[Cite as *Jelinek v. Abbott Laboratories,* 2013-Ohio-1675.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

David A. Jelinek,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-996 (C.P.C. No. 99CVH-09-7505)
Abbott Laboratories et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 25, 2013

Law Offices of Russell A. Kelm, Russell A. Kelm, Joanne W. Detrick and *Lynn R. Taylor*, for appellant.

Winston & Strawn LLP, James F. Hursty, Derek J. Sarafa and *Samantha L. Maxfield*; *Vorys, Sater, Seymour and Pease LLP, Michael G. Long* and *Lisa Pierce Reisz*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} This is an appeal from a judgment in favor of appellee Abbott Laboratories ("Abbott") on an age discrimination claim brought by appellant, David A. Jelinek ("Jelinek" or "appellant"). The basic facts are these.

{¶ 2} On September 10, 1999, Jelinek re-filed a complaint in the Franklin County Court of Common Pleas against Abbott, Ross Products Division ("Ross"), Joy A. Amundson, Thomas M. McNally, William H. Stadtlander, Karl V. Insani, Gregory A. Lindberg and James L. Sipes. Ross, an Illinois corporation, had employed Jelinek. The individual defendants were current and/or past employees of Ross. Jelinek set forth

claims for relief of promissory estoppel, age discrimination, in violation of R.C. 4112.02(A) and 4112.99, retaliation, in violation of R.C. 4112.02(I) and 4112.99, violation of public policy, and willful and malicious destruction of records for purposes of impeding or impairing the current claims ("spoliation of evidence claim"). *Jelinek v. Abbott Laboratories*, 10th Dist. No. 01AP-217 (Sept. 13, 2001) ("*Jelinek I*"). Jelinek also asserted that he had been constructively discharged.

{¶ 3} By way of background, Jelinek was born on May 15, 1942. He had worked for Ross in various sales positions for over 30 years. In January 1997, Jelinek took a new position at Ross as a primary care district manager ("PCDM"). Ross employed seven or eight PCDMs throughout the country. Jelinek was based in Columbus, Ohio and was the oldest PCDM. Ross's sales representatives reported to their respective district managers, including Jelinek.

{¶ 4} In an effort to reduce costs, Ross determined that it would eliminate all PCDM positions. In early October 1997, Jelinek was informed of the elimination of his position and was offered a demotion, also known as a re-deployment to sales representative.. This involved a transfer, with no change in his salary and benefits, to a territory, which included Gary, Indiana, known as the Lake County, Indiana territory. In the alternative, Jelinek could choose to separate from his employment at Ross and take "pay continuation leave," in which he would be paid his then-current salary for approximately nine months (or until he secured other employment or retired). Upon accepting the pay continuation leave package, Jelinek would waive his right to bring any discrimination suit against Ross. Jelinek was informed that if he accepted the severance package he could continue to search for jobs within the Abbott organization.

{¶ 5} On October 28, 1997, Jelinek injured his back while moving cases of product and went on sick leave. Then, three days later, Jelinek accepted the Lake County, Indiana territory offer although he remained on sick leave. He retired from Abbott, effective April 1, 1998, after working only a few days at the Lake County territory. He was 55 years old at the time he retired.

{¶ 6} After dismissal of some claims, a motion for summary judgment, and a successful appeal from the grant of summary judgment, the matter proceeded to trial.

Jelinek prevailed on his claim of age discrimination, but by means of interrogatories, the jury rejected his claims for promissory estoppel and constructive discharge. The jury awarded Jelinek $700,000 in compensatory damages for emotional distress suffered because of age discrimination. The jury also awarded $25 million in punitive damages plus attorney fees against Abbott.

{¶ 7} The trial court then granted a motion for judgment notwithstanding the verdict ("JNOV") on the age-discrimination claim and, in the event that the JNOV were reversed on appeal, granted a new trial on the issue of age discrimination. Jelinek appealed, asserting that the trial court erred in excluding certain evidence related to the constructive discharge theory. This court found that a new trial on the issue of age discrimination was appropriate, but also that the jury found that Jelinek had failed to prove constructive discharge. *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696 (10th Dist.) ("*Jelinek II*").

{¶ 8} In attempting to retry the case, the court declared two mistrials, and the case was assigned to another judge. The constructive discharge theory was the subject of more litigation until 2010 when this court held that the mandate in *Jelinek II* would not be construed as requiring the new trial on remand to include a constructive discharge theory. *Jelinek v. Schneider*, 10th Dist. No. 08AP-957, 2010-Ohio-1220, ¶ 14.

