IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 7, 2009 Session

TAMI LAMORE v. CHECK ADVANCE OF TENNESSEE, LLC DBA PAYDAY USA OF TENNESSEE, LLC

Appeal from the Circuit Court for Hamilton County
No. 06C1603 W. Jeffrey Hollingsworth, Judge

No. E2009-00442-COA-R3-CV - FILED JANUARY 28, 2010

Tami LaMore ("the plaintiff") filed this action alleging that the termination of her employment with Check Advance of Tennessee, LLC dba Payday USA of Tennessee ("the defendant") was motivated by her reporting of a co-worker for sexual abuse of a minor. A jury awarded back pay of $8,250 and found that the conduct justified punitive damages. In a separate hearing, the jury awarded punitive damages of $500,000. Post-trial, the trial court awarded front pay of $10,288 and reduced the punitive damages award to $250,000. The defendant appeals, contending that no reasonable juror could find by clear and convincing evidence that its actions were egregious enough to justify punitive damages and that the award, even as reduced, is excessive and violates due process. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Gary E. Veazey, Memphis, Tennessee, for the appellant, Check Advance of Tennessee, LLC, dba Payday USA of Tennessee.

Kristi M. Davis and Christopher D. Heagerty, Knoxville, Tennessee, for the appellee, Tami LaMore.

OPINION

I.

The plaintiff was fired by the defendant less than a week after reporting her co-worker and store manager, Kim Belcher, to authorities for what the plaintiff suspected was sexual abuse of a minor. The basis for her suspicion was an "instant message"[1] that she found on the employer's computer as she was in the process of logging off the computer and closing the store for the night. It is undisputed that the message contained material sufficient to trigger a duty on the part of the plaintiff to report the co-worker to authorities. That duty is statutorily imposed by Tenn. Code Ann. § 37-1-605(a) (Supp. 2009), which states, in pertinent part, as follows:

> Any person . . . who knows or has reasonable cause to suspect that a child has been sexually abused . . . shall report such knowledge or suspicion to the [Tennessee Department of Children's Services] . . . .

The same statutory scheme provides immunity to the reporting party and a "civil cause of action against any person who causes a detrimental change in the employment status of the reporting party by reason of the report." Tenn. Code Ann. § 37-1-410(b) (Supp. 2009); *see also* Tenn. Code Ann. § 37-1-613 (2006).

The plaintiff filed this action, alleging that her firing was motivated solely by her reporting of her co-worker. The complaint, as amended, alleges that the defendant's actions were in violation of Tenn. Code Ann. § 37-1-410(b), in violation of Tenn. Code. Ann. § 50-1-304 (Supp. 2009), and constitute common law retaliatory discharge. The defendant denied that the report played any role in the firing and claimed that the plaintiff was fired for being absent from work without giving the district manager, Joan Rinehart, advance notice that she was going to be absent. The plaintiff's position at trial was that the stated reason was not the true reason and was nothing more than a pretext. The real reason, according to the plaintiff, was that the defendant was trying to sell the company and that the "drama" inherent in one employee reporting another employee for sexual abuse of a minor was a "mess" that might make the company less marketable. The plaintiff sought to prove at trial that the defendant chose to clean the mess up by simply firing everyone involved.

In 2005, the plaintiff began working for American Heritage Cash Advance at a store on East Brainerd Road in Chattanooga. American Heritage, as its name suggests, was in the

[1]According to the testimony, an instant message is similar to an email, except that the participants are logged onto a computer website and are able to instantly read an incoming message.

business of advancing cash to customers in exchange for a fee, which cash and fee were paid by the customer's check held for presentment at a specified time in the future. The plaintiff needed flexibility in her schedule because she was a single mother and one of her children, a son who had attempted suicide, was housed in a skilled care facility and often required special attention. She had that flexibility with American Heritage, where she was in charge of marketing for the company's two stores, the one on East Brainerd, and one in East Ridge. Her marketing consisted of passing out materials such as ink pens, fliers and business cards and hanging similar materials on door knobs in nearby apartment complexes. She also worked in the East Brainerd store on an as-needed and as-able basis. She had an excellent working relationship with Mike Creagan, the company owner.

Creagan sold his two stores to the defendant in August 2006. Creagan immediately arranged for both Belcher and the plaintiff to meet with Brian Scoggins, who was one of the two principals of the new owner of the stores. Scoggins offered the plaintiff the job of manager of the East Brainerd store, but she declined because of her circumstances, which circumstances Creagan had previously explained to Scoggins. The plaintiff was allowed to continue the arrangement she had with American Heritage, including the marketing, and Belcher was made the store manager. This much is largely undisputed. Scoggins admitted this arrangement but claimed at trial that marketing was to be a sideline activity and that mostly the plaintiff was expected to be in the store handling transactions with customers. Scoggins conceded under cross-examination, however, that the company records reflected that the plaintiff's primary job designation was marketing.

This arrangement worked until the week beginning October 15, 2006. There are several different stories of what happened between then and October 19, 2006, when the plaintiff was fired by Joan Rinehart. What is clear is that the plaintiff reported the instant message to authorities on October 13, 2006, which was a Friday. Normally, Belcher would have been in the store on Monday October 16, 2006, but she was arrested before her shift. She was later fired for her absence.

The plaintiff was not in the store on Monday the 16th covering Belcher's absence, but sent in a time sheet that showed she worked a normal shift of 9:45 am to 6:00 pm. The plaintiff testified at trial that she did not work a full day on Monday, October 16, 2006, but said that she went to the doctor and then worked a partial day marketing at nearby apartment complexes. The time sheet was sent before the work was done, which was normal practice, and the plaintiff was fired before she had an opportunity to correct the time sheet.

