IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JERRY WILLIAMS, individually, Appellant, v. BOSE CORPORATION, a Delaware corporation; DON CHRISTENSEN and "JANE DOE" CHRISTENSEN, and the marital community composed thereof, Respondents.	)	No. 65713-5-I DIVISION ONE UNPUBLISHED OPINION FILED: November 21, 2011

Appelwick, J. — Williams appeals the trial court's partial summary judgment dismissal of his claims of racial discrimination; disparate treatment; hostile work environment; unlawful retaliation; negligent hiring, retention, and supervision; negligent

and intentional infliction of emotional distress; and the trial court's denial of his motion for reconsideration. He argues that the trial court abused its discretion with several evidentiary rulings and in denying his motion for a new trial, because the evidence did not support the jury's verdict for Bose on his claim of hostile work environment. No genuine issues of material fact precluded dismissal of Williams's claims. The jury verdict was supported by the evidence. The trial court did not abuse its discretion with its evidentiary rulings or by denying Williams's motion for a new trial. We affirm.

FACTS

Jerry Williams began work at the Bose Corporation in a retail store in Bellevue, Washington, in November 2006 as a temporary and part-time salesperson. He was hired by Don Christensen, then the store manager. In December 2006, Williams was hired as a regular part-time employee. Williams worked approximately 25 hours a week. In 2007, Williams recruited a friend, Eric Wong, to join him working at Bose. Christensen was no longer the store manager, having been demoted to assistant manager for performance problems and replaced by Mike Krassner. In December 2007, Williams asked that his hours be increased from part-time to full-time, and his request was granted. Williams remained a full-time Bose employee until his voluntary resignation in June 2008.

On November 4, 2007, Williams made a formal complaint about Christensen to Katherine Autry-Schiffgens, the lead demonstration specialist at the store. Williams stated that Christensen used terms that were "racial." Autry-Schiffgens forwarded Williams's complaint to store manager Krassner. Krassner then notified Bose Human Resources and began an investigation. Krassner determined that, as it was the first

complaint against Christensen, the appropriate response was to counsel Christensen about his behavior and issue him a verbal warning that future inappropriate behavior would lead to termination. The response was consistent with Bose's discipline policy. Christensen apologized to the store's employees, including Williams.

In early 2008, Williams learned that his wife was being transferred to Texas for her job. He alerted Bose of his intention to move to Texas and become a police officer. On February 4, 2008, Williams placed a call to the Bose Human Resources Solution Center. He spoke with Human Resources Specialist Marissa Abrams. The call was focused first on concerns about Krassner's handling of Williams's request for medical leave. These concerns are not a basis for this action. At the end of the call, Williams told Abrams that he also had concerns about Christensen, and his use of the word "nigger" in his presence on two occasions. One occasion was in March 2007, in reference to a movie scene. The second occasion was in August or September 2007, while Williams and Christensen were discussing Williams's future career in law enforcement and Christensen asked Williams what he would do if a white person called him the word "nigger" in the course of his police duty. Both of these instances occurred before Williams's November 2007 complaint, which resulted in Christensen receiving a warning and counseling. Williams also filed an online complaint the following day with the Washington State Human Rights Commission, alleging the same facts he had described to Abrams.

After Williams's conversation with Abrams, Bose contacted Williams to address his complaint. Williams declined to meet with anyone from Bose or provide additional information about his complaint without his attorney present. Because the comments

by Christensen that Williams complained of to Abrams occurred prior to Christensen's counseling, Bose's course of action was to remind Christensen about its policy against harassment. Krassner issued a written warning to Christensen stating: "We want to ensure that there is no slippage in the improvement you have shown in the three months following your performance counseling in the fall. . . . Any further instances could result in additional disciplinary action, up to and including termination of your employment with Bose Corporation."[1]

After resigning from Bose, Williams worked for a time at Study Island. Then, he applied to become a police officer with the Arlington Police Department in Texas. In his application, he was required to answer questions about his prior employment and about his physical and psychological well-being. Following a psychological exam, Police Psychologist Dr. Brandy Miller concluded that Williams passed the exam, showed no signs of a psychological disorder, and noted that Williams denied having any recent stressors of significance. Williams was eventually offered a position with the Arlington Police Department, and has worked there since 2009.

