IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, v. Swissport Fueling, Inc., Defendant.	No. CV-10-02101-PHX-GMS **ORDER**

Pending before the Court are Plaintiff's Motion to Set Aside First Jury's Answers to Damages Questions (Doc. 451) and Plaintiff's Renewed Motion for Judgment as a Matter of Law Under Rule 50 or for a New Trial under Rule 59 (Doc. 453). For the following reasons, Plaintiff's Motions are denied.

BACKGROUND

Plaintiff Equal Employment Opportunity Commission ("EEOC") brought the present suit against Defendant Swissport Fueling, Inc. ("Swissport") alleging claims of race, national origin, and color discrimination on behalf of fourteen current or former Swissport employees (the "Claimants"). The Court held a trial in this matter from March 11, 2014 to March 27, 2014. On March 27, 2014, the jury reached a unanimous verdict regarding six of these Claimants' claims and was unable to reach unanimous verdicts regarding the other eight Claimants' claims. Further, for seven of these eight other Claimants (the "remaining Claimants"), the jury did reach a unanimous verdict that Plaintiff was not entitled to punitive damages. The Court has scheduled a second trial on the remaining Claimants' claims.

The EEOC now moves to set aside the first jury's answers regarding punitive damages for the remaining Claimants. (Doc. 451.) The EEOC has also filed a Renewed Motion for Judgment as a Matter of Law under Rule 50 or For a New Trial under Rule 59 with respect to Swissport's affirmative defense to punitive damages. (Doc. 453.)

DISCUSSION

I. Motion to Set Aside

The EEOC first moves to set aside the jury's answers regarding punitive damages for the remaining Claimants. While a district court generally owes great deference to jury verdicts, they "should defer only to legitimate or viable findings of fact." *Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991). "[S]pecial findings issued in violation of the trial court's express instructions do not constitute legitimate or viable findings of fact" and "[t]he trial court must therefore dismiss them as surplusage, as a matter of law." *Id.* Here, the EEOC first argues that the jury's answers to one of the punitive damages question regarding the remaining Claimants should be dismissed as surplusage because the jury should not have answered any damages questions once they failed to reach a unanimous verdict on any of the remaining Claimant's claims.

The Court instructed the jury that the Plaintiff had the burden of proof regarding punitive damages and that they could "award punitive damages only if [they] find that the Defendant's conduct that harmed the claimant was malicious, oppressive or in reckless disregard of the claimants' rights." (*Id.*) The Court also instructed that, if the jury found "for the EEOC on one or more of the Claimant's claims, you must determine that Claimant's compensatory damages." (Doc. 424 at 28.) Further, the jury was instructed that if they "find for the Plaintiff on one or more of an individual Claimant's claims," they "may, but are not required to, award punitive damages to that Claimant." (*Id.* at 29.)

The jury verdict form had a separate page or pages for each of the Claimants. The form first asked the jury to decide for either Plaintiff or Defendant on each of that Claimant's individual claims. (Doc. 440.) Then, below the sections regarding these individual claims, each form had a section labeled "Damages" under which it stated that

“[i]f [the jury] find[s] in favor of the Plaintiff on any of [the Claimant’s] claims,” it needed to first state the amount, if any, of compensatory damages, and then proceed to questions on punitive damages. In the first of the two questions on punitive damages, the jury was asked whether Defendant “act[ed] with malice or reckless indifference to the federally protected rights of [the Claimant].” If the answer was yes, the second question on punitive damages asked what, if any, dollar amount was appropriate. The verdict form was approved by both parties.

The jury failed to reach a unanimous verdict in the one or more individual claims alleged by each of the seven remaining Claimants. While the jury had thus not found for Plaintiff on any claim, they nonetheless proceeded to answer the first of the two punitive damages questions, responding that Defendant had not acted with malice or reckless indifference toward that Claimant’s rights. The jury first returned after they expressed that they were unable to reach a unanimous verdict. Both parties approved the Court’s plan to ascertain whether the jury had reached a unanimous verdict as to any claim or claimants and, if so, to allow the jury to return to fill out the form regarding those unanimous verdicts. (Doc. 432 at 2.) The jury left the courtroom to do so and the Court told the parties “I would propose to take the jury verdict form that they give me. I will review it to see if I believe it is internally consistent and understandable. As to those claims and/or claimants as to which there is a unanimous verdict, I intend to enter judgment as to those claims and claimants. Is there any objection if I do so?” (*Id.* at 15.) The parties did not object. (*Id.*)

