

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PHI TRINH and MATTIE BAILEY,)	NO. 59763-9-I
)	
Respondents,)	DIVISION ONE
)	
JUAN RODRIGUES,)	
)	
Plaintiff,)	
)	
v.)	
)	
SEATTLE CITY LIGHT, a department)	UNPUBLISHED OPINION
of the CITY OF SEATTLE, a)	
municipality,)	
)	
Appellant,)	
)	
DANA BACKIEL, individually,)	
GARY ZARKER, individually, and)	
ROBERT ROYER, individually,)	
)	
Defendants.)	
)	FILED: June 16, 2008

Leach, J. — Phi Trinh and Mattie Bailey both began working at Seattle City Light in the early 1980s. Both plaintiffs thrived in their careers at City Light for several years, until Gary Zarker became City Light Superintendent in 1994. They claim that, under Zarker, they were subjected to racial discrimination and their job duties were removed from them and given to Caucasian employees.

Trinh and Bailey sued City Light for harassment, disparate treatment, and retaliation under the Washington Law Against Discrimination, chapter 49.60 RCW.

After a 16-day trial, a jury returned verdicts in favor of Trinh and Bailey on their disparate treatment and hostile work environment claims and in favor of City Light on their retaliation claims. On appeal, City Light makes several assignments of error. First, City Light argues that the trial court erred by joining Trinh's and Bailey's claims and by allowing nonplaintiff employees to testify. City Light assigns error to the trial court's denial of its motion for a new trial because of unfair prejudice resulting from the joinder and the testimony of nonplaintiff witnesses. Next, City Light assigns error to the trial court's denial of its motion for judgment as a matter of law on several claims, arguing that insufficient evidence supports each plaintiff's hostile work environment claim and Bailey's disparate treatment claim. Finally, City Light argues that the jury's awards of noneconomic damages to Trinh and Bailey were excessive.

We affirm the trial court's pretrial and evidentiary rulings and both Trinh's and Bailey's hostile work environment claims. We reverse Bailey's disparate treatment claim because it is barred by the statute of limitations. We affirm the jury's award of damages to Trinh and remand for a jury trial to determine damages for Bailey's hostile work environment claim.

BACKGROUND

PHI TRINH

Phi Trinh is Vietnamese American and works at City Light's Skagit Hydroelectric Project, approximately 140 miles north of Seattle. He started as a Hydroelectric Operator I in 1983 and quickly completed training for Hydroelectric Operator II. In 1988, Trinh became the generation supervisor¹ for the Diablo Powerhouse at the Skagit. From 1983-1994, Trinh was very satisfied with his job. He received regular performance evaluations and received an award for his job achievements. He was asked to participate in hiring panels, train employees, serve on a safety committee, and consult on staffing and union issues.

After Zarker became superintendent in 1994, Trinh no longer received annual performance evaluations required by City policy. This lack of annual evaluations continued after Jorge Carrasco succeeded Zarker in February 2004. In October 2000, Trinh was asked to complete a temporary special assignment, the Safety Improvement Project (SIP), which he was told would require him to leave his generation supervisor position for six months. However, when the six months expired, he was not permitted to resume working as generation supervisor. Trinh perceived the temporary assignment and subsequent delay in returning him to his original position as an effort to take away his supervisory duties and to remove him from the management team. At trial, he presented evidence that City Light managers attempted to persuade him to leave his generation supervisor position and offered pretextual reasons for doing so.

¹ At the time, the position was called "powerhouse supervisor."

In May 2001, Trinh's manager, Jim Hannigan, delayed Trinh's progress on the SIP by refusing to provide Trinh with the support and document retrieval necessary to complete the SIP. Trinh approached Hannigan's supervisor, Dave Howell. Instead of providing Trinh with the assistance needed to finish the SIP, Howell suggested that Trinh take a "lake level" position after finishing the SIP. This was another temporary position. Trinh continued up the chain of command and asked Dana Backiel, City Light Deputy Superintendent, to help him finish the SIP. Although Backiel gave Trinh some advice regarding the SIP, her advice ultimately did not assist Trinh in completing it. Backiel also told Trinh to continue considering the lake level job offer Howell had presented to him, even though he had already told Howell that he did not want the job.

