

FEDERAL COURTS AVOID TITLE VII'S CAP ON DAMAGES BY AMENDING COMPLAINT AFTER JURY VERDICT TO ADD STATE CLAIM AND APPORTION DAMAGES ACCORDINGLY TO PERMIT LARGER VERDICT

In *Baker v. John Morrell & Co.*, No. 03-2680 (8th Cir. 9/3/04), the Court of Appeals for the Eighth Circuit, in a hostile work environment, retaliation, sexual harassment and constructive discharge case, affirmed the jury verdict totaling \$1,172,785.00 by permitting plaintiff to amend her Complaint after the jury verdict to add a state claim under the Iowa Civil Rights Act in order to avoid the Title VII cap of \$300,000.00 largely because of the egregious conduct of supervisors and management toward the plaintiff over a period of six years.

The Eighth Circuit affirmed the district court and the jury verdict in all respects.

The plaintiff, Baker, commenced employment at John Morrell & Company, a meat packing plant in Sioux City, Iowa, on October 2, 1984, as a computer scale operator. She worked at the company until April 2001 when she took an extended medical leave due to the extreme hostile work environment placed upon her by co-workers, supervisors, and upper management. At trial, several Morrell employees testified about the numerous, sometimes almost daily, incidents which occurred by male employees towards the plaintiff either in the form of sexual comments or actual touching. Two co-workers, Eichmann and Murphy, were the harassers and were co-workers who worked on the production line with her. Their conduct towards her over a period of six years was off the radar chart in terms of obscene, filthy, and outrageous conduct. Apparently, both co-workers wanted to date the plaintiff, but she rebuffed them, and the two men undertook a scheme to sexually demean the plaintiff. Plaintiff complained to supervisors and upper management including the director of human resources constantly. It is hard to believe in this day and age that a director of human resources would turn

his head to such constant harassment towards a female employee over a six year period. But the company did.

The Court of Appeals for the Eighth Circuit spent an extraordinary amount of time discussing the facts, and then addressed the law, and applied the law to the facts in a summary fashion. The case is well worth reading regardless which side of the fence you sit, and the reader certainly would wonder why the company took this case to trial based upon the evidence.

The plaintiff, Baker, and other women, from the evidence, were constantly harassed by two co-workers, Jeff Eichmann, a/k/a “Eight-ball” and Brian Murphy. Rather than recite a litany of sexual harassment in detail towards Baker and other female employees over a six year period, a summary will be presented.

Eichmann, starting in approximately 1995, began a hostile work environment towards women by referring to plaintiff as a “fat cow or an elephant,” a “wine tit,” and a “fuc_ _ _ _ scab bitch.” Eichmann called other females in front of management, “Mexican low life fuc_ _ _ _ cu_.” A female employee complained to her foreman, her union representative and to human resources, but nothing was done. The director of human resources, Joyce, told the female employee and Eichmann to “quit acting like kids.” Female employees testified at trial that Eichmann would rub against plaintiff and other women by going up behind them and thrusting his hip into their behind. Another female employee who since left because of the sexual harassment testified about the general lewd behavior of Eichmann towards the women in the plant and in the lunchroom.

Another female employee testified that Eichmann “threw boxes at her and called her a fuc_ _ _ _ bitch.” She also observed Eichmann frequently talking to women about “blow jobs.”

Eichmann constantly harassed Baker both on a sexual basis with comments and touching, but also harassed her when a friend died and she was crying at work about her loss. Eichmann started mimicking her crying and moaning sounds on a constant basis. Baker also developed medical problems which required her to go to the bathroom frequently and Eichmann would mock her in front of the supervisor by saying "I gotta pee, I gotta pee, my friend died, boo-hoo." Before Baker could go to the bathroom, she needed permission from her supervisor who would often force her to wait 30-45 minutes to use the bathroom while male employees did not have to wait at all.

In October 1996, Eichmann made fun of Baker who had a hysterectomy and her medical problem. The plaintiff's dog died and Eichmann continued to harass her and make comments about the fact that her dog died.

In 1998, Eichmann continued to direct sexually suggestive and offensive remarks and actions toward Barker, repeatedly calling her "fuc_ _ _ idiot," or "dumb bitch." It got to the point where the plaintiff "would shake almost like a vibrator would be hooked to her because she was upset about what was happening and nothing was being done." Baker, prior to February 1999, had asked her union representatives a dozen or more times to contact the director of human resources to complain, and when they complained nothing was done.

