IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DEBORAH MONTHEI,	)	
	)	NO. 4:01-cv-30510
Plaintiff,	)	
	)	RULING ON DEFENDANT'S
vs.	)	MOTION FOR JUDGMENT
	)	AS A MATTER OF LAW, OR
MORTON BUILDINGS, INC.,	)	IN THE ALTERNATIVE,
	)	FOR REMITTITUR AND/OR
Defendant.	)	A NEW TRIAL

The above resisted motion is before the Court (#80). This is an action under Title VII, 42 U.S.C. § 2000e, et seq., and the Iowa Civil Rights Act, Iowa Code ch. 216, et seq., for hostile work environment sexual harassment allegedly resulting in a constructive discharge. The alleged harassment was by a non-supervisory co-worker. The case was assigned to the undersigned pursuant to 28 U.S.C. § 636(c).

Trial before the Court and a jury commenced on October 28, 2002. On October 31, 2002, the jury returned a verdict in favor of plaintiff Deborah Monthei (Monthei) and against her employer, Morton Buildings, Inc. (Morton). The jury found back pay in the amount of $40,000 and past emotional distress in the amount of $87,500. Based on the parties' stipulations, the Court proceeded to consider the issue of front pay.[1] The Court awarded

[1] See November 7, 2002 front pay findings and conclusions at 1-2.

front pay in the amount of $27,000. On November 7, 2002 judgment in the total amount of $154,500 was entered in Monthei's favor.

On November 21, 2002 Morton timely filed the present motion for judgment as a matter of law or, alternatively, for remittitur/new trial. Fed. R. Civ. P. 50(d), 59(a). Monthei has resisted. The matter is fully submitted. LR 7.1(c). The Court has carefully considered the parties' written arguments and the authorities cited, and now rules as follows on the issues presented.

FACTUAL BACKGROUND

The Court has twice before discussed the factual background of this case, in its October 2, 2002 summary judgment ruling and the November 7, 2002 front pay ruling. These rulings should be read in conjunction with this one. What follows presents the evidence, and reasonable inferences from it, favorably to plaintiff as the Court must view matters at this point.

Monthei worked as a secretary in Morton's Jefferson, Iowa office. Morton constructs buildings usually used for farm or light commercial purposes. Its offices typically employed a secretary, salesmen, and crewmen. Monthei was the only woman in the Jefferson office. The facility had an office and a crew room. The crews usually gathered and left for their assignments before Monthei arrived for work in the morning. The crews would return to the

facility after the day's work was done. Monthei handled paperwork for the crews.

Bill Dunivan was Monthei's supervisor and the Jefferson office manager. Tom Kalis was the crew supervisor in charge of Jefferson and other offices in his region. National construction supervisor Kevin Potter was Kalis' supervisor. Mike Morrison was, at the time, Morton's executive-vice president.

Chris Dinesen, a young construction crew member, was the alleged harasser. He came to the Jefferson office in about April 1999 and after a few months the alleged harassment began. The harassment was verbal. It consisted of gender-specific derogatory remarks and vulgarities directed at Monthei, or to others about Monthei in her presence. Monthei was the only one subjected to Dinesen's conduct. Monthei described some ten incidents occurring over an approximately eighteen-month period before she quit, but she said there were more. The gist of her testimony was that she was routinely subjected to verbal abuse from Dinesen like that described below.

In July 1999 Dinesen called her a "stupid bitch" when Monthei returned some improperly filled out paperwork. Monthei complained to Dunivan who responded that Dinesen was young. In November 1999 Dunivan asked the crew to work on a Saturday and when Monthei made a comment about her work on Saturdays, Dinesen told her "we don't sit on our ass all day and do nothing you stupid

bitch." Dunivan was there and told Dinesen "that's enough" but did nothing more. At the 1999 Christmas party Dinesen ordered drinks after Monthei had paid the bill. When she told him he would have to pay, Dinesen again called her a "bitch." In February 2000 Dinesen delivered material in a crew truck and was given cash. Dinesen told Monthei she better "keep her f.....g mouth shut." (Ex. 4). The next day, when Monthei asked Dinesen to reimburse the company for a personal phone call Dinesen dismissed her with "f..k off bitch." Monthei complained to Dunivan who again attributed Dinesen's conduct to his youth and inability to "control his mouth." (Id.).

Dinesen suffered a minor worker's compensation injury and blamed Monthei for a delay in benefits. In about April of 2000 he asked her where the "f.....g" check was and later called her a "dirty cunt." Monthei testified Dinesen referred to her as a "cunt" or "f.....g cunt" twice. The time period is not clear, but apparently also in the spring of 2000 in a dispute about paperwork he called her a "f.....g bitch" and, as he was leaving, yelled that sometime someone would have to "stomp [her] brains out."

In November 2000, shortly after the office had been remodeled, Dinesen tracked mud in. When it was called to his attention, Dinesen said "the bitch can clean it up." Sometime after Thanksgiving (the date is unclear) Monthei saw Dinesen at a

convenience store. She heard Dinesen call her a "bitch" under his breath.

Matters came to a head at the 2000 Christmas party in the presence of the Jefferson employees and their guests. Dinesen was again ordering drinks as the party was about to break up. Monthei talked to Dunivan about it. Dinesen was at the same table and heard her comments to Dunivan. Dinesen complained about being cut off, telling Monthei "Merry f.....g Christmas you f.....g bitch." Bill Fisher, a salesman, told him that was enough. Dinesen said he would say what was enough. He went on that he would never "apologize to that f.....g bitch."

Monthei testified she felt degraded by Dinesen's treatment of her, became intimidated and ultimately fearful of him. She became scared to go to work.

Morton had a policy against sexual harassment which defined the prohibited conduct to include "verbal . . . behavior of a sexual nature when . . . that conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment." (Ex. A at 15). An employee with a complaint of sexual harassment, or who witnessed conduct which violated the policy, was required to report the complaint or conduct promptly to their supervisor, or two other individuals, one of whom was executive-vice president Morrison. A supervisor receiving a complaint or information about alleged improper conduct was to

report the same to Morrison. The policy provided for a prompt investigation, typically to be conducted by Morrison. (Id. at 16).

Monthei testified she spoke to her supervisor, Dunivan, fifteen to twenty times about Dinesen's conduct in the hope Dunivan would get him to stop, but the conduct continued. At one point she told Dunivan "I just can't take this little asshole anymore." Dunivan did little to correct the situation beyond telling Dinesen on one occasion to "knock off" whatever he was doing that was bugging Monthei. At one point he told Monthei Dinesen did not take directions from women easily. Dunivan did not report Monthei's complaints to Morrison. Potter testified that under the company's policy Dunivan should have reported the complaints.

Monthei testified she also complained to regional supervisor Kalis on two occasions, telling him that Dinesen used filthy language toward her all the time. Kalis told Monthei he would talk to Dinesen. Kalis said he reprimanded Dinesen, but the reprimand was not documented as it ordinarily would have been under company policy. Monthei also testified that in late September or October 2000 she complained to Kalis' supervisor, Potter, that Dinesen had called her filthy names, and was rude and arrogant.

The Christmas party incident in 2000 was brought to Morrison's attention. Monthei complained to Kalis. Kalis talked to Dunivan and Morrison. Morrison reviewed the matter with Potter and a decision was made to ban Dinesen from the office area while

the incident was investigated. A statement acknowledging this restriction was presented to and signed by Dinesen. (Ex. D).