Dave Howell kept a journal at work. Just a few days before the June meeting in which Howell suggested Trinh take the lake level position, Howell had written a journal entry, memorializing a discussion with Hannigan that stated, "Discussion re: Phi [Trinh]/Diablo PH Super.^[2] Do not set up preselection scenario for Glenna to be PHS. Phi needs to know what his deficiencies are and given expectations. I have been trying to work up potential position where his talents fit. Possible System Performance Analysis." An October journal entry describes Howell's intent to give Trinh a position as spare parts coordinator, which Hannigan offered to him in November. However, coordinating spare parts

² "Powerhouse supervisor" (PHS) is synonymous with "generation supervisor."

was neither complex nor time-consuming and did not require a dedicated full-time employee because it was generally done by employees in existing positions as part of their other duties.

During this time period, City Light managers began to document problems with Trinh. Shortly after rejecting Howell's initial offer of the lake level position, Trinh received a memo from Howell, which expressed concerns about Trinh's work performance and Trinh's "slow pace of implementation of the safety improvements needed at the Skagit," despite the fact that Trinh had finished key portions of the SIP in late 2000 and early 2001. This memo was delivered by Hannigan during a meeting with Trinh on June 11, 2001. At the meeting, Hannigan also alleged that Trinh had been insubordinate nearly one and a half years earlier, although he had never before addressed this issue with Trinh. Trinh requested a meeting with Howell regarding the memo and met with Hannigan and Howell later the same day. Trinh explained that he disagreed with Howell's memo and that many of the problems and delays were caused by circumstances not in Trinh's control. Trinh's managers had not criticized his performance before the June 11, 2001, meeting. Furthermore, the memo did not criticize Trinh's performance as a generation supervisor, a position he held for twelve years prior to working on the SIP. In August 2001, Trinh was accused of disrupting a training meeting when he refused to sign a training documentation form which included training materials that were not covered during the training. Two other employees also refused to sign. Although Trinh was not formally

disciplined for his conduct at the training, Howell punished Trinh by removing his authority to train employees.

Although Trinh had not resigned from his job as generation supervisor and wanted to return to that position, City Light advertised his Diablo generation supervisor position as vacant while Trinh was on vacation in December 2001. The vacancy action form showed that Trinh was the current incumbent. The form was filled out on October 30, 2001, and approval signatures were obtained in November. Since a hiring freeze was in effect during 2001, City Light procedures required that Zarker prepare a waiver specifically giving Howell permission to advertise for and hire a generation supervisor. Zarker indicated on the waiver form that he intended to continue rotating employees into that position from out of class if it was not filled. When Trinh learned of the ad on December 24, 2001, he asked Hannigan to remove it. Hannigan told him to call back the following week. When Trinh spoke with Hannigan about ten days later, he offered Trinh a position entitled "generation supervisor," but which did not involve the supervision of any employees. The ad was withdrawn, but Howell blamed Hannigan for having to withdraw it because Hannigan failed to document Trinh's "performance problems" as Howell had instructed. Zarker also sent Hannigan a memo threatening disciplinary action if Hannigan's management performance did not improve. Just days before Trinh resumed working as Diablo generation supervisor, Hannigan admitted he was still hoping to talk Trinh into taking a different job and instructed him not to resume his duties.

In summary, Trinh presented evidence that City Light managers attempted to remove him permanently from his job as generation supervisor by delaying his special assignment and offering him additional, nonessential positions that were not offered to anyone else. Their efforts continued over a period of at least two years, during which time Trinh was subjected to unwarranted criticism and a lack of cooperation by his managers, felt humiliated by not being allowed to do his job, and experienced long-term anxiety about the possibility of permanently losing his job.

MATTIE BAILEY

Mattie Bailey, who is African American, began working as a consumer education supervisor at City Light in 1981. She supervised 13 employees and was responsible for outreach, program coordination, and internal and external publications regarding City Light programs and services. She became a public information manager in 1986 and held that position through trial. As a manager, Bailey continued to supervise 13 employees and also had responsibilities regarding budgeting, advertising, media, outreach, coordination of planned outages, and employee recognition. She chaired the marketing task forces for both City Light and the City of Seattle and served as City Light's representative in the Electric League, a regional utility organization. She worked on Superintendent Hardy's productivity improvement program for several months, helping to reorganize City Light. Under Superintendent Bradley, Bailey became a member of the executive team and shared the division director responsibilities

with two other managers. She served as acting superintendent for two weeks when Bradley was away. Bailey's job satisfaction was very high under Superintendents Hardy and Bradley. She received regular performance evaluations and was rated "outstanding" and "highly proficient" in several areas. She received only one evaluation under Zarker, in which she received an overall rating of "Exceeds Expectations and Achieves Targeted Objectives."

When Zarker became superintendent, he reorganized Bailey's division, moving most of the Caucasian employees in her unit within the division to other divisions. The employees remaining in Bailey's unit were mostly African American or Asian. Whereas Bailey previously reported directly to Superintendent Bradley, Zarker placed two new organizational layers between himself and Bailey, and Bailey was not given direct access to Zarker. Rather than reporting directly to the superintendent, Bailey reported to Carol Dickinson, who in turn reported to Andrew Lofton, Zarker's deputy superintendent.

The two other units in Bailey's division were headed by managers who also reported to Dickinson. However, only Bailey's mostly minority unit was required to move to an isolated area on the 28th floor of the City Light building. In 1994, Bailey observed that she was being paid less than other managers with similar responsibilities as well as employees with no management duties. She asked her supervisor, Carol Dickinson, to seek a salary increase for her. Although Dickinson agreed that Bailey's pay was unfair, Bailey did not receive a pay increase.

In 1998, Zarker required Bailey to create a reinvention proposal for herself and her unit. This required her to interview the managers of other divisions to learn how they thought her unit was performing. She was ultimately required to submit 14 different versions of the reinvention proposal. In December 1999, Dickinson prepared an annual variable pay review of Bailey. Her overall performance assessment was "Exceeds Expectations and Achieves Targeted Objectives." However, Bailey still did not receive a pay increase.

In 1999, Zarker hired Robert Royer to serve as the Director of Communications. Bailey then reported to Royer who, as a member of the executive team, reported directly to Zarker. Royer testified that he did not give any communications employees a raise from 2000-2003 because City Light was undergoing a budget crisis. However, during the same time period, Zarker and Royer created new positions for Caucasian employees, and Zarker's executive team, including Royer, received pay increases. In 2000, Royer hired Janice Boman and Larry Vogel. Royer, Boman and Vogel took over the duties that Bailey had been doing, and Bailey was given clerical duties, such as processing invoices.

On two occasions, Royer made racially motivated comments to Bailey. He expressed admiration for Thomas Jefferson's "fatherly relationship" to his slaves at a meeting where Bailey was the only African American in the room. In a private meeting with Bailey, Royer compared her with the African American movie character "Super Fly" because she was wearing sunglasses.

DISCUSSION

Permissive Joinder

City Light assigns error to the trial court's decision to consolidate Trinh's and Bailey's claims for trial. The trial court initially granted City Light's motion to sever Trinh's and Bailey's lawsuits, but ruled that they would remain consolidated for discovery. However, after completion of discovery and shortly before trial, the court granted plaintiffs' motion for joinder, finding "a commonality of evidence that had not been discovered before the earlier motion [to sever]."

A trial court's decision to join claims or parties will be reversed only where there has been a clear abuse of discretion and the moving party can show prejudice.³ A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons.⁴

City Light argues that Trinh's and Bailey's claims did not arise out of the same transaction, occurrence, or series of transactions or occurrences because Trinh and Bailey are not the same race and do not work within the same division at City Light. However, Trinh and Bailey both alleged that Superintendent Zarker and his executive team manipulated personnel rules to favor Caucasians and disfavor racial minorities throughout City Light. Because Trinh and Bailey met the minimum requirements for joinder, we affirm.

Washington CR 20(a) provides:

³ Nat'l Bank of Wash. v. Equity Investors, 86 Wn.2d 545, 560-61, 546 P.2d 440 (1976).

⁴ In re Det. of Halgren, 156 Wn.2d 795, 815, 132 P.3d 714 (2006).

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of these persons will arise in the action.^[5]

Since Fed. R. Civ. P. 20(a) is virtually identical to CR 20(a), federal cases provide persuasive authority for interpreting the state rule.⁶ The parties each cite federal cases that support their positions.⁷ However, because the decision to join or sever is fact-specific, “reported cases have only limited precedential value.”⁸ This is especially true of district court opinions because the standard of review is abuse of discretion and either severance or joinder may be within a trial court’s authority.

⁵ CR 20(a).

⁶ Fed. R. Civ. P. 20(a); Rinke v. Johns-Manville Corp., 47 Wn. App. 222, 225, 734 P.2d 533 (1987).

⁷ Compare Mangham v. Gold Seal Chinchillas, Inc., 69 Wn.2d 37, 416 P.2d 680 (1966) (severance of plaintiffs was improper where fraudulent transactions shared common source of authority), and Mosley v. General Motors Corp., 497 F.2d 1330 (8th Cir. 1974) (severance of plaintiffs was improper where company-wide policy discriminated against black employees), with Bailey v. Northern Trust Co., 196 F.R.D. 513, 516 (N.D. Ill. 2000) (claims of five female African American plaintiffs severed where they alleged no general discriminatory or illegal standard, policy, or procedure), Grayson v. K-Mart Corp., 849 F. Supp. 785 (N.D. Ga. 1994) (plaintiffs claiming age discrimination did not meet requirements of Fed. R. Civ. P. 20(a) where plaintiffs worked in 11 different store locations nationwide and did not present evidence of common discriminatory motive), and Anderson v. Phelps, 655 F. Supp. 560 (M.D. La. 1985) (court severed plaintiffs’ claims for religious discrimination where actions arose at different correctional facilities).

⁸ 3A Karl B. Tegland, *Washington Practice: Rules Practice* 447 (5th ed. 2006). See also Mosely v. General Motors Corp., 497 F.2d at 1333 (8th Cir. 1974) (courts generally use case-by-case approach in determining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Fed. R. Civ. P. 20).

Our Supreme Court addressed the issue of whether plaintiffs should be joined under CR 20(a) in Mangham v. Gold Seal Chinchillas.⁹ In Mangham, six plaintiffs sued the defendant for fraudulent representations made in sales of chinchillas.¹⁰ The transactions involved several different salesmen and occurred at different times over a six-year period.¹¹ Our Supreme Court held that the trial court had not abused its discretion in joining the claims because they constituted a series of related transactions.¹² Specifically, the court noted that the salesmen used the same marketing materials and sales pitch and that the defendant was the source of authority for all six transactions.¹³ Similarly, Trinh and Bailey alleged that City Light had a department-wide policy of discriminating against non-Caucasian employees by removing their job responsibilities and that Superintendent Zarker promoted this policy and Carrasco allowed it to continue.

City Light argues that this case differs from Mangham because the City Light superintendent did not direct managers to favor Caucasians and disfavor minorities. It claims any alleged discrimination Trinh and Bailey experienced was due to separate decisions made within Trinh's and Bailey's respective chains of command, not a general policy of discrimination at City Light. However, the plaintiffs here did allege a general policy of discrimination in their

⁹ 69 Wn.2d 37, 416 P.2d 680 (1966).

¹⁰ Mangham v. Gold Seal Chinchillas, Inc., 69 Wn.2d 37, 38-39, 416 P.2d 680 (1966).

¹¹ Mangham, 69 Wn.2d at 39.

¹² Mangham, 69 Wn.2d at 40.

¹³ Mangham, 69 Wn.2d at 40-41.

complaint. Their complaint alleged they each began to experience discrimination and harassment after Zarker became superintendent and that Zarker and his appointees engaged in discriminatory employment practices against them that were part of a pattern of department-wide practices. Thus, Trinh and Bailey asserted colorable claims that arose out of the same series of transactions or occurrences.

An Eighth Circuit opinion, Mosley v. General Motors Corporation,¹⁴ reversed a district court ruling that severed the claims of ten plaintiffs who had alleged a general policy of discrimination based on race and sex. The court held that “a company-wide policy purportedly designed to discriminate against blacks in employment . . . arises out of the same series of transactions or occurrences” under Federal Rule 20(a).¹⁵ Similarly, Trinh and Bailey alleged that City Light had a department-wide policy of discriminating against non-Caucasian employees.

City Light also argues that Trinh’s and Bailey’s claims share no common question of law or fact. We disagree.

Although Trinh and Bailey worked in different divisions of City Light, they alleged generalized discrimination throughout the department, and the testimony of several of the witnesses called by the plaintiffs and by City Light was relevant to both Trinh’s and Bailey’s claims. Our Supreme Court in Mangham held that

¹⁴ 497 F.2d 1330 (8th Cir. 1974).

¹⁵ Mosley, 497 F.2d 1330, 1334 (8th Cir. 1974).

common questions of fact and law were present even where “[t]he detailed evidence and the facts relating to each transaction must be separately proven at the trial.”¹⁶ Similarly, the Eighth Circuit in Mosley held that “the fact that the individual class members may have suffered different effects from the alleged discrimination is immaterial” for the purposes of finding a common question of law or fact under Rule 20(a).¹⁷

Because Trinh and Bailey alleged generalized discrimination promulgated by City Light’s upper management, it was not an abuse of discretion to join their claims.

TESTIMONY OF OTHER CITY LIGHT EMPLOYEES

City Light argues that the trial court erred when it refused to exclude all evidence not directly relating to discrimination against Trinh or Bailey. City Light argues that the testimony of Asian American employees Paul Nonog and Felix DeMello was unduly prejudicial to its defense of Bailey’s claims and that the testimony of EEO Officer Stephanie Lieberman was irrelevant and prejudicial to City Light regarding its defense of both Trinh’s and Bailey’s claims.

The decision to admit or refuse evidence is within the sound discretion of the trial court and will not be overturned absent manifest abuse of discretion.¹⁸ The testimony of nonplaintiff employees may be relevant regarding a

¹⁶ Mangham, 69 Wn.2d at 41.

¹⁷ Mosley, 497 F.2d at 1334.

¹⁸ Hume v. Am. Disposal Co., 124 Wn.2d 656, 666, 880 P.2d 988 (1994) (citing Maehren v. Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979)).

defendant's intent, plan, and pattern of discrimination.¹⁹

In its order denying City Light's motion in limine regarding Nonog and DeMello, the trial court found that the testimony was relevant to the claims of both Trinh and Bailey to show that City Light stripped other non-Caucasian employees of their job responsibilities and to show the bias of City Light managers Zarker, Backiel, Howell, and Royer. Nonog testified that he was discriminated against while working as a Management Systems Analyst at the Skagit by Zarker, Backiel, and Howell. His job was abrogated and his duties given to Caucasian employees. In 2002, he resigned after receiving a layoff notice. He returned to City Light as a Senior Management Systems Analyst but was not given responsibilities appropriate to that position and retired after three months. Similarly, DeMello testified that he experienced discrimination from Zarker, Backiel, and Howell at the Skagit when his job duties were taken from him and given to Caucasian employees. He eventually accepted a limited-duty position in the Seattle office as part of a settlement agreement, and his job duties were abrogated further still by Royer.

Lieberman's testimony was offered to rebut Carrasco's testimony of why he asked his executive assistant, rather than Lieberman, to conduct the

¹⁹ Hume, 124 Wn.2d at 666. See also Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir.1995) ("Evidence of [employer's] sexual harassment of other female workers may be used . . . to prove his motive or intent in discharging [plaintiff]."); Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990) ("As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent.").

investigation of Trinh's EEO claims. City Light claimed Lieberman was too busy to investigate Trinh's claim, while Trinh claimed City Light failed to investigate his claim adequately. After taking argument from the parties, the trial court admitted Lieberman's testimony about her experiences as City Light's EEO officer during a limited timeframe and allowed the jury to decide whether Lieberman's testimony conflicted with Carrasco's testimony.

The trial court did not abuse its discretion when it allowed Nonog, DeMello, and Lieberman to testify.

SUFFICIENCY OF THE EVIDENCE

After trial, City Light unsuccessfully moved for judgment as a matter of law as to all claims under CR 50(b). On appeal, City Light argues that the jury verdicts on each plaintiff's hostile work environment claim and Bailey's disparate treatment claim are not supported by sufficient evidence.

When reviewing a trial court's denial of a motion for a directed verdict or judgment as a matter of law, the appellate court applies the same standard as the trial court.²⁰ Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences from the evidence, there is substantial evidence to sustain a verdict for the nonmoving party.²¹ Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of a declared

²⁰ Schmidt v. Coogan, 162 Wn.2d 488, 491, 173 P.3d 273 (2007).

²¹ Hizey v. Carpenter, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

premise.²²

Hostile Work Environment – Trinh and Bailey

City Light claims the record contains insufficient evidence to support Trinh's and Bailey's hostile work environment claims. To establish a hostile work environment claim, a plaintiff must prove that the harassment was (1) unwelcome, (2) because he or she is a member of a protected class, (3) affected the terms or conditions of employment, and (4) imputable to the employer.²³ City Light challenges the sufficiency of the evidence for elements two and three, arguing that neither Trinh nor Bailey presented substantial evidence of harassment based on race and that neither plaintiff showed conduct severe or pervasive enough to alter the terms and conditions of his or her employment.

