2003 WL 24009006
United States District Court,
W.D. Missouri, Southern Division.

Cynthia HUFFMAN, Willa Burke, Virginia King, and Equal Employment Opportunity Commission, Plaintiffs,
v.
NEW PRIME, INC. d/b/a Prime, Inc.; Abel Lormand, and Samuel Turner, Defendants.

No. 01–3144–CV–S–0DS–ECF. | Dec. 17, 2003.

Opinion

ORDER (1) DENYING PLAINTIFF BURKE'S MOTION FOR NEW TRIAL, (2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS BURKE AND KING'S MOTION FOR A NEW TRIAL UNDER RULE 59(a), AND (3) GRANTING IN PART AND DENYING IN PART PLAINTIFF EEOC'S RULE 59(a) MOTION FOR A NEW TRIAL

SMITH, J.

***1** Pending are:

(1) Plaintiff Willa Burke's Motion for a New Trial Against Defendant Samuel Turner (Doc. # 495),

(2) Plaintiffs Willa Burke and Virginia King's Motion for a New Trial Under Rule 59(a) (Doc. # 496), and

(3) Plaintiff EEOC's Rule 59(a) Motion for a New Trial (Doc. # 500).

For the following reasons,

(1) Plaintiff Willa Burke's Motion for a New Trial Against Samuel Turner is DENIED,

(2) Plaintiffs Willa Burke and Virginia King's Motion for a New Trial Under Rule 59(a) is GRANTED IN PART and DENIED IN PART, and

(3) Plaintiff EEOC's Rule 59(a) Motion for a New Trial is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

The above-captioned matter was tried to a jury commencing on September 8, 2003, and concluding on September 19, 2003. The jury returned a verdict in favor of Plaintiffs Cynthia Huffman ("Huffman") and the EEOC against New Prime, Inc. ("Prime") on the claim of sexual harassment, awarding $5,000 in actual damages and $80,000 in punitive damages. The jury returned a verdict in favor of Huffman and against Defendant Abel Lormand ("Lormand") on her claim of battery, awarding actual damages in the amount of $1.00 and $10,000 in punitive damages. The jury returned verdicts in favor of Prime with regard to all the claims asserted by Plaintiff Virginia King ("King") and Plaintiff Willa Burke ("Burke").

On October 3, 2003, Plaintiffs King, Burke and the EEOC filed three Motions for New Trial. Plaintiffs argued that a new trial should be granted for the following nine reasons:

(1) The verdicts for Prime entered on King's, Burke's and the EEOC's sexual harassment claims were against the clear weight of evidence;

(2) The verdict for Prime entered on King's and EEOC's claim of sexual harassment resulted from juror confusion with

regard to elements six and seven of instruction No. 39;

(3) The verdict for Prime entered on King's, Burke's and the EEOC's claims of sexual harassment resulted from the Court's error in denying Plaintiffs' oral motion for reconsideration of the Court's summary judgment ruling, which held that truck driver trainers were co-workers rather than supervisors;

(4) The verdicts for Prime on King's, Burke's and the EEOC's claims of constructive discharge were against the clear weight of the evidence;

(5) The verdicts for Prime on King's, Burke's and the EEOC's claims of sexual harassment resulted from the Court's error in giving Instruction Nos. 2, 9, 11 and 14, which instructed the jury to consider each claim separately;

(6) The verdicts for Prime on King's, Burke's and the EEOC's claims for constructive discharge resulted from juror confusion regarding defense counsel's misstatement in closing arguments that the "knew or should have known" standard applied to the discharge claims;

(7) All the verdicts rendered in favor of Prime resulted from the Court's error in refusing Plaintiffs' proffered agency instruction, which was based on Eighth Circuit Model Instruction 8.01;

***2** (8) The Court erred in not admitted evidence of other bad acts of Prime; and
(9) The verdict entered against Burke and for Turner on her claims of assault and battery were against the clear weight of the evidence.[1]

The Court will address these arguments individually.

