IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
and	)	No. 97-1112
JOE CARLTON,	)	
Intervenor,	)	
VS.	)	
HARBERT-YEARGIN, INC.,	)	
Defendant.	)	

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL NEW TRIAL

The Equal Employment Opportunity Commission ("EEOC") filed this employment discrimination action against Defendant Harbert-Yeargin, Inc., pursuant to § 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The EEOC alleged that Defendant engaged in unlawful employment practices, including subjecting Joe Carlton and other male employees to offensive and unwelcome touching on the basis of sex, failing to take prompt remedial action and to prevent further such conduct, retaliating against

166

Carlton because of his complaints to management about sexual harassment, and constructively discharging Carlton by creating and allowing a sexually hostile work environment. The EEOC asserted causes of action for sexual harassment on behalf of Terry Dotson, Cedric Woods, and William Doyle.[1] Carlton subsequently intervened, asserting substantially similar claims on his own behalf.[2]

The case was tried by a jury during the week of April 26, 1999. On April 30, 1999, the jury returned a verdict in favor of Defendant on Carlton's retaliation and constructive discharge claims and on the claims brought by the EEOC on behalf of Dotson and Doyle. The jury found in favor of Carlton and Woods on the sexual harassment claims. Carlton was awarded $1 in compensatory damages and $300,000 in punitive damages. Woods was awarded $1 in compensatory damages and $50,000 in punitive damages.

Defendant has now filed a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 or, in the alternative, a motion for a partial new trial pursuant to Fed. R. Civ. P. 59.[3] Plaintiffs have filed a response to Defendant's motion, and Defendant has filed a reply to the response. For the reasons set forth below, Defendant's motion is PARTIALLY GRANTED

---

[1] The EEOC identified these individuals as employees who allegedly were subjected to sexual harassment; however, none of them are parties to this action, and they have brought no claims on their own behalf. The EEOC is not required to identify any particular aggrieved individual in order to maintain this action. Although the EEOC may "secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for back pay or benefits denied, on behalf of discrimination victims . . .," it need not do so. E.E.O.C. v. United Parcel Serv., 860 F.2d 373, 374-77 (10th Cir. 1988).

[2] The complaint alleged that Carlton's supervisor, Louis Davis, repeatedly and frequently touched, pinched, poked, "goosed," rubbed, and grabbed Carlton in the area of his groin, genitals and buttocks.

[3] Defendant moved for judgment as a matter of law at the close of Plaintiffs' proof and at the close of all the proof. The motions were denied.

and PARTIALLY DENIED.

Motion for Judgment as a Matter of Law

> Rule 50 of the Federal Rules of Civil Procedure provides, in part, as follows:
>
> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> . . . . .
>
> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . . If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

The issue presented by a motion for judgment as a matter of law is whether there is sufficient evidence to raise a question of fact for the jury. Morelock v. NCR Corp., 586 F.2d 1096, 1104 (6th Cir. 1978). That is, the court must determine whether there is evidence which would properly support a jury verdict in favor of the non-movant. Patrick v. South Central Bell Tel. Co., 641 F.2d 1192, 1197 (6th Cir. 1980). In making this determination, the court must view the evidence in the light most favorable to the non-movant and may neither weigh the evidence, pass on the credibility of the witnesses, nor substitute its own judgment for that of the jury. Morelock, 586 F.2d at 1104. The court must give the non-moving party the benefit of all reasonable inferences. Hunt v. Coynes Cylinder Co., 956 F.2d 1319, 1328 (6th Cir. 1992) (citation omitted). If all the evidence points so strongly in favor of the movant that

reasonable minds could not differ, then the motion should be granted. Morelock, 586 F.2d at 1104-05. However, the motion should be granted only when there is "a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would not differ." Tuck v. HCA Health Services of Tennessee, Inc., 7 F.3d 465, 469 (6th Cir.1993).

