

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

RACHEL TUDOR,

Plaintiff,

v.

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, and THE REGIONAL  
UNIVERSITY SYSTEM OF  
OKLAHOMA,

Defendants.

Case No. 15-cv-324-C

**DEFENDANTS' REPLY BRIEF ON THE  
MEASURE OF DAMAGES AWARDED BY THE JURY**

Plaintiff's response contains numerous inconsistencies, misstatements, and incorrect legal theories. For brevity's sake, Defendants will focus on five of the most egregious and noteworthy instances in reply (although there are plenty more):

1. Plaintiff asserts that Defendants have never before raised the issue of Title VII's statutory damages cap of \$300,000 against Plaintiff's discrimination and retaliation claims. This is false. On October 17, 2017, Plaintiff co-filed with Defendants the Joint Pretrial Report. [Doc. 207]. On pages 13 and 14 of that report (according to Plaintiff), Defendants only stated that the cap applied to the hostile work environment claim, rather than all of the claims. But just a handful of pages earlier, Defendants explicitly listed the Title VII damages cap under both the "Discrimination" and "Retaliation" headings in the "Legal Issues" section. (*Id.* at 7-8). And if that were not enough to prove Plaintiff wrong, the "Stipulated Facts" section—*i.e.* a part that *both parties agreed on*—states that "[b]ased on the number

of Defendants’ total employees, the \$300,000 damage cap at 42 U.S.C. § 1981a(b)(3)(D) *applies to this case.*” (*Id.* at 5 (emphasis added)). This stipulation alone means there can be zero doubt: the Title VII cap has not been waived.<sup>1</sup>

2. Plaintiff admits on page 15 of her brief that the jury compensated Plaintiff for “mental anguish” and “emotional pain and suffering,” while also reiterating that Plaintiff is not seeking—and has never sought—emotional distress damages. [Doc. 290, at 15, 18]. Put simply, Plaintiff now concedes that the jury awarded damages *that it should not have awarded because Plaintiff has disavowed them.* This admission against interest is rather extraordinary, and it is even further reason for the Court to reduce Plaintiff’s damages well below the \$300,000 statutory cap.

3. With emotional distress off the table, one will search Plaintiff’s brief in vain for a thorough explanation of what other evidence in the record actually supports the massive verdict here. Tellingly, even when the underlying evidence is discussed, ever so briefly, Plaintiff still cannot help but rely on testimony *about emotional distress*, despite having disavowed those damages. In footnote 8, for instance, Plaintiff claims the award is “further buttress[ed]” by testimony about Plaintiff’s “injuries” such as “shock and fright,” “fear,” “emotional toll,” “humiliation,” “anxiety,” and “depression”—all of which go to the foresworn assertion of emotional distress. [Doc. 290, at 17 n.8]. Plaintiff cannot have it both ways.

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<sup>1</sup> Of course, this was not the only time Plaintiff acknowledged the statutory cap. At trial, Plaintiff’s counsel affirmatively represented to the Court that “all” Plaintiff’s claims are “subject to the same cap.” [Doc. 266, at 843.]

To be sure, Plaintiff does briefly attempt to claim, based on trial testimony from Dr. McMillan and Dr. Snowden, that a tenured job was worth between \$1 and \$5 million. [Doc. 290, at 12]. But this clearly goes to front pay, and the jury did not have the authority to award front pay; that was the province of the Court. *See Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003). And even if we assume the doctors' testimony concerned back pay (which it could not have), Defendants explained in their opening brief why the jury could only award back pay for the period from the end of May 2011 until September 2012. [Doc. 289, at 4-6]. McMillan and Snowden, on the other hand, were testifying about multi-decade careers of tenured professors, and even then their testimony was not about the income and benefits Plaintiff would have received. Rather, they testified about the cost the State (or rather, a State university) incurs when it tenures a professor. [Doc. 265, at 676; Doc. 266, at 767-68]. Regardless, Plaintiff points to no case where a similar award was upheld on this basis alone, with emotional distress off the table.

4. This leads to the next point. Plaintiff claims the Tenth Circuit “as a rule . . . expressly disavows the comparator method” when determining damages. But Plaintiff's brief cites an unpublished decision for this supposed “rule,” *McInerney v. United Air Lines, Inc.*, 463 F.App'x 709 (10th Cir. 2011), and even that non-binding opinion does not expressly disavow ever using other cases as comparisons. *See id.* at 723 (stating only that “comparisons with other cases are not dispositive”). Moreover, earlier in the same brief Plaintiff criticizes Defendants for citing an unpublished Tenth Circuit case, *Nelson v. Rehab. Enters.*, 1997 WL 476111 (10th Cir. Aug. 21,

1997), even though Defendants only cited *Nelson* as an example of a way the Tenth Circuit has acted in the past (and not necessarily as laying out an absolute “rule”). Again, Plaintiff cannot have it both ways.

5. Finally, Plaintiff claims that any future filing of a Rule 50(b) motion would be “wildly untimely” because the Court’s deadline has already passed. [Doc. 290, at 21 n.16]. This misreads the law and the Court’s statement, which contextually and legally can only have been referring to Rule 50(b) motions addressing “a jury issue not decided by a verdict,” Fed. R. Civ. P. 50(b), as the deadline for those motions is not contingent on judgment being entered. Judgment has not been entered here, meaning that Rule 50(b)’s primary 28-day clock has yet to start ticking. *Id.* (“No later than 28 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law. . . .”).

Respectfully submitted,

/s/ Dixie L. Coffey

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 31<sup>st</sup> day of May, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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463 Fed.Appx. 709

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.

United States Court of Appeals,  
Tenth Circuit.

Jennifer McINERNEY, Plaintiff–  
Appellee/Cross–Appellant,

v.

UNITED AIR LINES, INC., a Delaware corporation,  
Defendant–Appellant/Cross–Appellee.

Nos. 09–1423, 09–1425.

|  
April 11, 2011.

**Synopsis**

**Background:** Former employee brought Title VII action against her former employer, alleging gender-based discrimination and retaliation. After jury entered verdict awarding employee \$300,000 in damages, the United States District Court for the District of Colorado entered order awarding employee \$89,877 in back pay and denying employer's motion for judgment as a matter of law. Parties cross-appealed.

**Holdings:** The Court of Appeals, [Briscoe](#), Chief Judge, held that:

[1] employee suffered adverse employment action when her employment was terminated;

[2] jury's \$300,000 damages award for emotional distress was not excessive; and

[3] district court did not abuse its discretion in denying employee's request for front pay.

Affirmed.

[Hartz](#), Circuit Judge, filed dissenting opinion.

West Headnotes (6)

[1] **Civil Rights**

🔑 [Discharge or layoff](#)

Employee suffered adverse employment action, as required to establish prima facie case of gender-based retaliation under Title VII, when her employment was terminated after she failed to return to work following employer's denial of her request for leave of absence, notwithstanding employer's contention that employee resigned; employee never told employer that she was resigning and she wanted to keep her job, and employer decided to end her employment six days after day she was scheduled to return to work but failed to do so. Civil Rights Act of 1964, § 704(a), [42 U.S.C.A. § 2000e–3\(a\)](#).

[2 Cases that cite this headnote](#)

[2] **Civil Rights**

🔑 [Causal connection;temporal proximity](#)

Evidence was sufficient to support finding that employee's discrimination complaint was causally connected to employer's decision to terminate her employment, as required to establish prima facie case of gender-based retaliation under Title VII; human resources manager learned of employee's complaint less than two months before deeming that she had resigned after failing to return to work when her request for leave of absence was denied, and manager failed to investigate employee's complaint before ending her employment. Civil Rights Act of 1964, § 704(a), [42 U.S.C.A. § 2000e–3\(a\)](#).

[2 Cases that cite this headnote](#)

[3] **Civil Rights**

🔑 [Instructions](#)

District court did not abuse its discretion in declining to give former employer's requested jury instructions on voluntary resignation in former employee's Title VII action alleging gender-based retaliation; jury was properly instructed that if it found that employer did not end employee's position, then it necessarily had to conclude that employee resigned. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[Cases that cite this headnote](#)

**[4] Civil Rights**

 [Measure and amount](#)

Jury's \$300,000 compensatory damages award for emotional distress in former employee's Title VII action against her former employer alleging gender-based retaliation was not excessive; employee testified that she was devastated and humiliated by her termination, that she was pushed "over the edge" regarding stress she was already experiencing due to her infant's medical condition, and that she suffered bouts of depression. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); 42 U.S.C.A. § 1981a(b)(3)(D).

[5 Cases that cite this headnote](#)

**[5] Civil Rights**

 [Back pay or lost earnings](#)

District court did not abuse its discretion in denying former employee's request for front pay in her Title VII action against her former employer alleging gender-based discrimination; employee made no attempt to address issues of life expectancy, continued term of employment, and viable discount rate that would support calculable front pay amount, and her calculation of projected average raises was inaccurate in light of employer's financial situation. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); 42 U.S.C.A. § 1981a(b)(3)(D).

[4 Cases that cite this headnote](#)

**[6] Civil Rights**

 [Costs and fees on appeal](#)

Former employee was entitled to attorney fees in successfully defending against former employer's appeal in her Title VII action alleging gender-based retaliation, but not for her unsuccessful cross-appeal of district court's denial of her request for punitive damages. Civil Rights Act of 1964, § 706(k), 42 U.S.C.A. § 2000e-5(k).