II. STANDARD

"The district court may order a new trial where it is convinced that the verdict goes against the clear weight of the evidence or where a miscarriage of justice will result. While the district court's discretion is not boundless, it can rely on its own reading of the evidence in determining whether the verdict goes against the clear weight of the evidence." *Mears v. Nationwide Mut. Ins. Co.,* 91 F.3d 1118, 1123 (8th Cir.1996). "The granting or denial of a new trial motion is a matter within the broad discretion of the trial judge that rests upon factual and credibility determinations." *United States v. Bohn,* 508 F.2d 1145, 1150 (8th Cir.1975) (citation omitted).

III. DISCUSSION

A. Sexual Harassment Verdicts Against Clear Weight of Evidence

First, Plaintiffs King, Burke and the EEOC argue that the verdicts returned on their claims of sexual harassment were against the clear weight of the evidence. The Court must "rely on its own reading of the evidence in determining whether the verdict goes against the clear weight of the evidence." *Mears v. Nationwide Mut. Ins. Co.,* 91 F.3d 1118, 1123 (8th Cir.1996) (citation omitted). To succeed in a hostile work environment claim, a plaintiff must show: (1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and her membership in the protected group; and (4) the harassment affected a term, condition or privilege of employment. *Dowd v. United Steelworkers of Am., Local No. 286,* 253 F.3d 1093, 1101 (8th Cir.2001) (citing *Carter v. Chrysler Corp.,* 173 F.3d 693, 700 (8th Cir.1999)). "The harassment must be so severe or pervasive that it alters the conditions of employment and creates an abusive working environment." *Cruzan v. Minneapolis Special Sch. Dist. # 1,* 294 F.3d 981, 984 (8th Cir.2002). The Court will address King's and Burke's claims of sexual harassment separately.

(1) King's and the EEOC's Claims of Sexual Harassment

At trial, considerable evidence was presented to establish that King was a member of a protected group, she was subjected to

unwelcome harassment, the harassment was based on her gender, the harassment was sufficiently severe, and King believed that her work environment was hostile. Neither of the parties contest any of these elements in their briefing of these motions. However, the parties disagree on whether sufficient evidence was presented to establish that Prime knew or should have known of the alleged sexual harassment, and Prime failed to take prompt and appropriate corrective action to end the harassment.

Considerable evidence was presented that Prime should have known of the hostile work environment to which King was subjected. On September 3, 1997, the day the alleged sexual assault occurred, King told her dispatcher, Stan Auman ("Auman"), that she wanted to get off Kenneth Littlejohn's truck because male truck drivers want sexual favors. Shortly after King was taken off of the truck, she called Auman again, telling him that she wanted a female trainer, wanted to come back to the yard, talk to another woman and see a doctor. Auman responded by telling King that Prime truckers were family men. Instead of permitting King to return to Prime, talk to another female, or see a doctor, King was sent out on assignment to California with yet another male trainer. While it was not until five days after the incident of sexual assault occurred that King reported the specific details of the incident, the information provided by King during the five interim days apprized Prime of the hostile work environment in which she labored. The clear weight of the evidence supported both that Prime knew or should have known of the harassment, and Prime, by placing King on another truck with another male trainer and denying her requests to see a doctor or talk to a woman, failed to take prompt and appropriate measures to end the harassment. For these reasons, the Court finds that the jury's verdict regarding King's and the EEOC's claims of sexual harassment was against the clear weight of the evidence. Therefore, King's and the EEOC's Motion for a New Trial is granted on this ground.

(2) Burke's and EEOC's Claims of Sexual Harassment

***3** It is undisputed that Burke is a member of a protected group. Considerable evidence was presented at trial that Burke was subjected to unwelcome harassment, the harassment was based on her gender, the harassment was severe, and Burke believed that her work environment was hostile. The parties dispute whether the clear weight of the evidence supports Prime's knowledge of the harassment.