Defendant contends that it is entitled to judgment as a matter of law on the following grounds: (1) Plaintiffs failed to adduce any evidence that the harassment was "because of sex" as required by Title VII; (2) Plaintiffs failed to demonstrate that the harassment was sufficiently severe or pervasive to constitute an abusive working environment; (3) Plaintiffs failed to prove a basis for employer liability with respect to either Carlton or Woods. In the alternative, Defendant moves the court to dismiss the punitive damages awards on the ground that no evidence was presented that Defendant acted with "malice or reckless indifference" to the rights of Carlton or Woods.

(1) Whether Plaintiffs failed to adduce any evidence that the harassment was "because of sex" as required by Title VII

Defendant contends that Plaintiffs presented no evidence that Louis Davis acted "because of" the sex of Carlton and Woods as required by Title VII. According to Defendant, the evidence at trial showed that Davis "goosed" Carlton and Woods solely because Davis thought that it was funny and not because Carlton and Woods were men. Defendant asserts that Plaintiffs offered no evidence that the proffered reason for Davis' conduct was pretextual and not a legitimate, non-discriminatory reason.

In Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998), the Supreme Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII and that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 118 S. Ct. at 1002.[4] "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id. (quoting Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring)).

> A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] ... because of ... sex."

Oncale, 118 S. Ct. at 1002. See also Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) (Oncale "demonstrates that there is no singular means of establishing the discriminatory aspect of sexual harassment. So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination. The most direct route to that end, of course, is via proof that men

---

[4] It is not necessary that the harasser be shown to be homosexual or bisexual. Oncale, 118 S. Ct. at 1002. Therefore, whether or not Plaintiffs presented proof of Davis' sexual orientation is irrelevant in light of the fact that Plaintiffs presented proof that Davis treated males and females differently.

and women were treated differently in the workplace.")

In the present case, Plaintiffs presented evidence that Davis repeatedly grabbed the genitals of male employees although he never touched female employees inappropriately. See, e.g., Carlton, TR, Vol. I. at 181-87 ("He [Davis] grabbed me by my private area.") ("[I]t [Davis' hand] kind of comes in from the backside to my testicles and kind of comes all the way around to the bottom of my back."); Woods, TR, Vol. II at 26-30 ("He [Davis] put his hand in my private, below my belt, down – he just touched me over my pants.") (Q. "How often would Louis touch you below the belt?" A. "[M]aybe once, two or three times."); Davis, TR, Vol. II at 112-13 (Q. "You never touched a woman in the breasts, buttocks, public area the whole time you working for the defendant, correct?" A. "Not on the job.") The jury could have found from this testimony that Davis treated males differently from females and that, therefore, the harassment of the males was because of their sex.[5]

Defendant argues that the court improperly invaded the province of the jury by ruling that Defendant had a mixed-sex workplace. This issue first arose in the context of the discussion between the court and the attorneys concerning the jury charge. The following colloquy took place.

> Court: But my question is, what objection do you have to the plaintiff's special request on the definition for sexual harassment?

---

[5] Defendant incorrectly states that Davis testified that, had women been around, he "probably" would have treated them the same. Defendant's Memorandum at 7. Defendant has failed to cite to any portion of the transcript for this assertion. To the contrary, Davis testified that he would not have "goosed" a woman below the belt, in the buttocks, or in the pubic area. See Davis, TR, Vol. II at 137.

Mr. Henderson [for Defendant]: The based on sex.

Court: All right. I'll take out based on. Because of sex.

Mr. Henderson: Members of the other sex in a mixed workplace.

Court: No. **I"m not going to grant that, because we're not going to get into whether this was or was not a mixed workplace.** I mean, there were women at the plant. The jury will have to decide whether they would have done it . . . . how does that help you?

Mr. Henderson: Because they're going to prove - - - okay. There were women at the plant; and therefore, since he didn't do it to them, it's sexual harassment. We're going to prove - - Louie Davis - - there were no women around.

Court: You certainly can argue that, but what does that have to do with the charge?

Mr. Henderson: Because that prong of the Supreme Court decision in Oncale talks about in a mixed workplace. It says that.

Court: Well, that was for example. It was for example. He didn't say for example, but that's what he's doing.

