STATE OF MICHIGAN

COURT OF APPEALS

DARRIN RUSHING,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED
June 20, 2024

No. 362811
Macomb Circuit Court
LC No. 2019-001635-CD

Before: BOONSTRA, P.J., and CAVANAGH and PATEL, JJ.

PER CURIAM.

Defendant appeals by right the judgment entered by the trial court after a jury verdict in favor of plaintiff. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff began working as a corrections officer with defendant in 1999, working at the Macomb Correctional Facility (MCF) for most of his career. In 2011, plaintiff intervened in a prisoner fight involving Lester Gunn, a mentally ill inmate with a lengthy assaultive record. As plaintiff pulled Gunn away from the altercation, Gunn resisted and caused plaintiff to fall backwards. Plaintiff's leg was seriously injured. When plaintiff eventually returned to work, he was restricted to "light duty" work for a time, followed by transitional employment, before being authorized for full duty without restrictions.

Plaintiff testified that he spoke to Warden Kenneth Romanowski about his recovery, indicated that he did not feel ready to be back on full duty, and asked if there was anything Romanowski could do to help him. Plaintiff was subsequently appointed as an acting prison counselor[1] in 2013, a role that does not involve direct supervision of inmates. Although acting positions are usually limited to one-year periods, plaintiff was an acting prison counselor for 1½ years and remained in that role when Romanowski transferred to another facility in 2015. Warden

[1] Acting positions are temporary placements to fill vacancies.

Randall Haas took over at MCF and, shortly thereafter, removed plaintiff from the acting prison counselor position. According to Haas, defendant's assistant director had instructed all wardens in his region to evaluate acting positions because the corrections officers union had complaints about the amount of overtime that was being required at that time. Haas ordered all employees in acting positions to return to their regular classifications. Consequently, plaintiff was reinstated as a corrections officer in March 2015.

Plaintiff subsequently encountered Gunn a few times, with severe effects. Plaintiff testified that he became nervous, sweaty, and experienced "a foot twitter thing" upon seeing Gunn. In June and July of 2015, plaintiff began asking his supervisors for help because he was struggling with extreme fear when he was around Gunn. He asked not to be assigned to Gunn's housing unit and to generally be kept away from Gunn. Plaintiff recalled a specific encounter on July 16, 2015 that was particularly troubling for him. Gunn identified plaintiff, gave him a "smart look," looked at plaintiff's leg, and asked how plaintiff was feeling. Plaintiff construed the comment as a threat and promptly reported it to his on-duty sergeant, again asserting that he could not be near Gunn. Plaintiff also went to see his primary care physician, Dr. Christopher Borgiel, who placed plaintiff on medical leave for three weeks.

During his medical leave, plaintiff consulted with the head of human resources (HR) at MCF and was advised to submit a written request for a Special Problem Offender Notice (SPON), which is designed to eliminate contact between the requesting corrections officer and the subject of the SPON. Plaintiff's request was denied, because the administrators who reviewed the request did not believe a SPON was warranted when Gunn did not directly target plaintiff and had injured plaintiff accidentally while resisting restraint.

Plaintiff returned to work from his medical leave on August 8, 2015, at which time he was assigned to work in the dining hall. Plaintiff had a coworker cover the assignment because plaintiff did not feel he could deal with Gunn. Plaintiff was assigned to the dining hall again the next day and was told he had to personally report for the assignment. Plaintiff went to the dining hall and spoke with Sergeant Dale Hughes about his concerns, asking if there was some other assignment he could do, because he felt as though he might hit Gunn in the head if he saw Gunn there. Hughes insisted that plaintiff work the dining hall assignment, so plaintiff spoke with his shift commander, Lieutenant James Webster, about the matter. Webster also rejected plaintiff's request for an alternative assignment. Plaintiff responded that he could not work in the dining hall and was going home sick. Webster reported plaintiff's actions for investigation. Plaintiff later submitted documentation in which Dr. Borgiel excused plaintiff from work through September 2, 2015 because plaintiff was suffering from post-traumatic stress disorder (PTSD) and depressive disorder.

Lieutenant Peter Neuberger investigated the allegations concerning the dining hall incident and determined that there was sufficient evidence to believe plaintiff had violated two work rules: "insubordination" for failure to comply with orders and "inhumane treatment" for threatening Gunn. Haas presided over a disciplinary conference, found that plaintiff had violated the insubordination and inhumane treatment work rules, and deferred the disciplinary recommendation to a discipline coordinator. Jennifer Nanasy reviewed the information from the disciplinary hearing and ordered a five-day suspension—two days longer than the usual sanction for violating the two work rules at issue—on the basis of unspecified aggravating circumstances.

The dining hall incident was plaintiff's first disciplinary event in seventeen years of employment with defendant, but it was quickly followed by a second—the hallway incident. Plaintiff was summoned to the personnel office on January 19, 2016 and was advised of his five-day suspension. As he was leaving the office, plaintiff saw Webster and Corrections Program Coordinator Todd VonHiltmayer in the hallway. Plaintiff waved paperwork toward Webster and "thanked" him for the suspension. According to Webster and VonHiltmayer, plaintiff said something along the lines of, "Five [f*****g] days, thanks a lot," while plaintiff maintained that he said, "Thanks, five days," but did not curse. As plaintiff was leaving the building, he had an exchange with Corrections Officer Marlene Reppenhagen, the substance of which was also disputed. VonHiltmayer claimed that he spoke with Reppenhagen after plaintiff left, and that Reppenhagen told him plaintiff said, "[I]f I ever see him [Webster] in the real world, he won't walk away." Reppenhagen later denied hearing or conveying any such remark. Plaintiff similarly admitted conversing with Reppenhagen, but denied threatening Webster.

Webster reported the hallway incident as another possible work rule violation, and the allegations were investigated by Mark McDonald, an investigator from another facility. McDonald was unable to substantiate the allegation concerning plaintiff's threat, but found by a preponderance of the evidence that plaintiff did make the "five f*****g days" comment, which constituted inhumane treatment toward Webster. Haas again presided over the disciplinary conference and agreed that plaintiff had violated the inhumane treatment work rule. Haas recommended that plaintiff receive a seven-day suspension. Nanasy approved the disciplinary recommendation, explaining at trial that the length of the suspension was dictated by a progressive discipline policy that required a more severe sanction than plaintiff's previous five-day suspension.[2]

In addition to reporting the hallway incident to defendant for investigation, Webster also sought a personal protection order (PPO) against plaintiff, citing only the "five f*****g days" comment in his petition. Webster testified that he had decided to pursue a PPO because he saw a number of "red flags" in plaintiff's behavior, namely, (1) the threat plaintiff purportedly conveyed to Reppenhagen; (2) plaintiff's conduct in the hallway, which reflected anger issues; and (3) plaintiff's constant claims of PTSD, along with Webster's understanding of the "workplace safety and violence" issues that were commonly associated with that condition. The circuit court denied Webster's PPO petition. Webster remained in plaintiff's chain of command thereafter, but they tried to limit their interactions with each other and spoke only of business-related matters.

After these disciplinary incidents, plaintiff began pursuing a variety of alternative job options, applying for numerous positions at MCF and other facilities operated by defendant. He also pursued outside employment opportunities, including a position with the St. Clair County Sheriff's Department. Plaintiff was doing well in the application and interview process for that position, but learned during the final interview that a representative of the sheriff's department had spoken with Webster and that Webster claimed to have recently filed a PPO against plaintiff, despite the fact that the reference check took place 11 months after the PPO proceedings and no

[2] Plaintiff was disciplined a third time in 2019. The circumstances of that discipline are not critical to this case and will not be discussed further.

PPO had ever issued. Webster testified that he did not disclose to the reference checker that the petition was denied because his goal was to get off the phone; the only reason he mentioned the PPO at all was in an effort to explain why the reference checker should speak with a different supervisor. Plaintiff did not get the job with the sheriff's department. His applications for various positions with defendant were also unsuccessful for a variety of reasons. Plaintiff lacked the experience or educational background for some positions, was unable to meet physical standards for others, and on one occasion failed to attend an interview. However, there were certain positions for which plaintiff was qualified and interviewed. Plaintiff was among the top three candidates for some of those positions, but his disciplinary record precluded his appointment because Haas had a personal policy of not promoting any employee who had active discipline on their record.[3]

In 2023, plaintiff filed suit against defendant, alleging that defendant had discriminated against him in violation of Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. In addition to the testimony of various corrections officers and supervisors, plaintiff also presented testimony from Dr. Borgiel; Jennifer Heinz, plaintiff's former counselor; and Dr. Gerald Shiener, an expert in psychiatry and neuropsychiatry, all of whom agreed that plaintiff suffered from PTSD arising from his interactions with Gunn at work. Plaintiff presented to the jury three theories of employment discrimination under the PWDCRA—failure to accommodate, disparate treatment, and retaliation. The jury found in plaintiff's favor with respect to all three theories and awarded substantial damages.

After the judgment in this case was entered, defendant moved judgment notwithstanding the verdict (JNOV) on several grounds, but the trial court denied the motion. This appeal followed.

II. JNOV

Defendant argues that the trial court erred by denying his motion for JNOV. We disagree except with regard to plaintiff's retaliation claim. This Court reviews de novo a trial court's denial of a motion for JNOV. *Dorsey v Surgical Institute of Mich, LLC*, 338 Mich App 199, 223; 979 NW2d 681 (2021). "JNOV is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 719; 922 NW2d 662 (2018). "If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury." *Id*. (quotation marks and citation omitted).

A. PLAINTIFF'S STATUS UNDER THE PWDCRA

Defendant argues that it is entitled to JNOV with respect to plaintiff's failure-to-accommodate and disparate-treatment claims because plaintiff did not prove that he was disabled as defined by the PWDCRA. We disagree.

[3] A few weeks before trial, plaintiff was promoted to sergeant by George Stephenson, the former deputy warden and current warden.

"To prove that a violation of the PWDCRA occurred, a plaintiff must show (1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute." *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 471; 957 NW2d 377 (2020) (quotation marks and citation omitted; alterations in original). Subject to exceptions, "a person shall accommodate a person with a disability for purposes of employment . . . unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1102(2). MCL 37.1103(d) defines "disability" under the PWDCRA and provides in relevant part

> Except as provided under subdivision (f), "disability" means 1 or more of the following:
>
> (*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> (A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
>
> * * *
>
> (*ii*) A history of a determinable physical or mental characteristic described in subparagraph (*i*).
>
> (*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (*i*).

"[L]ike the [Americans with Disabilities Act, 42 USC 12101 *et seq*.], the PWDCRA generally protects only against discrimination based on physical or mental disabilities that substantially limit a major life activity of the disabled individual, but that, with or without accommodation, do not prevent the disabled individual from performing the duties of a particular job." *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996) (quotation marks and citations omitted). The foregoing list is nonexclusive, and other functions may be considered major life activities. *Lown v JJ Eaton Place*, 235 Mich App 721, 729; 598 NW2d 633 (1999).

Defendant argues that plaintiff's PTSD does not qualify as a disability under the PWDCRA because it would not preclude plaintiff from working a variety of jobs—only jobs that involved potential encounters with Gunn—and therefore does not substantially impair the major life activity of working.

Defendant is correct that when a plaintiff's ability to work is the major life activity purportedly impaired by a physical or mental characteristic, "the impairment must significantly restrict [the] individual's ability to perform at least a wide range of jobs," and "the inability to perform a *particular* job does not constitute a substantial limitation." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 478; 606 NW2d 398 (1999). That is, a plaintiff must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Lown*, 235 Mich App 721 (quotation marks and citation omitted).

Here, Dr. Borgiel and Heinz both opined that plaintiff's PTSD was triggered by interactions with Gunn, and that plaintiff would have been able to work without issue if he was separated from Gunn. Dr. Shiener similarly indicated that it was plaintiff's return to a position that involved contact with Gunn that caused plaintiff's PTSD symptoms to manifest. He also indicated that plaintiff's PTSD interfered with his ability to perform the duties of plaintiff's job. And although plaintiff himself occasionally expressed fear concerning intervention in prisoner fights generally, he repeatedly testified that it was the possibility of interacting with Gunn that caused debilitating problems for him at work. On those occasions, plaintiff had panic attacks or panic reactions, became nervous and sweaty, felt spasms or twitching in his foot, experienced violent urges toward Gunn, and felt as though he was being threatened by Gunn's very presence.

The evidence suggests that plaintiff had little difficulty working in any capacity that did not require interactions with Gunn. However, employees of defendant repeatedly testified that there was always a possibility that plaintiff could encounter Gunn while working at MCF or other facilities, no matter his position. Haas was particularly insistent that defendant could never have guaranteed separation between Gunn and plaintiff even if plaintiff had been placed in a role that would not require him to work in Gunn's housing unit because they could still encounter each other by chance in common areas of the prison. Defendant questioned Corrections Officer Hebert Mueller about that theory as well. Mueller had received a SPON against Gunn and agreed that it remained possible he would see Gunn by happenstance within MCF. It is also undisputed that Gunn was regularly transferred between several facilities, though he was usually placed only in facilities with residential treatment programs capable of treating his mental health needs. Viewing the evidence in the light most favorable to plaintiff, the jury could have accepted that plaintiff's PTSD significantly restricted his ability to perform a broad range of corrections jobs because plaintiff could encounter Gunn—his PTSD trigger—in nearly any capacity at MCF and several other facilities.

Defendant alternatively argues that if the jury believed that plaintiff was unable or unwilling to intervene in fights among *any* prisoners, plaintiff was not disabled within the meaning of the PWDCRA because he could not perform the essential functions of a corrections officer. But plaintiff never advanced this theory at trial; rather, plaintiff agreed on cross-examination that he could be reinjured without Gunn's involvement and that his request for a SPON was motivated, in part, by his fear of having to cope with direct prisoner intervention generally. Plaintiff made it clear in his case-in-chief that his PTSD symptoms had only manifested in situations involving Gunn, and his attorney emphasized in closing arguments that plaintiff only ever asked to be kept away from Gunn. Moreover, plaintiff continued to work at MCF after his PTSD had manifested and remained employed there at the time of trial without any suggestion that he failed in his duties beyond the disciplinary incidents explored at trial. When this Court reviews a trial court's ruling

on a motion for JNOV, it is not tasked with considering whether every theory raised at trial would support the verdict—it considers whether the moving party is entitled to judgment as a matter of law. *Nahshal*, 324 Mich App at 719. To that end, "[i]f reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury," and the moving party is not entitled to JNOV. *Id.*

At any rate, in order to qualify as a disability under MCL 37.1103(d)(*i*)(A), the physical or mental characteristic at issue must not only substantially limit a major life activity, but also be "unrelated to the individual's ability to perform the duties of a particular job or position . . . ." For purposes of this definition, " '[u]nrelated to the individual's ability' means, with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(*l*)(*i*).

Accepting that intervening in prisoner fights and other emergencies is an essential duty of a corrections officer, plaintiff presented evidence from which, viewed in the light most favorable to him, the jury could have reached different conclusions about whether plaintiff's PTSD would have prevented him from performing that duty had he been given an accommodation in the form of a SPON. *Nahshal*, 324 Mich App at 719. The evidence at trial showed that SPONs are designed to act as the equivalent of a no-contact order between the subject prisoner and the person named in the SPON. There was testimony that a SPON still provides some level of protection and separation even when the prisoner cannot be transferred to a different facility. Indeed, despite acknowledging the possibility of encountering Gunn in passing, Mueller testified that he had not interacted with Gunn in the eight or nine years since a SPON was issued in his favor. The SPON resulted in Mueller no longer be assigned to Gunn's housing unit, and Mueller agreed that he was not required to go to the dining hall at the same time as Gunn. Accordingly, reasonable jurors could conclude that plaintiff was able to perform the essential function of intervening in prisoner fights and other emergencies had a SPON been entered that would, in all likelihood, preclude him from having to do so in situations involving Gunn.

Moreover, although it was defendant's position at trial that a SPON was not warranted, there was substantial evidence from which the jury could have concluded otherwise. Several of defendant's employees opined that the 2011 incident in which plaintiff was injured did not support issuing a SPON because Gunn did not directly target plaintiff or intend to injure him. The written SPON policy, however, does not require that a SPON recipient have been deliberately targeted or intentionally injured by a prisoner. In pertinent part, it provides that "[a] SPON shall be issued whenever an offender is believed likely to represent a genuine threat to the safety of an identified offender, volunteer, or employee, including a contractual employee, or to the order or security of a correctional facility." The policy also identifies examples of circumstances in which a SPON would be warranted, such as "[w]hen there is a specific act or threat of violence to or by an offender." There was also testimony that the SPON policy was flexible, and the list of examples provided therein was not exhaustive. Further, Mueller testified that the circumstances that led the granting of a SPON against Gunn involved intentional acts, but not injury; in fact, one of the incidents involved Gunn resisting Mueller's attempt to restrain him *without* resulting in injury to Mueller. The jury could have formed different conclusions about why these circumstances represented a genuine threat to Mueller's safety or constituted "specific act[s] or threat[s] of violence" when Gunn's intentional resistance of plaintiff's efforts to restrain him, which resulted

in physical injury to plaintiff, did not. And, to the extent that plaintiff's PTSD caused him to panic in Gunn's presence, the jury could have believed that a SPON was appropriate because the interactions between Gunn and plaintiff represented "a genuine threat . . . to the order or security of a correctional facility" in that plaintiff was unable to effectively do his job in such a state.

In sum, viewing the evidence in the light most favorable to plaintiff, a reasonable jury could have found that plaintiff's PTSD substantially limited the major life function of working by significantly restricting plaintiff's ability to perform a wide range of jobs and was unrelated to his ability to perform the duties of a corrections officer with an accommodation. *Peden*, 470 Mich at 204. The trial court did err by denying defendant's motion for JNOV with respect to this issue.

B. REQUEST FOR ACCOMMODATION

Defendant also argues that it was entitled to JNOV with respect to plaintiff's failure-to-accommodate claim because plaintiff never requested an accommodation. We disagree.

In order to bring a successful failure-to-accommodate claim under the PWDCRA, the claimant must provide notice "in writing of the need for accommodation within 182 days after the date the person with a disability knew or reasonably should have known that an accommodation was needed." MCL 37.1210(18). See also *Petzold v Borman's Inc*, 241 Mich App 707, 716; 617 NW2d 394 (2000). As this Court explained in *Bageris v Brandon Twp*, 264 Mich App 156, 163-164; 691 NW2d 459 (2004):

> [N]othing in the plain language of the statute provides any guidance on what type of written notification is necessary to reasonably inform the employer what type of accommodation is needed or, more importantly, why the accommodation is needed. However, the PWDCRA places the burden of proof for a claim of failure to accommodate on the person with a disability. MCL 37.1210(1). In light of that and applying common sense, we conclude that an employee cannot satisfy the written notice requirement of MCL 37.1210(18) by simply stating "I need a reader because I have difficulty with tests." Without at least a brief explanation of why an accommodation is needed, in terms of some physical or mental condition, the employer has no basis on which to make an educated decision whether a "disability" under the PWDCRA, and thus any "duty to accommodate," is at issue. The employer would be left in an unnecessarily precarious position. Having no informed basis on which to respond, an employer could deny an accommodation and be held liable in an action under the PWDCRA for a failure to accommodate—even though the employer had no way of knowing whether the act applied or whether an accommodation was legally necessary.

This Court also noted that the requirements for requests for accommodation under the PWDCRA were analogous to the notice requirements for claims alleging sexual harassment within a hostile work environment, which should be reviewed to determine whether "the totality of the circumstances were such that a reasonable employer would have been aware of a *substantial probability* that sexual harassment was occurring." *Id*. at 164-165 (quotation marks and citation omitted).

In this case, plaintiff consulted with Dr. Borgiel after he began experiencing PTSD symptoms during encounters with Gunn in June and July 2015, and Dr. Borgiel provided a note verifying the medical necessity for plaintiff to be off work between July 16, 2015 and August 6, 2015. A few days later, plaintiff wrote a memorandum to the deputy warden which stated as follows:

> I am writing this memorandum to you, as directed by HRD E. Davis. I am requesting that a Special Problem Offender Notice (SPON) be generated as a Staff SPON against/regarding prisoner Gunn #[XXXXXX].
>
> As is commonly known, I was injured by prisoner Gunn on October 17, 2011, while working in Housing Unit 7. As of March 31, 2015, I was returned to shift, and uniform, having to cope with the direct intervention/direction of prisoners. Physical issues aside, the mental stress has been considerable, in regards to my fear of being injured again.
>
> On Thursday, July 16, 2015, I had to scan ID cards in the dining hall. This was the third time, that I had direct contact with prisoner Gunn since his return to [MCF]. The first being on June 15, and the next July l, 2015. The first occurrence exhibited a strong response from me as my right heel started stuttering like a trip hammer. The second occurrence elicited a feeling of anger from me, but I was able to de-escalate. On July 16, I honestly felt like hurting the prisoner. The next day I sought immediate help. This resulted in my doctor taking me off of work at least until August 6, 2015.
>
> Human Resources, the Disability Management Unit and CMI/Worker's Compensation have all been notified, and the appropriate paperwork is being emailed/mailed to me to complete the appropriate forms.
>
> Any assistance you could provide in facilitating the SPON, and my return to work would be greatly appreciated.

Defendant argues that plaintiff's SPON memorandum did not satisfy the notice requirement of MCL 37.1210(18) because: (1) it did not identify his PTSD diagnosis; (2) the memorandum did not ask for an accommodation and, instead, indicated that his doctor already placed him on medical leave; and (3) plaintiff stated that HR, the disability management unit, and "CMI/Worker's Compensation" had all been notified and would be providing plaintiff with "appropriate forms" to complete, thereby suggesting that whatever remedy or accommodation plaintiff sought was being addressed elsewhere. We disagree.

Defendant takes issue with plaintiff's failure to reference his PTSD diagnosis—a diagnosis that was not formally reached until the month after plaintiff's memorandum—but neither *Bageris* nor MCL 37.1210(18) impose any such requirement. *Bageris* states only that the requisite notice must identify "some physical or mental condition" that requires accommodation, *Bageris*, 264 Mich at 164, while MCL 37.1210(18) required plaintiff to notify defendant of the need for accommodation in writing within a specified time frame. Plaintiff's memorandum did not identify a specific medical diagnosis, but it did alert defendant that plaintiff's postinjury interactions with

Gunn were causing plaintiff considerable mental stress, "stuttering" in his right heel, and extreme anger. The memorandum also stated that these problems had caused his doctor to determine that he was unable to work for at least a few weeks, thereby suggesting that plaintiff was suffering from something more than mundane stress. Despite failing to explicitly refer to PTSD, reasonable jurors could find from the totality of the circumstances that plaintiff's memorandum provided defendant with sufficient information to make an informed decision concerning plaintiff's request. *Bageris*, 264 Mich at 163-164.

Defendant also argues that plaintiff admitted that he did not request an accommodation under the PWDCRA. We disagree. It is true that plaintiff did not follow defendant's internal procedures for requesting an accommodation. But defendant has identified no portion of the PWDCRA or other authority that precludes a failure-to-accommodate claim because a particular procedure adopted by an employer was not followed when the claimant otherwise satisfied the written notice requirement of MCL 37.1210(18).

Further, the jury could have concluded that plaintiff's request for a SPON was a request for an accommodation. The PWDCRA does not define what constitutes an accommodation, *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 29; 580 NW2d 397 (1998),[4] but it does recognize certain types of accommodations in the context of addressing when an accommodation might impose an undue hardship on the employer, *id*. at 32-33. For instance, MCL 37.1210(14) contemplates restructuring of a job or alteration of schedules, but limits the availability of such an accommodation to employers with more than 15 employees. In this case, the evidence at trial showed that a SPON could act as a limitation on the protected employee's assignments or, in other words, a minor alteration of the employee's scheduling, without otherwise affecting any of the employee's normal duties. A reasonable juror could conclude that a SPON was a reasonable form of accommodating plaintiff's PTSD by substantially reducing the likelihood of interactions between plaintiff and Gunn.

Additionally, we reject defendant's argument that the statement in plaintiff's memorandum indicating that HR, the disability management unit, and worker's compensation had all been notified implied that whatever remedy or accommodation plaintiff sought was being addressed. Plaintiff explicitly requested a SPON, and trial testimony from defendant's employees indicated that his memorandum was an appropriate method for such a request. And as stated, the jury could reasonably have concluded that a SPON was an accommodation. Viewing the evidence in the light most favorable to plaintiff, a reasonable jury could have found that plaintiff requested an accommodation under the PWDCRA. The trial court did not err by denying defendant's motion for JNOV as to this issue.

C. CAUSAL CONNECTION – DISPARATE-TREATMENT CLAIM

[4] *Rourk* refers to the PWDCRA by its former name, the Handicappers' Civil Rights Act. See *Chiles*, 238 Mich App at 465 n 1.

Defendant also argues that it was entitled to JNOV concerning plaintiff's disparate treatment claim because plaintiff did not establish a sufficient causal connection between discriminatory animus and any adverse employment actions. We disagree.

"To prove that a violation of the PWDCRA occurred, a plaintiff must show (1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute." *Jewett*, 332 Mich App at 471 (quotation marks and citation omitted; alterations in original). Section 202 of the PWDCRA provides that an employer shall not "[f]ail or refuse to hire, recruit, or promote an individual because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position," MCL 37.1202(1)(a), nor may it "[d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position," MCL 37.1202(1)(b). As this Court explained in *Jewett*, 332 Mich App at 474,

> [i]f a plaintiff establishes a prima facie case of employment discrimination, the burden shifts to the defendant to articulate a legitimate business reason for the decision. *Aho v Dep't of Corrections*, 263 Mich App 281, 289; 688 NW2d 104 (2004). If a defendant provides a legitimate business reason, then the burden returns to the plaintiff to prove that the reason was a pretext. *Id*. A defendant must produce evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001).

Additionally,

> [a]n employer's legitimate, nondiscriminatory reasons for [adverse employment action] can be established as pretext "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Major v Village of Newberry*, 316 Mich App 527, 542; 892 NW2d 402 (2016) (quotation marks and citation omitted). The plaintiff may use direct or indirect evidence, but the plaintiff must establish a causal connection between the discriminatory animus and the adverse employment decision. *Id*. [*Jewett*, 332 Mich App at 475.]

Defendant argues that there was insufficient evidence of a causal connection between any alleged discriminatory animus and plaintiff's failure to obtain positions he had applied for, or the manner in which he was disciplined for work rule violations. We disagree.

Defendant's written SPON policy states that "[a] SPON shall be issued whenever an offender is believed likely to represent a genuine threat to the safety of an identified offender, volunteer, or employee, including a contractual employee, or to the order or security of a correctional facility." After experiencing PTSD symptoms when he came in contact with Gunn over the summer of 2015, plaintiff requested a SPON on July 20, 2015. Although defendant maintained at trial that a SPON was not appropriate under the circumstances of plaintiff's request

because Gunn did not directly target plaintiff, reasonable jurors could have concluded that defendant's explanation was pretextual because its explanation did not justify denial of the SPON request.

The circumstances in which Mueller was granted a SPON are highly significant to this issue. One of the inciting events that led to the SPON even involved Gunn resisting restraint. But unlike in plaintiff's case, Mueller was not injured in that incident. Mueller's testimony left the impression that he was not particularly bothered by Gunn's behavior, and he indicated that a SPON was generated without his request. The evidence demonstrated that Mueller was given a SPON despite the fairly innocuous nature of his interactions with Gunn, whereas plaintiff was denied a SPON even though encountering Gunn caused him to enter a state of panic in which he was unable to effectively do his job. The jury could infer that the symptoms plaintiff experienced in Gunn's presence satisfied the requirements of the SPON policy because they implicated his safety, the safety of others around him, and the security of the facility as a whole. The jury could also accordingly infer that defendant's stated reason for denying a SPON was pretextual.

One of plaintiff's main theories of the case was that if a SPON had been issued, he never would have been disciplined and would not have been excluded from promotion opportunities on the basis of his disciplinary record. This theory was supported by the evidence. Haas agreed that if defendant had fashioned some sort of accommodation or remedy that kept plaintiff away from Gunn, it was unlikely he would have been disciplined. And according to Mueller, he was no longer required to work in the dining hall during periods Gunn would be there after a SPON was generated on his behalf. Webster indicated that he was unsure whether a SPON would have precluded assigning plaintiff to the dining hall, but agreed that he would have complied with its terms had a SPON been issued. Therefore, the jury could have determined that the dining hall discipline was a direct product of defendant's discrimination against plaintiff with respect to his SPON request. It could also view defendant's refusal to consider plaintiff's medical explanation for his behavior as evidence of discrimination. And because the hallway incident arose from plaintiff's reaction to the dining hall discipline, plaintiff's second discipline can likewise be traced back to defendant's denial of his SPON request.

Moreover, plaintiff testified that he did not get several positions because of the active discipline on his record. Haas testified that his personal policy against promoting employees with active discipline was applied to plaintiff in connection with his applications for corrections program coordinator, resident unit manager, and multiple applications for prison counselor positions. Although Haas did not specifically know whether plaintiff was one of the top contenders for these positions, he was quite clear that he would never have considered plaintiff for promotion because of plaintiff's disciplinary record. Given the clear chain of events in this case, and viewed in the light most favorable to the plaintiff, the jury could conclude that plaintiff's first two disciplines and his failure to obtain several positions with MCF stemmed from defendant's discriminatory animus.

Defendant also argues, regarding plaintiff's disciplinary incidents, that plaintiff presented no evidence that other corrections officers who violated the same work rules were treated differently and, therefore, that plaintiff failed to rebut Nanasy's testimony that the discipline plaintiff received was consistent with defendant's universally applied policies. Presenting evidence that similarly situated individuals were treated differently is indeed an appropriate and

persuasive way to rebut a nondiscriminatory reason for adverse employment action, see, e.g., *Town v Mich Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (explaining that inference of disparate treatment in age discrimination claim could arise if the plaintiff proves that a similarly situated employee was held to different standard). But it is not the only way. This Court has stated that an employer's proffered explanation for adverse action can be rebutted "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Jewett*, 332 Mich App at 475 (quotation marks and citation omitted.) Thus, the mere fact that plaintiff did not identify similarly situated corrections officers who were disciplined differently does not entitle defendant to JNOV.

Defendant also argues that JNOV was appropriate because there was insufficient evidence that discrimination based on plaintiff's disability was a motivating factor for plaintiff's discipline. We disagree. Viewing the evidence in the light most favorable to plaintiff, the jury could infer that defendant had a discriminatory motive, at least with respect to the dining hall incident. By the time defendant was investigating those allegations, plaintiff had submitted paperwork confirming that his absence from work was medically necessary as a result of his PTSD. Nanasy insisted that was irrelevant because the information was not available to the supervisors at the time plaintiff refused to work in the dining hall. That might reasonably explain why Webster declined to reassign plaintiff and reported the incident for investigation, but it does not address why the documented medical explanation did not factor into the disciplinary proceedings, or why plaintiff's suspensions were subject to aggravating factors, but not the mitigating factor of a medical explanation for his behavior.

D. CAUSAL CONNECTION – RETALIATION CLAIM

Defendant also argues that it was entitled to JNOV concerning plaintiff's retaliation claim because there was insufficient evidence that plaintiff's participation in a protected activity was a significant factor in defendant's adverse employment decisions. We agree that the trial court should have granted defendant's motion for JNOV relative to this issue, but decline to grant appellate relief because the error was harmless when plaintiff's failure-to-accommodate and disparate-treatment claims were properly submitted to and decided by the jury.

"To establish a prima facie case of unlawful retaliation under § 602(a), a plaintiff must show: (1) that he engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action." *Aho*, 263 Mich App at 288-289. To satisfy the first element, the plaintiff must either "oppose[] a violation of the PWDCRA" or "(1) make a charge, (2) file a complaint, or (3) testify, assist, or participate in an investigation, proceeding, or hearing under the PWDCRA." *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 435; 653 NW2d 415 (2002). See also MCL 37.1602(a) (describing prohibited retaliation). Additionally, "[t]o establish a causal connection, a plaintiff must demonstrate that his participation in the protected activity was a 'significant factor' in the employer's adverse employment action, not merely that there was a causal link between the two events." *Aho*, 263 Mich App at 289. "Thus, mere discriminatory or adverse action will not suffice as evidence of retaliation unless the plaintiff demonstrates a clear nexus between such action and the protected activity." *Id.*

Defendant contends that plaintiff did not engage in a protected activity to support a retaliation claim until he filed a discriminatory harassment complaint against Webster on December 29, 2016, and that the only other protected activity that arose in this case was the filing of this lawsuit in February 2018. Defendant further alleges that there was no evidence establishing a clear nexus between either of those activities and subsequent adverse employment actions. Although plaintiff contends that his SPON request was a protected activity under MCL 37.1602(a), we find it unnecessary to address the question because, even if we answered it in the affirmative, defendant is correct that there was insufficient evidence that plaintiff's request was a significant factor in subsequent adverse employment actions. *Aho*, 263 Mich App at 289. We conclude from the totality of the evidence presented at trial that plaintiff's SPON request was essentially disregarded by defendant in its subsequent disciplinary decision-making. Indeed, the tenuous connection seems to be little more than coincidental temporal proximity, which is insufficient to establish the requisite causal nexus for a retaliation claim. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 286; 696 NW2d 646 (2005).

Because it does not appear that there was sufficient evidence from which any reasonable juror could conclude that plaintiff established that his protected activities were a significant factor in subsequent adverse employment actions, we agree that the trial court should have granted defendant's motion for JNOV with respect to plaintiff's retaliation claim. However, the error was harmless.

MCR 2.613(A) provides that "an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." Here, defendant's challenges to the sufficiency of plaintiff's failure-to-accommodate and disparate-treatment claims lack merit, and those claims were properly submitted to the jury for determination. The submission of an additional, unsupported claim was harmless because it did not affect the integrity of the jury's verdict relative to plaintiff's other claims. *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 5; 930 NW2d 393 (2018).

III. MOTION FOR NEW TRIAL

Defendant also argues that the trial court erred by denying its motion for a new trial, because several errors occurred during the proceedings that entitle defendant to a new trial. We disagree. "This Court reviews for an abuse of discretion a trial court's ultimate decision whether to grant a new trial, but considers de novo any questions of law that arise." *Dorsey*, 338 Mich App at 223 (quotation marks and citation omitted). Evidentiary rulings are reviewed for an abuse of discretion. *Carlsen Estate v Southwestern Mich Emergency Servs, PC*, 338 Mich App 678, 693; 980 NW2d 785 (2021). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Id*. (quotation marks and citation omitted). This Court reviews claims of judicial misconduct before a jury de novo, *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015), as well as claims of attorney misconduct, *Moody v Home Owners Ins Co*, 304 Mich App 415, 445; 849 NW2d 31 (2014), abrogated in part on other grounds by *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211 (2016).

A. LIMITATION ON TESTIMONY FROM PLAINTIFF'S TREATING THERAPIST

Defendant argues that the trial court abused its discretion by limiting the testimony of plaintiff's recent treating therapist, Thomas Kennedy, on the basis of an alleged violation of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*. We disagree.

Plaintiff repeatedly objected to defendant's plan to call Kennedy as a witness, because he had engaged in multiple ex parte conversations with defense counsel without plaintiff's consent or a qualified protective order. Defense counsel stated he only intended to ask Kennedy to authenticate plaintiff's therapy records, which had been entered into evidence. The trial court opined that such a limited scope of testimony would not implicate HIPAA or plaintiff's patient privilege when Kennedy's records were already in evidence. Defense counsel sought to clarify whether his inquiries could reference the conclusions within the records for purposes of eliciting confirmation, and the trial court said, "No, no, we're not going to go through it and ask specifics about his conclusions."

The parties agree that the leading case concerning this issue is *Holman v Rasak*, 486 Mich 429; 785 NW2d 98 (2010). The defendant in *Holman* moved for a qualified protective order to permit an ex parte interview with the decedent's treating physician after the plaintiff signed a release for medical records but refused to authorize oral communications. *Id*. at 432. The trial court denied the motion, this Court reversed, and the Michigan Supreme Court granted leave to appeal to consider whether HIPAA permits a defendant's attorney to seek ex parte interviews with a treating physician. *Id*. at 432-433.

The Court observed in *Holman* that Michigan law permits "defense counsel in a medical malpractice action . . . to seek an ex parte interview with a plaintiff's treating physician once the plaintiff has waived the physician-patient privilege with respect to that physician." *Id*. at 436, citing *Domako v Rowe*, 438 Mich 347, 361; 475 NW2d 30 (1991). Although *Domako*, like *Holman*, involved a medical-malpractice claim, this Court has held that *Domako*'s reasoning regarding the propriety of ex parte interviews with treating physicians extends beyond the context of medical malpractice to other claims in which the plaintiff has put his or her physical condition in controversy. *Davis v Dow Corning Corp*, 209 Mich App 287, 293; 530 NW2d 178 (1995).

The *Holman* Court further explained:

> Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health information without a written authorization from the individual as described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510. 45 CFR 164.512, however, enumerates several specific situations in which "[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 CFR] 164.508, or the opportunity for the individual to agree or object as described in [45 CFR] 164.510 . . . ." 45 CFR 164.512. This regulation provides alternative requirements for disclosures in specific situations. Relevant here is paragraph (e), "[d]isclosures for judicial and administrative proceedings," which permits a covered entity to disclose protected health information in response to "an order of

> a court or administrative tribunal," or "[i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if":
>
> > (A) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
> >
> > (B) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. [45 CFR 164.512(e)(1)(i) and (ii).] [*Holman*, 486 Mich at 438-440 (alterations in original).]

Holman ultimately held that the permissibility of ex parte interviews as an informal discovery tool was not contrary to HIPAA and that such interviews could be conducted "in a manner that is consistent with HIPAA, as long as '[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)].' " *Id.* at 446, citing 45 CFR 164.512(e)(1)(ii)(B) (alterations in original).

Here, it is undisputed that defendant did not make any efforts to secure a qualified protective order before communicating with Kennedy. Nonetheless, defendant maintains that it did not violate HIPAA because the second circumstance allowing disclosure for purposes of judicial proceedings mentioned in *Holman* was applicable, i.e., the portion of the regulation that permits disclosure of protected health information "[i]n response to a subpoena, discovery request, or other lawful process," without a court order, if

> [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request[.] [45 CFR 164.512(e)(1)(ii)(A).]

Defendant maintains that this provision was satisfied because plaintiff had already authorized release of Kennedy's records, Kennedy was named in defendant's witness list, and defendant issued a subpoena requiring Kennedy to testify at trial, giving plaintiff ample notice that Kennedy was being asked to provide information and plaintiff offered no objection. We disagree.

Defendant focuses too narrowly on whether *plaintiff* had notice that Kennedy would testify at trial when "45 CFR 164.512(e)(1) is directed at covered entities, not parties or trial courts." *Holman*, 486 Mich at 447. The exception upon which defendant relies requires that the covered entity—in this instance, Kennedy—receive "satisfactory assurance" that reasonable efforts were

made to give "the individual who is the subject of the protected health information"—here, plaintiff—notice of the request. 45 CFR 165.412(e)(1)(ii)(A).

> For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
>
> (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);
>
> (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and
>
> (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:
>
> (1) No objections were filed; or
>
> (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution. [45 CFR 164.512(e)(1)(iii).]

The subpoena defendant sent to Kennedy is not contained in the lower court record. Consequently, this Court is without any basis to assess whether Kennedy received the satisfactory assurances required under HIPAA. Under these circumstances, we cannot conclude that the trial court abused its discretion by limiting Kennedy's testimony. *Carlsen Estate*, 338 Mich App at 693.

In any event, "[a] trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected, and it affirmatively appears that failure to grant relief is inconsistent with substantial justice." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003) (citations omitted). As the trial court observed in denying defendant's motion for a new trial, any error in limiting Kennedy's testimony was likely harmless because his full records were in evidence. Defense counsel advised the jury in closing arguments that Kennedy did not believe plaintiff had PTSD, and the jury asked to review Kennedy's records during its deliberations, so there can be little doubt that the jury was aware of Kennedy's opinion. The trial court therefore did not abuse its discretion by denying defendant's motion for a new trial relative to this issue. *Dorsey*, 338 Mich App at 223.

B. PROPENSITY EVIDENCE

Defendant also argues that the trial court abused its discretion by admitting improper propensity testimony from two witnesses: former union president Patrick McGough and Stephen Marschke, defendant's head of internal affairs. We find no error with respect to McGough, but agree that Marschke's challenged testimony was inadmissible. Nonetheless, the trial court did not

abuse its discretion by denying defendant's motion for a new trial, because the error in the admission of evidence was not outcome-determinative. *Lewis*, 258 Mich App at 200.

Other-acts evidence is governed by MRE 404(b)(1), which provided as follows at the time of trial:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

In addition to being legally relevant under MRE 404(b)(1), other-acts evidence must be logically relevant, meaning it has " 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Rock v Crocker*, 499 Mich 247, 256; 884 NW2d 227 (2016), quoting MRE 401. Moreover, even if evidence is both logically relevant under MRE 401 and legally relevant under MRE 404(b)(1), it remains subject to exclusion under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In sum,

> [o]ther-acts evidence is only admissible under MRE 404(b)(1) when a party shows that it is (1) offered for a proper purpose, i.e., to prove something other than the defendant's propensity to act in a certain way, (2) logically relevant, and (3) not unfairly prejudicial under MRE 403. " '[I]f the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.' " [*Rock*, 499 Mich at 257 (citations omitted; second alteration in original).]

Regarding McGough's testimony, after explaining that the disciplinary process usually begins with an allegation of a work rule violation, assignment to an investigator, and investigation by that investigator, McGough indicated that the process continues to a hearing before a warden or deputy warden, which he characterized as "a little kangaroo court." Defendant objected to that term, and the objection was sustained. McGough then explained what takes place at a disciplinary hearing and indicated that the warden's decision on the matter is then sent to the central office in Lansing for review and a determination of punishment. Inquiring into possible ways in which the process could be manipulated, plaintiff's attorney asked McGough to explain how an employee might face a charge merely because a supervisor dislikes the employee. McGough agreed that could easily happen and said: "All you have to do is say, this guy violated a work rule. And then they assign an investigator who could be that guy's buddy, or it could be the warden's crony . . . ." Defense counsel objected again, and the trial court warned McGough to respectfully refer to people by their professional positions. McGough then testified that there was always a risk that the assigned investigator could be a friend of the accuser. McGough further opined that an unfair

result could arise from the fact that the facility administrator, whether a warden or deputy warden, was responsible for selecting an investigator. He viewed that as a fundamental flaw in the disciplinary process "[b]ecause if you have your judge, jury and executioner assigning your investigator, and they already have a preconceived notion of what they want, they're going to find what they want every time." McGough further observed that the disciplinary rules allowed defendant to "stack[] complaints" by alleging multiple work rule violations arising from the same conduct.

Defendant argues that the challenged testimony was offered to show defendant's handling of matters pertaining to plaintiff was suspect and corrupt. Defendant's other-acts argument is fundamentally flawed because McGough's challenged testimony is simply not governed by that MRE 404(b). "[B]y its plain terms, MRE 404(b) only applies to evidence of *crimes, wrongs, or acts* 'other' than the 'conduct at issue in the case' that risks an impermissible character-to-conduct inference." *People v Jackson*, 498 Mich 246, 262; 869 NW2d 253 (2015) (emphasis added). Defendant takes issue with McGough's criticisms of the disciplinary process and testimony about the manner in which it could potentially be abused, but McGough never identified instances in which the process had actually been abused or manipulated in the past. As such, there was simply no other crime, wrong, or act suitable for analysis under MRE 404(b)(1).

Additionally, part of plaintiff's theory of the case was that defendant unfairly disciplined him and that such discipline reflected its discriminatory animus toward plaintiff, while defendant maintained that plaintiff was properly disciplined for violating work rules. The integrity of the disciplinary process and whether it was manipulated in this case were, therefore, material issues in that they could provide circumstantial evidence that defendant's actions were not truly motivated by legitimate business reasons. And although McGough had no knowledge concerning the facts of this case, his testimony was still probative of this issue because the jury could infer that some of the flaws he described were, in fact, exploited in this case. See MRE 401.

For instance, McGough suggested that a supervisor could falsely accuse an employee of wrongdoing because of personal animus, and plaintiff presented evidence from which the jury could infer that there was a great degree of discord between plaintiff and Webster, the supervisor who filed the complaints that led to plaintiff's first two disciplines. There was also some evidence from which the jury could conclude that Webster's feelings toward plaintiff were fueled, at least in part, by plaintiff's disability. McGough also indicated that a warden could selectively choose an investigator who would reach the conclusions desired by the administration. Neuberger agreed that the dining hall complaint was originally assigned to another investigator, and no explanation for why the original investigator was replaced was ever offered. McGough also noted that the process could be manipulated by alleging multiple work rule violations arising from the same conduct, and plaintiff was alleged to have violated two rules in connection with the dining hall incident. Considering McGough's challenged testimony alongside the balance of the evidence in the case, it is apparent that his testimony was relevant under MRE 401 because it made plaintiff's theory that he was improperly disciplined more probable than it would have been without that evidence.

Defendant also argues that the challenged evidence, even if relevant, was unfairly prejudicial. We disagree. MRE 403 does not prohibit all prejudicial evidence, only evidence that is *unfairly* prejudicial. *In re Piland*, 336 Mich App 713, 733; 972 NW2d 269 (2021). "This

unfairness arises if there is a danger that marginally probative evidence will be given undue weight by the jury." *Id*. It is clear from the record that there was little risk of the jury attaching undue weight to McGough's testimony. After defense counsel repeatedly objected to McGough's testimony exceeding the scope of defendant's policies and procedures, the trial court sua sponte cautioned the jury that McGough's testimony concerned "general information based on his experiences, none of which are related specifically to the facts of this case[.]" Because this Court assumes the jury followed its instructions, *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013), there is no reason to conclude that the jury gave McGough's testimony undue weight or failed to recognize that it had significance only if the jury found evidence the possible abuses he described actually occurred in this case.

Regarding Marschke's testimony, defendant challenges portions of it concerning memorandums he wrote regarding disciplinary matters. One memorandum concerned Kathy Warner, a high-ranking member of the executive affairs department, coming to Marschke in 2018 to demand that he change a decision reached in an internal affairs investigation. Marschke further confirmed that he was aware of others raising similar complaints about changed decisions in the past. Marschke also acknowledged writing a memorandum that claimed the "culture of corruption" from an earlier administration had continued under defendant's new director.

The trial court ruled before trial that the Marschke's memorandums could not be admitted at trial and could be referenced only if necessary for impeachment purposes. Defendant argues that Marschke's testimony concerning the content of his memorandums was improperly offered to show that defendant's handling of plaintiff's disciplines was suspect and corrupt. Plaintiff argues that it was properly admitted for impeachment purposes. "Generally speaking, impeachment by contradiction can be a proper purpose for admission of other-acts evidence." *People v Wilder*, 502 Mich 57, 63-64; 917 NW2d 276 (2018). Nonetheless, it does not appear that Marschke's testimony regarding memorandums relating to Warner was actually admitted for proper impeachment purposes. Moreover, the challenged testimony was irrelevant and prejudicial. The record shows that all of the disciplinary sanctions imposed against plaintiff were either ordered or approved by Nanasy, rather than Warner. Considering the lack of evidence that Warner had any involvement in the disciplinary phase of the proceedings or that Nanasy had a history of similar improper conduct, it would appear that the only purpose for eliciting this testimony was to show that defendant's staff had abused the disciplinary process before so as to suggest that they did so again in this case—the precise type of propensity inference barred by MRE 404(b)(1). *Rock*, 499 Mich at 257. Further, Marschke's testimony concerning his memorandum about a "culture of corruption" at MCF was irrelevant to the issues in this case, as he testified that it pertained to financial matters related to the administration of MCF, not defendant's treatment of disabled persons or other matters at issue in this case. MRE 401.

In sum, McGough's challenged testimony was not governed by MRE 404(b), was logically relevant under MRE 401, and was not unfairly prejudicial under MRE 403. Consequently, the trial court did not abuse its discretion by allowing plaintiff to present McGough's testimony at trial. Marschke's testimony concerning Warner's misconduct was not admitted for a proper purpose and should have been excluded under MRE 404(b), while Marschke's testimony concerning a "culture of corruption" was not logically relevant to the purpose for which it was admitted and should have been excluded under MRE 401.

However, this evidentiary error does not entitle defendant to a new trial. A new trial may be granted when a party's substantial rights were materially affected by "an order of the court or abuse of discretion which denied the moving party a fair trial." MCR 2.611(A)(1)(a); *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001). The trial court's error in admitting Marschke's challenged testimony does not rise to that level. Defense counsel effectively cross-examined Marschke, allowing Marschke to make clear to the jury that he had no criticisms of the manner in which plaintiff, specifically, was disciplined. Marschke explicitly testified that he was familiar with the specific facts of the misconduct involving Warner, and that the circumstances of those cases were not related to the issues for which plaintiff was disciplined. And as noted earlier, his clarification regarding his claim of corruption made it quite plain that the corruption he complained of had no bearing on this case. Lastly, the entirety of Marschke's testimony, not all of which was objectionable, lasted less than two hours, a relatively insignificant portion of a nearly three-week jury trial involving numerous and complex factual allegations and legal claims. On this record, we are not persuaded that the trial court's evidentiary error materially affected defendant's substantial rights by denying defendant a fair trial. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial. *Lewis*, 258 Mich App at 200.

C. JUDICIAL MISCONDUCT

Defendant also argues that the trial court pierced the veil of impartiality in its questioning of Neuberger and McDonald. Defendant did not object to the trial court's questioning at trial, but first raised this issue in its motion for a new trial; accordingly, the issue is unpreserved for review. *Stevens*, 498 Mich at 180 n 6; see *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) *Napier v Jacobs*, 429 Mich 222, 229; 414 NW2d 862 (1987). "In civil cases, Michigan follows the raise or waive rule of appellate review." *Tolas Oil & Gas Exploration Co v Bach Servs & Mfr, LLC*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 359090); slip op at 2 (quotation marks and citation omitted). Under that rule, there is no need to consider an issue not properly raised before the trial court. *Id*. at ___; slip op at 3. We accordingly decline to review this issue. *Id.*; see also MRE 614(c) (requiring objections to a trial court's interrogation of a witness "be made at the time or at the next available opportunity when the jury is not present.").

D. ATTORNEY MISCONDUCT

Defendant argues that the trial court erred by denying its motion for a new trial on the grounds that plaintiff's attorney improperly argued to the jury that it could find that plaintiff had a disability for purposes of the PWDCRA on the basis of his leg injury. We disagree.

"An attorney's comments do not normally constitute grounds for reversal unless they reflect a deliberate attempt to deprive the opposing party of a fair and impartial proceeding." *Zaremba Equip*, 302 Mich App at 21. But reversal may be necessary when "counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 192; 600 NW2d 129 (1999). In most circumstances, proper instructions to the jury will cure issues of misconduct by counsel. *Moody*, 304 Mich App at 446.

