

APPELLATE COURT ARGUMENT FOR PLAINTIFF

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Paul W. Mollica © 2007
Meites, Mulder, Mollica & Glink
20 South Clark Street, Suite 1500
Chicago, Illinois 60603, (312) 263-0272
pmollica@mmmglaw.com
Law blog: www.mmmglaw.com

STANDARD OF REVIEW

The district court denied Hooligans Inc.'s motion for a judgment as a matter of law on punitive damages. Although the Court accords that order de novo review, the reviewing court's analysis is narrowly focused. It may not re-weigh the evidence after a jury trial, nor may it make credibility determinations. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). While the Court "review[s] the entire record, [it] cannot consider evidence favorable to appellant that the jury need not have believed. That is, [it] must disregard contradicted evidence and testimony from impeached and interested witnesses that supports appellants." *Gronowski v. Spencer*, 424 F.3d 285, 292 (2d Cir. 2005) (citing *Reeves*, 530 U.S. at 151 ("although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . That is, the court should give credence to the evidence favoring the non-movant as well as 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses'") (quoting 9A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §2529, pp. 297-301 (2d ed.1995)). This Court may thus reverse "only if there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against [the moving party]." *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 227 (2d Cir. 2006) (quoting *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 429 (2d Cir.1995) (alteration in original)).

THE JURY PROPERLY AWARDED PUNITIVE DAMAGES

To award punitive damages to Wild, the jury had to make two findings: that Hooligans Inc. acted in deliberate or reckless disregard of her state or federal rights, and that the wrongful behavior of the employees is imputable to the defendant. The record supports the jury on both points, and the award ought to be affirmed.

I. Intentional or Reckless Disregard of Wild's Federal and State Rights

Under 42 U.S.C. § 1981a(b)(1), a jury may award punitive damages in a Title VII case where the employer “engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 529-30 (1999) (internal quotation marks omitted). Our Circuit has charted two paths to proving this element — where the employer (1) “discriminate[d] in the face of a perceived risk that its actions . . . violate[d] federal law,” *Kolstad*, 527 U.S. at 536; or (2) it committed “egregious or outrageous acts” that “may serve as evidence supporting an inference of the requisite ‘evil motive.’” *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 101 (2d Cir.2001) (internal quotation marks and alteration omitted) (quoting *Kolstad*, 527 U.S. at 538). The same standards for apply under the New York City Human Rights Law (CHRL), see N.Y. City Admin. Code § 8-502(a). See *Farias*, 259 F.3d at 101-02 (applying *Kolstad* to both statutes).

The record here allowed the jury to find that Hooligans Inc. employees were informed of anti-harassment norms in writing when they went to work there (Ex. 4), the same policy was echoed in the employee handbook (Ex. 5), and that — at the

management level — they received special training in the anti-harassment policy, echoing the requirements of federal and local civil rights laws. The jury could infer, based on the materials published to employees, that the whole workforce was made aware that a sexually hostile work environment violates the law. See *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 385 (2d Cir.2001) (“training in ‘equal opportunity’ may now fairly be understood to convey some awareness of Title VII requirements”; supervisor was “exposed to ‘human resources training’ and training on ‘hiring practices and equal opportunity,’” even though anti-discrimination laws were not expressly discussed); *McDonough v. City of Quincy*, 452 F.3d 8, 23 (1st Cir. 2006) (evidence included that employer published an anti-discrimination policy).

On the second route to proving wilfulness, the supervisors’ own harassment against Wild reveals wilfulness. The harassment by the assistant managers was no close-call for the jury. As the jury heard, the assistant managers were persistent:

- Squirrel daily commented on the Wild and the other servers: “he would chase the girls around, make comments about our butts, our breasts, about us looking good, losing weight...just regular flirting. His ‘butt’ comments were, ‘Your butt’s looking good or are you working out? His breast comments would be, ‘Your breasts look bigger today or did you get a boob implants?’ And with me one day, he looked at me and ...and repeated it... ‘did you got breast implants?’” (Wild Tr. at 133).
- Unger, an Assistant Manager, called her “big titty ho” repeatedly. He was flirtatious with all the servers. He would say things about their “butts” and “breasts,” and hair or makeup. He did it often enough that Wild was offended. She complained repeatedly to him about his conduct. (Id. at 140.)
- Eichner would comment on way the women looked. He would say “just things that you would say to a pretty girl.” (Id. at 142.)

- Piper also commented on the way the women looked, and asked Cindy to go out with him. (Id. at 143.)

Wild and other women servers were also harassed on a regular basis by the kitchen workers (id. at 145). She reported the behavior to her supervisors. Wild reported telling Squirrel that the kitchen staff made comments relating to her breasts or buttocks; at least once, she also complained of grabbing. “When I complained, it was all of them. It was all –it wasn’t just one of them that I would have to point them out. All of them said things.” Id. Squirrel not only failed to arrest the behavior, but upped the ante by locking Wild in an ice locker with one of the workers (id.). The jury could have found this behavior “egregious or outrageous” under Kolstad.