Mr. Henderson: No. But if they're going to take the first part of that example, they ought to take the second part with it.

Court: Isn't it always the critical issue in one of these cases, whether this harassment was because of sex, whether it's in a mixed workplace or not? I mean, that's true everywhere. I don't see where that helps you any. **But in any event, I'm not going to grant it.** I'm taking out based on, and giving just because of. . . .

Mr. Henderson: Here it is. Quote, "A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."

Court: We have that in this case.

Ms. Liner [for Plaintiff EEOC]: They have men and women that work there.

> Court: They've offered evidence that men were treated differently than woman at Harbert-Yeargin.
>
> Mr. Henderson: And my issue is, I don't think they've proven there was a mixed-sex workplace.
>
> Court: Right. **You can certainly argue that to the jury.**

TR, Vol. IV at 290-92 (emphases added).

Although the court later inadvertently indicated that a different ruling had been made, see TR, Vol. V at 120, no such ruling was actually made, and the jury was not charged that Defendant had a mixed-sex workplace. Furthermore, neither party argued that Defendant did or did not have a mixed-sex workplace. Therefore, this issue is without merit.[6]

Defendant's argument that it presented a legitimate, non-discriminatory reason for Davis' conduct is also without merit.[7] As explained in Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999),

> The district court correctly noted that the test for a hostile work environment has both objective and subjective components.... The district court misconstrued the requirements of this subjective test, however, when it found as follows:
>
> > Williams also stated that Ryan never threatened her in any way and that she never felt physically threatened.... Nor has Williams met the subjective requirement of a hostile work environment claim, i.e. that she actually perceived the environment to be abusive. While aware of GM's policy

---

[6] Defendant's argument that a mixed-sex workplace exists only when there are relatively equal numbers of males and females performing substantially equivalent jobs appears to apply to disparate impact cases only and not to disparate treatment cases such as the present case.

[7] Defendant has cited no authority for the proposition that the Burdine shifting burden of proof approach to discrimination applies to sexual harassment cases. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). However, the court has assumed for the sake of Defendant's argument only that Burdine does apply.

> against sexual harassment, she never complained about Ryan's behavior to anyone but her co-worker, Dodie. She stated that she thought Ryan was joking and that she never felt threatened by him. She never told Ryan to stop. In fact, Williams described Ryan as having a "boyish type personality[.]" He was a person who "joke[d] around a lot with people in the work place."
>
> The district court turns the subjective test on its head, substituting Ryan's possible intended result--to "banter," albeit crudely--for the plaintiff's perception. The subjective test must not be construed as requiring that a plaintiff feel physically threatened. Instead, the victim must "subjectively perceive the environment to be abusive," Harris, 510 U.S. at 21, 114 S. CT. 367, which we believe Williams has sufficiently alleged. Even though, as the district court noted, Williams thought Ryan was joking, the intent of the alleged harasser is irrelevant in the court's subjective prong analysis. The fact that Williams thought that Ryan meant his comments to be a joke does not necessarily mean that Williams perceived them as a joke. **Simply put, humor is not a defense under the subjective test if the conduct was unwelcome.**

Williams, 187 F.3d at 566.

Carlton and Woods testified that Davis' touching was unwelcome. Therefore, whether or not Davis meant his conduct to be funny is not a defense.[8] Because there was evidence from which a jury could find that the alleged harassment was "because of sex," Defendant's motion on this ground is denied.

(2) Whether Plaintiffs failed to demonstrate that the harassment was sufficiently severe or pervasive so as to constitute an abusive working environment

Next, Defendant argues that the evidence does not support a finding that the harassment was sufficiently severe or pervasive so as to constitute an abusive working

[8] If the court accepted Defendant's argument, a sexual harasser could rape an employee and defend himself by asserting that he thought that the rape was "funny."

environment. A plaintiff may establish a violation of Title VII by proving that the discrimination based on sex created a hostile or abusive work environment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986). A hostile environment occurs "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris, 510 U.S. at 21(citations and internal quotation marks omitted). To determine whether the alleged harassment is sufficiently severe or pervasive to constitute a hostile work environment, the court must consider the totality of circumstances. Williams, 187 F.3d at 562 (citing Harris, 510 U.S. at 23 ("whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances")). "Moreover, the totality-of-circumstances test must be construed to mean that even where individual instances of sexual harassment do not on their own create a hostile environment, the accumulated effect of such incidents may result in a Title VII violation." Id. at 563.

