STATE OF MICHIGAN

COURT OF APPEALS

LYNETTE BURNS,

Plaintiff-Appellee,

v

CITY OF DETROIT, a Municipal Corporation; DERECK HICKS, Individually and in his Official Capacity; TERRENCE HILL, Individually and in his Official Capacity; and DARRYL HOPSON, Individually and in his Official Capacity, Jointly and Severally,

Defendants-Appellants.

UNPUBLISHED
October 31, 2000

No. 213029
Wayne Circuit Court
LC No. 95-529767-CL

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

PER CURIAM.

Defendants appeal by right from a judgment for plaintiff entered after a jury trial. Plaintiff, who was a fingerprint technician for the Detroit Police Department, claimed that two male coworkers on the midnight shift sexually harassed her and that her employer did not take appropriate rectifying actions after she reported the harassment. Plaintiff sued for sexual harassment, retaliation, defamation, and tortious interference with a business relationship. The jurors found for plaintiff on all four claims. We affirm in part, reverse in part, and remand for a new trial on damages.

I

Defendants first argue that the trial court should have granted their motion for a new trial because the sexual harassment verdict was against the great weight of the evidence. We review a trial court's denial of a motion for a new trial for an abuse of discretion. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). "The question is whether the verdict was manifestly against the clear weight of the evidence." *Id*. "A verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.'" *Id*., quoting *Nagi v Detroit United Railway*,

231 Mich 452, 457; 204 NW 126 (1925). If the verdict resulted in a miscarriage of justice, then a new trial may be granted. *DeLisle, supra* at 661.

Plaintiff's sexual harassment claim was based on a hostile work environment. The Supreme Court set forth the elements of a hostile work environment sexual harassment claim in *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993):

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
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> (3) the employee was subjected to unwelcome sexual conduct or communication;
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> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior.

Defendants' arguments are directed toward elements 2, 3, 4, and 5.

To establish elements 2 and 3, plaintiff had to show she was subject to unwanted sexual communication because of her gender. *Id*. at 383. Defendants contend that the comments allegedly directed toward plaintiff by defendants Terrance Hill and Darryl Hopson had nothing to do with sex or with her gender as a female but were simply the result of a disagreement among coworkers. However, Hill and Hopson's comments, as testified to by plaintiff and her coworker Elaine Davis, *were* of a sexual nature and *did* occur, at least in part, as a result of plaintiff's gender. Particularly, Hill and Hopson referred to plaintiff as a "b---h" and a "f-----g female" and indicated that plaintiff needed to "get her a-- f----d by a man every night." They further indicated that plaintiff was abnormal for being over thirty years old and without a man. Thereafter, at a meeting held to discuss various issues about the workplace, one of the fingerprint technician supervisors, defendant Dereck Hicks, indicated in plaintiff's presence that women will "cry sexual harassment" because of premenstrual syndrome. This evidence showed that plaintiff was indeed subjected to abuse of a sexual nature because of her gender as a female. While some witnesses denied that Hill, Hopson, and Hicks made the comments at issue, the evidence was nearly balanced such that the sexual harassment verdict was not against the great weight of the evidence.

The evidence also supported the jury's finding with regard to element 4. As stated in *Radtke*, *supra* at 394-395, even a single incident of sexual harassment, if extreme, will support a hostile work environment sexual harassment claim. Here, there was more than a single incident. In addition to the initial harassing conduct that occurred on November 14th and 15th, 1994, plaintiff testified that she had received numerous, irritating, romantic notes from Hopson over the years and that Hill sometimes blew in her ear and asked why she covered her body. Keeping in mind that plaintiff worked within a small group of individuals and could not avoid seeing either Hill or Hopson if she continued working on the midnight shift, we conclude that a reasonable person, in the totality of the circumstances, would have felt

extremely disrupted by the comments and actions directed at plaintiff. See *Radtke, supra* at 394 (indicating that whether a hostile work environment existed is determined by the "reasonable person" standard). The jury's finding regarding element 4 was not against the great weight of the evidence.

