No. 20-____

In the
Supreme Court of the United States

DR. FAYSAL KHALAF,

Petitioner,

v.

FORD MOTOR COMPANY,
BENNIE FOWLER, and JAY ZHOU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S APPENDIX

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

FAISAL[1] KHALAF, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 15-12604
	)	
FORD MOTOR CO., BENNIE FOWLER, JAY ZHOU,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' REVISED POST VERDICT MOTION

Attorneys and Law Firms
Carol A. Laughbaum, Raymond J. Sterling, Sterling Attorneys at Law, Bloomfield Hills, MI, for Plaintiff.
Elizabeth P. Hardy, Shannon V. Loverich, Thomas J. Davis, William B. Forrest, Kienbaum Hardy Viviano Pelton & Forrest, P.L.C., Birmingham, MI, for Defendant.

MARIANNE O. BATTANI, United States District Judge

This matter is before the Court on Defendants' post verdict motion. Defendants Ford Motor Company ("Ford"), Bennie Fowler, and Jay Zhou ask the Court to Set Aside the Verdict Under Rule 58(b) and Rule 59(d), or in the Alternative Grant Judgment as a Matter of Law Under Rule 50(b), for a New Trial under Rule 59(a), to Alter or Amend the Judgment Under Rule 59(e) and for Remittitur (ECF No. 102). For the reasons that follow, the Court **GRANTS in part and DENIES in part** the motion.

[1] N.B. "Faisal" and "Faysal" are equivalent English translations of the same Arabic name. Dr. Khalaf prefers the English spelling, "Faysal," which is used in this cert. petition.

I. PROCEDURAL BACKGROUND

On March 28, 2018, following an eleven day trial, the jury entered a verdict in favor of Plaintiff, Faisal G. Khalaf, on his claims of (i) a hostile work environment based on his national origin or race, as to Fowler, and Plaintiff's subordinates; (ii) retaliation against his engagement in protected activity by Fowler, Zhou, and Ford. Specifically, the jury concluded that Plaintiff proved (a) retaliatory demotion by Fowler and Ford; (b) a retaliatory Performance Enhancement Plan ("PEP") by Zhou; and (c) retaliatory termination by Ford. Plaintiff did not prevail on his claims that he was demoted and terminated because of his national origin or his race. (See ECF No. 74, Jury Verdict Form, Question No. 1 (Discrimination-National Origin), Question 2 (Discrimination-Race)). In addressing Question 3 on the Jury Verdict Form, (Hostile Environment-Subordinates), the jury found that Khalaf proved he was subjected to a severe or pervasive hostile environment by his subordinates based on his national origin or race. (See ECF No. 74, Jury Verdict Form). The jury likewise found that Fowler had subjected Plaintiff to a severe or pervasive hostile environment based on his national origin or race. (See *id*. Question 4). The jury determined pursuant to Question 5 (Retaliation) "that Plaintiff was retaliated against because he, in good faith, engaged in the protected activity of opposing discrimination." (*Id*.)

Specifically, the jury found that Plaintiff was demoted by Fowler and Ford, placed on a Performance Improvement Plan by Zhou, and terminated

by Ford because of his protected activity. (*Id.*) The jury awarded damages to Plaintiff for pension and retirement losses in the amount of $1.7 million, and $100,000 emotional distress damages. (*Id*. Question 6). The jury also awarded punitive damages in the amount of $15 million against Ford. (*Id*. Question 8).

Defendants had filed a Rule 50(a) Motion for Judgment as a Matter of law at the close of Plaintiff's proofs. The Court heard argument after instructing the jury and took the motion under advisement. Among other things, Defendants asserted that because Ford had made a job available to Khalaf, and Khalaf refused the offer, "[a]s a matter of law and logic" he voluntarily quit. (ECF No. 66 at 5). Following the jury's verdict and discharge, the Court, in a statement from the bench, indicated its agreement with Defendants' argument that the termination claims failed, observing that the trial testimony showed that when Khalaf returned from a leave of absence there were no jobs available at his level, and that the job he was offered, although at a lower level, would be paid the same. The Court considered Plaintiff to be terminated not because of discrimination or for any reason other than he decided not to accept the position. Thereafter, the parties filed briefs relating to the judgment.

In its July 23, 2018, Opinion, the Court observed that it had stated its intention to grant a judgment as a matter of law in Defendants' favor to the extent that Plaintiff's claims rest on a theory of wrongful termination. (ECF No. 95 at 2). The Court had not entered an Order or Judgment, however, and

the Court instructed the parties to address any effect on the jury's award of damages through a renewed post-trial motion brought under Rule 50(b). (Id.) The Court then denied without prejudice Defendants' pre-verdict March 22, 2018 motion under Fed. R. Civ. P. 50(a) for judgment as a matter of law. Accordingly, on July 23, 2018, the Court entered Judgment in the amount of $1.8 million in compensatory damages in favor of Plaintiff and against Defendants Ford, Fowler, and Zhou, jointly and severally; judgment in the amount of $15 million in punitive damages in Plaintiff's favor and against Ford; and held that Plaintiff would be awarded such interest, costs, and attorney fees as allowed by law and authorized by the Court. (ECF No. 99).

In their revised Rule 50(b) motion, Defendants contend that the Court's grant of a directed verdict on the wrongful termination claim requires the Court to vacate all of the damages. Specifically, Defendants ask the Court to hold as a matter of law that the $1.7 million award of economic damages must be reduced to zero because it rests entirely on the wrongful termination theory; that the $15 punitive damages award be reduced to zero because in the absence of a viable wrongful termination theory, the jury's answers on the verdict form do not support a punitive damages award as a matter of law. Defendants argue in the alternative that the punitive damages award is unconstitutionally excessive. Defendants ask the Court to grant judgment as a matter of law on the remaining claims. Finally, Defendants ask the Court to award a new trial due to instructional errors and prejudicial argument by

Plaintiff's counsel. In the event that the Court orders a new trial, Defendants ask the Court not to retry any claim resolved in their favor and to retry the remaining claim as to both damages and liability.

II. ANALYSIS

A. Rule 50(b) Renewed Motion for Judgment as a Matter of Law

"If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the movant may file a renewed motion for judgment as a matter of law." Fed. R. Civ. P. 50(b). The legal "standard for judgment as a matter of law under Rule 50 is the same as the standard for summary judgment under Rule 56." *Groeneveld Transport Efficiency, Inc. v. Lubecore Int'l, Inc.*, 730 F.3d 494, 503 (6th Cir. 2013) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). The Court should grant a motion for judgment as a matter of law if "there can be but one reasonable conclusion as to the verdict." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)) (internal quotation marks omitted). Accordingly, the Court must determine "whether there was sufficient evidence presented to raise a material issue of fact for the jury." *Powers v. Bayliner Martine Corp.*, 83 F.3d 789, 796 (6th Cir. 1996) (quoting *Monette v. AM-7-7 Baking Co.*, 939 F.2d 276, 280 (6th Cir. 1991)) (internal quotation marks omitted). " '[I]f the verdict is one that reasonably could be reached, regardless of whether the trial judge might have reached a different conclusion were he [or she] the

trier of fact,' " the motion must be denied. *Powers,* 83 F.3d at 796 (quoting *Wayne v. Village of Sebring*, 36 F.3d 517, 525 (6th Cir. 1994).

1. Termination Claims

Although the Court indicated on the record it was inclined to grant the Rule 50(a) motion on Plaintiff's termination claims, upon further reflection and the opportunity to review all the evidence, including the testimony and documents, it is apparent that Plaintiff's retaliatory termination claim does not fail for a complete absence of proof; controverted issues of fact upon which reasonable persons could disagree do exist.

At the outset, the Court notes that under Sixth Circuit law, an adverse employment action involves a "materially adverse change in the terms of employment." *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 791 (6th Cir. 2004) (en banc) (quoting *Kocsis v. Multi–Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996)). In *Kocsis*, the appellate court determined that in the absence of evidence that the reassignment of a nursing supervisor to a unit nurse involved less prestige, a lower salary, worse hours, or a difference in employment related benefits was not an adverse action. *Id.* at 886-87. The Sixth Circuit reached a different conclusion in White, a case involving the reassignment of the plaintiff from a forklift position to a track laborer position. 364 F.3d at 792. Even though the plaintiff kept the same pay and benefits because the job was more difficult, more labor intensive and

considered a worse job by other workers, 364 F.3d at 792-73, the Sixth Circuit concluded the transfer constituted a demotion. *Id.* at 803.

The Court's obligation is to consider this authority through the lens of its obligation under Rule 50 to view the evidence in the light most favorable to the nonmoving party, Khalaf, to render no credibility determinations of the witnesses, and to decline to weigh the evidence. See *Denhof v. City of Grand Rapids*, 494 F.3d 534, 543 (6th Cir. 2007) (citing *Ratliff v. Wellington Exempted Vill. Sch. Bd. of Educ.*, 820 F.2d 792, 795 (6th Cir.1987)); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (explaining that the Rule 50 standard mirrors that of Rule 56). With these standards in mind, the Court directs its attention to the evidence put forth during trial.

Plaintiff presented evidence to support the job he was offered upon his return from medical leave was an adverse action. Specifically, he testified that the job offered to him was not at the same grade although he would receive the same pay, which would impact his potential bonuses. More importantly, his seniority date would be altered, which would impact his pension benefits. He also testified that he had to self-demote to return to work. Director of HR, Mike Lank, testified that Ford offered Plaintiff money if he separated because there was no LL5 position, and Lank admitted that Ford does not offer money to voluntary quits. (ECF No. 110, Ex. H at 186). The Court is cognizant that Lank denied that Khalaf's benefits would have

been altered, but Khalaf testified to the contrary. In addition, the jury received testimony about Ford's Disability Policy.

Under the express language of Ford disability leave policy, employees reemployed by the Company following an extended disability termination will be reinstated with original Ford Service Date if: 1) adequate proof of disability is submitted that covers the entire period of lost time and 2) reemployment occurs prior to the employee breaking service with the company. (Ford's written Disability (Medical) Leave Policy, (**Exhibit C**, admitted as a trial exhibit P-145, Disability Medical Leave Policy). Khalaf's disability ended before he returned to work because of inadequate proof. Therefore, there was sufficient evidence, if credited by the jury, to support that Khalaf did not end his employment voluntarily.

Next, the Court considers whether there was evidence presented to support Khalaf's claim that his termination was retaliatory. That evidence is not viewed in a vacuum, and Plaintiff's evidence revolved around the sequence of events just prior to and those following Plaintiff's protected activity. Plaintiff's first involvement in such activity occurred in February 2013, when he instructed Pauline Burke to make a complaint of sexual harassment. Prior to the complaint, Plaintiff's supervisor, Fowler, made Khalaf manager of QS and PP and reinstated Khalaf to his former LL5 position. Also in early 2013, prior to the Burke complaint, Fowler told

Plaintiff during a discussion about compensation that Khalaf would be receiving a gift that would make him very happy.

Instead of receiving good news, in April 2013, Fowler met with Khalaf and told Khalaf he was being removed as manager of QS and PP and stripped of his title due to "corporate investigations." (ECF No. 110, Ex. G at 65-66). At the same meeting, Fowler told Khalaf that the current QPIP target of under $1 billion was being raised to $15 billion. (Id. at 67-69). Thereafter, Khalaf informed the manager of HR, Wendy Warnick, that he had been given unachievable goals designed to set him up for failure. (Id. at 69-70). Khalaf also presented evidence that HR did not want Fowler to "get wind" of the Burke complaint.

Zhou took over Plaintiff's position, unofficially, in April 2013. In June 2013, Khalaf complained to HR about his hostile work environment.

In October 2013, Khalaf approached Zhou because Zhou was sidestepping Khalaf and giving directions directly to Khalaf's QFLs. In his December 2013 performance review, Khalaf did not receive a single "does not meet" expectations rating, and he exceed his most critical objection by $200 million. Nevertheless, Zhou told Khalaf he was trending toward low achiever, yet Zhou provided no coaching to Khalaf. Thereafter, Khalaf's efforts to transfer to open positions were blocked, and HR ignored Khalaf's January 2014 e-mail to HR and Zhou seeking assistance with his work situation.

In April 2014, Khalaf was placed on a Performance Enhancement Plan ("PEP"), and during the meeting to discuss the PEP, Lank referenced Plaintiff's harassment complaint. After the PEP was underway, Zhou and Ford attempted to add additional objectives to those established in February 2014, contrary to Ford policy; Zhou told Khalaf to take an ESL class; and thirty days into the PEP, Ford signed off on a Career Transition Plan, as did Zhou and Fowler. Khalaf's request to be considered for other positions was refused.

Khalaf filed this case in July 23, 2015, while he still worked for Ford. In his lawsuit, he alleged retaliation for protected activity and hostile work environment that resulted in Khalaf's one-year medical leave. (ECF No. 1). He later amended his complaint to encompass his termination. Finally, Ford listed Plaintiff's employment status as terminated as of July 14, 2015, the date Khalaf attempted to return to work from his medical leave.

