IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Wilford P. BEARDEN,
Plaintiff-Respondent,
Cross-Appellant,
v.
N. W. E., INC.,
dba Fantasyland, II,
an Oregon corporation,
Defendant-Appellant,
Cross-Respondent,
and
Steven WIENER,
Defendant.

Clackamas County Circuit Court
CV12030202; A159352

Michael C. Wetzel, Judge.

Argued and submitted August 15, 2017.

Steven M. Wilker argued the cause for appellant-cross-respondent. On the briefs were Robyn Ridler Aoyagi, Corbett Gordon, and Tonkon Torp LLP.

Shenoa Payne argued the cause for respondent-cross-appellant. Also on the briefs was Shenoa Payne Attorney at Law PC.

Before Ortega, Presiding Judge, and Egan, Chief Judge, and Powers, Judge.*

ORTEGA, P. J.

Affirmed on appeal; reversed and remanded on cross-appeal.

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* Egan, C. J., *vice* Garrett, J. pro tempore.

ORTEGA, P. J.

In this employment discrimination action, defendant N. W. E., Inc., appeals a general judgment, entered after a bench trial, in favor of plaintiff on both plaintiff's sexual harassment claim under ORS 659A.030(1)(b) and his retaliation claim under ORS 659A.030(1)(f). Defendant assigns error to the court's denial of its motions for directed verdict on both claims. We reject all of defendant's contentions and, consequently, affirm on appeal. On cross-appeal, plaintiff appeals a supplemental judgment in which the court awarded him costs and attorney fees but awarded less than he requested. He contends that the court erred in three ways in reducing the amount of the awards. We agree with his first two contentions and, consequently, reverse the supplemental judgment and remand for further consideration.

We begin with defendant's appeal. On appeal of the denial of a motion for directed verdict, we review for "any evidence to support the verdict in plaintiff's favor." *Woodbury v. CH2M Hill, Inc.*, 335 Or 154, 159, 61 P3d 918 (2003). That is, we view the evidence, and all reasonable inferences from it, in the light most favorable to the plaintiff. *Id.*

Viewed in that light, the relevant facts are as follows. Plaintiff, who was 67 years old and openly gay, worked for defendant as a clerk in a pornographic video store doing business as Fantasyland II. The store was open 24 hours a day, with one clerk per 8-hour shift for three shifts during each 24-hour period. Each clerk would see the clerk from the previous shift for a few minutes at the start of his or her shift and would see the clerk from the next shift for a few minutes at the end of his or her shift. Otherwise, at least in the evening, the clerks worked alone. During the three months when plaintiff worked at the store, the manager, Mansur, would come in around 10 or 10:30 a.m., and she was frequently unavailable. Frank, the clerk who worked the day shift (from 7 a.m. to 3 p.m.), trained plaintiff and gave him instructions on all of his job functions, either directly or by telling another clerk to tell plaintiff. Frank interviewed and hired one of the other clerks, Arbow.

One of the clerks would buy copies of Busted magazine, which is a publication that prints mug shots of arrestees,

and leave them on the counter or on a shelf where the other clerks could look through them. Some of the clerks, not including plaintiff, would write remarks about the arrestees depicted in the mug shots, including sexual remarks. The remarks included comments about women and men, most often based on their appearance but also occasionally based on the crimes for which they had been arrested. Not all of the remarks were sexual, but most were. Commonly appearing remarks included "I'd bang her" and "I'd fuck it," as well as more specific comments like "Cock n her butt" and "Insert cock here" next to a circle drawn over a woman's mouth. Comments apparently based on the particular crime of arrest included, "Grandpa's gonna buttfuck you!" and "I'm gonna buttfuck you!" for charges of sodomy; "You damn kids look at my wiener!" for a charge of indecent exposure; and "I take it in the butt" for a charge of sex abuse.

The clerk who bought the magazines complained to Frank about the lewd remarks that his coworkers would write in them, and she responded, "Yeah, they're idiots." Plaintiff also told Frank that the notations were totally inappropriate in the workplace, and she responded, "Boys will be boys." Eventually, plaintiff removed the Busted magazines from the store.

The clerks would also assign arrestees from Busted to another clerk's "team," for example, noting above a mug shot, "Andy's Team," as a kind of game. In that way, one of the clerks assigned to plaintiff's "team" a man who had been arrested for murder and abuse of a corpse. That notation was unique; no other arrestees were assigned to plaintiff's "team" in any of the magazines. "Abuse corpse" was underlined several times.

The clerk who made the notation testified that, in light of widespread knowledge of the crimes of Jeffrey Dahmer, it was reasonable to understand the suggestion to be that plaintiff was interested in sexually abusing corpses. Plaintiff saw that notation and wrote, "Don't use my name for this crap" above the photograph. He was offended by the notation and assumed that it had a sexual connotation.

Later in plaintiff's employment, another clerk, Arbow, drew a cartoon about plaintiff. Entitled "Terror at the

Porn Store," the cartoon begins, "It was a dark and stormy afternoon at the porn store, when, all of a sudden…" The next page depicts plaintiff, naked, with excrement exploding out of his anal region. Plaintiff is depicted as saying, "I'm Paul, motherfuckers, and I'm goin' ta shit on you!" The next panel shows plaintiff collapsed face down in the excrement and is captioned, "His anus betrays him!" The cartoon concludes, "And the reign of terror ends at Fantasyland."

Plaintiff found the cartoon under the stack of magazines on the shelf during his night shift on Wednesday, July 7, 2010. He showed it to Frank at the end of his shift, at 7 a.m. on the morning of Thursday, July 8. He said, "I need to talk to you about this." He told her, "You know, this is sexual harassment. Something's got to be done about it." And he told her he thought it was offensive because he was gay.

Frank was distracted because she was trying to count her till while he was showing her the cartoon. She asked him to work it out with Arbow directly and, if he could not, then to talk to Mansur about it. Plaintiff handed the cartoon to Frank but could not say whether she looked at all the pages. Plaintiff took the cartoon back and kept it.

The same Thursday morning, Mansur called Arbow at home. Mansur "read [Arbow] the riot act" and told him that, if plaintiff pursued legal action for sexual harassment based on the cartoon, Arbow could lose his job.[1] When plaintiff learned of that call, he inferred that Frank must have passed on his complaint about the cartoon to Mansur, because there was no other way Mansur could have known about it.

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[1] Defendant asserts that plaintiff's testimony on this subject, which is the most detailed (but not the only) source of information in the record about the contents of Mansur's call to Arbow, was hearsay and, consequently, that we should not rely on it for the truth of the matter asserted. *See generally* OEC 802 (hearsay rule). At trial, plaintiff's testimony about Arbow's account of Arbow's conversation with Mansur was offered to show that Mansur knew that Arbow had drawn a sexually harassing cartoon involving plaintiff. Defendant did not object to the testimony on hearsay (or any other) grounds. Nor does defendant assign error on appeal to the admission of that testimony. Consequently, we rely on plaintiff's testimony for the truth of Arbow's statements to plaintiff recounting the call from Mansur to Arbow.

The evening of the next Sunday, July 11, Arbow delivered a letter of apology to plaintiff after his shift, and he and plaintiff discussed the cartoon. Plaintiff told Arbow that he found it offensive because it was sexual and, as a gay person, he didn't appreciate it. Arbow begged plaintiff not to pursue it further and told plaintiff what Mansur had said in her call to Arbow on Thursday morning. Plaintiff thanked Arbow for his apology. The two shook hands and agreed to start fresh.

On the evening of the next day, Monday, July 12, plaintiff arrived for work and found another clerk and Arbow behind the counter. The other clerk said that he would work plaintiff's shift and that plaintiff should go home. Plaintiff tried to call Mansur, but he could not reach her; the number listed for her in the store just rang without any option to leave a voice message.

When plaintiff woke up around 8:30 the next morning, Tuesday, July 13, he received a message from Mansur asking him to come to the store before 12:30 p.m., when she would be leaving. He brought a copy of the cartoon, because he assumed that was what they would be talking about. He arrived around noon. Mansur handed him his paycheck and told him that his services were no longer needed. Plaintiff was angry; he put the cartoon down on the counter, called Mansur and Frank, who was also present, a rude name, and left.

Although Mansur told plaintiff that his services were no longer needed and made the same notation on a terminated-employee notice in his personnel file, she had scheduled him to work on the weekly schedule posted the previous Friday, July 9. He was immediately replaced with a new clerk. As a result of the harassment and Mansur's termination of plaintiff, plaintiff suffered depression and anxiety related to, among other things, his sexual orientation.

Plaintiff alleged (1) that defendant discriminated against him on the basis of his sex and sexual orientation and (2) that defendant retaliated against him for complaining about sexual harassment. The trial court found in favor of plaintiff on both his claims, and, on appeal, defendant

challenges the court's denial of its motions for directed verdict on both claims. We begin with its fifth assignment of error, in which it challenges the court's denial of its motion for directed verdict on the retaliation claim. Defendant contends that that was error on the grounds that there is no evidence that Mansur knew that plaintiff had engaged in protected activity—a complaint of sexual harassment—when she terminated his employment. *See Lacasse v. Owen*, 278 Or App 24, 32-33, 37, 373 P3d 1178 (2016) (knowledge of the protected conduct by the decisionmaker or someone who influenced the decision is necessary to show causation under ORS 659A.030(1)(f)); *see also Ossanna v. Nike, Inc.*, 365 Or 196, 210-11, ___ P3d ___ (2019) (explaining causation in Oregon employment law).

However, that argument fails to account for our standard of review. As set out above, the record includes evidence that, the same morning that plaintiff complained of sexual harassment to Frank, Mansur called Arbow and told him that he could lose his job if plaintiff pursued legal action for sexual harassment based on the cartoon. From that evidence, a reasonable factfinder could infer, as the trial court appears to have done, that Frank informed Mansur that plaintiff had complained of sexual harassment, and, thus, that Mansur knew of plaintiff's protected activity when she decided to terminate his employment. The court did not err in denying defendant's motion for directed verdict on the retaliation claim.

We turn to defendant's first four assignments of error, all of which relate to the sexual harassment claim. ORS 659A.030(1)(b) provides that it is an unlawful employment practice "[f]or an employer, because of an individual's *** sex [or] sexual orientation *** to discriminate against the individual in compensation or in terms, conditions or privileges of employment." "For sexual harassment to be actionable, 'it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Pameco Corp.*, 170 Or App 164, 177, 12 P3d 524 (2000) (quoting *Mains v. II Morrow, Inc.*, 128 Or App 625, 635, 877 P2d 88 (1994) (some internal quotation marks and brackets omitted)). "In

determining whether conduct has created an intimidating, hostile, or offensive working environment, we apply an objective standard, that is, we determine whether a reasonable person would arrive at that conclusion." *Fred Meyer, Inc. v. BOLI*, 152 Or App 302, 307, 954 P2d 804 (1998) (internal quotation marks omitted); *cf. Fuller v. City of Oakland*, 47 F3d 1522, 1527 (9th Cir 1995) (under Title VII, "[w]hether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics" as the plaintiff). "[W]hen the plaintiff claims that a co-worker created a hostile environment through sexual harassment, the employer is liable if the employer knew or should have known of the harassment and failed to take prompt remedial action ***." *Harris*, 170 Or App at 177 (internal quotation marks omitted).

In four assignments of error, defendant contends that (1) there is no evidence to support a finding that the harassment was "because of" plaintiff's sexual orientation or gender; (2) there is no evidence to support a finding that the conduct would be objectively sexually offensive to a gay male; (3) there is no evidence that the sexual harassment was severe or pervasive enough to alter the conditions of plaintiff's employment and create an abusive working environment; and (4) there is no evidence that defendant knew or should have known of the harassment.

We reject defendant's first two assignments of error without extended discussion. Contrary to defendant's argument, in light of our standard of review, the fact that it might be *possible* for a trier of fact to find that some of the harassment was not sexual in nature is immaterial if, as is the case here, it is also possible for a trier of fact to find that it was sexual and objectively offensive to a gay man. Likewise, testimony by the offending clerks, which defendant presented below and relies on on appeal, that they did not intend those things to be sexual in nature does not change the outcome. The documents speak for themselves, and a reasonable fact finder could find, as the trial court did, that they were sexual and objectively offensive to a gay man and that, despite testimony to the contrary by the perpetrators, the harassment was aimed at plaintiff because he was gay.

Next we consider whether the evidence, viewed in the light most favorable to plaintiff, allows a determination that the sexual harassment was severe or pervasive enough to alter the conditions of employment and create an abusive working environment. We conclude that it does. The sexually offensive comments in the Busted magazines were numerous, and, despite at least two complaints to Frank, they continued unabated over the three months that plaintiff worked at the store, until plaintiff removed the magazines from the store. In addition to dozens of general sexually offensive comments, the magazines contained one uniquely offensive sexual suggestion that was directed specifically at plaintiff. Regardless of whether that harassment, alone, would be sufficient to create an abusive working environment, it provides a backdrop against which another incident of more severe harassment has the potential to create an abusive working environment.

That brings us to the cartoon, which, as described above, was an explicit and humiliating depiction of plaintiff's body and bodily functions that carried an extremely offensive and personal sexual implication. We also find it significant that, when plaintiff complained about that depiction, Mansur fired him without even discussing it with him. Plaintiff's work environment was affected not only by the humiliating and demeaning actions of his coworkers, but also by Mansur's actions, which indicated her lack of interest in remedying the harassment. *Cf. Sheriff v. Midwest Health Partners, P.C.*, 619 F3d 923, 930-31 (8th Cir 2010) (considering the employer's response to the plaintiff's complaints in evaluating whether the plaintiff had been exposed to a hostile work environment). Viewing the evidence, and all inferences, in the light most favorable to plaintiff, the remarks in Busted, including the one directed specifically at plaintiff, together with the cartoon and its aftermath, were sufficient to "alter the conditions of [plaintiff's] employment and create an abusive working environment." *Harris*, 170 Or App at 177 (internal quotation marks omitted).

Finally, for the same reasons explained above regarding the retaliation claim, 298 Or App at 703-04, we reject defendant's fourth assignment of error. The question here is whether there is any evidence to show that defendant

"knew or should have known of the harassment and failed to take prompt remedial action ***." *Harris*, 170 Or App at 177 (internal quotation marks omitted).

Defendant attacks the trial court's finding that plaintiff filed a complaint with management when he discussed the cartoon with Frank; defendant asserts that the evidence demonstrates that Frank was not a manager. However, ultimately, that reasoning is immaterial to the outcome here because, as explained above with respect to the retaliation claim, the evidence supports the court's finding that Frank informed Mansur of plaintiff's complaint. That is, the evidence shows that Mansur knew that Arbow had drawn a cartoon involving plaintiff and she knew that plaintiff perceived the cartoon as sexual harassment. Even assuming that Mansur lacked knowledge of *all* the details of the cartoon, the information that she did have was plainly enough to require an investigation, which would quickly have yielded the information that plaintiff's complaint was legitimate. Thus, there is evidence that defendant knew or should have known of the harassment.[2]

We turn to plaintiff's cross-appeal. Plaintiff contends that the trial court abused its discretion in three ways when it awarded him less than he requested in attorney fees and costs. First, he contends, the court should not have excluded fees incurred for time spent on an administrative proceeding before the Oregon Bureau of Labor and Industries (BOLI). Second, he argues that it abused its discretion in awarding less than the full amount of fees he requested in connection with his motion for summary judgment, which was denied. And third, he contends that the court incorrectly awarded him less than the full amount he requested for costs.

The parties agree that, because he prevailed on a civil rights claim, plaintiff was entitled to attorney fees under ORS 20.107. *See also* ORS 659A.885(1) (in a civil rights action, the court may allow "reasonable attorney fees at trial and on appeal"). "Whether a party is entitled to attorney

[2] Defendant has not developed any argument that defendant had to know of all of the harassment, not just the cartoon; consequently, we do not consider that question.

fees presents a question of law, but whether fees are reasonable is a factual determination that we review for abuse of discretion." *Makarios-Oregon, LLC v. Ross Dress-for-Less, Inc.*, 293 Or App 732, 739, 430 P3d 142, *adh'd to as modified on recons*, 295 Or App 449, 430 P3d 1125 (2018). "Although a court has broad discretion when determining an appropriate award, its exercise of discretion must be accompanied by findings regarding the relevant ORS 20.075 factors." *Id.* at 741; *see also* ORS 20.075 (listing factors that the court shall consider in determining the amount of a fee award). "To be adequate, the court's findings need not be lengthy or complex, but they must describe the relevant facts and legal criteria underlying the court's decision in terms that are sufficiently clear to permit meaningful appellate review." *Makarios-Oregon, LLC*, 293 Or App at 741; *see McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 185, 190-91, 957 P2d 1200 (1998) (establishing the standard for the sufficiency of fee-award findings).

We begin with plaintiff's first contention, which is that the court erred when it declined to award attorney fees incurred for proceedings before BOLI. Before the trial court, plaintiff sought $2,625 in fees for the time his attorney spent on the BOLI proceeding and presented evidence that participation in a proceeding before BOLI is important to a plaintiff's later-filed civil case because it involves an investigation, a third-party evaluator, and access to the defendant's stated reasons for its actions.

"[W]here a party succeeds on a fee-generating claim that shares common issues with other claims or unsuccessful efforts, time spent working on those other matters is recoverable if it 'was reasonably incurred to achieve the success that the party eventually enjoyed in the litigation.'" *Makarios-Oregon, LLC*, 293 Or App at 745 (internal quotation marks and brackets omitted); *Fadel v. El-Tobgy*, 245 Or App 696, 709-10, 264 P3d 150 (2011), *rev den*, 351 Or 675 (2012) (that principle applied to fees incurred in connection with an earlier complaint that had been dismissed). That principle applies here and entitles plaintiff to an award of the fees incurred during the BOLI proceeding that were "reasonably incurred to achieve the success that ***

plaintiff eventually enjoyed in the litigation." *Fadel*, 245 Or App at 709.

Because the trial court categorically rejected the fees incurred in the BOLI proceedings, it did not evaluate how much of that amount was reasonably incurred to achieve plaintiff's success in the litigation. Consequently, we reverse the supplemental judgment and remand for the court to conduct that analysis. *See id.* at 710 (affirming where the trial court had "reviewed each of the time entries in plaintiff's detailed attorney-fee petition to determine which of the fees incurred before the second complaint was filed were reasonably related to the prosecution of the action and the result obtained and which were not" (internal quotation marks omitted)); *Makarios-Oregon, LLC*, 293 Or App at 746 (vacating and remanding for the trial court to determine "whether counsel's work on the unsuccessful motion to dismiss involved issues in common with the claim on which defendant prevailed and was reasonably performed in helping defendant prevail" (internal quotation marks and brackets omitted)).

We turn to plaintiff's second argument, which is that the court abused its discretion in awarding him only half of the amount he requested in connection with his motion for summary judgment on the retaliation claim. The court reasoned as follows: "[T]he motion for summary judgment by plaintiff's counsel was filed in good faith; however, the court finds the amount of fees incurred in connection with the motion, $14,342, excessive, especially in light of the factual nature of employment discrimination cases."

On appeal, plaintiff argues that the court's reasoning does not support its reduction of his fee award; he contends that we should reverse or, at a minimum, vacate and remand that aspect of the judgment for the court to explain its decision sufficiently for meaningful appellate review. *See McCarthy*, 327 Or at 190-91 (a court must explain its reasoning with respect to the amount of an attorney fee award sufficiently for meaningful appellate review).

We conclude that the court's explanation is insufficient for our review. As defendant notes, the court appears

to have relied on some factor or factors other than the single one it articulated. In the absence of a more complete explanation of why the requested amount was excessive, the record is insufficiently clear for meaningful appellate review. *Id.*; *see also Frakes v. Nay*, 254 Or App 236, 256, 295 P3d 94 (2012), *rev den*, 353 Or 747 (2013) (remanding for reconsideration where, on the existing record, "we would be required to speculate as to how the trial court reached its $50,000 attorney fee award").

We turn to plaintiff's final argument on cross-appeal, which is that the court erred in awarding less in costs than plaintiff requested. Plaintiff argues that most of the costs that the court declined to award were recoverable as part of attorney fees under *Robinowitz v. Pozzi*, 127 Or App 464, 470, 872 P2d 993, *rev den*, 320 Or 109 (1994). There, we explained that a court should consider "special overhead expenses," like photocopying, telephone charges, and postage, that an attorney attributes and bills to individual clients, rather than adding to the attorney's hourly rate, "in setting a reasonable attorney fee."

Below, however, plaintiff requested the disputed items in his cost bill. When defendant pointed out that those items were not allowable as costs, *see* ORCP 68 A(2) (defining costs and disbursements), plaintiff responded by citing the cases on which he relies on appeal, which, as explained above, hold that items like those may be allowable as *fees*. However, plaintiff did not ask the court to consider those items as part of his requested attorney fees. Relying on ORCP 68 A(2), the court denied plaintiff's request and reduced his cost award accordingly.

On appeal, plaintiff now contends that the court abused its discretion in declining to award those items as costs. The problem with that argument is that plaintiff does not contend that those items should have been awarded as costs under ORCP 68 A(2); he contends that they should have been awarded as fees. However, because he never requested them as part of his fee award, the court was not alerted to the fact that it should consider them in deciding on a reasonable fee award. The court was not required to

undertake that evaluation in the absence of a request from plaintiff.

Affirmed on appeal; reversed and remanded on cross-appeal.