Nor was the jury's finding regarding element 5 against the great weight of the evidence. As stated in *Radtke, supra* at 396, to establish respondeat superior a plaintiff must show that her employer, after receiving notice of alleged sexual harassment, failed to adequately investigate the claim and take prompt and appropriate remedial action. Here, plaintiff and others testified that plaintiff told one of her supervisors, Nola Hitchens, that she had been sexually harassed and that in response, the city (1) counseled Hill for using vulgar language, (2) entered a demerit on Hill and Hopson's annual evaluations for an "altercation with a coworker;" (3) reissued a sexual harassment policy; and (4) held a meeting at which claims of sexual harassment were belittled. The jury, based on this evidence, could reasonably have concluded that the city's efforts failed to adequately address plaintiff's claim. Indeed, there was no evidence that anyone spoke to Hill or Hopson about their use of *sexually* abusive language, they received no suspension for it, the meeting purporting to address it only furthered the harassment, and *plaintiff*, instead of Hill and Hopson, was subsequently removed from the midnight shift. The jury's verdict with respect to plaintiff's sexual harassment claim was not against the great weight of the evidence.

II

Next, defendants argue that the trial court erred by excluding evidence that plaintiff filed a sexual harassment claim against her former employer, Chrysler Motor Corporation. Defendants contend that the evidence was relevant to show (1) that plaintiff knew the sexual harassment reporting requirements yet failed to complain about any alleged sexual harassment that occurred before the November incidents, and (2) that plaintiff had a pattern of filing sexual harassment suits after getting into altercations with coworkers. We review a trial court's decision to exclude evidence for an abuse of discretion. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 517; 592 NW2d 786 (1999). An abuse of discretion occurred only if an unprejudiced person, considering the facts on which the trial court acted, would find no justification for the ruling made. *Lombardo v Lombardo*, 202 Mich App 151, 154; 507 NW2d 788 (1993).

The trial court ruled that the evidence should be excluded because (1) there was no evidence that the prior claim was without merit and that plaintiff filed it merely because of an altercation with a coworker, and (2) such a showing would require a full-blown "trial within a trial." This ruling did not constitute an abuse of discretion. Indeed, the evidence available to the court showed only that the prior claim was settled in some fashion; it did not indicate whether the claim was frivolous. Moreover, defendants proffered no evidence in support of their contention that the claim was indeed frivolous. Accordingly, evidence of the claim was not relevant to prove that plaintiff filed a frivolous claim in the instant case. Nor, contrary to defendants' contention, was evidence of the claim relevant to show that even though plaintiff knew about the "sexual harassment reporting requirements," she did not report any instances of sexual harassment at the City of Detroit occurring before November 14, 1994. First, there was no indication that plaintiff learned the "sexual harassment reporting requirements" as a result of her first sexual harassment claim. Second, plaintiff *admitted* that she did not report pre-November 14,

1994, conduct by Hill and Hopson because it, standing alone, did not amount to an intolerable interference with her work environment. No error requiring reversal occurred.

III

Next, defendants argue that the trial court should not have allowed into evidence the fact that Hopson ran an unauthorized criminal background check (a "LEIN" check) on plaintiff in order to "dig up dirt" on her. Defendants argued below that because plaintiff did not mention the LEIN check as an instance of retaliation in either her complaint or in her answers to interrogatories, the evidence was inadmissible. Plaintiff argued that defendant had actual notice about the LEIN information and that it was relevant to show (1) that defendants retaliated against her as a result of her suit, and (2) that even though a higher supervisor recommended a ten-day suspension for Hopson as a result of the LEIN check, Hicks recommended only a three-day suspension (plaintiff evidently believed that this demonstrated Hicks' nonchalant attitude toward the mistreatment of plaintiff).