Williams sued Bose and Christensen, asserting claims of racial discrimination; disparate treatment; hostile work environment; unlawful retaliation; negligent hiring, retention, and supervision; and both negligent and intentional infliction of emotional distress. The trial court granted summary judgment for Bose on all of Williams's claims except for the hostile work environment claim. That claim proceeded to trial where the jury ruled in Bose's favor. On June 2, 2010, Williams filed a motion for reconsideration

[1] The new warning was issued in part as a response to a new offensive comment that Christensen made to Krassner, not to Williams, in March 2008.

and a new trial. The trial court denied that motion. Williams timely appeals.

DISCUSSION

I. Evidentiary Rulings

Williams argues that the trial court erred in several of its evidentiary rulings and that he should be entitled to a new trial. We review a trial court's decisions to admit or exclude evidence for an abuse of discretion. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. Id. at 668-69.

A. Stipulated Description of the Song

During his testimony at trial, Williams was asked about a song, "Rednecks" by Randy Newman, that Williams alleged Christensen would play regularly while Christensen and Williams were opening the store. The song contained the word "nigger" in several places. Williams's counsel asked to play the song for the jury, for demonstrative purposes. Outside the presence of the jury, Bose's counsel objected to the song being played on grounds that it was prejudicial and that the exhibit was not timely disclosed on Williams's exhibit list. Rather than play the song, the trial court proposed a stipulated agreement that would explain the song's lyrics and content, including the fact that it contains the word "nigger" in the refrain. Williams's attorney agreed to the stipulation.

Williams nevertheless argues that the trial court's decision unreasonably prejudiced his case. Bose responds that Williams is precluded from making this argument, having explicitly agreed to the handling of the contents of the song. Bose points to the invited error doctrine, under which a party may not set up error at trial and

then complain about the error on appeal. See State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). We agree that Williams may not challenge this issue on appeal.

Even if his objection was not precluded by the invited error doctrine, Williams presents no evidence that the trial court abused its discretion by declining to play the song. He argues that the song was relevant under ER 401 and 402, and that trial courts should normally admit an original document or recording. But, the trial court explained that the song was satirical and stated that there was a substantial risk that by playing it the jury would misperceive the lyrics or be unduly prejudiced.

We hold that the trial court did not abuse its discretion by using the stipulated agreement.

B. Expert Witness Testimony

Williams next argues that the trial court erred by excluding testimony from one of his expert witnesses, Dr. Albert Black, and that this error was highly prejudicial. An expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact. Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The law prohibits legal opinions on an ultimate legal issue under the guise of expert testimony. King County Fire Prot. Dist. No. 16 v. Housing Auth. of King County, 123 Wn.2d 819, 826 n.14, 872 P.2d 516 (1994).

Bose argued that Dr. Black was unqualified, his testimony was unhelpful to the

jury, and he sought to testify about an ultimate question of law. Dr. Black's testimony was directed at whether Bose violated its own anti-harassment policy, whether Williams suffered from depression and emotional distress, and whether or not there was a hostile work environment at Bose. Yet, Dr. Black had no training in the law, human resources, or medicine. And, while Williams argues that Dr. Black would merely have provided context, Dr. Black's proposed testimony directly lays out a definition of "hostile work environment" and thus impermissibly goes to the ultimate legal issue. Moreover, Dr. Black did not have legal knowledge about the elements of a hostile work environment claim, instead relying on Williams's counsel to draft that portion of his report that defined a hostile work environment. He lacked the qualifications necessary to diagnose Williams's medical condition. The trial court did not abuse its discretion by excluding Dr. Black's testimony.

C. Subsequent Employment Application Information

Williams argues the trial court erred in admitting video deposition testimony from Kelly Shoaf, his supervisor at Study Island, where he worked after leaving Bose and before he was accepted into his job with the Arlington Police Department. Shoaf testified about the prehire interview she conducted with Williams in September 2008, when she inquired about his previous employer, Bose. She said Williams responded that he liked his manager at Bose and that he had fun while employed there. In a pretrial motion, Williams had objected broadly to Shoaf's testimony, arguing that it was irrelevant and should be inadmissible.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Salas, 168 Wn.2d at 671. When

evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. Id. This testimony is directly relevant to the issue of whether Williams found the environment at Bose to be offensive or abusive. Nothing about it suggests it would evoke an emotional response or cause unfair prejudice. The trial court properly considered the probative value and the risk of prejudice, limiting the subject matter of Shoaf's testimony.

Williams similarly assigns error to the trial court's admission of evidence regarding his hiring process and employment at the Arlington Police Department, a job he applied for and received after resigning from Bose. He assigns error to the admission of testimony from Bose's witness, Officer Ricky Eudy. Officer Eudy was an investigator for the police department who conducted a background check on Williams to determine whether Williams met the general requirements to be hired as a police officer. The trial court admitted Officer Eudy's testimony over Williams's objection, but carefully limited it. He was not allowed to testify about the hiring criteria at the police department or whether Williams's statements, if found to be false, would disqualify him. Officer Eudy testified only that in October 2008, Williams did not disclose that he had a pending lawsuit against Bose, nor did he tell Officer Eudy that he suffered from post traumatic stress disorder. Williams asserts that this testimony created a risk of prejudice and should have been excluded. Here, Officer Eudy's testimony was highly relevant to challenge Williams's credibility and his claims of emotional distress. Nothing suggests it was an appeal to emotion over reason or would result in unfair prejudice. The trial court properly considered whether any risk of prejudice was outweighed by probative value.

We hold that the trial court did not abuse its discretion by admitting either Officer Eudy's or Shoaf's testimony.

D. Results of Subsequent Mental Health Screening

Finally, Williams argues the trial court erred by admitting testimony from Dr. Brandy Miller, the psychologist who examined Williams in September 2008 to determine his fitness for duty with the Arlington Police Department as a police officer. He contends that Dr. Miller's testimony was more prejudicial than probative and should have been excluded.

Dr. Miller's testimony was relevant and highly probative to rebut testimony from Williams and his expert witness, clinical psychologist Dr. Michael Kane, that Williams suffered deep emotional stress and post traumatic stress disorder as a result of discrimination at Bose. Dr. Kane further testified that Williams was deeply troubled and suffered from ongoing psychological trauma because of his time at Bose. By contrast, Dr. Miller determined, after a series of tests some three months after Williams had left Bose that Williams showed no evidence of psychological problems and had expressly denied any recent stressors of significance.

Williams argues that Dr. Miller's testimony improperly suggested that Williams either lied to Dr. Miller and the police department, or that Williams was a sociopath. The relevant portion of Dr. Miller's testimony appears as follows:

> In your professional opinion, based on -- as a licensed psychologist, based on your years of experience, would you expect that the testing that you administer as part of the pre-hire psychological testing for the Arlington Police Department would be able to detect severe and permanent emotional distress in a candidate?
>
> A. I would say generally yes, but not always. So there is a

> possibility that we would miss it, but I would say most of the time we would be able to identify it.
>
> Q. And in what instances would you think that you might miss it?
>
> A. If you've got someone who's a sociopath and is really good at lying and is smart enough to know what to put and to pull the validity scales and to charm and, you know, fool me, then that can happen.

But, as Bose points out, Dr. Miller's testimony was in response to general questions about when a psychologist might or might not be able to detect severe emotional distress and did not relate to any questions about Williams in particular. Additionally, Bose made no attempt to characterize Williams as a sociopath. Dr. Miller's testimony was relevant to rebut his claim that he suffered from emotional distress and post traumatic stress disorder, and the probative value of this testimony outweighed any risk of prejudice. We hold that the trial court did not abuse its discretion by admitting Dr. Miller's testimony.

II. Summary Judgment on Statutory and Common Law Claims

Williams appeals the trial court's partial summary judgment on several of his claims. This court reviews summary judgment orders de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). Employment discrimination cases often present genuine factual disputes that preclude summary judgment. See Sangster v. Albertson's, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000). But, for a plaintiff alleging discrimination in the workplace to overcome a motion for summary judgment, the worker must do more than express an opinion or make conclusory statements. Id. To defeat summary judgment, the

employee must establish specific and material facts to support each element of the prima facie case. Id.

A. Racial Discrimination-Disparate Treatment

Williams argues that the trial court erred by granting Bose's motion for summary judgment on his claims of racial discrimination and disparate treatment. Employers are prohibited from discriminating against employees because of race. RCW 49.60.030, .180; Johnson v. Dept. of Soc. & Health Servs., 80 Wn. App. 212, 226, 907 P.2d 1223 (1996). To establish a prima facie case of racial discrimination based on disparate treatment, Williams must show that he (1) belongs to a protected class; (2) was treated less favorably in the terms or conditions of his employment than a similarly situated, nonprotected employee, and (3) the nonprotected "comparator" was doing substantially the same work. Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 81, 98 P.3d 1222 (2004).

As both parties point out, a plaintiff can establish a prima facie case of such disparate treatment in one of two ways: either through the McDonnell Douglas burden-shifting test, or through direct evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Kastanis v. Educ. Emps. Credit Union, 122 Wn.2d 483, 490-91, 859 P.2d 26, 865 P.2d 507 (1993). Under McDonnell Douglas, Williams has the initial burden to prove a prima facie case. Kastanis, 122 Wn.2d at 490. If Williams establishes a prima facie framework, the burden shifts to Bose to present evidence of a legitimate nondiscriminatory reason for its actions. Id. at 490. The burden then shifts back to Williams to produce evidence that the asserted reason was merely a pretext. Id. at 491. To establish a prima facie case by direct

evidence, Williams must provide direct evidence that Bose acted with a discriminatory motive and that the discriminatory motivation was a "'significant or substantial factor in an employment decision.'" Id. at 491 (quoting Buckley v. Hosp. Corp. of Am., Inc., 758 F.2d 1525, 1530 (11th Cir. 1985)).

Under the direct evidence route, Williams was required to show that he suffered some adverse employment decision or action. Id. Williams argues that he suffered such an adverse employment action, because Bose management treated him differently than his co-workers by not communicating with him as openly after he complained about the racial comments. He contends that this lack of communication made his job more difficult. Williams cites to Kirby to support his argument that he suffered an adverse employment action. Kirby v. City of Tacoma, 124 Wn. App. 454, 465, 98 P.3d 827 (2004). But, Kirby does not support his argument. That case stated:

> An actionable adverse employment action must involve a change in employment conditions that is more than an "'inconvenience or alteration of job responsibilities,'" such as reducing an employee's workload and pay. In contrast, yelling at an employee or threatening to fire an employee is not an adverse employment action.

Id. (citations omitted) (quoting DeGuiseppe v. Vill. of Bellwood, 68 F.3d 187, 192 (7th.cir. 1995)). Here, Williams testified that during the entire time of his employment, he never had any complaints about the number of hours or shifts he was working, the salary he received, or about promotions and performance reviews. He was never demoted or fired, but resigned and moved to Texas with his wife. Williams's allegation of a lack of open communication does not amount to an actionable adverse employment action.

Williams also suggests he suffered an adverse employment action, because he

had to endure a hostile work environment. This argument merely attempts to bootstrap his disparate treatment claim to his separate hostile work environment claim. We treat Williams's hostile work environment claim separately below and not as a basis to sustain his disparate treatment claim.

Williams has failed to present evidence showing that he suffered an adverse employment action and has thus failed to make a prima facie case of disparate treatment. We affirm the trial court's decision to grant summary judgment on his disparate treatment claim.

B. Unlawful Retaliation

Williams next argues the trial court erred by granting summary judgment on his retaliation claim. To make a prima facie case of retaliatory conduct, Williams must show that (1) he engaged in statutorily protected activity, (2) Bose took adverse employment action against him, and (3) there was a causal link between the protected activity and the adverse action. Frisino v. Seattle Sch. Dist. No. 1, 160 Wn. App. 765, 785, 249 P.3d 1044, review denied, 172 Wn.2d 1013, 259 P.3d 1109 (2011). Williams raises the same arguments as above, including that management would not communicate as openly with him and that he endured a hostile work environment. We reject those arguments for the same reasons—they do not establish that Williams suffered an adverse employment action and thus cannot support his prima facie case of retaliation.

Additionally, Williams argues on appeal that he suffered an adverse employment action because he was constructively discharged. He did not plead constructive discharge below. After he complained of the discrimination, his manager, Krassner,

frequently questioned him about when he was going to resign. Williams initially characterized Kassner's questions as a "constant bother," though he never complained to Bose about Krassner's inquiries. He suggests that the questioning was intended to drive him out of the company in retaliation for his having reported the prior discrimination. Williams contends that this questioning was an adverse employment action that ultimately led to his departure and amounted to a constructive discharge.

To show constructive discharge, Williams is required to show: (1) a deliberate act that made his working conditions so intolerable that a reasonable person would have felt compelled to resign and (2) that he actually resigned because of the conditions and not for some other reason. Washington v. Boeing Co., 105 Wn. App. 1, 15, 19 P.3d 1041 (2000). A resignation is presumed to be voluntary, and the employee must introduce evidence to rebut that presumption. Id. at 16. Williams failed to make such a showing. He testified that he knew well in advance of his resignation that he would need to leave Bose to move to Texas with his wife. Indeed, once Williams alerted his employer of his intention to move to Texas and become a police officer, it was not unreasonable for his manager to inquire about the specific date he planned to leave. The record does not clearly establish whether Krassner made any such inquiry prior to Williams providing notice. If he did, the evidence does not establish that it rose to a level intolerable for a reasonable person. The constructive discharge that Williams alleges thus cannot comprise an adverse employment action taken against him.

Williams has failed to make a prima facie showing of retaliatory conduct. We affirm summary judgment on Williams's unlawful retaliation claim.

C. Common Law Claims

Williams concedes his common law claims were asserted solely in the alternative, in the event that his statutory claims under the law against discrimination were unsuccessful. In its motion for summary judgment, Bose argued that Williams's common law claims were duplicative of his statutory claims of discrimination, retaliation, and hostile work environment under the Washington Law Against Discrimination, chapter 49.60 RCW. Even after Bose presented this argument in its motion for summary judgment, Williams failed to respond with any argument or assert any different facts to support his common law claims. His sole response was to state, "should any [of his Washington Law Against Discrimination] causes of action be dismissed by the jury, the jury could alternatively rule favorably that defendants are liable for one of the common law claims, such as outrage or negligent hiring." A plaintiff may not maintain a separate and duplicative claim for emotional distress based on the same facts that support a claim under the law against discrimination. See Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 864-65, 991 P.2d 1182 (2000). If Williams had alleged some additional facts, or alleged that his emotional distress was the result of some additional nondiscriminatory conduct, he could maintain a separate common law claim. Chea v. Men's Wearhouse, Inc., 85 Wn. App. 405, 413-14, 932 P.2d 1261, 971 P.2d 520 (1997). But, Williams's separate common law claims are not compensable, where the only factual basis for them is his failed discrimination claim. Id. at 413.

We affirm the trial court's decision to grant Bose summary judgment on Williams's common law claims.

III. Hostile Work Environment Claim

Williams's only cause of action to survive summary judgment and go to trial was his hostile work environment claim. The jury rendered a verdict against him on that

claim. Williams argues that the trial court erred by denying his motion for a new trial. Williams's motion relied on two provisions of CR 59(a):

> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.
>
> . . . .
>
> (9) That substantial justice has not been done.

Abuse of discretion is the standard of review for an order denying a motion for a new trial. Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000). Discretion is abused if a feeling of prejudice has been engendered or located in the minds of the jury preventing a fair trial. Id. The grant of a motion for a new trial is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party. Kohfeld v. United Pac. Ins. Co., 85 Wn. App. 34, 41, 931 P.2d 911 (1997). We defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence, viewing all evidence in the light most favorable to Bose as the nonmoving party. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

RCW 49.60.180(3) prohibits an employer from discriminating against an employee in terms or conditions of employment because of race. There are four

elements Williams must show to prevail on his hostile work environment claim: (1) the harassment was unwelcome, (2) the harassment was because he was a member of a protected class, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer. Antonius v. King County, 153 Wn.2d 256, 261, 103 P.3d 729 (2004); Davis v. W. One Auto. Grp., 140 Wn. App. 449, 457, 166 P.3d 807 (2007). Williams asserts that each of these elements was met at trial. Bose's response focuses on the third element. To satisfy that element, an employer's conduct must be so pervasive as to alter the terms and conditions of employment and create an abusive working environment. Clarke v. Office of the Attorney Gen., 133 Wn. App. 767, 787, 138 P.3d 144 (2006). The conduct must be both objectively abusive and subjectively perceived as abusive by the victim. Id. Bose argues that Williams failed to meet his burden of proving both the objective and subjective elements.

Here, there was substantial evidence and reasonable inferences to sustain the trial court's verdict. Bose presented uncontested evidence that Williams did not *subjectively* perceive the environment to be abusive. During the time Williams alleged he was being subject to harassment, Williams asked to become a regular employee and to have his hours increased. He never sought or applied for a different job. He recruited a minority friend to work in the same store as Christensen. He never sought to alter his schedule to minimize his contact with Christensen. He did not complain about abuse from other managers, and actually stated that he preferred working with Christensen to other managers. And, the resignation letter that Williams wrote voluntarily upon his departure stated that he enjoyed working at Bose and it had "truly

been a great experience." Collectively, and viewing this evidence in the light most favorable to Bose, these facts amount to substantial evidence that Williams did not subjectively perceive his work environment to be abusive. Where Williams bore the burden of proving each element of his hostile work environment claim, the jury could reasonably have concluded that he failed to meet this prong of showing that the terms and conditions of his employment were affected.

Additionally, Bose argues that Williams failed to demonstrate the conduct he faced was *objectively* hostile and abusive, so as to alter the terms and conditions of his employment. In making this determination, we look to the totality of the circumstances. Clarke, 133 Wn. App. at 787. "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). Here, there was substantial testimony, from Williams and the witnesses, to support the jury's verdict.

Williams did not allege any physically threatening behavior. There was evidence that his work performance did not suffer; he remained a top salesman at the store. And, while testimony that Williams presented suggested that the alleged harassment was "constant," there was, countervailing evidence that Christensen's inappropriate behavior was limited to several instances, and importantly, occurred only before Williams complained to Bose. Most of the Bose employees who testified could

only recall a limited number of incidents where Christensen behaved inappropriately. And, Williams only made two formal complaints to Bose; the first in November 2007 alleging that Christensen used terms that were "racial" and the second in February 2008 addressing two instances where Christensen used the term "nigger" in conversation with him.[2] This evidence, taken in the light most favorable to Bose as the nonmoving party, is sufficient to sustain the jury's conclusion that the conduct Williams complained of was not severe or pervasive enough to constitute an alteration of the terms of his employment. The jury could reasonably have concluded that Christensen's conduct was neither objectively abusive nor subjectively perceived as abusive.

We hold that the trial court did not abuse its discretion by denying Williams's motion for a new trial.

We affirm.

Appelwick, J.

WE CONCUR:

Leach, A.C.J.

Grosse, J.

[2] Both of the incidents reported in February 2008 occurred prior to Williams's November 2007 complaint. The evidence shows that following Williams's complaint, Bose management took swift and proper action to address the problem, and Christensen's behavior improved following Krassner's warning and counseling; evidence is lacking that Christensen said or did anything racially offensive or objectionable to Williams thereafter.