[Cases that cite this headnote](#)

**Attorneys and Law Firms**

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Before [BRISCOE](#), Chief Judge, [McKAY](#) and [HARTZ](#), Circuit Judges.

**ORDER AND JUDGMENT\***

[MARY BECK BRISCOE](#), Chief Judge.

\*\***1** Jennifer McInerney brought suit against her former employer, United Air Lines, Inc. (United), alleging that United discriminated and retaliated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”), by denying her an unpaid leave of absence and subsequently terminating her employment. A jury found in McInerney's favor on her retaliation claim. The jury awarded \$3,000,000 in compensatory damages, which was reduced to the statutory maximum of \$300,000, and the district court awarded \$89,877 in back pay. Both parties appealed. United appeals the district court's denial of its renewed motion for judgment as a matter of law, the district court's rejection of some of its requested jury instructions, and the district court's denial of its motion for a new trial based on excessive damages. McInerney appeals the district court's

refusal to submit the issue of punitive damages to the jury and the district court's denial of front pay. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm and remand only for determination of reasonable attorney fees for McInerney's defense of United's appeal.

\*711 I

McInerney began her employment with United in December 1994, working in sales and reservations at the Denver International Airport (DIA). She later worked as a customer service representative and, by January 2000, had become a customer service supervisor. McInerney became a ramp supervisor in 2002, managing the operation of several gates within DIA's Concourse B. Working on the ramp was a physically demanding job that involved supervision of the loading and unloading, fueling, and deicing of aircraft at ten to twelve gates. JA at 1485–88. The chain of command within the ramp department was as follows: ramp servicemen reported to ramp supervisors, who reported to ramp operating managers, who, in turn, reported to the ramp manager.

Kevin Mortimer became United's DIA ramp manager in April 2005. Mortimer “watched over all of his department,” which was the entire ramp department at DIA, and was a “very hands on” manager. *Id.* at 1857. McInerney and other former United employees testified that Mortimer treated male employees better than female employees, that he raised his voice when speaking with, and was generally dismissive of, female employees. He was heard on two occasions to remark that women belonged at “home, barefoot and pregnant.” *Id.* at 1780, 2053 (“Women belonged at home, pregnant, barefoot, and in the kitchen.”). McInerney testified that, in spite of her consistently positive performance evaluations, Mortimer “scream[ed]” at her about her “dependability” during a meeting in May 2005. She testified that he “really just kind of went off from the second I walked in the office.” *Id.* at 1497.

McInerney became pregnant with her first child in May 2005. She began having health problems in June 2005, due in part to the hot temperatures in Denver. Her doctor discouraged her from working on the ramp, and she began looking for desk positions within United. She unsuccessfully applied for a scheduling supervisor position, and testified that she later learned that Mortimer

“specifically told [the department supervisor] that I could not interview for that position” because “[Mortimer] was not able to lose [her] from the ramp at [that] time.” *Id.* at 1538. However, McInerney also learned that another male ramp supervisor, Tim Hushion, received the scheduling supervisor position. *Id.* at 1532. She also unsuccessfully applied for an opening in the Wellness Department, and heard that Mortimer had placed a male ramp supervisor, Greg Banton, in the position in September 2005. *Id.* at 1548.

\*\*2 By July 2005, McInerney had been moved to Concourse A, a less demanding ramp assignment with fewer gates to manage. Her health began to deteriorate, and she took “intermittent days off here and there.” *Id.* at 1518. On September 28, 2005, McInerney had a “really bad dizzy spell” and a United doctor told her “there is no way that you should be working on the ramp in the condition that you are in.” *Id.* at 1519. The same day, McInerney's doctors diagnosed her with [preeclampsia](#) and placed her on bed rest. Her health further deteriorated in late October, and she was admitted to the hospital in early November. Days later, with kidney and [liver failure](#) and fluid in her lungs, doctors performed “an emergency C-section at 28 weeks” and delivered her son, Cooper, on November 11, 2005. *Id.* at 1520.

Cooper weighed one pound, fifteen ounces and suffered from severe medical problems: his heart would frequently stop beating, he could not digest food, he suffered from [apnea](#) because of his weak lungs, and “there [were] a lot of questions \*712 of [cerebral palsy](#) because of the central nervous system being so compromised.” *Id.* at 1520, 1522–24. Two days after McInerney was released from the hospital, her cesarian section split open and she had to return to the hospital and then receive home health care. Cooper was released from the hospital in late January 2006, and McInerney “lived in [a] bubble with Cooper” at home, constantly monitoring his condition and working with a therapist on a daily basis. *Id.* at 1524.

Cooper's doctors informed McInerney that “[she had] a huge road ahead of [her], and this is going to be a tough fight, and [she's] going to need to be the person taking care of [Cooper].” *Id.* McInerney had been on Family and Medical Leave Act (FMLA) leave beginning in September 2005, and that leave was scheduled to expire on February 19, 2006. *Id.* at 2579. In December 2005, McInerney began

to inquire about her options for a more extended, and unpaid, leave of absence from United.

McInerney contacted ramp operating manager Rhonda Patterson–Eachus (Patterson) in the first week of December, “told her the situation was pretty grim,” and asked about her options for obtaining an extended leave. *Id.* at 1531–32. McInerney testified that Patterson “didn’t really think that it was going to be a problem for me to get a leave of absence” and that Patterson said she would talk to Mortimer about it. *Id.* at 1532. Patterson told McInerney to give her a couple of weeks to see about the leave of absence, and in the meantime, scheduled McInerney’s accrued vacation time in order to extend her time off until March 20, 2006. *Id.* at 1533, 2579.

On December 28, 2005, after leaving a few messages with Patterson and not receiving a response, McInerney called Jeanne Nelli, a United Human Resources Generalist in Chicago, and explained her request for an unpaid leave of absence. According to McInerney, she also made a discrimination complaint at this time, explaining how she had applied for several jobs off the ramp and “felt that [she] was being frozen out because [she] was a female and [she] was pregnant.” *Id.* at 1534. Nelli testified that McInerney did not make a discrimination complaint during this discussion, and that she first learned of McInerney’s discrimination complaint in an e-mail from Patterson in late February 2006. McInerney testified that Nelli said the leave of absence “should be no problem.” *Id.* at 1559.

**\*\*3** McInerney called Nelli several times in January and February 2006 but received no response regarding her leave of absence. Patterson called McInerney on February 23, 2006 and told her that Mortimer had denied the leave of absence based on “operational need, they didn’t have enough supervisors.” *Id.* at 1566. During this conversation, McInerney complained to Patterson about discrimination stating, “this is discrimination. I’m not being given this because I’m a woman on the ramp, and I just had a disabled child.” *Id.* at 1567. McInerney testified that Patterson “basically said I agree with you” and “agreed to call Jeanne Nelli, to go over Kevin Mortimer’s head and see if there was something that her and Jeanne Nelli could do.” *Id.* Two days later, Patterson called back and told McInerney there was nothing she (Patterson) could do. On February 28, 2006,

Nelli telephoned McInerney and informed her “that she supported Kevin Mortimer’s decision.” *Id.* at 1586.

Nelli and McInerney exchanged e-mails throughout March 2006 concerning a meeting to discuss McInerney’s discrimination complaint. McInerney wanted to have a lawyer or an independent witness present, or to tape record the meeting. Nelli refused **\*713** because those options were against company policy, but suggested that a member of United management be present. McInerney refused that option. In the interim, McInerney’s complaint was not investigated.

McInerney sent an e-mail to Mortimer on March 6, 2006 “express[ing] [her] deep concern that United ... has never investigated [her] claims that [she has] been the victim of sex discrimination.” *Id.* at 2473. Mortimer did not respond. McInerney also sent him an e-mail on March 19, 2006, attaching a letter from Cooper’s doctor explaining that “[i]t will be necessary for Mrs. McInerney to remain at home to care for her special needs infant, Cooper, until at least 01 December 2006.” *Id.* at 2512. Mortimer did not respond to this e-mail, but forwarded it to Nelli with the annotation “Latest and greatest from Jennifer.” *Id.* at 2511–12.

McInerney’s combined FMLA leave and vacation was scheduled to expire on March 20, 2006. She was allowed to extend her absence for a few days by taking personal holidays. On March 23, 2006, Nelli sent McInerney an e-mail informing her of a return date of March 25, 2006, but also suggesting another option:

Due to the shortage of staffing for [ramp] Supervisors, as discussed we cannot provide a [leave of absence] for you. You can, however, exercise your seniority and return to the position of a Customer Service Representative. A non-management job does provide more flexibility and we would be able to grant you a [leave of absence]. Based on the contract ... you would be granted a Leave for 90 days, a leave can be extended upon an appropriate application in writing, but it is not guaranteed.

*Id.* at 2589. McInerney contacted Pam Brown, a scheduling supervisor, who informed McInerney that customer service was “so short staffed, there is no way [customer service] could give you a leave.” *Id.* at 1593–94. McInerney decided that “there was no way I could take this demotion. I was going to take a 40 percent pay cut, and go back to work and lose right away, and lose everything.” *Id.* at 1594.