{¶ 9} In 2011, the case proceeded to trial again on the age-discrimination claim. The trial court issued preliminary rulings on a number of motions in limine. The trial court restricted Jelinek to presenting evidence related to the sole remaining claim, age discrimination, and prohibited evidence regarding defunct claims including retaliation, breach of public policy, promissory estoppel, and constructive discharge. Jelinek was precluded from referring to the crime rate in Gary, Indiana, the quality of the Lake County territory, and any testimony referring to a memorandum allegedly saying that all employees over 50 years old with 20 years of service should take early retirement.

{¶ 10} The 2011 trial resulted in a verdict for appellees. Jelinek appealed, assigning the following as errors:

> I. The trial court erred in admitting evidence that was either irrelevant or even if relevant, exclusion was mandatory under Evid.R. 403(A) because the probative value was

> substantially outweighed by the danger of unfair prejudice, of confusion of the issues, and/or of misleading the jury.
>
> II. The trial court erred in excluding relevant evidence favorable to Jelinek, which would not have been unfairly prejudicial to defendants.
>
> II. The trial court erred in allowing defendants to claim Jelinek was part of a reduction in force that occurred in 1997; in failing to compel defendants to produce requested discovery relating to the 1997 reduction in force; in excluding statistical evidence relating to the 1997 RIF; and in placing a higher burden on Jelinek because he was deemed to be included of the reduction in force.
>
> IV. The trial court erred in limiting the scope of the retrial by excluding any evidence of Jelinek's constructive discharge.
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> V. The trial court erred in granting directed verdict for defendants on punitive damages because the court was not present for the testimony of two witnesses and excluded punitive damages without reviewing the testimony of those witnesses.
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> VI. The trial court erred in granting directed verdict in favor of Gregory Lindberg.
>
> VII. The jury erred in ruling for the defendants on Jelinek's age discrimination claim.
>
> VIII. The trial court abused its discretion in not assessing costs against defendants for all costs of the proceeding through the appeal of the first trial and remand.

{¶ 11} In his first assignment of error, Jelinek argues that the trial court abused its discretion in admitting evidence of his wealth. "It is well established that the decision to admit or exclude evidence is within the sound discretion of the trial court and that an appellate court will not disturb that decision absent an abuse of discretion. This is because the trial court is in a much better position than we are to evaluate the authenticity of evidence and assess the credibility and veracity of witnesses." (Citations omitted.) *America's Floor Source, L.L.C. v. Joshua Homes*, 191 Ohio App.3d 493, 2010-Ohio-6296,

¶ 27 (10th Dist.). (Citations omitted.) "Absent an abuse of discretion and material prejudice to appellant, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence * * *. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable." (Citations omitted.) *Bruce v. Junghun*, 182 Ohio App.3d 341, 347-48, 2009-Ohio-2151, ¶ 19 (10th Dist.)

{¶ 12} In his opening statement, defense counsel referred to Jelinek's "beautiful home in a beautiful neighborhood." (Tr. Vol. II, 303.) The trial court sustained an objection. Defense counsel then referenced Jelinek's status in 1997 as a millionaire. (Tr. Vol. II, 305.) An objection was sustained as to the millionaire reference, but the trial court went on to state: "Obviously, evidence may well come in as to Mr. Jelinek's financial position in 1997, *which will be relevant*, and the jury can decide what it means at that time." (Emphasis added; Tr. Vol. II, 305.) In addition, Jelinek objected that Abbott was allowed, over objection, to display a picture of Jelinek's home, and inquire into the value of his 401K plan.

{¶ 13} During his case-in-chief, Jelinek addressed his finances. He testified that his house was paid off, and that prominent people such as the president of Ross Laboratories and Thad Matta, The Ohio State University men's basketball coach, lived in his neighborhood. Jelinek testified that he had Abbott stock worth over $1 million, and when he was offered the PCDM job, he was a millionaire. He bought his wife "a little Mercedes" for Christmas because "she wanted a little toy." (Tr. Vol. II, 419.) Jelinek further testified that when his job was eliminated, he lost sleep and worried about paying his bills and about not having enough money in the bank.