In his opening statement, plaintiff's counsel stated that it was undisputed that plaintiff was injured on the job, and "that injury caused him disability." Counsel continued, "That disability

was physical, in terms of, you know, the metal rod that was put in his leg, and the – the risk of reinjury, and that disability is mental in terms of the depression, anxiety and post-traumatic stress disorder." In closing arguments, plaintiff's counsel argued that the jury's first task was to determine whether plaintiff had a disability that was unrelated to his ability to perform the duties of a corrections officer and opined that there were four potential disabilities at issue in the case, including a disability based on plaintiff's leg injury. Plaintiff's counsel also suggested that the jury could find that plaintiff had a disability because of his psychological conditions, i.e., PTSD, depressive disorder, or anxiety disorder.

After plaintiff's counsel concluded his closing argument and the jury was released for a break, the trial court admonished plaintiff's counsel because plaintiff did not plead or present evidence suggesting that his physical injury was at issue in this case; rather, plaintiff's psychological injury "has been the basis for all the arguments associated in this case." The trial court acknowledged that plaintiff's physical injury was undisputed, but maintained that his physical restrictions were accommodated when he first returned to work until he was approved for full return without any restrictions, at which point "the physical aspect" of the case was over. When the jury returned, the trial court provided the following curative instruction:

> *The Court*: . . . Folks, I'm going to remind you that the argument of counsel is not evidence. Everybody understands that. And during the course of [plaintiff's] closing argument, the reference was made to the injury to the leg. You must understand in this case [plaintiff's counsel is] not requesting compensation for the physical injury to the leg itself. That is not a consideration in this Court, not a consideration for you in your deliberations. Everybody understands that?
>
> *Unknown Juror*: Yes.
>
> *The Court*: It is the contention I believe of the Plaintiff in this case that is what precipitated the subsequent alleged disability of post-traumatic stress disorder, anxiety, and depression, but the leg itself is not an issue, we understand?
>
> *Unknown Jurors*: Yes.

Plaintiff concedes on appeal that only plaintiff's psychological injury was a disability for purposes of his PWDCRA claims, effectively acknowledging that counsel's closing argument was improper to the extent it urged the jury to accept plaintiff's leg injury as the relevant disability. As stated, an attorney's remarks are usually not grounds for reversal unless it appears the attorney deliberately tried to prevent a fair and impartial trial, *Zaremba Equip*, 302 Mich App at 21, or the comments deflected the jury's attention from the issues in a manner that affected the verdict, *Ellsworth*, 236 Mich App at 192. Although plaintiff now concedes that his attorney's argument regarding plaintiff's leg injury was improper, trial counsel argued outside the jury's presence that his statements were accurate under the law, and there is no basis to conclude that counsel was deliberately attempting to deprive defendant of a fair trial. Further, the trial court issued a detailed curative instruction. Jurors are presumed to follow their instructions, *Zaremba Equip*, 302 Mich App at 25, and the trial court's instruction made it clear that plaintiff's alleged disabilities were his psychological impairments and not the physical injury to his leg. Under these circumstances, we cannot conclude that counsel's improper argument "had a controlling influence on the verdict."

Ellsworth, 236 Mich App at 192. See also *Moody*, 304 Mich App at 446 (acknowledging that proper instructions cure most instances of misconduct). The trial court did not abuse its discretion by denying defendant's motion for a new trial relative to this issue.

IV. ATTORNEY FEES

Defendant argues that the trial court erred by awarding attorney fees at lead trial counsel's hourly rate ($550) for time spent reviewing e-mails produced in discovery, because that task is more suitable for a paralegal with a substantially lower hourly fee rate. We disagree.

We review for an abuse of discretion a trial court's award of attorney fees. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

The general "American Rule" of litigation requires each party to pay for its own attorneys. *Woodman v Dep't of Corrections*, 511 Mich 427, 450; 999 NW2d 463 (2023). Under that rule, "attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Haliw v Sterling Heights*, 471 Mich 700, 707; 691 NW2d 753 (2005). When a statute calls for recovery of "reasonable" attorney fees, the award of such fees is guided by the framework outlined in *Smith v Khouri*, 481 Mich 519, 530; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.), and further refined in *Pirgu*, 499 Mich at 281-282. The Supreme Court has recently summarized that framework as follows:

> First, the trial court is required to determine "the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence." *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.); see *Pirgu*, 499 Mich at 281. Second, the court must "multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure." *Pirgu*, 499 Mich at 281. Finally, after that baseline number is determined, "the trial court must consider" a nonexhaustive list of factors to "determine whether an up or down adjustment is appropriate." *Pirgu*, 499 Mich at 281, discussing *Wood* [*v Detroit Auto Inter-Ins Exchange*], 413 Mich 573[; 321 NW2d 653 (1982)], and MRPC 1.5(a). [*Woodman*, 511 Mich at 451.]

Notably, defendant does not identify which portion of the *Smith-Pirgu* framework it believes the trial court misapplied in reaching its decision. Because defendant does not directly take issue with the hourly rate selected by the trial court for plaintiff's lead counsel's fees, we assume that defendant believes the time spent on work suitable for a paralegal constituted unreasonable hours under the second prong of the *Smith-Pirgu* framework. "In determining whether the number of hours expended is reasonable, the trial court 'should exclude excessive, redundant or otherwise unnecessary hours regardless of the attorneys' skill, reputation or experience[].' " *Kidder v Poborsky-Kidder*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 365527); slip op at 4, quoting *Smith*, 481 Mich at 532 n 17 (opinion by TAYLOR, C.J.).

The billing records submitted in support of plaintiff's motion for attorney fees included charges from plaintiff's lead trial counsel totaling 154.7 hours for reviewing, analyzing, and

sorting various portions of the 31,842 pages of e-mails produced by defendant in discovery. At the hearing regarding plaintiff's motion for attorney fees, the trial court initially seemed to view defendant's argument regarding this issue favorably, questioning how plaintiff could justify such extensive billings. Plaintiff's attorney, however, explained that reviewing the lengthy discovery materials was like "searching for needles in a haystack," and he did not have any other employees to assist him in that task at the time e-mails were produced. Defendant opined that there was software counsel could have utilized to substantially narrow the disclosed e-mails by relevant keywords, but plaintiff's attorney insisted that he could not have relied on a computer program because the significance of many of the e-mails required a complete understanding of the case and could not be narrowed by reference to certain words. Moreover, his search was not "a fool's errand," as he ultimately discovered 10 to 15 e-mails that were actually admitted as trial exhibits. When the trial court ruled on this issue, it declined to reduce the hours attributed to reviewing the e-mails because "there were substantial emails in this case, [plaintiff's attorney] did not have the benefit of other persons working with him, and it was absolutely necessary that he go through them."

The trial court's decision concerning this issue was well within the range of reasonable and principled outcomes. While we appreciate that the discovery documents were extensive, plaintiff's counsel would have been remiss not to review the e-mails to determine if they had relevance to the case. And regardless of whether such review might be properly delegated to someone with less experience or fewer professional credentials (individuals with a correspondingly reduced reasonable hourly rate) in other circumstances, that was simply not an option in this case when counsel's paralegal and associates did not join his staff until long after the e-mails were disclosed and reviewed. Defendant does not challenge the hourly rate selected by the trial court with respect to plaintiff's lead trial counsel, which was substantially less than originally requested. During the time counsel spent reviewing the e-mails, he could not perform tasks that defendant might deem more suitable for an attorney of his experience. The trial court did not abuse its discretion by compensating counsel at the same rate it deemed appropriate for counsel's other work.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Sima G. Patel