The plaintiff testified that Tuesday, October 17, 2006, was her day off. According to the plaintiff, Rinehart asked her to work on Tuesday, but she could not because her son had an emergency and she had to go to the hospital. Nevertheless, she did what was necessary

to open the store so that it could operate that day with another employee present, and did not report or claim any time. Joan Rinehart's testimony corroborated the plaintiff's to this extent.

According to the plaintiff, Tuesday the 17th is the day she told both Scoggins and Rinehart about discovering the Kim Belcher message and her report to the authorities. The plaintiff testified that she called Scoggins directly. Scoggins immediately became angry and told her that he "didn't want to hear it." According to her, when Scoggins calmed down a little, he told her to call Rinehart, which she did.

Rinehart, again, corroborated the telephone conversation with the plaintiff wherein the plaintiff acknowledged that she was the one who discovered and reported the Kim Belcher message. Rinehart also learned the content of the message from the plaintiff. Rinehart testified that she shared the news with Scoggins by calling him, also on the 17th.

Up until trial, Scoggins maintained that he did not know anything about the message, nor the plaintiff's involvement in reporting it, until October 21, 2006, after the plaintiff had been fired. When confronted at trial with a cell phone record showing a telephone call from the plaintiff's phone to his on the afternoon of October 17, 2006, Scoggins remembered not only the phone call, but also what he was doing at the time and the "first words out of [the plaintiff's] mouth." Thus, when the "dust settled," Scoggins' testimony also corroborated the plaintiff's testimony about what happened on October 17, 2006.

There is no dispute that the plaintiff worked in the store on October 18, 2006, the day before she was fired. According to the plaintiff, Rinehart offered her Kim Belcher's job as manager of the store. The plaintiff's testimony was corroborated by Donna Vasquez, a "floater" who filled in at the defendant's stores as needed. Vasquez heard Rinehart make the offer and heard the plaintiff turn it down because of the situation with her son. Rinehart was not asked at trial whether or not she offered the manager job to the plaintiff.

Another thing that happened on October 18, 2006, was a conversation between Creagan and Rinehart and then a telephone call between Creagan and Scoggins. Creagan testified that he met Rinehart in one of the stores the day before Rinehart fired the plaintiff. Creagan was one of the first people the plaintiff called when she discovered the Belcher message. Creagan characterized the plaintiff's call to him as a sort of reality check and a request of how to handle it. According to Creagan, Rinehart asked him whether he knew that Belcher had been arrested for suspected sexual abuse of a child and Creagan confirmed that he did. Rinehart asked Creagan how he had learned about it and he revealed that the plaintiff had called him directly. At that point, according to Creagan, Rinehart became noticeably upset that the plaintiff had shared the information with him. Later that same day, Creagan called Scoggins to try to smooth over any problems he had made for the plaintiff by revealing

his involvement. Scoggins was out of town on business, so they were not able to have a substantive discussion. The day the plaintiff was fired Creagan had a telephone conversation with Scoggins because of his concern that he might "be a part of having her get fired." Scoggins assured Creagan that "there were other issues, that that wasn't the reason." Reportedly Scoggins told Creagan that the plaintiff simply got "crossways" with Joan. The conversation lasted 26 minutes. Scoggins tried to deny any such conversation and, when confronted with the telephone records, testified that he could not deny the conversation but could not recall it.

It is undisputed that the plaintiff worked in the East Brainerd store part of the day on October 19, 2006. According to the plaintiff, she made arrangements for Donna Vasquez to cover for her that afternoon so she could take her youngest daughter to the doctor for a kidney infection. A short time after leaving the store, the plaintiff called the store to speak to Ms. Vasquez. This telephone conversation occurred before she had picked up her youngest daughter from school and while the plaintiff's middle daughter, Kristen, was present. The plaintiff testified that Donna told her, "Joan is here and Joan needs to talk to you." The plaintiff testified of the following exchange with Joan:

> I got on the phone with Joan and she said, Tami, where are you?
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> * * *
>
> And I said I'm going to take my daughter to the doctor.
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> And she said why did you leave the office without calling me?
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> And I said I didn't know I was supposed to call you. I've never had to call you before when I've left the office.
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> And she proceeded to tell me . . . that I was fired and I was flabbergasted and I was like why? I said I don't understand.
>
> And she said, well, you're not following company policy.
>
> I said it's never been company policy, Joan, that we call you and report to you when we're leaving the office. You told us specifically to work that out between us, between me and Kim . . . .
>
> And so, you know, I pleaded my case with her. . . .

> And . . . she said, well, not only that, Tami, . . . but you didn't call and let me know that you were coming in yesterday morning.
>
> And I said I didn't know I was supposed to call and let you know I was coming in if I was there.
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> * * *
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> . . . [W]hen I said to her that . . . it didn't make sense why they were firing me, and I was pleading my case with her and she . . . said, and not only that, but all this drama.
>
> And I said all what drama? . . . .
>
> And she said all this drama with Kim, with you and Kim.

The plaintiff also testified that she had never been told that changes had to be cleared with Ms. Rinehart, that she had never been reprimanded for absences, and that the store had remained open and staffed on October 19, 2006. Under cross examination, the plaintiff added that Ms. Rinehart also told her when she fired her that she should not have talked to Mike Creagan about the Belcher message. The plaintiff's daughter, Kristen, corroborated her mother's testimony, testifying that the telephone was on speaker from about the time Joan Rinehart started speaking. Donna Vasquez testified that she heard the conversation. Vasquez was reluctant to testify regarding the contents of the call, claiming that she could not remember the contents. When pressed, Vasquez admitted telling the plaintiff's attorneys before trial that "Joan got on the phone and told Tami she was fired because she [Joan] didn't want all that drama." Kim Belcher testified by deposition that scheduling is handled locally at the store without the involvement of the district manager, and that being absent during a scheduled shift is usually not a problem as long as arrangements are made for the store to be staffed and open.