In order to satisfy the second element, Trinh and Bailey must show that they were harassed because of race. Substantial evidence of a racial motive for City Light's conduct was presented. For example, Nonog and DeMello, two other non-Caucasian employees, testified that they were discriminated against by Zarker and Backiel at the Skagit, and DeMello testified that he continued to be treated differently by Royer in the Seattle office. This evidence is relevant and sufficient to persuade a jury of the existence of an intent, plan, or pattern of

²² Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 126 (2003) (quoting Helman v. Sacred Heart Hosp., 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

²³ Robel v. Roundup Corp., 148 Wn.2d 35, 44-45, 59 P.3d 611 (2002).

discrimination by City Light. In addition, at a meeting where Bailey was the only African American present, Royer discussed Thomas Jefferson's "fatherly relationship" with his slaves. In 2004, Royer compared Bailey with "Super Fly," an African American pimp movie character, when she was wearing sunglasses. A jury could reasonably infer that these comments were made because of Bailey's race. From the evidence presented, reasonable minds could conclude that City Light managers harassed Trinh and Bailey because they were not Caucasian.

The third element of a hostile environment claim requires that the harassment be sufficiently severe or pervasive as to alter the conditions of employment and create an abusive working environment.²⁴ The totality of the circumstances must be considered in determining whether harassment is severe or pervasive.²⁵ No single factor is determinative, but some of the factors that may be considered are the frequency and severity of the conduct, whether it unreasonably interferes with an employee's work performance, and the effect on an employee's psychological well-being.²⁶ Where reasonable minds could differ on the question of whether allegedly ongoing harassment is severe and pervasive, this determination is best left for a jury.²⁷ We conclude that the

²⁴ Davis v. W. One Auto. Group, 140 Wn. App. 449, 457, 166 P.3d 807 (2007).

²⁵ Davis, 140 Wn. App. at 458.

²⁶ Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

²⁷ Kahn v. Salerno, 90 Wn. App. 110, 127, 951 P.2d 321 (1998).

evidence here is sufficient to satisfy this element as to each plaintiff.

The record contains sufficient evidence of acts that a rational juror could have viewed as harassment of Trinh. He was removed from his job and placed on a temporary project, the SIP. The completion of the SIP was delayed by managers who wanted to prevent him from returning to his permanent position. While working on the SIP, he was offered multiple jobs that were not offered to anyone else when he declined them. He was accused of and unofficially punished for disrupting a training seminar when he refused to sign a false statement regarding what the training covered. He was criticized for putting too many things in writing while his supervisor, Hannigan, was simultaneously criticized for not documenting enough of Trinh's alleged performance problems. After fighting to return to his job as generation supervisor, he received a threatening memo from Howell, cautioning him that he could again lose his position. Reasonable minds could conclude that this conduct was sufficiently severe and pervasive to constitute harassment that altered the terms and conditions of Trinh's employment.

Similarly, Bailey's hostile work environment claims are supported by substantial evidence of conduct which reasonable minds could conclude altered the terms and conditions of her employment. For example, Zarker interrupted and walked out on a presentation Bailey was making to him, Lofton, Dickinson, and a representative from the mayor's office. When the division was reorganized in 2000, employees assigned to Bailey's unit were mostly minorities,

and the entire unit was moved to an isolated area on the 28th floor. She was required to submit 14 reinvention proposals for her unit, which no other manager was required to do, and which she found humiliating. Royer discussed Thomas Jefferson's relationship with his slaves in front of Bailey and compared her with the African American pimp movie character "Super Fly."

Relying on this evidence, a reasonable juror could conclude that the conduct of City Light managers was because of Trinh's and Bailey's race and altered the terms and conditions of their employment. We hold that Trinh's and Bailey's hostile work environment claims are supported by substantial evidence.

Disparate Treatment - Bailey

City Light argues that there was insufficient evidence to support Bailey's claim for disparate treatment because she presented no evidence of disparate treatment occurring within the three-year period preceding this lawsuit. We agree.

The Washington Law Against Discrimination, chapter 49.60 RCW, prohibits employment discrimination based on race.²⁸ RCW 49.60.180 makes it an unfair practice "to discriminate against any person in compensation or in other terms or conditions of employment because of . . . race."²⁹ To assert a prima facie case of discrimination, Bailey must show "(1) she belongs to a protected class, (2) she was treated less favorably in the terms or conditions of

²⁸ RCW 49.60.010, .030, .180.