II. Behavior of Agents Fairly Imputed to Hooligans Inc.

Punitive damages may be awarded against an employer when the agent who violated Title VII functioned in a managerial capacity and was acting in the scope of employment. See Kolstad, 527 U.S. at 542. By “managerial capacity,” the Kolstad opinion directs courts to consider “the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.” Id. at 543 (internal quotation omitted). Such an “employee must be important,” but not necessarily “top management, officers, or directors, to be acting in a managerial capacity.” Id. (internal quotation omitted).

The initial focus here would be on the assistant managers (Squirrel, Unger, Eichner and Piper), who took no steps to end the kitchen workers’ harassment of the servers despite repeated complaints, and who piled on with vile behavior of

their own. The jury could have found that the assistant managers at Hooligans Inc. wielded managerial authority in the one respect that mattered: they were supposed to be first-responders when an employee complained about harassment. Hooligans Inc. admitted that it conferred authority on direct supervisors to enforce its anti-harassment policy. Ex. 3, New Hire Manual (“Employees who want to report an incident of sexual or other unlawful harassment should promptly report the matter to their supervisor.”). It took another step by requiring the assistant managers (on pain of termination) to attend annual training sessions on the policy from 2000 on (Less Tr. at 100; O’Neil Tr. at 78), meetings to which only managers were invited until 2003. The assistant managers were thus the company’s agents for purposes of enforcing the anti-harassment policy. This turned out to be defendant’s undoing.

To fend off this argument, defendant would point to language in Ex. 4, the employee handbook, which states that employees “ must report such offensive conduct or situations to any Hooligans General Manager, the Area Supervisor, or the President at (800) 560-1234, as desired by the employee.” The two descriptions of the reporting tree in harassment situations policy are facially inconsistent. The jury could have found that by having the employee sign the Ex. 3 statement and keep a copy (Less Tr. at 85, O’Neil Tr. at 72-74), the true policy of the company was to confer authority on direct supervisors (i.e. assistant managers) to police and correct sex harassment. Even if the policy stated in Ex. 4 were in effect, though, there was testimony that Wild and others approached general manager Mary O’Neil with complaints about the changing room, but were brushed off.

The supervisors' failure to correct (and their contribution to) the harassing conditions, after repeated complaints by Wild, supports the punitive damage award. Squirrel shrugged off the responsibility to end the kitchen workers' spying into the changing room area (Wild Tr. at 84), while Unger actually joked about the peephole ("Cool, I got to check it out") (id. at 100). On this record, "the jury could rationally have credited plaintiff's version that, in spite of her complaints to company officials, the company did nothing to protect her from the abuse for many months." *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001). See *Parker v. General Extrusions, Inc.*, 491 F.3d 596, 603 (6th Cir. 2007) ("investigation was not taken seriously"); *Walsh v. Nat'l Computer Systems, Inc.*, 332 F.3d 1150, 1161 (8th Cir. 2003) (punitive "awards [allowed] in cases where the employer has deliberately turned a deaf ear to discriminatory conduct"); *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 755 (7th Cir. 2002) (manager designated as contact for discrimination complaint failed to carry out her duties); *Swinton v. Potomac Corp.*, 270 F.3d 794, 810 (9th Cir. 2001) ("inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment").

The jury also heard a clash of testimony about whether general manager Mary O'Neil, the next level manager, was made aware of peepholes and took any action on them. Melissa Frost, in particular, testified that upon discovery of another hole, O'Neil "kind of let it be someone else's problem" (Frost Tr. at 55.) The jury was entitled to infer a lack of credibility by O'Neil, and a consciousness by her

of the illegality of the behavior. See, e.g., *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1096 (8th Cir. 2007) (noting as factor supporting punitive award “refusal of Titan decision-makers to associate themselves with” challenged decision); *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 992 (8th Cir. 2007) (where jury heard “each person simply den[y] that he or she had any involvement at all in the decision,” jury could infer employer was aware that it violated ADA).

Finally, the jury could have concluded that the above actions and omissions fell within the agents’ scope of employment, as defined by Hooligans Inc.’s own anti-harassment policy. See *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75, 90 (1st Cir. 2006) (where the supervisors charged with enforcing anti-harassment policy were themselves committing the harassment, jury could find that the behavior was within scope of employment); *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 461 (4th Cir. 2002) (in context of hostile environment claim, “[this] requirement is satisfied when ‘a supervisor with immediate (or successively higher) authority over the [victimized] employee’ creates ‘an actionable hostile environment’”) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 757 (1998)). For these reasons, the jury could have found sufficient support in the record to award punitive damages.

“GOOD FAITH” DEFENSE DOES NOT VITIATE AWARD

I. Court Need Not Reach Merits of “Good Faith” Defense

For two reasons, this Court need not reach Kolstad “good faith” defense.

First, Hooligans Inc. failed to preserve the defense below. This Circuit recognizes that Kolstad “good faith” presents an affirmative defense, on which the

employer bears the burden of proof. See, e.g., Zimmermann, 251 F.3d at 385. Under Fed. R. Civ. P. 8(c), Hooligans Inc. had to plead the defense in its answer, or else risk forfeiture. See, e.g., Oden v. Oktibbeha County, 246 F.3d 458, 467 (5th Cir. 2001) (under Title VII, “[a]ppellants waived the personal staff exception by failing to raise it in a responsive pleading”); Venters v. City of Delphi, 123 F.3d 956, 969 (7th Cir. 1997) (limitations defense in Title VII case waived by not pleading it, waiting until after discovery was closed and mentioning it in summary judgment reply brief a month before trial). The “good faith” argument concerning Hooligan Inc.’s anti-discrimination policies appears nowhere in its answer. This omission was prejudicial: it short-circuited Wild’s ability to target her discovery and retain an expert on the good faith issue, particularly whether the company as a whole maintained an effective EEO policy. Hooligans Inc. thus forfeited this defense.

Second, the verdict may be affirmed separately under New York City law, which provides no “good faith” defense. Local law does not march lockstep with Title VII; federal law sets only the floor for liability under the CHRL.¹ In contrast

¹Amendments to the CHRL made by the Local Civil Rights Restorations Act, N.Y.C. Local Law No. 85 of 2005, § 1 (Oct. 3, 2005), state:

[T]he provisions of New York City’s Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise..

to Title VII, the CHRL makes “good faith compliance procedures only a factor to be considered in mitigation of punitive damages, rather than a complete defense.”

Thompson v. American Eagle Airlines, Inc., No. 99 CIV. 4529 JGK, 2000 WL 1505972 at *11 (S.D.N.Y. Oct. 6, 2000) (citing Admin. Code § 8-107(13)(e)). See also Jordan v. Bates Advertising Holdings, Inc., 11 Misc.3d 764, 777, 816 N.Y.S.2d 310, 322 (N.Y. Co. 2006) (finding no Kolstad defense under CHRL). The jury had the opportunity to weigh this factor, among others, and set the damage figure under review. Because good faith is not a complete defense, the verdict may be sustained.

II. Jury Found That Hooligans Inc. Failed to Establish Good Faith

Assuming that the Court reaches the affirmative defense, Hooligans Inc. did not establish an entitlement to entry of judgment as a matter of law. Under Kolstad, an employer may avoid punitive damages from an agent’s violation of federal law if it persuades the jury more likely than not that the employer made “good faith efforts to enforce an antidiscrimination policy.” Kolstad, 527 U.S. at 546. An employer must “establish both that it had an antidiscrimination policy and made good faith effort to enforce it.” Zimmermann, 251 F.3d at 386. And a formal written policy is not enough. *Id.* As the one court has held in denying this defense:

Every court to have addressed this issue thus far has concluded that, although the implementation of a written or formal antidiscrimination policy is relevant to evaluating an employer's good faith efforts at Title VII compliance, it is not sufficient in and of itself to insulate an employer from a punitive damages award. Otherwise, employers would have an incentive to adopt formal policies in order to escape liability for punitive damages, but they would have no incentive to enforce those policies.

Bruso v. United Airlines, 239 F.3d 848, 858-59 (7th Cir. 2001) (footnote omitted).

See also *Tisdale v. Federal Exp. Corp.*, 415 F.3d 516, 532 (6th Cir. 2005) (“an anti-discrimination policy by itself does not shield an employer from liability”).

The jury could have found that the Hooligan Inc. policy existed only on paper, and in the imaginations of its executives. Significantly, Hooligans Inc. has omitted evidence of its policy’s effectiveness. The jury could find a complete lack of evidence that the defendant ever counseled or neutralized the behavior of its kitchen workers or assistant managers (none were punished), whose harassment triggered the EEOC charge in the first place. O’Neil’s role as manager, as it emerged at trial, also revealed an utter non-interest in the changing room situation. Nor, apparently, were the assistant managers ever taken to task for failing to enforce the anti-discrimination policies. See *Parker v. General Extrusions, Inc.*, 491 F.3d 596, 603-4 (6th Cir. 2007) (jury heard testimony that policy was not enforced, and although human resources hoped that foremen would enforce policy on the floor, foremen were not penalized for inaction). An inefficacious policy, in short, flunks the Kolstad defense. See *Bruso*, 239 F.3d at 861; *Zimmerman*, 251 F.3d at 386; *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 931 (8th Cir. 2004) (noting employer’s “apathy” in following up on employee discrimination complaints).

Moreover, a fire-prevention policy shouldn’t consist of just putting out the fires as they flare up. The company belatedly swung into gear months after the initial complaints, only after notice of Wild’s EEOC charge (and the real prospect of government compulsion) arrived at its door. Even then, the company avoided interviews with the several women who had actually complained about the hostile

work environment — never even asking their lawyer’s consent for an interview — confining their investigation to friendly witnesses (current/former managers, servers who hadn’t complained, the accused harassers in the kitchen). And only after the EEOC charge did the company institute anti-harassment training for all employees, rather than just for management. While the investigation apparently brought the assistant managers’ harassment to a halt, it had the opposite effect on the kitchen staff, who stepped up their harassment (Wild Tr. at 199-200). For these reasons, the jury could have inferred defensiveness and a lack of commitment by the company to enforce the EEO policy and thus rejected the good-faith defense.