Rinehart denied making the statements about drama, and testified that the reporting of the Belcher message had nothing to do with the firing. Rinehart admitted that the plaintiff had not violated any written company policy by being absent without notifying Rinehart that a substitute would be covering for her. Rinehart claimed that there was a company-wide unwritten policy that employees report to their district manager when they were going to be absent. According to Rhinehart, she became suspicious of the plaintiff's activities after she noticed that the time sheets showed time worked for occasions when she had made calls to the store and found the plaintiff absent. At trial Rhinehart identified six occasions when the

plaintiff had missed work without giving notice that she would be absent, but Rhinehart acknowledged that she had not reprimanded the plaintiff either in writing or verbally for being absent without notice. Rhinehart claimed to have counseled the plaintiff on or about October 17, 2006, that she must provide notice that she is going to be absent during working hours. Rhinehart testified that when she stopped by the store for an unexpected visit and found the plaintiff absent, the absence without advance notice was unacceptable and prompted her to fire the plaintiff.

Before trial, Joan Rhinehart denied any knowledge that the plaintiff was working on marketing. During trial, she claimed to have learned about it a short time before the firing, but had never been able to obtain mileage and expense logs from the plaintiff confirming any marketing. It is undisputed that, as to her marketing activities, the plaintiff was to report directly to Scoggins. When his deposition was taken before trial, Scoggins was unable to recall whether he had told the plaintiff to report to Joan when she was going to be out of the office. At trial, he claimed to recall telling the plaintiff to report to Joan anytime she was going to be marketing outside the office, but, when confronted with his deposition testimony, recanted and admitted, "Maybe I don't recall." He further admitted that the plaintiff would have "no reason to discuss her marketing activities with Joan because . . . [marketing was his] ball of wax." It is also undisputed that the plaintiff had not yet secured new materials bearing the name of the new owner rather than the old name, American Heritage. The plaintiff testified that the important thing was to get the customers into the store, so, with Scoggins' permission, she used the old marketing materials for American Heritage, which contained the right phone numbers and address. Scoggins claimed that he "rebranded" the stores and never would have allowed that. The plaintiff testified that she was to obtain quotes for new marketing handouts after the defendant bought out American Heritage, and that she did that. She further testified that after Scoggins approved the new materials and the quote, she told him that he would need to make arrangements to pay for the materials. As of the date the plaintiff was fired, the materials had not arrived. It was because of this delay that she obtained Scoggins' permission to use the old materials. Kyle Burgess, the plaintiff's son, testified that he passed out marketing materials for the defendant with his mother.

Brian Scoggins admitted that when his company purchased the two stores from American Heritage, it was looking to sell them as part of a package deal involving all the stores in which he held an ownership interest. In June of 2006, before the defendant bought the two stores in August of 2006, the defendant engaged a broker to help arrange a sale. In June of 2007, the defendant signed an agreement to sell its assets, along with the assets of ten other similar check cashing companies, to C.W. Financial for the total sum of $11,800,000. Scoggins admitted that the due diligence period for a potential buyer could be as long as one year.

The closing took place in October 2007. Joe Moore, the majority owner of the defendant and its affiliates that were sold to C.W. Financial, was asked whether, in his opinion as a businessman, the situation reported by the plaintiff, and particularly the use of a company computer by an employee to exchanges messages about sexually abusing a child, "would scare a potential buyer." Moore testified that a buyer would be looking at the "bottom line" and that at most the situation was " a mess that could be cleaned up."

The CFO of the defendant was called as a witness during the punitive damage phase and, under questioning by the plaintiff's counsel, placed a value on the company of $600,000. The company was relatively small, operating only seven stores in Tennessee, compared to the numerous other companies in other states that each operated numerous stores.

The defendant made a motion for directed verdict at the end of the plaintiff's proof. The trial court treated the motion as taken under advisement and instructed the defendant to proceed with its proof. The defendant renewed the motion at the end of all the proof and the trial court denied the motion. The defendant later filed its motion for judgment notwithstanding the verdict pursuant to Tenn. R. Civ P. 50.02, combined with a motion for new trial. The defendant also asked the trial court to set aside or reduce the amount of the punitive award as excessive.

The trial court made its ruling on the various motions in a memorandum opinion. First, the trial court found that Tenn. Code Ann. § 37-1-410(b) "does not relieve the reporter of suspected child sexual abuse of the burden of proving her case or of proving her punitive damage claim by clear and convincing proof." The trial court next found that there "was material evidence upon which the jury could find, by clear and convincing evidence, that the Defendant acted intentionally, maliciously or recklessly." The evidence that the trial court noted in support of its finding can be summarized thusly: the proximity in time between the firing and the report; the conflict between the stated reason for the firing and the absence of previous reprimands or discipline for the six previous times it allegedly happened; Rhinehart's identification of "all the drama" as a reason for the firing as related by more than one witness; and the testimony that the plaintiff did not report to Rhinehart in the plaintiff's capacity as a marketer, which supported a finding that absence from the office without reporting to Rhinehart was not the real reason for the termination.

The trial court analyzed the amount of the punitive damage award using both the factors set forth in ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896, 901 (Tenn. 1992), and guidelines identified by the United States Supreme Court in ***Gore v. BMW of North America, Inc.***, 517 U.S. 559, 574 (1996). The court held as follows:

> Based upon all the factors, this Court concludes that a punitive damage award of $500,000 is beyond the limits to due process and fairness and that an award of much less in punitive damages will adequately serve the purpose of punishing this Defendant.
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> Therefore, this Court reduces the amount of punitive damages from $500,000 to $250,000. This figure is 13.5 times the compensatory damages and more than 40% of the stated value of the company for which the plaintiff worked. Such an award punishes the Defendant for its conduct, but stays within the confines set by the court.

Accordingly, the trial court denied the motion for directed verdict as to the imposition of punitive damages, but ordered that the "motion for reduction of the punitive damages is **Granted** and the punitive damages are reduced [from $500,000] to $250,000." (Bold print in original.) The defendant filed a timely notice of appeal.

