IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHARON B. POLLARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 95-3010 Ml**
	)	
E.I. DUPONT DE NEMOURS, INC.,	)	
	)	
Defendant.	)	

OPINION AND ORDER AWARDING PUNITIVE DAMAGES

This case is currently before the Court to determine the amount of punitive damages that Plaintiff should be awarded. The Court held a punitive damages hearing on August 28, 2003. Plaintiff Sharon Pollard was represented by Kathleen Caldwell, Esq. Defendant E.I. DuPont de Nemours, Inc. ("DuPont") was represented by Stephen Goodwin, Esq., Eugene Podesta, Esq., and Maurice Wexler, Esq.

The Court previously determined the question of liability under Title VII in favor of Plaintiff on August 20, 1998 after a bench trial held in October, 1997. The Court awarded $107,364.00 in back pay and accrued benefits and $300,000.00 in compensatory damages and front pay. On remand, this Court determined the issue of liability for the state tort of intentional infliction of emotional distress in favor of Plaintiff. After holding a

hearing on front pay and compensatory damages, the Court awarded Plaintiff $853,215.00 in front pay and made a total award of compensatory damages in the amount of $1,250,000.00[1]. The Court also determined, based on clear and convincing evidence, that an award of punitive damages was appropriate in this case because DuPont intentionally or recklessly disregarded a substantial and unjustifiable risk to Plaintiff that she would suffer severe emotional distress as a result of the treatment of her co-workers.

At the hearing to determine the amount of punitive damages, Plaintiff presented testimony from Sharon Pollard. Defendant presented testimony from John Wasilik, plant manager at the DuPont Memphis site.

I. CONCLUSIONS OF LAW

Under Tennessee law, after the factfinder determines that a defendant is liable for punitive damages, the factfinder must consider at least the following factors to determine the amount of punitive damages:

> (1) The defendant's financial affairs, financial condition, and net worth;
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> (2) The nature and reprehensibility of defendant's wrongdoing, for example
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> > (A) The impact of defendant's conduct on the plaintiff, or

[1] This amount was reduced by the $300,000.00 the Court previously awarded in August, 1998.

> (B) The relationship of defendant to plaintiff;
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> (3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;
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> (4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;
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> (5) The expense plaintiff has borne in an attempt to recover the losses;
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> (6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
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> (7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;
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> (8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempt to make amends by offering a prompt and fair settlement for actual harm caused; and
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> (9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901-02 (Tenn. 1992) ("The purposes of an award of punitive damages are punishment and deterrence.")

In addition to the state law considerations that bear on the question of punitive damages, the United States Supreme Court has noted that an award of punitive damages is subject to constitutional limitations. Pursuant to the Due Process Clause

of the Fourteenth Amendment, a "grossly excessive" punishment may not be imposed on a tortfeasor. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996). In evaluating whether an award is "grossly excessive", the Court in BMW analyzed three factors: (1) the degree of reprehensibility of the defendant's conduct; (2) the difference between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the remedy and the civil penalties imposed in comparable cases. Id. at 575; Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 435 (2001); State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S.Ct. 1513, 1520 (2003).

Among these factors, the Court noted that the "most important indicium of reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." BMW, 517 U.S. at 575. To determine the reprehensibility of a defendant's conduct, a court must consider whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." Campbell, 123 S.Ct. at 1521.

With respect to the second factor, the Court recognized that

an award of punitive damages must bear a "reasonable relationship" to the amount of compensatory damages. BMW, 517 U.S. at 580 (finding that a $2,000,000 award of punitive damages did not bear a reasonable relationship to the $4,000 award of compensatory damages because it was 500 times the amount of the actual harm). While "reject[ing] the notion that the constitutional line is marked by a simple mathematical formula", id. at 582, the Court has suggested that the relevant ratio is "not more than 10 to 1", id. at 581. On other occasions, the Court has advised that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process", Campbell, 123 S.Ct. at 1524, and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety", id. (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991)). Furthermore, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Campbell, 123 S.Ct. at 1524 (stating that a compensatory award of "$1 million for a year and a half of emotional distress" was substantial and "likely would justify a punitive damages award at or near the amount of compensatory damages").

II. FINDINGS OF FACT AND ANALYSIS

A. Toof Factors

With respect to the nine factors enumerated by the Tennessee Supreme Court, the Court makes the following findings:

1. DuPont's Financial Condition

As can be seen from DuPont's filings with the Securities Exchange Commission, DuPont is a multinational company with net sales in excess of $24 billion and assets in excess of $34 billion. (Tr. Exh. 46 at 13, F-3.)[2] DuPont is clearly capable of satisfying an award of punitive damages.

2. Nature and Reprehensibility of DuPont's Wrongdoing and DuPont's Awareness of the Harm

The second and third Toof factors are related in this case and the Court considers them together. As illustrated in previous opinions from both this Court and the Sixth Circuit, the Court finds DuPont's inaction to be reprehensible and completely unacceptable considering the length of the period during which the men on "A" shift harassed Plaintiff. Notably, none of the employees or managers associated with Plaintiff's harassment has ever been disciplined as a result of their actions or inaction, or in light of the testimony they gave at the first trial in this case admitting misconduct. (Tr. at 948-50.)

As discussed in the Court's prior orders, DuPont was aware

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[2] The Court continued the successive numbering of exhibits from the hearing on compensatory damages and front pay.

of the manner in which the employees on "A" shift treated Plaintiff and of the harassment she endured. Plaintiff repeatedly complained to her supervisor, David Swartz, who utterly failed to correct the problem. On other occasions, Plaintiff also spoke with Beth Basham, unit supervisor for the peroxide area, Bob Shaw, employee relations manager, Lee Ann Rice, a manager in Human Resources, and Gary Fish, a plant shift supervisor, each of whom failed to take any action to correct the situation in the peroxide area.

DuPont argues that its "institutional indifference" towards Plaintiff distinguishes this case from other employment related cases in which punitive damages have been awarded. (Def.'s Punitive Damages Brief at 5.) DuPont argues that there is no evidence of an "evil motive or purpose" in this case and this should be considered in its favor when computing a punitive damages award. (Id.) However, the lack of an "evil motive" on the part of DuPont's management does not significantly alter the analysis here because DuPont's management utterly failed to protect Plaintiff, who was in a position of vulnerability and could only turn to her supervisors for help. The Sixth Circuit even described the "nature of the conduct of DuPont employees together with the refusal of its managers to correct the situation and its blanket, continuing official denial in the face of contrary facts that discrimination based on gender occurred or

that its managers were aware of the discrimination" as outrageous. Pollard v. E.I. DuPont de Nemours Co., 213 F.3d 933, 947 (6th Cir. 2000).

Mr. Wasilik finally acknowledged during his most recent testimony that the managers in charge during the time period in which Plaintiff was harassed "didn't clearly understand their obligations under the law and to DuPont." (Tr. at 917.) He further acknowledged that "[i]t was not recognized as a sexual harassment case by the management then . . ., and it was not treated effectively by the management then in almost all of its stages." (Tr. at 917.) Mr. Wasilik's testimony during the punitive damages hearing is the first time the Court has heard DuPont express its regret for the way Plaintiff was treated and acknowledge that its failure to act was wrong and caused Plaintiff to be harmed. The Court credits DuPont for finally realizing and acknowledging management's failures that allowed the harassment to occur, but the duration of the harassment, the severity of the harm, and the fact that it has taken eight years for DuPont to arrive at this realization mandates that the second and third factors unquestionably weigh in favor of a significant punitive damages award.

3. Duration of the Misconduct and Whether it was Concealed

Plaintiff suffered harassment in the workplace from

December, 1994[3] through the termination of her employment. (Tr. at 897.) This litigation has continued from December, 1995 through the present. The duration of the harassment supports a finding in favor of Plaintiff.

Although Plaintiff presented evidence supporting her belief that DuPont employees, such as Bob Shaw, concealed the misconduct by failing to acknowledge Plaintiff's repeated complaints of harassment, the Court believes there is a distinction to be drawn between the inept management in this case and the type of willful concealment contemplated by this prong. Although there is abundant evidence that DuPont failed to appropriately respond to Plaintiff's repeated complaints, there is no evidence that DuPont concealed the employees' misconduct or the actions of its management.

4. Plaintiff's Expenses to Recover the Loss

Defendant has pointed out that Plaintiff has not provided the Court with an itemized statement of her fees and expenses incurred in connection with the state tort claim. Undoubtedly, these fees are somewhat extensive, but the Court has no basis for making such a finding.

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[3] The harassment actually commenced prior to December 1994, however, the one-year statute of limitations prevents Plaintiff from litigating events on the state tort claim that occurred prior to December, 1994.

5. Whether DuPont Has Profited from the Activity

The parties agree that this does not seem applicable in the present case. Therefore, the Court will not consider this factor in calculating a punitive damages award.

6. Whether DuPont Has Been Subjected to Previous Punitive Damage Awards Based on the Same Wrongful Act

The parties stipulated that DuPont has not been subjected to previous punitive damage awards stemming from Title VII violations either at the Memphis plant or company-wide. (Tr. at 913-914.) The Court weighs this factor in DuPont's favor.

7. Whether DuPont Took Prompt Remedial Action or Offered a Prompt and Fair Settlement

DuPont offered Plaintiff $1,200,000.00 to settle this case in February, 2001. (Tr. at 904.) Defendant made the settlement offer five years into this litigation after both this Court and the Sixth Circuit had issued opinions[4] and after the Supreme Court had granted certiorari, but before the Supreme Court had heard oral argument. (Tr. at 904, 907.) The offer of settlement included stipulations regarding total confidentiality and complete release, and also required that Plaintiff drop her petition before the Supreme Court. (Tr. at 904, 907; Tr. Exh. 51.) Plaintiff did not accept the settlement. Although

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[4] The Sixth Circuit's opinion reinstated the intentional infliction of emotional distress claim that is the subject of this punitive damages opinion.

Plaintiff agreed to attend subsequent mediation sessions, DuPont canceled each of them. (Tr. at 908-09.) While the Court certainly appreciates DuPont's attempt to settle the case and understands that a settlement in consideration of the state tort claim was not possible prior to the issuance of the Sixth Circuit's opinion reinstating the claim, the importance of the settlement offer is tempered by the fact that it occurred well into this litigation.

DuPont also offered evidence that a senior DuPont official from Wilmington also apologized to Plaintiff. (Tr. at 904.) Plaintiff did not consider this apology sincere because DuPont then filed a motion for summary judgment in the case. (Tr. at 905.) Certainly DuPont is entitled to litigate its case and should not be prejudiced in these proceedings for filing a motion for summary judgment. Yet, an apology for wrongdoing followed by a motion denying responsibility for that wrongdoing does draw into question the effectiveness of the apology. The Court was more impressed by Mr. Wasilik's testimony during the punitive damages hearing in which he expressed his sincere regret for the treatment of Ms. Pollard and acknowledged the emotional turmoil she has suffered. (Tr. at 918.) However, as noted above, that apology was eight years overdue.

8. Other Relevant Factors

The Court also finds DuPont's efforts to improve employee

treatment at the Memphis site to be relevant on the question of punitive damages.[5] DuPont has implemented mandatory employee training classes designed to foster a respectful working environment and has instituted management processes designed to better recognize and respond to allegations of harassment or discrimination.[6] (Tr. at 919-932.) This training included a workshop in the winter and spring of 1998 concerning issues between women and men working together. (Tr. at 927.) DuPont mandated some of these training sessions, known as CREW (i.e. Creating Respectful Environment Workshop), on a company-wide

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[5] During the punitive damages hearing, the parties discussed the Supreme Court's decision in Campbell in the context of DuPont's remedial efforts. (Tr. at 958-961.) Campbell instructs that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." Campbell, 123 S.Ct. at 1523.

The Court concluded during the hearing, and reaffirms here, that evidence regarding DuPont's subsequent remedial measures *at the DuPont Memphis site* is admissible and relevant on the questions of the reprehensibility of DuPont's conduct and whether punitive and deterrent measures are necessary, despite the fact that such efforts were not projected directly towards Plaintiff as she no longer worked at DuPont. Plaintiff's challenge to DuPont's evidence goes toward its weight rather than its admissibility. The cross-examination of Mr. Wasilik regarding Ms. Millner is also relevant and admissible to question the effectiveness of DuPont's remedial measures. That is the only purpose for which the Court considers this evidence. Consistent with Campbell, the Court has not considered the merits of Ms. Millner's claim.

[6] DuPont also conducted (apparently ineffectual) harassment prevention training prior to the incidents at issue in this case, which Plaintiff and her supervisors attended. (Tr. at 971; Tr. Exh. 52.)

basis and Mr. Wasilik implemented additional programs at the DuPont Memphis site. (Tr. at 919-920; Tr. Exhs. 47, 48.) Moreover, DuPont's annual employee evaluations now include an evaluation for how well the employee performs at fostering a respectful workplace and DuPont has tied employee compensation to this evaluation. (Tr. at 921.) The Court credits DuPont for attempting to improve in this area.

B. Constitutional Considerations

The Court also is mindful of the constitutional limitations that the United States Supreme Court has placed on an award of punitive damages and the factors set forth in BMW, Cooper Industries, and Campbell that would contribute to a finding that the Court's award is "grossly excessive."

As explained above, the Court will not reiterate its previous opinions or the opinion of the Sixth Circuit in a discussion of reprehensibility here, but the Court does note that Plaintiff suffered substantial mental and economic harm as a result of the lengthy campaign of harassment and intimidation that DuPont failed to stop and which ultimately led to the conclusion of Plaintiff's employment with DuPont.

Consistent with the Supreme Court's decisions in BMW, Cooper Industries, and Campbell, the Court will apply a single digit multiplier approach to an award of damages in light of the severity of the harm in this case and the substantial

compensatory damages already awarded.

C. Damages Award

After considering the factors set forth by the Tennessee Supreme Court and the United States Supreme Court, the Court believes that a significant punitive damages award is appropriate in this case and awards two (2) times compensatory damages (i.e. an amount of two million five hundred thousand dollars ($2,500,000.00)). Such an award is necessary due to the duration and the severity of the conduct toward Ms. Pollard and the degree of suffering she has endured as a result of DuPont's failure to take appropriate action in response to harassment. The Court intends its award to act as both a punitive measure, because of the reprehensibility of the conduct and the severity of the harm, and as a deterrent measure to discourage management at the Memphis site from ignoring similar behavior in the future. The Court's award also reflects the Court's belief that, as of the date of the punitive damages hearing, DuPont is finally beginning to understand and accept the nature of its wrongdoing in this case. Moreover, the award reflects the self-imposed attempts of the current plant management at the Memphis site to improve its responses to harassing behavior.

III. CONCLUSION

For the foregoing reasons, the Court ORDERS Defendant to pay two million five hundred thousand dollars ($2,500,000.00) in

punitive damages.

So ORDERED this ___ day of October, 2003.

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JON P. McCALLA
UNITED STATES DISTRICT JUDGE