Morrison also spoke with Monthei. He asked her to send a letter to his residence describing the incident. Monthei promptly wrote the letter and sent it by certified mail. It was receipted for by Morrison's wife, but the letter was evidently lost without Morrison seeing it. Morrison did not inquire about the letter and Monthei was never interviewed about the incident. Monthei was not told what the result of the investigation was. She was told only that Dinesen had been instructed to stay out of the office. In fact the investigation did not proceed very far. For several days after the incident, at Morrison's direction, account supervisor Pat Moody contacted Monthei daily to see if Dinesen was staying away. On about December 15, 2000, during the last of these conversations, Monthei mentioned she had consulted with an attorney. Moody stopped calling after that because the company's policy was that if the company learned an employee had contacted an attorney all subsequent communications went through Morton's lawyers. The jury could therefore have found that once Monthei said she had a lawyer, the investigation ceased and Morton took no further action.

Monthei testified that the last time she talked to Moody she told him she did not think that she could handle much more. She quit her employment, giving notice on January 15, 2001. When

she did so, she told Dunivan she could no longer come to work and be afraid. She later told Dunivan and Kalis she was leaving because her complaints had not been taken seriously. Monthei had heard nothing since December 15 about Morton's investigation, and had received no response to the letter Morrison had requested.

Two days after she gave her notice, while Monthei was still employed, Dinesen followed her to the post office. Monthei was mailing Morton's mail. Dinesen made an obscene gesture to Monthei and said "f..k you bitch." Monthei testified she reported the incident to Kalis who responded "he just doesn't get it does he."

JUDGMENT AS A MATTER OF LAW

Legal Standard

A party seeking judgment as a matter of law must meet a high standard:

> Judgment as a matter of law is proper "[o]nly when there is a complete absence of probative facts to support the conclusion reached" so that no reasonable juror could have found for the nonmoving party.

Henderson v. Simmons Foods, Inc., 217 F.3d 612, 615 (8th Cir. 2000) (quoting Hathaway v. Runyon, 132 F.3d 1214, 1220 (8th Cir. 1997)); see Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960, 965 (8th Cir. 2002). In applying this standard all of the facts are to be looked at in the light most favorable to the nonmoving party. Warren v. Prejean, 301 F.3d 893, 900 (8th Cir. 2002). "[T]he court must assume as proven all facts that the nonmoving party's evidence

tended to show, give her the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in her favor." Hathaway, 132 F.3d 1214 at 1220; see Lawrence v. Bowersox, 297 F.3d 727, 731 (8th Cir. 2002). It is therefore incumbent on Morton to demonstrate that all of the evidence points in its direction and "is susceptible of no reasonable interpretation sustaining" Monthei's claims. Ogden v. Wax Works, Inc., 214 F.3d 999, 1006 (8th Cir. 2000); see Duncan v. General Motors Corp., 300 F.3d 928, 933 (8th Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3552 (Feb. 13, 2003) (No. 02-1201).

Hostile Work Environment Sexual Harassment

The elements of Monthei's claim of hostile work environment sexual harassment are: (1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) Morton knew or should have known of the harassment and failed to take prompt and effective remedial action. See, e.g., Duncan, 300 F.3d at 933; Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1050 (8th Cir. 2002)(racially hostile work environment claim); Beard v. Flying J, Inc., 266 F.3d 792, 797-98 (8th Cir. 2001); Bogren v. Minnesota, 236 F.3d 399, 407 (8th Cir. 2000), cert. denied, 122 S. Ct. 44 (2001) (citing Austin v. Minnesota Mining & Mfg. Co., 193 F.3d 992, 994 (8th Cir. 1999)); Howard v. Burns Bros., Inc., 149

F.3d 835, 840 (8th Cir. 1998).[2] Morton disputes the sufficiency of the evidence on all but the first of these elements.