II.

The defendant identifies seven issues for our review, all of which are variations on the two dispositive issues and the only issues the defendant actually briefs, namely:

> Whether there is material evidence in the record to support a finding by clear and convincing evidence of intentional, malicious or reckless conduct by the defendant.
>
> Whether the punitive damage award is excessive to the point of violating due process under state and federal precedent.

We will also address briefly the issue of whether the trial court erred in admitting excerpts of the actual text message that the plaintiff found and reported and the plaintiff's issue of whether the defendant waived that issue by not briefing the argument in its lead brief.

III.

The standard for reviewing punitive damage awards[2] was recently addressed in ***Goff v. Elmo Greer & Sons Const. Co.***, 297 S.W.3d 175 (Tenn. 2009) as follows:

> [A] verdict imposing [punitive] damages must be supported by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. Evidence is clear and convincing when it leaves "no serious or substantial doubt about the correctness of the conclusions drawn." In other words, the evidence must be such that the truth of the facts asserted be "highly probable."
>
> . . . . We thus review the record to determine whether there is material evidence to support the jury's finding that there is no serious or substantial doubt that [the defendant] acted intentionally or recklessly.
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> * * *
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> . . . . When deciding whether a punitive damages award is excessive to the point that it transgresses constitutional due process standards, our review is de novo to ensure that the

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[2]The defendant also lists as an issue whether the trial erred in denying its motion for directed verdict, but its brief appears to concentrate on whether there was material evidence to support the award. The standard of review of orders on motions for directed verdict is accurately stated as follows:

> In reviewing the trial court's decision to deny a motion for a directed verdict, an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. A motion for a directed verdict should not be granted unless reasonable minds could reach only one conclusion from the evidence. The standard of review applicable to a motion for a directed verdict does not permit an appellate court to weigh the evidence.... Accordingly, if material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence, the motion must be denied.

Johnson v. Tennessee Farmers Mutual Ins., 205 S.W.3d 365, 370 (Tenn. 2006)(citations omitted). We do not see any difference in this standard and the standard of reviewing for material evidence as stated in ***Flax***.

> award is based on an application of the law rather than the jury's caprice.

Id. at 187, 190 (citations omitted). Our review for material evidence must "take the strongest legitimate view of all the evidence in favor of the verdict , . . . assume the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and . . . discard all to the contrary." ***Flax v. DaimlerChrysler Corp.***, 272 S.W.3d 521, 532 (Tenn. 2008). We do not re-weigh the evidence. ***Id.*** Since the trial court reduced the amount of the award, we must engage in an intermediate step of reviewing that reduction to determine whether the trial court conducted the review required by ***Hodges*** and of reviewing the trial courts findings using the standard of review applicable to decisions of trial courts sitting without a jury. ***Coffey v. Fayette Tubular Products***, 929 S.W.2d 326, 331 (Tenn. 1996). In that step we presume the factual findings are correct, unless the evidence preponderates against the trial court's findings. ***Id.***

IV.

Two themes permeate the defendant's arguments that we can easily dispense with. The defendant argues that "the circumstantial nature of this case may allow an award of compensatory damages, but certainly cannot be the basis of punitive damages." We reject the implication that punitive damages cannot be awarded unless a defendant admits its wrongdoing and relieves the plaintiff of the need to prove intent, malice, recklessness or fraud through circumstantial evidence. It is well accepted that fraud usually must be proven through circumstantial evidence. ***Spence v. Spence***, 1990 WL 112361 at *3 (Tenn. Ct. App., August 8, 1990)(quoting Gibson, Suits in Chancery); *see* ***Dodson v. Anderson***, 710 S.W.2d 510, 513 (Tenn. 1986). Further, by including the question of "whether defendant attempted to conceal the conduct" as a relevant factor in determining the amount of punitive damages, courts have implicitly recognized that punitive damages may be awarded even when the defendant denies any wrongdoing. *See* ***Hodges***, 833 S.W.2d at 901. In ***Elmo Greer***, no person saw the excavation contractor bury huge tires on the landowner's property, but it was proven that the contractor changed huge earthmover tires when he occupied the property, and that the landowner dug huge tires out of the ground after the contractor left. 297 S.W.3d at 187-88. The contractor denied burying the tires. ***Id***. Contrary to the defendant's argument in this case, the jury's finding in ***Elmo Greer*** of a fact that was contrary to the story the contractor told became a key piece of evidence that the Supreme Court relied on in finding material evidence to support the verdict. The jury in the present case could just as easily as the jury in the ***Elmo Greer*** case have concluded that the defendant was trying to hide the truth behind an unbelievable story. In ***Elmo Greer***, it was highly unlikely that the huge earthmover tires just materialized and buried themselves below several feet of dirt. Here, the jury was entitled to find it was highly unlikely that an employee who had never been

disciplined or reprimanded for absences, and who admittedly had a reason to be out of the office on legitimate employer business on occasions, would have been fired for an absence immediately after she reported her co-worker to authorities for material that she found on the employer's computer. The finding was also supported by the testimony of Kim Belcher, the store manager and the person the plaintiff reported, that scheduling was handled in store and as long as the store was covered, the district manager was not bothered with scheduling. Scoggins' admission that he knew the plaintiff needed flexibility and allowed her to market for that reason worked against the defendant's theory that they fired the plaintiff suddenly for not marching to the strict beat of the district manager. Also, the evidence is not entirely circumstantial. The plaintiff, her daughter, and witness Vasquez all testified that Rhinehart mentioned the "drama" with Belcher as a reason for the firing. The defendant tried to impeach each witness and tried to convince the jury that the word "drama" was the plaintiff's word, but that obviously did not work.

We also reject the defendant's argument that even if it fired the plaintiff in violation of the statute, its actions were not egregious enough to justify punitive damages. Again, we look to the ***Elmo Greer*** case for guidance. The one major factor that the Supreme Court cited in support of its finding of material evidence, in addition to the unbelievable denial, was the strong public policy against such conduct as shown by "state and federal regulations." ***Id.*** In this case, there is a strong public policy in favor of reporting suspected sexual abuse of a child and a strong public policy against allowing any unnecessary adverse consequences to the one doing the reporting. Tenn. Code Ann. §§ 37-1-410(b); 37-1-605.

At this point we should also note that the plaintiff argues that it is not necessary that a jury find clear and convincing evidence of intent, malice or recklessness under Tenn. Code Ann. § 37-1-410(b) in order to impose punitive damages. The plaintiff relies on the following language: "Any person reporting under the provisions of this part shall have a civil cause of action for appropriate compensatory and punitive damages against any person who causes a detrimental change in the employment status of the reporting party by reason of the report." ***Id***. (2005).[3] The plaintiff argues the quoted language means that "if a jury finds a violation of the statute, the plaintiff has established the right to punitive damages." The plaintiff acknowledges that she has no cases to support the argument but contends that her interpretation is the only one that makes sense. We disagree. We believe it makes much better sense to follow the body of law beginning with ***Hodges*** tailored specifically to evaluating whether given conduct qualifies for an award of punitive damages. Thus, we hold that merely establishing a violation of the statute does not relieve a plaintiff of proving

[3]A 2008 amendment deleted the language about compensatory and punitive damages. ***Id***. (Supp. 2009).

intentional, malicious, reckless or fraudulent conduct to the satisfaction of the jury by clear and convincing evidence.

The trial court did not charge the jury on the theory of fraud, so the question is whether there was clear and convincing evidence of intent, recklessness, or malice. The plaintiff lumps all three factors together and argues that in proving that the defendant wanted to clean up the mess by firing the plaintiff and then hide its true motives, she proved all three factors. We have no problem seeing that an employer who plans on selling its business as a going concern would want to clean up any problems and put as good a face on the business as possible. We can also see that if the cleanup involves eliminating someone for engaging in a controversial but protected act, that elimination can be an intentional or reckless act. *See* ***Elmo Greer***, 297 S.W.3d at 188 (intentional or at least reckless to bury material on the land). However, we do not see how, in the particulars of this case, that the firing involved malice toward the plaintiff. If the plaintiff is correct that the defendant was trying to clean up the mess, and there is certainly material evidence to support such a motivation, then the defendant's decision was an intentional or reckless business decision that had little or nothing to do with ill will toward the plaintiff. Nevertheless, we hold that there was material evidence to support a finding by clear and convincing evidence that the defendant engaged in intentional or reckless behavior when it fired the plaintiff for reporting her co-worker and store manager for suspected sexual abuse of a child.

We turn now to our review of the amount of the award. Our first step is to determine whether the trial court reviewed "the award, giving consideration of all matters on which the jury is required to be instructed," and whether it "clearly set forth the reasons for decreasing or approving [the award] in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed." ***Hodges***, 833. S.W.2d at 901-902. Those factors are:

> (1) The defendant's financial affairs, financial condition, and net worth;
>
> (2) The nature and reprehensibility of defendant's wrongdoing, for example
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> (A) The impact of defendant's conduct on the plaintiff, or
>
> (B) The relationship of defendant to plaintiff;
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> (3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;

> (4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;
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> (5) The expense plaintiff has borne in the attempt to recover the losses;
>
> (6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
>
> (7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;
>
> (8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and
>
> (9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.
>
> The trier of fact shall be further instructed that the primary purpose of a punitive award is to deter misconduct, while the purpose of compensatory damages is to make plaintiff whole.

Id. at 901-902. The trial court's analysis of the ***Hodges*** factors was as follows:

> 1. The evidence was somewhat scarce on the Defendant's financial affairs. The Plaintiff did introduce evidence that the Defendant[]s sold several companies for a gross amount of $11.8 million. However, the evidence was that the stores owned by Payday of Tennessee, the company for which the Plaintiff worked, were valued at $600,000.00.
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> 2. If the Defendant fired the Plaintiff because she reported suspected child sexual abuse, which the jury apparently believed it did, such action is reprehensible.

> 3. In its memorandum opinion on front pay, this Court noted the Plaintiff did not prove that all the problems she suffered were as a result of her termination. As noted in that previous order, the Plaintiff's son died about the time she was terminated and that obviously had great affect on her ability to work. In addition, the job from which the Plaintiff was fired paid her approximately $9.00 per hour. As the Court previously noted in its other order, the Plaintiff could have found work at minimum wage. The affect of the firing on the Plaintiff was not as significant as the Plaintiff's counsel argues.
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> 4. Defendant was aware that termination would harm the Plaintiff and Defendant's motivation in firing her was, according to the jury's verdict, to remove "all the drama" relating to the report of child sexual abuse.
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> 5. The duration of the conduct was limited. At most, Defendant's actions in reaching the decision to fire the Plaintiff and firing her lasted a few days at most. The companies were subsequently sold and Defendants were not in a position to rehire the Plaintiff.
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> 6. There was little, if any evidence of out-of-pocket expenses actually paid by the Plaintiff.
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> 7. There is no evidence that the Defendant profited from the termination. Plaintiff wants the Court to assume the purchase price was higher because the Defendant kept the situation about the suspected child sexual abuse quiet. However, there is no evidence in the record upon which to base such an assumption or inference.
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> 8. There is no evidence of prior punitive or damages against this Defendant.
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> 9. There is no evidence of any remedial action taken by the Defendant.

Based upon the above, we are convinced that the trial court did conduct the review and make the findings that it was obligated to make under ***Hodges***. Also, based on our extensive

review of the record, we cannot say that the evidence preponderates against the trial court's findings as to the ***Hodges*** factors. However, the trial court did not expressly state whether or not it was reducing the award from $500,000 to $250,000 based on its ***Hodges*** review. Instead, of stating whether the ***Hodges*** factors justified adjusting the award up or down or leaving it the same, the trial court proceeded directly to a discussion of fairness and due process under federal precedent wherein it stated as follows:

> In ***Gore*** and ***Campbell,*** the United States Supreme Court stated that an award of punitive damages beyond certain multiples of the compensatory damages strains the concept of fairness and due process. Plaintiff's counsel points out language in ***Gore*** and other cases which states that, in a case which calls for low compensatory awards, the ratio may be greater so that the punitive purpose of such damages may be accomplished. In making this determination, the United States Supreme Court stated there were three guidepost[s] that must be considered. The first guidepost is the reprehensible nature of the Defendant's conduct. In this case, the damage[s] to Plaintiff were purely economic. Also, there is no evidence the Defendant's actions adversely affected anyone other than the Plaintiff. Therefore, although the Defendant's action was reprehensible, there is no evidence of widespread damage or potential damage to others from this action.
>
> The second guidepost is the ratio between compensable and punitive damages. As noted previously, in this case the punitives are 27 times the compensable damages.
>
> The final guidepost is the comparison of the punitives to any civil or criminal penalties that may be imposed. That guidepost does not apply in this case. There is no evidence that any civil or criminal penalties could have been imposed by a governmental agency against this Defendant for this action.
>
> ***Gore*** and other cases acknowledge that punitive damages may be more than four or even ten times the compensatory damages and still be valid. Plaintiff cites the Tennessee Supreme Court case of ***Coffey v. Fayette Tubular Products***, 929 S.W.2d 326 (Tenn. 1996) as authority for this Court to approve an award of punitive damages of $500,000.00. However, in ***Coffey***, the

> Court was dealing with a company with a net worth of 35 million dollars. As noted previously in this memorandum opinion, the evidence supports a conclusion that the stores owned by the Plaintiff's employer were valued at $600,000.00.
>
> Based upon all the factors, this Court concludes that a punitive damage award of $500,000.00 is beyond the limits to due process and fairness and that an award of much less in punitive damages will adequately serve the purpose of punishing this Defendant.
>
> Therefore, this Court reduces the amount of punitive damages from $500,000.00 to $250,000.00. This figure is 13.5 times the compensatory damages and more than 40% of the stated value of the company for which the Plaintiff worked. Such an award punishes the Defendant for its conduct, but stays within the confines set by the court.

We believe that the trial court's discussion shows that it based its reduction of the verdict, not on the basis of its findings under the ***Hodges*** factors, but on the overarching standard of due process and fairness. Accordingly, we cannot afford the deference to the amount set by the trial that was accorded in ***Coffey***, 929 S.W.2d at 329. Instead, we must review the amount imposed by the jury and as reduced by the trial court *de novo*. ***Elmo Greer***, 297 S.W.3d at 190.

Unlike the trial court, we have the benefit of the Tennessee Supreme Court's recent guidance in ***Elmo Greer***. The High Court not only confirmed that the due process/fairness analysis is to be made in light of the three guideposts identified in ***Gore***, but also furnished additional guidance as to the meaning and application of those guideposts.

> The first of the three guideposts is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." ***Gore,*** 517 U.S. at 575, 116 S.Ct. 1589. Citing factors similar to those set forth in ***Hodges,*** the Supreme Court has explained that "some wrongs are more blameworthy than others," ***id.,*** including "trickery and deceit," ***id.*** at 576, 116 S.Ct. 1589 (quoting ***TXO Prod. Corp. V. Alliance Res. Corp***., 509 U.S. 443, 462, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). And while the Court has indicated that purely economic harm may be less reprehensible than harm involving health and safety, it has also indicated that

"infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." ***Id***. at 576, 116 S.Ct. 1589 (citation omitted). The Supreme Court has also observed that, when addressing the reprehensible nature of a defendant's conduct, courts should consider 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.

[***State Farm Mut. Auto Ins. Co. v.***] ***Campbell***, 538 U.S. [408,] 419, 123 S.Ct. 1513 [(2003)].

Applying these factors to the instant case, we find Elmo Greer's actions objectionable in several significant ways. First, Elmo Greer intentionally buried tires on the Goffs' property. . . . Second, this intentional conduct included an effort by Elmo Greer to hide its deliberate misdeeds. . . . Third, because Mr. Anderson testified that there is a cost associated with properly disposing of tires, it appears that Elmo Greer buried them to avoid having to pay these expenses. Fourth, Elmo Greer knew that its conduct was not only in violation of its contract with the Goffs, but was illegal as well, for Mr. Anderson admitted to being aware of State law regarding the disposal of tires. He also knew that Elmo Greer would have faced heavy penalties had the company been caught burying tires. Fifth, Elmo Greer's conduct violated clearly expressed public policies regarding pollution and unauthorized landfills. The legislature has clearly set forth the public policy behind the State's solid waste disposal laws. . . . Despite being aware of these policies, Elmo Greer elected to ignore them.

Elmo Greer's conduct was exacerbated by its refusal to accept responsibility for its actions. Mr. Anderson conditioned the company's apology by stating that " *[i]f* Elmo Greer had something to do with [the tires], [it was] sorry." (Emphasis added). Elmo Greer's witnesses downplayed the significance of the concealed tires. This testimony, in our opinion, does not demonstrate much accountability or remorse-important factors in evaluating the likelihood that a tortfeasor will repeat its tortious conduct. Instead, it suggests that Elmo Greer operates with the mind-set that burying tires in violation of the law and in breach of contractual obligations is simply "no big deal."