Joe Carlton

In the present case, there was testimony that Davis touched Carlton's genitals and buttocks on more than one occasion and that Carlton found the touching painful and humiliating. Carlton, TR, Vol. I. 169-260. Carlton testified that, initially, when Davis talked to him "he had to be touching you." Id. at 181. Then, Davis' conduct "progressively got worse. He would get up next to me. You know, I would step back, and then he would step

forward. . . It just seemed like he had to have his hands on you in some kind of way. . . ." Id. at 181-82. A couple of weeks after Carlton had been employed, Davis "grabbed me by my private area." Id. at 182. After that incident, Carlton would "try to keep somebody in between me and him." Id. at 184-85. However, Davis "kept trying to get close." Id. at 186. "It was an everyday thing" to the point that Carlton had trouble doing his job. Id. The next incident occurred when Davis grabbed Carlton's buttocks and testicles. Id. at 187. Carlton was "outraged" by this incident. Id. at 188.

When Carlton reported the incident to Don Bomar, Defendant's general superintendent, Bomar laughed before taking the incident seriously. Id. at 190. After Carlton was moved to another crew, Davis would "stalk" him. Id. at 194. When the other employees found out about Davis' conduct, they would "grab each other, and they would, like hunch on each other" when they saw Carlton. Id. at 195. The other men treated Carlton as if he had the "plague." Id. at 198. If Carlton got in a truck to ride to a job, the other men got out. Id. Carlton was "ashamed" and "almost sick" about the incidents. Id. at 195. Although Carlton reported to Bomar that Davis was still stalking him and that the other men on the job were making fun of him, Davis continued to stalk him, and the ridicule got worse. Id. at 199-200. Carlton ultimately quit his job because he was physically and mentally "drained" by the harassment. Id. at 200.

Considering the totality of the circumstances, see Williams, 187 F.3d at 562, there was evidence from which a jury could find that Carlton had been subjected to a hostile working

environment. Therefore, Defendant's motion fails on this ground as to Joe Carlton.

Cedric Woods

Cedric Woods testified that Davis first touched him while they were riding in a "taxi," i.e., a truck that carried employees to the shop. Woods, TR, Vol. II at 25-26. Davis put his arm around Woods and then Davis' "other hand [fell] down below [Woods'] belt" and touched Woods' genitals over his pants. Id. at 26. Woods brushed off Davis' hand. Id. Woods didn't like the touching, but he tried to "forget it." Id. at 26-27. Woods testified that Davis touched him "a lot." Id. at 29. Sometimes Davis touched him two or three times a day. Id. Anytime that Davis saw Woods and could get close to him, "he would touch something." Id. Davis touched Woods' genitals more than once and his buttocks "once or twice a day."[9] Id. at 30. When Woods saw Davis, he knew "to get up and get ready to try to run, or, you know, be prepared to get away." Id. at 29. Woods felt uncomfortable about the touching and "just want[ed] to blank it out of [his] mind." Id. at 31. Woods testified that the touching offended him and that "it ain't no good feeling" when Davis touched him. Id. at 33-34.[10]

Although the evidence supporting the claim of a hostile environment as to Cedric Woods is somewhat weaker than that for Joe Carlton, there is not such an absence of evidence that the court can find that Defendant is entitled to judgment as a matter of law on this issue.

---

[9] On cross-examination, Woods testified that Davis touched him only "once or twice" below the waist, but that, after that, he considered any touching by Davis to be inappropriate. Woods, TR, Vol. II at 49-50.

[10] Although Woods testified that he laughed after the first touching episode, on re-direct, he explained that "everybody was laughing, you know. I just might as well blow it off. That's just the way I looked at it." Id. at 60. He also stated that he did not consider the incident to be a joke. Id.