Morton first argues that the claimed verbal abuse by her co-worker, Dinesen, was not unwelcome because Monthei herself used vulgarities on occasion and had made derogatory remarks about Dinesen like that noted in the factual background above. The frequency with which Monthei used vulgar language was disputed. For his part, Dinesen's verbal abuse consisted of frequent statements to and about Monthei that she was a "stupid bitch," "f.....g bitch," a "bitch," and on a couple of occasions, a "f.....g cunt" or "cunt." The Eighth Circuit has said whether conduct is unwelcome turns "largely on credibility determinations by the trier of fact." Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1378 (8th Cir. 1996). Apparently the jury credited Monthei's testimony, as it had a right to. That Monthei on occasion used foul language and may have responded in kind to Dinesen with vulgar references about him does not compel a finding for defendant on the element. See Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993) (quoting Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987)). Whether language is welcome is determined

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[2] Monthei sued both under Title VII and the Iowa Civil Rights Act (ICRA). The Iowa Supreme Court has applied the same analysis to hostile work environment claims under ICRA as the federal courts have under Title VII. See Lynch v. City of Des Moines, 454 N.W.2d 827, 833 (Iowa 1990); Noble v. Monsanto Co., 973 F. Supp. 849, 854 (S.D. Ia. 1997). Accordingly, the discussion above focuses on federal case law.

with reference to the individual circumstances. Beach v. Yellow Freight System, 312 F.3d 391, 393 (8th Cir. 2002). The proper inquiry asks if Monthei's conduct demonstrates the harassment was unwelcome. Id. Clearly, Monthei's many complaints to Dunivan and other supervisors, the hurtful and humiliating nature of Dinesen's statements and Monthei's description of the effect they had on her, support the jury's finding that the abuse was unwelcome. The jury could likewise have concluded that to the extent Monthei made vulgar references to Dinesen, her statements were in angry response and, therefore, further evidence that she did not welcome what Dinesen said about her.

Morton also contends the evidence was insufficient for the jury to find Dinesen's verbal abuse was based on Monthei's sex. It was Morton's theory of the case that Monthei and Dinesen did not get along very well stemming from Dinesen's refusal to do some moonlighting work on Monthei's own Morton buildings in the summer of 1999;[3] they had a personality clash unrelated to gender.

Certainly the jury could have found the friction between Dinesen and Monthei was based on personal dislike, not Monthei's gender. It is also true, as Morton states, that vulgarities like those involved here may be, but are not necessarily, related to the victim's gender. See Kriss v. Sprint Communications Co. Ltd.

[3] Monthei and her husband also farmed and rented storage for boats.

Partnership, 58 F.3d 1276, 1281 (8th Cir. 1995). But, "obscene name-calling" can amount to harassment based on sex. Burns, 989 F.2d at 964; see Hocevar v. Purdue Frederick Co., 223 F.3d 721, 731-32, 737 (8th Cir. 2000)(Lay, J., dissenting at 731-32, panel op. at 737); Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999); Quick, 90 F.3d at 1377. In fact, actionable harassment "need not be explicitly sexual in nature . . . nor have explicit sexual overtones." Quick, 90 F.3d at 1377.

Monthei, the only female worker in the office, was the sole target of Dinesen's harassment. See Beard, 266 F.3d at 798 (that women are the primary target of harassment sufficient to satisfy "based on sex" element). The words "bitch" and "cunt" are not only gender-specific, but gender-demeaning, particularly when combined with "stupid" or "f..k." See Hocevar, 223 F.3d at 731-32 (Lay, J., dissenting, such language by its nature is "inherently sexual"). While proof of gender-based motive is not essential, it is relevant and the frequency and nature of Dinesen's abusive language are probative of a gender-based animus on his part. See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998); Duncan, 300 F.3d at 933-34. Dinesen could have reasonably been viewed by the jury as disparaging Monthei as a woman in the workplace--"the bitch can clean it up." The jury may also have found telling Dinesen's remark that Dinesen did not take directions from women easily. Overall, Monthei presented substantial evidence

from which the jury could have found Dinesen's gender-specific, verbal abuse was motivated by Monthei's gender. Id.

Morton argues Monthei failed to show that Dinesen's verbal abuse affected a term or condition of her employment because Monthei herself used vulgar language and, after the incident at the 2000 Christmas party, Monthei continued to work as usual. As noted, the extent to which Monthei used vulgar language was disputed. Just as her own use of vulgar language does not compel a conclusion Dinesen's vulgarities were "not unwelcome," neither does it mean her employment was unaffected by Dinesen's language. Monthei continued to work, but crediting her testimony, she worked despite a fear of Dinesen and feelings that, as she told Moody, she didn't think she could handle much more.