**\*\*4** McInerney did not return to work on March 25. On March 29, 2006, Nelli sent McInerney an e-mail informing her that she was expected to return to work (either on the ramp or as a customer service representative) on March 31, and if she failed to do so, United “will consider you to have voluntarily resigned your employment....” *Id.* at 2493. McInerney was designated as “ANP,” or “authorized no pay,” between March 25 and March 31, 2006. Nelli testified that a person “who is not showing up to work” would be designated “UNP,” or “unauthorized no pay.” *Id.* at 2252. On March 31, 2006, McInerney did not return to work and Nelli deemed her to have resigned as of that date. Nelli also designated McInerney as “not eligible for rehire” for failure to give two weeks’ notice. *Id.* at 2254. United opposed McInerney’s claim for unemployment benefits, arguing that McInerney was ineligible because she resigned. *Id.* at 1606–07.

Patterson, Mortimer, and Nelli offered their own versions of events. In December 2005, Patterson thought that the ramp department could afford to grant McInerney a leave of absence because the department had plenty of supervisors. Patterson testified that Mortimer’s initial response to her inquiry was, simply, “no.” *Id.* at 1831. In February 2006, Patterson determined that “we [the ramp department] could not afford for her to be gone any longer” because there was a difference between covering McInerney’s position while she was on leave and filling her position with a replacement. *Id.* at 1835, 1870.

**\*714** Mortimer testified that, when Patterson approached him in December, he said “we would look at it,” and discussed the ramp department’s “ability to absorb a body out of the department given [its] current conditions.” *Id.* at 2155. When Mortimer made the final decision to deny the leave of absence in late February 2006, he “knew at that point that there were options available to Jennifer that would have allowed her time away from work ... but not under the [ramp] organization.” *Id.* at 2170. Mortimer testified that he

could not give McInerney a leave of absence because it was his understanding that he had to keep the position open for her until she returned and, thus, could not fill the position while she was out. However, Mortimer admitted on cross-examination that this was his personal interpretation of United’s leave policy. *Id.* at 2161. The policy itself states that a return from a leave of absence greater than ninety days is contingent upon available job openings, which would mean that Mortimer was not required to hold McInerney’s position open following a leave of absence greater than ninety days. *Id.* at 2162.

The jury found in United’s favor on McInerney’s discrimination claim and in McInerney’s favor on her retaliation claim and awarded her \$3,000,000 in compensatory damages. The district court reduced the damage award to the statutory limit of \$300,000 and awarded McInerney \$89,777 in back pay, but denied McInerney’s request for front pay.

**\*\*5** United filed a renewed motion for judgment as a matter of law pursuant to [Fed.R.Civ.P. 50\(b\)](#), and a motion for a new trial under [Fed.R.Civ.P. 50](#) and [59](#) on the ground that the jury’s award of damages was so excessive that it could only have been the result of passion, prejudice, or other improper cause. The district court denied both motions. Both parties have appealed.

## II

### *Denial of United’s Rule 50(b) Motion*

United argues that McInerney failed to present evidence that United terminated her (United contends she resigned), or that a causal connection existed between her discrimination complaint and her discharge. Given the highly deferential standard applicable to our review of jury verdicts, we conclude that there was sufficient evidence from which the jury could find that United terminated McInerney’s employment, and from which the jury could infer that United did so in retaliation for McInerney’s discrimination complaint. Therefore, we affirm the district court’s denial of United’s [Rule 50\(b\)](#) motion.

#### *A. Standard of Review*

We review de novo the denial of a motion for judgment as a matter of law, applying the same legal standard as the district court. *Hysten v. Burlington N. Santa Fe Ry. Co.*, 530 F.3d 1260, 1269 (10th Cir.2008). Judgment as a matter of law is appropriate only if there is no legally sufficient evidentiary basis from which a jury could reasonably find for the nonmoving party. Fed.R.Civ.P. 50(a)(1). In our review, we “review all the evidence in the record, construe the evidence and inferences most favorably to the nonmoving party, and refrain from making credibility determinations and weighing evidence.” *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir.2000). We must “disregard all evidence favorable to the moving party that the jury is not required to believe.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

**\*715** *B. Discussion*

Title VII prohibits an employer from retaliating against an employee for making a claim of gender discrimination. See 42 U.S.C. § 2000e-3(a). To prevail on a Title VII retaliation claim, a plaintiff must show “that retaliation played a part in the employment decision...” *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1224 (10th Cir.2008). In order to make a prima facie case of retaliation, a plaintiff must show: 1) that he or she engaged in protected activity; 2) that he or she was subject to an adverse employment action; and 3) “that a causal connection exists between the protected activity and the materially adverse action.” *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 803 (10th Cir.2007). If the employer, as United did here, proffers a legitimate, non-retaliatory explanation for the adverse action, the plaintiff must demonstrate that this reason is pretextual. *Id.* at 804–05. “Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-[retaliatory] reasons.”<sup>1</sup> *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997) (internal quotations omitted). United concedes that McInerney engaged in protected activity, but United argues she did not establish that she was subject to an adverse employment action or that there was a causal connection between the protected activity and the adverse action. To prevail on appeal, United must show that no reasonable person could find 1) that it

terminated McInerney's employment, or 2) that there was a retaliatory motive behind its decision to terminate McInerney. See *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1252 (10th Cir.2001).

*i. Adverse Employment Action/Termination*

**\*\*6 [1]** United argues that McInerney presented no evidence that United terminated her employment, and contends that she voluntarily resigned. United's voluntary resignation argument misses the mark and speaks more to United's *reason* (her failure to return to work) for ending McInerney's employment, rather than whether United ended it.

We must note that, from the outset of this case, the district court determined that this was a straightforward termination case. It did not instruct the jury regarding constructive discharge or non-termination adverse employment actions.<sup>2</sup> Thus, we assume that United's denial of McInerney's requested leave of absence was not, itself, an adverse employment action.<sup>3</sup> Nonetheless, we conclude that there was sufficient evidence from which the jury could find that McInerney suffered **\*716** an adverse employment action because United terminated her employment.

Termination of employment is “clearly an adverse employment action.” *Fye*, 516 F.3d at 1228. Throughout the trial, United contended that it did not terminate McInerney, but rather that she voluntarily resigned by failing to return to work on March 31, 2006. There is no evidence that McInerney told her employer that she was resigning. The evidence showed that McInerney did not intend to resign, and that she desperately wanted to keep working at United. *Cf., e.g., Strickland v. United Parcel Svc., Inc.*, 555 F.3d 1224, 1227–29 (10th Cir.2009) (determining whether employee intended to end her employment was a jury question where employee turned in her company laptop and informed her supervisor she was leaving, but testified that she did not believe she had quit or resigned at that time). This is not a case where an employee simply abandoned her position without any notice to or communication with her employer. Rather, there was ample testimony at trial that, after initially extending her return date, Nelli decided to end McInerney's employment by “deeming” that McInerney had resigned.

A jury could reasonably find that United terminated McInerney. In *Wells v. Colorado Department of Transportation*, 325 F.3d 1205 (10th Cir.2003), the employer claimed “he had no choice but to terminate Plaintiff because he had never received notice that [plaintiff] was able to return to work” after the expiration of her medical leave. *Id.* at 1212. We stated that the termination was an adverse employment action because “[i]t hardly requires stating that when an employer tells an employee that she no longer has a job, that employee's job status has been significantly and materially altered.” *Id.* at 1216.<sup>4</sup> We determined that there was an adverse employment action by the employer, even though the termination was the natural consequence of the employee's choice not to return to work. If, for example, an employer informed an employee that it would consider her late arrival at work to be a voluntary resignation, a jury could still reasonably find that the employer took an adverse employment action if it subsequently terminated her employment \*717 for tardiness. *Cf. Roberts v. Park Nicollet Health Svcs.*, 528 F.3d 1123 (8th Cir.2008) (assuming, without discussing, that an employee suffered an adverse employment action under similar circumstances). The same is true in this case. Whether or not it was a consequence of McInerney's failure to return to work, a jury could reasonably find that United took the action that ended McInerney's employment tenure by terminating her when it “deemed” she had resigned.

\*\*7 McInerney did not report to work on her scheduled return date of March 25, 2006. However, McInerney's failure to report to work on March 25 was not “deemed” a resignation, and her employment did not end on that date. When asked, “did you at that point [on March 25] deem that she had resigned?” Nelli replied, “I kn[e]w she still wasn't coming back to work. Based on our e-mails, *I hadn't quite deemed it that she had resigned at that point.* I think I had sent her another e-mail after this point.” *Id.* at 2218–20 (emphasis added). On March 29, 2006, Nelli sent McInerney another e-mail stating: “[y]ou are expected to return to work within 2 days, March 31st, to your current position as a Supervisor in [the ramp] or as a Customer Service Representative, with the option of a 90 day LOA. If you do not return to either position within 2 days, we will consider you to have voluntarily resigned your employment at United Airlines. Please notify me of your decision.” *Id.* at 2493. When McInerney did not appear at work on March 31, 2006, Nelli determined that

McInerney “had chosen not to come back to work” and deemed that McInerney resigned as of that date. *Id.* at 2223. McInerney's employment with United ended when Nelli made that decision.<sup>5</sup>

A jury could reasonably find that Nelli had the discretion to extend McInerney's return date, even after McInerney failed to report to work on March 25, 2006. A jury could reasonably find that, on March 31, Nelli decided not to further extend McInerney's return date and, instead, decided to end McInerney's employment. Given this evidence, a jury could reasonably find that Nelli terminated McInerney's employment on March 31, 2006.