²⁹ RCW 49.010.180.

her employment than a similarly situated, nonprotected employee, and (3) she and the nonprotected 'comparator' were doing substantially the same work."³⁰

Discrimination claims must be brought within three years under the general statute of limitations for personal injury actions.³¹ Unlike hostile work environment claims, disparate treatment claims are based on discrete retaliatory or discriminatory acts such as termination, failure to promote, denial of transfer, or refusal to hire.³² The statute of limitations begins to run on the date of the discrete act.³³

Bailey claims that she was treated less favorably than similarly situated employees in conditions and compensation because her duties were removed from her and given to Caucasian employees. Specifically, Bailey argues that Zarker hired Royer to do Bailey's job for more pay than Bailey had received for the same work. However, Royer was hired in 1999. Bailey testified that her job duties were stripped in 2000 and that they were essentially the same from 2000 forward. This action was commenced on August 5, 2004. To be timely, Bailey's claim of disparate treatment must relate to conduct occurring on or after August 5, 2001. It did not.

Although acts that occurred before the limitations period may be used as

³⁰ Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 81, 98 P.3d 1222 (2004).

³¹ Antonius v. King County, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004).

³² Antonius, 153 Wn.2d at 264 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 108-13, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)).

³³ Antonius, 153 Wn.2d at 264 (citing Morgan, 536 U.S. at 108-13).

background evidence to support a timely claim, only those acts occurring within the limitation period are actionable.³⁴ Past discriminatory conduct is not actionable after the statute of limitations has run, even if the past conduct will influence the amount an employee will be paid during the limitation period.³⁵ In Ledbetter v. Goodyear Tire & Rubber Co., Inc.,³⁶ the United States Supreme Court rejected the argument that a new charging period is triggered by nondiscriminatory acts, such as nondiscriminatory salary decisions, that incorporate adverse effects resulting from past discrimination.³⁷ Ledbetter filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC), asserting disparate treatment based on sex under Title VII.³⁸ She introduced evidence that during the course of her employment, she had been given poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions affected the amount of her pay throughout the remainder of her employment.³⁹ Toward the end of her employment, Ledbetter's pay was significantly lower than that of her male colleagues.⁴⁰ The Supreme Court held that Ledbetter's claim was time-barred

³⁴ Morgan, 536 U.S. at 102.

³⁵ See Ledbetter v. Goodyear Tire & Rubber Co., Inc., ___ U.S. ___, 127 S. Ct. 2162, 2169, 167 L. Ed. 2d 982 (2007).

³⁶ 127 S. Ct. 2162 (2007).

³⁷ Ledbetter, 127 S. Ct. at 2169.

³⁸ Ledbetter, 127 S. Ct. at 2165.

³⁹ Ledbetter, 127 S. Ct. at 2165-66.

⁴⁰ Ledbetter, 127 S. Ct. at 2166.

because the discriminatory conduct on which her claim was based occurred before the EEOC charging period for her claim.⁴¹

Similarly, the discriminatory conduct underlying Bailey's claim for disparate pay did not occur within the three-year statute of limitations period preceding the commencement of this lawsuit. Royer was hired in 1999 and City Light was reorganized in 2000. Bailey failed to show any discrete discriminatory act by City Light within three years before she filed her claim.

Because Bailey's disparate treatment claim is based on discriminatory conduct that occurred more than three years before she filed her claim, her claim is time-barred. We reverse the trial court's denial of City Light's motion for judgment as a matter of law regarding Bailey's disparate treatment claim.

EXCESSIVE DAMAGES

City Light argues that the damages awarded to Trinh and Bailey were excessive. As acknowledged by counsel at oral argument, it is not possible to segregate the jury's damage award for Bailey's hostile work environment claim from its award for her disparate treatment claim. Therefore, we review only Trinh's damages award and remand the issue of damages for Bailey's hostile work environment claim.

We review a trial court order denying remittitur for abuse of discretion.⁴² An appellate court may not overturn an award of damages made by a jury unless

⁴¹ Ledbetter, 127 S. Ct. at 2169.

