were of a "like nature" to the job Seabrook left at Delta.

The record also plainly reflected that Seabrook believed that Kuehl intended to carry out his threat to keep her from working in the mortgage industry. As Michael Abramsky, Ph.D., her psychologist, noted in a report submitted to the trial court at the time of the motion for summary disposition, Seabrook acted as if she believed that Kuehl had tremendous influence and power. Even if Kuehl did not actually possess those attributes, Seabrook reportedly was anxious, kept herself isolated, and frequently "looked over her shoulder" because of her fear of Kuehl following her separation from Delta, which affected her ability to obtain a job. That Kuehl deposed a number of former Delta employees and associates who claimed that they had not heard about Seabrook being "black listed" in the mortgage industry only underscores that there was a controversy concerning whether Seabrook's

claims were credible and her efforts to find jobs in other industries were reasonable. The deposition testimony did not disprove Seabrook's claim that Kuehl threatened her future ability to find a job. Consequently, this threat and its effect on Seabrook's mental well-being does figure into what were reasonable efforts to find a job in the circumstances present in this case.

In sum, Kuehl did not satisfy his burden of proving, conclusively, that Seabrook failed to act reasonably to mitigate her damages. *Morris*, *supra* at 266; *Auto Club Ins Ass'n*, *supra* at 437. Therefore, the trial court did not err in denying the motion for partial summary disposition.

VII. Remittitur

A. Standard Of Review

Following the jury's verdict, Kuehl raised the mitigation of damages issue again by moving for remittitur. He now challenges the trial court's decisions to deny that motion. We review the remittitur decision to determine if the trial court abused its discretion. See *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997).

B. Legal Standard

To merit remittitur, the movant must show that the jury returned an "excessive award" that was "influenced by passion or prejudice." MRE 2.611(A)(1)(c). In other words, "a trial court must determine whether the jury verdict is for an amount greater than the evidence can support." *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 401; 493 NW2d 441 (1992); MRE 2.611(E)(1). Notably, the trial court is in the "superior position" to determine if the evidence at trial supported the jury's award. See *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995).

C. Mitigation

Kuehl's argument concerning remittitur is little more than a restatement of his argument concerning partial summary disposition: going to school instead of finding a job in the mortgage industry barred Seabrook from being awarded front pay. There are only two significant differences between the two issues concerning mitigation.

First, under the standard of review we generally defer to the trial court's discretion on remittitur decisions, while we review summary disposition issues de novo. This abuse of discretion standard tends to work in Seabrook's favor because the trial court denied the underlying motion. See *Spiek*, *supra*; *Phillips*, *supra*.

Second, with remittitur, we look at the evidence adduced at trial that the jury considered rather than the record that existed at the time of the motion for partial summary disposition, which may or may not have been presented to the jury. See *McLemore*, *supra*. In this case, the evidence the jury considered was substantially similar to the evidence on the record at the time of the motion for partial summary disposition. Not only did the jury hear conflicting evidence concerning whether Seabrook's

efforts to mitigate her damages were reasonable, the jury also heard Mauricio Kohn, a financial analyst, testify. Kohn interviewed Seabrook, looked at Seabrook's tax records, and gathered information concerning Delta, her particular job at Delta, her new career, the projected rates of inflation, and long-term trends in the mortgage industry. Using these pieces of information, Kohn calculated the economic loss Seabrook incurred from when Kuehl allegedly fired her in 1992 until the year 2006, which took into consideration other wages she had earned, mitigating her damages. Kohn concluded that her total damages amounted to a present value of $345,996, which he viewed as a "conservative" and "reasonable" calculation. Although Kuehl challenged Kohn's calculations during cross-examination, he did not present any evidence to contradict Kohn's calculations. Given that Kohn explained in detail how he determined Seabrook's economic loss and that the jury only awarded Seabrook roughly one-third of that amount, it is clear that the evidence supported the award. We see no abuse of discretion in the trial court's decision to deny remittitur in this case.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder