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Case Number 598,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANA MILLER,	)
	) C.A. No. 598, 2012
Plaintiff-Below,	) Court Below: Superior Court
Appellant,	) of Delaware, New Castle County
	) C.A. No. 08C-07-231-JOH
v.	)
	)
STATE OF DELAWARE,	)
DEPARTMENT OF PUBLIC SAFETY,	)
	)
Defendant-Below	)
Appellee	)

APPELLEE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATED: July 22, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

On July 28, 2008, Plaintiff-Below Appellant Diana Miller ("Appellant" or "Plaintiff" or "Miller") filed a complaint against defendant State of Delaware Department of Public Safety (hereinafter "State") in Superior Court. (B-1). The complaint asserted claims under the Delaware Discrimination in Employment Act, 19 *Del. C.* § 710 *et seq*. *Complaint* at ¶3. (B-1).

On April 6, 2011, the Superior Court granted summary judgment to the State on the plaintiff's claims of hostile work environment and retaliation. *Miller v. State of Delaware*, 2011 WL 1312286, at *9-10, 12-13 (Del. Super. Apr. 6, 2011). The Superior Court ruled that the plaintiff's remaining claim of *quid pro quo* sexual harassment would proceed to trial based on disputed material facts. *Id.* at *11-12. Appellant does not challenge this grant of summary judgment on the hostile work environment and retaliation claims in this appeal.

The case was tried before a jury from July 24, 2012 through August 1, 2012. The parties submitted a Proposed Pretrial Stipulation and Order prior to trial. (B-17). The trial court conducted two pretrial conferences in this case on July 6, 2012 and July 11, 2012. In the Pretrial Stipulation, plaintiff stated that "[T]his cause of action is a *quid pro quo* sexual harassment claim arising out of the Delaware Discrimination in

Employment Act, 19 Del. C. § 711(b)." (B-17).

Prior to trial, counsel for the parties submitted separate proposed jury instructions. (B-39, 169). The trial court conducted an office conference on July 23, 2012 and noted that the defendant's proposed instructions were based on Model Third Circuit Civil Jury Instructions. (B-101-02). The Superior Court agreed to give the plaintiff's shorter instruction on the elements of the *quid pro quo* claim as part of preliminary instructions. (B-101-02). The defense reserved its right to request that the Third Circuit instruction be given as part of the final instructions. (B-101-02).

The trial began on July 25, 2012 and the trial court did give preliminary instructions. (B-222). At the conclusion of the evidence on July 31, 2012, the trial court conducted a prayer conference and provided counsel with proposed final instructions. The proposed final instructions contained the defendant's proposed *quid pro quo* instruction which is the Third Circuit Court of Appeals Model Instruction. At this prayer conference, plaintiff's counsel objected to this *quid pro quo* instruction and requested the opportunity to provide additional authority. (B-491-502). The trial court allowed plaintiff's counsel to provide authority by 5:00 p.m. (B-495-96). Later that evening, plaintiff's counsel submitted two letters to the Court. (B-508-15). In one letter, plaintiff's counsel stated that the element of "tangible or adverse employment

action" was not pled by the plaintiff nor raised as a defense. (B-508, 515). The trial court conducted a second prayer conference with counsel on August 1, 2012 and heard additional argument from counsel. (B-517-23). At this prayer conference, plaintiff's counsel raised a number of objections to the Third Circuit Model Instruction and argued for an instruction based in part on the elements of a hostile work environment claim. (B-517-23). At the conclusion of this prayer conference, the trial court ruled that it would instruct the jury based on the Third Circuit Model Instruction. (B-522-23).

The jury returned a verdict on August 2, 2012 in favor of the defense and found no discrimination. (B-555). Plaintiff moved for a new trial on August 14, 2012 and challenged the trial court's jury instructions. The trial court denied the motion for a new trial on October 11, 2012. *Miller v. State*, 2012 WL 8258506 (Del. Super. 2012). Plaintiff filed a timely appeal on November 12, 2012.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court's jury instructions on *quid pro quo* harassment were a correct statement of the law and were consistent with the jury instructions proposed by appellant on the issue of adverse employment action.

II. Denied. The issue of the Superior Court's instruction on the affirmative defense is moot as the jury never reached that issue and the instruction alternatively, at most constituted harmless error.

III. As an alternative ground for affirming the Superior Court, the jury's verdict finding of no *quid pro quo* harassment by the defendant was supported by the evidence and entitled to be treated as conclusive.

STATEMENT OF FACTS[1]

Appellant-Plaintiff Diana Miller was employed by the defendant Delaware Department of Public Safety from 1998 through 2012. (B-111, 289). She worked in administrative positions for the Delaware State Police ("DSP"). (B-259-60). Miller was a member of the Communications Workers union during her employment with the DSP. (B-253). Plaintiff was hired at DSP as a Communications Specialist and worked in that job for about five to six years. (B-259). Miller was aware of the DSP anti-harassment policy and had been give the policy on multiple occasions in her employment. (B-247-48)

In 2004, Miller applied for and obtained an Administrative Specialist position at Troop #2. (B-260-61). Her job was located at the back of the troop. Captain John Laird was the commander for Troop #2. (B-261). In June, 2006, the troop was reorganized and Miller was reassigned to an administrative position near the front of the troop building to work for Captain Laird. (B-262). Miller resisted the reorganization and a senior officer had to move her belongings to her new location. (B-321). Miller enjoyed working in the back of the troop building where

1. The facts are set forth in the light most favorable to the State as the prevailing party at trial. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co.*, 866 A.2d 1, 7 (Del. 2005).

she socialized with the troopers who were frequently at her desk. (B-324). In November, 2006, Miller was involved in an affair with Sergeant Quickel, who was also assigned to Troop #2. At that time, Miller received a disturbing phone call from Corporal Towns who advised that she also had an affair with Quickel. Captain Laird became aware of this phone call and spoke to Miller about it. This led to an Internal Affairs investigation. (B-264-65). This Towns' call and investigation was devastating to Miller. (B-271). Plaintiff's relationship with Quickel began in September, 2005 and lasted until January, 2007. (B-256). This was a secretive relationship as Quickel was married. (B-256).

In December, 2006, Captain Laird and Miller attended an office Christmas party at the Chesapeake Inn. At the party, Miller sat down near Laird and Miller believed their feet came into contact. (B-263, 333-34). When they returned to the Troop, Miller told John Laird that "I thought about playing footsies with you." (B-334). Miller believed this contact was sexual harassment. (B-294).

Laird and Miller did have discussions about non-work topics in Laird's office (B-266). These visits were not hidden as the office door was wide open. (B-266). Miller and John Laird also exchanged a number of friendly, lighthearted emails from January 23, 2007 through March 23, 2007. (B-121-25, 129-30, 132, 137, 152). These

emails covered such topics as treatment options for plaintiff's mother (sent from Cleveland on a weekend) (B-121-23, 294--95), plaintiff's recent grades in college (B-137, 297), and a reference to a chat with Laird that the plaintiff "[r]eally enjoyed" and "deleted immediately." (B-129-30, 295-96).

Miller went out on FMLA leave in February, 2007. (B-267). Prior to her FMLA leave, plaintiff came into John Laird's office and they had a discussion about having a relationship. Laird declined a relationship but agreed to meet with Miller to have a drink or a meal. (B-334-35). Miller returned to the office and displayed a naked photo of herself. (B-365-66).

In March, 2007, John Laird came to Miller's house to visit and found the front door unlocked. Laird entered the house and met Miller in her bedroom where there were no chairs. (B-303). Miller was highly medicated and is a "little fuzzy" about the interaction. (B-267-68). Miller invited Laird up into her bedroom where he sat on the corner of the bed. Plaintiff was wearing tight jeans, a tight black scoop neck top, and high heels. (B-336). Plaintiff came over to Laird and initiated a kiss. (B-337-38). Plaintiff then removed her top and bra and Laird made contact with her breast. (B-339) Laird testified that plaintiff knew what she was doing and they both acted inappropriately. (B-341-42). Plaintiff in her first statement about this incident advised

Internal Affairs that Laird asked to kiss her and they engaged in "physical intimacy." Plaintiff also told Internal Affairs that Laird did not force himself on her. (B-414).

On March 23, 2007, before her return to work, John Laird emailed Miller to advise that she was missed at work and Miller responded "thanks....see you next week!" (B-152, 297-98). After returning from FMLA leave, Miller struck up a friendship with Captain Laird's wife Cissy Laird. (B-269-70). In April, 2007, the two planned a trip to Mexico for July, 2007 and Miller paid $1,000 for the trip. Miller never requested that the vacation vendor provide a refund. (B-188, 271, 298-99). Cissy Laird later told Miller that there was a change in plans and John Laird would also be going on the trip for protection in Mexico. (B-271). In preparation for the trip, the Lairds did come to Miller's house and visited. (B-272). These visits occurred between April and June, 2007. (B-276). The Mexico vacation was the plaintiff's idea according to John Laird's trial testimony. (B-352). Plaintiff threatened the Lairds if she was not allowed to go on the vacation and they felt they had no choice but to let her go on the trip. (B-353-54, 370). Plaintiff had made threats that she could say anything she wanted about John Laird and what he had done to her. (B-371). Cissy Laird at no time told plaintiff that she could have sex with John Laird. (B-370).

John Laird provided information to Miller about the Internal Affairs

investigation and advised that Towns and Quickel had engaged in an affair. (B-271). Miller later learned that she was subject to an Internal Affairs investigation of an allegation that she had sex in a maintenance closet at Troop #2 with Sergeant Quickel. (B-270).

Miller was also experiencing issues at Troop #2 with other coworkers and DSP Human Resources. The other secretary in plaintiff's area, Kisha Smith, began making complaints that Miller was receiving preferential treatment from John Laird. (B-279). Due to poor working relationships in the Troop, Human Resources and Major Albert Homiak met with all staff on April 23, 2007. (B-283). There was a perception that Miller could do whatever she wanted to in the troop. (B-383). DSP had issues with Miller's work performance in the past as she had problems getting along with coworkers, had a reputation of complaining and not getting along with supervisors. (B-376-77). At the interviews on April 23rd, the employees, other than Laird and Miller, stated that Miller was a behavior problem that was affecting the troop. (B-378). There was a second meeting on May 3, 2007 to provide performance plans for all of the staff. (B-178-80; 393). Laird had previously given Miller a private office and this order was revoked. (B-179, 280). At this May 3rd meeting, all staff were given an anti-harassment memo to read and sign. (B-178; 382). Miller was also reassigned to

report directly to Lieutenant Melissa Hukill. (B-280). Miller was supposed to stay out of John Laird's office but she was defiant to that directive. (B-328).

Around June 11, 2007, John Laird had a conference at Dover Downs and Miller asked him to spend the evening at her house. (B-349). They fell asleep in bed and Laird woke up when Miller was performing oral sex on him which led to intercourse. (B-349).

Shortly before the Mexico trip, on June 28, 2007, John Laird sent out an email to DSP staff asking for their plans for the upcoming week. Miller responded with "VACATION!!!!!!!" (B-197, 291). The Lairds and plaintiff flew to Mexico on July 2, 2007 (B-313). On the night before the trip, the Lairds and Miller spent the night at a Philadelphia airport hotel and they all slept in a king-sized bed. (B-307). John Laird had no sexual contact with plaintiff in Mexico. (B-350-51). Plaintiff slept in a king size bed while the Lairds slept in a sofa bed. (B-350-51). During the vacation, plaintiff and Cissy Laird had a violent confrontation. (B-286-87). Plaintiff testified that she went on the Mexico trip voluntarily and did not feel that she would lose her job. (B-307-08).

After the vacation, Cissy Laird had told John Laird to have no contact with Miller. (B-287-88). John Laird and Miller had exchanged text messages for some

time. After the Mexico trip, she made sure the messages were not erased. (B-288). Miller had received over 100 text messages from John Laird, starting in April, 2007. She locked some but not all of these messages. She did not save any of the messages that she sent to Laird. (B-304-05). Plaintiff knew that the phone had a limited amount of memory. (B-305). John Laird admitted to sending inappropriate text messages to Miller but the messages were out of context because plaintiff did not save any of the messages that she sent. (B-309-10).

On August 1, 2007, plaintiff was interviewed by Internal Affairs about the allegation of having sex in the maintenance closet with another officer. At that time, she made a sexual harassment complaint against John Laird. (B-288, 398). At this interview, Miller told the investigators that she did not resist Laird's contact at her house on the March, 2007 visit. (B-414). Miller also stated that she never responded negatively to John Laird and she did engage in texting with him. (B-415). She gave her phone to Internal Affairs Officers at her interview to look at but would not relinquish possession of it. (B-289). DSP made extensive unsuccessful efforts to obtain the plaintiff's phone. (B-398, 401). After meeting with Internal Affairs, plaintiff gave a recorded statement in her attorney's office with the messages on the phone. (B-305). Plaintiff then continued to use the phone into 2008. (B-305-06).

From April 1, 2007 through July 1, 2007, plaintiff would text John Laird an average of ten times per day. (B-365). The DSP suspended John Laird within hours of the plaintiff's complaint, (B-394) and he never returned to work at Troop #2. (B-210, 214, 389). Prior to August 1, 2007, Colonel MacLeish had no knowledge of any improper relationship between John Laird and Miller. (B-409). Plaintiff believes that the DSP acted promptly once she made a complaint. (B-308).

After her sexual harassment complaint, Miller was transferred to the Training Academy in Dover. (B-216-17, 301-02). Miller agreed to this transfer and her job title and salary did not change, and her daily commute was shortened. (B-216-17, 301--02). Miller claimed that she suffered anxiety and physical ailments from her alleged harassment by John Laird. (B-290).

John Laird did admit that he used poor judgment in his relationship with plaintiff but there was no sexual harassment. (B-314). Laird described plaintiff as "vindictive, mean, evil, manipulative, delusional, malicious, miserable, unhappy, irate, nuts", and "paranoid." (B-318, 328).

Miller's friend Sergeant Vince Fiscella testified that Miller never mentioned anything about sexual harassment by John Laird. (B-253). Corporal Suzanne Lowman was plaintiff's friend and in late July, 2007, after the trip to Mexico, Miller advised her

that she had a relationship with John Laird and she ended up feeling uncomfortable about it. (B-423). Miller's coworker Kisha Smith never saw any problems between Miller and John Laird and, prior to the Mexico trip, saw Miller with a notation on her calendar for the upcoming trip to Mexico. (B-424-25). Miller's job was unionized and she was permitted to file a grievance about her work conditions. (B-435, 468-69).

I. THE SUPERIOR COURT CORRECTLY FOLLOWED THE THIRD CIRCUIT MODEL JURY INSTRUCTION ON *QUID PRO QUO* DISCRIMINATION.

Question Presented

Did the Superior Court correctly instruct the jury on the elements of *quid pro quo* discrimination by using the Third Circuit Model Civil Jury Instruction?

Standard and Scope of Review

This Court reviews a claim of error in a trial court's instructions *de novo*. *Guy v. State*, 913 A.2d 558, 563 (Del. 2006) (citing *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006); *Ayres v. State*, 844 A.2d 304, 309 (Del. 2004)). When a party claims error in a jury instruction, "reversal is only appropriate 'if the alleged deficiency in the jury instructions undermined ... the jury's ability to intelligently perform its duty in returning a verdict." *Guy*, 913 A.2d at 568 (quoting *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983) (internal quotations omitted)).

Merits of Argument

Appellant Miller filed her discrimination claim against the State under the Delaware Discrimination in Employment Act, 19 *Del. C.* §§ 710-18. The complaint alleged a violation of 19 *Del. C.* §711(b). At the close of the plaintiff's case, the trial court permitted plaintiff to amend the complaint to pursue her claim under § 711(a). (B-407). Prior to trial, the Superior Court had granted summary judgment to the State

on plaintiff's claims of hostile work environment and retaliation. *See Miller v. State of Delaware*, 2011 WL 1312286, at *9-10, 12-13. Plaintiff does not challenge the grant of summary judgment on these claims of hostile work environment and retaliation on this appeal. The only remaining claim for trial was *quid pro quo* harassment under § 711(a).

The Delaware courts have looked to federal law to interpret the Delaware Discrimination in Employment law. *See Riner v. National Cash Register*, 434 A.2d 2d 375 (Del. 1981). For Miller's *quid pro quo* claim, both parties submitted competing proposals for jury instructions. The defendant's proposed instructions (B-79-80) were based on the United States Third Circuit Court of Appeals Model Civil Jury Instruction-5.1.3 Elements of a Title VII Claim-Harassment-Quid Pro Quo.2 (B-557). The trial court correctly chose to use Third Circuit Model Instruction 5.1.3 to set forth the elements of plaintiff's *quid pro quo* claim in the final jury instructions. The complete charge on *quid pro quo* is set forth in the Appellant's Opening Brief at *10-13 and in Appellee's Appendix at B-523-27, 548-50. The plaintiff's main contention of error is the trial court's language on the element of "tangible

2 The Third Circuit Model Instructions are available at www.ca3.uscourts.gov/model-jury-instructions

employment action" which provided:

> Let me turn to the burden of proof on the claim plaintiff Ms. Miller has and the burden of proof on the defense which the State Police have raised. These are the issues in the case, the disputes of fact that you must resolve.
> Plaintiff Ms. Miller alleges that former Captain John Laird, subjected her to sexual harassment. It is for you to decide whether the State of Delaware is liable to the plaintiff for the actions of former Captain Laird while he was a police officer. Ms. Miller must prove all of the following by a preponderance of the evidence:
> ...
> Fifth, Ms. Miller was subjected to an adverse "tangible employment action"; a "tangible employment action" is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits; ....

(B-525).

In so instructing the jury on this element of a *quid pro quo* case, the trial court followed the Third Circuit Model Instruction 5.1.3 which provides:

> [Plaintiff] alleges that [his/her] supervisor [name of supervisor], subjected [him/her] to harassment. It is for you to decide whether [employer] is liable to [plaintiff] for the actions of [supervisor].
> To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:
> ...
> Fourth: [Plaintiff] was subjected to an adverse "tangible employment action"; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits; ....

Third Circuit Model Jury Instruction 5.1.3-Quid Pro Quo (B-557).

Miller's Opening Brief, at *19 contains a general statement that, because she submitted to the sexual advances of former Captain Laird, she did not have to prove the element of adverse tangible employment action based on the Third Circuit's model instruction and based on *Burlington v. Ellreth*, 524 U.S. 742 (1998). The Third Circuit Model Instruction 5.1.3 does in fact require proof of an adverse tangible employment action. The Comments to Model Instruction 5.1.3 indicate that in cases where an employee does submit to a supervisor's advances, the law is "unsettled" and "not entirely clear" on whether the Model Instruction should be modified. The Comments suggest that in the case where an employee submits, the Model Instruction may, but is not required to be, modified to use the term "tangible employment action" instead of "adverse tangible employment action." (B-559-60). Even if the Model Instruction could have been modified, which is at best "unsettled," this is at most a minor revision of no significance and the trial court's *quid pro quo* instruction was an accurate statement of the law. *See Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) ("jury instructions must give a correct statement of the substance of the law and must be 'reasonably informative and not misleading'"). The Model Third Circuit Instructions do not relieve the plaintiff of the obligation of proving either an adverse tangible employment action or a tangible employment action.

The *Burlington* case also does not apply to this question. In *Burlington*, the United States Supreme Court considered whether an employee, in a hostile work environment case who suffers no tangible employment action, can still recover against the employer. 524 U.S. at 746-47. The Court's holding defined the scope of the employer's affirmative defense in such a hostile work environment case, *id.* at 765, but did not in any way draw into question the propriety of the Model Third Circuit Quid Pro Quo Instruction.

Plaintiff also relies on the unpublished decision in *Lee v. Gecewicz*, 1999 WL 320918 (E.D. Pa. 1999) for the assertion that an employee who submits to sexual advances is relieved of proving the element of tangible employment action. The holding in *Lee* was simply that the plaintiff, who failed to allege any sexual demands from her supervisor that were contingent on her job benefits, did not establish the elements of a *quid pro quo* case. *Id.* at *3. The language regarding the burden of proof on a plaintiff who submits to a supervisor's demands is simply dicta and is based on a citation to the concurring, not majority, opinion in *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 133 (3d Cir. 1998) (Cowen, J., concurring). The State submits that the limited holding of this unpublished, nonprecedential case is not controlling to the extent that it could be interpreted to be in conflict with the Third Circuit's Model Jury

Instructions and to be in conflict with Third Circuit precedent.

The Third Circuit most recently reaffirmed that a plaintiff in a *quid pro quo* case is required to prove harassment that impacts on his or her employment. *See Pittman v. Bob*, 2013 WL 1386204, at *1 (3d Cir. Apr. 5, 2013) (allegation of *quid pro quo* innocuous conduct that bore no relation to any term or condition of employment failed to state a claim of harassment); *see also Boneberger v. Plymouth Township*, 132 F.3d 20, 28 (3d Cir. 1997) (Title VII liability for *quid pro quo* harassment only exists if the consequences attached to the employee's response to the sexual advances were "sufficiently severe to alter the employee's compensation, terms, conditions or privileges of employment"). The Third Circuit's Model Jury Instruction requiring proof of adverse tangible employment action in a *quid pro quo* case is also consistent with the recent decisions in other federal courts. *See Butler v. Crittenden County*, 708 F.3d 1044, 1049 (8th Cir. 2013) (*quid pro quo* requires proof that submission to unwelcome advances was an express or implied condition for receiving job benefits); *Okoli v. City of Baltimore*, 648 F.3d 216, 222 (4th Cir. 2011) (*quid pro quo* requires proof that harassment affected tangible aspects of employment); *Frensley v. North Mississippi Medical Center*, 440 Fed. Appx. 383, 386 (5th Cir. 2011) (plaintiff in *quid pro quo* must show causal nexus between acceptance or rejection of supervisor's

sexual harassment and a "tangible employment action"); *Rosa v. Board of Educ. of Charles County*, 2012 WL 3715331, at *11 (D. Md. 2012) (submission to sexual advances must affect tangible aspects of employment); *Monaghan v. El Dorado County Water Agency*, 2011 WL 4738356, at *6 (E.D. Cal. 2011) (plaintiff must prove that her reaction to harassment complained of affected tangible aspects of employment) (citing *Holly D. v. California Inst. of Technology*, 339 F.3d 1158, 1169-71 (9th Cir. 2003)).

The trial court properly set forth the law on the element of *quid pro quo* harassment by instructing the jury under the Third Circuit's Model Jury instruction. This Court has previously approved the trial court's use of approved federal jury instructions as the correct statement of the law. *See Mills v. State*, 732 A.2d 845, 852 (Del. 1999) (trial court did not err in giving reasonable doubt instruction that was almost identical to proposed Federal Pattern Criminal Jury Instructions). The Third Circuit has also declared that its Model Jury Instructions are proper statements of the law. *See United States v. Petersen*, 622 F.3d 196, 208 (3d Cir. 2010) ("We have a hard time concluding that the use of our own model jury instruction can constitute error...."); *Stuckey v. Blessing*, 2013 WL 1632555, at *7 (M.D. Pa. 2013) ("The Third Circuit has suggested that its own model instructions are presumptively reasonable,

unless there is some credible argument that the model instruction is, in fact wrong.", citing *Peterson*).

