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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1443**

Jacquelyn Bliss,
Appellant,

vs.

Central States Insulation Wholesale, Inc., et al.,
Respondents.

**Filed May 30, 2017
Affirmed
Randall, Judge***

Anoka County District Court
File No. 02-CV-14-658

Stephen C. Fiebiger, Stephen C. Fiebiger Law Office, Chartered, Burnsville, Minnesota
(for appellant)

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Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and
Randall, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL, Judge

After a jury trial on appellant's claims for sexual harassment, hostile work environment, and constructive discharge in violation of the Minnesota Human Rights Act (MHRA), appellant argues that the district court abused its discretion in excluding certain evidence; admitting certain evidence; instructing the jury on sexual harassment, hostile work environment, and vicarious liability; allowing respondent to take and use a trial deposition; and awarding computer forensic fees. We affirm.

FACTS

Procedural history

After appellant Jacquelyn Bliss quit her job, she sued her former employer, respondent Central States Insulation Wholesale, Inc. (CSI), alleging that she had been sexually harassed and subjected to a hostile work environment by her supervisor, C.P., and that she had been constructively discharged in violation of the MHRA.¹ Bliss alleged that C.P. showed her pornography on company computers and that he made sexual remarks about Bliss and another female employee.

In a deposition, C.P. admitted viewing pornography on his work computer and receiving e-mails from customers containing links to and attachments of pornographic images. He also admitted sending such e-mails to male CSI customers and a male CSI

¹ Bliss also sued C.P. individually, but he was dismissed from the lawsuit.

employee. C.P. denied sending pornographic e-mails to any females, and he denied showing anyone pornographic images on company computers.

At a pretrial conference, CSI notified the district court and Bliss that CSI employee B.S. would be out of the country on the trial date. CSI orally moved to have parts of B.S.'s deposition transcript read into the record at trial or to take his video deposition for trial. The district court reserved its ruling and instructed the attorneys to attempt to reach an agreement on the issue.

The district court granted in part and denied in part the parties' motions in limine. The order preliminarily barred the parties from presenting evidence on the decision by the Minnesota Department of Human Rights (DHR) on Bliss's discrimination charge against CSI and C.P. The order preliminarily barred the parties "from presenting evidence or making argument with respect to any pornographic image, video, or website not actually viewed by [Bliss] during her employment with [CSI]." The order also states, "Subject to objection at trial the parties may present evidence of [Bliss's] prior employment lawsuit; [and] the parties may present evidence of her prior romantic relationship with a co-worker."

CSI served a notice of taking video deposition of B.S., and Bliss filed a motion to quash the deposition based on untimeliness and prejudice. Trial began three days after the deposition was taken. The district court stated that either B.S.'s deposition transcript or the video deposition would be admitted and that the court would determine which deposition would be admitted if the attorneys were unable to agree.

Sexual-harassment allegations

Bliss worked in CSI's Blaine office from September 2010 through August 2011. During that time, four other employees worked in the Blaine office and warehouse: D.S., B.S., C.P., and T.F. Bliss testified that she understood that C.P. was CSI's president and that he sometimes referred to himself as the chief financial officer. CSI was owned by W.S., who visited the office twice during Bliss's employment.

Bliss testified about specific incidents of alleged harassment by C.P. She testified that C.P. repeatedly showed her a pornographic cartoon video on an office computer. Bliss testified that on another occasion, C.P. showed her a pornographic image on his office computer and laughed when she asked why he showed it to her. She testified that numerous times C.P. made inappropriate comments, including sexual comments about her appearance, describing her in sexually derogatory terms, and questioning her about sexual preferences. Bliss testified that a truck driver at the worksite made an offensive comment to her and that when she complained to C.P., he said that in the future he would send all of the truck drivers to her office to check in. Bliss testified that she heard C.P. make a sexual comment to D.S., and that D.S. witnessed incidents of sexual harassment by C.P. against Bliss.

Bliss testified that in July 2011, when she brought her sister to the office to show her around, C.P. looked at the sister inappropriately by looking her up and down with a smirk on his face. The sister described C.P.'s demeanor as aggressive, looking her up and down several times while smiling, and testified that she felt uncomfortable, demeaned, and offended.

Bliss testified that when she complained to C.P. about his comments or behavior, he would laugh or push it further. Bliss testified that the sexual harassment peaked in the summer of 2011 when C.P. made at least one offensive remark every workday.

D.S., the only other female employee, denied ever hearing C.P. “discuss things of a sexual nature in the workplace” or “instigate a discussion of a sexual nature in the workplace.” D.S. denied witnessing incidents of sexual harassment of Bliss by C.P. D.S. testified that it was Bliss who brought up sexual matters at the workplace. This typically occurred after weekends when Bliss would bring up sexual comments that men had made to her and sexual encounters that she or others had engaged in. D.S. described Bliss’s allegations against C.P. as “things she’s flipped around from her own stories of talking about things” and gave two examples to explain what she meant.

B.S. denied ever hearing C.P. discuss sexual topics or make comments about women’s body parts in the workplace. B.S. denied ever witnessing any incidents of sexual harassment by C.P. B.S. specifically denied Bliss’s claims that she complained to B.S. about C.P. and that B.S. repeatedly told Bliss that C.P.’s workplace conduct was not normal.

CSI’s sexual-harassment policy

When Bliss started working for CSI, she received a copy of the company’s employee handbook and signed a document stating that she had read the handbook and understood it. The handbook identifies C.P. as CSI’s president. The handbook contains a dating-in-the-workplace policy that states that CSI prohibits sexual or other harassment and directs employees to immediately notify human-resources employee J.C. of any

uncomfortable or unwelcome conduct. The handbook provides for discipline, including termination, for violation of this policy.

When asked whether CSI had a human-resources department, C.P. testified that “[J.C.] was the human resources person.” But J.C. did not work at CSI during Bliss’s employment there, and Bliss had taken over J.C.’s job duties. The handbook also contains a policy stating that “any employee can speak to any executive, manager, or supervisor on any matter” because “we can’t implement change(s) if we are unaware of the need for change(s).”

Bliss admitted that she knew that W.S. had purchased CSI and was the company’s owner. Bliss met W.S. in person twice and communicated with him by phone and e-mail. But she did not report any incidents of sexual harassment to him. Bliss testified that she understood that W.S. had previously worked at CSI but that his current role was that of investor.

Following a four-day trial, the jury returned a verdict in favor of CSI. The jury found that Bliss was not constructively discharged or subjected to sexual harassment or a hostile work environment. The jury also found that CSI exercised reasonable care to prevent and correct harassing behavior and that Bliss unreasonably failed to take advantage of CSI’s preventative or corrective measures. The district court denied Bliss’s new-trial motion. This appeal followed.

DECISION

“The decision to grant a new trial generally lies within the sound discretion of the district court and will not be disturbed absent a clear abuse of that discretion.” *Dostal v. Curran*, 679 N.W.2d 192, 194 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). If the district court decides a motion for a new trial because of an error of law, this court applies a de novo standard of review. *Id.*

I.

“The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). “Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” *Id.* at 46 (quotation omitted).

Bliss argues that the district court erred by excluding from evidence pornographic images recovered from C.P.’s computer and e-mails exchanged between C.P. and B.S. and others that were not seen by Bliss. CSI responds that the district court’s pretrial order only “preliminarily barred” evidence of pornographic images recovered from C.P.’s computer and that because Bliss did not make any attempt to introduce the evidence during trial, she cannot seek a new trial based on the exclusion of that evidence. Bliss argues that she was not required to renew her objection at trial or make an offer of proof because the district court did not change its pretrial ruling. *See* Minn. R. Evid. 103(a)(2) & advisory comm. cmt.; *State v. Litzau*, 650 N.W.2d 177, 183 (stating that objection at trial is required only

if “excluded evidence is offered at trial because the court has changed its initial ruling”). In the order denying Bliss’s new-trial motion, the district court described its ruling as “a limited pretrial ruling . . . , not a definitive ruling.” This description is consistent with the language of the ruling, and the district court did not err in finding that it was Bliss’s responsibility to seek clarification if she was uncertain whether the ruling was preliminary or definitive. *See State v. Word*, 755 N.W.2d 776, 782-83 (Minn. App. 2008) (“[O]ccasionally the context at trial is more developed and may be different from what was anticipated at the time of the former ruling, justifying . . . a different ruling.”).