Viewing the totality of the circumstances, based on the testimony that Davis subjected Woods to inappropriate touching on more than one occasion, that Woods was forced to "run" from Davis, and that Woods found the touching to be offensive, the jury could have reasonably found that Davis' harassment of Woods was so severe and pervasive that Woods' work environment became hostile. Therefore, Defendant's motion for judgment as a matter of law on this issue as to Cedric Woods is denied.

(3) Whether Plaintiffs failed to prove a basis for employer liability with respect to either Carlton or Woods

Joe Carlton

In Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. Boca Raton, 118 S. Ct. 2275 (1998), the Court clarified the standard for employer liability when the alleged harasser was the plaintiff's supervisor:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure

> will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Burlington Industries, 118 S. Ct. at 2269; Faragher, 118 S. Ct. at 2293.

It is not enough for an employer to take corrective action; employers have an affirmative duty to prevent sexual harassment by supervisors. Williams, 187 F.3d at 561. Once an employee has established actionable discrimination although "no tangible employment action" was taken, Faragher, 118 S. Ct. at 2293, an employer can escape liability only if it took reasonable care to prevent and correct any sexually harassing behavior.

It is undisputed that Louis Davis was Carlton's supervisor and that Carlton reported Davis' actions to Don Bomar after the second incident. It is also undisputed that Defendant had a posted sexual harassment policy. Defendant argues that Carlton unreasonably failed to take advantage of the policy because he did not report the first touching incident. Carlton testified that he did not report the first incident because no one had witnessed the incident and he did not think that he would be believed. Carlton, TR, Vol. I at 184. Based on this testimony, a jury could find that it was reasonable for Carlton not to report the first incident. Furthermore, Plaintiffs did not contend that Defendant should have stopped the harassment after the first incident. Instead, Plaintiffs argued that Defendant was liable for not stopping the harassment after the second incident. Although Defendant argues that no further harassment occurred after Carlton reported the second incident to Bomar, Carlton testified that Davis continued to stalk him after the report. Therefore, Defendant's argument is without

merit.

Because there was evidence from which a jury could find that Defendant was liable for Davis' harassment of Carlton, Defendant's motion on this ground is denied.

Cedric Woods

Defendant's motion as to its lack of liability for Davis' harassment of Cedric Woods is well-taken. During the times that Davis touched Woods, Davis was not Woods' supervisor. Woods, TR, Vol. II at 48-49.[11] To establish employer liability for sexual harassment by a co-worker, a plaintiff must show that the employer knew or should have known of the harassment and failed to take prompt and appropriate corrective action. Hafford v. Seidner, 183 F.3d 506, 513 (6th Cir.1999).[12] See also Fleenor v. Hewitt Soap Co., 81 F.3d 48, 50 (6th Cir. 1996) (The standard "is one of failure-to-correct-after-notice or duty to act after knowledge of harm.").

Here, Plaintiffs presented no evidence that Defendant knew or should have known of Woods' harassment by Davis. To the contrary, Woods testified that he did not report the harassment. Woods, TR, Vol. II at 51. Therefore, Plaintiffs have failed to establish that

---

[11] Woods testified that he occasionally worked under Davis. Woods, TR, Vol. II at 58. A supervisor is "an individual who serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803 (6th Cir.1994). Therefore, to establish that an individual was the plaintiff's supervisor, the plaintiff must offer evidence that the individual exercised significant control over the plaintiff's hiring, firing, or conditions of employment. Summerville v. Ross/Abbott Lab., 1999 WL 623786 at *7-8 (6th Cir.) In the present case, there is no evidence showing that Davis exercised "significant control" over Woods, particularly at the time of the incidents alleged.

[12] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), addressed employer liability for harassment by supervisors and did not affect the standard for cases involving harassment by co-workers.

Defendant is liable for Davis' harassment of Woods, and Defendant is entitled to judgment as a matter of law on Woods' claim.

