

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

January 27, 2015 Session

On Remand from the Supreme Court of Tennessee Oct. 29, 2014

JIM FERGUSON v. MIDDLE TENNESSEE STATE UNIVERSITY

Appeal from the Chancery Court for Rutherford County

No. 036336MI John D. Wootten, Jr., Judge

No. M2012-00890-COA-R3-CV - Filed March 11, 2015

This case is before us on remand from the Tennessee Supreme Court. Appellee/Employee filed suit against Appellant/Employer for discrimination. Appellee later filed a separate suit for retaliation and malicious harassment. The two lawsuits were consolidated in the trial court. The case was tried to a jury, which returned a verdict in favor of Appellant on the retaliation claim. The jury awarded Appellant \$3,000,000 in compensatory damages. In *Ferguson v. Middle Tennessee State University*, No. M2012-00890-COA-R3-CV, 2013 WL 1304490 (Tenn. Ct. App. March 28, 2013), we reversed the jury verdict, finding that Appellant had failed to prove the knowledge element of his retaliation claim. In *Ferguson v. Middle Tennessee State University*, ___ S.W.3d ___, No. M2012-00890-SC-R11-CV, 2014 WL 5463941 (Tenn. Oct. 29, 2014), the Supreme Court reversed this Court and remanded the case to us for the sole purpose of reviewing the award of damages. Because there is material evidence on which a reasonable jury could conclude that Appellant was entitled to \$3,000,000 in compensatory damages, we affirm and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is
Affirmed and Remanded**

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which ARNOLD B. GOLDIN, J., and BRANDON O. GIBSON, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor General;

William J. Marett, Jr., Senior Counsel; Leslie Ann Bridges, Senior Counsel; and Casey N. Miley, Assistant Attorney General., Nashville, Tennessee, for the appellant, Middle Tennessee State University.

Michelle M. Benjamin, Winchester, Tennessee, for the appellee, Jim Ferguson.

OPINION

I. Background

In *Ferguson v. Middle Tennessee State University*, No. M2012-00890-COA-R3-CV, 2013 WL 1304490 (Tenn. Ct. App. March 28, 2013) (“*Ferguson I*”), this Court reversed the trial court’s judgment on a jury verdict in favor of the Appellee Jim Ferguson, who is of Japanese-American ancestry. The jury found that Mr. Ferguson’s employer, Middle Tennessee State University (“MTSU,” or “Appellant”) retaliated against Mr. Ferguson in violation of Title VII of the Civil Rights Acts of 1964 (“Title VII”), 42 U.S.C. §2000e-3 (2006), and the Tennessee Human Rights Act (“THRA”), Tennessee Code Annotated Section 4-21-301. Title VII and the THRA prohibit an employer or its agent from retaliating against an employee who engages in protected activity, such as filing an employment discrimination lawsuit.

The relevant facts here are not disputed. For purposes of continuity, we recite a brief case history based upon our opinion in *Ferguson I* and our Supreme Court’s opinion in *Ferguson v. Middle Tennessee State University*, ___ S.W.3d ___, No. M2012-00890-SC-R11-CV, 2014 WL 5463941 (Tenn. Oct. 29, 2014) (“*Ferguson Supreme Court*”). Mr. Ferguson began working for MTSU in May 1987. Beginning in 1997, he worked in the Housing Department under the supervision of Ms. Dana Byrd. On December 29, 1998, Mr. Ferguson had shoulder surgery. When he returned to work in February 1999, Mr. Ferguson’s doctor placed certain restrictions on the work he could perform. It is undisputed that Ms. Byrd knew that Mr. Ferguson was working under medical restrictions. Nonetheless, Ms. Byrd directed him to do work that exceeded these restrictions. Mr. Ferguson believed that the assignments Ms. Byrd mandated were more onerous than the work assigned to other maintenance employees. Accordingly, in March 1999, Mr. Ferguson complained to Karen Milstead, a benefits specialist with MTSU’s Human Resources Department. For a time thereafter, Mr. Ferguson was assigned lighter duty; however, on or about August 9, 2002, Mr. Ferguson injured his shoulder and back at work. Mr. Ferguson received medical care and a new set of work restrictions. He took the restrictions to Ms. Byrd, who advised him that his duties would comply with the restrictions. Mr. Ferguson testified that he could hardly walk, but Ms. Byrd still had him perform overhead tasks. Ultimately, Mr. Ferguson’s injuries required back surgery. Mr. Ferguson’s recuperation kept him off work until March

2003.

In November or December 2002, during the time he was recuperating from back surgery, Mr. Ferguson filed an employment discrimination complaint against MTSU with the Equal Employment Opportunity Commission (“EEOC”). The EEOC complaint alleged discrimination on the basis of race and national origin and further alleged that Mr. Ferguson was subjected to a hostile work environment.

Mr. Ferguson returned to work on March 17, 2003. However, within days of returning to work, on March 27, 2003, Mr. Ferguson filed his first lawsuit against MTSU. In his complaint, Mr. Ferguson alleged discrimination on the basis of disability, race, and national origin under the Americans with Disabilities Act, Title VII, the THRA, and the Tennessee Handicap Act. After filing his lawsuit, Mr. Ferguson continued to report for work. On April 7, 2003, four days after MTSU was served with Mr. Ferguson’s employment discrimination lawsuit, Ms. Byrd ordered Mr. Ferguson to perform tasks that required physical labor beyond his medical restrictions.

On April 22, 2003, Mr. Ferguson received further work restrictions from his doctor. These included limited overhead work with his right shoulder and only occasional lifting over twenty pounds. The next day, Ms. Byrd ordered Mr. Ferguson to convert the exterior lights on all campus buildings to flood lights. On April 24, 2003, Ms. Byrd ordered Mr. Ferguson to check all exit lights in every dormitory. Both of these tasks required Mr. Ferguson to perform overhead work that exceeded his medical restrictions.

In May 2003, Mr. Ferguson informed Ms. Byrd that his job duties were causing him severe pain and increasing numbness in his legs. Mr. Ferguson believed that Ms. Byrd treated him worse after he made this complaint. On Sunday, June 1, 2003, Ms. Byrd called Mr. Ferguson in to work to unstop a drain. Mr. Ferguson and another maintenance employee observed that they would need an auger, which weighed between seventy-five and one hundred pounds. While using the auger, Mr. Ferguson experienced numbness in his legs and had to leave.

On June 11, 2003, Mr. Ferguson was having some physical difficulties performing his job, and he asked Ms. Byrd to provide him with assistance. She denied his request, and Mr. Ferguson had to perform the work alone. Later than day, he fell down a flight of stairs, injuring his leg and suffering a concussion. When he returned to work on June 16, 2003, Ms. Byrd presented him with thirty-nine work orders; on June 18, 2003, he received fifty-three work orders. Many of these tasks required him to exceed his medical restrictions. His condition continued to deteriorate. Mr. Ferguson left MTSU in December of 2003; he was approved for accidental disability retirement on June 22, 2004.

On April 21, 2004, Mr. Ferguson filed another lawsuit against MTSU, alleging unlawful

retaliation under Title VII and the THRA. In December 2004, this lawsuit was consolidated with his discrimination lawsuit. On April 19, 2010, Mr. Ferguson filed an amended complaint that included the previously filed discrimination and retaliation claims and also added a claim for malicious harassment under the THRA.