{¶ 14} Ordinarily, in actions where only compensatory damages are sought, evidence is not admissible to show the wealth or poverty of the plaintiff or defendant. *Goodburn v. Gierhart*, 10th Dist. No. 84AP-43 (July 10, 1984). Here, however, Jelinek's financial situation was at issue because his claim for compensatory damages was based entirely on emotional stress caused by his financial concerns. Jelinek testified that he had sleepless nights, tossing and turning, worrying about how much money he had in

the bank, that he was very stressed about money, and he was concerned about making ends meet.

{¶ 15} In *America's Floor Source*, this court held that it was not an abuse of discretion to admit a photograph of the defendant's home after he had testified about his downtrodden personal finances. Even if the evidence would be irrelevant under ordinary circumstances, the photograph became relevant once the defendant put his own personal wealth—or purported lack thereof—at issue. *Id*. at ¶ 27.

{¶ 16} Jelinek argues that the value of his home and the size of his 401K account were irrelevant to his ability to pay his bills since he could not be expected to pay his bills by selling his house or liquidating his 401K. The argument addresses weight and credibility rather than admissibility. The evidence was probative of the alleged emotional distress. The trial court did not abuse its discretion in deciding the probative value of the evidence as to the issue of emotional distress outweighed any prejudice, particularly in light of Jelinek's own extensive testimony about his finances.

{¶ 17} Accordingly, it was not an abuse of discretion to admit evidence of Jelinek's wealth. The first assignment of error is overruled.

{¶ 18} In its second assignment of error, Jelinek contends that it was error to refuse him the opportunity to present evidence that the territory he was assigned was an undesirable territory in an undesirable area of the country, and that was why he did not want to move to Gary, Indiana. Jelinek argues that evidence about the quality of the territory was highly relevant to the issue of pretext and why his assignment to that territory was less preferential than what occurred with other, younger employees. He claims it was also highly prejudicial to exclude evidence that the territory had been collapsed before it was given to him, and that his demotion to a collapsed, economically unviable territory led to his emotional distress.

{¶ 19} Abbott was permitted to argue in closing that the reason Jelinek did not want to move away from Columbus was that he did not want to leave his comfortable house. Abbott was also allowed to argue that the decision maker, Karl Insani, thought that Jelinek would not take the Lake County, Indiana territory because he did not want to leave his beautiful house. Jelinek, however, was not permitted to argue that the reason he

did not want to take the Lake County territory was that it had been collapsed from 12 counties to 2 prior to it being offered to him, as well as the fact that the Gary, Indiana area was not a desirable place to live.

{¶ 20} Abbott argues that the evidence about the quality of the Lake County, Indiana territory was nothing more than an attempt to introduce constructive discharge evidence for a claim that was no longer part of the case. Abbott contends that the evidence that Jelinek sought to introduce at trial was previously offered solely on the constructive discharge claim to explain his claim of forced retirement. As such, Abbott concludes that the trial court did not err in excluding all references to the Lake County, Indiana territory.

{¶ 21} "It is fundamental that evidence that is admissible for one purpose may be inadmissible for another purpose." *State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 156 (1982) *accord*, *Barnett v. Sexten*, 10th Dist. No. 05AP-871, 2006-Ohio-2271, ¶ 14; *see also* Evid.R. 105.[1] In establishing pretext, " '[i]f the plaintiff shows that that employer's explanation is not credible, the trier of fact may, but does not have to, draw the inference of intentional discrimination without any further evidence of discrimination.' " *Detzel v. Brush Wellman, Inc.*, 141 Ohio App.3d 474, 483 (6th Dist.2001), quoting *Brock v. Gen. Elec. Co.*, 125 Ohio App.3d 403, 408 (1st Dist.1998).

{¶ 22} Here, evidence of the quality of the territory offered to Jelinek was relevant to show that the offer of the territory was pretextual. Evidence that the territory was "collapsed" from twelve counties to two shortly before it was offered to Jelinek addresses both the issue of pretext, and the reason why Jelinek was reluctant to accept the territory. This pretext evidence was critical to Jelinek's ultimate burden of proof and therefore its exclusion was highly prejudicial. By taking the extreme position that any mention of the quality of the territory related only to constructive discharge, the trial court abused its discretion.

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[1] Evid.R. 105 states: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Since the 2011 jury was not presented with a constructive discharge theory or claim, a limiting instruction as contemplated by Evid.R. 105 was not necessary.

{¶ 23} In addition, the trial court excluded testimony by Phil Pini, a Ross salesperson, who had a conversation with Insani, vice president of sales. The conversation occurred in August 1999, and concerned an alleged memorandum circulated in 1997, indicating that employees over 50 years old with 20 years of service should take early retirement. The memorandum was never produced, and Ross contends it did not exist.

{¶ 24} Ross contends that Insani's statement to Pini was hearsay. Jelinek argues that Insani's statement about the memorandum is not hearsay and therefore admissible as a statement of a party opponent under Evid.R. 801(D)(2). Ross further contends that Evid.R. 801(D)(2) is inapplicable because Insani was not an agent of Ross at the time he made the statement, having retired on May 7, 1999.

{¶ 25} Evid.R. 801(D)(2) defines an admission by a party opponent as not hearsay. Insani was a party opponent in the 2011 trial. The rule applies to Insani's statement because the statement was "offered against a party and is * * * the party's own statement, in either an individual or a representative capacity." Evid.R. 801(D)(2)(a). Thus, the trial court erred in excluding Insani's statement.

{¶ 26} Error in the admission or exclusion of evidence is grounds for reversal only where substantial rights of the complaining party were affected or substantial justice appears not to have been done. *Faieta v. World Harvest Church*, 10th Dist. No. 08AP-527, 2008-Ohio-6959, ¶ 73. To determine whether a substantial right of the party has been affected, a reviewing court must decide whether the trier of fact probably would have reached the same conclusion had the error not occurred. *Id.* Here, the trial court's decision to exclude all evidence of the Lake County, Indiana territory greatly affected Jelinek's substantial rights. Insani's statement was highly probative of whether Abbott intentionally discriminated against older workers, and highly prejudicial to Abbott's defense. Since the alleged memorandum was never produced, the jury can decide how much weight, if any, to give to Insani's admission. It is only fair that the jury must appropriately reach its own conclusions and render its verdict after independently evaluating and weighing the evidence presented in this case. "When a new trial is granted, it must encompass all issues that come into doubt by the tainted verdict." *Iames*

v. Murphy, 106 Ohio App.3d 627, 633 (1st Dist.1995). Because this case must be remanded for a new trial, we shall address the remaining assignments of error that are not clearly moot in order to provide additional information to the trial court.

{¶ 27} The second assignment of error is sustained.

{¶ 28} In its third assignment of error, Jelinek argues that the trial court erred by allowing defendants to claim Jelinek was part of a 1997 reduction in force without compelling defendants to produce discovery related to the 1997 reduction in force. The trial court also excluded Jelinek's statistical evidence related to the reduction in force, but included a jury instruction that placed a heightened burden on Jelinek because he was part of a reduction in force.

{¶ 29} In *Karsnak v. Chess Fin. Corp.*, 8th Dist. No. 97312, 2012-Ohio-1359, ¶ 26, the court stated:

> In RIF cases, the fourth prong of the prima facie test is modified to require the employee to offer additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled him out for impermissible reasons. *Ramacciato* [*v. Argo-Tech Corp.*], 8th Dist. No. 84557, 2005–Ohio–506, ¶ 29. This prong "may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force." *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (C.A.10, 1988). "The purpose of the additional evidence requirement is to ensure, in reduction of force cases, that the plaintiff has presented evidence to show that there is a chance the reduction in force is not the reason for the termination." *Southworth* [*v. N. Trust Sec., Inc.*], 195 Ohio App.3d 357, 2011–Ohio–3467, 960 N.E.2d 473, ¶ 25, quoting *Asmo v. Keane, Inc.*, 471 F.3d 588, 593 (6th Cir.2006).

{¶ 30} Here, the trial court instructed the jury, in relevant part, as follows:

> Plaintiff alleges that he has presented evidence which would allow you the jury to find the defendants [sic] stated reason for the challenged employment decision is unworthy of belief, and therefore a pretext for discrimination.
>
> Defendants' stated reason for the change in position was that the same was a business decision that took place in the context of a reduction in force. In the context of a reduction

> in force, an age discrimination plaintiff carries a greater burden of supporting allegations of discrimination by coming forward with additional evidence, be it direct, circumstantial or statistical to establish that their age was the reason they were reassigned. As long as the defendants' employment decisions regarding plaintiff were not based on intentional age discrimination, the defendants are entitled to considerable discretion in making business decisions such as reassignment.

(Tr. Vol. VIII, 1787.)