**\*718** *ii. Retaliation*

[2] United also argues that there was insufficient evidence from which a jury could infer that it terminated McInerney's employment in retaliation for her discrimination complaint. “[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully” retaliated. *Reeves*, 530 U.S. at 148, 120 S.Ct. 2097.

“A causal connection is established where the plaintiff presents evidence of circumstances that justify an inference of retaliatory motive....” *MacKenzie v. City and Cnty. of Denver*, 414 F.3d 1266, 1279 (10th Cir.2005) (internal quotation omitted). “[P]rotected conduct followed closely by adverse action may justify an inference of retaliatory motive.” *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324, 329 (10th Cir.1996).

Nelli testified that she learned of McInerney's discrimination complaint in late February 2006. According to McInerney, this complaint was never investigated, and by March 31, 2006, all remaining leave options were rejected and she was terminated. The timing of these events could reasonably give rise to an inference of a retaliatory motive. Nelli admitted that she did not pursue any investigation other than attempting to speak with McInerney. JA at 2241. For example, she did not question Mortimer. *Id.* Nelli also admitted that she was “wearing two hats,” in that she terminated McInerney at the same time she was supposed to be investigating McInerney's complaint. *Id.* at 2259. She acknowledged that her obligation to investigate the discrimination

ended once McInerney was terminated. *Id.* The lack of investigation is consistent with testimony by Dara Dalvit, another female former United ramp supervisor. Dalvit testified that United never acted on her own complaints of gender discrimination by Mortimer.<sup>6</sup> *Id.* at 2074.

**\*\*8** Further, the jury could reasonably infer retaliation from Nelli's decision to designate McInerney as ineligible for rehire based on her purported failure to give two weeks' notice. McInerney was "ANP" from March 25 through March 31, 2006, which means that United authorized her absence during that period.<sup>7</sup> Further, Nelli had discussed McInerney's leave of absence or return to work prior to March 25. Nonetheless, Nelli determined that McInerney failed to give two weeks' notice as of March 31. A jury could reasonably find Nelli's explanation for designating McInerney as ineligible for rehire disingenuous because Nelli was aware of McInerney's situation for many weeks prior to March 31, and it was Nelli who unilaterally determined the date on which McInerney's employment ended, which was the date from which any two weeks' notice would have been measured. Further, the two weeks' notice requirement would only be triggered if McInerney had in fact resigned.

United argues that McInerney's employment was terminated for a legitimate non-**\*719** retaliatory reason: its policy that employees who did not return to work would be deemed to have resigned. *See* United Opening Br. at 33 ("[W]hen an employee's separation is the result of the employer's consistent application of its policies—in this case treating a failure to return to work after the expiration of authorized leave as a resignation—it cannot constitute retaliation."). It is true that an employer's application of a general policy to an employee is not retaliation. *See Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1229 (10th Cir.2006). However, there was evidence from which the jury could reasonably find that United's explanation was pretextual because the return-to-work policy was not generally applied and was not even consistently applied by Nelli to McInerney.<sup>8</sup>

McInerney was scheduled to return to work on March 25, 2006. However, when McInerney failed to return to work, Nelli "hadn't quite deemed that [McInerney] had resigned at that point." JA at 2219. On March 29, 2006, Nelli sent McInerney an e-mail offering her the customer service position and informing her that she was expected

to return to work on March 31, 2006. *Id.* at 2493. When asked at trial, "Why did you wait five days after she was supposed to return to work to reach out to her again?" Nelli replied:

She still hadn't returned back to work. I knew she had missed again four days. I was thinking that maybe the next day we'd hear from her or something. So, *I extended it again*. And, I sent her an e-mail and just said, okay, this was kind of the last ditch effort. Let's see if she'll come to work, call me, have some type of conversation as far as if she was going to return or not. So, *I extended it until the 31st*.

*Id.* at 2219 (emphases added). Nelli continued, "I thought maybe I would just give her a little bit more time and we would just say, okay, here it is. This is the last chance. This is as far as I could go with it. Maybe you still want to reconsider. So yeah, I gave her one more opportunity." *Id.* at 2220. McInerney also testified that a ramp supervisor named Marcus "didn't show up to work for six weeks, and nothing was done to him for two months."<sup>9</sup> *Id.* at 1692. From this evidence, a jury could reasonably find that United did not have a consistent policy of treating a failure to return to work as a resignation.

**\*\*9** On March 30, 2006, McInerney telephoned Nelli to inform her that she could not come to work on March 31 because Cooper was having surgery that day. McInerney did not return to work on March 31, 2006. When asked, "Why didn't you just go ahead and extend the [return] date further?" Nelli replied, "I had extended it already. I mean, at this point it was clear that she was not going to be returning to work. She had chosen not to come back to work." *Id.* at 2223. Nelli **\*720** ended McInerney's employment on March 31, 2006.

Nelli was the United employee charged with the responsibility of investigating McInerney's discrimination complaint, and she was also the person who decided to terminate McInerney's employment before that complaint was investigated. Further, Nelli made this decision with the knowledge that McInerney's discrimination complaint was intertwined with whether United would make further allowances to permit her continued employment with United. Even with this knowledge, and after having

been in protracted discussions with McInerney about her ability to return and granting extensions to that return date, Nelli “deemed” McInerney to have resigned without two weeks' notice. Mindful of our standard of review, which requires us to construe the evidence and make all inferences in McInerney's favor, *Tyler*, 232 F.3d at 812, we conclude that there was sufficient evidence from which the jury could find that United terminated McInerney's employment in retaliation for her discrimination complaint. Therefore, we affirm the district court's denial of United's Fed.R.Civ.P. 50(b) motion.

### III

#### *Jury Instructions*

##### *A. Standard of Review*

We review the jury instructions de novo to determine if, as a whole, the jury instructions accurately informed the jury of the governing law. *Zokari v. Gates*, 561 F.3d 1076, 1090 (10th Cir.2009). In contrast, we review the district court's decision to deny a request for a particular jury instruction for an abuse of discretion. *Id.* In this regard, we have stated that

a party is not entitled to a specific jury instruction on every correct proposition of law. When the other instructions establish a sound basis for an argument by the party to the jury on that proposition, an additional instruction is not essential and runs the risk of suggesting that the trial judge has adopted the party's view.

*Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1023 (10th Cir.2004). If we conclude that the district court erred in instructing the jury, we must reverse only if the instructional error was prejudicial in light of the whole record. *Smith v. Diffie Ford–Lincoln–Mercury, Inc.*, 298 F.3d 955, 962 (10th Cir.2002).

##### *B. Discussion*

[3] United contends that the jury instructions “were premised on the notion that United had fired/terminated McInerney,” and, therefore, the district court's refusal

to give its requested Instruction Nos. 9, 16–18, and 26 constituted error. United Opening Br. at 50. United emphasized its voluntary resignation argument throughout trial and during closing argument. *E.g.*, JA at 2298 (“The first key question, did United terminate Ms. McInerney's employment? Did it fire her? That's what you as the jurors have to determine. Was there even a termination?”); 2301 (“[Y]ou cannot hold United Air Lines liable when somebody makes a choice not to come back to work.”). However, as explained in Part II, *supra*, there was significant evidence that it was United and not McInerney, who took the action that ended McInerney's employment.

**\*\*10** The jury instructions, as a whole, accurately informed the jury of the governing law. The jury was asked to decide whether United terminated McInerney. If it concluded that United did not end McInerney's employment, it necessarily had to conclude that McInerney had resigned. The district court instructed the jury that it had to find “that the plaintiff suffered an adverse employment action resulting \*721 [sic] termination of her employment,” that “the plaintiff's opposition to discrimination was a determining factor in the termination of her employment at United Air Lines,” *id.* at 2608, and that McInerney must prove that “retaliation for her complaints made a difference in the actions in the sense that but for ... retaliation, she would not have been treated in the same way and then terminated from her employment,” *id.* at 2610. Further, the verdict form required the jury to find “by a preponderance of the evidence that the defendant United Air Lines retaliated against her because of her complaints of sex discrimination in terminating her employment.” *Id.* at 1241. Although they are not a model of completeness or clarity,<sup>10</sup> these instructions are sufficient to inform the jury of the governing law. If the jury believed that McInerney had voluntarily resigned, it could not have found that “but for ... retaliation [McInerney] ... would not have been ... terminated from her employment” or that “United Air Lines retaliated against her ... in terminating her employment.”

United's requested Instruction No. 9<sup>11</sup> is basically a reiteration of United's argument that it did not terminate McInerney's employment because she resigned, and it was not an abuse of discretion for the district court to reject it. The same is true of requested Instruction No. 26.<sup>12</sup> As

discussed in Part II, *supra*, the adverse employment action itself and the reason for the adverse employment action are distinct. United's argument that it notified McInerney that failure to return to work would be construed as a voluntary resignation would not preclude a jury from reasonably finding that United terminated McInerney's employment. An employer cannot avoid a finding of an adverse employment action by unilaterally declaring that certain employee actions will be deemed a resignation. *Cf. Wells*, 325 F.3d at 1212 (holding that the employer took an adverse employment action even though he "had no choice" but to do so, and separately analyzing whether the employer had a legitimate, non-discriminatory reason for taking the adverse employment action).

Requested Instruction No. 18<sup>13</sup> appears to be a list of factors to be considered in differentiating between a voluntary resignation and a constructive discharge. Compare JA at 1221 with \*722 *Potts v. Davis Cnty.*, 551 F.3d 1188, 1194 (10th Cir.2009). Because McInerney did not advance a constructive discharge theory,<sup>14</sup> it was not an abuse of discretion to reject Instruction No. 18.

\*\*11 Requested Instruction No. 16 defines termination, and states that an employee is not terminated if she chooses to resign rather than work under undesirable conditions.<sup>15</sup> JA at 1219. This instruction was not necessary because the district court's instructions included termination as an element of McInerney's case. As discussed *supra*, the jury could not, consistent with the instructions, have found in McInerney's favor if it believed she resigned. Requested Instruction No. 17 states that the termination inquiry is objective.<sup>16</sup> *Id.* at 1220. To the extent that Instruction Nos. 16 and 17 emphasize that an employee is discharged if a reasonable employee would believe her employment has been terminated, such instructions are unnecessary because United's final decision and notification of McInerney were not ambiguous. *Cf. Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 (10th Cir.2008) ("Sprint does not, and could not, contest the ... question whether a reasonable employee would find the termination of his or her employment to be materially adverse.").

United also appeals the district court's denial of its requested Instruction No. 15 defining similarly situated employees. United cannot show that the failure to give this instruction was prejudicial because the jury's verdict

can be sustained without reliance on any of the testimony regarding other employees who were or were not granted personal leaves of absence. In the same vein, United's argument regarding the district court's refusal to give a "business judgment rule" instruction relates to the reasons the leave of absence was denied, and not to the decision to terminate McInerney's employment. See United Opening Br. at 54–55. Because the jury's verdict can be sustained without reliance on the denials of leave, the failure to give this instruction was not prejudicial. When read as a whole, the jury instructions accurately informed the jury of the governing law. The district court did not abuse its discretion in denying United's request for requested Instruction Nos. 9, 16–18 and 26.

## IV

### *Excessive Damages*

#### *A. Standard of Review*

We review the district court's denial of a motion for a new trial on the grounds of \*723 excessive damages for an abuse of discretion. *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1261 (10th Cir.1995). "[A]bsent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1168 (10th Cir.1981) (en banc).

#### *B. Discussion*

[4] United contends that it is entitled to a new trial because the jury's emotional distress award was excessive. The jury awarded McInerney \$3,000,000 in compensatory damages on her retaliation claim, which the district court reduced to the statutory maximum of \$300,000. See 42 U.S.C. § 1981a(b)(3)(D). United argues that, pursuant to *Wulf v. City of Wichita*, 883 F.2d 842, 874–75 (10th Cir.1989), we must compare the amount of damages awarded in this case to damage awards in similar cases to determine if the award is excessive. In *Wulf*, we determined that an emotional distress award was excessive based on review of the record "informed by a review of awards granted in other comparable cases[.]" *Id.* at 875. However, we also stated that "comparisons with other cases are not dispositive[.]" *Id.* In cases decided

after *Wulf*, we have analyzed the propriety of emotional distress awards without referencing other comparable jury verdicts. See, e.g., *Smith v. Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1416–17 (10th Cir.1997) (considering the nature of the remarks made to the plaintiff, the nature of the harm suffered by the plaintiff, and the context of the discriminatory behavior); *Malloy v. Monahan*, 73 F.3d 1012, 1017 (10th Cir.1996) (determining that “the award was adequately grounded in the evidence”); *Fitzgerald*, 68 F.3d at 1265–66 (determining that damages awards were excessive based on a review of the record). We are not persuaded by United’s comparisons to other jury awards. We focus instead on “whether the compensatory award was excessive in relation to the injury[.]” *Malandris*, 703 F.2d at 1169.

**\*\*12** McInerney testified that she was “devastated” and “humiliated” by her termination, JA at 1817, and that she “couldn’t stop crying, and for weeks on end, [ ] didn’t really sleep, and it just, it was devastating and humiliating. And, it was horrible.” *Id.* at 1819. Her eleven-year career with United was “part of [her] identity,” and now “any time [she] want[s] to do anything to start a new career, [she has] to put on this piece of paper that [she] was fired.” *Id.* at 1818–19. She also testified that the termination “put [her] over the edge” regarding the stress she was already experiencing due to her son’s condition. *Id.* at 1817. She was “so stressed out because [she] didn’t know what we were going to do financially.... [Her family] had a very expensive baby. [She] lost [her] insurance, and it was so stressful and so emotional, and it’s impacted [her] to this day.” *Id.* at 1817–18. Even though she was not “clinically depressed,” McInerney explained that she has “definitely had bouts of depression because of this,” it has had “an effect on [her] home life,” and her personality has changed in that she has “definitely lost confidence” and is “not as secure as [she] used to be with who [she is].” *Id.* at 1820–21.

While McInerney’s testimony “about her emotional suffering was not exceedingly graphic or detailed, it could constitute substantial evidence when considered in conjunction with the totality of the circumstances surrounding [her] claim.” *Smith*, 129 F.3d at 1416. The emotional toll of **\*724** McInerney’s termination was substantial not only because it ended her career as a management veteran with a company for whom she had worked since she was 23 years old, JA at 1818, but also because it had a stressful impact on her already difficult situation which involved caring for her prematurely-born

son who was in critical condition, and recovering from her own pregnancy-related complications. Further, “the context of the [retaliatory] behavior [is] also relevant to the award of damages in this case.” *Smith*, 129 F.3d at 1417; cf. also *Fitzgerald*, 68 F.3d at 1265 (determining that a damages award was excessive based, in part, on the context of the discriminatory behavior). McInerney’s persistent requests for an unpaid leave of absence were denied by ramp supervisors who were aware of her severe personal circumstances and who managed a department which could have functioned in her absence. United decided that McInerney resigned when that leave was denied and she did not return to work when her leave was not extended. The district court did not abuse its discretion in denying United’s motion for a new trial based on excessive damages.

## V

### *Punitive Damages*

McInerney appeals the district court’s refusal to submit the issue of punitive damages to the jury. At the close of McInerney’s case-in-chief, the district court stated it was “not going to submit punitive damages in this case. So, you haven’t supported a claim for punitive damages.” JA at 1995.

**\*\*13** We decline to consider whether the district court erred in refusing to submit the punitive damages issue to the jury because any error would have no effect on McInerney’s damages award. The district court reduced the jury’s compensatory damages award to \$300,000, which is the statutory limit provided in 42 U.S.C. § 1981a(b)(3)(D). This limit applies to the combined sum of compensatory and punitive damages. See *id.* (“The sum of the amount of compensatory damages awarded under this section ... and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party ... \$300,000,” for an employer of United’s size.); see also *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir.1996) (“[T]he Civil Rights Act of 1991 limited the amount of monetary recovery under Title VII ... by placing caps on the total amount of compensatory and punitive damages that could be awarded to any complaining party.” (quoting *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir.1995))). Thus, even if the jury would have awarded punitive damages to McInerney,

her total compensatory and punitive recovery would still be limited to the \$300,000 she was, in fact, awarded. *Cf. Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 377–78 (1st Cir.2004) (determining that the availability of punitive damages was not a “live issue” where the compensatory damage award alone exceeded the statutory cap and, therefore, “the award would have been the same regardless of whether the jury awarded any punitive damages”).

## VI

### *Front Pay*

[5] McInerney also appeals the district court's denial of front pay. Front pay is “money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.” *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001). We review the district court's decision regarding the award of \*725 front pay for an abuse of discretion. *Smith*, 298 F.3d at 964. In this case, the parties stipulated that reinstatement of McInerney would not be appropriate. JA at 2351. Although front pay may be appropriate when reinstatement is not possible, it is not a mandatory remedy. *Starrett v. Wadley*, 876 F.2d 808, 824 (10th Cir.1989). “The amount of front pay, if any, is set in the court's discretion.” *McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1145 (10th Cir.2006) (internal quotation omitted). The following factors are relevant in assessing such an award:

work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which the plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value.

In formulating a front-pay award the district court may consider all evidence presented at trial concerning the individualized circumstances of both the employee and employer, but it must avoid granting the plaintiff a windfall.

\*\*14 *Id.* at 1146 (quoting *Whittington v. Nordam Gp., Inc.*, 429 F.3d 986, 1000–01 (10th Cir.2005)).

After her employment at United ended on March 31, 2006, McInerney began to look for other employment in May 2006. At that time, finding a position in the airline industry was not a priority for her; McInerney was looking for any type of position that would offer her flexibility. JA at 2404. As of January 2008, McInerney had applied for only two jobs in the airline industry, and those applications were for customer service positions. *Id.* at 2405–06. In January 2007, McInerney accepted a position with a healthcare business doing insurance billing. *Id.* at 2407. The position allowed her to work from home. *Id.*

McInerney contends that she is entitled to front pay because her “long career was wiped out, and she was not made whole for the damage thereto, particularly as she inevitably would suffer continuing harm well into the future.” McInerney Opening Br. at 74. From McInerney's briefs and the record, it is not clear what exactly McInerney sought in front pay, although it appears she calculated front pay “based upon an average of the past four years raises....” JA at 2453. McInerney also appears to have sought several years of United flight benefits for herself and her family, and the value of potential promotions she claims for which she would have applied. At the hearing, United argued that McInerney was not entitled to front pay because she did not mitigate her damages, she chose to obtain a new job at lower pay that allowed her the flexibility to work from home, and she was made whole by the jury's damages award. *Id.* at 2459.