(4) Whether evidence was presented that Defendant acted with "malice or reckless indifference" to the rights of Carlton or Woods so as to justify an award of punitive damages

Title 42 U.S.C. § 1981a(a)(2). Subsection (b) sets forth the standard under which punitive damages may be awarded in a Title VII case.

> A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1). In order to recover punitive damages pursuant to § 1981a, a plaintiff must show that the defendant acted with "reckless or callous indifference to the federally protected rights" of the plaintiff or that defendant was "motivated by evil motive or intent ." Beauford v. Sisters of Mercy-Province, 816 F.2d 1104, 1108-09 (6th Cir.1987). It is well-settled that the punitive damages standard is higher than the general standard for liability for discrimination or retaliation. See, e.g., EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089, 1098 (6th Cir. 1998) (stating that "not every violation of the ADA is reckless" and rejecting the EEOC's argument to the contrary); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1215 (6th Cir.1996) (upholding a finding of liability under Title VII, yet reversing the trial court's award of punitive damages).

In Kolstad v. American Dental Assoc., 119 S. Ct. 2118 (1999), the Supreme Court

rejected the Court of Appeals' determination that eligibility for punitive damages could only be based on an employer's "egregious" misconduct. Id. at 2124. "While egregious misconduct is evidence of the requisite mental state, § 1981a does not limit plaintiffs to this form of evidence, and the section does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind." Id. The Court explained that the terms "malice" or "reckless indifference" pertain to the employer's knowledge that it may be acting in violation of federal law. Id. That is, to be liable for punitive damages, an employer must discriminate in the face of "a perceived risk that its actions will violate federal law." Id. at 2125. "Egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive.'" Id. at 2126.

Joe Carlton

Evidence from which a jury could find that Defendant acted with malice or reckless indifference to Carlton's rights is as follows. Carlton testified that Bomar's initially laughed when Carlton told him of the harassment. Carlton, TR, Vol. I. at 190. Tony Warren, a co-worker of Carlton, testified that he had seen management personnel such as supervisors and foremen make fun of Carlton because of the harassment. Warren, TR, Vol. III at 184-85. Management personnel stated that, if Carlton were a "real man," he would settle his claim "another way besides the way he was doing it." Id., Vol. IV at 16-17. Co-workers teased Carlton in the presence of management by calling him Davis' "girlfriend." Id. at 17. Warren was instructed by Bomar and William Irvine, Warren's foreman, not to tell the complete truth

to the EEOC investigator. Id. at 23-24. Warren did not tell the investigator the truth based on the statements of Bomar and Irvine which Warren perceived to be threats. Id. at 22-25. Warren did not tell the truth about the harassment until he realized that the case was proceeding to court. Id. at 32-34. Additionally, the fact that Davis continued to "stalk" Carlton after Carlton reported the harassment to Bomar supports an award of punitive damages. Carlton, TR, Vol. I at 194. See Moore v. Kuka Welding Systems, 171 F.3d 1073,1083 (6th Cir. 1999) (The fact that the defendants knew and allowed the offensive conduct to continue supports the punitive damage award.); Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990), *reversed on other grounds*, 982 F.2d 295 (8th Cir. 1992) (Affirming award of punitive damages and noting that the jury could have found that the "evasive, teasing responses" of plaintiff's supervisor to plaintiff's "earnest inquiries constituted callous or reckless indifference to [plaintiff's] federally protected rights.")

Defendant also argues that the punitive damages award should be set aside because Davis was not acting within the scope of his employment when he touched Carlton. If the court accepted Defendant's argument, a plaintiff could never establish a sexual harassment claim because a sexual harasser always acts outside his job description. C.f. Mackey v. Milam, 154 F.3d 648, 651 (6th Cir. 1998) ("In determining whether to impose liability based on respondeat superior on an employer for the sexually harassing acts of one of its employees, federal courts have employed traditional agency principles. Specifically, they have held that where an employee is able to sexually harass another employee **because of the authority or**

apparent authority vested in him by the employer, it may be said that the harasser's actions took place within the scope of his employment." (citation omitted) (emphasis added)).