The jury then returned and the Court reviewed the verdict form. Finding no inconsistencies, the Court polled each juror as to each of their responses to ensure that they reflected that juror’s true verdict. The Court included the jury’s unanimous verdicts regarding the second punitive damages question. For example, the Court stated “[w]ith respect to claimant Michael Aba, the jury is unable to arrive at a verdict on the unlawful harassment claim of Mr. Aba and they therefore determined no compensatory damages with respect to Mr. Aba, but they did find in favor of Swissport on the question of

whether Swissport acted with malice or reckless indifference to the federally-protected rights of Michael Aba, meaning that you found that there would be no liability against Swissport for punitive damages." (*Id.* at 22.) The Court then asked the Courtroom Deputy to poll the jury and each responded that this reflected their true verdict. (*Id.* at 22–23.) Neither party objected and the jurors confirmed that each response reflected their true verdict.

In *Floyd v. Laws*, the Ninth Circuit affirmed the district court's decision to set aside the jury's answers to a particular question on the jury form. 929 F.2d at 1392–93. In that case, Question 13 on the verdict form asked the jury to decide if "'plaintiff . . . was damaged as a result of any of the actions of defendant . . . found in questions 9, 10, 11, or 12?'" The jury replied "no." *Id.* After Question 13, the form explained: "'[i]f your answer to question 13 is 'No,' do not answer any further questions, but proceed to the end of this form and sign the verdict. If you answered 'Yes' to question 13, proceed to question 14.'" *Id.* Question 14 asked "'What amount of money will reasonably compensate plaintiff . . . for any of the actions of defendant . . . found in questions 9, 10, 11, or 12?" *Id.* The jury responded "$7,500." *Id.* The trial court determined that the jury's answer to Question 14 was surplusage because it disobeyed the express instructions of the verdict form. *Id.*

In reviewing this decision, the Ninth Circuit first considered whether the jury's answers to the special interrogatories contained inconsistent answers. *Id.* at 1396. Under the Supreme Court's decision in *Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 110 (1963), "when confronted by seemingly inconsistent answers to the interrogatories of a special verdict, a court has a duty under the seventh amendment to harmonize those answers, if such be possible under a fair reading of them." *Floyd*, 929 F.2d at 1396.

Next, the court considered "the situation in which a jury proffers superfluous answers in violation of a trial court's express instructions contained on the special verdict form," noting that this situation was not specifically addressed in *Gallick*. *Id.* The court determined that it did not need to reconcile the apparent inconsistencies between the jury's responses to Questions 13 and 14 because the jury had violated the verdict form's

express instructions not to proceed to Question 14 if they answered "no" to Question 13. *Id.* at 1399. Thus, the court upheld the district court's determination that the response to Question 14 was surplusage.

In the present case, unlike the jury's answers in *Floyd*, the jury's responses here were not internally inconsistent. It is not illogical that the jury was unable to reach a unanimous decision on a Claimant's harassment or retaliation claim, but could determine that Swissport had not acted with malice or reckless indifference to that Claimant's rights. Thus, the answers do not present an inconsistency that the Court must resolve under *Gallick*.

Next, the Court must consider if the jury's responses violated the Court's express instructions, and therefore must be dismissed as surplusage. The jury was explicitly instructed that they could only award compensatory or punitive damages if they first found for the Plaintiff on one or more of a Claimant's claims. The jury did not disobey this instruction as they did not award any dollar amount of compensatory or punitive damages. Further, the jury instructions did not reference whether or not the jury might unanimously determine whether the Defendant acted with malice or reckless indifference, even in the event they could not reach a unanimous decision about a Claimant's claims.[1] The verdict form itself also did not explicitly instruct the jury not to answer this second punitive damages question, however the structure of the form does imply that the jury was to proceed to the section of questions on damages "if [they] find in favor of Plaintiff on any of [a charging party's] claims." Thus, there was not a "violation of the court's express instructions" that would warrant the setting aside of the jury's answers under *Floyd*.

Because the jury's verdict is not inconsistent and did not violate any of the Court's express instructions, the EEOC's Motion is denied and the Court will not set aside the

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[1] While *Floyd* did not address a situation where a jury violates an express jury instruction, as opposed to an express instruction on a verdict form, the verdict form in this case did contain cross-references to the jury instructions and thus the Court will consider whether the jury violated either set of directions.

jury answers regarding punitive damages for the remaining Claimants.

II. Motion for Judgment as a Matter of Law or For a New Trial

Next, the EEOC renews its Motion for Judgment as a Matter of Law under Rule 50 or for a New Trial under Rule 59 regarding Defendant's affirmative defense to punitive damages under *Kolstad v. Amer. Dental Ass'n*, 527 U.S. 526 (1999).