These multiple aspects of Elmo Greer's conduct are indicative of bad faith. *See* ***Gore,*** 517 U.S. at 579, 116 S.Ct. 1589 (invalidating a punitive damage award in part because the record disclosed "no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive"). Moreover, they indicate that Elmo Greer was willing to deliberately harm not only the Goffs, but willing to place others potentially at risk by essentially creating an unauthorized landfill. Elmo Greer's disregard for the public interest is all the more troubling in light of the fact that it was acting as a contractor for the State of Tennessee. Elmo Greer did nothing to alleviate the situation its indifference had created, but rather chose to hide and trivialize it.

At the same time, consistent with the testimony presented, the jury found that Elmo Greer did not create an environmental hazard to the Goff property. . . .

Thus, although Elmo Greer's conduct was sufficiently reprehensible for this guidepost to point toward a substantial punitive damages award, it did not rise to the highest level of reprehensibility.

The second guidepost is the "disparity between the harm or potential harm suffered" and the punitive damages awarded. ***Gore,*** 517 U.S. at 575, 116 S.Ct. 1589. This guidepost reflects

the general concern that punitive damages bear a "reasonable relationship" to compensatory damages. ***Id***. at 580, 116 S.Ct. 1589. According to the Supreme Court, "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." ***Id***. at 581, 116 S.Ct. 1589 (internal quotation marks and citation omitted). Although the Court has repeatedly refused to "impose a bright-line ratio which a punitive damages award cannot exceed," the Court has also stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process." *Campbell,* 538 U.S. at 425, 123 S.Ct. 1513. *See also* ***Gore,*** 517 U.S. at 582-83, 116 S.Ct. 1589 ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula...."). Moreover, the Supreme Court has made clear that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," and that "there are no rigid benchmarks that a punitive damages award may not surpass." ***Campbell,*** 538 U.S. at 425, 123 S.Ct. 1513. We agree.

The Supreme Court has acknowledged that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." ***Gore,*** 517 U.S. at 582, 116 S.Ct. 1589. "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." ***Id***. However, the Court has described as "breathtaking" a 500-to-1 ratio between punitive and compensatory awards. ***Id***. at 583, 116 S.Ct. 1589.

In this case, Elmo Greer asserts that a $1 million punitive damage award is excessive because it exceeds the compensatory award by a ratio of 302 to 1. Thus we must analyze the Supreme Court's cases dealing with punitive damages in greater detail to determine whether focusing only on the ratio, and insisting that

only single-digit ratios are constitutional, reflects an overly restrictive view that does not comport with the Supreme Court's jurisprudence on the subject.

In ***TXO Production Corp.***, 509 U.S. at 453, 113 S.Ct. 2711, the Supreme Court affirmed a punitive damage award that was 526 times as great as the compensatory damages. In that case, TXO contracted to purchase the oil and gas rights on a tract of land owned by Alliance. TXO subsequently manufactured a claim that title to the property was defective and attempted to renegotiate its deal with Alliance. When the negotiations were unsuccessful, TXO sought a declaratory judgment to remove the purported defect. Alliance counterclaimed for slander of title and was awarded $19,000 in actual damages and $10 million in punitive damages. In affirming the award, the Supreme Court observed that it "is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." ***Id***. at 460, 113 S.Ct. 2711. The Court then held that it did

> not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly

> excessive" as to be beyond the power of the State to allow.

Id. at 462, 113 S.Ct. 2711 (footnote omitted).

Other courts have been willing to affirm ratios exceeding single digits when the compensatory damages were relatively low but the actions of the wrongdoer were egregious. For example, in ***Saunders v. Branch Banking & Trust Co. of Virginia***, 526 F.3d 142, 154-55 (4th Cir. 2008), the Fourth Circuit affirmed an 80-to-1 ratio in a case involving violations of the Fair Credit Reporting Act. In ***Abner v. Kansas City Southern Railroad***, 513 F.3d 154, 165 (5th Cir. 2008), the Fifth Circuit affirmed a 125,000-to-1 ratio in a case involving a race-based hostile work environment. In ***Kemp v. American Telephone & Telegraph Co.***, 393 F.3d 1354, 1365 (11th Cir. 2004), the Eleventh Circuit imposed a punitive award of $250,000 accompanying compensatory damages of only $115.05, a ratio of 2,173 to 1. In ***Mathias v. Accor Economy Lodging, Inc.***, 347 F.3d 672, 678 (7th Cir. 2003), the Seventh Circuit upheld a 37.2-to-1 ratio in a case involving bedbugs at a motel. In ***Lynn v. TNT Logistics North America Inc***., 275 S.W.3d 304, 312 (Mo. Ct. App. 2008), the court imposed in a sexual harassment case a punitive award equivalent to a 75-to-1 ratio. In ***Jones v. Rent-A-Center, Inc.***, 281 F.Supp.2d 1277, 1290 (D. Kan. 2003), the court upheld a 29-to-1 ratio in a sexual harassment case. These cases reflect the principle that "there are no rigid benchmarks that a punitive damages award may not surpass," but instead "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." ***Campbell***, 538 U.S. at 425, 123 S.Ct. 1513.

In this case, the ratio of $1 million punitive damages to compensatory damages as approved by the trial judge is over 302 to 1. This ratio is excessive in light of the circumstances presented. As set forth above, Elmo Greer buried tires which, while constituting a nuisance, do not constitute an environmental hazard or threaten the health or safety of any individual.

Before leaving this point, however, we note that the jury heard proof that the cost to plaintiffs to clean up the entire property, to ensure that no other impermissible waste materials are buried on their property, would be $318,000. Although the jury rejected the notion that this amount was the required measure of damages, it highlights the problem that the monetary value of noneconomic harm is sometimes difficult to determine, thus justifying a higher ratio. ***Gore,*** 517 U.S. at 583, 116 S.Ct. 1589.