The trial court's instruction which required proof of tangible employment action was also consistent with the Delaware Discrimination in Employment Act. Under 19 *Del. C.* § 711(a)(1), the plaintiff was required to prove that the alleged sexual harassment affected her "compensation, terms, conditions or privileges of employment...." The term "adverse tangible employment action" in the trial court's instruction mirrors the language in § 711(a)(1) requiring proof of an effect on "conditions or privileges of employment." *See generally Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 830 (Del. 2005) (plaintiff could not establish claim for racial discrimination under Title VII absent evidence of an adverse employment action).

The trial court's instruction on *quid pro quo* also did not differ substantively from the instruction proposed by the plaintiff. Plaintiff's own proposed *quid pro quo* instruction provided in part that plaintiff was required to prove: "Third: John Laird's sexual harassment altered the conditions of Ms. Miller's employment or adversely affected her status as an employee." (B-49). This proposed instruction did not list a source. The Seventh Circuit has defined the term "adverse employment change" as follows:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Crady v. Liberty National Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). *See also Conley v. State of Delaware*, 2011 WL 113201, at *4 (Del. Super. 2011) ("materially adverse change" requires proof of significant change in employment status such as hiring, firing, failing to promote, reassignment or significant change in benefits). This definition for "adverse employment change" is substantively identical to the definition of "adverse employment action" used in the trial court's instructions.

Regarding Miller's claim regarding the preliminary instructions, the State notes that the trial court did instruct in the preliminary instructions using the shortened plaintiff's version of the *quid pro quo* instruction. The State agreed to the use of this shortened instruction at a pretrial conference so long as the Court would still consider the defense proposal using the Third Circuit instructions for the final instructions. The plaintiff was aware of the defendant's proposed jury instructions which were filed before the trial on July 18, 2012 (B-69) and was aware of the elements of a prima facie *quid pro quo* claim. Defense counsel had also indicated in the Pretrial Stipulation the

defendant's position that plaintiff could not establish a *prima facie* claim. Moreover, the trial court's opinion denying summary judgment provided that a plaintiff in a *quid pro quo* claim was required to prove that the employer's conduct altered the employee's terms, conditions, or privileges of employment. *Miller v. State of Delaware*, 2011 WL 1312286, at *11 (Del. Super. 2011). Plaintiff was certainly on notice over a year prior to the trial of the necessary elements for her *quid pro quo* claim.

The trial court's preliminary instructions were simply given as an overview of the case and the trial court told the jury that those instructions were not the complete jury instructions. (B-223-24). The trial court also made clear in the final instructions that the jury would use those instructions to decide the case. (B-548, 550). As the trial court found in denying the motion for new trial, there was no substantive difference between the preliminary instructions and the final instructions. *Miller v. State*, 2012 WL 8258506, at *7-8 (Del. Super. 2012). *See Unites States v. Stein*, 429 F. Supp. 2d 648, 650 (S.D.N.Y. 2006) (federal courts may give preliminary jury instructions that briefly explain the legal issues and principles) (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 12.432, at 154-55 (2004)).

Plaintiff also cannot avoid the requirement of proving a necessary element of the

quid pro quo claim by simply taking the stance that the element was never pled in the complaint. Superior Court Civil Procedure Rule 8(a)(e) provides for notice pleading that is required to put the opposing party on notice of the claim being brought against it. *See Precision Air, Inc. v. Standard Chlorine,* 654 A.2d 403, 406 (Del. 1995). Miller as the party bringing the *quid pro quo* claim at trial had the responsibility to establish a *prima facie* case.

See Thompson v. Dover Downs, 887 A.2d 458, 461 (Del. 2005) (plaintiff has burden of establishing *prima facie* case of discrimination under Delaware Equal Accommodations Law); *Giles v. State*, 411 A.2d 599, 601 (Del. 1980) (petitioner has initial burden of proving racial discrimination under 19 *Del. C.* § 711).

Finally, plaintiff appears to argue that there was agreement that adverse tangible employment action was not an element in the case. At the final prayer conferences, plaintiff's counsel argued that Miller had been subject to a transfer to a new job, and also had received favoritism from former Captain Laird which caused tension in the workplace. (B-493-95, 518). Plaintiff's counsel argued that he only had to prove an alteration in the work conditions (B-517-18, 520-22), and also argued alternatively that the plaintiff's transfer might be evidence of tangible employment action. (B-519, transcript page 10). The State had previously moved for judgment as a matter of law

under DEL. R. SUPER. CT. CIV. PRO. 50, in part, on the plaintiff's failure to prove an adverse tangible employment action. (B-401-02). The State renewed this motion at the prayer conference when the plaintiff's counsel argued that he had proven an adverse affect or alteration of her employment but not an adverse employment action. (B-521). The trial court denied the State's motion for judgment as a matter of law on both occasions and allowed the case to proceed to the jury. (B-406-07, 518, 522--23). If the plaintiff concedes that she did not establish an adverse employment action, then she concedes that she did not establish a *prima facie* case.

In short, the trial court's jury instructions on *quid pro quo* gave a correct statement on the substance of the law and the elements of the claim and did not constitute legal error. *See Corbitt,* 804 A.2d at 1062.

II. THE ISSUE OF THE SUPERIOR COURT'S INSTRUCTION ON THE AFFIRMATIVE DEFENSE IS MOOT AS THE JURY NEVER REACHED THAT ISSUE AND THE INSTRUCTION ALTERNATIVELY CONSTITUTED AT MOST HARMLESS ERROR.

Question Presented

Did the Superior Court correctly instruct the jury on the elements of the employer's affirmative defense by using the Third Circuit Model Civil Jury Instruction?

Standard and Scope of Review

This Court reviews a claim of error in a trial court's instructions *de novo*. *Guy v. State*, 913 A.2d 558, 563 (Del. 2006) (citing *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006); *Ayres v. State*, 844 A.2d 304, 309 (Del. 2004)). When a party claims error in a jury instruction, "reversal is only appropriate 'if the alleged deficiency in the jury instructions undermined … the jury's ability to intelligently perform its duty in returning a verdict." *Guy*, 913 A.2d at 568 (quoting *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983) (internal quotations omitted)).

Merits of Argument

Appellant Miller claims that the trial court committed error by using the Third Circuit Model Civil Jury Instruction 5.1.3 on the employer's affirmative defense for

plaintiff's *quid pro quo* claim. Appellant argues that the affirmative defense was not available to the State as the employer in this case because the trial court's charge required the plaintiff to prove an adverse tangible employment action. *See Appellant's Opening Br.* at *24-26. Appellant's brief also contains a contradictory statement that "Miller's evidence showed no tangible job action of any kind was taken against her: no wage reduction, no demotion, no discharge or undesirable re-assignment, etc. **In that circumstance, therefore, the defenses come into play**. The evidence showed the State Police had an anti-sexual harassment policy which had been in effect for several years and of which Miller was aware before all of this business with Laird started." *Id.* at *15 (emphasis added).

This Court does not need to reach the question of whether the trial court properly instructed the jury on the issue of the employer's affirmative defenses. The Special Verdict Form (B-555-56) provided in part:

> 1. Has Diana Miller shown all the elements of her claim of sexual harassment by Captain Laird?
>
> Yes _____ No _____
>
> If the answer is "No" stop and summon the bailiff. That is a verdict for the defendants.
>
> If the answer is "Yes" to on to Question No. 2
>
> 2. Did the defendants prove by a preponderance of the evidence all of the elements of their defense?
>
> Yes_____ No _____

In the final jury instructions, the trial judge spent significant time explaining the jury verdict sheet to the jury. (B-551--52). The trial court instructed the jury that they must first deliberate on question #1 which concerned the elements of the sexual harassment claim and if they answered "No", they should stop their deliberations as that would be a verdict for the defendant. The trial court also instructed the jury that they would only consider question #2 if they answered question #1 in the affirmative. (B-552).

The jury answered "No" to question # 1 and returned a verdict for the defendant. (B-555). The jury never reached the issue of whether the employer's affirmative defense applied and never had to consider the issue of the applicability of the defense and never had to render any specific verdict on this issue. Miller's challenge to the employer affirmative defense instruction is simply a moot, hypothetical issue as the jury never reached that issue. Miller attempts to speculate that the presence of the employer affirmative defense instruction somehow prejudiced her claim for sexual harassment. However, juries are presumed to follow the instructions of the trial court and those instructions specifically told the jury not to consider Question #2 unless and until they have answered Question #1. (B-552). *See Brown v. State*, 781 A.2d 262 (Table), 2001 WL 898589, at *2 (Del. 2001) ("A jury is presumed to understand the

law and follow the instructions given by the Superior Court. Mere speculation is not a sufficient basis for the grant of a new trial.") (internal citations omitted). The Special Verdict Form is also very clear on this point. Therefore, the issue of whether the State was entitled to the employer affirmative defense is either moot or at most harmless error. *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1255 (Del. 2011) (language in special verdict form did not constitute plain error when read in the context of the entire jury instructions); *Koutoufaris v. Dick*, 604 A.2d 390, 399 (Del. 1992) (any error in jury instruction on punitive damages was harmless in light of the jury's specific verdict); *Sykes v. State*, 588 A.2d 1143, 1991 WL 28883, at *4 (Del. 1991) ("any errors [] in the instructions concerning lesser included offenses were rendered irrelevant by the jury's verdict"); *Ross v. State*, 482 A.2d 727, 736 (Del. 1984) (general principle that jury verdict can render certain jury instructions harmless)

The question of the applicability of the employer affirmative defense is also at most harmless error in light of the fact that Miller concedes throughout her Opening Brief that there was no evidence to prove the element of adverse tangible employment action. As set forth in Argument I of this Brief, Miller's *quid pro quo* discrimination claim required proof of several elements including proof of adverse tangible employment action. Appellant's Opening Brief concedes that the necessary elements

of a *prima facie* case were not proven and the State was entitled to judgment as a matter of law under DEL. R. SUPER. CT. CIV. PRO. 50 on that claim which would render irrelevant any issue of claimed error regarding the employer's affirmative defense.