Based on a review of all the evidence, the Court's inclination to direct a verdict against Plaintiff and in Defendants' favor on the claim of retaliatory termination of Plaintiff's employment with Defendant Ford was misguided. (See 3/28/2018 Trial Tr. at 35-36.) Plaintiff did advance sufficient evidence from which the jury could and did find in his favor.

2. Hostile Environment

In general, Defendants seek relief from the hostile environment claims on their assertion that the harassment was neither pervasive nor severe. When courts assess "whether an actionable hostile work environment claim exists," they consider the totality of "the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (internal citation omitted). Consequently, an occasional offensive utterance does not create a hostile work environment. "To hold otherwise would risk changing Title VII into a code of workplace civility." *Grace v. USCAR*, 521 F.3d 655, 679 (6th Cir. 2008) (internal quotation marks omitted).

a. National Origin/Fowler

The testimony at trial was that Fowler subjected Plaintiff to comments about his English on a weekly basis, asking Plaintiff whether he understood English, and telling Plaintiff to speak English. In addition, Khalaf demeaned Plaintiff at weekly meetings, blamed Plaintiff for low Pulse scores, and subject Plaintiff to a performance review and PEP that were contrary to Ford policy.

b. Subordinates

Because the alleged harassers in this case also included Khalaf's subordinates, the standard is formulated differently. An employer can be vicariously liable when a subordinate employee harasses his or her supervisor when "the employer knew or should have known of the harassment and failed to implement prompt and appropriate action" except "where the supervisor-plaintiff had the ability to stop the harassment and failed to do so." *Lyles v. D.C.,* 17 F. Supp. 3d 59, 69–71 (D.D.C. 2014). Notably, when the supervisor reports the harassment to his supervisors because he cannot stop the harassment, and " the employer resists such actions, the employer will still be liable for allowing the hostile work environment to persist despite being on notice of the problem." *Id*. Here, Khalaf eventually sought the intervention of HR, but the harassment continued.

Plaintiff did offer evidence to support a claim of hostile environment based on national origin or race by Plaintiff's subordinates. Although the bulk of the evidence presented demonstrated disrespect by Plaintiff's subordinates, there was evidence relating to Plaintiff's accent conveyed through an anonymous comment left in a drop box that criticized his "writing and understanding English."

3. Protected Activity Involving Pauline Burke

Defendants challenge whether as a matter of law, Khalaf established he engaged in protected activity relative to the Pauline Burke complaint. A prima facie case of retaliation is established under Title VII when the plaintiff shows that "(1) he...engaged in protected activity, (2) the employer knew of the exercise of the protected right, (3) an adverse employment action was subsequently taken against the employee, and (4) there was a causal connection between the protected activity and the adverse employment action." *Niswander v. Cincinnati Ins. Co.,* 529 F.3d 714, 720 (6th Cir.2008). Specifically, "but for" causation between the protected activity and the adverse employment action is needed. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 362 (2013).

The sexual harassment claim arose out of a coworker telling Burke to "put her big girl pants on." Plaintiff told Burke to file a complaint. According to Defendants, his conduct does not constitute protected activity because his belief that she was subjected to discriminations was not objectively reasonable.

Under the authority of this circuit, an employee " 'may not invoke the protections of the Act by making a vague charge of discrimination.' " *Fox v. Eagle Distrib. Co.*, 510 F.3d 587, 591 (6th Cir. 2007) (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir.1989) (holding that complaints about "ethnocism" were too vague to constitute protected

activity)). Nevertheless, there is no requirement that a complaint "be lodged with absolute formality, clarity, or precision." *Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 645 (6th Cir.2015) (internal quotation marks omitted). The Court finds sufficient evidence was presented to support a finding that Plaintiff engaged in protected activity regarding the Burke complaint.

4. Retaliation/PEP

The jury found that Zhou retaliated against Plaintiff by placing him on a PEP. Defendants argue that Plaintiff's placement on a PEP was not retaliatory as a matter of law under Rule 50 for several reasons. Zhou did not retaliate over the Burke complaint because Zhou was not even in the department when Burke made the complaint, and Defendants argue that Plaintiff's counsel conceded this point.

Notably, Zhou became the unofficial manager in April 2013, shortly after the Burke complaint.

When Zhou evaluated Khalaf's performance in December 2013, Zhou warned Khalaf that a PEP would be coming if Khalaf did not improve his performance. The characterization of Khalaf as trending toward a lower achiever came even as Khalaf was rated as achieving all of his performance goals, and exceeding his most important one. Zhou did not provide performance counseling to Khalaf even after Khalaf's performance review.

Instead Zhou decided to institute the PEP in March 2014. Although the PEP paperwork was processed before Plaintiff made his April 2014 harassment complaint, the evidence at trial demonstrated a continuous course of conduct aimed at Khalaf following his protected activity. Each alleged incident of harassment cannot be viewed in a vacuum, as "[w]hat may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents." *Jackson v. Quanex Corp.,* 191 F.3d 647, 661–62 (6th Cir. 1999) (citations omitted). The mere existence of arguments that challenge the jury's finding is an insufficient basis for the requested relief. The jury had the opportunity to assess all of the evidence as a whole, and evidence was presented to support Plaintiff's claim as to Zhou.

5. Punitive Damages

Defendants maintain that a directed verdict on the termination claim means that the punitive damages award must be set aside. In *Parker v. Gen. Extrusions, Inc.*, 491 F.3d 596, 601 (6th Cir. 2007), the Sixth Circuit set forth the standard that must be met by a Title VII claimant to recover punitive damages. Specifically, the appellate court held that a claimant must "demonstrate by a preponderance of the evidence that the employer 'engaged in a discriminatory practice...with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' " *Id.* (citing 42 U.S.C. § 1981a(b)(1)). Under this standard three criteria must be met. First, those

"individuals perpetrating the discrimination [must have] acted with malice or reckless disregard as to whether the plaintiff's federally protected rights were being violated. " Second, the employer is liable, only if "the agent was employed in a managerial capacity and was acting in the scope of employment; and an absence of evidence showing that the defendant "engaged in good faith efforts to comply with Title VII." " *Kolstad v. American Dental Ass'n*, 527 U.S. 536, 542–43, 544-46 (citations omitted). The requirements also apply to claims under Section 1981. Id. at 535-36.

Here, Ford advances arguments based on its position that the retaliatory termination claim has been invalidated. Because that is not the case, the Court considers its alternate argument–-that punitive damages against Ford are not justified. In support of their position, Defendants point to the absence of any award of punitive damages as to the individual Defendants, Fowler and Zhou. Defendants conclude from this fact that Ford cannot be responsible for punitive damages based on their actions.

The Court finds this argument unavailing. The jury heard testimony from other managerial employees, thereby creating a basis for an award of punitive damages.

Even if punitive damages are justified, the Court must consider whether the punitive damages award is unconstitutionally excessive. The measure of punishment must be reasonable and proportionate to the amount of harm to the Plaintiff and to the general damages recovered. To determine "[w]hether

a punitive damages award is so excessive as to offend due process," courts assess three factors: "the degree of reprehensibility of the defendant's conduct, the punitive award's ratio to the compensatory award, and sanctions for comparable misconduct." *Romanski v. Detroit Entm't, L.L.C.,* 428 F.3d 629, 643 (6th Cir. 2005) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576–84 (1996)).

In order to grant a motion for a remittitur, a court must find that the jury's award "is: 1) beyond the range supported by proof; 2) so excessive as to shock the conscience; or 3) the result of mistake." *Szeinbach v. Ohio State Univ.*, 820 F.3d 814, 820 (6th Cir. 2016) (quotation omitted). "In making its determination, the court must review the evidence in a light most favorable to the prevailing party.... A court's decision to grant or deny remittitur is reversible only for abuse of discretion." *Chapman v. AmSouth Bank*, No. 1:04-CV-237, 2005 WL 3535150, at *4 (E.D. Tenn. Dec. 22, 2005).

Before turning to the factors, the Court finds that the punitive damages award was so excessive as to shock the conscience. The Court considers the Gore factors to establish what award, if any, is appropriate.

a. Reprehensibility

Defendants assert that the award is unconstitutionally excessive. First they challenge the existence of any factors to support reprehensibility. The Supreme Court has spoken to this factor, observing that "[t]he most important indicium of the reasonableness of a punitive damages award is the

degree of reprehensibility of the defendant's conduct." *Romanski,* 428 F.3d at 643 (citations omitted). Criteria assessed in making the determination include, "whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id*. (citing *Gore*, 517 U.S. at 576–77).

According to Defendants, Plaintiff did not suffer physical harm; there was no reckless disregard to the health and safety of others; and Plaintiff was not financially vulnerable. They add that the there is no proof of intentional malice, trickery, or deceit by Ford. In contrast, Plaintiff claims he experienced physical manifestations of his psychological harm, and asks the Court to consider Fowler's threatening and abusive behavior toward Khalaf as establishing indifference or reckless disregard for Plaintiff's health and safety.

The Court agrees with Defendants, that Plaintiff did not suffer physical harm. He suffered no physical assault or trauma; his harm was emotional–humiliation and outrage. The jury awarded Plaintiff emotional distress damages. See *Wesley v. Campbell*, 864 F.3d 433, 444 (6th Cir. 2017). There is no evidence of indifference to the "health and safety of others" in this case. Nor does the Court find that Khalaf was in a position of financial

vulnerability. Within days of his termination from Ford, Plaintiff had employment.

Nevertheless, the conduct at issue was ongoing. Although Defendants rely on the fact that Plaintiff did not offer evidence that "similar reprehensible conduct [was] committed against various different parties." *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 1000 (6th Cir. 2007), the Court finds the standard is met through the conduct directed at Plaintiff. In sum, the factors assessed to measure the reprehensibility of Ford tip slightly in favor of Ford.

2. Ratio

Defendants next assert that the ratio between the punitive damages and the compensatory damages awarded supports the unconstitutionality of this award. In making this argument, Defendants use only the compensatory emotional damages and ignore the compensatory economic front pay award. Generally, the ratio between punitive and compensatory damages should be limited to "single-digit" ratios, meaning no more than 9:1. See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (observing that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with rations in range of 500 to 1"). Here, the ratio was 8.3 to 1 when considering the total compensatory damages, but 150 to 1 considering the emotional damages.

c. Disparity

The final consideration is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575. In this case, Defendants use the punitive damages cap imposed under Title VII as measured against the absence of a cap on punitive damages under Section 1981. Under Title VII, the cap is $300,000. The Supreme Court instructed in *Gore* that "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *Gore*, 517 U.S. at 583. Here, the Court finds that the disparity between $15 million and $300,000 creates a basis for remittitur. The degree of the discrepancy when considered with the other factors is difficult to ignore. Accordingly, the Court finds the that the punitive damages award must be reduced. Accordingly, the Court grants the request for remittitur and will award punitive damages in the amount of $300,000, an amount three times greater than the emotional damages award.

B. Motion for New Trial

"The court may, on motion, grant a new trial on all or some of the issues--and to any party ... after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1). "Generally courts have interpreted this language to mean that a new trial is warranted when a jury has reached a 'seriously erroneous result' as

evidence by: (1) the verdict being against the great weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias." *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1045-46 (6th Cir. 1996). The governing consideration in deciding whether to order a new trial is " 'whether, in the judgment of the trial judge, such course is required in order to prevent an injustice ....' " *Davis by Davis v. Jellico Cmty. Hosp. Inc.,* 912 F.2d 129, 133 (6th Cir.1990) (quoting *Kilgore v. Greyhound Corp.,* 30 F.R.D. 385, 387 (E.D. Tenn.1962)).

Defendants advance several grounds for a new trial. Because the Court has found the jury verdict supported by the evidence, Defendant's arguments about the jury verdict form are immaterial. Likewise, in light of the Court's ruling on the directed verdict motion, Defendants' assertion that the economic damages award, which rests entirely on the termination theory, must be vacated and reduced to zero is moot as is Defendants' assertion that the $100,000 emotional distress damages award must be vacated because it was infected by the retaliatory termination claim. In contrast, Defendants' claims that they are entitled to a new trial based upon the jury instructions and improper argument by Plaintiff's counsel remain viable despite the Court's ruling on the Rule 50(b) motion. Those arguments are addressed below.

Defendants assert that they are entitled to a new trial due to the individual and cumulative effects of the erroneous jury instructions and improper, prejudicial argument by Plaintiff's counsel. The Court disagrees.

Jury Instruction 27 reads:

> Even hostility, conduct and comments directed at a Plaintiff that are not expressly racial or discriminatory in nature may contribute to his hostile work environment, if you find that conduct would not have occurred but for the fact of the plaintiff's race or national origin.

Defendants observe that antidiscrimination laws are not a code of general civility, and that generic antipathy is not enough to support a violation of the law. The instruction conveys that statement of law, connecting the conduct to race or national origin discrimination.