The district court awarded McInerney \$89,877 in back pay and stated:

I'm not going to include anything for front pay. I'm not going to include anything for promotions or anything for the strike benefits. I don't think it's capable of calculation. And, you know, this is kind of rough and ready, but then that's the way it is with equitable remedies here. And I'm not —certainly not going to reduce the verdict below the amount that I have to reduce it to, which is the \$300,000.

*Id.* at 2468. We conclude that the district court did not abuse its discretion in denying front pay because McInerney's attempt to calculate front pay at the hearing was inadequate. The record contains no reference to any

attempt on her part to address life expectancy, continued term of employment with United, or a viable discount \*726 rate that would have supported a calculable front pay amount. See *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 862 (7th Cir.2001) (stating that a district court does not abuse its discretion in denying a request for front pay if the plaintiff fails to provide “the essential data necessary to calculate a reasonably certain front pay award” (internal quotation omitted)). United also presented testimony that McInerney's calculation of projected average raises was inaccurate in light of United's financial situation. See JA at 2442–43 (testimony that United had not committed to providing raises in the upcoming year). Finally, the district court would have been well within its discretion to conclude that McInerney did not adequately attempt to find comparable employment. McInerney documented only two attempts to find employment with other airlines, and those applications were for customer service positions. She accepted a position involving medical insurance billing that paid less than her ramp supervisor position, but allowed her the flexibility to work from home. Cf. *Sellers v. Mineta*, 358 F.3d 1058, 1066 (8th Cir.2004) (holding that the district court abused its discretion in not reducing the front pay award by the amount the plaintiff could have earned if she had attempted to find comparable work). We conclude that the district court did not abuse its discretion in denying front pay.

## VII

### *Appeal–Related Attorney Fees*

\*\*15 [6] McInerney's opening brief makes a request for appellate attorney fees. McInerney Opening Br. at 74. Title VII permits “the court, in its discretion, [to] allow the prevailing party ... a reasonable attorney's fee....” 42 U.S.C. § 2000e–5(k). “We have discretion to award attorney fees when we deem it appropriate, but a prevailing party is not automatically entitled to an award of attorney fees.” *Harsco Corp. v. Renner*, 475 F.3d 1179, 1191 (10th Cir.2007). Such an award is appropriate in this case for McInerney's successful defense of United's appeal. However, attorney fees are not appropriate for McInerney's unsuccessful cross-appeal. We, therefore, remand to the district court to determine reasonable appellate attorney fees.

The judgment of the district court is AFFIRMED. We REMAND to the district court to determine reasonable attorney fees for McInerney's defense of United's appeal.

HARTZ, Circuit Judge, dissenting:

\*\*15 I respectfully dissent from the majority opinion's affirmance of the jury's verdict in favor of Ms. McInerney on her retaliation claim. The majority opinion holds that there was sufficient evidence that Nelli retaliated against Ms. McInerney by exercising her discretion to terminate Ms. McInerney when she did not return to work after expiration of her leave. I disagree. My disagreement is ambivalent because the verdict baffles me. There was a great deal of evidence that Mortimer discriminated against Ms. McInerney because of her gender, yet the jury rejected that discrimination claim. Perhaps it was confused when it granted Ms. McInerney a verdict on the retaliation claim, which, even under the majority opinion's analysis, rested on minimal evidence. But we have no power to correct what may have been an improper verdict on the discrimination claim by affirming an improper verdict on the retaliation claim.

To begin with, I disagree that Nelli fired Ms. McInerney. Ordinarily, an employer has the right to set the duties of its employee. If the employee does not wish to perform those duties and therefore does \*727 not appear for work, the employee has abandoned the job; the employer has not terminated the employee. It does not matter that the employee would like to remain an employee on her own terms—either by performing other duties or by extending her leave. We said as much in *Lauck v. Campbell County*, 627 F.3d 805, 810 n. 2 (10th Cir.2010) (employee “abandoned” job when he “refused to report to work after his transfer”). Our opinion in *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205 (10th Cir.2003), is not to the contrary. First, the opinion does not expressly address whether Wells was terminated or simply abandoned her job. The issue was not disputed. Second, the facts were rather different from our case. When Wells's leave expired, her boss terminated her without asking her to return to work. See *id.* at 1212. Here, in contrast, Ms. McInerney refused to return to work when asked.

\*\*16 To be sure, Ms. McInerney may have a retaliation claim even if one adopts the above view of the distinction between abandonment and termination. If, as the majority opinion states, Nelli retaliated against Ms. McInerney

by refusing to exercise her authority to extend Ms. McInerney's leave, then Ms. McInerney has a cause of action. (Indeed, if her leave should have been extended, Ms. McInerney would have a constructive-discharge claim. An employee who abandons her job may be said to have been constructively terminated if she quit because the employer imposed an improper duty on her. *See Lauck*, 627 F.3d at 812. In this case the improper duty would have been that Ms. McInerney return to work.) In my view, however, the record does not support the contention that Nelli had the authority to extend Ms. McInerney's leave to the relevant extent.

There is no dispute that United's stated policy was that an employee who failed to return to work after expiration of leave was deemed to have abandoned her job. Ms. McInerney acknowledged this policy during her trial testimony. *See* J.App. at 1689–90. Perhaps Nelli had authority to ignore that policy and grant Ms. McInerney the lengthy leave of absence she desired; but the evidence does not support a finding that she had that authority. Although the majority opinion states two grounds upon which the jury could find that the stated policy was not generally applied and that Nelli could extend Ms. McInerney's leave after its expiration, I am not persuaded.

One ground was that Nelli actually did extend Ms. McInerney's leave. Although Ms. McInerney's leave expired on March 25, 2006, Nelli waited until March 31 to deem her to have resigned. Nelli waited the extra week, however, to be sure that Ms. McInerney, whom she had not heard from, was not going to accept a position as a Customer Service Representative, which might provide another 90-day leave of absence. There is a great difference between (1) the authority to defer termination to be sure that the employee was aware of her options and had decided not to return to work, and (2) the authority to grant an employee a leave of absence of many weeks or months. Although the jury could properly have found that Nelli had the prior authority, that finding could not possibly have supported the jury's verdict, which awarded hundreds of thousands of dollars in damages. It would have availed Ms. McInerney nothing for Nelli to have extended the leave a few extra days to remove any iota of doubt that Ms. McInerney did not plan to return to work as required. What there was no evidence of is that Nelli had the authority to grant what Ms. McInerney wanted—an extended leave to care for her child. By conflating \*728 the two types of authority,

the majority opinion imposes liability on United simply because it allowed Nelli a little wiggle room in enforcing company policy. We do not serve the workers of this country by issuing decisions that encourage employers to be rigid in their employment decisions.

**\*\*17** The other ground upon which the majority opinion relies is the evidence that another worker had not been terminated for failure to come to work until he had been absent for two months. The only evidence on this matter was the following testimony by Ms. McInerney on cross-examination:

Q. And, you certainly weren't aware of anybody who didn't show up to work and was not let go?

A. Actually, there was a supervisor that that happened to, and it was a ramp supervisor, Marcus—I'll think of his last name in a minute. But he didn't show up to work for six weeks, and nothing was done to him for two months, no contact, no nothing.

Q. Was he eventually fired?

A. After two months of no contact, yes.

*Id.* at 1692.

This testimony cannot support an inference that Nelli could have granted the leave desired by Ms. McInerney. First, there was no evidence that Nelli, or even anyone in the same position as Nelli, had anything to do with the two-month delay. Second, Marcus was never permitted to return to work, as Ms. McInerney wished to do after being granted additional leave. Third, and perhaps most important, the testimony is so bereft of detail that one cannot determine whether the Marcus situation bears any material similarity to Ms. McInerney's. The gist of the majority opinion's theory is that Nelli's purported reliance on United's policy is pretext because that policy had not been applied to Marcus. We have held, however, that pretext cannot be shown by evidence that other employees were treated differently than the plaintiff unless those employees were similarly situated; and the burden was on Ms. McInerney to prove similarity. *See Hysten v. Burlington N. & Santa Fe Ry. Co.*, 296 F.3d 1177, 1182 (10th Cir.2002). Absent that proof, one can only speculate that the Marcus episode supports the majority opinion's theory; and we cannot affirm a verdict based on speculation.

Accordingly, with respect and reluctance, I dissent.

**All Citations**

463 Fed.Appx. 709, 2011 WL 1350453, 112 Fair Empl.Prac.Cas. (BNA) 7

**Footnotes**

- \* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with [Fed. R.App. P. 32.1](#) and [10th Cir. R. 32.1](#).
- 1 We have stated that, “[i]n analyzing the sufficiency of the evidence post-trial, ‘the burden-shifting framework of [McDonnell Douglas \[ v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 \(1973\)\]](#),’ is largely irrelevant.” [Hysten, 530 F.3d at 1270](#) (quoting [Stewart v. Adolph Coors Co., 217 F.3d 1285, 1288 \(10th Cir.2000\)](#)). While the burden-shifting framework is largely irrelevant after a jury trial, the substantive elements of the test remain relevant.
- 2 We address the jury instructions in Part III, *infra*.
- 3 This is not to say that the denials of leave are irrelevant. The jury could consider them as evidence of retaliation, and could consider them to the extent that they factored into Nelli's assessment of McInerney's situation and Nelli's ultimate decision. The same is true for United's designation of McInerney as not eligible for rehire.
- 4 Each of the three district court cases that United relies heavily upon in its brief supports our conclusion. In each of these cases the plaintiff's employment was terminated after the plaintiff failed to return to work upon the expiration of FMLA leave. In each case, the district court determined that the termination was an adverse employment action. See [Johnson v. Cmty. Coll. of Allegheny Cnty., 566 F.Supp.2d 405, 425, 432 \(W.D.Pa.2008\)](#) (finding that the plaintiff suffered an adverse employment action when her employment was “brought to a closure” because she had not reported to work); [Mitchell v. The Geo Gp., Inc., No. 05–cv–00197–PSF–CBS, 2006 WL 2711757, at \\*1 \(D.Colo. Sept. 21, 2006\)](#) (“It is undisputed that plaintiff was terminated on or about May 20, 2003 when she did not return to work following an authorized leave of absence pursuant to her FMLA request, thus she was subject to an adverse employment action.”); [Sweis v. Hyatt Corp., No. 98 C 7770, 2001 WL 619509, at \\*4 \(N.D.Ill. May 25, 2001\)](#) (“Sweis suffered an adverse action by the employer when she was terminated from her position [after failing to return to work] with the Hyatt Corporation on July 27, 1995.”). The plaintiffs in these cases did not ultimately prevail because they could not rebut the employers' proffered non-discriminatory reasons for the adverse employment actions: their return-to-work policies. United's argument on this point speaks to whether McInerney can show pretext, and not whether she has made a showing of an adverse employment action. Cf. [Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 & n. 3 \(10th Cir.2006\)](#) (analyzing whether the employer's explanation that the plaintiff was terminated due to “job abandonment” was a pretext for discrimination, and not considering whether the termination was an adverse employment action).
- 5 This evidence reveals the fallacy of the dissent's statement that Nelli did not have authority to extend McInerney's leave and, by the same token, control the date of her termination. The broader question posed by the dissent, *i.e.*, whether Nelli had the authority to grant McInerney “the lengthy leave of absence she desired” was not the focus of the evidence presented by either party. Dissent at 727. Rather, the parties' arguments focused on whether McInerney was terminated, or whether she voluntarily resigned. Regardless of whether Nelli could have granted a leave of absence going forward, this evidence permits the inference that Nelli made the decision to terminate McInerney's employment by declining to further extend her return date and deeming her to have resigned.  
 The narrow issue presented here is whether McInerney presented enough evidence to satisfy the second element of her retaliation case: that she suffered an adverse employment action. The dissent suggests that our decision “imposes liability on United simply because it allowed Nelli a little wiggle room in enforcing company policy.” *Id.* at 728. Not so. This “wiggle room,” and Nelli's ultimate decision are evidence from which the jury could find that United took an adverse employment action. That adverse action, by itself, is not sufficient to impose liability. Rather, the jury had to further find that the adverse action was taken for an improper reason.  
 Clearly, there is a plausible benign explanation for Nelli's action: United's return-to-work policy. However, we are bound by the scope of review in this case. As explained *infra*, there was sufficient evidence from which the jury could find that this explanation was pretextual, and that the real reason United terminated Nelli's employment was retaliatory.
- 6 United does not appeal the admission of Dalvit's testimony at trial. Therefore, our statement that “anecdotal evidence of discrimination should only be admitted if the prior incidences of alleged discrimination can somehow be tied to the

employment actions disputed in the case at hand,” is not relevant here. *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857 (10th Cir.2000) (internal quotation omitted). Dalvit’s testimony was before the jury.

7 Nelli testified that she had the power to determine whether McInerney was designated “ANP” (authorized no pay) or “UNP” (unauthorized no pay). JA at 2251–52.

8 United’s contention that “the undisputed evidence was that ... no employee who failed to return to work from FMLA or other leave was allowed to maintain their employment with United,” United Opening Br. at 41, mischaracterizes the record. The only evidence presented regarding other employees’ failure to return to work was McInerney’s undisputed testimony that “nothing was done” to a ramp supervisor named Marcus for two months after he failed to return to work. JA at 1692; see also n. 8, *infra*.

9 McInerney’s testimony about Marcus was elicited on cross-examination by United’s counsel. Counsel did not question McInerney further about Marcus. Although this testimony was not corroborated, it also was not challenged. Neither party mentions this testimony in its briefs on appeal. However, in reviewing the denial of a motion for judgment as a matter of law, we review the entire record. *Tyler*, 232 F.3d at 812.

10 We do have concerns with the jury instructions. The retaliation instructions focused more heavily on the denial of the leave of absence, rather than the end of McInerney’s employment. For example, the instructions discuss United’s proffered nondiscriminatory reason for denying the requested leave, but not for deeming McInerney to have resigned. However, when the instructions are read as a whole, we cannot conclude the failure to give the instructions United requested was reversible error.

11 Instruction 9 does not appear in the record on appeal, but is quoted in United’s opening brief. See United’s Opening Br. at 51. It states: “United denies it terminated McInerney’s employment. Rather, United notified McInerney that if she did not return to work, United would construe her failure to return ... as a voluntary resignation. Accordingly, it was McInerney’s voluntary decision to resign and not to return to her position....” *Id.*

12 Instruction No. 26 states:  
 United contends that the separation of McInerney and United was based on a legitimate non-retaliatory reason: McInerney failed to return to work after her leave was exhausted.  
 If you find that United has proved by a preponderance of the evidence that it had a legitimate non-retaliatory reason for the separation of McInerney and United, your verdict must be for United.  
 JA at 1219.

13 Instruction No. 18 states:  
 An employee is not discharged, and her employment is not terminated, if she voluntarily resigns. Factors to consider in determining whether an employee’s resignation was voluntary are:  
 1. Whether the employee was given some alternative to resignation;  
 2. Whether the employee understood the nature of the choice she was given;  
 3. Whether the employee was given a reasonable time in which to choose; and  
 4. Whether she was permitted to select the effective date of resignation. JA at 1221.

14 Constructive discharge is an issue where the plaintiff resigns, but argues that untenable working conditions forced her to do so. Here, the relevant issue was whether McInerney resigned or was terminated—not the reason she did not return to work.

15 Instruction No. 16 states:  
 An employee is discharged, or her employment is terminated, when the employer uses language or engages in conduct that would logically lead a prudent person to believe her employment has been terminated. A discharge or termination does not occur, however, when an employee chooses to resign rather than work under what she perceives to be undesirable conditions.  
 JA at 1219.

16 Instruction No. 17 states: “In determining whether a discharge or termination has occurred, the test is an objective one—whether a reasonable person would believe from the employer’s language or conduct that the employee’s tenure has been terminated. The employee’s subjective belief is not relevant.” JA at 1220.

124 F.3d 217

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.

See CTA 10 Rule 32.1 before citing.)

United States Court of Appeals, Tenth Circuit.

Jeanette NELSON, Plaintiff-Appellee,

v.

REHABILITATION ENTERPRISES OF NORTH EASTERN WYOMING; Terry O'Gorman, Defendants-Appellants.

Jeanette NELSON, Plaintiff-Appellant,

v.

REHABILITATION ENTERPRISES OF NORTH EASTERN WYOMING;

Terry O'Gorman, Defendants-Appellees.

Nos. 96-8102, 96-8105.

|

(D.C.No. 95-CV-38)

|

Aug. 21, 1997.

Before BALDOCK, BRORBY, and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT\*

\*1 Defendant Rehabilitation Enterprises of North Eastern Wyoming (RENEW) appeals from a jury verdict and subsequent adjusted judgment in favor of plaintiff Jeanette Nelson, a former RENEW employee, on her claims under Title VII for retaliatory discharge and hostile work environment sexual harassment. Nelson cross-appeals the district court's reduction of the jury's damage award in accordance with the damages cap of 42 U.S.C. § 1981a(b)(3). We modify the judgment in part and affirm as modified.

I.

RENEW is a private nonprofit corporation which provides services to the disabled. RENEW hired Nelson in December 1992 as a part-time case manager in its rehabilitation department. As part of her duties, Nelson worked on a grant project with Terry O'Gorman, a supervisor and unit director in RENEW's production department. According to Nelson, O'Gorman made unwelcome sexual advances and remarks toward her during the course of their working relationship. Nelson reported the harassment to Elbert Belish, her immediate supervisor, who eventually reported the harassment to upper management. Based upon the reports, Larry Samson, who was president of RENEW, met with O'Gorman, Belish, and Nelson on separate occasions to discuss the accusations. No disciplinary action was taken against O'Gorman and no further sexual harassment was committed by O'Gorman following these meetings.

In separate but related events, Nelson developed a friendship with Kyle Dittmer, a temporary production worker hired by O'Gorman. Nelson provided rides to Dittmer to and from work and to and from counseling sessions and the two shared personal problems. In addition, Nelson at times engaged in sexual banter with Dittmer. Although Belish allegedly believed Nelson was providing case management services to Dittmer, Nelson did not view her relationship with Dittmer as part of her position at RENEW. Dittmer eventually ended the relationship and informed O'Gorman that Nelson had been sexually harassing him. O'Gorman reported Dittmer's complaint to upper management and Jim Stewart, the human resources manager, was assigned to investigate. Samson met with Nelson after Stewart had completed his investigation and decided to discharge Nelson.