When Burke first called Prime to obtain permission to get off of Samuel Turner's truck, Prime took Burke off the truck and placed her in a hotel in California. The testimony presented at trial conflicted with regard to when Prime knew of the alleged sexual assault. In fact, Burke testified that she was unsure as to when or what she told the dispatcher when she sought permission to get off of the truck. Regardless of when Burke told Prime that she was sexually assaulted or gave them enough information that would impute such knowledge, it makes no difference because Prime took Burke off the truck when she first asked to be taken off of the truck. The evidence established that Prime took measures reasonably calculated to end the alleged harassment. For these reasons, the Court finds that the jury's verdict with regard to Burke and the EEOC's claim of sexual harassment was *not* against the clear weight of the evidence; therefore, Burke's and the EEOC's Motion for New Trial is denied.

B. Juror Confusion Regarding Instruction 39

Second, Plaintiffs King and EEOC contend that a new trial should be granted because the jury was confused about the meaning of Instruction 39. Specifically, Plaintiffs argue that (1) the jurors did not understand elements six and seven of Instruction 39, and (2) the Court erred in denying Plaintiffs' request to individually interview the jurors regarding their confusion. The instruction read as follows:

INSTRUCTION NO. 39

Your verdict must be for plaintiffs Virginia King and the EEOC on the claim of sexual harassment against defendant New Prime, Inc., if all the following elements have been proved by the greater weight of the evidence:

First, plaintiff Virginia King was subjected to sexual contact by Kenneth Littlejohn;

Second, such conduct was unwelcome;

> Third, such conduct was based on plaintiff's gender;
>
> Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile;
>
> Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed her work environment to be hostile;
>
> Sixth, defendant knew or should have known of the alleged sexual contact by Kenneth Littlejohn; and,
>
> Seventh, defendant failed to take prompt and appropriate corrective action to end the harassment.
>
> If any of the above elements has not been proved by the greater weight of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim.
>
> ***4** To return your verdict on this sexual harassment claim of plaintiff, use Verdict E.

(Doc. # 487). During the jury's deliberations, the Court received the following note: "To the Judge, On instruction *39* we are having problems with two of the rules # 6 and 7 due to the fact the situation had already taken place, so therefore [P]rime could not known, or ended, but the other five is a greater weight of the evidence would this still be or allow us to make an accurate verdict ." Doc. # 483, Court Exhibit No. 2. After reading the note, Plaintiffs' counsel requested that the Court individually interview the jurors about the confusion surrounding elements six and seven of Instruction 39. The Court denied Plaintiffs' request and sent a response to the jury's note stating, "I am unable to offer you any help beyond the instruction I've already given you. I would suggest that each of you re-read instruction 39, in its entirety, then resume your discussion." Doc. # 438, Court Exhibit No. 2. The jury later returned a verdict in favor of Prime on King and the EEOC's claim of sexual harassment.

In support of Plaintiffs' argument that a new trial should be granted due to juror confusion on Instruction 39, they submit the "Verified Statement of Rebecca S. Stith," which sets forth a conversation between Plaintiff's counsel and a juror who called her after the conclusion of the trial about the jury's confusion surrounding Instruction 39. Plaintiffs' reliance on the Verified Statement is misplaced. Pursuant to Rule 606(b) of the Federal Rules of Evidence, a juror cannot provide testimony, affidavits or statements for the purpose of invalidating a verdict.[2] Fed.R.Evid. 606(b). The Eighth Circuit has also held that "the testimony or affidavits of jurors are incompetent to show that jury instructions were misinterpreted." *Scogin v. Century Fitness, Inc .,* 780 F.2d 1316, 1320 (8th Cir.1985). Therefore, the Court will not consider the Verified Statement.

A new trial can be granted if there is instructional error that prejudices a party. *McKay v. WilTel Communication Sys., Inc.,* 87 F.3d 970, 975 (8th Cir.1996). "A judgment will be reversed on the basis of instructional error only if the error affected the substantive rights of the parties. The test is whether the instructions given, taken as a whole and viewed in the light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *Gasper v. Wal–Mart Stores, Inc.,* 270 F.3d 1196, 1200 (8th Cir.2001) (internal citations and quotations omitted).