Cedric Woods

Because the court has found that Defendant is not liable for the actions of Louis Davis toward Cedric Woods, the award of punitive damages as to Woods must be set aside also.

Motion for Partial New Trial

Fed. R. Civ. P. 59(a) states, in part,

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

"Rule 59 recognizes the common-law principle that it is the duty of a judge who is not satisfied with the verdict of a jury to set the verdict aside and grant a new trial." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 2801. Although the court has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one that could reasonably have been reached; the verdict should not be considered unreasonable merely because different inferences could have been drawn or because another result would have been more reasonable. J. C. Wyckoff & Assoc. v. Standard Fire Ins. Co., 936 F.2d 1474, 1487 (6th Cir. 1991); Bruner v. Dunaway, 684 F.2d 422, 425 (6th Cir. 1982).

(1) Whether the court should grant a new trial for all the reasons stated above with respect to Defendant's Rule 50 motion

For the reasons discussed above denying Defendant's Rule 50 motion, the motion for a new trial on this ground is denied.

(2) Whether the court should grant a new trial as to the punitive damage award or issue a remittitur

Defendant contends that the court should grant a partial new trial on the issue of punitive damages or, in the alternative, grant a remittitur on the ground that the award was excessive. Punitive damages were not available for Title VII claims until the 1991 amendments to the Civil Rights Act of 1964, 42 U.S.C. § 1981a. Under § 1981a(b)(1), punitive damages are to be awarded when the complaining party shows "that the respondent engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The amount of any punitive damages awarded should be what is needed to punish and deter the defendant. Coleman v. Rahija, 114 F.3d 778, 787 (8th Cir.1997) (citing Smith v. Wade, 461 U.S. 30, 54 (1983)). A punitive damage award should be examined in light of the twin policy aims of punishment and deterrence. Pacific Mutual Life Insurance. Co. v. Haslip, 499 U.S. 1, 19 (1991).

If a plaintiff is awarded punitive damages after having shown a violation of Title VII, the award may be reduced if it is so high that it violates due process. Pavon v. Swift Transportation Co., 192 F.3d 902, 909 (9th Cir. 1999) (citing BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)). In BMW, the Supreme Court set forth three factors to be

considered in reviewing an allegedly excessive jury award. First, courts are to examine "the degree of reprehensibility" of the conduct. 517 U.S. at 575. Second, courts should look at "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damage award." Id. Finally, reviewing courts must examine "the difference between [the punitive damages] and the civil penalties authorized or imposed in comparable cases." Id. The Court noted that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Id.

According to Defendant, its behavior was not so reprehensible as to justify an award of punitive damages. Defendant also asserts that the amount of the punitive damage award ($300,000) bears no reasonable relationship to the amount of the compensatory damage award ($1). Finally, Defendant argues that the award is excessive compared to the financial penalty for sexual battery.

As previously discussed, there was evidence from which the jury could find that Defendant's conduct was reprehensible. There was testimony that Carlton's complaint was not treated seriously by management, that he was teased about the harassment by management in front of his co-workers, that Davis stalked him after he complained to Bomar, and that a co-worker was instructed to lie to the EEOC during its investigation. See Pavon v. Swift Transportation Co., 192 F.3d 902 (9th Cir. 1999) (Plaintiff presented evidence from which a jury could determine that defendant's conduct was reprehensible: the jury could have found that racial slurs were a common occurrence, that management was aware of this behavior and

took no meaningful steps to stop it, that defendant did not believe the plaintiff's allegations and never seriously investigated the situation, and that defendant's refusal to investigate stemmed from its "blame-the-victim mentality," wherein it wrongly perceived the plaintiff as the problem, labeled him a troublemaker and terminated him.)

Defendant acknowledges that punitive damages may be awarded even though, as here, the plaintiff was awarded only nominal compensatory damages, see e.g., Timm v. Progressive Steel Treating, Inc., 137 F .3d 1008, 1010 (7th Cir.1998); however, Defendant argues that the punitive damage award must bear a reasonable relationship to the compensatory damage award. According to Defendant, the disparity in the ratio of the awards in the present case is indicative of unreasonableness.