Harassment affects a term, condition, or privilege of employment if the plaintiff subjectively perceives the working environment to be abusive (as Monthei clearly did if she is believed) and the work environment is "severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The objective component required Monthei to make a threshold showing of a "workplace . . . permeated with discriminatory intimidation, ridicule, and insult." See Duncan, 300 F.3d at 934 (quoting Harris, 510 U.S. at 21). The issue is

determined with reference to the totality of the circumstances, including "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." Id. (quoting Harris, 510 U.S. at 23). Physical proximity to the harasser and the presence of other people are also probative. Carter, 173 F.3d at 702. Proof of all of these factors is not required. They are merely illustrative of what may be significant in a given case. Harris, 510 U.S. at 23. "Simple teasing, offhand comments, and isolated incidents generally cannot amount to severe or pervasive harassment." Klein v. McGowan, 198 F.3d 705, 709 (8th Cir. 1999); see Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). But "once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." Howard, 149 F.3d at 840.

Viewing the evidence favorably to Monthei, the verbal, gender-specific abuse testified to by her involved more than isolated incidents and is not easily dismissed as simple teasing, offhand comments or mere offensive utterances. Dinesen's obscene and derogatory comments were made frequently, often in the presence of others, and in close proximity to Monthei. The jury could have found that in content and context the abuse would be objectively

humiliating and intimidating to a woman, as well as sufficiently severe.

Monthei testified she felt physically threatened by Dinesen, particularly after the incident at the 2000 Christmas party. The jury could have concluded her fear was reasonable, when considered with the comment about stomping Monthei's brains out and Dinesen's overall course of conduct. Dinesen's conduct did not affect Monthei's work directly in the sense that she remained able to work and perform her duties, but her testimony provides evidence that the conduct and resulting fear "discourage[d] [her] from remaining on the job." Harris, 510 U.S. at 22. In the Court's judgment the evidence was sufficient to establish that the alleged harassment affected a term, condition, or privilege of employment.

Morton attacks on several levels the sufficiency of the evidence on its knowledge of the alleged harassment and failure to take prompt and effective remedial action. First, it contends that while Monthei complained to Dunivan, Kalis and Potter, her complaints did not provide reasonable notice that she was attempting to register a sexual harassment complaint. Monthei complained of Dinesen's repeated use of "filthy" language directed at her. The jury was not required to accept Morton's testimony, principally from Dunivan, to the effect that as presented by Monthei her complaints seemed to be more a personality conflict, a dislike of Dinesen, which did not appear to present a serious

problem. From Monthei's testimony about the content and frequency of her complaints, the jury could have concluded Morton should have known of the alleged harassment. The facts were legitimately in dispute here.

Morton criticizes Monthei for failing to take her complaints to Morrison as the company's policy provided she could do, arguing that once the harassment came to Morrison's attention he took action to put a stop to it (an argument which suggests Monthei's earlier complaints about Dinesen's verbal abuse should have prompted Dunivan to take action under the company's sex harassment policy). Under the policy Monthei's complaints to Dunivan were to an appropriate person, sufficient to charge Morton with knowledge. The policy required Dunivan to inform Morrison. Monthei could also have gone to Morrison--she said she didn't because she did not want to go over Dunivan's head--but her failure to do so is not fatal to her proof on the knowledge element.

Morton also suggests that Morrison took prompt and effective remedial action. He did act promptly in ordering Dinesen to stay out of the office area where Monthei worked, but this was a temporary measure while he made an investigation. The investigation was abandoned after only a few days. Morrison's action also came after the company's failure to respond to the complaints made to Dunivan, Kalis and Potter. While Dinesen was told to stay out of the office, he was not told to change his

behavior and was not disciplined. For about a month he and Monthei did not have contact, but Dinesen evidently did not feel constrained from abusing Monthei outside the office as the final, January 17, 2001 post office episode shows. None of the factors which bear on an assessment of the reasonableness of an employer's response compel a finding for Morton on the effectiveness of its remedial action. See Carter, 173 F.3d at 702; Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1199 (N.D. Ia. 2000) (summarizing case law).