Instruction 39 mirrors the Eighth Circuit Manual of Model Jury Instruction on sexual harassment by a non-supervisor with no tangible employment action (No. 5.43). Additionally, elements six and seven of Instruction 39 are almost identical to the sixth element of the jury instruction found on page 33 of Plaintiff's Proposed Jury Instructions, which states, "Defendant New Prime, Inc. knew or should have known of the inappropriate comments or conduct of a sexual nature committed by Kenneth Littlejohn or Gerald Felders, and failed to take appropriate preventative or corrective measures." Doc. # 435.

***5** Instruction 39 fairly, accurately and adequately instructed the jury on King and the EEOC's claim of sexual harassment. Also, the Court's denial of Plaintiffs' request to individually interview the jurors about elements six and seven was not error. Therefore, Instruction 39 did not prejudice any of the parties. Plaintiffs' Motion for a New Trial is denied with regard to the argument of juror confusion.

C. Denial of Oral Motion for Reconsideration of Court's Summary Judgment Ruling

Third, Plaintiffs King, Burke and EEOC argue that a new trial should be granted because the verdict for Prime entered on their claims of sexual harassment resulted from the Court's error in denying Plaintiff's oral motion for reconsideration of the Court's summary judgment ruling, which held that truck driver trainers were co-workers rather than supervisors. The evidence presented at trial was consistent with the evidence that accompanied the parties' summary judgment motions. The Court was unpersuaded then and is unpersuaded now that its summary judgment ruling was in error. Plaintiffs' Motion for

New Trial on these grounds is denied.

D. Constructive Discharge Verdicts Against Clear Weight of Evidence

Fourth, Plaintiffs King, Burke and the EEOC claim that a new trial should be granted because the verdicts for Prime on their claims of constructive discharge were against the clear weight of the evidence. An employee is constructively discharged when the employer deliberately renders the employee's working conditions intolerable and, thus, forces her to quit her job. *See Duncan v. Gen. Motors Corp.,* 300 F.3d 928, 935 (8th Cir.2002); *Jackson v. Ark. Dep't of Educ.,* 272 F.3d 1020, 1026 (8th Cir.2002). Plaintiff must show that a "reasonable person, from an objective viewpoint, would find the working conditions intolerable." *Campos v. City of Blue Springs,* 289 F.3d 546, 550 (8th Cir.2002). Additionally, the employee must give her employer a reasonable opportunity to correct the problem. *Id.* at 550–51 (citation omitted). However, if an employee quits without giving her employer a reasonable chance to work out the problem, the employee has not been constructively discharged. *Tidwell v. Meyer's Bakeries, Inc.,* 93 F.3d 490, 494 (8th Cir.1996) (citations omitted); *see also Sowell v. Alumina Ceramics, Inc.,* 251 F.3d 678, 685 (8th Cir.2001) (citations omitted). The Court will analyze Burke's and King's constructive discharge claims individually.

(1) King's and the EEOC's Claims of Constructive Discharge

At trial, evidence was presented that King planned to quit working for Prime once she got off of Gerald Felder's truck. Immediately before getting off of the truck, King sent a QualComm message to Prime stating that she wanted to go home and she wanted her lawyer and Prime's lawyer to battle it out in court. Prime also agreed to place King with another trainer so that she could complete her training. King was called on a few occasions by one of Prime's dispatchers asking King when she planed on returning; however, King never agreed to come back. It was reasonable for the jury to conclude, in light of the evidence, that King did not intend to continue working for Prime. Therefore, the Court concludes that the verdict on King's and the EEOC's claims of constructive discharge was not against the weight of the evidence, and the Motion for New Trial is denied in this respect.