Although Defendant is correct that the ratio between the awards is extremely high, there was proof that Defendant's net worth is over 11.8 billion dollars. The jury could have reasonably found that a lesser punitive damage award would not serve Title VII's purpose of punishment and deterrence. See Whitney v. Citibank, N.A., 782 F.2d 1106 (2nd Cir. 1986) (A court may take a defendant's financial circumstances or net worth into consideration when determining the amount of punitive damages to be awarded.) See also BMW, 517 U.S. at 582 (Rejecting simple mathematical formulas to determine the reasonableness of a punitive damage award).

Furthermore, if the court were to accept Defendant's argument, then any time that nominal compensatory damages were awarded, only nominal punitive damages could be

awarded, thus negating the goals of punishment and deterrence. See, Edwards v. Jewish Hospital of St. Louis, 855 F.2d 1345, 1352 (8th Cir. 1988) ("To apply the proportionality rule to a nominal damages award would invalidate most punitive damages awards because only very low punitive damages awards could be said to bear a reasonable relationship to the amount of a nominal damages award.")

Finally, the court notes that the fine cited by Defendant for sexual battery in a criminal case, i.e., $3000, is the financial penalty only. Sexual battery under state law is also subject to up to six years imprisonment. See T.C.A. § 40-35-11. However, even considering the amount of the fine only, a penalty of $300,000 for a corporation worth nearly $12 billion is comparable to a $3000 fine for an individual.

Accordingly, Defendant's motion for a partial new trial or for a remittitur on the issue of punitive damages is denied.

(3)Whether the court erred in admitting the testimony of Tony Warren

Defendant contends that it is entitled to a new trial because the court allowed Tony Warren to testify that he had been improperly touched while working for Defendant. At trial, Defendant objected to Warren's testimony. TR, Vol. III at 171-72. The court allowed the testimony because Plaintiffs had alleged a hostile environment. Id. at 171. The court noted that Warren would have been a plaintiff if his identity had been disclosed in time. Id. at 172. Defendant has cited no authority to convince the court to change its ruling.

(4) Whether the court erred in not precluding testimony regarding other touchings on the ground that Plaintiffs failed to comply with Fed. R. Evid. 415

Defendant contends that the court should have excluded testimony regarding Davis' touching of employees other than Carlton because Plaintiffs did not comply with Rule 415 of the Federal Rules of Evidence. As noted by Defendant, the court ruled in a pre-trial order that Rule 415 did not apply because the allegations in the complaint put Defendant on notice that Plaintiffs were alleging that Davis had touched other male employees. See Order, 4/22/99 ("The court finds that Rule 415 simply does not apply where the evidence to be admitted is evidence of conduct which is charged in the complaint.")

Defendant also contends that the court erred in allowing testimony that Don Bomar and Harold Scott improperly touched other males. Defendant objected to such testimony at trial. TR, Vol. I at 11-13. The court overruled Defendant's motion because Defendant was on notice that Plaintiffs had alleged a hostile environment. Id. at 13.

Defendant has not convinced the court that it made an error in its prior rulings. Therefore, Defendant's motion on this ground is denied.

(5) Whether the court erred in ruling that Defendant had a "mixed-sex" workplace

As noted above, the court did not make such a ruling. Accordingly, Defendant's argument is meritless.

(6) Whether the court erred in not using the *Burdine* burden-shifting analysis

The court has previously addressed this argument and found it to be without merit. See note 7, *supra*.

Summary and Conclusion

For the reasons stated above, Defendant's motion for judgment as a matter of law or, alternatively, for a partial new trial is DENIED as to Joe Carlton. Defendant's motion for judgment as a matter of law or, alternatively, for a partial new trial as to Cedric Woods is GRANTED, and the verdict as to Woods is hereby SET ASIDE. Judgment will be entered in accordance with this order after the court has ruled on the remaining pending motions.

IT IS SO ORDERED.

James D. Todd

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

12-16-99

DATE