The Court also instructed the jury that "[d]iscrimination based on accent or manner of speaking can be national origin discrimination. The fact that Plaintiff has a foreign accent is not sufficient to establish a claim of national origin discrimination based on accent or manner of speaking." (Jury Instr. 18). The Court properly exercised its discretion in declining to give Defendants' instruction that English criticism alone was not evidence of national origin discrimination. The Court is not persuaded that it exercised its discretion improperly by Defendants' argument, which builds on the jury's question requesting a definition of "manner of speaking" but not "accent."

Defendants use the question to speculate that the jury believed the two terms had different meanings, when they actually are synonymous. Defendants conclude that although the jury understood it could not reach a

verdict based solely on accent, it likely believed Plaintiff's English skills were his manner of speaking; therefore, a new trial is warranted.

The Court's instructions accurately conveyed the governing law. Defendants' conjecture that the jury erroneously believed that mere English language criticism was sufficient for finding national origin discrimination is an insufficient basis for awarding a new trial.

Defendants also challenge statements made by Plaintiff's counsel during closing argument. Counsel told the jury that no one from Ford would admit to having prejudice against people of Arabic descent or equate Arabic people with terrorist, "but the reality is we live in a post 911 world and people of Arabic descent, like Dr. Khalaf, and people who have a Middle Eastern a accent like Dr. Khalaf, are not always judge by the content of their character but rather by awful stereotypes." (3/27 Tr. at 14).

The Court denied a curative instruction. Counsel's comments were innocuous inasmuch as counsel merely asked the jury to determine what motivated the hostility of Khalaf's coworkers, using common sense and experience. The statement provides no basis for awarding a new trial.

III. CONCLUSION

For the reasons stated above, the Court **GRANTS in part and DENIES in part** the Rule 50(b) motion for judgment as a matter of law. The Court grants remittitur as to the punitive damages award. It is reduced to $300.000.

IT IS FURTHER ORDERED that Defendants shall file a response to Plaintiff's motion for attorney fees and costs within fourteen days of the Court's ruling on the post-trial motions.

IT IS SO ORDERED.

No.19-1435/1468
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FAYSAL KHALAF, Ph.D.,	)
	)
Plaintiff-Appellant/ Cross-Appellee,	)
	)
v.	)
	)
FORD MOTOR CO., BENNIE FOWLER, JAY ZHOU,	)
	)
Defendants-Appellees/ Cross-Appellants.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Argued: May 6, 2020
Decided and Filed: August 31, 2020
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Before: GUY, THAPAR, and BUSH, Circuit Judges.

OPINION

JOHN K. BUSH, Circuit Judge.

This appeal involves claims of national origin discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and Michigan's Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws 37.2101 *et seq.*, and racial discrimination and retaliation in violation of 42 U.S.C. § 1981. The claims were brought by Faisal G. Khalaf, Ph.D., who is of Lebanese descent, against Ford Motor Company, his former employer, and Bennie Fowler and Jay Zhou, his former supervisors at Ford. Specifically, Dr. Khalaf contends that, he was subjected to a hostile work environment because of his race or national origin, and that defendants illegally retaliated against him, after he engaged in protected activities, by demoting him, placing him on a "Performance Enhancement Plan" (PEP), and ultimately terminating his employment.

The jury found that (1) Dr. Khalaf was neither demoted nor terminated by Ford because of his race or national origin; (2) neither Ford as a corporate entity nor Zhou subjected him to a hostile work environment, but Dr. Khalaf's subordinates at Ford had done so (based on national origin or race), and so had Fowler (based on national origin, but not race); and (3) Dr. Khalaf was subjected to retaliatory demotion by Ford and Fowler, retaliatory placement on a PEP by Zhou, and retaliatory termination by Ford alone, but was not subjected to retaliatory placement on a PEP by Fowler or Ford or retaliatory termination by Fowler or Zhou.

For the collective actions of all defendants, the jury awarded Dr. Khalaf $1.7 million in pension and retirement losses and $100,000 in emotional-distress damages. For the actions of Ford only, the jury awarded Dr. Khalaf $15 million in punitive damages. The district court granted Ford's motion for remittitur of punitive damages but denied all of defendants' other post-verdict motions, including motions for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). As to remittitur, the district court determined, in light of all of the evidence, that the exemplary damages imposed on Ford were "so excessive as to shock the conscience" and violated due process. Therefore, the court reduced the punitive damages award to $300,000.

For the reasons outlined below, we hold that the district court erred in denying defendants' motions for judgment as a matter of law. Accordingly, we **REVERSE** and direct the district court to enter judgment in favor of defendants. Based on this holding, we need not address remittitur.

I. BACKGROUND

A. Dr. Khalaf's Employment at Ford

In 1999, Ford hired Dr. Khalaf as a full-time non-management process engineer. R.134, 3.12. Tr., PageID 5655. During much of his career at Ford, Dr. Khalaf was a technical specialist responsible for working on projects involving Six Sigma methodology.1 *Id.* at PageID 5655, 5678. In his early years in that capacity, Dr. Khalaf did not gain extensive experience managing other employees. Nonetheless, in 2002, he attained "Leadership Level (LL)" 6, Ford's lowest managerial level.2 Three years later, in 2005, Dr. Khalaf moved up to an LL5 position. R.134, 3.13. Tr., PageID 5663-5664.

In 2006, Dr. Khalaf met the new Vice President of Global Quality at Ford, Bennie Fowler. During the conversation, Dr. Khalaf shared information about his educational and professional background. Dr. Khalaf also told Fowler that he had immigrated from Lebanon and spoke Arabic. R.134, 3.13 Tr., PageID 5671-5672.

In 2007, Fowler reorganized the Global Quality Department and eliminated Dr. Khalaf's position. *Id.* at PageID 5673. According to Dr. Khalaf, he had been assured by another manager that, even with his job gone, he would remain at the LL5 level, though it would require a new reporting relationship. However, as Dr. Khalaf later learned, this was incorrect, as Fowler then assigned him to an LL6 position. *Id.* at 5673-5674. Nonetheless, pursuant to Ford's "in-grade protection" policy, Dr. Khalaf was permitted to

maintain the same salary and benefits of an LL5 while serving as an LL6. *Id*. at PageID 5675; R.135, 3.14.Tr., PageID 5839-5840.

In January 2008, Fowler approved a job transfer for Dr. Khalaf to Brazil. R.137, 3.19.Tr., PageID 6129. According to Fowler, this international role was a "high-rank assignment[ ]" for Dr. Khalaf that "not everyone [at Ford] had the opportunity" to hold. R.134, 3.13.Tr., PageID 5683. The position was intended to last two years, with Dr. Khalaf supervising four or five Ford employees. R.140, 3.22.Tr., PageID 6884. However, after just one year in his new job, Dr. Khalaf was sent back to the United States by his supervisor, Ruebens Vaz—a decision that, according to Ford, resulted from Dr. Khalaf's "lack of management skills" and adverse effect on "the morale of the team" he was supervising. *Id.* at 6885, 6890; *see id.* at 6890 (supervisor explaining that Dr. Khalaf had "lost the team," and therefore, the supervisor "had to make the decision to ... end the assignment"). Upon Dr. Khalaf's return to the United States, he immediately accused Vaz of discrimination and harassment based on race or national origin, and mistreatment during one-on-one meetings. R.135, 3.14.Tr., PageID 5831-5833, 5835.

Fowler assigned Dr. Khalaf to a new job as a "Quality Functional Leader (QFL)" in Ford's Quality Strategy and Productive Placement Department (QS&PP Department), R.134, 3.14.Tr., PageID 5840; R.137, 3.19.Tr., PageID 6130, which is part of Ford's Global Quality Organization. In this group, Dr. Khalaf worked as an LL6 on cost-savings projects for Ford. R.135, 3.14.Tr.

PageID 5674-5675. According to Ford, Dr. Khalaf was deliberately placed as an LL6 through the company's "Individual Grade Protection" Program. Under this program, a returning international-service employee retains the Leadership Level held during the foreign assignment for a limited time as the employee seeks a job to restore the higher Leadership Level that the employee held prior to the foreign assignment. *Id.* at PageID 5839–5840.

In June 2012, following the resignation of the QS&PP Department manager, Fowler appointed Dr. Khalaf as an interim manager of this department. Shortly thereafter, the appointment became permanent, R.136, 3.15.Tr., PageID 6009, 6014; R.135, 3.14.Tr., PageID 5706, 5710–5714, 5746; R.136, 3.15.Tr., PageID 6010–6012, and Dr. Khalaf again became an LL5. R.135, 3.14.Tr., PageID 5746. In this new management role, Dr. Khalaf oversaw two teams of Ford employees: (1) QFLs (Dr. Khalaf's former job), who worked on cost-saving projects; and (2) Quality Analysts, who were responsible for gathering data and preparing detailed PowerPoint presentations for Ford's weekly "Business Plan Review" (BPR) meetings. R.135, 3.14.Tr., PageID 5703, 5707. BPR meetings, as Ford explains, were essential strategy sessions with Ford's executive leadership team.3 The BPR presentations involved lengthy reports (of approximately 500 pages) and critical quality data about Ford's vehicles. R.138, 3.20.Tr., PageID 6466–6470. Given the importance of the meetings, Fowler testified, he always "needed the information to be timely" and "free from errors." R.137, 3.19.Tr.,

PageID 6121. That standard was not met by Dr. Khalaf's team, according to Fowler. Compounding the problem, Fowler was disappointed with Dr. Khalaf's leadership of his team at the time. Particularly, while Fowler had expected Dr. Khalaf "to establish the relationships with the team" and "spend time learning what the standards are, learning what the information is, and working with the teams from the business office," Dr. Khalaf seemed to struggle with this role. Indicative of this, in June 2013, Kim Harris, one of the employees directly reporting to Dr. Khalaf, recorded that as a result of Dr. Khalaf's management style, the "[d]epartment is in [t]urmoil (extremely high stress levels, some have had to seek counseling, many applying to get out of th[is] department)." R.79-12, PX27, PageID 2487.

B. Dr. Khalaf's Alleged Protected Conduct

Dr. Khalaf alleges three instances of protected conduct in support of his retaliation claims against Jay Zhou, to whom Dr. Khalaf reported from August 2013 to June 2014.

The first involved a heated phone call between two employees in Dr. Khalaf's department, Pauline Burke and David Buche, in February 2013. This exchange reportedly involved discussion of cost-saving measures. Buche allegedly told Burke to "be a big girl and come up with the savings." R.79-7, PX15, PageID 2459.

Upon learning of the phone exchange, Dr. Khalaf directed Burke to send a "claim" to Human Resources (HR). R.79-8, PX16, PageID 2469.4 In her HR

submission, Burke indicated she had a "right to work in a non-hostile environment." However, in neither Burke's filing nor subsequent email exchanges between Dr. Khalaf and HR did Burke or Dr. Khalaf ever characterize the phone conversation as involving sexual discrimination or sexual harassment. *See id.*; R.79-8, PX16, PageID 2468–2469.

The second instance of protected conduct referenced by Dr. Khalaf involved an email he sent in June 2013 to Wendy Warnick, a Human Resources manager at Ford. *See* R.37-14, PX26, PageID 1176-1180. Prior to sending the email, Dr. Khalaf had approached Fowler, alleging hostile treatment by his subordinates. Fowler responded to Dr. Khalaf's concerns by directing Dr. Khalaf to ask that Warnick transition the hostile subordinates to a different part of the company. R.135, 3.14.Tr., PageID 5744-5745. Adhering to Fowler's instruction, Dr. Khalaf sent an email to Warnick, in which he outlined the hostile treatment he had faced by his subordinates, and explained that the subordinates' direct supervisor, Kim Harris, had refused to hold them accountable. *Id.* at PageID 5745; R. 37-14, Warnick Email, Page ID 1176-1179. Dr. Khalaf characterized the collective actions of his subordinates as creating a hostile work environment. R.37-14, PX25, PageID 1176-1179. According to Dr. Khalaf, HR's response was to do nothing. R.135, 3.14.Tr., PageID 5745. Frustrated with the inaction, Dr. Khalaf approached Fowler again about his subordinates. *Id.* at PageID 5745-5746. At that point, Fowler responded that Ford would not relocate the hostile

subordinates, and Dr. Khalaf would just have to "deal with it." *Id*. at PageID 5746.

The final instance of protected conduct referenced by Dr. Khalaf involved his filing another complaint to HR on April 4, 2014, approximately three weeks before he was placed on the "performance-enhancement-plan" (PEP) by Zhou. *Id*. at PageID 5782, 5787-5787; R.140, 3.22.Tr., PageID 6840-6841. In the email, Dr. Khalaf specifically alleged that he was being subjected to a hostile work environment by Zhou and Fowler, and that he was being retaliated against for his protected activity. R.135, 3.14.Tr., PageID 5783; PX64, R.79-24, HR Email, PageID 2536. Several days after Dr. Khalaf's filing of the complaint, he met with HR officer Les Harris. During this encounter, Dr. Khalaf offered further explanation of his April 4 complaint, stating that he was reporting discrimination and harassment based on his national origin, which included Fowler's abusive treatment of him in one-on-one meetings and Fowler's demands that Dr. Khalaf—and only Dr. Khalaf—fetch Fowler coffee in larger meeting settings. R. 135, 3.14.Tr., PageID 5785-5786.