⁴² Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 176, 116 P.3d 381 (2005).

it is outside the range of substantial evidence in the record, shocks the conscience of the court, or appears to result from passion or prejudice.⁴³ The determination of damages is particularly a jury's function, and the court "strongly presumes" the verdict is correct.⁴⁴ Other than to inquire whether the substantial evidence test has been met, an appellate court should not concern itself with the amount of damages because "the jury is the final arbiter of the effect of the evidence, for it determines the credibility of the witnesses, the weight of their testimony, and the consequence of all other evidence."⁴⁵

The jury awarded Trinh \$175,290 in front pay and \$772,000 in emotional harm for a total of \$947,290 in damages for harassment and disparate treatment. City Light does not appeal the jury's finding that Trinh was a victim of disparate treatment and we affirm its finding of harassment based on a hostile work environment. City Light argues that Trinh's award for noneconomic damages is not supported by substantial evidence because the only evidence of emotional harm was Trinh's own testimony. It argues that the award should have been remitted as in Hill v. GTE Directories Sales Corp.⁴⁶

However, this court will not disturb a jury verdict that is supported by substantial evidence. In Hill, the trial court remitted the jury's award of economic

⁴³ Bunch, 155 Wn.2d at 179 (quoting Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)).

⁴⁴ Bunch, 155 Wn.2d at 179.

⁴⁵ Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 176-77, 422 P.2d 515 (1967).

⁴⁶ 71 Wn. App. 132, 856 P.2d 746 (1993).

and noneconomic damages because the extent of damages awarded by the jury was not supported by substantial evidence.⁴⁷ Specifically, Hill testified only that she was under constant pressure, felt inadequate and frustrated, and had seen a doctor for a stress-related problem.⁴⁸ Division Three of this court affirmed the trial court's remittitur of the award and noted, "The trial court was in the better position to make that determination and is to be accorded room for the exercise of its sound discretion."⁴⁹ Conversely, in Bunch v. King County Department of Youth Services,⁵⁰ our Supreme Court reversed the appellate court's remittitur of a jury's award of noneconomic damages that was based solely upon the plaintiff's testimony. The court held that the plaintiff's testimony of anguish and distress was sufficient to support the award of emotional distress damages.⁵¹ Here, Trinh testified that he felt isolated, depressed, devalued, humiliated, stressed, sad, discouraged, preoccupied, helpless, and had insomnia, heartburn, and neck tension. This evidence is sufficient to convince a rational, fair-minded person that Trinh suffered significant noneconomic damages.

City Light also argues that Trinh's award for emotional distress must have been a result of passion and prejudice because Trinh's noneconomic damages were four times his economic damages award. In distinguishing Hill, where the

⁴⁷ Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 139-40, 856 P.2d 746 (1993).

⁴⁸ Hill, 71 Wn. App. at 139.

⁴⁹ Hill, 71 Wn. App. at 140.

⁵⁰ 155 Wn.2d 165, 116 P.3d 381 (2005).

⁵¹ Bunch, 155 Wn.2d at 181.

noneconomic damages were 10 times the economic damages, our Supreme Court in Bunch noted that the discrimination in Hill had only occurred for about 13 months compared with six years in Bunch.⁵² Here, Trinh's award is based on claims of harassment and disparate treatment spanning a period of about six years. In both Hill and Bunch, our Supreme Court noted that the trial court was in a better position than the appellate court to determine whether the verdict was outside the range supported by the evidence.⁵³ Here, as in Bunch, the trial court's refusal to remit damages strengthened the verdict.⁵⁴

Finally, City Light argues that Trinh did not suffer any economic harm because, although he was not promoted to Skagit project manager in 2003, the overtime pay Trinh historically received made up the difference in base salaries between the generation supervisor and project manager positions. However, Trinh testified that although he had earned overtime pay in the past, overtime pay was not guaranteed for generation supervisors. Thus, it was reasonable for the jury to base the award on lost wages without overtime.

Because the jury's award of damages to Trinh is not outside the range of substantial evidence in the record, is not obviously the result of passion or prejudice, and does not shock the conscience of the court, we conclude that the trial court did not abuse its discretion when it denied remittitur of the jury verdict and affirmed the jury's award of damages.

⁵² Bunch, 155 Wn. 2d at 181-82.

⁵³ Hill, 71 Wn. App. at 140; Bunch, 155 Wn.2d at 182-83.

⁵⁴ See Bunch, 155 Wn.2d at 182.

CONCLUSION

We affirm the trial court's pretrial and evidentiary rulings, both plaintiffs' hostile work environment claims, and Trinh's award of damages. We reverse Bailey's disparate treatment claim because it is barred by the statute of limitations, and remand for a trial on the issue of damages for her hostile work environment claim.

REVERSED in part and AFFIRMED in part.

Leach, J.

WE CONCUR:

Dwyer, A.C.J.

Cox, J.