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JILLIAN BROWN vs. COOLEY DICKINSON HOSPITAL, INC.

13-P-1057

APPEALS COURT OF MASSACHUSETTS

2014 Mass. App. Unpub. LEXIS 824

July 3, 2014, Entered

**NOTICE:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

**JUDGES:** Green, Trainor & Grainger, JJ.

#### OPINION

#### MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Cooley Dickinson Hospital, Inc. (hospital), appeals from denial of its motions for judgment notwithstanding the verdict (judgment n.o.v.) and remittitur, following a jury verdict on special questions awarding compensatory and punitive damages to the plaintiff, Jillian Brown, for sexual harassment and retaliation.<sup>1</sup> We affirm.

1 The jury awarded Brown \$40,000 in back pay damages, \$75,000 in emotional distress damages, and \$100,000 in punitive damages. Brown accepted the back pay award of \$20,000 on remittitur found appropriate by the judge. Posttrial, the judge awarded Brown substantial attorney's fees and costs. An amended judgment entered accordingly.

"Our standard for reviewing a motion for judgment n.o.v. is 'whether, anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [other party].'"<sup>2</sup> *Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 651, 888 N.E.2d 897 (2008), quoting from *Masingill v. EMC Corp.*, 449 Mass. 532, 543, 870 N.E.2d 81 (2007) (other citation omitted). In reviewing the judge's ruling, we construe the evidence in the light most favorable to Brown and disregard the evidence favorable to the hospital. See *O'Brien v. Pearson*, 449 Mass. 377, 383, 868 N.E.2d 118 (2007).

2 The judge did not separately address the hospital's motion for a new trial, which required the application of a different legal standard (one more favorable to the moving party). See *O'Brien v. Pearson*, 449 Mass. 377, 384, 868 N.E.2d 118 (2007). The hospital has not pursued this issue on appeal.

While the evidence underpinning Brown's sexual harassment claim was not overwhelming, it was sufficient to support the verdict. From Brown's testimony, the jury could have found that she was subjected to sexual advances and/or physical conduct of a sexual nature by a physician whose date request she had rejected. See *G. L. c. 151B, § 1(18)*. The unwelcome conduct included invading Brown's personal space, reaching over and touching Brown unnecessarily, and giving Brown's shoulders extra squeezes in greetings. A touching in a private area of the body is not a required element of a sexual harassment claim. See *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 290, 676 N.E.2d 45 (1997) (recognizing that statutory definition of sexual harassment extends to any physical or verbal conduct of sexual nature). The jury could have found that the complained-of conduct was sexual in nature.

The judge also properly denied the hospital's motion for judgment n.o.v. with respect to Brown's retaliation claim. Brown proceeded on two theories of retaliation, claiming that (1) she was singled out for discipline and placed on paid administrative leave for opposing the hospital's discriminatory practices (i.e., complaining internally about the sexual harassment); and (2) the hospital fired her sixteen days after she filed a complaint with the Massachusetts Commission Against Discrimination (MCAD).<sup>3</sup> The hospital defended with evidence that it took adverse action against Brown because she deviated from standards of good nursing practice and failed to acknowledge mistakes in with her care of Patient A. The questions whether the hospital acted with discriminatory intent or motivation in its actions framed classic factual determinations for the jury. The jury were entitled to credit Brown's version of events, and decide the motivational issues in her favor. Based on conflicting evidence regarding Brown's job performance, a permissible inference that the hospital's decision maker knew of Brown's MCAD complaint, and the brief period between her MCAD filing and her termination, the jury's retaliation verdict was not unsupported.<sup>4</sup> See *Ciccarelli v. School Dept. of Lowell*, 70 Mass. App. Ct. 787, 793-794, 877 N.E.2d 609 (2007).

3 The special verdict form contained only one question regarding retaliation. In response to a jury question, the judge instructed the jury, without objection, that if they found either theory of liability supported, they could find in favor of Brown on the retaliation claim.

4 The jury were not required to find that Brown caused her own termination by rejecting the hospital's transfer offer. Since the harasser was allowed to continue working in the emergency department, the jury could have found that the hospital's transfer offer was made in response to Brown's internal complaints. Compare *College-Town, Div. of Interco, Inc. v. Massachusetts Commn. Against Discrimination*, 400 Mass. 156, 168, 508 N.E.2d 587 (1987). The jury could also have based the retaliation verdict on the hospital's termination decision.

Finally, the judge did not abuse his discretion in denying the defendant's motion for remittitur of punitive damages. See *Clifton v. Massachusetts Bay Transp. Authy.*, 445 Mass. 611, 623, 839 N.E.2d 314 (2005). "An award of punitive damages requires a determination of the defendant's intent or state of mind, determinations properly left to the jury, whose verdict should be sustained if it could 'reasonably have [been] arrived at . . . from any . . . evidence . . . presented.'" *Haddad v. Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. 91, 107, 914 N.E.2d 59 (2009), quoting from *Dartt v. Browning-Ferris Indus., Inc. (Mass.)*, 427 Mass. 1, 16, 691 N.E.2d 526 (1998). An award of punitive damages under *G. L. c. 151B* is appropriate only where the defendant's conduct is "outrageous or egregious," warranting "punishment and not merely compensation." *Haddad, supra* at 110. This requires a "heightened finding beyond mere liability." *Ibid.*

There was sufficient evidence to support the award of punitive damages. Brown reported the harassment twice, but the hospital did not investigate promptly or take any precautionary measures, and Brown had to continue working with her harasser for months.<sup>5</sup> The "duration of the wrongful conduct" and the "defendant's conduct after learning that the initial conduct would likely cause harm" are appropriate factors for the jury to consider on a request for punitive damages. *Id. at 111.*

5 Brown testified that she reported the harassment to her supervisor in January, 2009, and he simply told her to reevaluate her approach to working with the physician in question. No action was taken, and she continued to work with the harasser several days per week. In April, 2009, she complained to the harasser's supervisor, and was asked to make a report to human

resources, which she did. Again, however, nothing was done, and she continued to work with the harasser throughout April and most of May. During this period she was told that human resources employees were "trying to facilitate a meeting." The meeting was finally held in June, after Brown had already been placed on leave. Moreover, no investigation of the charges took place until late July and August, after Brown had been terminated.

Furthermore, Brown testified that an important page was missing from Patient A's chart during the investigation of Patient A's death.<sup>6</sup> In addition, a nurse who supervised Brown during her orientation testified that she produced evaluations indicating that Brown was "progressing appropriately for a new graduate," but that these forms went missing from the office where they were kept. The jury could have inferred that the hospital concealed documents in an effort to bolster its claim that Brown was fired for cause rather than in retaliation. Such behavior would also support the award of punitive damages. See *ibid.* (defendant's "concealment" of wrongful conduct appropriate factor to consider when determining whether to award punitive damages).

<sup>6</sup> Brown testified that she conducted a "head to

toe assessment" of Patient A and wrote the results on a paper attached to the patient's chart. However, the assessment was later missing and the chart's pages had been numbered by someone else.

"As the prevailing party in her claim of discrimination in employment based on gender, in violation of *G. L. c. 151B, § 4*, the plaintiff is entitled to an award of 'reasonable' appellate attorney's fees pursuant to *G. L. c. 151B, § 9*." *Haddad v. Wal-Mart Stores, Inc. (No. 2)*, 455 Mass. 1024, 1024, 920 N.E.2d 278 (2010). Brown shall, within fifteen days following the date of rescript, file with this court and serve on the defendant a motion for determination of the amount of her attorney's fees incurred on appeal, supported by an affidavit detailing such fees, in accordance with the procedure described in *Fabre v. Walton*, 441 Mass. 9, 10-11, 802 N.E.2d 1030 (2004). The defendant may, within fifteen days thereafter, file with this court and serve on Brown an opposition to the amount of fees so claimed.

*Amended judgment affirmed.*

By the Court (Green, Trainor & Grainger, JJ.),

Entered: July 3, 2014.

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