Also, Bliss has failed to show the relevancy of the evidence. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401.

Bliss argues that the pornographic images recovered from C.P.’s computer would have added significant weight to her claim that C.P. showed her a pornographic video and a pornographic image.

In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, including the 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.

Goins v. West Grp., 635 N.W.2d 717, 725 (Minn. 2001) (quotations omitted). “Evidence of a general work atmosphere – as well as evidence of specific hostility directed toward the plaintiff – is an important factor in evaluating the claim [of a hostile work

environment].” *White v. Honeywell, Inc.*, 141 F.3d 1270, 1276 (8th Cir. 1998) (quotation omitted).

C.P. certainly engaged in inappropriate conduct by viewing and exchanging pornography at the worksite on company computers. But absent evidence that Bliss saw the images, they do not add weight to Bliss’s claim of a hostile work environment. This also applies to the e-mails exchanged between C.P. and B.S. and others.

II.

The *Faragher/Ellerth* defense set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08, 118 S. Ct. 2275, 2293 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998), was adopted by the Minnesota Supreme Court in *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 568 (Minn. 2008). The defense is available to employers as an affirmative defense to claims by employees involving hostile-work-environment harassment by the employee’s supervisors or superiors. *Schmitz v. U.S. Steel Corp.*, 852 N.W.2d 669, 671 n.1 (Minn. 2014). The *Faragher/Ellerth* affirmative defense is satisfied by an employer who proves that (1) it exercised reasonable care to prevent and correct workplace harassment and (2) the victim-employee unreasonably failed to take advantage of employer-established preventive and corrective mechanisms. *Id.* (citing *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270).

Evidence of Bliss’s previous lawsuit was relevant to CSI’s *Faragher/Ellerth* defense. Bliss admitted on cross-examination that in the earlier lawsuit, she sued her employer for discrimination and hostile work environment and that she claimed her direct

supervisor was the harasser. In the earlier lawsuit, Bliss complained to her supervisor, reported the harassment up the chain of command, and visited other worksites to make complaints. Bliss admitted that she had the same attorney for both lawsuits, that the earlier lawsuit was going on during the entire time that she worked at CSI, and that she did not ask her attorney for advice about what to do about the harassment by C.P.²

Bliss argues that the evidence about the previous lawsuit was improperly used as character evidence during cross-examination and closing argument. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith. Minn. R. Evid. 404(a). Because Bliss failed to make a character-evidence objection before or during trial and failed to make any objection to the cross-examination question or closing argument, the objections are waived. *See* Minn. R. Evid. 103(a)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context"); *State v. Ray*, 659 N.W.2d 736, 747 n.4 (Minn. 2003) (cautioning defense counsel that "failure to object to improper closing argument may waive any claim of prosecutorial misconduct on appeal"); *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006) (stating that when a party failed to object to evidence at trial, the party generally waives the right to object), *review denied* (Minn. Aug. 23, 2006).

² Bliss cites *Batiste-Davis v. Lincare, Inc.*, 526 F.3d 377, 379 (8th Cir. 2008), which was decided under the Federal Rules of Evidence and has not been adopted in Minnesota. But even if *Lincare* applied, its standard for admitting evidence of a prior lawsuit is not met in this case. *See id.* at 380.

Bliss argues that admission of the settlement amount was improperly used to characterize Bliss as litigious and out to wrongfully obtain money from CSI. Bliss did not object to evidence of the settlement amount as improper character evidence, and she did not object to the closing argument. Therefore, the objections are waived. Also, as CSI points out, the settlement amount, which was almost \$9,000 higher than Bliss's 2011 salary, was relevant because it provided an alternative theory on why Bliss left her employment.

III.