A. Legal Standard

Rule 50(a) of the Federal Rules of Civil Procedure provides that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve the issue against the party." Here, where the Court did not grant the Rule 50(a) motion, Rule 50(b) allows the moving party to "renew" their motion no later than 28 days after discharge of the jury.

The standard governing interpretation of the term "legally sufficient evidentiary basis" is analogous to a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("[T]he standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same.") The moving party must therefore show an absence of a dispute of material fact and that they are entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A review of the entire record is required—evaluating only the evidence supporting the verdict will not do. *Reeves*, 530 U.S. at 150. But in so doing, "the court must draw all reasonable inferences in favor of the nonmoving party." *Id.*

The question, then, is whether there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fisher v. City of San Jose*, 558 F.3d 1069, 1074 (9th Cir. 2009) (en banc) (internal quotation omitted). The standard is "extraordinarily deferential" and "is limited to whether there was any evidence to support the jury's verdict." *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961–62 (9th Cir.

2009). The watchword is "manifest miscarriage of justice." *Janes v. Wal–Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002).

B. Application

At trial, the jury was instructed on the circumstances under which it could award punitive damages as well as the Defendant's possible use of the *Kolstad* affirmative defense. (Doc. 424 at 29 ("[I]f you determine that the harassment or retaliation was contrary to the Defendant's good faith efforts to comply with federal law, the claimants are not entitled to punitive damages.")). The EEOC alleges that there was no legally sufficient basis on which a reasonable juror could have found that Swissport was entitled to this defense.

The EEOC first claims that this defense cannot be asserted regarding Jim Vescio's conduct because he was the highest-ranking official at Swissport's Arizona facility and thus was a proxy for the company. However, taking the evidence in the light most favorable to Defendant, the first complaint of race discrimination or harassment Mr. Vescio received was the May 2007 anonymous letter. (Doc. 456 at 4; Vescio Dep. 38:3–21, 41:15–20.) After Vescio received this letter, he testified that he immediately notified the Executive Vice President of Operations and began an investigation. (*Id.* at 41:11–25, 110:22–111:6.) Further, he testified that he spoke with multiple fuelers about the incident, required Mr. Pelkey to document the incident and apologize, and that the company held refresher discrimination and harassment training shortly after the anonymous complaint. A reasonable jury could have found Mr. Vescio's testimony more credible than any conflicting testimony and determined that he acted appropriately in responding to the allegations. Thus, even assuming without deciding that Swissport could not have been entitled to the *Kolstad* defense for any misconduct by Mr. Vescio, a reasonable jury could have found no such misconduct, and therefore no need to consider the possibility of the *Kolstad* defense regarding any of Mr. Vescio's own actions.

Similarly, the jury could have found Mr. Vescio's testimony credible regarding Swissport's good faith efforts to comply with the law, including providing training to

managers and supervisors on preventing discrimination and making a hotline available to employees through which they could report concerns. (Vescio Dep. 39:19–40:9, 29:3–33:18, 31:24–32:11.) The Court is also not persuaded that Swissport waived the defense by failing to specifically name the defense in its Answer or Final Pretrial Order. Thus, Plaintiff is not entitled to judgment as a matter of law regarding the possible availability of the *Kolstad* defense.[2]

C. Motion for New Trial

Defendant has also moved for a new trial under Rule 59(a). "Rule 59 does not specify the grounds on which a motion for a new trial may be granted." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003). Instead, the Court looks to "those grounds that have been historically recognized." *Id.* Historically recognized grounds include, but are not limited to, claims "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). Once again, the Court is on the lookout for "miscarriage[s] of justice." *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n. 15 (9th Cir. 2000).

Here, as described above, a reasonable jury could have determined that Defendant was entitled to the *Kolstad* defense and the jury did not actually reach the issue as they did not find any punitive damages liability. Thus, the EEOC has failed to demonstrate that the jury's verdict was against the weight of the evidence or otherwise involved a miscarriage of justice. The Motion for a New Trial is denied. Therefore,

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[2] Further, as the jury did not find the EEOC was entitled to punitive damages on any claim, they would not have reached the issue of the *Kolstad* affirmative defense to punitive damages liability.

IT IS ORDERED that Plaintiff's Motion to Set Aside First Jury's Answers to Damages Questions (Doc. 451) is **denied**.

IT IS FURTHER ORDERED that Plaintiff's Renewed Motion for Judgment as a Matter of Law under Rule 50 or for a New Trial under Rule 59 (Doc. 453) is **denied**.

Dated this 21st day of August, 2014.

G. Murray Snow
United States District Judge

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