The court originally granted defendants' motion, indicating that the LEIN check did not relate to any allegations in plaintiff's complaint. Later, the court granted plaintiff's motion for reconsideration and allowed the evidence to be admitted, indicating that plaintiff could amend her complaint to reflect an allegation regarding the LEIN check. Defendants argue on appeal that the trial court had no good cause to allow plaintiff to amend her complaint. We agree. As stated in *Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973), amendments should be freely allowed in the absence of a dilatory motive, undue prejudice, or futility. Here, there was no evidence of a dilatory motive, and numerous pretrial pleadings gave defendant notice that the LEIN check was in issue. We find, however, that the amendment was essentially futile, since the LEIN check was unrelated to any *adverse employment treatment*, see *Kocenda v Detroit Edison Co*, 139 Mich App 721, 726; 363 NW2d 20 (1984), and therefore could not support a finding of retaliation. Nor was the LEIN evidence relevant to show Hicks' allegedly nonchalant attitude toward the mistreatment of plaintiff, since there was no evidence presented as to *why* Hicks recommended a three-day suspension instead of the ten-day suspension recommended by a higher supervisor. Indeed, there may have been a justifiable reason, such as a previously overlooked city policy, for the reduction in the suspension. Accordingly, we conclude that the trial court abused its discretion by allowing the amendment of the complaint and the admission of the LEIN check information.

Nevertheless, the erroneous admission of evidence can be rendered harmless if it did not more probably than not affect the outcome of the case. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Given the clear evidence supporting plaintiff's sexual harassment claim (see *supra*) and her retaliation claim (see *infra*), we find that the admission of the relatively inconsequential LEIN check evidence could not reasonably have affected the outcome of the case. No error requiring reversal occurred.

IV

Next, defendants argue that the jury's verdict with regard to defamation was against the great weight of the evidence. This Court set forth the elements for a defamation claim in *Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432, 443-444; 566 NW2d 661 (1997):

> The elements of a defamation claim are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.

In her appellate brief, plaintiff cites *Heritage Optical Center, Inc v Levine*, 137 Mich App 793, 797; 359 NW2d 210 (1984), in which this Court stated that "[f]alse and malicious statements injurious to a person in his or her business are actionable per se, and special damages need not be alleged or proved." Plaintiff contends that because defendants called her a liar and a "f--- up" and stated that having her help a new employee was like "the blind leading the blind," there was sufficient evidence of statements injurious to plaintiff's business reputation such that special harm did not have to be proven. Defendants, on the other hand, contend that special damages had to be shown because the alleged defamatory comments were mere insults and were not injurious to plaintiff's business reputation.

We agree with defendants. The only comment directly relating to plaintiff's profession was the statement that she was a poor worker and that having her help a new employee was like "the blind leading the blind." The test for this comment is as follows:

> . . . the real, practical test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must, or naturally and presumably will, occasion pecuniary damage to the person of whom it is spoken. [*Croton v Gillis*, 104 Mich App 104, 109; 304 NW2d 820 (1981), quoting *Henkel v Schaub*, 94 Mich 542, 547-548; 54 NW2d 293 (1893).]

We hold that the words spoken about plaintiff's ability to do her job were not words that "naturally and presumably [would] occasion pecuniary damage" to plaintiff. Indeed, the circumstances surrounding the statement should be considered in deciding whether a statement is defamatory, see *Sawabini v Desenberg*, 143 Mich App 373, 380; 372 NW2d 559 (1985), and *Morganroth v Whitall*, 161 Mich App 785, 790; 411 NW2d 859 (1987), and here, the allegedly damaging words were spoken (1) in the context of an abusive tirade against plaintiff, and (2) within earshot of individuals who had worked with plaintiff for months or years and who had the ability to form their own opinions about plaintiff's work abilities. See *Swabini, supra* at 380 (the tone, purpose, and audience of a statement are relevant in determining whether the statement was defamatory). Therefore, plaintiff did not establish the existence of defamatory statements that were actionable per se, and she was thus obligated to prove the existence of special damages in order to succeed on her defamation claim. Since she did not prove the existence of such damages, the jury verdict with regard to defamation was improper and must be reversed.[1]