C. Fowler's Re-Organization of the QS&PP Department

Fowler testified that even after several months as department manager, Dr. Khalaf in 2013 was still failing to prepare the BPR in a satisfactory manner. R.137, 3.19.Tr., PageID 6122. Additionally, Dr. Khalaf continued to encounter difficulties in managing his team, as documented by "Pulse" surveys,5 completed by Dr. Khalaf's subordinates in August and September

2013. R.138, 3.20.Tr., PageID 6388-6390; R.137, 3.19.Tr., PageID 6167; *see also id.* at PageID 6252. One particular report indicated that Dr. Khalaf received a rating of "30" from his subordinates based on their dissatisfaction with him as a supervisor. Ford characterized this score as "shocking[ly] low." In fact, it was the "lowest" score to ever be recorded in the QS&PP Department. R.137, 3.19. Tr., PageID 6256, 6265.

According to Fowler, Dr. Khalaf's sub-optimal scores, as well as "[a] lot of errors in [Dr. Khalaf's] presentation," led Fowler to reorganize the QS&PP Department. R.136, 3.15.Tr., PageID 6029. The first change he made was to appoint Zhou as manager of the department. *Id.*; R.135, 3.14.Tr., PageID 5755-5756; R.137, 3.19.Tr., PageID 6166. Fowler then created a new LL5 position, "Lead QFL," which he assigned to Dr. Khalaf. This position relieved Dr. Khalaf of his prior responsibility to manage the Quality Analysts, though he would still supervise the QFLs. R.135, 3.14.Tr., PageID 5756; R.136, 3.15.Tr., PageID 6029. As Lead QFL, Dr. Khalaf retained the same pay and benefits as his prior position, but he now reported directly to Zhou. R. 137, 3.14.Tr., PageID 6124-6125.

D. Dr. Khalaf's Performance as Lead QFL

In a November 2013 performance assessment conducted by Zhou, Dr. Khalaf received an "Achiever" rating, which, according to Zhou, is the "average rating ... that most [Ford employees] get." R.137, 3.19.Tr., PageID 6261. However, Zhou informed Dr. Khalaf that he was "trending toward a

lower achiever" rating. *Id.* In his written evaluation, Zhou indicated that Dr. Khalaf's "leadership & supervisory skills need to be addressed." R.82-5, DX26, PageID 2899. Underscoring this assessment, Zhou offered examples of what he believed were Dr. Khalaf's sub-optimal leadership characteristics, including his inabilities to (1) "own[ ] an issue" versus decide it was "out of [his] control"; (2) "acknowledg[e] a concern & [ ] delegat[e] for resolution"; and (3) "deal[ ] with difficult situations, communication skills, team motivation & leadership engagement." *Id.* According to this written assessment, improvement would require Dr. Khalaf to address his "PULSE [ratings], personnel relations issues, morale, relationships, & decision making." *Id.* at PageID 2900. Finally, Zhou warned that "[i]f there [was] not sustained improvement," Dr. Khalaf would "be placed on a PEP." *Id.*

After providing this evaluation, Zhou made efforts to assist Dr. Khalaf with his leadership skills. Zhou shared with Dr. Khalaf resources, available through Ford's website, that could aid employees with "leadership and development and communications skills development." R. 37, 3.19.Tr., PageID 6262. However, according to Zhou, when he met with Dr. Khalaf in January 2014, Dr. Khalaf continued to deny his "responsibility on the items highlight[ed] in the performance [review]." R.137, 3.19. Tr., PageID 6265.

E. Dr. Khalaf's Initial Placement on a "Performance Enhancement Plan"

Dr. Khalaf's management problems with his teams persisted into March 2014. During that month, Dr. Khalaf's direct supervisees met with Zhou to "complain[ ] about ... the leadership behaviors of Dr. Khalaf" and discuss "how people [were] mistreated" within the group. R.137, 3.19.Tr., PageID 6214-6215. According to Zhou, one employee in particular wanted "to change job[s]" because the stress of dealing with Dr. Khalaf was "affecting [that employee's] health." R.138, 3.20.Tr., PageID 6394. Upon concluding that the "team was destroyed by [Dr. Khalaf]," R.137, 3.19.Tr., PageID 6214, Zhou decided to place him on a PEP. R.137, 3.19.Tr., PageID 6213. An HR representative, who was directly responsible for Dr. Khalaf's department, decided a 30-day PEP, as opposed to a 60-day PEP, would be most appropriate, given that members of HR had "already coached [Dr. Khalaf] on [ ] issues [related to his leadership performance]." R.82-5, DX132, PageID 2902. Nonetheless, as HR noted at the time, if Dr. Khalaf did not improve during his initial 30-day PEP, this plan would be "extend[ed] to a second 30[-]day PEP with [Career Transition Plan] language." *Id.*

The first PEP was set to commence on April 4, 2014. On that day, Zhou scheduled a meeting with Dr. Khalaf at which he planned to deliver news of the PEP. But, before the meeting could take place, Dr. Khalaf canceled the appointment. He indicated to Zhou that he would be "working from home" on

April 4 instead. R.82-5, DX135, PageID 2909; R.137, 3.19.Tr., PageID 6273–6274.

On the afternoon of April 4, Dr. Khalaf then submitted an official complaint to HR, in which he stated that he had been harassed by Fowler and Zhou. R.79-24, PX64, PageID 2536. As discussed above, his act represented the third instance of "protected conduct" that Dr. Khalaf referenced in support of his retaliation claim against Zhou. However, nowhere in Dr. Khalaf's complaint or within any other correspondence he sent to HR related to the alleged harassment, did Dr. Khalaf ever state that Fowler had criticized his English. *Id.*; R.136, 3.15.Tr., PageID 5899.

On April 23, 2014, Zhou finally delivered the PEP to Dr. Khalaf. Shortly thereafter, when Dr. Khalaf asked HR supervisor Mike Lank why he was being placed on a PEP, Lank responded to him, "you had your chance when you filed your complaint." R.135, 3.14.Tr., PageID 5789. During the months thereafter, Zhou met with Dr. Khalaf on a weekly basis in order to review Dr. Khalaf's progress and offer feedback. R.82-5, DX159, PageID 2944; R.137, 3.19.Tr., PageID 6281–6262, 6285–6293.

F. Dr. Khalaf's Second PEP and His Disability Leave

Dr. Khalaf failed to complete the first PEP successfully and therefore was placed on a second PEP. R.137, 3.19.Tr., PageID 6294. This PEP stated that if Dr. Khalaf did not "demonstrate significant and sustained improvements," his employment could be terminated. DX164, App.4; *Id.*, App.3. On June 27,

2014, the day the second PEP was scheduled to end, Dr. Khalaf filed for a disability leave of absence, claiming he was "totally disabled from working." R.135, 3.14.Tr., PageID 5842–5843. According to Dr. Khalaf, his need for a leave of absence stemmed from emotional strain he had experienced at work. He also indicated he had taken antidepressants and anti-anxiety medication since March 2014. *Id.* at PageID 5794, 5796.

Throughout this period, Dr. Khalaf had consulted with his family physician, as well as a psychologist, Dr. Michael Katz. *Id.* at 5795-5796. The latter diagnosed Dr. Khalaf with post-traumatic stress disorder (PTSD), based on Dr. Khalaf's symptoms, which included difficulty sleeping, nightmares, stress, muscle tension, extreme anxiety, and depression. R.137, 3.19 Tr., PageID 6317-6319, 6324-6330. Defendants dispute Dr. Katz's PTSD diagnosis and claim that he made it prematurely, after seeing Dr. Khalaf on only one occasion. Appellees' Br. at 56-57.

Dr. Khalaf remained on medical leave from Ford for approximately one year. R.135, 3.14.Tr., PageID 5803. Based on the terms of Ford's disability insurance policy, he was paid 100 percent of his salary for the first twelve weeks of his disability leave and 60 percent for the remainder of the year. *Id.* at 5796-5797. In compliance with Ford's requirements under the policy, Dr. Khalaf's physician and psychologist submitted paperwork at approximately one-month intervals, which confirmed Dr. Khalaf's need for a medical leave. *Id.* at PageID 5797. It eventually came to light, however, that Dr. Khalaf was

teaching at a local college, Wayne State University. *Id.* at PageID 5801, 5843-5844.

With his disability benefits ending, Dr. Khalaf indicated that he would return to Ford in July 2015.6 *Id.* at PageID 5804. Ford responded to Dr. Khalaf that his prior Lead QFL role had been filled by another employee. R.139, 3.21.Tr., PageID 6559. Consistent with Ford's leave policy, the company placed Dr. Khalaf on a "no work available" status for a 30-day period. *Id.* at 6566. During this time, a search was conducted across the company for an open job commensurate with Dr. Khalaf's skills, experience, and LL5 designation. The search particularly focused on opportunities within the Global Quality Organization, as well as Manufacturing Operations and Powertrain Program Engineering and other groups, including the Material Handling Organization, the Product Development Group, the Vehicle Operations Manufacturing Engineering Group, and New Models departments. R.139, 3.21.Tr., PageID 6565, 6568, 6583, 6582-6590. According to Ford, the search found no LL5 openings. *Id.* at PageID 6586.

Dr. Khalaf disputes that there were no LL5 openings, claiming that his own investigation of Ford Motor Company's career website revealed "[m]any" jobs that were available and possibly consistent with his qualifications. R.135, 3.14.Tr., PageID 5805. However, Dr. Khalaf pointed to no specific job that was available. *Id.* at PageID 5805-5806. Regardless, however, Dr. Khalaf did not dispute that Ford eventually located a Global Quality supervisor

position within Ford's Quality Organization that reasonably matched Dr. Khalaf's skills and experience.7 R.139, 3.21.Tr., PageID 6596. Though the position was at the LL6 level, it offered the same salary as Dr. Khalaf's pre-disability-leave LL5 job, while providing comparable benefits and the potential for him to get another LL5 position in the future. *Id*. The new assignment also would accommodate Dr. Khalaf's specific request that he not report directly to either Zhou or Fowler. *Id.* at PageID 6606.

Dr. Khalaf rejected the job offer. R.135, 3.14.Tr., PageID 5806-5807, 5824–5825; R.80-12, PX122, PageID 2587; R.80-14, PX132, PageID 2597. Consequently, on September 1, 2015, Dr. Khalaf was officially separated from Ford under a designated program that would have offered him a severance package. However, Dr. Khalaf rejected the severance package, given that acceptance was contingent on his signing a release form. R.140, 3.22.Tr., PageID 6871. Dr. Khalaf accepted a higher salary job at BASF, another Michigan-based-corporation. This new position also offered Dr. Khalaf a signing bonus.

G. Procedural History

1. The Jury's Findings

In July 2015, Dr. Khalaf sued Ford, Fowler, and Zhou. R.1., Complaint, PageID 2. He amended the complaint in May 2017. R.45, Amended Complaint, PageID 1820. He alleged violations of 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.; Michigan's Elliott-

Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws, 37.201 *et seq*.; and 42 U.S.C. § 1981. In March 2018, the case was tried before a jury, which returned the following verdicts.

First, the jury concluded that Dr. Khalaf had been neither demoted nor terminated by Ford on account of his race or national origin. Second, the jury determined that neither Ford as a corporate entity nor Zhou had subjected Dr. Khalaf to a hostile work environment. However, the jury did find that Dr. Khalaf's subordinates had subjected him to a hostile work environment based on national origin or race, and that Fowler had subjected him to a hostile work environment based on national origin, but not race. Finally, the jury agreed with Dr. Khalaf's claims that he had been subjected to retaliatory demotion by Ford and Fowler, retaliatory placement on a PEP by Zhou, and retaliatory termination by Ford. Nonetheless, the jury rejected Dr. Khalaf's contentions that he had been subjected to retaliatory placement on a PEP by Fowler or Ford, and that he had been subjected to retaliatory termination by Fowler or Zhou. R.74, Jury Verdict Form, PageID 2400-2401.

Based on these findings, the jury awarded Dr. Khalaf $1.7 million in pension and retirement losses, $100,000 in emotional distress damages, and $15 million in punitive damages, with the latter award to be imposed against Ford alone.

2. Post-Verdict Motions

After the jury returned the verdict, the district court indicated its initial inclination to grant judgment as a matter of law (JMOL) in Ford's favor on the Dr. Khalaf's retaliatory termination claim. R.143, 3.28.Tr., PageID 7237-7238. However, the court decided to delay ruling definitively until it after it had evaluated defendants' post-verdict motions in their entirety.

On July 23, 2018, the district court issued an opinion and order on the entry of judgment. Here again, the court deferred its decision on whether to grant JMOL to Ford on the termination claim, indicating it would do so eventually upon ruling on all of the post-judgment motions. R.95, PageID 3952-3953. Immediately thereafter, the court entered judgment in Dr. Khalaf's favor, which reflected the compensatory and punitive damages awards, in addition to interest, costs, and attorney's fees, as allowable by law. R.99, Judgment, PageID 3964.

On August 20, 2018, defendants filed the following motions: (1) for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b); (2) for a new trial pursuant to Rule 59(a); (3) to alter or amend the judgment pursuant to Rule 59(e); and (4) for remittitur. R.102, New Trial Motion, PageID 4084-4122.

On March 28, 2019, the district court granted defendants' motion for remittitur and reduced the punitive damages from $15 million to $300,000. However, the district court denied defendants' motions for JMOL, to alter or

amend the judgment, or to grant a new trial. R.115, Order, PageID 5111-5130.

Dr. Khalaf subsequently filed an appeal of the district court's remittitur, while defendants cross-appealed the district court's denial of their motions for JMOL or a new trial.8

II. DISCUSSION

We focus our discussion on the motion for judgment as a matter of law because its resolution is dispositive of this appeal. We review a district court's denial of a JMOL motion de novo. *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005). We consider "the evidence in the light most favorable to the non-moving party." *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004) (internal quotations omitted). Judgment as a matter of law is appropriate if "there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Id.* (internal quotations omitted).

"When reviewing the facts of a discrimination claim after there has been a full trial on the merits," this court will consider the "evidentiary underpinnings of a plaintiff's prima facie case" to decide whether the "plaintiff has proven [his] case by a preponderance of the evidence." *Barnes*, 401 F.3d at 736 (original brackets omitted). This review "focus[es] on the ultimate question of [the existence of] discrimination rather than on whether a plaintiff made out a prima facie case." *Id.*

A. Alleged Hostile Work Environment

First, we consider the hostile-work-environment claims alleged against Ford (based on the actions of Dr. Khalaf's subordinates) and Fowler (Dr. Khalaf's supervisor). The jury found that (1) Dr. Khalaf's subordinates had subjected him to a hostile work environment based on national origin or race (thereby implicating Ford as a corporation); and (2) Fowler had subjected Dr. Khalaf to a hostile work environment based on national origin, but not race. However, the jury also found that neither Ford's corporate conduct nor Zhou's individual conduct had subjected Dr. Khalaf to a hostile work environment.

For the reasons discussed below, we hold that the evidence is insufficient to support a finding of defendants' liability on Dr. Khalaf's claims of hostile work environment. Therefore, we **REVERSE** the district's court's denial of defendants' motion for JMOL on these claims.

To allege a hostile work environment claim based on race or national origin under Title VII or the ELCRA, a plaintiff must demonstrate that "(1) [he] belongs to a protected class; (2) [he] was subject to unwelcome harassment; (3) the harassment was based on race [or national origin]; (4) the harassment affected a term, condition, or privilege of employment; and (5) the defendant knew or should have known about the harassment and failed to take action." *Phillips v. UAW Int'l*, 854 F.3d 323, 327 (6th Cir. 2017); *see Boutros v. Canton Reg'l Transit Auth.*, 997 F.2d 198, 203 (6th Cir. 1993) (applying analysis to national-origin based claim); *see also Phillips*, 854 F.3d

at 327 n.3 ("The elements are substantially the same for [the] ELCRA claim."); *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 547 N.W.2d 314 (1996). When evaluating these claims, this court "look[s] at the totality of the alleged [ ] harassment to determine whether it was 'sufficiently severe or pervasive to alter the conditions of [a plaintiff's] employment and create an abusive working environment.' " *Phillips*, 854 F.3d at 327 (quoting *Williams v. CSX Transp. Co.*, 643 F.3d 502, 512 (6th Cir. 2011) (alteration in original) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993))). The circumstances we consider include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Phillips*, 854 F.3d at 327 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (internal citation omitted)).

"[T]his court has established a relatively high bar for what amounts to actionable discriminatory conduct under a hostile work environment theory." *Phillips*, 854 F.3d at 328. "[O]ccasional offensive utterances do not rise to the level required to create a hostile work environment because, '[t]o hold otherwise would risk changing Title VII into a code of workplace civility.' " *Id.* at 327 (quoting *Grace v. USCAR*, 521 F.3d 655, 679 (6th Cir. 2008)). For example, in the context of alleged racial discrimination, this court has determined that "even offensive and bigoted conduct is insufficient to

constitute a hostile work environment if it is neither pervasive nor severe enough to satisfy the claim's requirements." *Id.* at 328; *see also Clay v. United Parcel Service*, 501 F.3d 695, 707–08 (6th Cir. 2007).

Ford disputes Dr. Khalaf's surviving hostile-work environment claims against his subordinates and Fowler. As to the charges against Dr. Khalaf's subordinates, Ford argues that he failed to present any evidence that their alleged harassment of him was "based on race [or national origin]," *Phillips*, 854 F.3d at 327, and relatedly, that he failed to introduce proof indicating the allegedly discriminatory harassment by his subordinates was sufficiently "pervasive [or] severe enough." *Williams*, 643 F.3d at 506, 513; *see also Clay*, 501 F.3d at 707–08. As to Dr. Khalaf's claim against Fowler, Ford argues that Fowler's alleged criticism of Dr. Khalaf's English skills is insufficient evidence of national-origin discrimination. We address this proof in more detail below.

1. Hostile Work Environment Allegedly Created by Dr. Khalaf's Subordinates

a. Absence of Harassment "Based on Race or National Origin"

In support of his claim of harassment by his subordinates, Dr. Khalaf described specific instances of "disrespect" by employees Jim Miller, Les Javor, and Pauline Burke. R.135, 3.14. Tr., PageID 5733. According to Dr. Khalaf, Miller hung "up the phone on [him] two or three times," and "when [Dr. Khalaf] would give [Miller] an assignment, [Miller] would say do it yourself." *Id.* at PageID 5733-5734. In addition, Dr. Khalaf described how Javor was "[v]ery disrespectful" towards him, and "did not accept assignments from [him]." *Id.* at PageID 5737. Dr. Khalaf also testified that "Burke had an issue with [his] performance review comments made to her" and "would not be happy with [him]" unless he changed them. *Id.* at PageID 5762, 5783–5784; R.139, 3.21.Tr., PageID 6657–6660; R.140, 3.22.Tr., PageID 6728–6729; *see also* Appellant's Br. at 10-12.

Dr. Khalaf further referenced anonymous comments submitted by Ford employees in a survey circulated by Ford at the end of 2012. In these responses, as Dr. Khalaf notes, several individuals submitted " 'extremely disrespectful and hostile comments' about [his] English-language skills." R.135, 3.14.Tr., PageID 5741-5743. However, Dr. Khalaf admits that these comments were directed specifically to his "writing and understanding" of English, and did not reference his speech or accent.9 *Id.*

Although, subjectively, these statements from subordinates could have been offensive to Dr. Khalaf, none of these alleged incidents of disrespect10 demonstrates that his subordinates made any comments because of Dr. Khalaf's Lebanese origin or Middle Eastern ethnicity, as required for him to prove a hostile work environment.

Title VII does "not prohibit all verbal or physical harassment in the work place; it is directed only at 'discriminat[ion] ... because of' " protected characteristics under the statutes. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Mere disrespect or antipathy will not be actionable under the statute unless a plaintiff can prove that such was motivated by discriminatory animus. *See id.* The "conduct of jerks, bullies, and persecutors is simply not actionable under Title VII unless they are acting because of the victim's [protected status]." *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 467 (6th Cir. 2012).

When denying defendants' JMOL motion, the district court did acknowledge that "the bulk of the evidence presented demonstrated disrespect by [Dr. Khalaf's] subordinates." R.115, JMOL Order, PageID 5120. Such disrespect, standing alone, is not enough to show unlawful discrimination. But, the district court deemed significant one "anonymous comment left in a drop box [by a Ford employee] that criticized [Dr. Khalaf's] 'writing and understanding English.' " R.115, JMOL Order, PageID 5120. Although this comment made

no explicit mention of Dr. Khalaf's English speaking abilities, the district court considered the comment to be "relat[ed] to [Dr. Khalaf's] accent." *Id.*

As noted above, we have held that in certain circumstances, discrimination based on accent "can be national origin discrimination." *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 549 (6th Cir. 1991) (citing *Berke v. Ohio Dep't of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam)). However, this is a fine line, and each factual scenario must be evaluated contextually, considering that "[u]nlawful discrimination does not occur ... when a Plaintiff's accent affects his ability to perform the job effectively." *Id.* (citation omitted). For example, in *Igwe v. Salvation Army*, we concluded that there was no evidence of national-origin discrimination towards the plaintiff-employee, given that a single comment by another company employee regarding the plaintiff's "broken speech" related to concern about the plaintiff's "communication skills," as opposed to being motivated by discriminatory animus towards his national origin. 790 F. App'x 28, 36 (6th Cir. 2019). Similarly here, the comments about Dr. Khalaf's English skills (which did not reference Dr. Khalaf's accent) related to frustration expressed by Dr. Khalaf's subordinates about their manager's ability to manage and communicate clearly with them in preparation for the weekly BPR meetings—a critical activity performed by the group. Because clear communication skills are a fundamental skillset required of managerial positions across the United States, and such ability was a necessary part of

Dr. Khalaf's specific role as QS&PP Department Manager, there is simply no basis, without more evidence, to infer that the comments were motivated by discriminatory animus.

Nor is there legal merit to Dr. Khalaf's alternative argument for finding discrimination by his subordinates, which he calls a "differential treatment" theory. He claims that his subordinates treated him differently as compared to how they treated his "predecessor Mike Hardy—who is white and American born." Appellant's Resp. 15. As foundation for this argument, he references (1) his testimony that Les Javor had a "smooth relationship" with Hardy, 4.135, 3.14.Tr., PageID 5735; and (2) Michelle Dietlin's testimony that Jim Miller "wasn't interested in doing work that wasn't specifically requested by Mike Hardy." R.136, 3.15.Tr., PageID 5953.

This court has held that a comparison between one member of a protected class and one employee outside of that protected class is not "comparative evidence about how the alleged harasser[s] treated *members* of both races in a mixed-race workplace." *Williams*, 643 F.3d at 511 (emphasis added). Furthermore, none of the cases referenced by Dr. Khalaf supports the theory that differential treatment of only *two* individuals, as compared to differential treatment of *all* individuals in the relevant racial categories, demonstrates discriminatory animus under a "differential treatment" theory. Finally, the two pieces of testimony about Javor and Miller do not demonstrate that the subordinates refused assignments on account of Dr.

Khalaf's race or national origin. In fact, this testimony leaves open a number of non-discriminatory rationales to account for the feelings expressed by the employees, including potentially the fact that they simply preferred Mike Hardy's management style.

Therefore, we determine that Dr. Khalaf failed to introduce sufficient evidence to allow a reasonable jury to find the requisite discriminatory animus from his subordinates based on race or national origin.

b. Absence of Sufficiently "Pervasive" or "Severe" Discriminatory Harassment

In addition to the absence of proof of discriminatory animus, there is another reason why Dr. Khalaf lacks sufficient evidentiary support for his claim of hostile work environment created by his subordinates. He did not introduce evidence that would allow a reasonable jury to find that he was subjected to harassment that was widespread and significant enough to give rise to a claim.

"A hostile work environment occurs '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 463 (6th Cir. 2000) (citation omitted; alteration in original); *see also In re Rodriguez*, 487 F.3d 1001, 1010-11 (6th Cir. 2007) (evidence of discrimination based on accent that was sufficient to survive summary

judgment on failure-to-promote claim was insufficient to support hostile-work-environment claim).

Alleged harassment in the context of a hostile-work environment-claim must be sufficiently "pervasive" or "severe" to alter the conditions of employment. *Williams*, 643 F.3d at 513. This standard sets a high bar for plaintiffs in order to distinguish meaningful instances of discrimination from instances of simple disrespect. In this court's determination of whether conduct clears that bar, we consider various factors, including " 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Id.* at 512–13 (citing *Harris*, 510 U.S. at 21, 114 S.Ct. 367). "Isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of [a plaintiff's] employment.' " *Id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). "Occasional offensive utterances do not rise to the level required to create a hostile work environment." *Grace v. USCAR*, 521 F.3d 655, 679 (6th Cir. 2008). "To hold otherwise would risk changing Title VII into a code of workplace civility, a result we have previously rejected." *Id.* (citation omitted).