The district court denied Bliss's motion in limine to exclude evidence about her romantic relationship with a coworker, T.F., and T.F.'s testimony about the reasons Bliss quit her job. Bliss objects to the scope of cross-examination allowed. Bliss argues that she should not be punished for bringing up the relationship during her testimony because she did so due to the district court's ruling on her motion in limine, seeking to minimize the surprise element of the evidence. We agree with the district court's analysis:

Bliss had the option of waiting until [CSI] brought up the relationship between Bliss and [T.F.] and then objecting and allowing the Court to rule, instead she decided to front this information to the jury and by doing so she opened the door to [CSI's] line of questioning. This is admissible cross-examination under the Minnesota Rules of Evidence.

Bliss also argues that the relationship was not probative of her claims of sexual harassment, hostile work environment, and constructive discharge. In evaluating a claim of hostile work environment, the totality of the circumstances must be considered. *Goins*, 635 N.W.2d at 725. The circumstances, in totality, must create an environment that is both

objectively and subjectively offensive. *Id.* T.F.’s testimony about how their relationship ended and about Bliss being uncomfortable because other employees knew about the relationship was relevant to her subjective state of mind and to her credibility.

The credibility of Bliss’s allegations against C.P. was strongly disputed by C.P., D.S., and B.S, and the evidence of Bliss’s relationship with T.F. was relevant to the credibility of those allegations. It is the jury’s role to determine “[t]he weight and credit to be accorded conflicting testimony.” *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). Given the strongly disputed credibility of Bliss’s allegations and the district court’s broad discretion in evidentiary rulings, we cannot conclude that the district court erred in admitting the relationship evidence.

IV.

Bliss argues that the district court erred in ruling that she would not be able to use CSI’s response to the DHR charge at trial without allowing CSI to present evidence on the outcome of the charge, which was dismissal for lack of probable cause. The admissibility of CSI’s response to the DHR charge was the subject of an unrecorded bench conference during trial. Bliss asserts that her attorney made an offer of proof that the purpose of the document was for impeachment and that the district court stated that questioning about the inconsistency would open the door to inquiry about the dismissal of the charge. In the order denying Bliss’s new-trial motion, the district court stated that its recollection of what occurred during the bench conferences differed from that of Bliss and that Bliss was given ample opportunity, at the beginning and the end of the day and before morning and afternoon breaks, to make a record of any objections. Bliss, therefore, failed to preserve

this issue for appellate review. See Minn. R. Evid. 103(a)(1) (“Error may not be predicated upon a ruling which admits ... evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”).

V.

District courts also have considerable latitude in selecting the appropriate language for jury instructions, and this court reviews the instructions in their entirety. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011). This court will not reverse jury instructions that state the applicable law fairly and correctly. *Daly v. McFarland*, 812 N.W.2d 113, 122 (Minn. 2012). A new trial is only required if the jury instructions were erroneous and the resulting error was prejudicial or if the effect cannot be determined. *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002).

Elements of sexual harassment

The district court instructed the jury that it should find respondents liable if it found that:

First, [Bliss] was subjected to unwelcomed sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature that had the purpose or effect of substantially interfering with [Bliss’s] employment, or created an intimidating hostile or offensive employment environment.

....

And fourth, [CSI] harassed [Bliss] intending her to quit or believe the harassing conduct would reasonably force [Bliss] to quit.

Elements of hostile work environment

The district court instructed the jury that it should find respondents liable if it found that:

First, [Bliss] was subjected to unwelcomed sexual advances, request for sexual favors, sexually motivated physical contact or other verbal or physical conduct, or communication of a sexual nature that had the purpose or effect of substantially interfering with [Bliss's] employment, or created an intimidating, hostile or offensive employment environment.

. . . .

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in [Bliss's] position would find the work environment to be hostile.

Bliss argues that the instructions on the first element of both claims was confusing because this case did not involve requests for sexual favors or sexually motivated physical contact. The instructions correctly define sexual harassment. See Minn. Stat. § 363A.03, subd. 43 (2016). And they include the type of conduct that occurred in this case. Because the instructions correctly stated the law, they were not erroneous.

Also at trial, CSI argued that the language about other types of sexual harassment should be included. Bliss's attorney responded:

I think the first prong as it's referenced is fine. It fits with evidence that has been presented in the trial and it falls under the statutory definition of sexual harassment. Again that's what they have to decide, with respect to the evidence in this case. And this allows them to do that.

