

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

21-P-814

INDALINA LOPEZ

vs.

NDIP ENOH & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in the Superior Court, judgment entered against the defendants, Global Healthcare Services, LLC (Global), and its chief executive officer, Ndip Enoh, on the plaintiff's sexual harassment claims. After moving unsuccessfully for a new trial or, alternatively, for remittitur of the jury's compensatory and punitive damage awards, see Mass. R. Civ. P. 59, 365 Mass. 827 (1974), the defendants appeal. To the extent the defendants' arguments were preserved at trial, we do not find them persuasive. Because we discern no abuse of discretion in the judge's conclusions that (1) the jury's verdict was not against the weight of the evidence, and (2) the damages that the jury awarded were not excessive and did not

¹ Global Health Care Services, LLC.

violate constitutional standards of due process, see Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 412-413 (2013), we affirm.

Discussion. 1. Standard of review. We review the denial of the defendants' motion for new trial under an abuse of discretion standard, see Wahlstrom v. JPA IV Mgt. Co., 95 Mass. App. Ct. 445, 448 (2019), affording considerable deference to the decision where, as here, the motion judge presided over the trial. See Gath v. M/A-Com, Inc., 440 Mass. 482, 492 (2003).

2. Waived claims. The defendants raise several arguments for the first time on appeal.² Because these arguments were not preserved at trial, they are waived and we do not consider them. See Motsis v. Ming's Supermkt., Inc., 96 Mass. App. Ct. 371, 383 (2019) ("[a]ny objection to the form of a verdict slip must be timely raised"); Anderson-Mole v. University of Mass., 49 Mass. App. Ct. 723, 726 (2000) (unspoken objection to composition of jury waived); Jarry v. Corsaro, 40 Mass. App. Ct. 601, 603 (1996) (objection to jury instruction waived if not made before jury retires).³

² This includes challenges to the racial composition of the jury, the wording of the judge's jury instructions, the formulation of the verdict slip, and portions of the plaintiff's closing argument. Particularly as to the defendants' claim that they were denied access to a racially-diverse jury pool, the record is entirely undeveloped.

³ Even assuming the validity of the defendants' suggestion that unpreserved errors in a civil case may be addressed where "the trial was so laden with error, misinstruction, and probable juror confusion," Squeri v. McCarrick, 32 Mass. App. Ct. 203,

3. Weight of the evidence. There was ample evidence to support the jury's verdict, and we discern no abuse of discretion in the judge's rejection of the defendants' claim that the verdict was "the product of bias, misapprehension or prejudice." Turnpike Motors, Inc. v. Newbury Group, Inc., 413 Mass. 119, 127 (1992). The plaintiff testified in detail about Enoh's persistent and escalating sexual harassment which culminated with Enoh's putting his hand down into her pants. See G. L. c. 151B, § 1, par. 18 ("sexual harassment" includes "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment" and stating, "[d]iscrimination on the basis of sex shall include, but not be limited to, sexual harassment"). The plaintiff also introduced evidence of medical records that supported her testimony about the harassment and its effect on her.⁴

204 (1992), the garden-variety issues raised by the defendants do not rise to this level.

⁴ As the defendants point out, those records also included references to other traumatic events in the plaintiff's life; still, the jury could properly have inferred that the records documented treatment the plaintiff sought and obtained as a result of Enoh's conduct here.

We acknowledge that the defendants presented evidence that conflicted sharply with the plaintiff's account of Enoh's conduct and which could have called into question the plaintiff's claim that she feared Enoh and discouraged his attention. This evidence included the testimony of two witnesses who corroborated portions of Enoh's testimony.⁵ To the extent the evidence conflicted, it was for the jury to assess its weight and credibility. See Meyer v. Wagner, 57 Mass. App. Ct. 494, 502, 505 (2003) (jury determines "credit" given to testimony and "[i]t is the job of the jury . . . to weigh conflicting evidence"). "The fact that the jury could have found for the [defendants] does not make their verdicts against the weight of the evidence or inconsistent with substantial justice." Jamgochian v. Dierker, 425 Mass. 565, 571 (1997). See Dakin v. OSI Restaurant Partners, LLC, 100 Mass. App. Ct. 92, 101 n.13 (2021). The judge was well within his discretion in rejecting the defendants' argument that "the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion." W.