In summary, the Court should find that the issue of the applicability of the employer affirmative defense was never reached by the jury and is simply irrelevant.

III. THE JUDGMENT OF THE SUPERIOR COURT SHOULD BE AFFIRMED AS THE JURY'S VERDICT WAS SUPPORTED BY THE EVIDENCE AND ENTITLED TO BE TREATED AS CONCLUSIVE.

Question Presented

Could this Court affirm the judgment of the Superior Court in favor of the defendant as the jury verdict was supported by sufficient evidence in the trial record?

Standard and Scope of Review

The Court reviews the trial court's denial of a motion for a new trial under an abuse of discretion standard. "A jury verdict is presumed to be correct and will be upheld unless it is against the great weight of the evidence. The Delaware Constitution sets forth this Court's standard of review: on appeal from a verdict of a jury, the finding of the jury, if supported by the evidence, shall be conclusive." *Mitchell v. Haldar*, 883 A.2d 32, 43 (Del. 2005) (internal citations and quotations omitted). The Court may affirm on grounds presented to the trial court, but not decided by it. *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

Merits of Argument

Appellant Miller has filed this appeal from the trial court's denial of her motion for a new trial. Miller has challenged the jury verdict in favor of the defendants based on alleged errors in two parts of the jury instruction on *quid pro quo*. Miller has not

challenged the accuracy of the other portions of the *quid pro quo* instruction. This instruction required the plaintiff to prove all elements including that John Laird met the narrow definition of "supervisor" under federal law and also that Laird's conduct and sexual advances were "unwelcome."

The jury's verdict in favor of the defendant should be presumed as conclusive under DEL. CONST. ART. IV, § 11(1)(a), as there was sufficient evidence, viewed in the light most favorable to the defendant, to find that Miller did not establish a *prima facie* claim. The jury could find John Laird lacked the power to hire, fire, demote, transfer, or discipline the plaintiff or otherwise adversely impact the terms and conditions of her employment as required by the trial court's instructions. (B-525). This definition of a "supervisor" was narrowed recently to now require proof that the person has authority "to effect a 'significant change in the employee's employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Vance v. Ball State Univ.*, 133 S. Ct. 2434, at *9 (U.S. June 24, 2013). Under 29 *Del. C.* § 8203(6), only the Director of Public Safety was authorized to fire Department employees or fix their salary. The trial testimony also showed that Miller was a union employee and the terms and conditions of her employment were governed by that union contract. (B-253, 435-37,

468-69). There was no testimony that John Laird as Troop Commander had any authority to alter or interpret that union contract. In addition, the testimony indicated that a transfer had to be approved by the Colonel of the State Police (B-216-19, 301-02) and that promotions were determined by hiring panels along with the Department's Human Resources. (B-190-91, 281-82, 299). In short, there was sufficient evidence for a jury to conclude that the plaintiff did not prove that John Laird was a supervisor for purposes of her *quid pro quo* claim.

There was also sufficient evidence from which the jury could find that any sexual conduct between John Laird and plaintiff was completely welcomed. There was essentially a credibility dispute in the case between the testimony of plaintiff and that of John Laird and to some degree his wife Cissy Laird. The jury could have found that plaintiff voluntarily agreed to allow John Laird into her house and that they engaged in consensual sexual contact and sexual intercourse. The State introduced a series of casual, flirting emails between plaintiff and John Laird from before and after the acts complained of as sexual harassment. (B-121-25, 129-32, 137, 152, 197). The testimony of John Laird was that there were two incidents of sexual contact. The first was in March, 2007 when Miller invited Laird into her house and bedroom and then Miller removed her shirt and the two engaged in a

kiss, after which Laird touched Miller's breast. (B-336-32). In her Internal Affairs statement, Miller described a moment of intimacy in this encounter. (B-414). On the second incident in June, 2007, the jury could have credited Laird's testimony that Miller invited him to her house and they voluntarily engaged in sexual intercourse during that visit. (B-349). The jury could also have credited the testimony of the Lairds that there was no sexual harassment or contact during the Mexico trip. (B-350-51, 370). The trial testimony supports the jury's verdict in favor of the defendant and the finding that the plaintiff did not prove the elements of her sexual harassment claim, and, pursuant to DEL. CONST. ART. IV, § 11(1)(a), the Superior Court judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF MAILING AND/OR DELIVERY

The undersigned certifies that on July 22, 2013, he caused the attached *Appellee's Answering Brief* to be delivered via LexisNexis and U.S. Mail postage prepaid to the following person(s):

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