The alleged comments of Dr. Khalaf's subordinates regarding his "writing and understanding" of English, do not rise to the level of hostility based on

national origin to trigger Title VII or ELCRA liability. R.135, 3.14.Tr., PageID 5741-5743. The same can be said of the several isolated comments submitted in one survey conducted by Ford in 2012. That these survey comments are insufficient to establish a pattern of "pervasive" discrimination, is clear when they are compared to far more problematic statements in other cases that have been insufficient to establish Title VII liability. *See, e.g.*, *Williams*, 643 F.3d at 513 (holding that multiple "despicable" statements that were "certainly insensitive, ignorant, and bigoted" did not constitute "severe or pervasive harassment given their isolated nature and their resemblance to a 'more offensive utterance' ").

Therefore, we determine that Dr. Khalaf failed to introduce sufficient proof for a reasonable jury to find the requisite "severe and pervasive" element for the hostile-work-environment claim relating to his subordinates.

2. Hostile Work Environment Allegedly Created by Fowler

Although the jury rejected Dr. Khalaf's claim against Fowler of a race-based hostile work environment, it found that Fowler subjected Dr. Khalaf to a national-origin-based hostile work environment. The national-origin claim is a closer call, but we ultimately conclude that Dr. Khalaf presented insufficient evidence to show that Fowler subjected him to a hostile work environment based on either race or national origin.

To support the national-origin claim, Dr. Khalaf states that Fowler was "disrespectful" to him during one-on-one meetings. As QS & PP Department

manager, Dr. Khalaf reported directly to Fowler, and therefore was required to meet on a weekly basis with him. R.135, 3.14.Tr., PageID 7515. According to Dr. Khalaf, at these weekly sessions, "Fowler frequently exhibited disrespectful behavior towards [him]," First Appellant Br. at 8, which included Fowler's "pound[ing] the table with his fist in a hostile manner, shouting demeaning things such as: '[W]hat's wrong with you? Don't you *know* English? Don't you *understand* English? Do I have to *spell* every time to you in English? Are you talking down to me? Are you whispering in my ears?' " *Id.* (emphases added).

Dr. Khalaf testified that Fowler was "[v]ery hostile" during their one-on-one meetings. Fowler stated that he was going to "crush" Dr. Khalaf "like an ant." *Id.* During "those hostile moments," Dr. Khalaf testified he "would pray that the earth would open and swallow" him. First Appellant Br. at 8 (quoting R.135, 3.14.Tr., PageID 5717). On other occasions, Fowler would call Dr. Khalaf up to his office, "only to order him to stop and leave as soon as he arrived at the door." First Appellant Br. at 9 (quoting R.135, 3.14.Tr., PageID 5717-5718). And, on "[o]n still other occasions, when Dr. Khalaf brought documents to Fowler's office, Fowler 'bark[ed] commands' to him like 'a dog' telling him not to come close, and to 'drop' what he 'ha[d] and leave.' " First Appellant Br. at 9 (quoting R.135, 3.14.Tr., PageID 5718). Fowler's comments during these encounters made Dr. Khalaf feel "shocked, horrible, humiliated,

[and] devastated," "week after week after week" for months. First Appellant Br. at 8 (citing R.135, 3.14.Tr., PageID 5717).

Dr. Khalaf alleged further abuse from Fowler at departmental meetings. On those occasions, Dr. Khalaf's role was to lead the meeting, by both "setting up the agenda" and running the group "through reports from various regions." First Appellant Br. at 10; *see* R.135, 3.14.Tr., PageID 5722–5723. However, as Dr. Khalaf explained, Fowler treated him "in a demeaning and disrespectful manner," in front of the entire group, including [ ] passing him notes [and] demanding that Dr. Khalaf leave the meeting to obtain coffee for [him]." First Appellant Br. at 10; *see* R.135, 3.14.Tr., PageID 5724-5725. Similar to his experience during the one-on-one meetings, Dr. Khalaf found this treatment "to be humiliating," and he believed "other attendees had the same reaction to Fowler's conduct." First Appellant Br. at 10; *see* R.135, 3.14.Tr., PageID 5724–5728. This behavior continued "every week for months," and Dr. Khalaf contends it constituted national-origin discrimination because he "was the only person of Middle Eastern descent in those meetings—and the only person Fowler asked to fetch him coffee." First Appellant Br. at 10; *see* R.135, 3.14.Tr., PageID 5726.

Dr. Khalaf was understandably upset by Fowler's behavior. But, was there enough proof for a reasonable jury to find a hostile work environment based on Dr. Khalaf's national origin? We conclude there was not, based on the applicable case law, as we explained below.

We turn first to whether the evidence of Fowler's criticism of Dr. Khalaf's English skills is sufficient to support the jury's finding of a hostile work environment. We understand that "accent and national origin" are overlapping concepts, and in some circumstances can be "inextricably intertwined." *Ang*, 932 F.2d at 549. Or, in other words, "discrimination based on manner of speaking can be national origin discrimination." *Id.*

For example, in *Rodriguez*, we held that a plaintiff had demonstrated a prima facie case of national-origin discrimination sufficient to survive summary judgment on a failure-to-promote claim. The plaintiff proffered evidence that the decision-maker in her company had made "derogatory remarks about [her] accent and ethnicity and statements to the effect that [the decision-maker] 'would not allow her to become a supervisor ... because of [her] Hispanic speech pattern and accent.' " 487 F.3d at 1006. Similarly, in *Berke*, we found sufficient evidence for a plaintiff's failure-to-promote claim, concluding that "plaintiff was denied two positions ... because of her accent which flowed from her national origin." 628 F.2d at 981.

However, both *Rodriguez* and *Berke* involved plaintiffs who offered evidence that they were *denied* promotions on direct account of accent-based national origin discrimination by corporate decision-makers. Our court recognizes the difference between discriminatory animus motivating accent-based comments directed at an employee, as in *Rodriguez* and *Berke*, and situations "when a [p]laintiff's accent affects his ability to perform the job

effectively," when criticism of English skills does not constitute unlawful discrimination. *Ang*, 932 F.2d at 549; *see also Igwe*, 790 F. App'x at 36 (determining that in certain contexts where a job requires a specific skillset, it is not unlawful to complain of an employee's "communication skills—whether related to his national origin or not"). Other circuits have also recognized the difference between comments motivated by discriminatory intent and legitimate job-specific-related critiques. *See, e.g.*, *Hannoon v. Fawn Eng'g Corp.*, 324 F.3d 1041, 1048 (8th Cir. 2003); *Bina v. Providence Coll.*, 39 F.3d 21, 26 (1st Cir. 1994) ("references to audience difficulty in understanding [plaintiff] may reasonably be interpreted as expressing a concern about his ability to communicate to students rather than discriminatory animus based on ethnicity or accent"); *Fragante v. City & Cty. of Honolulu*, 888 F.2d 591, 596–97 (9th Cir. 1989) ("[t]here is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance") (emphasis omitted).

Dr. Khalaf presents no evidence that Fowler's statements included any criticism of Dr. Khalaf's accent. Dr. Khalaf also fails to provide any relevant context regarding the referenced statements by Fowler that would allow a reasonable jury to find discriminatory animus. There is no proof that could help a jury and this court assess what motivated the comments. Undoubtedly, Dr. Khalaf's role as QS&PP Department Manager required

that he communicate clearly with the team he managed, as well as with Fowler.

And, while Dr. Khalaf was offended by Fowler's comments, a plaintiff's mere subjective offense does not rise to the situations we deemed "discriminatory" in *Rodriguez* or *Berke*. The plaintiffs in both those cases presented evidence that their accents were the source of their superiors' decisions to deny them job promotions.

Based on those cases, Dr. Khalaf needed to present proof to allow a reasonable inference that Fowler's remarks about Dr. Khalaf's English were really about Dr. Khalaf's accent. Then, Dr. Khalaf would have to offer evidence to allow a reasonable inference that criticism of his accent was related or motivated by Fowler's animus towards Dr. Khalaf's Lebanese national origin. This, Dr. Khalaf did not do.

Fowler's derogatory statements, though abusive, were not enough to establish a hostile work environment based on Fowler's national origin. Rude, yes; discriminatory, no. Therefore, we hold that there was insufficient evidence to conclude that Fowler's criticism of Dr. Khalaf's English skills and other comments constituted national-origin discrimination.

B. Alleged Retaliation

Next, we consider the claims of alleged retaliation against Dr. Khalaf through his demotion, placement on a PEP, and alleged termination. As noted, the jury found that Dr. Khalaf had been subjected to retaliatory

demotion by Ford and Fowler, retaliatory placement on a PEP by Zhou, and retaliatory termination by Ford.

To demonstrate a prima facie case of retaliation under Title VII and the ELCRA, the plaintiff bears the initial burden of establishing that "(1) he ... engaged in protected activity, (2) the employer knew of the exercise of the protected right, (3) an adverse employment action was subsequently taken against the employee, and (4) there was a causal connection between the protected activity and the adverse employment action." *Beard v. AAA of Mich.*, 593 F. App'x 447, 451 (6th Cir. 2014) (quoting *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720 (6th Cir. 2008)); *see also Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 464 (6th Cir. 2001) (retaliation claims under Section 1981 governed by same standards as Title VII). "[W]hen it comes to federal antidiscrimination laws like § 1981 ... a plaintiff must demonstrate that, but for the defendant's unlawful conduct, [the] alleged injury would not have occurred." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, —— U.S. ——, 140 S. Ct. 1009, 1014, 206 L.Ed.2d 356 (2020) ("This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action.").

Furthermore, "the Supreme Court ... made clear that the scope of Title VII's retaliation provision is broader than that of Title VII's discrimination provision." *Niswander*, 529 F.3d at 720 (citing *Burlington Northern & Santa*

Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)); *see also* Civil Rights Act of 1964, §§ 703(a), 704(a), 42 U.S.C. §§ 2000e–2(a), 2000e–3(a). "In contrast to Title VII's discrimination provision, the 'adverse employment action' requirement in the retaliation context is not limited to an employer's actions that affect the terms, conditions, or status of employment, or those acts that occur in the workplace." *Id.* (citing *Burlington N.*, 548 U.S. at 62–66, 126 S.Ct. 2405). "The retaliation provision instead protects employees from conduct that would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Niswander*, 529 F.3d at 720 (quoting *Burlington N.*, 548 U.S. at 60, 126 S.Ct. 2405).

1. Alleged Retaliatory Demotion of Dr. Khalaf by Fowler

We first address whether there is sufficient evidence that would allow a reasonable jury to find that Dr. Khalaf's encouragement of Burke to file a HR complaint against Buche in February 2013 qualified as a "protected activity" under Title VII and the ELCRA. Dr. Khalaf claims that he instructed Pauline Burke, following her phone exchange with David Buche, to file a claim with HR. R.79-8, PX16, PageID 2469 ("I have asked Pauline to file a claim with you because she made accusation over a discussion she had with David [ ]"). Dr. Khalaf contends that Fowler "retaliated" against this "protected activity" in March 2013 by replacing him with Jay Zhou (a higher-level LL3 employee) as Lead QFL responsible for overseeing the QS&PP Department. As a result

of Zhou's appointment, Dr. Khalaf was relieved of his former responsibility of managing the Quality Analysts. R. 79-11, PX24, PageID 2480; DX70, App.1.

For a plaintiff to demonstrate a qualifying "protected activity," he must show that he took an "overt stand against suspected illegal discriminatory action." *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 288 (6th Cir. 2012) (citations omitted). "In other words, an employee 'may not invoke the protections of the Act by making a vague charge of discrimination.' " *Id.* (quoting *Fox v. Eagle Distrib. Co.*, 510 F.3d 587, 591 (6th Cir.2007) (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir.1989) (holding that complaints about "ethnocism" were too vague to constitute protected activity))).

With this legal standard in mind, we find that *Willoughby v. Allstate Insurance Co.*, offers a comparable set of facts to what occurred here. In *Willoughby*, the plaintiff claimed he had engaged in a "protected activity" when he sent a three-page letter to his employer following his demotion, which "mention[ed] three previous sexual harassment complaints against" another employee and discussed general unhappiness amongst white employees at his company. 104 F. App'x 528, 530–31 (6th Cir. 2004). Although the plaintiff had mentioned "sexual harassment" in his letter, which could be indicative of his taking a stand against such, we dismissed his complaint because the letter was not actually "asserting discrimination," but rather was intended primarily to "impeach the other employee's credibility"

and "contest[ ] the correctness of a decision made by his employer. ..." *Id.* (concluding that the "vague charge of discrimination in [[the employee's] internal letter] is insufficient to constitute opposition to an unlawful employment practice") (quoting *Booker*, 879 F.2d at 1313).

Dr. Khalaf's report to Ford's HR Department said even less about discrimination than did the letter in *Willoughby*. Dr. Khalaf's report did not even explicitly characterize Burke as having been "sexually harassed." Nor did Dr. Khalaf ever state that he had instructed Burke to file a sexual harassment or sexual discrimination complaint. Rather, immediately after the incident occurred, Dr. Khalaf indicated that he had "asked Pauline [Burke] to file a claim with [HR] because she made an accusation over a discussion she had with David Buche yesterday." R.79-7, PX15, PageID 2458; R. 79-8, PX26, PageID 2469. Dr. Khalaf's statements were not enough for a reasonable juror to conclude that Dr. Khalaf charged "illegal discriminatory action," as to which he was taking a direct stand. *Blizzard*, 698 F.3d at 288.

There was insufficient evidence to show that Dr. Khalaf's action in response to the February 2013 telephone call was "protected activity" under Title VII or the ELCRA. We therefore **REVERSE** the district court's denial of JMOL on Dr. Khalaf's retaliatory demotion claim.

2. Zhou's Alleged Retaliatory Placement of Dr. Khalaf on a Performance Enhancement Plan

The jury determined that Zhou, but not Ford or Fowler, retaliated against Dr. Khalaf by placing him on a PEP. We conclude that this finding was not supported by the evidence based on an evaluation of the undisputed timeline related to Dr. Khalaf's employment, which indicates no connection between Dr. Khalaf's alleged protected activities and Zhou's PEP decision.

Dr. Khalaf encouraged Burke to report the phone incident to HR in February 2013, and he filed his harassment complaint against Fowler and Zhou on April 4, 2014. There is no evidence that either of these acts had any impact on Zhou's decision to place Dr. Khalaf on a PEP. The latter decision was actually made in March 2014, based on documented evidence of Dr. Khalaf's sub-par job performance.

As Dr. Khalaf's counsel conceded at trial, Zhou's imposition of the PEP had nothing to do with the Burke complaint because Zhou was not Dr. Khalaf's supervisor at the time of the complaint: "I'm not going to try to ask the jury to find liability against Zhou for the Pauline Burke complaint; it was before his time." R.141, 3.26.Tr., PageID 6998. Indeed, Zhou joined the QS&PP Department in August 2013, *six months* after the Burke-Buche phone incident occurred. *See id*; DX70, App. 1. Retaliation requires proof "that the individuals charged with taking the adverse employment action knew of the [plaintiff's] protected activity," *Mulhall v. Ashcroft*, 287 F.3d 543,

551–52 (6th Cir. 2002), and there is simply no evidence that Zhou even was aware of Burke's complaint to HR and Dr. Khalaf's actions related to that complaint.

Dr. Khalaf contends that another relevant protected activity motivating Zhou's decision to place him on the PEP was the email he sent to HR manager Wendy Warnick in June 2013.11 *See* R.37-14, PX 26 PageID 1176-1180. Attempting to support the connection between the email and his eventual placement on a PEP, Dr. Khalaf references the response made by HR supervisor Mike Lank to Dr. Khalaf's question for why he was being placed on a PEP, where Lank stated "you had your chance when you filed your complaint." R.135, 3.14.Tr., PageID 5789. According to Dr. Khalaf, this comment alone is sufficient evidence to support the jury's conclusion that Zhou's imposition of the PEP represented retaliation for Dr. Khalaf's protected activity. However, we find no merit in this argument either.

The contents of Dr. Khalaf's email to Warnick and the alleged connection Dr. Khalaf attempts to draw between its transmission and Mike Lank's statement appear tenuous and unclear. As we noted above, in the context of protected conduct claims, employees "may not make[ ] vague charge[s] of discrimination." *Blizzard* 698 F.3d at 275 (quoting *Fox*, 510 F.3d 587 (quoting *Booker*, 879 F.2d at 1313)). Therefore, it is questionable whether the email, in which Dr. Khalaf described what he perceived as the sub-optimal behaviors of his subordinates, constituted a protected activity in the first place, given

that not once did Dr. Khalaf describe an instance of actual discrimination directed towards him based on his race or national origin. R.37-14, PX 26 PageID 1176-1180. Instead, Dr. Khalaf only described what he perceived to be instances of subordinates' disrespect, sub-par work quality, and defensiveness, none of which he explicitly connected to being motivated by subordinates' animus towards his race or national origin. For example, Dr. Khalaf described one subordinate, "Kim," as "[v]ery defensive when a comment or question is raised to a person in [her] section." R.37-14, PX 26 PageID 1179. He described the performance of another subordinate, "Shari," as "[a]lways requr[ing] direction," and characterized her leadership as "aggressive" and "show[ing] a lack of respect." *Id.* Similarly, Dr. Khalaf explained that the leadership qualities of another subordinate, "Jim," included his "[h]aving tendency to get unpolite, nervous, and aggressive in his lack of respect to others including his manager." *Id.*

However, even under the assumption that the email represented a valid protected activity, Dr. Khalaf must show proof that Zhou, the *decision-maker* on the PEP, "knew of the protected activity," *Mulhall v. Ashcroft*, 287 F.3d 543, 551-52, which Dr. Khalaf fails to do. The dearth of evidence showing Zhou had of knowledge of the email is further demonstrated by the facts that (1) the email was addressed to Warnick alone; and (2) the email was delivered in June 2013, two months before Zhou joined the Department. R.37-14, PX26, PageID 1176; *see also* DX 70, App. 1. Finally, Dr. Khalaf fails to

show the requisite causality between the June 2013 email and his April 2014 placement on a PEP—an act that occurred *ten* months later. Lank's comment, without more, is irrelevant, as Dr. Khalaf has shown no connection between the comment and the action of Zhou, the *decision-maker* here. Furthermore, for causation to be shown between an alleged protected activity and the retaliatory action, "the temporal proximity must be 'very close.' " *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001). That nexus is clearly not met here, given the ten-month span separating the complaint and the PEP. For these reasons, there is no evidence from which a reasonable jury could find a connection between Dr. Khalaf's June 2013 email to Warnick and the imposition of the PEP.

Finally, there is no evidence from which a reasonable jury could find a connection between Dr. Khalaf's complaint against Fowler and Zhou and the imposition of the PEP. Consider the undisputed chronology of events that occurred relating to the PEP decision. Although Dr. Khalaf notes that his official placement on a PEP (on April 23, 2014) occurred after he filed the April 4, 2014 complaint with HR, there is no evidence in the record from which a reasonable juror could have found that the PEP was caused by Dr. Khalaf's complaint. The basis for the PEP dated back to November 2013, when Zhou met with Dr. Khalaf about his performance review. Zhou indicated that Dr. Khalaf was "trending towards a lower achiever & he is expected to improve & sustain expected behaviors." R.79-16, PX39, PageID

2506. At that time, Zhou warned Dr. Khalaf that "[i]f there [was] not sustained improvement," Dr. Khalaf would "be placed on a PEP." *Id.; see also* R.137. 3.19.Tr., PageID 6261-6262; R.135, 3.14.Tr., PageID 5773-5775. Following this review, Zhou testified, he tried to help Dr. Khalaf improve the noted deficiencies in his job performance, particularly his leadership skills. Zhou even "went through Ford['s] website to try to find resource[s] ... for the leadership and development and communications skills development," which he shared with Dr. Khalaf. R.137, 3.19.Tr., PageID 6262. However, Zhou testified that he met with Dr. Khalaf again in January 2014, and at this meeting Dr. Khalaf "didn't own [his leadership issues]" or "take responsibility on the items highlight[ed] in the performance review." R.137, 3.19.Tr., PageID 6265. Instead, according to Zhou, Dr. Khalaf placed blame on his subordinates.

Meanwhile, despite this initial performance review and follow-up, the relationship between Dr. Khalaf and his team of department employees failed to improve. Dr. Khalaf's management problems were the focus of a March 2014 meeting between department employees and Zhou. It was a "very, very painful discussion," Zhou testified, in which "everybody complained about ... the leadership behaviors of [Dr. Khalaf] and how people are mistreated." Based on these negative responses, Zhou concluded that the "team [had been] destroyed" by Dr. Khalaf. That same month, Zhou made the decision to institute the PEP for Dr. Khalaf. R.137, 3.19.Tr., PageID 6214. In order to

officially process the decision, Zhou had to work with HR through late-March 2014, which required that he and HR representatives finalize the wording of the PEP. *Id.* at PageID 6213. On April 2, 2014, HR then sent an email to Zhou approving the final version of the PEP and instructing him that it was "Ok to move forward with delivery" of the PEP on Friday, April 4. R.140, 3.22.Tr. PageID 6851; R.82-5, DX132, PageID 2902. However, on the morning of April 4, 2014, Dr. Khalaf unexpectedly cancelled his scheduled meeting with Zhou, meaning Zhou was unable to deliver the PEP that day. R.82-5, DX135, PageID 2909. That afternoon Dr. Khalaf sent an email to HR complaining about the alleged harassment by Fowler and Zhou. R.79-24, PX64, PageID 2536.

"To establish a causal connection between the protected activity and the adverse employment action, a plaintiff must present evidence 'sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action.' " *In re Rodriguez*, 487 F.3d 1001, 1011 (6th Cir. 2007) (quoting *Walcott v. City of Cleveland*, 123 F. App'x 171, 178 (6th Cir. 2005) (quoting *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir.1997))).

There was no proof presented at trial to allow for a reasonable inference that the PEP resulted from Dr. Khalaf's complaint about Fowler and Zhou. The district court acknowledged the specific sequence of events outlined above, even recognizing that (1) Zhou did not become Dr. Khalaf's manager until months after Dr. Khalaf's actions related to the Burke complaint in

February 2013; and (2) that "the PEP paperwork was processed before [Dr. Khalaf] made his April 2014 harassment complaint" about Zhou and Fowler. R.115, JMOL Order, PageID 5122 (emphasis added). Nonetheless, the court denied judgment as a matter of law to Zhou, rationalizing that "the evidence at trial demonstrated a continuous course of conduct aimed at [Dr. Khalaf] following his protected activity." *Id.* Respectfully, we believe the district court did not adequately account for the lack of evidence that Zhou actually knew about Dr. Khalaf's first protected activity (encouraging Burke to report the February 2013 call sexual harassment incident) or second protected activity (the June 2013 email) or that the PEP had anything to do with the third protected activity (reporting alleged harassment under Fowler and Zhou to HR).

Ultimately then, because there was no evidence to support a continuous course of retaliatory conduct aimed at Dr. Khalaf following any protected activity, there was no basis for a reasonable jury to find the requisite causation for Dr. Khalaf's retaliation claim. Therefore, we **REVERSE** the district court's denial of JMOL on Dr. Khalaf's retaliatory PEP claim against Zhou.

3. Dr. Khalaf's Alleged Retaliatory Termination by Ford

Finally, Ford argues that it is entitled to JMOL on Dr. Khalaf's retaliatory termination claim.

Ford advances two arguments: (1) that undisputed evidence shows that Dr. Khalaf was not actually terminated; and (2) alternatively, that even if he had been terminated, Dr. Khalaf's undisputed refusal to take the job offered to him by Ford constituted a legitimate, non-retaliatory reason for Dr. Khalaf's termination. We agree with Ford's first argument and do not address the second.

Dr. Khalaf was on a medical leave of absence from June 28, 2014 through July 13, 2015. R.135, 3.14.Tr., PageID 5824. Dr. Khalaf ended his leave of absence after his benefits under his disability plan terminated.

Ford then conducted a generalized search for open positions suitable for Dr. Khalaf's experience and skillset; however, Ford was unable to identify any available jobs at Dr. Khalaf's old management level (LL5) and made this clear to Dr. Khalaf. *Id*. at 5824-5826; R.80-14, PX132, PageID 2597. Dr. Khalaf even conducted a search himself and could not identify any available managerial jobs at his former LL5 level, only finding non-management LL6 positions. R.136, 3.15.Tr., PageID 5909-5911. Ford then offered Dr. Khalaf an LL6 job, with an August 31, 2015 deadline for acceptance. Though this was a lower level position than Dr. Khalaf previously held, Ford indicated that the job would be at the same rate of pay as Dr. Khalaf's prior LL5 job. R. 135, 3.14.Tr., PageID 5806-5807, 5824-5825; R.80-12, PX122, PageID 2587; R.80-14, PX132, PageID 2597. But, on August 28, Dr. Khalaf rejected Ford's job offer and he accepted a position with another Michigan-based corporation,

BASF. The new job gave Dr. Khalaf a higher salary, as well as a signing bonus. R.135, 3.14.Tr., PageID 5818, R.136, 3.15.Tr., PageID 5911-5915.

This evidence cited by Ford establishes that Dr. Khalaf cannot establish his retaliatory-termination claim because Ford offered him the only available and reasonable job at the time, which Dr. Khalaf refused in order to accept the BASF job offer. Therefore, Dr. Khalaf was not terminated. *See, e.g.*, *Green v. Brennan*, —— U.S. ——, 136 S. Ct. 1769, 1777, 195 L.Ed.2d 44 (2016) ("An ordinary wrongful discharge claim ... has two basic elements: discrimination and *discharge*.") (emphasis added); *Evans v. Davie Truckers, Inc.*, 769 F.2d 1012, 1014 (4th Cir. 1985) (concluding that the "evidence clearly established that [the employee] voluntarily resigned his employment with the defendant, [he] suffered no adverse employment action at the hand of the defendant"). "The sine qua non of a discharge case is, of course, a discharge." 1 B. Lindemann, *et al.*, Employment Discrimination Law 21–33 (5th ed. 2012).