In March 1999, the director of human resources, Joyce, received additional complaints and then he went to Eichmann and Baker and told them that they "had a hard-on for each other," and told them they had to get along. About this time, Brian Murphy joined Eichmann in harassing Baker. Eichmann had told Murphy that Baker had gone to personnel again and "ratted out." Murphy had told other female employees that he wanted to "get in Baker's pants."

In December 1999, Eichmann worked on the line with Baker on one side and Murphy on the other, and the two would continually harass her by throwing 40 pound boxes of meat at her and make comments to her like “I wonder what you look like naked.”

Murphy was spreading rumors about Baker that he had gone to her house, and “she answered the door with nothing on but a robe and that she was good in the sack.” Baker told her supervisors that she wanted to see Joyce, but was told that Joyce did want to see her, and was tired of Baker and Eichmann coming in and out of the personnel office. About the same time, Eichmann again called Baker a “fuc_ _ _ bitch,” and threw a box of meat at her. Eichmann also made the comment to Baker that “your fuc_ _ _ mother’s dead,” and Baker reported the incident to her family doctor and took time off. Her doctor noted that she was having trouble with anxiety and depression due to the harassment and prescribed an anti-depressant. Eichmann and Murphy harassed her in the parking lot with Eichmann driving his truck right at her and stopping just short of hitting her and they were both laughing. Baker finally had a panic attack, became confused, and left the plant on December 29, 1999. A co-worker confirmed the conduct of Eichmann and Murphy against Baker and said that Eichmann and Murphy called Baker names “pretty much every day.” He also testified that he observed Baker becoming depressed and no longer the happy-go-lucky person she once had been. He also testified that Eichmann only harassed women.

On December 30, 1999, the union told Baker that the company fired her because she abandoned her job the previous day. A letter was sent to Baker on January 5, 2000, confirming the termination. Baker then drafted a Iowa Civil Rights Commission complaint detailing the sexual harassment and filed the charge.

The director of human resources, Joyce, commenced an investigation as to why Baker left the job on December 29, 1999, conducted an investigation, and other employees confirmed the plaintiff's view of the facts. Joyce interviewed Eichmann about why Baker left, but the investigation was incomplete. On January 25, 2000, Baker saw a doctor and told him that the company had offered her job back, but she was afraid to return. She had chest pains, shortness of breath, crying spells, and sleeping problems and the doctor diagnosed her with depression and hypertension.

During the investigation of the Iowa Commission on Human Rights complaint, Joyce admitted at trial that he had never performed an investigation into Baker's sexual harassment complaints ever after she filed her state complaint. Eichmann was given a written reprimand because Eichmann's treatment of a female employee was inappropriate. Eichmann was never reprimanded for sexual harassment, however.

In mid-February 2000, the plaintiff was released by her doctor to go to work. Upon her return to work, Eichmann intentionally rubbed against her buttocks, which was confirmed by a witness at trial. The conduct continued by Eichmann and Murphy against Baker and Joyce was aware of the conduct but never disciplined either employee even after the state charge was filed.

The plaintiff's supervisor, in the spring of 2000, warned her about dragging him into "this mess" by filing the complaint. Baker's bathroom breaks were shortened, she was given additional job responsibilities, but less help, and Baker complained about the retaliation to Joyce. Baker's supervisor told her that "she was sick of my shi_ and tired of me complaining." When Baker complained to her supervisor, she was told to "shut the fuc_ up."

In December 2000, Baker brought a female co-worker with her to report additional harassment to Joyce because Baker did not believe that Joyce was documenting everything she reported. Murphy continued his harassment with a “gross, sexual hip thrust” on Baker.

On April 4, 2001, Baker’s treating psychiatrist diagnosed her with major depressive disorder, single episode, post traumatic stress disorder and panic disorder. She was hospitalized and transferred to the psychiatric unit where she was classified as suicidal. Similarly, her family doctor hospitalized her again for suicidal thoughts.

