

07-2347-cv(1L), 08-3753-cv(XAP)
Zakre v. Norddeutsche

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of June, two thousand nine.

Present:

HON. ROGER J. MINER,
HON. ROBERT A. KATZMANN,
HON. REENA RAGGI,

Circuit Judges.

BEVERLY ZAKRE,

Plaintiff-Appellee-Cross-Appellant,

v.

No. 07-2347-cv(L), 08-3753-
cv(XAP)

NORDDEUTSCHE LANDESBANK GIROZENTRALE,

Defendant-Appellant-Cross-Appellee.

Plaintiff-Appellee-Cross-Appellant: ANNE L. CLARK (Karen Cacace, *of counsel*),
Vladeck, Waldman, Elias & Engelhard, P.C., New
York, NY

Defendant-Appellant-Cross-Appellee: JOEL E. COHEN (Carolyn T. Schiff, Katherine D.
Kale, *of counsel*), McDermott Will & Emery LLP,
New York, NY

Appeal from the United States District Court for the Southern District of New York
(Sweet, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and
DECREED that the amended judgment of the district court entered July 18, 2008, is
AFFIRMED.

Defendant-appellant Norddeutsche Landesbank Girozentrale (“NORD/LB”) appeals from
an amended judgment entered July 18, 2008, awarding plaintiff back pay, compensatory
damages, punitive damages, attorneys’ fees, and costs after a jury trial. Plaintiff-appellee cross
appeals from the judgment insofar as it reduces the jury’s punitive damages award to \$600,000.
We assume the parties’ familiarity with the facts, procedural history, and issues on appeal.

We review a district court’s evidentiary rulings under a deferential abuse of discretion
standard “and give district court judges wide latitude in determining whether evidence is
admissible at trial.” *Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138, 148 (2d Cir. 2001) (internal
quotation marks omitted). Moreover, under Rule 61, an error in admitting evidence is not
grounds for granting a new trial unless the error affects a party’s “substantial rights.” Fed. R.
Civ. P. 61. “Whether an evidentiary error implicates a substantial right depends on the likelihood
that the error affected the outcome of the case. . . . [A]n evidentiary error in a civil case is

harmless unless [the appellant demonstrates that] it is likely that in some material respect the factfinder's judgment was swayed by the error." *Tesser v. Bd. of Educ.*, 370 F.3d 314, 319 (2d Cir. 2004) (second alteration in original; citations and internal quotation marks omitted). After thoroughly reviewing the trial record in this case, we conclude that none of the evidentiary rulings that NORD/LB challenges on appeal were an abuse of discretion. We also conclude that the district court did not err in permitting Zakre to present a hostile work environment claim to the jury.

We review a lower court's determination of the constitutionality of a punitive damages award *de novo*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), deferring to the district court's findings of fact unless they are clearly erroneous, *Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 81 (2d Cir. 2007). A punitive damages award will not be upheld where it is so "grossly excessive" that it arbitrarily deprives the defendant of property. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court set forth three categories of factors to be considered in assessing the validity of a punitive damage award. These factors include: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 574-75.

The district court properly analyzed the degree of reprehensibility of NORD/LB's misconduct and the disparity between the actual harm suffered by Zakre and the punitive damages award in this case. As to the third *BMW* factor, while Title VII does not provide for

civil penalties, the New York City Administrative Code provides for civil penalties of no more than \$125,000 for an unlawful discriminatory practice and no more than \$250,000 if the discriminatory practice was the result of a “willful, wanton or malicious act” or if discriminatory harassment or violence occurred. N.Y. City Admin. Code § 8-126(a). Therefore, the district court did not err in reducing the punitive damages award in this case to \$600,000.

We have considered all of NORD/LB’s arguments and find them without merit.

Therefore, the judgment of the district court is AFFIRMED.

FOR THE COURT:
CATHERINE O’HAGAN WOLFE, CLERK

By: _____