⁵ In assessing the testimony presented, the jury was permitted to consider the potential bias of either of the parties or the witnesses, both of whom were still employed by Global at the time of trial, and one of whom had a long-standing intimate relationship with Enoh.

Oliver Tripp Co. v. American Hoechst Corp., 34 Mass. App. Ct. 744, 748 (1993).

4. Remittitur. The jury awarded the plaintiff compensatory damages of \$80,464⁶ and punitive damages of \$241,392. The judge denied the defendants' request for a new trial or, alternatively, a remittitur reducing the total verdict to \$69,888. "[A] judge may reduce a verdict where the damages awarded were 'greatly disproportionate to the injury proven,' represent a 'miscarriage of justice,' or were so large 'that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption.'" Dubuque v. Cumberland Farms, Inc., 93 Mass. App. Ct. 332, 350 (2018), quoting Reckis v. Johnson & Johnson, 471 Mass. 272, 299 (2015). We will reverse a judge's decision on a motion for remittitur only in the "exceedingly rare" circumstance, Reckis, supra, quoting Loschi v. Massachusetts Port Auth., 361 Mass. 714, 715 (1972), in which we discern in the ruling an abuse of the judge's "broad discretion." Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 623 (2005). This case does not present that rare circumstance.

⁶ The parties agree that the compensatory damages consist of an award of approximately \$34,000 in back pay, and the balance for emotional distress.

In assessing damages for emotional distress, the jury should consider "factors . . . includ[ing] (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counselling or by taking medication)."⁷ Charles v. Leo, 96 Mass. App. Ct. 326, 343 (2019), quoting Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 576 (2004). Here, there was evidence that as a result of Enoh's conduct the plaintiff became depressed and anxious, "felt disgusted with herself" for "allow[ing] [the abuse] to happen," experienced nightmares, required extended mental health treatment, and was unable to work for approximately two years. The judge did not abuse his discretion in permitting the compensatory damage award to stand.

We likewise discern no abuse of discretion in the judge's refusal to reduce the jury's award of punitive damages. Considering "'the degree of reprehensibility of [Enoh]'s conduct'; the ratio of the punitive damage award to the 'actual harm inflicted on the plaintiff'; and a comparison of 'the punitive damages award and the civil or criminal penalties that

⁷ The judge explicitly instructed the jury on the first three of these considerations. To the extent the judge did not instruct on the fourth, as we have noted, the defendants failed to raise an objection at trial, and the issue is waived.

could be imposed for comparable misconduct,'" Clifton, 445 Mass. at 623, quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575, 580, 583 (1996), we conclude that the jury's apparent tripling of the compensatory damages to arrive at the punitive damage award was "reasonably . . . arrived at . . . from [the] . . . evidence . . . presented," DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 392 (2019), quoting Haddad v. Wal-Mart Stores, Inc. (No. 1), 455 Mass. 91, 107 (2009). There was no abuse of discretion in the judge's denial of the defendants' motion for remittitur of the jury's damage award.

Conclusion. The judgment and the order denying the defendants' motion for new trial or, in the alternative, remittitur, are affirmed. The plaintiff's request for

attorney's fees in the instant appeal is allowed.⁸

So ordered.

By the Court (Ditkoff, Hand &
Brennan, JJ.⁹),



Clerk

Entered: August 4, 2022.

⁸ Pursuant to G. L. c. 151B, § 9, the plaintiff's request for appellate attorney's fees is allowed. In accordance with the procedure specified in Fabre v. Walton, 441 Mass. 9, 10-11 (2004), the plaintiff may, within fourteen days of the issuance of this memorandum and order, submit an application for attorney's fees with the appropriate supporting materials. The defendants shall have fourteen days thereafter to file a response to that application.

⁹ The panelists are listed in order of seniority.