The plaintiff ended her employment at the company on February 14, 2002. Joyce testified that the company never performed a sexual harassment investigation or a discrimination investigation into the complaints that the plaintiff made. A lawsuit was brought under Title VII for sexual harassment, hostile work environment, retaliation, disparate treatment and constructive discharge. The case proceeded to trial, and the jury found for Baker on the sexual harassment, hostile work environment, and retaliation claims and also found that she had been constructively discharged. The jury awarded her \$839,470 in compensatory damages, \$33,314 in back pay, and \$650,000 in punitive damages. The district court awarded \$174,927 in attorneys’ fees and costs and \$38,921 in front pay.

A legal hitch occurred in the verdict because the case was only brought under Title VII which had a \$300,000 cap on damages excluding back pay. Therefore, Baker moved to amend her complaint to include the state claim, which state statute did not allow for punitive damages, but also did not include a cap for compensatory damages. She argued that she should be allowed to amend her complaint because the legal standards for claims under Title VII and the Iowa statute are identical and the company would not be prejudiced by the amendment as it had fully defended the Title VII action. Initially, the district court denied the motion, but then upon

reconsideration granted it and reallocated the damages to maximize the plaintiff's recovery. The district court allocated all the compensatory damages to the Iowa statute (\$839,470), reduced the punitive damages award to \$300,000 and allocated the punitive damages to the Title VII claim.

The company appealed and argued that the district court abused its discretion by refusing to grant its motion for judgment as a matter of law. The company contended that the evidence was insufficient to prove (1) an objective hostile work environment, (2) constructive discharge, (3) the company cited a remedy to the alleged harassment, (4) the company's notice of any sex based harassment, (5) the company retaliated against Baker for complaining about the harassment, and (6) any retaliation affected a material term or condition of Baker's employment. They also argued that the award of front pay and attorneys' fees were excessive, and that Baker failed to find replacement employment, and importantly that the district court erred by allowing the amendment to the Complaint for the sole purpose of maximizing the plaintiff's recovery. Essentially, the company appealed every decision of the district court.

The Court of Appeals for the Eighth Circuit disagreed with every contention of the company and affirmed the decision.

Hostile Work Environment

First, Title VII prohibits employment discrimination based on sex and covers a broad spectrum of disparate treatment. A plaintiff may prevail in a discrimination claim by showing the inappropriate conduct creates a "hostile work environment" which can be proven by showing that the plaintiff is a member of a protected group, she was subjected to unwelcome sexual harassment, the harassment was based on sex, and the harassment affected a term, condition or privilege of employment. The harassment must be "severe or pervasive" enough to create an objectively hostile or abusive work environment, and the victim must subjectively believe her

working conditions have been altered. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

The Court said there is no bright line between sexual harassment and merely unpleasant conduct, but we view the “totality of circumstances” in determining whether there is a hostile work environment. Such factors as frequency of the behavior, its severity, whether physical threats are made, and whether the behavior interferes with plaintiff’s performance on the job are considered in determining a hostile work environment. *Duncan v. General Motors Corp.*, 300 F.3d 928, 934 (8th Cir. 2002). Conduct sufficient to establish a hostile work environment claim includes pervasive, sexual innuendo and repetitive offensive touching. *Eich v. Bd. of Regents*, 350 F.3d 752, 755-56 (8th Cir. 2003); *Howard v. Burns Bros.*, 149 F.3d 835, 838 (8th Cir. 1998) [describing a co-employee constantly making sexual innuendos, brushing up against plaintiff and telling lewd jokes with gestures].

The Court had little difficulty in applying these standards and concluding that the evidence supported the jury’s verdict. The Court relied upon its lengthy factual recitation, which summarized in this article, established years of blatant sexual harassment leaving no doubt Baker was subjected to severe and pervasive conduct which she objectively and subjectively considered hostile and abusive.

Constructive Discharge

Constructive discharge occurs when an employer deliberately renders the employee’s working conditions intolerable, thereby forcing her to quit. The intolerability of working conditions is “judged by an objective standard, not the employee’s subjective feelings.”

Gartman v. Gencorp, Inc., 120 F.3d 127, 130 (8th Cir. 1997). The conditions created by the employer must be such that a reasonable person would find them intolerable, and secondly, the employer’s actions must have been taken with the intention of forcing the employee to quit.

Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). The Court also directed in its opinion that an employee who quits must give his employer a reasonable chance to work out the problem or else there is no constructive discharge. *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 498 (8th Cir. 1995).