The district court recognized this logic when it initially announced its intention to direct a verdict in favor of Ford. R.143, 3.28.Tr., Page ID 7237-7238. However, a year later, the court reversed its initial view on the question of Dr. Khalaf's termination. R.115, JMOL Order, PageID 5117. In denying Ford's motion for JMOL, the court cited Dr. Khalaf's perception that the job offered by Ford (1) was not at the same grade as his pre-disability job, and therefore could potentially affect Dr. Khalaf's future bonuses; and (2) would alter Dr. Khalaf's seniority date, thus potentially affecting his pension

benefits. *Id.* at PageID 5116. The court also cited Dr. Khalaf's statements of *subjective* belief (1) that he would have had to "self-demote to return to work"; and (2) that, given HR Director Mike Link's testimony "that Ford [had] offered [Dr. Khalaf] money if he separated," this offer represented an effective termination, because in the ordinary course of business "Ford does not offer money to voluntary quits." *Id.* at PageID 5116.

The district court erred in its emphasis on evidence of Dr. Khalaf's subjective belief unsupported by objective facts. Any reduction in grade or benefits, or perception of "self-demotion" related to a job, does not indicate that Dr. Khalaf was actually terminated. Dr. Khalaf's perceptions regarding his new role were merely *assumptions* based on his "review and understanding of Ford policies." R.135, 3.14. Tr., PageID 5811-5812. In fact, these assumptions were incorrect, as established by the testimony of a Ford employee with knowledge about the seniority date that would have been assigned to Dr. Khalaf. R.140, 3.22.Tr., PageID 6849-6850, 6873-6875. Therefore, there is no evidence to show that Dr. Khalaf would have lost his seniority or would have lost his ability to participate in Ford's defined-benefit plan. R.135, 3.14.Tr., PageID 5811-5812.

If anything, the factors Dr. Khalaf references as demonstrating actual discharge under Ford would be more appropriate for a "constructive discharge" claim, *Logan v. Denny's Inc.*, 259 F.3d 558, 569 (6th Cir. 2001).12 However, constructive discharge was never presented by Dr. Khalaf as a

theory for the jury to consider. The only question that the jury was asked to decide relative to Dr. Khalaf's alleged termination was whether he was *actually terminated*.

"An actual discharge ... occurs when the employer uses language or engages in conduct that would logically lead a prudent person to believe his tenure has been terminated." *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972, 979 (10th Cir. 2008) (quoting *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 88 (2nd Cir. 1996)); *see also Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629 (10th Cir. 1984) ("The test of whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer."). "An actual discharge does not occur, however, when the employee chooses to resign rather than work under undesirable conditions." *Id*.

It is undisputed that, after engaging in a search of available positions, Ford offered Dr. Khalaf a job that he refused. There is no evidence in the record suggesting that Ford used any "language" or "conduct" that "would logically lead [Dr. Khalaf] to believe his tenure [had] been terminated." *Forestwood*, 525 F.3d at 979. While Dr. Khalaf may have assumed the new job offered to him by Ford represented a termination based on his personal "review and understanding of Ford policies," R.135, 3.14. Tr., PageID 5811-5812, as we noted above, these assumptions were incorrect, as established by the testimony of a Ford employee who possessed knowledge of the new

seniority date assigned to Dr. Khalaf. Based on these facts, we hold that no reasonable juror could have concluded that Dr. Khalaf was actually discharged based on Ford's actions. *See Pennypower Shopping News* 726 F.2d at 629.

Dr. Khalaf's reference to Lank's testimony (where he stated that Ford does not generally offer severance pay to employees who voluntarily quit, yet offered severance to Dr. Khalaf) does not change our conclusion. R.140, 3.22.Tr., PageID 6869. This is because Lank qualified his statement, explaining how the circumstances were different in Dr. Khalaf's unique situation. Namely, as was the case with Dr. Khalaf upon his return from disability leave, when a Ford employee's position "goes away" or is no longer available, and the only replacement position "available" to that employee requires a reduction in level, then Ford's personnel system classifies the situation "as an involuntary separation," which thereby qualifies that employee for severance benefits. *Id.* at 6871.

This was the case with Dr. Khalaf because, after conducting its search, Ford did not locate a position available at Dr. Khalaf's prior LL5 management level—meaning Dr. Khalaf would have necessarily been reduced to an LL6 position (though that position offered the same salary and benefits). Therefore, under Ford's internal classification nomenclature, Dr. Khalaf's rejection of the offer and departure represented "an involuntary separation," *id.* at PageID 6871-6872, meaning Dr. Khalaf would be eligible

for "some [severance] pay." *Id.* Regardless of Ford's internal classification, however, it is clear that Dr. Khalaf "was given a choice to take the [Ford] position and he chose not to," *id.* at PageID 6870; instead, he chose to separate from Ford in order to take a higher paying job at BASF.13

For these reasons, we conclude that there was insufficient evidence to allow a reasonable jury to find that Dr. Khalaf was actually terminated by Ford. Therefore, we **REVERSE** the district court's denial of JMOL on Dr. Khalaf's retaliatory termination claim.

III. CONCLUSION

In sum, we hold that the district court erred in denying defendants' motions for judgment as a matter of law. Accordingly, we **REVERSE** the district court court's judgment and remand for entry of judgment in favor of defendants.

I. Footnotes

1 Sigma is a set of statistical problem-solving tools that are used by companies, like Ford, to eliminate manufacturing process defects with the goal of yielding cost savings.

2 Each Ford management employee is assigned to one of six levels. The levels advance from LL6, which is the lowest level of management, to LL1, which is the highest, held by those in the position of vice president and above. R.134, 3.13. Tr., PageID 5656.

3 The weekly meetings involved separate sessions with Fowler's QS&PP Department and with Ford's CEO and his leadership team. R.136, 3.15.Tr., Page ID 6094-6104.

4 Dr. Khalaf also notified HR that he had "asked Pauline to file a claim with HR because she made accusation [*sic*] over a discussion she had with David Buche yesterday." R.79-7, PX15, PageID 2459.

5 Ford used the annual "Pulse" surveys to solicit input from employees regarding their supervisors and workplace. R. 138, 3.20. Tr., PageID 6388-6390; R. 137, 3.19. Tr., PageID 6167. According to the company, "[t]he Pulse score is the most reliable process" at Ford "to get the feedback from the people in the organization." *Id*.

6 The parties dispute whether Dr. Khalaf's disability benefits were terminated or had run out under the terms of Ford's disability plan.

7 This position was located within Ford's Global Quality Organization, the same group that Dr. Khalaf had formerly worked in as a QS&PP manager.

8 Defendants did not appeal the district court's denial of their motion to alter or amend the judgment.

9 In addition to the anonymous comments made by his subordinates in the 2012 survey, Dr. Khalaf references on appeal one comment in particular made by a Ford employee, Rick Radners, that a "[c]ultural block .. prevents [Dr. Khalaf] from being effective" and that Dr. Khalaf was "[r]aised differently." Appellant's. Resp. at 14 (quoting R.80-7, PX81, PageID 2575). However, this comment was made by Radners in April 2014, *after* Dr. Khalaf had ceased managing the group of subordinates (the Quality Analysts), of which he complained during the trial. *See id.*; DX70, App.1. Radners was a Quality Functional Lead, not a Quality Analyst, and Dr. Khalaf never suggested during his testimony that Radners engaged in any disrespectful conduct, *see* R.139, 3.21.Tr., PageID 6517, 6660, nor does he even reference Radners by name in his appellate briefing. Therefore, we will not conduct an analysis of Radners's allegedly discriminatory comment towards Dr. Khalaf because the comment does not represent evidence of discrimination that Dr. Khalaf claimed at trial supported his claim of harassment by his subordinates.

10 The evidence Dr. Khalaf presented regarding subordinates' alleged harassment consists of largely his own testimony. The only testimony he presented from others was that of Michelle Dietline, who stated that Dr. Khalaf's subordinates did "disrespect" him. However, here too, this evidence does not prove any presence of anti-Arabic or anti-Lebanese bias attributable to Dr. Khalaf's subordinates. *See* R.136, 3.15 Tr., PageID 5951-5954, 5983-5984, 5993.

11 Note that Dr. Khalaf did not reference the email to Warnick in connection with his retaliatory-PEP claim in his response to defendants' Rule 50(a)

motion before the district court. *See* R.67, Plaintiff Rule 50(a) Opp., PageID 2361.

12 "To determine if there is a constructive discharge, both the employer's intent and the employee's objective feelings must be examined." *Id*. Our analysis of the first prong "depends on the facts of each case." *Id*. "[W]e consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status." *Id*. Based on the evidence presented by Dr. Khalaf, it may be questioned whether he would have been even able to demonstrate evidence of a constructive discharge, but we do not address that issue because Dr. Khalaf did not raise it.

13 Additional support for Lank's description of Ford's internal personnel classifications comes from the "Salaried Involuntary Reduction Process Approval Form" signed by Fowler, Zhou, and other Ford representatives on September 1, 2015 to document Dr. Khalaf's departure. That form explains that Dr. Khalaf was offered an LL6 position, but "failed to accept the position by the specified deadline of 12:00 p m. on August 31, 2015," and therefore, Dr. Khalaf was "involuntarily separated from Ford Motor Company." R.80-14, PX132, PageID 2597.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FAISAL G. KHALAF, Ph.D.,

Plaintiff,

v. Case No. 15-cv-12604

FORD MOTOR COMPANY, ET AL., Hon. Marianne O. Battani

Defendants.

_____/

JURY VERDICT FORM

VERDICT FORM

Question No. 1 (Discrimination – National Origin)

Has Plaintiff proved that he was demoted or terminated because of his national origin?

Answer "Yes" or "No": NO

If your answer is Yes, which of the following adverse actions do you find that Plaintiff has proven? (Check all that apply)

	Defendant Fowler	Defendant Zhou	Defendant Ford
Demotion by	____	Not applicable	____
Termination by	____	____	____

Question No. 2 (Discrimination – Race)

Has Plaintiff proved that he was demoted or terminated because of his race?

Answer "Yes" or "No": NO

If your answer is Yes, which of the following adverse actions do you find that Plaintiff has proven? (Check all that apply)

	Defendant Fowler	Defendant Zhou	Defendant Ford
Demotion by	____	Not applicable	____
Termination by	____	____	____

Question No. 3 (Hostile Environment - Subordinates)

Has Plaintiff proved that he was subjected to a severe or pervasive hostile environment by his subordinates based on his national origin or race?

Answer "Yes" or "No": YES

Question No. 4 (Hostile Environment - Supervisors)

Has Plaintiff proved that he was subjected to a severe or pervasive hostile environment by Fowler and/or Zhou based on his national origin or race?

Answer "Yes" or "No": YES

If your answer is yes, identify the defendant or defendants who you find subjected plaintiff to a severe or pervasive hostile environment.

	Defendant Fowler	Defendant Zhou	Defendant Ford
National Origin	X	___	___
Race	___	___	___

Question No. 5 (Retaliation)

Has Plaintiff proved that Plaintiff was retaliated against because he, in good faith, engaged in the protected activity of opposing discrimination?

Answer "Yes" or "No" YES

If your answer is Yes, which of the following do you find that Plaintiff has proven occurred done due to retaliation, and by which Defendant(s)? (Check all that apply)

	Defendant Fowler	Defendant Zhou	Defendant Ford
Demotion	✓	Not Applicable	✓
Placement on PEP	___	✓	___
Termination	___	___	✓

If you answered "No" to all five questions, you are finished. Your verdict is for the Defendants. Otherwise, continue to the next section.

Question No. 6 (Compensatory Damages)

How much in damages do you award (if any) to Plaintiff in the following categories:

Pension and Retirement Losses: $1.7 million

Emotional Distress Damages: $100,000.00

Question No. 7 (Punitive Damages - Entitlement)

Has Plaintiff proved that he is entitled to an award of punitive damages? Answer "Yes" or "No" as to each Defendant.

Ford: YES

Fowler: NO

Zhou: NO

Question No. 8 (Punitive Damages - Amount)

How much in punitive damages do you award against the following Defendants (write a dollar figure, or $0 if you award no punitive damages):

Ford (if any): $15 MIL

Fowler (if any): 0

Zhou (if any): 0

s/Jury Foreperson

In compliance with the Privacy Policy Adopted by the Judicial Conference, the verdict form with the original signature has been filed under seal.

March 28, 2018

Date

Nos. 19-1435/1468

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 30, 2020
DEBORAH S. HUNT, Clerk

FAISAL G. KHALAF, PH.D.,

Plaintiff-Appellant/Cross-Appellee,

v.

FORD MOTOR COMPANY; BENNIE FOWLER; JAY ZHOU,

Defendants-Appellees/Cross-Appellants.

ORDER

BEFORE: GUY, THAPAR, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judges White and Donald recused themselves from participation in this ruling.