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[1] We note that defendants frame this issue as one involving the great weight of the evidence. Normally, if a verdict is found to be against the great weight of the evidence, a new trial is allowed. See *Huhtala v Anderson*, 15 Mich App 693, 698-699; 167 NW2d 352 (1969). However, the *substance* of

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V

Next, plaintiff argues that the jury's verdict with regard to tortious interference with a business relationship was against the great weight of the evidence. This Court set forth the elements of a tortious interference with a business relationship claim in *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996):

> The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.

In *Wood v Herndon Investigations, Inc*, 186 Mich App 495, 500; 465 NW2d 5 (1990), this Court indicated that a plaintiff alleging tortious interference with a business relationship must allege the intentional doing of a "per se wrongful" act or the doing of a lawful act with malice for the purpose of invading the business relationship of another.

At first blush, it appears that plaintiff might have established a "per se wrongful" act that interfered with her business relationship with the City of Detroit, since the vulgar and abusive comments made to her by Hill and Hopson were unjustified and indirectly led to the end of her employment by causing her mental distress. Moreover, this Court has stated that if a defendant acts out of "a personal motive to harm" the plaintiff, a tortious interference claim may be justified. See *Feaheny v Caldwell*, 175 Mich App 291, 305; 437 NW2d 358 (1989). There was a reasonable inference that Hill and Hopson, by making abusive comments, intended to harm plaintiff, at least in the sense of hurting her feelings.

However, in *Prysak v R L Polk Co*, 193 Mich App 1, 12-14; 483 NW2d 629 (1992), this Court implicitly indicated that to be actionable, even a "per se wrongful" act must be done *for the purpose of invading a business relationship*. Here, plaintiff produced no evidence that any defendant acted for the purpose of terminating or otherwise interfering with her relationship with the City of Detroit. Instead, the evidence showed that defendants were motivated by personal animosity (Hill and Hopson) or indifference or contempt (Hicks). Accordingly, the jury's finding on tortious interference was improper. We reverse the jury's verdict with regard to intentional interference with a business relationship.[2]

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defendants' argument indicates that, in actuality, they are arguing that there was *insufficient evidence* to support the jury's verdict and that, accordingly, their motion for judgment notwithstanding the verdict should have been granted. We agree that the motion for judgment notwithstanding the verdict should have been granted with respect to the defamation claim, and for this reason we do *not* remand for a new trial on this claim. See *Id*.

[2] Again, defendants frame this issue as one involving the great weight of the evidence, whereas the substance of their argument indicates that, in actuality, they are arguing that there was insufficient

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VI

Next, defendants argue that the trial court should have granted their motion for a new trial because the retaliation verdict was against the great weight of the evidence.

To succeed on a retaliation theory, a plaintiff must show that a defendant took adverse employment action against her because she engaged in a protected activity, such as filing a sexual harassment claim. See *Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989), and *Howard v Canteen Corp*, 192 Mich App 427, 434; 481 NW2d 718 (1992), overruled in part on other grounds by *Rafferty v Markovitz*, 461 Mich 265 (1999). Here, defendants admitted that they transferred plaintiff to the day shift as a result of her claim, and plaintiff testified that this caused her hardship with child care and a reduction in pay. Accordingly, the jury's finding on retaliation found reasonable support in the evidence. See *DeLisle, supra* at 661.

VII

Next, defendants argue that MCL 600.6303; MSA 27A.6303 mandated that the economic damages in this case be offset by the amount of worker's compensation benefits plaintiff received. This issue involves statutory interpretation. We review issues of statutory interpretation de novo. *Ewing v City of Detroit*, 237 Mich App 696, 699; 604 NW2d 787 (1999).