Applying these legal standards to the facts, the Court again found little trouble in concluding a constructive discharge. Besides the numerous incidents of sexual harassment, there were numerous attempts to resolve the problems which went largely ignored by supervisors and management.

Retaliation

To establish a case of retaliation, the plaintiff must show (1) she engaged in a protected activity, e.g., complained about sexual harassment, (2) the employer took adverse action against her, and (3) there is causal connection between the two. *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997). The company attacked the second element, arguing insufficient evidence to support the jury's finding that the retaliatory acts constituted an adverse employment action. Termination is an adverse action and not everything that makes an employee unhappy is an actionable adverse action. Changes in duties or working conditions that cause no materially significant disadvantage are insufficient to establish the adverse conduct required to make out a prima facie case. *Harlston v. McDonnell Douglas Corp*, 37 F.3d 379, 382 (8th Cir. 1994). A reasonable jury could conclude that negative references to potential employers constituted sufficient adverse action to state a retaliation claim.

The Court held that the plaintiff presented evidence showing that her supervisor became antagonistic towards her because she filed the state complaint, which reflected badly on the supervisor's job performance. As a result, the supervisor limited the plaintiff's bathroom and

other breaks, added to her job duties, refused to provide her necessary job assistance, repeatedly yelled at her for making mistakes, withheld privileges allowed to other employees, and attempted to dissuade her from making further complaints. The Court was satisfied that these changes in working conditions constituted significant and material disadvantages sufficient to support the retaliation claim.

Probably the most interesting issue was whether the district court properly allowed the plaintiff to amend her complaint after the jury verdict. Apparently, plaintiff's counsel did not envision such a huge verdict in the case and failed to piggy-back the state claim with the federal claim. Pursuant to Rules 15(b) and 54(c), F.R.C.P., the plaintiff moved to amend the complaint after the verdict was decided.

Under Rule 15(b), the district court's discretion to grant or deny a motion to amend is only reversible on a abuse of discretion. *Granson v. Univ. of Minn.*, 272 F.3d 568, 575 (8th Cir. 2001). An issue not raised in the pleadings, but tried by expressed or implied consent of the parties, shall be treated as having them raised in the pleadings under Rule 15(b). Thus, "such amendment of the pleadings as may be necessary to cause them to conform to the evidence and raise these issues may be made upon motion of any party at any time even after judgment." *IES Industries, Inc. v. United States*, 349 F.3d 574, 579 (8th Cir. 2003). The Court relied upon an Internal Revenue Service case challenging its decision denying tax credits resulted from trades of American depository receipts. The case was reversed on appeal against the IRS and on remand, the IRS moved to amend the complaint to assert an affirmative defense it had not previously plead. The district court granted the amendment and on appeal, IES argued that the district court abused its discretion because IES did not consent expressly or impliedly to try the issue of the affirmative defense in the earlier proceedings. The Court rejected the argument and held that

IES adduced evidence relevant to the affirmative defense. Thus, the court found in the case at bar that the district court did not abuse its discretion by allowing the amendment of the complaint to include the state claim. The parties agreed that the proof and legal standards applicable to Title VII are also applicable to the state claim. Thus, the amendment sought by Baker in no way was inconsistent with the company's position throughout the litigation. The Court of Appeals did not find an abuse of discretion by the district court by granting the Rule 15(b) amendment even though the appeals court may have decided the issue differently.

As an alternative basis for permitting the amendment, the Court used Rule 54(c) which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party is not demanded such relief in his pleadings." The caveat is whether ordering such relief so prejudiced the opposing party that it would be unjust to grant such relief. *Atlantic Purchasers, Inc. v. Earcraft Sales, Inc.*, 705 F.2d 712, 716 (4th Cir. 1983). The company argued that it was prejudiced by the plaintiff's failure to plead the state claim because had it known that damages would not be capped under Title VII, it may have settled the claim instead of risking a verdict in excess of the cap. The Court ruled, however, that the company failed to present any evidence to show its settlement strategy was affected by the Title VII cap. Their assertion was not enough. The Court affirmed the district court's amendment.

Obviously, the egregious conduct on the part of the co-workers over a six year period, and the numerous complaints of the plaintiff to company management led the Court of Appeals to achieve a good result for the plaintiff.