{¶ 31} As can be seen, the trial court instructed the jury that Jelinek needed to come forward with additional evidence, but disallowed discovery and introduction of the evidence.

{¶ 32} If, when the case is retried, Abbott intends to argue that the elimination of Jelinek's position was part of an overall reduction in force in order to receive the heightened jury instruction, Jelinek should be allowed to rebut Abbott's claim by means of statistical evidence. Abbott argues that statistics are irrelevant since Jelinek did not assert a disparate impact claim, but statistics can be useful to prove discrimination in a disparate impact case, but such evidence is unlikely to be sufficient in itself. *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 423 (7th Cir.2000).

{¶ 33} "For statistics to be valid and helpful in a discrimination case, 'both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.' " *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (C.A.6, 1987). "Unless the statistics, standing alone or in comparison, are sufficient to lead the mind naturally to the conclusion sought, they have no probative value; they do not move the proof one way or another. “In short, their usefulness depends on all of the surrounding facts and circumstances." *Id.*

{¶ 34} Accordingly, the third assignment of error is overruled as moot. On remand, the trial court will decide whether to allow statistical evidence and whether to give the heightened jury instruction for RIF cases.

{¶ 35} In its fourth assignment of error, Jelinek argues that the issue of constructive discharge should have been presented to the jury. This issue has been fully

litigated and addressed by way of an earlier appeal and an original action. *Jelinek II* at ¶ 52; *Jelinek v. Schneider*, 2010-Ohio-1220, ¶ 16, 17. Therefore, regardless of whether constructive discharge is technically a distinct claim or only one of two alternative theories, the trial court acted in accordance with the law of the case and this court's mandate in excluding the issue of constructive discharge.

{¶ 36} The fourth assignment of error is overruled.

{¶ 37} In its fifth assignment of error, Jelinek argues that the trial court abused its discretion in granting a directed verdict on the issue of punitive damages. Jelinek contends that the trial court judge was absent for part of the trial when two witnesses' prior testimony was read to the jury, and that the unheard testimony supported a finding of conscious disregard sufficient to allow the issue of punitive damages to go to the jury.

{¶ 38} A motion for directed verdict is an issue of law that this court reviews under a de novo standard of review. *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90 (1987). The evidence is construed most strongly in favor of the party against whom the motion is made, and where reasonable minds could reach different conclusions, the motion must be denied. *Posin v. A.B.C. Motor Court Hotel*, 45 Ohio St.2d 271, 275 (1976). *Ridley v. Fed. Express Corp.*, 8th Dist. No. 82904, 2004-Ohio-2543. Punitive damages are awarded upon a showing of malice. Malice can consist of a spirit of ill will or hatred or conscious disregard of a plaintiff's rights. *Id.* at ¶ 86.

{¶ 39} Jelinek argues that the testimony of James Sipes and Charlie Fisher indicated a conscious disregard for Jelinek's right not to be discriminated against because of his age. Abbott contends that Jelinek mischaracterizes the evidence.

{¶ 40} The evidence for punitive damages was sparse. Jelinek characterizes the testimony of the two witnesses as showing that managers were either not trained in age discrimination or could not recall being trained in age discrimination.

{¶ 41} Our examination of the evidence reveals that Charlie Fisher, who at one time was Jelinek's regional manager, testified that he could not remember being trained in age discrimination. He testified that the only thing he could remember was "accepting differences," but he could not recall specifics. (Tr. Vol. VI, 1154.)

{¶ 42} James Sipes was the human resources manager responsible for implementing the re-deployment. He did not play a part in determining which employees would be selected for re-deployment. He did not personally compare the treatment of Jelinek with a younger employee who received favorable treatment from the re-deployment. However, he further stated that three people, at least one of them a lawyer, from "corporate" looked at the ages of the people whose jobs were being eliminated. Sipes testified that he received training about age discrimination through internet access to the company's policies. He stated that he was familiar with Abbott's EEOC policy and that age discrimination was prohibited. When asked whether he had sufficient training in age discrimination to recognize issues to bring to the attention of Abbott, he stated that he had experts in the corporate office that he could rely upon, and he knew enough to be able to administer the plan.

{¶ 43} The only other evidence of malice was Jelinek's testimony that Insani's secretary asked why Insani hated him.