MCL 600.6303; MSA 27A.6303 states, in relevant part, as follows:

> (1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. . . . [I]f the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source. . . .
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> * * *
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> (4) As used in this section, "collateral source" means . . . worker's compensation benefits . . . .

Defendants argue that this statute is clear and unambiguous in indicating that the jury's award of economic damages must be offset by any worker's compensation benefits plaintiff received. Plaintiff, on

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evidence to support the jury's verdict and that their motion for judgment notwithstanding the verdict should have been granted. As with the defamation claim, we agree that the motion for judgment notwithstanding the verdict should have been granted with respect to the tortious interference claim, and, accordingly, we do *not* remand for a new trial on this claim. See *Id*.

the other hand, relies, in part, on *Eide v Kelsey-Hayes Co*, 154 Mich App 142; 397

NW2d 532 (1986), reversed in part on other grounds 431 Mich 26 (1988), in arguing that an offset is unnecessary in cases brought under the civil rights act. The trial court also relied on *Eide* in refusing to reduce the jury's award of damages.

In *Eide, supra* at 159-160, a sexual harassment case, the Court stated the following:

> Finally, we reject defendant's contention that it is entitled to a credit against the judgment for sickness benefits and workers' compensation benefits which it paid to Mrs. Eide. Claims under the Elliott-Larsen Civil Rights Act are independent of claims under the workers' compensation act or for company provided benefits.

At first blush, *Eide* appears to be dispositive in holding that no offset for worker's compensation benefits is necessary in a case under the civil rights act. However, in *McCalla v Ellis*, 180 Mich App 372, 386-387; 446 NW2d 904 (1989), and *Slayton v Michigan Host, Inc*, 144 Mich App 535, 559; 376 NW2d 664 (1985), this Court indicated that a civil rights plaintiff may recover only those damages *unrelated to the disability already compensated for by worker's compensation* (*McCalla* and *Slayton* did not indicate on which statute they relied in reaching this conclusion). There appears, then, to be a conflict among *Eide, McCalla,* and *Slayton*.

It must be noted, however, that all three of these cases predate 1990 and therefore do not constitute *binding* authority on this Court. See 7.215(H)(1). With this in mind, we reject defendants' argument. MCL 600.6303; MSA 27A.6303, on which defendants' exclusively rely in support of their argument, indicates that damages must be reduced in "a personal injury action." The preceding section, MCL 600.6301; MSA 27A.6301, defines "personal injury" as "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm." Here, plaintiff's damages resulted not from bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm; instead, they resulted from purely emotional harm. Therefore, under the plain language of the statute, MCL 600.6303; MSA 27A.6303 does not require a reduction in plaintiff's damages. See *Sun Valley Food Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), and *Adrian School District v Michigan Public School Employees Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998) (indicating that a clear and unambiguous statute must be enforced as written).

We reverse the jury's verdict with regard to the claims of defamation and tortious interference with a business relationship but uphold the verdict with respect to the remaining two claims. Because the jury did not apportion damages among the four claims but instead rendered a general award of damages, and because we are vacating two of the claims, a remand for a new trial on damages is necessary. See *Hughes v Michoff*, 288 Mich 259, 260-262; 284 NW 718 (1939). Accordingly, we need not address defendants' argument that the trial court should have granted their motion for remittitur.

Affirmed in part, reversed in part, and remanded for a new trial on damages. We do not retain jurisdiction.[3]

/s/ Patrick M. Meter
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin

[3] We note that defendants filed a "supplemental authority" document in which they asked the Court to take judicial notice of *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999), in which the Supreme Court held that a plaintiff may not recover duplicate attorney fees under both the civil rights act and the mediation rules. We do not consider *Rafferty*, however, since the alleged duplication of fees in this case was not raised as an issue below or argued as an issue in defendants' appeal.