

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SELINA OWENS,

Plaintiff,

v.

ENIS RAGLAND,

Defendant.

ORDER

03-C-0369-C

Plaintiff Selina Owens has filed a motion after verdict pursuant to Fed. R. Civ. P. 50 and 59. She asks the court to alter or amend the judgment entered in this case on the ground that the special verdict that the court approved was erroneous, that no reasonable jury could have concluded that defendant's conduct was welcome to her and that once the court found that defendant had made sexual advances toward plaintiff, the jury should have been allowed to consider an award of damages.

In filing this motion, plaintiff seems to be thinking of her case as one of disparate treatment subject to the McDonnell Douglas test, in which a plaintiff has to establish four elements in order to make out a prima facie case. Plaintiff brought her case as one of sexual harassment. In order to prove her case, she had to prove that defendant engaged in sexual

conduct that was (1) unwelcome; (2) severe or pervasive; and (3) based on sex. Although the court of appeals has sometimes described these factors as part of a prima facie case that a plaintiff must establish to avoid summary judgment, see, e.g., Robinson v. Sappington, 351 F.3d 317, 328 (7th Cir. 2003), the factors are unlike those McDonnell Douglas that drop away at trial, with the ultimate question being whether the plaintiff can prove that the defendant discriminated against the plaintiff. Rather, a plaintiff must prove each one in order to prevail at trial.

The difference is understandable. In the McDonnell Douglas test, the four factors are both a screening device to insure that the plaintiff has a facially plausible charge of discrimination and a means of establishing the possibility of discrimination in the absence of direct evidence. At trial the jury is not instructed on the elements of a prima facie case or asked to determine their existence because the McDonnell Douglas test is only *one* way that a plaintiff may prove her case. In a sexual harassment case, a plaintiff *must* show that the defendant's conduct was unwelcome, serious or pervasive or both and based on the plaintiff's sex. There is no other way to prove sexual harassment. Thus, if a plaintiff fails to prove that the defendant's sexual advances were unwelcome, she has failed to prove that she was sexually harassed.

If plaintiff is objecting to making each of the elements of sexual harassment a separate question on the verdict form, her objection is meritless. Whether unwelcomeness was a

separate question or simply one aspect of one question, the jury would have had to determine it specifically. The only way that plaintiff could have benefited from a single question verdict would be if the jury had disregarded the instruction on welcomeness. Plaintiff cannot argue that she was prejudiced unfairly by the elimination of this possibility.

Although it was disputed at trial whether defendant's conduct was unwelcome to plaintiff, defendant introduced sufficient evidence to support the jury's finding that it was not. Witnesses testified that over the 18-month period at issue, the relationship between the two appeared friendly, flirtatious and cheerful and that plaintiff would openly seek out defendant whenever he visited her department and purposefully interject herself into conversations with him. Plaintiff admitted that she never turned down a lunch invitation from defendant, never told him to leave her office and actually invited him out to lunch on several occasions. As of May 29, 2001, plaintiff included defendant in her list of personal references.

Despite the evidence that plaintiff introduced that she had complained to friends and co-workers at the time about defendant's conduct, that she complained to the department head in September 2000, and her own testimony that she rejected many of defendant's invitations and comments, the jury was entitled to disbelieve this evidence and believe the evidence that defendant adduced. I cannot say that its verdict was unreasonable.

Plaintiff argues that the jury's verdict was inconsistent, but this argument is simply

a rehash of the previous one. She maintains that once the jury found that defendant had subjected her to sexual advances, the jury had no evidence that the advances were welcome. If it believed plaintiff that there were advances, it had implicitly disbelieved defendant, who testified that the advances never occurred. As I have explained, however, the jury had evidence from which it could find that plaintiff had welcomes the advances. In any event, there is nothing inconsistent about a jury's disbelieving one party about one matter (in this case, whether the advances occurred) and disbelieving the other party about another matter (in this case, whether the advances were welcome).

As for plaintiff's voluntariness argument, it is true that mere voluntariness does not equal welcomeness. A person who accepts a luncheon invitation may be doing it because she thinks she has to, not because she wants to. In this case, however, the jury had more than the evidence that plaintiff went to lunch with defendant voluntarily, including the evidence that she asked him to go to lunch on occasion.

Because plaintiff has not shown that the sexual advances defendant made to her constituted sexual harassment under the law, she had no basis on which to claim damages. Therefore, it was proper to enter judgment for defendant without allowing the jury to address that issue.

ORDER

IT IS ORDERED that plaintiff Selina Owens's motion to alter or amend the judgment entered herein on May 27, 2004, is DENIED.

Entered this 2nd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge