

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-577

MICHELLE DIMANCHE

vs.

BOSTON CARMEN'S UNION.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Boston Carmen's Union (union), appeals from a judgment entered for the plaintiff, Michelle Dimanche, after a jury trial in Superior Court. The jury found that the union failed to take her grievance to arbitration because of the plaintiff's national origin in violation of G. L. c. 151B, § 4 (1), and awarded the plaintiff \$490,500 for emotional distress. The trial judge denied the union's motion for judgment notwithstanding the verdict and for a new trial or remittitur of damages. Concluding that the evidence at trial supported the verdict, we affirm.

1. Judgment notwithstanding the verdict. "In reviewing the denial of a motion for judgment notwithstanding the verdict or a directed verdict, the question is whether 'anywhere in the evidence, from whatever source derived, any combination of

circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'" Beliveau v. Ware, 87 Mass. App. Ct. 615, 616 (2015), quoting Zaniboni v. Massachusetts Trial Court, 81 Mass. App. Ct. 216, 217 (2012). "In reviewing the denial of a motion for judgment notwithstanding the verdict, we view the evidence presented in the light most favorable to the plaintiff and disregard the evidence favorable to the defendant." Salvi v. Suffolk County Sheriff's Dep't, 67 Mass. App. Ct. 596, 598 (2006).

The jury heard testimony from several witnesses about derogatory statements made by union officials to the plaintiff about her national origin.¹ See Gannon v. Boston, 476 Mass. 786, 795 n.8 (2017) (plaintiff may offer specific statements as evidence of discriminatory animus). Furthermore, the jury could reasonably infer that the union president manipulated the vote on whether to take the plaintiff's grievance to arbitration at the August 2013 union meeting. See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo, P.C., 474 Mass. 382, 399-400

¹ The plaintiff testified that in December 2012 the union president said, "them people come in this country to take the job away from them, something like that." Several months after the January 2013 incident which led to her discharge, the plaintiff testified that the union president said to her, "damn nigga always want to fight." The plaintiff's psychiatrist testified that the union president said to the plaintiff, "you come in here taking our jobs" and, "go back to your country." During the August 2013 union meeting, one of the barn captains interrupted with, "you better go back to your country."

(2016).² First, the jury heard testimony from three witnesses that no vote -- either by voice or secret ballot -- was called for the plaintiff's grievance at the meeting. Second, the jury heard evidence that the union's bylaws entitled the plaintiff to a secret ballot vote to determine whether to bring her case to arbitration, but even the union witnesses agree that the plaintiff received only a voice vote (after, according to some witnesses, a barn captain interjected national origin discrimination into the discussion). Another union member received a secret ballot vote at the same meeting. Third, the jury heard evidence that the plaintiff won the voice vote, and the union president, tasked with counting the voice vote, nevertheless stated that she had lost the vote.

Whichever of these versions the jury believed, they had a legally sufficient basis to conclude that the union president manipulated the process to deprive the plaintiff of arbitration and, in light of the union president's own statements expressing national origin bias against the plaintiff, they could conclude that she was treated differently than other similarly situated people because of her national origin. See Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 99 (2009) (substantial evidence of

² The union does not take every discharge grievance to arbitration. The question is put to a vote of the entire union membership at a monthly union meeting, presided over by the president.

different treatment of similarly situated people supports inference of discriminatory animus). Accordingly, the judge properly denied the motion for judgment notwithstanding the verdict.³

2. Damages for emotional distress. "A judge acting on a motion for remittitur has broad discretion." Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 623 (2005). "In exercising that broad discretion, a judge may remit so much of the damages as he or she 'adjudges is excessive, in order to bring the award within the range of verdicts supported by the evidence.'" Dubuque v. Cumberland Farms, Inc., 93 Mass. App. Ct. 332, 350 (2018), quoting Clifton, supra. "The assessment of damages is traditionally a factual undertaking appropriate for determination by a jury as the representative voice of the community." Dubuque, supra at 350, quoting Glavin v. Eckman, 71

³ The union does not appear to separately challenge the trial judge's denial of a new trial, apparently requested on the ground that the verdict was against the weight of the evidence. In any event, "[t]he judge should only set aside a verdict as against the weight of the evidence when it is determined that the jury 'failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.'" Parsons v. Ameri, 97 Mass. App. Ct. 96, 103 (2020), quoting O'Brien v. Pearson, 449 Mass. 377, 384 (2007). We review only for an abuse of discretion, and we discern none. See DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 377 n.2 (2019). To the extent that the union claims that the judge abused his discretion in not determining that the damages were against the weight of the evidence, we disagree for the reasons explained infra.

Mass. App. Ct. 313, 320 (2008). "This is particularly true where the damages available 'are difficult to compute and depend upon the judgment of the fact-finding tribunal in appraising the deprivations and "translating them into a compensatory sum."" Dubuque, supra at 350, quoting MacCuish v. Volkswagenwerk A.G., 22 Mass. App. Ct. 380, 398 (1986). "[A]n award of damages must stand unless . . . to permit it to stand was an abuse of discretion on the part of the court below, amounting to an error of law." Larkin v. Dedham Med. Assocs., Inc., 93 Mass. App. Ct. 661, 669 (2018), quoting Reckis v. Johnson & Johnson, 471 Mass. 272, 299 (2015). "It is an error of law for a court to allow an award of damages for emotional distress that is 'greatly disproportionate to the injury proven or represented a miscarriage of justice.'" DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 393 (2019), quoting Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

The plaintiff testified that after the August 2013 union meeting she had thoughts about self-harm, she attended therapy, and her pain affected her relationship with her children. She had significant weight gain, flash backs, and difficulty sleeping. See DaPrato, 482 Mass. at 394 (upholding emotional distress damages award where plaintiff "consulted a doctor for anxiety and experienced migraine headaches and other negative health effects"). Expert testimony and medical records

supported the plaintiff's testimony that she had significant and prolonged emotional distress as a result of the union's conduct.

Prior to the union's unlawful actions, the plaintiff was diagnosed with posttraumatic stress disorder and major depression. The plaintiff's psychiatrist testified that the union's conduct aggravated her condition and that she was still doing "relatively poorly." The judge instructed the jury that the plaintiff must prove that the union's unlawful act was an important and material cause that aggravated her emotional distress. See DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 7 (2006). "We presume that the jury follow the judge's instructions." Commonwealth v. Kolenovic, 478 Mass. 189, 201 (2017).

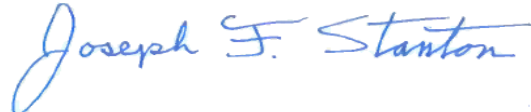
Despite the high damages, the jury heard evidence that the plaintiff was suffering substantial emotional distress and that the union's actions were an important and material cause of that suffering. We discern no abuse of discretion in the judge's denial of a new trial or remittitur on the basis of excessive damages.⁴

⁴ The plaintiff has requested, and is entitled to, attorney's fees on appeal pursuant to G. L. c. 151B, § 9. The plaintiff may file her application for appellate attorney's fees and costs within fourteen days of the date of the rescript, in accordance with Fabre v. Walton, 441 Mass. 9 (2004). The union shall then have fourteen within which to respond. See Charles v. Leo, 96 Mass. App. Ct. 326, 353 n.16 (2019).

3. Conclusion. The judgment is affirmed. The denial of the union's motion for judgment notwithstanding the verdict and for a new trial or remittitur of damages is affirmed.

So ordered.

By the Court (Kinder, Sacks & Ditzkoff, JJ.⁵),



Clerk

Entered: June 30, 2020.

⁵ The panelists are listed in order of seniority.