{¶ 44} Construing this evidence in the light most favorable to Jelinek, he has failed to establish that he was entitled to an instruction on punitive damages. At best, the evidence shows that some managers did not receive formal instruction on age discrimination, but to infer that Abbott exhibited a conscious disregard for Jelinek's right to be free from age discrimination requires a leap of logic not supported by the evidence. The fifth assignment of error is overruled.

{¶ 45} In his sixth assignment of error, Jelinek disagrees with the trial court's decision to dismiss defendant Gregory Lindberg by means of a directed verdict. Jelinek admitted that the decision to abolish all the PCDM positions was not discriminatory. Rather, he argues that he was treated less favorably than younger PCDMs because he was asked to redeploy to the Lake County, Indiana area.

{¶ 46} Shortly before the reduction in force, Lindberg started as the vice-president of sales and medical nutrition in June of 1997. Lindberg was present at a meeting with Abbott Human Resources and a corporate attorney to discuss the decisions made regarding the reduction in force. The testimony at trial did not establish that Lindberg made personnel decisions in the re-deployment. Lindberg had been in his position for

four months and was not familiar with the people involved. Rather, Insani made the decision to send Jelinek to the Lake County, Indiana territory. Lindberg did state that he would have had the option and opportunity to review performance evaluations of the affected employees, but that he did not personally go through the available information to see whether the company was treating older people less favorably than younger people. Jelinek argues, without citation to any authority, that Lindberg had a duty to inquire on his own to make sure the decision to move Jelinek to Lake County, Indiana was not discriminatory.

{¶ 47} Given the evidence that Abbott, as a corporation, did review the PCDM positions, and Lindberg's unfamiliarity with the individuals involved, Lindberg's failure to review the re-deployments of the PCDMs personally is not sufficient to show a conscious disregard for Jelinek's rights such that he could be personally liable for the alleged discrimination.

{¶ 48} The sixth assignment of error is overruled.

{¶ 49} The seventh assignment of error is a manifest weight argument regarding the jury verdict in favor of Abbott. Because this case must be remanded for a new trial, the assignment of error is moot.

{¶ 50} In the eighth assignment of error, Jelinek argues that the trial court should have assessed costs against defendants for all the costs of the proceeding through the appeal of the first trial and remand.

{¶ 51} In *Jelinek II*, this court's judgment entry remanded the case for a new trial and assessed costs against defendants. Jelinek contends that this judgment entry was meant to assess all costs against defendants from the beginning of the case up to the judgment entry in *Jelinek II*.

{¶ 52} A trial court is authorized to award costs under Civ.R. 54(D), which provides that unless provided by a statute or by the Civil Rules, costs are to be awarded to the prevailing party unless the court decides otherwise. The assessment of costs is a matter within the discretion of the trial court, and, absent an abuse of discretion, the trial court's decision must be upheld. *Keaton v. Pike Community Hosp.*, 124 Ohio App.3d 153 (4th Dist.1997), citing *Vance v. Roedersheimer*, 64 Ohio St.3d 552 (1992).

{¶ 53} However, App.R. 24(B) defines costs as "an expense incurred in preparation of the record including the transcript of proceedings, fees allowed by law, and the fee for filing the appeal. It does not mean the expense of printing or copying a brief or an appendix." App.R. 24(A)(4) permits the court of appeals to order these costs as it sees fit if the judgment appealed is affirmed or reversed in part or is vacated. This court only assessed the costs associated with the appeal in *Jelinek II* against defendants. Because this case must be remanded for a new trial on the age discrimination claim, the remaining arguments in this assignment of error are rendered moot.

{¶ 54} The eighth assignment of error is overruled.

{¶ 55} Based on the foregoing, Jelinek's second assignment of error is sustained, and the case is remanded to the Franklin County Court of Common Pleas for further proceedings in accordance with law and consistent with this decision. Assignments of error one, three, four, five, six, and eight are overruled, and assignment of error seven is rendered moot.

Judgment affirmed in part and
reversed in part, cause remanded.

BROWN, J., concurs.
DORRIAN, J., concurs in part and dissents in part.

DORRIAN, J., concurring in part; dissenting in part.

{¶ 56} I concur in part and respectfully dissent in part from the majority. I ultimately would affirm the trial court's decision.

{¶ 57} I concur with the majority that the trial court did not err in admitting evidence of Jelinek's wealth. I would overrule the first assignment of error.