Bliss also objects to the instruction on the fourth element of the sexual harassment.

At trial, CSI argued that the instruction should not be given because constructive discharge is not an element of sexual harassment. Bliss's attorney stated:

I think the jury needs to decide this question. They need both jury instructions to do that. That's – those are the issues that they're needing to decide. . . . So these are really the issues the jury needs to decide and they need the instructions to be able to do that.

After providing the parties with written copies of the final instructions, the district court gave the parties the opportunity to make additional objections on the record, but Bliss's attorney relied on his earlier statements. Because Bliss approved the instructions and failed to make any objection before the jury retired, the objections are waived. *See Colby v. Gibbons*, 276 N.W.2d 170, 178 (Minn. 1979) (stating that to preserve an objection to jury instructions for appellate review, a party must object before the jury retires).

VI.

The district court's refusal to give a requested jury instruction is reviewed for an abuse of discretion. *Daly*, 812 N.W.2d at 122.

Bliss requested the following instruction:

An employer is responsible for the sexual harassment by a supervisor of an employee with an immediate or successively higher authority over a victimized employee. An employer is responsible for a hostile environment created by a supervisor with immediate or successively higher authority over a victimized employee.

Bliss argues that in denying a new trial, the district court erroneously applied the pre-2001 amendment law that required a plaintiff to prove that an employer knew or should have known of the harassment and failed to take timely and appropriate action. In construing a 2001 amendment to the definition of sexual harassment, the supreme court held "that a plaintiff who brings a claim under the MHRA for sexual harassment by a

supervisor is not required to prove that his or her employer knew or should have known about the sexual harassment and failed to take timely and appropriate action.” *Frieler*, 751 N.W.2d at 567.

But the district court’s instruction did not incorporate the pre-2001 standard. The district court instructed the jury:

A corporation acts only through its agents and employees, and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of authority delegated to the agent by the corporation or within the scope of his or her duties as an employee of the corporation.

The district court did not abuse its discretion in declining to give the instruction requested by Bliss.

VII.

Bliss argues that the district court erred in allowing CSI to take B.S.’s trial deposition only a few days before trial began. The district court should consider all relevant factors to determine whether good cause for a trial deposition is shown, including the following: “(1) the primary purpose for taking the deposition (i.e., whether it is truly for preserving trial testimony or is a pretext for conducting late discovery); (2) the materiality and importance of the deposition testimony to the deposing party’s argument; (3) the potential for unfair prejudice to the opposing party; (4) and the amount of time remaining before the date set for trial.” *TC/Am. Monorail, Inc. v. Custom Conveyor Corp.*, 840 N.W.2d 414, 420-21 (Minn. 2013).

B.S. was unavailable to testify at trial because he was out of the country. His testimony was needed to refute Bliss's claims that he had witnessed incidents of harassment and talked to her about the harassment. Bliss was not prejudiced by the use of the trial deposition because it did not contain any questions not contained in the longer discovery deposition, and B.S.'s answers were the same in both depositions. Under these circumstances, the district court did not err by allowing CSI to use the trial deposition.

VIII.

Bliss argues that the district court abused its discretion by awarding CSI \$3,500 in disbursements for computer forensic fees. CSI incurred the \$3,500 in costs for the forensic examination of C.P.'s computer, which was performed in response to Bliss's discovery demands and yielded images and e-mails that Bliss used in pretrial proceedings and an image that Bliss used as a trial exhibit repeatedly and in closing argument. Minn. Stat. § 549.04, subd. 1 (2016) states, "In every action in a district court, the prevailing party shall be allowed reasonable disbursements paid or incurred." The determination of what disbursements are reasonable is vested in the district court's discretion. *Green-Glo Turf Farms v. State*, 347 N.W.2d 491, 495 (Minn. 1984). Its decision will be reversed only for an abuse of discretion. *Striebel v. Minn. State High School League*, 321 N.W.2d 400, 403 (Minn. 1982). The district court did not abuse its discretion by awarding CSI the disbursements incurred for computer forensic fees.

In summary, this case was close at trial. It could have gone either way, as there was inappropriate conduct. However, the district court did not err in any of the rulings that are challenged on appeal.

Affirmed.