(2) Burke's and the EEOC's Claims of Constructive Discharge

***6** Evidence was presented at trial that after Burke was released to work by her medical providers, she did not want to return to work at Prime. Prime called Burke on several occasions after she was removed from Turner's truck to facilitate Burke's return to Prime. Prime also agreed to place her with a different trainer so that she could complete her training. In light of this evidence, the jury reasonably concluded that Burke was not constructively discharged. Therefore, the Court finds that the jury's verdict on Burke's and the EEOC's claims of constructive discharge was not against the weight of the evidence; Plaintiffs' motion is denied on this ground.

E. Limiting Instruction Nos. 2, 9, 11 and 14

Fifth, Plaintiffs King, Burke and the EEOC argue that the verdicts for Prime on their claims of sexual harassment resulted from the Court's error in giving Instructions 2, 9, 11 and 14. The contested instructions were actually one instruction given on four separate occasions. The instruction read as follows:

INSTRUCTION NO. 2

> This case involves separate, distinct claims by four plaintiffs, the EEOC, Cynthia Huffman, Willa Burke and Virginia King, against three defendants, New Prime, Inc., Abel Lormand and Samuel Turner. No one claim is dependent on any other claim. When evidence is introduced that pertains to only one of the plaintiffs' claims, you are to consider that evidence *only* as to that particular plaintiff's claim against that particular defendant, and you should consider that evidence only as to that particular claim.

(Doc. # 487). Plaintiffs' motion may be granted if the instructional error prejudices a party. *McKay,* 87 F.3d at 975. The instruction, viewed in light of the evidence and applicable law, must fairly and accurately instruct the jury as to the issue.

Gasper, 270 F.3d at 1200.

When other complaints of sexual harassment have not occurred within the same time frame or under the same circumstances as those at issue in the trial, that evidence must be excluded as irrelevant under Rule 402 of the Federal Rules of Civil Procedure. *Williams v. City of Kansas City. Mo.,* 223 F.3d 749, 755 (8th Cir.2000). The events surrounding King's, Burke's and Huffman's claims occurred in 1997, 1999 and 2000, respectively. In addition, the complaints of sexual harassment were made against at least three different individuals. Because some complaints of sexual harassment did not occur in the same time frame or at the hands of the same people, those complaints cannot be considered with regard to other claims of sexual harassment. Therefore, the limiting instruction given by the Court fairly and accurately instructed the jury in light of the evidence of this case and the applicable law. Plaintiff's Motion for New Trial is denied with regard to the limiting instruction.

F. Juror Confusion Regarding Constructive Discharge Standard

Sixth, Plaintiffs King, Burke and the EEOC contend that a new trial should be granted because the verdicts for Prime on their claims for constructive discharge resulted from juror confusion regarding defense counsel's misstatement in closing arguments that the "knew or should have known" standard applied to the discharge claims. Arguments of counsel justify a new trial if they are "plainly unwarranted and clearly injurious." *Vanskike v. Union Pac. R.R.,* 725 F.2d 1146, 1149 (8th Cir.1984).

***7** In Prime's closing argument, counsel discussed Instruction 45, which stated that the jury could not return a verdict for Plaintiffs just because it disagreed with Prime's actions or found them to be unreasonable or harsh. While discussing Instruction 45, counsel argued the "knew or should have known" standard in reference to Plaintiffs' claims of sexual harassment. Plaintiffs objected to the reference because Instruction 45 referred the jury to Instruction 44, which was the verdict director for Huffman's claim of constructive discharge and did not contain the "knew or should have known" standard. The Court sustained Plaintiffs' objection.

Instruction 45 was identical to Instructions 21, 40, 51 and 56. While it would have been better for Prime's counsel to refer to Instructions 21, 40 or 51, which followed the verdict directors for Plaintiffs' claims of sexual harassment, defense counsel's error was cured by the Court sustaining Plaintiff's objection. Therefore, defense counsel's argument was not clearly injurious. Plaintiffs' Motion for New Trial is denied on this ground.

G. Denial of Plaintiff's Proffered Agency Instruction

Seventh, Plaintiffs King, Burke and the EEOC argue a new trial should be granted because all the verdicts (specifically, Verdicts E, F, G and H) rendered in favor of Prime resulted from the Court's error in refusing Plaintiffs' proffered corporation instruction, which was based on Eighth Circuit Model Instruction 8.01.

PLAINTIFF'S PROPOSED INSTRUCTION

> A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of his duties as an employee of the corporation.

(Doc. # 435). The Court denied Plaintiff's proposed instruction. Plaintiffs' Motion for New Trial can be granted if the instructional error prejudices a party. *McKay,* 87 F.3d at 975. The instruction, viewed in light of the evidence and applicable law, must fairly and accurately instruct the jury as to the issue. *Gasper,* 270 F.3d at 1200.

The instruction proffered by Plaintiffs instructed a jury with respect to when a principal is strictly liable for the acts of an agent, which was not an issue in this case. In this case, Prime was not strictly liable for its employees' actions, but it was liable for co-worker harassment only if it knew or should have known of the harassment and failed to take measures reasonably calculated to end the harassment. Based on the facts of this case and the applicable law, Plaintiffs' proposed instruction did not fairly and accurately state the law. Therefore, Plaintiffs' Motion for New Trial on the basis of the Court's denial of Plaintiffs' proposed agency instruction is denied.

H. Admissibility of Other Bad Acts of Prime

Eighth, Plaintiffs King and Burke argue that a new trial should be granted because the Court erred in not admitting evidence of other bad acts of Prime. Specifically, Plaintiffs contend that evidence of Prime's alleged acts of doctoring log book, falsifying HAZMAT tests, and other complaints of sexual harassment and sex discrimination against other female employees should have been admitted. Evidentiary errors justify a new trial if there was, in fact, an error and that error affected a party's substantial rights. *See Anderson v. Genuine Parts Co.,* 128 F.3d 1267, 1270 (8th Cir.1997). The Court was unpersuaded at trial and remains unpersuaded that these alleged bad acts are relevant to the claims in this case. And, as also stated at trial, if the evidence was relevant, its probative value is substantially outweighed by the danger of prejudice and confusion. This evidence was properly excluded pursuant to Rules 401 and 403 of the Federal Rules of Civil Procedure. Therefore, Plaintiffs' Motion for New Trial is denied on these grounds.

I. Assault and Battery Verdicts Against Clear Weight of Evidence

***8** Finally, Plaintiff Burke argues that a new trial should be granted because the verdicts returned in favor of Turner on Burke's claims of assault and battery were against the clear weight of the evidence. As stated previously, the Court must "rely on its own reading of the evidence in determining whether the verdict goes against the clear weight of the evidence." *Mears,* 91 F.3d at 1123.

The undisputed evidence presented at trial was that Burke neither objected to nor resisted Turner's sexual advances. As a result, it was not unreasonable for the jury to conclude that Burke may have consented to Turner's advances and, thus, was not assaulted or battered. Therefore, the jury's verdict in favor of Turner on Burke's claims of assault and battery were not against the clear weight of the evidence. Plaintiff's Motion for New Trial is denied on this ground.

IV. CONCLUSION

For the foregoing reasons,

(1) Plaintiff Willa Burke's Motion for a New Trial is DENIED,

(2) Plaintiffs Willa Burke and Virginia King's Motion for a New Trial Under Rule 59(a) is GRANTED on King's claim of sexual harassment and otherwise DENIED, and

(3) Plaintiff EEOC's Rule 59(a) Motion for a New Trial is GRANTED on Plaintiffs King's and EEOC's claims of sexual harassment and otherwise DENIED.

IT IS SO ORDERED.

Parallel Citations

85 Empl. Prac. Dec. P 41,768

Footnotes

1 In Plaintiff Burke's Motion for New Trial Against Samuel Turner (Doc. # 495), Burke sets forth a second basis for a new trial, which appears to be more indicative of a factual argument that the jury may or may not have considered.

2 Rule 606(b) does provide for a limited exception when a juror is permitted to provide testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed.R.Evid. 606(b). This exception does not apply in this case.