Nelson filed this action against RENEW and O'Gorman. The jury awarded Nelson \$90,000 on her sexual harassment claim and \$100,000 on her retaliatory discharge claim. The jury rejected Nelson's claim against O'Gorman for intentional infliction of emotional distress. After apportioning the jury's retaliatory discharge award into back pay and other components, and after applying the damages cap set forth in 42 U.S.C. § 1981a(b)(3)(B), the district court entered judgment in favor of Nelson in the amount of \$139,000.00. In a separate order, the court also awarded attorney fees and costs to Nelson as a "prevailing party" under 42 U.S.C. § 2000e-5(k).

## II.

### A. RENEW's Appeal

#### 1. Sufficiency of evidence to support verdict on retaliatory discharge claim

\*2 RENEW argues the district court erred in denying its motion for judgment as a matter of law on Nelson's retaliatory discharge claim. Although RENEW does not challenge Nelson's ability to establish a prima facie case of retaliation, it contends Nelson presented insufficient evidence of pretext to rebut RENEW's proffered nonretaliatory reason for dismissing her and, accordingly, the evidence was insufficient to support the jury's verdict in favor of Nelson.

We review de novo the district court's denial of a motion for judgment as a matter of law, applying the same standard as the district court. *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442, 1450 (10th Cir.1997); *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1363 (10th Cir.1994). "Under this standard, judgment as a matter of law is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Mason*, 115 F.3d at 1450. In conducting our review, "we can neither assess the credibility of witnesses nor substitute our judgment for that of the jury." *Considine*, 43 F.3d at 1363. "Instead, we must view the evidence most favorably to [ ] the party against whom the Rule 50 motion was made, and give [that party] the benefit of all reasonable inferences from the evidence." *Id.*

Although it is a close question whether Nelson provided a basis for the jury to disbelieve RENEW's proffered reasons for discharge, we ultimately conclude she did. It was uncontroverted that when Samson met with Nelson to discuss Dittmer's accusations, he was armed with a memorandum from Stewart listing allegations culled from a tape recording of a conversation between Nelson and Dittmer. Stewart stated in the memorandum to Samson that "the fact that you present this type of detail may deter her from further action." Append. II at 74. Although RENEW's witnesses explained this ambiguous statement alluded to deterring further sexual harassment by Nelson, we believe it possible that the jury could interpret the statement as referring to Nelson's complaints against O'Gorman and any potential legal action she

may have contemplated filing as a result of those complaints. The jury could also arguably have inferred retaliation from the fact that Nelson and O'Gorman, though similarly situated as accused sexual harassers, were treated differently by RENEW. See *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir.1995) (differential treatment leading to discharge of only one of similarly situated employees may establish improper motive). Finally, the record contains ample evidence that, contrary to the testimony of RENEW's witnesses, Dittmer was only an employee of RENEW and not Nelson's client. In light of this evidence, the jury could have concluded RENEW was attempting to redefine a personal non-working relationship between Nelson and Dittmer as one involving workplace sexual harassment in order to discharge Nelson. Such a conclusion is not implausible when one considers the key piece of evidence purportedly relied upon by RENEW in suspending and discharging Nelson, *i.e.*, a tape recorded conversation between Dittmer and Nelson which was admittedly made after hours and away from work. These inferences, bolstered by the close temporal proximity of Nelson's discharge (December 21, 1993) to her complaint against O'Gorman (first described to Belish on November 11, 1993; Samson met with Nelson on December 3, 1993) arguably support a suspicion of mendacity. For these reasons, we conclude the district court did not err in denying RENEW's motion for judgment as a matter of law with respect to Nelson's retaliatory discharge claim. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) (factfinder's disbelief of defendant's proffered reason for discharge, together with elements of the prima facie case, suffice to show intentional discrimination).

#### 2. Amount of back pay in jury's compensatory damage award on retaliatory discharge claim

\*3 Although Nelson sought an award of back pay in connection with her retaliatory discharge claim and the jury was instructed on back pay, the verdict form did not ask for a specific determination of the amount of back pay damages. Instead, the verdict form asked the jury to make a general determination of damages Nelson had suffered in connection with her retaliatory discharge claim, which under the court's instructions could have included back pay, front pay, emotional pain and suffering, and loss of enjoyment of life. See Append. I at 120 (verdict form asks jury to determine "what amount of damages, if any, will adequately compensate Nelson for her retaliatory discharge claim"). In response to this question, the jury

awarded Nelson \$100,000 in damages. After trial, at the urging of Nelson and over RENEW's objection, the court concluded Nelson was entitled to two years of back pay at an annual salary of \$19,500. Specifically, the court concluded "Nelson asked for backpay, and the jury was instructed on back pay," and "Nelson's evidence supports a jury finding that Nelson is entitled to two years of back pay at an annual salary of \$19,500." Append. I at 149. Accordingly, the court found "the jury awarded Nelson a total of \$39,000 in back pay." *Id.* Although the court's finding is not entirely clear, we presume it intended to provide that the \$100,000 damage award on Nelson's retaliatory discharge claim included an intended award of \$39,000 for back pay.

On appeal, RENEW challenges the district court's decision to award \$39,000 in back pay after concluding the jury had made such an award. In particular, RENEW argues the court could not properly enter judgment on a back pay award because there is no way to determine whether the jury awarded any back pay damages.

Because the district court's apportionment of the damage award occurred in the context of applying the 42 U.S.C. § 1981a(b)(3) damages cap, we construe RENEW's argument as a challenge to the court's application of the damages cap. Although we have found no cases indicating what standard of review to apply in such a case, see *Jonasson v. Lutheran Child and Family Services*, 115 F.3d 436, 441 (7th Cir.1997) (affirming application of damages cap without stating applicable standard of review), we find it unnecessary to decide the controlling standard of review. Under any conceivable standard of review, it is clear the court erred in finding the jury's \$100,000 damage award included \$39,000 for back pay. At trial, the jury was instructed it could award damages for back pay (as well as other types of damages), but it was also instructed that Nelson had a duty to mitigate her damages. In light of these instructions, and in light of the conflicting evidence concerning whether Nelson was capable of working after her termination and whether she made reasonable attempts to find work after her termination, the jury could have reached a variety of conclusions with respect to the issue of back pay (e.g., Nelson was entitled to full back pay for the twenty-nine months between her termination and trial; partial back pay; no back pay). As the court realized after trial, the verdict form should have asked the jury to separate the damage components to allow easy and effective application of the damages cap.

Because the court did not do so and neither party objected to the verdict form, see *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1468 (10th Cir.1992) (party may not take advantage of ambiguities created by jury instructions or verdict form if party did not point out ambiguities to court prior to submission to jury), we conclude the court should have treated the entire award as compensatory damages subject to the damages cap. It would arguably have been appropriate for the court to apportion the general award only if the evidence concerning Nelson's entitlement to back pay, as well as the amount of the back pay, had been uncontroverted.<sup>1</sup> Accordingly, we exercise our authority under 28 U.S.C. § 2106 to modify the judgment to allow only \$100,000 in total damages.<sup>2</sup> See *Wilmer v. Board of County Com'rs of Leavenworth County*, 69 F.3d 406, 410 (10th Cir.1995) (exercising inherent appellate authority under § 2106 to modify judgment directly in order to obviate purely ministerial remand).

#### B. Nelson's Cross-Appeal

##### 1. Application of damages cap to aggregate award of all claims

\*4 In her cross-appeal, Nelson contends the district court erred in applying the damages cap. Specifically, Nelson argues the court erroneously applied the cap by aggregating her damages and limiting her to \$100,000 for all of her Title VII claims. According to Nelson, the cap should be applied separately to each Title VII claim and she should be entitled to the full award of \$190,000.

We reject Nelson's argument. "[W]hen a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Here, the clear and unambiguous language of § 1981a(b)(3) indicates the cap applies "for each complaining party," not to each claim. Thus, the court properly applied the cap (\$100,000 in this case due to the number of persons employed by RENEW) to the aggregate damages awarded on both of Nelson's Title VII claims.

#### III.

The judgment is MODIFIED in part and AFFIRMED AS MODIFIED. Nelson's motion to strike RENEW's docketing statement is DENIED.

**All Citations**

124 F.3d 217 (Table), 1997 WL 476111, 97 CJ C.A.R. 1696

**Footnotes**

- \* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.
- 1 We do not conclusively decide whether such action on the part of a district court would be appropriate. We do emphasize, however, that this situation can be avoided entirely by use of a verdict form that asks the jury to make separate findings with respect to each damage component.
- 2 Because of our affirmance of the jury's verdict in Nelson's favor on her Title VII retaliatory discharge claim, combined with the fact that the jury's award of compensatory damages on the retaliatory discharge claim is the maximum amount Nelson can recover for all of her Title VII claims, it is unnecessary to reach the issues raised by RENEW concerning Nelson's sexual harassment claim. Specifically, even if we were to resolve these issues in RENEW's favor, it would not affect the compensatory damage award, which is limited to \$100,000, and we could not provide any effectual relief. In addition, because Nelson remains a "prevailing party" under [42 U.S.C. § 2000e-5\(k\)](#), we find it unnecessary to address RENEW's challenge to the court's award of attorney fees and costs, which is based only upon the argument that Nelson should not have prevailed on either claim and therefore no fees or costs should be awarded.

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