The third and final guidepost requires courts to compare the punitive damage award to civil or criminal penalties authorized or imposed in comparable cases. ***Gore,*** 517 U.S. at 583, 116 S.Ct. 1589. The Supreme Court has instructed that in determining whether the award is excessive, courts should give " 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." ***Id***. at 583, 116 S.Ct. 1589 (. . .). Penalties that could be imposed for similar conduct "are relevant because they provide defendants with notice of the severity of the penalty that may be imposed upon them." ***Flax,*** 272 S.W.3d at 537. . . .

In this case, we are readily able to determine the amount of civil penalties that may be assessed for the improper disposal of waste tires. . . . However, Johnny Michael Apple, Director of Solid Waste Management for the Tennessee Department of Environment and Conservation, testified that no fines had been or would be imposed on Elmo Greer for this violation and that no further investigation of this property was needed. Given the apparent disparity between the sanctions authorized by the legislature and the sanctions that would, in practice, be imposed, we cannot conclude that this guidepost either supports or undermines the punitive damages awarded.

In short, we have carefully considered the application of the three guideposts to the punitive damages awarded in this case. After doing so we are constrained to acknowledge that the

> punitive award approved by the trial court is too large given the circumstances and does violate Elmo Greer's due process rights. We conclude that the award must be modified to $500,000. This award sends a strong message about the serious nature of Elmo Greer's misconduct. At the same time, however, it is more rationally related to the non-physical harm suffered in this case.

Elmo Greer, 297 S.W.3d at 191-96 (headings omitted, footnotes omitted, parententicals in original). The amended punitive award in ***Elmo Greer*** was approximately 25 times the compensatory award.

We begin our consideration of the three guideposts from the perspective that the defendant's actions were reprehensible. They were directly contrary to public policy as expressed by statute. The plaintiff was vulnerable as a low-paid, at-will employee who, without her attorneys, did not have the resources to do battle with the defendant. Further, we conclude they involved an element of trickery and deceit because the defendant made up a pretextual reason for the firing and continued even to the present to argue that the pretext was the real reason for the firing. Also, in determining reprehensibility, we consider whether the defendant was willing to risk the health and safety of others. In the instant case, the defendant's attitude toward the plaintiff's reporting of the suspected child abuse, including her termination, was reasonably calculated to put the plaintiff in a bad light regarding the suspected crime she had reported to the authorities. This bad light, in turn, could be used to adversely affect her credibility vis-a-vis her claim and thereby risk "others," *i.e.*, the child at issue.

We note many similarities between the conduct of this defendant and the defendant in ***Elmo Greer***. The thrust of the defendant's argument here, as in that case, is to the effect that even if they violated the statute, it was "no big deal." ***Elmo Greer***, 297 S.W.3d at 193. We disagree – it was and is a "big deal."

As to the second guidepost, the comparison of "the harm or potential harm suffered" and the punitive award, it is clear from ***Elmo Greer*** that we are not to consider the federal precedent as setting rigid benchmarks. The defendant is in a sense fortunate that the plaintiff reported the conduct, and presumably thwarted future harm to the child, despite her fear of repercussions. Also, the plaintiff's damages were mitigated as found by the trial court, not because she quickly found new employment and began to make money, but because she was unable for other unfortunate reasons, to work. We also believe this case is analogous to one

where the injury is hard to detect, because the course of conduct chosen by the defendant made it hard to prove. We, like the trial court, find that although a punitive award of 27 times the compensatory award is excessive, especially when that award is roughly comparable to the total value of the entity that employed the plaintiff, there is no constitutional offense on these facts in an award that exceeds "a single digit ratio" to the compensatory award.

The third guidepost requires us to compare the award to civil or criminal penalties that could be imposed for similar conduct. The parties point us to no such penalties and concede "this guidepost is not particularly helpful in this case." On this point, the present case is again comparable to ***Elmo Greer***.

To conclude, we have carefully considered the record *de novo*, including the facts as found in the trial court's analysis of the ***Hodges*** factors, in light of the guideposts that keep the award within the realm of due process and fairness. Having done that, we are constrained to hold that a punitive award of $500,000 is excessive, and should be modified to $250,000 as the trial court did. This award sends a strong message about the serious nature of the defendant's conduct, but keeps it within the boundaries of due process and fairness.

Our final discussion addresses the defendant's argument that the trial court erred in admitting excerpts of the instant message the plaintiff found and reported to authorities. We agree with the plaintiff that the defendant did not provide a discussion with authorities in its lead brief, and we could consider the issue waived. ***Branum v. Akins***, 978 S.W.2d 554,557 n. 2 (Tenn. Ct. App. 1998). However, since the defendant did not overlook the point altogether, and cited the excerpt as something that may have inflamed the jury, we will give the defendant the benefit of the doubt and address the merits of the argument that is made in the defendant's reply brief. The defendant argues that the message should have been excluded under Tenn. R. Evid. 4.03 because its potential to "inflame a jury . . . far outweighs its probative value." This is a matter on which the trial court had considerable discretion, and we will not find error absent an abuse of that discretion. ***Seffernick v. St. Thomas Hosp.***, 969 S.W.2d 391, 393 (Tenn. 1998). We have reviewed the message, but we see nothing to be gained in quoting it verbatim. The trial court would not allow any portion of the message to be published to the jury until proof was submitted that agents and decision makers for the defendant knew the content of the message when it terminated the plaintiff. Once that proof came into the record, the trial court required that the most inflammatory portions be redacted from the excerpt before it was published to the jury. Also, the trial court carefully instructed the jury that it could not consider the defendant to be guilty of the actions of Kim Belcher and could only consider the message in evaluating the knowledge of the defendant at the time it

fired the plaintiff. We hold that the trial court did not abuse its discretion in allowing redacted excerpts of the message to come into evidence.

V.

The judgment of the trial court is affirmed. Cost on appeal are taxed to the appellant Check Advance of Tennessee, LLC dba Payday USA of Tennessee. This case is remanded, pursuant to applicable law, for enforcement of the judgment and collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE