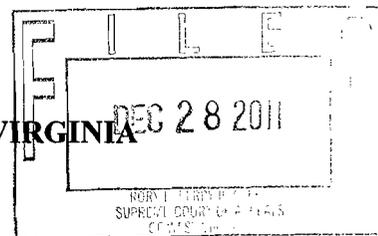


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 11-0694



ANGELA SMITH

Respondent,

v.

CSX TRANSPORTATION, INC.

Petitioner.

*APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 08-C-96*

JUDGE WILLIAM S. THOMPSON

**SUPPLEMENTAL
APPELLANT'S ~~REPLY~~ BRIEF**

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Argument

Respondent's brief fails to appreciate the severity of the errors below, and instead outlines a hodgepodge of transient evidence in an effort to shift focus from the prevailing issues. Respondent, Angie Smith ("Smith"), however, does not appear to dispute the salient facts of this appeal. Smith overheard on a cell phone speaker, a single inappropriate comment made by Wes Knick to a third person, Clay Newsome. Once she reported this comment to CSXT, a full investigation was conducted pursuant to CSXT's sexual harassment policy and Knick was terminated from his job as a supervisor. Ms. Smith never encountered Wes Knick again. This single incident cannot establish a claim of sexual harassment or a hostile work environment.

Smith was subsequently fired for misappropriating the company's taxi service for her personal use. Despite the fact that "Angela Smith was a ten-year employee of [Appellant] who had never been disciplined... and who had been promoted several times[,]" (Response at p. 1), she is not allowed to steal from her employer. She admitted to this wrongdoing and was properly discharged. The trial court, however, improperly instructed the jury on the law of the case. These instructions effectively negated Smith's wrongful act in relation to her wrongful discharge claim.

Furthermore, the trial court should not have allowed punitive damages to go to the jury, and once the punitive damage verdict was returned, the court should have set it aside as not supported by the evidence. Given these errors and on the record below, CSXT again requests that this Court reverse the judgment of the Circuit Court and enter judgment in its favor or remand this matter for a new trial to be conducted in accordance with the well established law of the State of West Virginia.

I. Respondent Failed to Establish the Elements of Sexual Harassment Hostile Work Environment as a Matter of Law.

Appellant's Brief details the law as applicable to Smith's claim for sexual harassment hostile work environment, and that discussion is incorporated herein by reference. For purposes of this Reply, it is enough to recite the general law of the case. To recover on a claim of sexual harassment hostile work environment under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 through § 5-11-20, Smith was required to prove that the subject conduct was: (1) unwelcome; (2) based on the sex of the plaintiff; (3) sufficiently severe or pervasive to alter the plaintiff's conditions of employment (*e.g.* it was hostile); and (4) imputable on some factual basis to the employer. *See Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996) (quoting *Syl. Pt. 5, Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

The third element is the key inquiry on appeal. It requires proof of the existence of: (1) severe and pervasive conduct; (2) that alters the plaintiff's conditions of employment; and, (3) creates an abusive work environment. *Id.* Importantly, the West Virginia Human Rights Act, as well as Title VII, tempers the employer's duty in this regard by requiring that they ensure, "as best they can, that their workplaces are free of sexual harassment that creates hostile or offensive working environment." 198 W. Va. at 370, 480 S.E.2d at 809 (citing *Hanlon, supra*; *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). As discussed below, a single incident of alleged harassment that is reported, investigated and which results in discipline against the harasser, cannot constitute a hostile work environment.

It should first be emphasized that Wes Knick' alleged comment on June 28, 2007 was the first and only comment Smith heard. Prior to that date she had never worked with Wes Knick, nor had she ever seen him, met him or talked to him. (Excerpted Trial Testimony of A. Smith,

Day 5, at p. 98). As such, there can be no sexual harassment hostile working environment prior to that date. Once the comment was reported to CSXT, Wes Knick was placed on administrative leave and never encountered Smith again. (Trial Tr. Day 8, at pp. 231-236). Therefore, CSXT did everything it could do to ensure that Smith's workplace was free from sexual harassment. To counter the dearth of evidence of a pervasive or hostile work environment, Smith relies on remote evidence of Wes Knick's comments about other persons, long before the date of the comment regarding Ms. Smith, to establish the existence of a hostile work environment.

Smith's Response first argues that CSXT had knowledge of harassing comments made by Knick concerning another female trainmaster, Brenda Coffey, and that those comments can be used as evidence of a hostile work environment for Ms. Smith. *See* Response at pp. 6-7, 25. Brenda Coffey was a Trainmaster in Clifton Forge, Virginia, a location hundreds of miles from Grafton, West Virginia, where Angela Smith worked. (Trial Tr., June 2, 2010 at pp. 14-20). CSXT's alleged knowledge of previous comments made by Knick about a trainmaster in Clifton Forge cannot support Smith's claims for sexual harassment hostile work environment in Grafton, West Virginia. Specifically, this evidence does not establish that: (1) Smith's conditions of employment were altered, or (2) Smith was subjected to an abusive work environment.

First, comments about another worker made outside of Smith's presence cannot constitute a hostile work environment because the comments were not aimed at her. As this court noted in *Conrad*, "we said in *Hanlon* that hostile environment sexual harassment can occur 'when the workplace is infected, for example, by sexual barbs or innuendos, offensive touching, or dirty tricks *aimed at the employee* because of her gender.'" 198 W. Va at 371, 480 S.E.2d at 810. To the extent that Wes Knick made comments about Brenda Coffey in a way that were not directed

at Ms. Smith, or for the purpose of harassing Smith, specifically, they cannot form a basis for a hostile work environment.

Additionally, Knick's prior comments about Brenda Coffey did not alter Smith's conditions of employment because Smith had no knowledge of Wes Knick or those comments prior to June 28, 2007. Since Smith did not learn of the other acts by Wes Knick until well after the single incident was reported and investigated, Smith's conditions of employment could not be altered by the prior comments.¹ Therefore, as the conditions of employment were unaltered, this evidence is irrelevant and does not support a finding of sexual harassment hostile work environment.

Finally, these prior comments cannot create an abusive work environment because they allegedly transpired in Clifton Forge, Virginia not Grafton, West Virginia. (Trial Tr., June 2, 2010 at pp. 14-20). Therefore, as Smith and Brenda Coffey never worked in the same location, Smith's work environment could not be affected by Knick's prior comments concerning Coffey. *See, Conrad v. Ara Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996) (stating that only sexual harassment of co-workers who were simultaneously employed with the complainant would be relevant to show sexually hostile work environment). For these reasons, Smith's reliance on Knick's prior comments regarding an unrelated trainmaster in Clifton Forge, Virginia does not support a finding of a hostile work environment sexual harassment.²

¹ This rationale holds true for Smith's contention that she subsequently learned of prior comments that Knick made about her. *See* Response at pp. 24-25. As she had no knowledge of these comments prior to June 28, 2007, and as she never encountered Knick after she reported the comment of June 28, 2007, any subsequent knowledge of prior comments cannot be held to have created an abusive work environment.

² For the same reasons, Smith's reference to complaints made to CSXT by Wanda Yopp in 2001 do not support Smith's claim for sexual harassment hostile work environment. *See* Response Brief, at p. 8. They were not aimed at Ms. Smith, they occurred years before the Wes

Smith also relies upon an alleged incident wherein an unidentified male came to her house and pounded on the front door making threatening statements. *See* Response, at pp. 12-13. This incident cannot support Smith's claims for sexual harassment hostile work environment because it did not happen at work and there was no evidence that the incident was perpetrated by a railroad employee. It, therefore, cannot be charged against CSXT for purposes of establishing the claim because CSXT has no control over the non-work environment of Smith's front porch. To hold otherwise would make an employer strictly liable for any environment instead of liable for failure to avoid a hostile work environment. As such, this evidence does not establish an abusive work environment and is irrelevant to the discussion.³

Lastly, Smith points to the testimony of CSXT representatives confirming that Smith was subjected to "sexual harassment." *See* Response, at pp. 23-24. Smith attempts to mislead the Court by inferring that these employees were admitting the elements of sexual harassment under West Virginia law. This is not the case. These employees were not admitting liability as Smith contends but rather confirming that CSXT made a finding of one instance of "sexual harassment" under CSXT policies and procedures. Such a thorough investigation is exactly what an employer is expected to undertake in a situation such as this. And in the present case, once CSXT completed its investigation it terminated Knick. In reality, Wes Knick's single incident comment regarding Ms. Smith constituted a violation of CSXT's Sexual Harassment policy, but it alone cannot constitute a viable claim for sexual harassment under West Virginia law because a single

Knick comment and they were at a location remote from where Ms. Smith worked. Therefore, just as Ms. Smith's reliance on the prior complaints of Brenda Coffey was misplaced, her reliance on the prior complaints of Wanda Yopp is also misplaced.

³ Similarly, Smith attempts to rely upon alleged threatening phone calls from an unknown caller to support her claims of abusive work environment. These claims also cannot support such a finding because there was no evidence that CSXT had any control over the alleged caller, or that the calls were made by CSXT officials.

incident is not severe or pervasive enough to create a hostile work environment. *Conrad*, Syllabus Pt. 3.

In conclusion, the primary issue on appeal is whether a single comment made to a third person and overheard via speakerphone can establish sexual harassment hostile work environment under West Virginia law. In making this determination, it is important to note that Smith was not subjected to any sexual advances, was not subjected to any unwanted physical contact, and was not subjected to physically threatening or repetitive conduct. Instead, Smith was subjected to a single offensive utterance. This does not establish sexual harassment hostile work environment. See *AMTRAK v. Morgan*, 536 U.S. 101, 116 (2002) ("A hostile work environment claim is comprised of a series of separate acts that collectively constitute an 'unlawful employment practice.'") *Id.* quoting 42 U.S.C. § 2000e-5(e)(1); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("A claim arises when the workplace is permeated with discriminatory intimidation, ridicule and insult."); *Hanlon v. Chambers*, 464 S.E. 2d 741, 749 (W.Va. 1995) (hostile environment harassment may be present "when the workplace is infected by sexual barbs or innuendos, offensive touching or dirty tricks"). Smith failed to establish the elements of sexual harassment hostile work environment at the trial of this matter, and CSXT is entitled to a have judgment rendered in its favor on this claim.

II. Instruction No. 7 Impermissibly Allowed the Jury to Infer the Existence of an Element of Smith's Cause of Action.

The trial court improperly instructed the jury on the law of the case, and that impropriety permeated the jury instructions as a whole. At trial, the court instructed the jury that it may disregard Smith's burden of proof on her retaliatory discharge claim despite the fact that CSXT submitted a nondiscriminatory reason for discharge. Specifically, the trial court instructed the

jury that "if it disbelieves the defendant's explanation for its termination of the Plaintiff, the jury may conclude that the logical explanation for the action was the plaintiff's complaints of harassment or her filing of the lawsuit." (Trial Tr. June 24, 2010, at pp. 3-4). This allowed the jury to improperly infer the existence of an element of Smith's cause of action despite the burden-shifting provisions of *Hanlon v. Chambers, infra*.

In West Virginia, when a defendant submits credible evidence of nondiscriminatory reasons for discharge, the burden shifts to the plaintiff to prove by a preponderance of the evidence that "the reasons offered by the employer for discharge were merely a pretext for unlawful retaliation." *Hanlon v. Chambers*, 195 W. Va. 99, 106, 464 S.E. 2d 741, 748, fn. 3 (1995); *West Virginia Dept. of Natural Resources v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994). Instruction No. 7 improperly invalidated this standard and allowed a jury to find an improper motive without evidence to support it being presented by the plaintiff.

Smith opposes this argument by first citing to *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995), for the proposition that "a finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and, thus, permits the ultimate inference of discrimination." *See* Response, at p. 31. In reply, it must be emphasized that the jury in *Barefoot* was not improperly instructed to disregard the plaintiff's burden of proof. *Id.* Instead, the Court in *Barefoot* was tasked with determining whether plaintiff submitted sufficient evidence to establish pretext *after the burden shifted*, as required by West Virginia law. In so doing, that Court determined that plaintiff met her burden by "showing that the defendant's articulated reasons were implausible." 193 W. Va. at 487, 457 S.E.2d at 164. Therefore, the *Barefoot* decision actually supports the Appellant's argument because it requires

Smith to prove a pretextual motive by a preponderance of the evidence once the applicable burden shifts.

Smith further opposes the assigned error on the contention that "[a]lthough the Plaintiff was not required to show the Defendant's reason was a pretext for discrimination, there was plenty of evidence presented to support that finding." Response, at p. 33. The existence of other evidence is irrelevant for several reasons. First, Smith is undeniably required to show, pursuant to West Virginia law, that Defendant's reason was a pretext for discrimination and the jury should not have been instructed otherwise. Second, it is irrelevant whether Smith believes that "plenty of evidence [was] presented to support that finding[,]" because the jury was not properly instructed on the standard to apply to any such evidence to begin with. Instead, Instruction No. 7 allowed the jury to simply disregard whether the evidence met this standard or didn't meet this standard.

In summary, jury instruction No. 7 substantially lowered the burden of proof applicable to Smith's claim of retaliatory discharge. It permeated the jury instructions and resulted in instructions as a whole that were inaccurate and unfair to CSXT. Therefore, CSXT should be entitled to a new trial under the well-established laws of this state.

III. Instruction No. 26 Improperly Shifted the Burden of Proof Upon CSXT to Prove a Negative.

The trial court again committed reversible error when it instructed the jury to disregard Smith's burden of proof in Jury Instruction No. 26. Specifically, the trial court instructed the jury "if you find that the defendant was motivated by both a retaliatory reason and a non-retaliatory reason in its decision to terminate the plaintiff, then the defendant will be able to avoid liability *only if it can prove* that the same result would have occurred even without the unlawful motive."

(Trial Tr. Day 9, at p. 103) (emphasis added). The plain language of this instruction clearly and improperly placed the burden of proof on CSXT to prove a negative. This impropriety, both standing alone and taken in conjunction with Instruction No. 7, amounted to jury instructions that were inaccurate and unfair as a whole.

Smith attempts to rely upon *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996), for the proposition that the scheme of proof for pursuing a pretext and mixed motive theory in a *Harless* action is identical to the scheme of proof applicable to retaliatory discharge claims. This is an inaccurate statement of law and an inaccurate interpretation of the Court's holding in *Page*. Instead, the *Page* decision stands for the proposition that, in a *Harless* action, a claimant can submit both a mixed-motive theory and a pretext theory if it is properly instructed on the burden-shifting scheme of proof applicable to both claims.⁴ *Page*, 198 W. Va. at 390-92, 480 S.E.2d at 829-31. *Page*, however, does not stand for the proposition that a claimant may assert and advance a retaliatory discharge claim only and then interject instructions on pretext and mixed-motive claims under a *Harless* type action in conjunction with instructions under a *Hanlon* retaliatory discharge claim. To hold otherwise would effectively overrule *Hanlon* and the burden-shifting provisions applicable to a retaliatory discharge claim.

IV. The Trial Court Erred in Allowing Punitive Damages to be Submitted to the Jury.

The facts of the case do not support an award of punitive damages, and the trial court erred in allowing the jury to consider an award of punitive damages. Again, Smith overheard a

⁴ It should also be noted that the Court in *Page* found that the objections to the jury instruction were not properly preserved and prevented the trial court from remedying any potential errors. *Id.* at 391-92, 830-31.

single inappropriate comment made by Wes Knick. This comment was not directed at her, but at a third person. She overheard this comment through a speaker on a cell phone. At the time she heard Knick's comment, he was 200 miles away.

Once Smith reported this comment to CSXT, Knick was terminated and she never encountered him again. In fact, upon the slightest possibility that Smith and Knick would be working in the same geographic area, CSXT placed Smith on paid administrative leave so that her concerns could be addressed. CSXT offered Smith several viable employment options, including trainmaster positions at various locations on its system. Smith rejected these offers and chose to resign as a trainmaster and return to Danville as a yardmaster. Thereafter, she misappropriated the taxi service for personal use and was caught doing so. She admitted to this wrongdoing and was released from employment.

Despite these facts, the jury was allowed to consider punitive damages and ultimately returned an award of \$500,000.00 against CSXT. This finding was unsupported by the evidence because there was nothing to suggest that CSXT acted maliciously as required by West Virginia law. Instead, any finding of a wrongful act committed by CSXT was committed under a *bona fide* claim of right. Under these circumstances, a punitive damage award cannot go forward "without malice in any form." *Peters v. Rivers Edge Min., Inc.*, 224 W. Va. 160, 190, 680 S.E.2d 791, 821 (2009) (citing *Joplin v. Bluefield Ware Works & Improvement Co.*, 70 W. Va. 670, 74 S.E.2d 692 (1912)). Smith failed to present evidence of malice below.

In opposition, Smith contends that "the jury could have reasonably concluded that CSXT specifically disregarded [her] rights and intentionally terminated her employment in retaliation for her complaints of harassment and/or her filing of a lawsuit." Response, at p. 39. This is not so. Smith admitted to charging CSXT for the cost of personal taxi service which, in conjunction

with evidence that Smith altered taxi vouchers to cover up her use of the taxis, amounts to a *bona fide* claim of right to terminate her employment. Again, "a wrongful act done under a *bona fide* claim of right and without malice in any form constitutes no basis for punitive damages." *General Motors Acceptance Corp. v. D.C. Wrecker Service*, 220 W. Va. 425, 431, 647 S.E.2d 861, 867 (2007) (citing *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W. Va. 670, 74 S.E.2d 943 (1912)) (paraphrased).

Moreover, Smith's contention that an 'intentional termination' satisfies the standard for punitive damages is misplaced. Again, "[a] wrongful act, done under a *bona fide* claim of right, and without malice in any form, constitutes no basis for such damages." *D.C. Wrecker Service*, at 431, 867. At trial, no evidence was introduced that met this standard. Instead, the evidence relevant to Smith's claim for retaliatory discharge relied upon her position that she should have been allowed to use the taxis for personal use because no one else had been fired for doing so. It is undisputed however, that Smith altered taxi vouchers and admitted to misappropriating the taxi service. Therefore, CSXT possessed a *bona fide* claim of right to terminate her. Whether this action was wrongful under the facts presented to the jury only supports a finding of the elements of the claim itself. It does not congruently prove that CSXT acted maliciously. *See Rivers Edge Min., Inc.*, at 190, 821 (quoting *Harless v. First National Bank in Fairmont*, 169 W. Va. 673, 692-93 289 S.E.2d 692, 703 (1982)) ("[t]he mere existence of a retaliatory discharge will not automatically give rise to the right to punitive damages. The plaintiff must also prove further egregious conduct on the part of the employer"). Smith should have been required to submit further evidence of egregious conduct of the part of CSXT during her discharge before the jury was allowed to consider punitive damages.

Smith also contends that CSXT failed to preserve the argument that actual malice (as opposed to the 'willful conduct of an intentional termination') is the appropriate standard for punitive damages to be submitted to the jury. Smith asserts that CSXT waived this argument because it did not refer to malice as "actual malice" during trial arguments on the subject. Response at 42. During argument, CSXT asserted:

[I]n making that determination as to the existence of malice, you're not looking for the existence of some evidence of intentional conduct. That is not the standard. The question is, is there evidence of malice? So if we're talking about the spectrum of possible conduct[,] with negligence somewhere in the middle, and intentional conduct would be to the right of that, malice has to be to the right of that. There has to be some evidence of ill-will on the part of the railroad in actually taking forth that intentional conduct.

(Trial Tr. Day 10, at pp. 101-102). Whether or not CSXT framed the standard as one of "actual malice" or as one of malice brought about by ill-will, it remains clear from the record below that CSXT was moving the Court to implement a standard beyond simple proof of intentional conduct. Therefore, the argument was properly preserved below.⁵

⁵ During the argument on punitive damages, counsel for Ms. Smith repeatedly advised the court that that standard for punitive damages in labor & employment cases is 'very low.'

Judge, as this court well knows, the standard for whether punitive in an employment case goes to the jury in West Virginia is stated in the *Haynes v. Rhone-Poulenc* case that this Court has heard repeatedly, and it's a very lenient standard.

* * *

It's an extremely liberal standard.

(Trial Tr. Day 10, at p. 95).

It is this argument that this court should address by clearly defining that punitive damages in labor & employment cases are only recoverable when there is a heightened level of misconduct by a defendant. *See* Appellant's Brief, at Section E, 2.

Smith further asserts that punitive damages were appropriate because she was subjected to a hostile work environment. Without rehashing the prior discussion (*Infra*, at § II), Smith did not submit evidence sufficient to support such a finding. Therefore, Smith certainly was not entitled to punitive damages as associated with that claim as a matter of law. In the event that the current rule of law allows punitive damages to be submitted to a jury under the present facts, it must be modified. Otherwise, the threshold for punitive damages in cases such as the present is meaningless, violates due process and imposes an impermissible standard upon the state businesses.

Conclusion

Wherefore, for the reasons stated herein and more fully developed in the previously-filed Appellant's brief, CSXT requests relief from the judgment of the trial court below, as well as any and all further relief as this Honorable Court deems fair and equitable under the circumstances presented.

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Respondent,

v.

CASE NO.: 11-0694

CSX TRANSPORTATION, INC.,

Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the "*Appellant's Reply Brief*" was served upon the following individuals as indicated below and by depositing a true copy thereof in the regular manner in the United States Mail, postage prepaid, at Huntington, West Virginia, on the 28th day of December 2011:

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