{¶ 58} I dissent from the majority and would find that the trial court did not err in excluding evidence regarding (1) the dismal state of the Gary, Indiana territory, and (2) the conversation between Mr. Pini and Mr. Insani regarding an alleged report of Abbott's efforts to force retirements. As to the state of the territory, I disagree that such evidence is relevant to the element of pretext or to the claim of emotional distress. Therefore, I believe that the resolution of this portion of the second assignment of error depends on the resolution of the fourth assignment of error. Regarding the fourth assignment of error, I concur with the majority that the trial court did not err in limiting the scope of

retrial by not allowing the question of constructive discharge to be retried. Because I would overrule the fourth assignment of error, I would also overrule the second assignment of error as to the exclusion of evidence regarding the state of the territory.

{¶ 59} As to the conversation between Mr. Pini and Mr. Insani regarding the alleged report of Abbott's efforts to force retirements, I believe such testimony would be hearsay and is not excluded pursuant to Evid.R. 801(D)(2). Furthermore, in the appeal of the first trial, this court found that the trial court did not err in excluding the same testimony for lack of personal knowledge. *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696, ¶ 59 (10th Dist.). Therefore, I would also overrule the second assignment of error as to the exclusion of evidence regarding the conversation between Mr. Pini and Mr. Insani.

{¶ 60} Because it sustained the second assignment of error and finds that a new trial is necessary, the majority did not determine the third assignment of error as to whether the trial court erred in allowing Abbott to claim a reduction in force at trial. I, however, would find there was no error in this regard, as nothing in this court's remand orders from *Jelinek*, 2005-Ohio-5696, precluded Abbott from arguing a reduction in force theory at the new trial.

{¶ 61} The majority did determine the third assignment of error as to whether the trial court erred by failing to compel discovery of and excluding statistical evidence which Jelinek determined was relevant to the reduction in force. Here, the majority found error. I dissent from the majority on this finding. Regarding the motion to compel, Jelinek had ample opportunity to make such a motion prior to trial and did not do so until the eve of trial. In his brief, Jelinek admits that he had been requesting this same discovery since the beginning of the case. He also states that Abbott asserted the RIF theory at the retrial in April 2007. Jelinek does not satisfactorily explain why he waited almost four and one-half years to pursue a motion to compel discovery of this statistical information. The motion to compel was filed September 2, 2011, ten days before the trial started on September 12, 2011. Jelinek argues that such discovery did not become relevant until the court's ruling of August 24, 2011 to deny his motion in limine to exclude references to the 1997 RIF. Jelinek states that he filed the motion in limine in 2008. Given the scope of

discovery may have turned on the trial court's resolution of the motion in limine, Jelinek could have requested a trial court ruling on the motion in limine well in advance of trial. There is no indication that Jelinek did. Instead, the motion in limine apparently languished for three years. Furthermore, nothing prohibited Jelinek from pursuing discovery in anticipation of a possible adverse ruling on his motion in limine. Regarding the exclusion of statistical evidence he did have, Jelinek did not disclose its expert witness or expert report in advance of trial. Taking into consideration the procedural history of this case, the fact that the complaint was first filed in September 1999, and the fact that the motion to compel and request to present statistical evidence were made so late in the game, I cannot say that it was an abuse of discretion for the trial court to deny the motion to compel or exclude the statistical evidence. Therefore, I would overrule the third assignment of error.

{¶ 62} As noted above, I concur with the majority in overruling the fourth assignment of error.

{¶ 63} I concur with the majority that the trial court did not err in granting a directed verdict in favor of Abbott on the issue of punitive damages. I would overrule the fifth assignment of error.

{¶ 64} I concur with the majority that the trial court did not err in granting a directed verdict in favor of Gregory Lindberg. I would overrule the sixth assignment of error.

{¶ 65} Because it sustained the second assignment of error and found that a new trial is necessary, the majority found to be moot the seventh assignment of error and the question of whether the jury erred in ruling in favor of Abbott on Jelinek's age-discrimination claim. I would, however, overrule the seventh assignment of error, as I do not believe the jury erred in its determination.

{¶ 66} Finally, I concur with the majority that the trial court did not err in not assessing costs against Abbott for all costs of the proceeding through the appeal of the first trial and remand. I would overrule the eighth assignment of error.

{¶ 67} For these reasons, I would overrule all of appellant's assignments of error. I respectfully dissent from the majority's order to remand the case to the trial court for a new trial, and I would affirm the judgment of the trial court.

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