The lawsuit was tried to a jury for eight days, beginning in November 2011. Mr. Ferguson's discrimination claim was based on two theories—a disparate treatment claim and a hostile work environment claim alleging workplace harassment—both involving his Japanese-American heritage. At the conclusion of Mr. Ferguson's proof, MTSU moved for directed verdict under Tennessee Rule of Civil Procedure 50.01. The trial court granted the motion as to Mr. Ferguson's hostile work environment claim but denied it as to all other claims. The jury found in favor of MTSU on Mr. Ferguson's disparate treatment and malicious harassment claims, but it found in favor of Mr. Ferguson on his retaliation claim. The jury awarded Mr. Ferguson \$3,000,000 in damages. On November 29, 2011, the trial court entered its judgment on the jury verdict in the amount of \$3,000,000. On December 21, 2011, MTSU filed a motion for directed verdict, partial new trial, and/or remittitur, arguing, *inter alia*, that the “jury's \$3,000,000 compensatory damages award for [Mr. Ferguson's] retaliation claim is excessive, is not supported by the evidence, and is not warranted by law.” By order entered April 17, 2012, the trial court denied MTSU's motion for directed verdict, partial new trial, and/or remittitur, stating, in relevant part:

Considering the totality of the circumstances, the overall weight of the evidence, and the parties' stipulation to [Mr. Ferguson's] approximate 1.1 million dollar[s] in economic losses, the Court finds that a \$3,000,000 verdict is not a large leap and is not an excessive award for compensatory damages. For these reasons, the Court den[ies] the motion for remittitur.

MTSU appealed the judgment to this Court in *Ferguson I*.

In *Ferguson I*, we noted that it was undisputed that some persons in MTSU's administration knew of Mr. Ferguson's EEOC complaint and lawsuit. *Ferguson I*, 2013 WL 1304490, at *8. However, we rejected the view that general corporate knowledge of an employee's protected activity is sufficient to establish the knowledge requirement of a *prima facie* case of retaliation. *Id.* Thus, we concluded that Mr. Ferguson failed to submit to the jury material evidence showing that Ms. Byrd personally knew of his lawsuit at the time she took adverse action against him. *Id.* at *9.

Mr. Ferguson filed a Tennessee Rule of Appellate Procedure 11 appeal in the Tennessee Supreme Court, which appeal was granted. In *Ferguson Supreme Court*, the Supreme Court

reversed our holding in *Ferguson I*. Specifically, the Supreme Court reasoned that the “close temporal proximity of the service of the lawsuit on MTSU and the increase in Mr. Ferguson’s work duties could be considered by the jury in determining not if, but when, Ms. Byrd acquired the requisite knowledge.” *Ferguson Supreme Court*, 2014 WL 5463941, at *7. The Court conceded that “temporal proximity, by itself, is not enough to prove knowledge, but can be considered by the jury, along with other direct and circumstantial evidence of knowledge, to support an inference that the employer had the requisite knowledge.” *Id.* The Court further noted that the jury’s decision rested, in part, on the “jury’s assessment of the credibility. . . of MTSU’s witnesses who claimed ignorance of the protected activity of the whistleblowing employee.” *Id.* Accordingly, the Supreme Court concluded that the jury could have reasonably found that Ms. Byrd was not a credible witness and that there was circumstantial evidence that she knew Mr. Ferguson had filed a lawsuit before she materially increased his work load. *Id.* The Supreme Court found that this Court had erred in “substituting its judgment for that of the jury, which had the opportunity to evaluate the credibility of both Mr. Ferguson and Ms. Byrd.” *Id.* at *8. Finding that the jury’s verdict was supported by material evidence, the Supreme Court reversed this Court’s holding in *Ferguson I*, thereby affirming the jury’s finding that MTSU had retaliated against Mr. Ferguson for filing his discrimination lawsuit. The Supreme Court then remanded the case to us “for review of the award of compensatory damages.” *Id.*

II. Issue

Based upon the Supreme Court’s mandate, the sole issue for review, as stated by MTSU is:

Whether MTSU is entitled to a new trial or, in the alternative, a remittitur because the jury’s \$3,000,000 compensatory damage award is excessive and not supported by the evidence.

III. Standard of Review

Although the calculation of damages is primarily for the jury, the trial court has the statutory prerogative to adjust damage awards to accomplish justice between the parties and to avoid the time and expense of a new trial. Tenn. Code Ann. §§ 20-10-101, 102; *Long v. Mattingly*, 797 S.W.2d 889, 896 (Tenn. Ct. App.1990). Pursuant to this power, the trial court, acting as the thirteenth juror, may grant remittitur “when the trial judge is of the opinion that the verdict in favor of a party should be reduced.” *Bates v. Jackson*, 639 S.W.2d 925, 926 (Tenn. 1980); *Benson v. Tennessee Valley Elec. Co-op.*, 868 S.W.2d 630, 639 (Tenn. Ct. App.1993). But where a trial judge has approved a jury award and denied a motion for remittitur, the reviewing court should afford deference to those who heard the evidence. *See*

Thrailkill v. Patterson, 879 S.W.2d 836, 841 (Tenn.1994). When the defendant seeks remittitur on appeal, appellate review is subject to the rule that if there is any material evidence to support the award, it should not be disturbed. *Pettus v. Hurst*, 882 S.W.2d 783, 788 (Tenn. Ct. App.1993) (citing Tenn. R. App. P. 13(d)). Therefore, we must limit our factual review to determining whether the record contains material evidence that supports an award of \$3,000,000. *Poole v. Kroger Co.*, 604 S.W.2d 52, 54 (Tenn.1980); *Pettus v. Hurst*, 882 S.W.2d 783, 788 (Tenn. Ct. App.1993).

IV. Analysis

During the trial of this case, the parties stipulated that, if called to testify, Mr. Ferguson's economics expert, Michael Costello, would opine that Mr. Ferguson's economic losses totaled \$1,094,000. MTSU does not dispute this portion of the jury's award. However, it contends that the jury's award of approximately \$2,000,000 over the stipulated amount is excessive in light of the evidence presented. MTSU notes that the jury considered three claims: discrimination, retaliation, and malicious harassment. MTSU argues that Mr. Ferguson "sought \$3,000,000 representing both compensatory and punitive damages **for all three claims.**" (Emphasis added). Because Mr. Ferguson prevailed only on his retaliation claim, MTSU contends that the jury erred in awarding the full measure of compensatory damages Mr. Ferguson requested because such award included compensatory damages for the two claims that failed.

Concerning his prayer for damages, Mr. Ferguson's April 19, 2010 amended complaint stated, in relevant part:

WHEREFORE PREMISES CONSIDERED, Plaintiff demands the following additional relief from the defendant:

- A. Damages reflecting lost income and benefits due to forced early retirement as a result of supervisor's malicious acts;
- B. Compensatory damages in the amount of \$3,000,000.

While it is true that the amended complaint averred causes of action for discrimination, retaliation, and malicious harassment, there is nothing in the prayer for relief to indicate that the request for compensatory damages encompasses all three claims. Mr. Ferguson asks, broadly, for all of the damages from lost income and benefits; these damages are reflected in the stipulated economic losses of \$1,094,000. However, Mr. Ferguson asks separately for compensatory damages up to \$3,000,000. "Taking the strongest view of the evidence and allowing all reasonable inferences in favor of Mr. Ferguson, as we must given the jury

verdict in his favor,” *Ferguson Supreme Court*, 2014 WL 5463941, at *8, we conclude that the compensatory damages request could have been for any one of Mr. Ferguson’s claims, or for all three of them.

MTSU further contends that the \$2,000,000 above the stipulated economic losses is for “non-economic, emotional damages;” this conclusion is not clear from the record. As noted by MTSU in its appellate brief, the jury verdict form is not itemized. MTSU, therefore, assumes that the jury “awarded [Mr. Ferguson] the entire \$1,094,000 projected by Costello, plus \$1,906,000 in non-economic, emotional damages, totaling \$3,000,000.” Even if MTSU’s assumption is correct, this does not, *ipso facto*, lead to a conclusion that the jury award was excessive. The only dispositive question is whether there is material evidence to support the jury’s award in excess of the stipulated economic losses. To answer that question, we turn to the record.

The evidence shows that Mr. Ferguson was 45 years old at the time he qualified for disability as a result of his injuries. There is no dispute that Ms. Byrd ordered Mr. Ferguson to perform tasks that were in excess of his medical restrictions, despite the fact that she knew about the restrictions. Mr. Ferguson was made to do overhead work and to lift and use heavy equipment such as the auger. He testified that he was in fear of losing his job and medical benefits if he refused.

Mr. Ferguson concedes that he was progressing well until he fell down the stairs on June 11, 2003. This accident caused another back injury that required surgery and, specifically, fusion of his L4-L5 vertebrae and the implantation of a dorsal column stimulator, which he will need to have for the rest of his life to control his significant pain. In its brief, MTSU argues that because the worst of Mr. Ferguson’s injuries occurred while he was performing an activity, i.e., climbing stairs, that was not prohibited by his medical restriction, he cannot recover compensatory damages based upon injuries sustained in the fall. We disagree. The evidence indicates that on the same day as the fall, but prior to it, Mr. Ferguson requested that Ms. Byrd assign someone to help with the tasks that were outside his medical restriction. She refused his request. Accordingly, on the day Mr. Ferguson fell down the stairs, Ms. Byrd made him perform tasks that did not comply with his medical restrictions. Mr. Ferguson testified that performing these tasks had aggravated his pain and had made his legs weak. Accordingly, a reasonable jury could infer that had Mr. Ferguson received help with the tasks as requested, his legs would not have been weakened and his pain would not have been acute at the time he traversed the stairs. Furthermore, because the verdict form is not itemized, there is no basis to conclude that the portion of the damage award over the stipulated economic losses was specifically for injuries sustained in the fall.

The evidence shows that Mr. Ferguson has suffered myriad symptoms, including nausea,

vomiting, severe headaches, dizziness, memory loss, and pain. In 2008, Dr. Howard Kirshner, a graduate of Harvard Medical School and a neurologist at Vanderbilt University, examined Mr. Ferguson. Dr. Kirshner concluded that Mr. Ferguson was suffering from a traumatic brain injury (or post-concussive syndrome) as a result of the 2003 fall. Dr. Kirshner explained that Mr. Ferguson would be required to take the medication Aricept to help with his memory issues and opined that, in the absence of this medication, Mr. Ferguson's condition would "probably go down again."

In addition to Dr. Kirshner, both of Mr. Ferguson's adult children testified about the change in their father's behavior since the accident. James Ferguson, Jr., observed that Mr. Ferguson became child-like in his actions. He further observed that Mr. Ferguson's condition had strained his parents' marriage. Testimony indicated that Mr. Ferguson had become dependent on a cane for walking and that he had no stamina to perform even minor household tasks such as sweeping.

Mr. Ferguson's younger son, Charlie Ferguson, testified that his father would often get lost trying to find his way to places he had often visited. Charlie Ferguson also recalled that, before his symptoms worsened, Mr. Ferguson would usually come home from work and prepare dinner for the family. Mr. Ferguson also volunteered as a Boy Scout leader and went camping, hiking, and canoeing with his troop. However, after his fall, Mr. Ferguson had difficulty standing long enough to cook dinner and could not perform basic household maintenance, which he had always done in the past. Charlie Ferguson also testified that Mr. Ferguson would forget things and that he lost much of his ability to recall stories from his childhood and life experiences. In addition, Charlie Ferguson testified that his father was no longer able to drive due to his confusion and the fact that he had to take pain medication.

Without outlining all of the evidence adduced at the hearing, suffice it to say there is ample material evidence from which the jury could have concluded that Mr. Ferguson would suffer the effects of his disability for the remainder of his life. From the totality of the circumstance, and in light of Mr. Ferguson's relatively young age, we cannot conclude that the trial court erred in affirming the \$3,000,000 jury verdict in Mr. Ferguson's favor.

V. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against the Appellant, Middle Tennessee State University, and its surety, for all of which execution may issue if necessary.

KENNY ARMSTRONG, JUDGE