For all of the foregoing reasons, the Court finds that Morton is not entitled to judgment as a matter of law.

Constructive Discharge

Morton argues Monthei did not establish a constructive discharge because she did not show that Morton created the intolerable working conditions with the intention of forcing her to resign, citing Moisant v. Air Midwest, Inc., 291 F.3d 1028, 1032 (8th Cir. 2002), and she failed to take advantage of Morton's policy providing a remedy for Dinesen's conduct, quitting without allowing Morton a reasonable opportunity to address the problem.

To prove constructive discharge an employee must show the employer created the intolerable working conditions with the intention of forcing the employee to quit, here the failure to remedy sex harassment it knew, or should have known about. Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490, 494 (8th Cir.

1996); see, e.g., Duncan, 300 F.3d at 935-36; Tadlock v. Powell, 291 F.3d 541, 547 (8th Cir. 2002); Campos v. City of Blue Springs, Mo., 289 F.3d 546, 550 (8th Cir. 2002). The employee, however, is not required to establish a specific intent to force her to quit. The intent element is satisfied if the employee's resignation was a reasonably foreseeable consequence of the intolerable working conditions. Duncan, 300 F.3d at 935 (citing Phillips v. Taco Bell Corp., 156 F.3d 884, 890 (8th Cir. 1998)); Jaros, 294 F.3d at 965; Delph v. Dr. Pepper Bottling Co., 130 F.3d 349, 356 (8th Cir. 1997) (the question is whether the harassment "was so severe or pervasive that it would be reasonably foreseeable that an employee subjected to it would resign"); Summit v. S-B Power Tool, (Skil Corp.), 121 F.3d 416, 421 (8th Cir. 1997), cert. denied, 523 U.S. 1004 (1998) (citing Tidwell, 93 F.3d at 494); Hukkanen v. International Union of Operating Engineers, 3 F.3d 281, 284-85 (8th Cir. 1993).

For reasons stated previously, the jury could have found Dinesen's frequent use of derogatory, gender-specific vulgarities created an intolerable working environment. Little, if anything, was done to correct the problem despite frequent complaints by Monthei. She also signaled to Morton that she thought the workplace was intolerable. Monthei told Dunivan she did not think she could take Dinesen any more and, on the last December 15 conversation with Moody, said she was feeling stressed. Indeed from her comments Moody thought she might quit. The jury could

have found from this evidence that Monthei's resignation was a reasonably foreseeable consequence of Dinesen's uncorrected harassment.

An employee has an obligation "not to assume the worst and not to jump to conclusions too quickly." Duncan, 300 F.3d at 935. An employer is entitled to a reasonable opportunity to investigate complaints of sexual harassment and to remedy the workplace environment.[4] Id. (citing Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1247 (8th Cir. 1998)). Here again, Morton contends Monthei failed to follow its sexual harassment policy. Monthei made numerous complaints to her supervisor. Though Monthei did not follow the alternative provided to her under the policy of contacting Morrison directly, she did avail herself of the recourse provided in the policy by complaining to Dunivan. Morton, in the persons of Dunivan, Kalis and Potter, had opportunities to remedy the situation when Monthei brought it to their attention. The only action taken when the Christmas party incident was brought to Morrison's attention was Dinesen's banishment from the office. There is no evidence of other corrective action and, from the subsequent post office incident, the jury could have found the situation had not been remedied. The investigation was abandoned, Monthei was not interviewed, and she received no response to her

[4] The jury was instructed to this effect. See Inst. No. 12.

letter to Morrison. In these circumstances the jury could find that Monthei's belief, communicated to Dunivan and Kalis, that her complaints were not taken seriously was a reasonable one, and that she gave Morton a reasonable opportunity to investigate and take corrective action.

Morton is not entitled to judgment as a matter of law on the constructive discharge claim.

NEW TRIAL

Monthei argues that the Court erred in certain evidentiary rulings and that the jury's award of emotional distress damages was excessive and not evidentially supported.

Evidentiary Rulings

Morton argues the Court erred in evidentiary rulings in numerous particulars and refers the Court to its pretrial motion in limine and memorandum in support thereof. It makes a general argument that the items referred to should have been excluded from evidence and argues that their admission and cumulative effect were prejudicial error.

The Court's ruling on the motion in limine is not a basis to assert error as the Court expressly stated the ruling was "not a definitive ruling on any item of evidence." (October 24, 2002 limine ruling at 1). See Fed. R. Evid. 103(a). Morton does not identify any specific evidentiary ruling at trial as erroneous nor, beyond a conclusory statement, does it advance reason to believe

that any evidentiary ruling was "inconsistent with substantial justice." Fed. R. Civ. P. 61. See Qualley v. Clo-Tex Intern., Inc., 212 F.3d 1123, 1127 (8th Cir. 2000). It follows Morton has provided no basis to grant a new trial on the ground of evidentiary error.

Emotional Distress Damages

The jury awarded compensatory damages for past emotional distress in the amount of $87,500. Both sides recognize the verdict should not be disturbed unless it is "so grossly excessive as to shock the conscience of [the] court." Ouachita Nat. Bank v. Tosco Corp., 716 F.2d 485, 488 (8th Cir. 1983); see Foster v. Time Warner Entertainment Co., L.P., 250 F.3d 1189, 1196 (8th Cir. 2001); Thorne v. Welk Inv., Inc., 197 F.3d 1205, 1211 (8th Cir. 1999). In practice, the court's conscience is likely to be shocked where the verdict is outside a reasonable range, giving due deference to the jury's right to accept or reject the evidence and give that weight to it which it felt was merited. See 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 2807 at 82-84.

Emotional distress damages must be supported by evidence of "genuine injury." Forshee v. Waterloo Indus., Inc., 178 F.3d 527, 531 (8th Cir. 1999)(quoting Carey v. Piphus, 435 U.S. 247, 264 n.20 (1978)). Such evidence may come from plaintiff, or members of her family and those who observed her, and does not require medical

testimony. Id.; Kim v. Nash Finch Co., 123 F.3d 1046, 1065 (8th Cir. 1997).

Monthei testified she felt degraded, "lower" and intimidated by being talked to and about as Dinesen did. She was frustrated by her inability to stop him. By the time she gave notice she was resigning, she described herself as not doing well emotionally and scared to return to work. Monthei testified she explained to Dunivan she could no longer come to work and be afraid. She said that after her resignation she did not look for jobs in Jefferson right away because she was afraid she would run into Dinesen. She also said, however, that after three or four months her attitude was much improved. Monthei did not treat with a counselor, mental health professional, or doctor.

Monthei's friend, Lori Ward, was waiting in the car when Monthei returned after the confrontation with Dinesen in the convenience store. Ward described Monthei as pale and shaking from the incident. After the 2000 Christmas party incident, Ward noticed Monthei was losing weight, seemed stressed out, and was not herself. Monthei's husband, Tom Monthei, testified that many times his wife would return from work at Morton upset, sometimes a little, sometimes a lot. He attributed his wife's weight loss to problems she was having at work.

In addition to this evidence, the jury could have considered that frequently being called obscene or derogatory names

over an approximately eighteen-month period would have been wearing emotionally, exacerbated by Morton's lack of responsiveness to Monthei's complaints. If the jury believed Monthei became genuinely fearful of Dinesen it also could have considered her fear caused a measure of emotional harm. And, it could have inferred additional distress from being forced to quit and Monthei's inability to obtain a similar paying job. See November 7, 2002 front pay ruling at 3-4; Ross v. Douglas County, Nebraska, 234 F.3d 391, 397 (8th Cir. 2000).

The evidence summarized above was sufficient to establish a genuine mental or emotional injury to permit an award of emotional distress damages. As to the amount, comparison of emotional injury awards with what has been approved in other reported cases is an uncertain exercise because each case stands on its own facts. As the parties' briefs illustrate, the case law can be plumbed to find a wide range of emotional distress verdicts held to be sufficiently and insufficiently supported in the evidence. The closest analogue in this circuit which the parties refer to is Delph v. Dr. Pepper Bottling Co., supra. In Delph the court reduced a $150,000 emotional distress finding by the trial court to $50,000. 130 F.3d at 357-58. Delph was a racially hostile work environment case. As here, Delph's claim was not supported by medical or other expert evidence (though an inconclusive doctor's report was received in evidence). He had testified he felt

"emotionally hurt," had experienced headaches, "hurt" in his stomach, and "was under a lot of pressure, and just couldn't take it no more," not much different in degree than Monthei's testimony here. Id. at 357. Monthei did not attribute any physical symptoms to her distress other than, possibly, weight loss, but the evidence of physical symptoms here was no less "vague and ill-defined" than the evidence in Delph. Id. at 358. Delph's wife testified he was "very withdrawn" and "upset a lot of the time." Again, not much different than Mr. Monthei's testimony. Id. at 357. Delph featured a hostile work environment resulting in a constructive discharge in which the African-American plaintiff was subjected to "a steady barrage of racial name-calling" of the most odious type. Id. at 352. The Eighth Circuit's discussion suggests the improper conduct to which Delph was subjected was at least as degrading and humiliating, if not more so, than what Monthei was subjected to.

Delph, therefore, sets a useful benchmark to approximate the boundaries within which the jury could exercise its judgment, but it does not necessarily follow that the jury could find no more than what the Eighth Circuit approved in Delph for emotional distress damages. The $150,000 compensatory damages finding in Delph was made by the trial court following a bench trial and the court of appeals examined it under the "clearly erroneous" appellate standard. Id. at 358 (citing Vigoro Indus., Inc. v. Crisp, 82 F.3d 785, 789 (8th Cir. 1996)). The verdict here is

subject to new trial or remittitur under a different, "grossly excessive" standard which recognizes the damages findings of a jury are entitled to a degree of latitude and deference consistent with the Seventh Amendment. While very generous, indeed, beyond what was discussed in the argument, the Court finds the amount awarded by the jury for emotional distress damages is not so lacking in evidential support or beyond reason as to make the verdict grossly excessive warranting new trial or the opportunity for a remittitur.[5]

RULING AND ORDER

In light of the discussion above, defendant's Motion for Judgment as a Matter of Law, or in the Alternative, for Remittitur and/or a New Trial should be and is denied.

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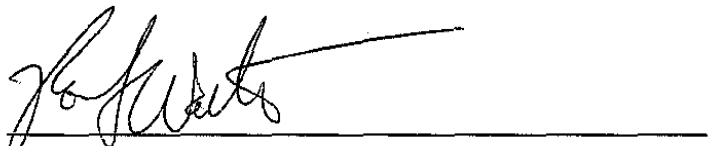
[5] Morton asks the Court to enter a remittitur. The Court cannot simply reduce the judgment as to do so would run afoul of the Seventh Amendment's prohibition on the reexamination of facts determined by a jury. See Hetzel v. Prince William County, 523 U.S. 208, 211 (1998) (citing Kennon v. Gilmer, 131 U.S. 22, 28-29 (1889)). The plaintiff must be afforded an opportunity for a new trial rather than accept the reduced damages, for example, by "conditioning the denial of a new trial on Plaintiff's consent to the remittitur." Thorne, 197 F.3d at 1212.

IT IS SO ORDERED.

Dated this 26th day of March, 2003.



ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE