

11-0206

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IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

2010 DEC 30 AM 10 26

BRENDA L. MILLER

ALBERT POSTLEWAIT,

Plaintiff,

v.

Civil Action No.07-C-291

THE CITY OF WHEELING,

Defendant.

ORDER

On the 17th day of December 2010, the Court heard the Defendant's *Motion for Judgment as a Matter of Law and Alternative and/or Joint Motion for New Trial*, as well as the Plaintiff's *Motion for Attorneys' Fees and Costs*. The Court granted, in part, the Plaintiff's *Motion for Attorneys' Fees and Costs*, denied the Defendant's *Motion for Judgment as a Matter of Law* and took under advisement the *Motion for a New Trial*. The Court has reviewed the Motions and the Memorandums of Law; considered all papers of record; and reviewed all pertinent legal authorities. As a result of these deliberations and for the reasons set forth below, this Court has concluded that the Defendant's *Motion for a New Trial* is **GRANTED**.

On October 20, 2010, following *voir dire*, the Court impaneled a jury to try the issues in this case. On October 21, 2010, after the presentation of evidence by the parties, the jury returned a verdict in favor of the Plaintiff, "find[ing] in favor of Albert Postlewait on his age discrimination claim," and awarding him damages for "[p]ast lost retirement benefits" in the amount of \$99,164.98, and "[e]motional distress, embarrassment, humiliation, depression or anxiety" in the amount of \$1,219.28.

The Court first takes up the Defendant's *Motion for Judgment as a Matter of Law and Alternative and/or Joint Motion for New Trial*. The Defendant argued that there was no legally sufficient evidentiary basis upon which a reasonable jury could have found in favor of the Plaintiff on the issue of liability on his claim against the Defendant. In particular, the Defendant argued that the Plaintiff failed to present evidence to establish an essential element of his age discrimination claim under the West Virginia Human Rights Act, namely that "[b]ut for the plaintiff's protected status, the adverse [employment] decision would not have been made." The Court denied the *Motion for Judgment as a Matter of Law* at the December 17, 2010 hearing and found that the Plaintiff presented testimony at the trial that could have lead a reasonable jury to infer that the Plaintiff was not hired because of his protected status, including one employee at the Vehicle Maintenance Department of the city of Wheeling who expressed his desire to take the newly hired person "under his wing." The Court found that a reasonable jury could have inferred that taking someone under your wing meant that they wanted a younger person. The Court also found that the testimony of the primary witness for the defense did not satisfy the Court and apparently did not satisfy the Jury that the city of Wheeling had reasons other than the Plaintiff's age not to hire him.

The Defendant also moved for a new trial based on three grounds. First, the Defendant argued that instructing the jury that it could award damages for "[a]ny loss of past retirement benefits sustained as a result of the adverse employment action," as well as permitting the jury to award damages for "[p]ast lost retirement benefits," was improper, as retirement benefits are not a separately recoverable element of damages, but are an item to be included in the calculation of back pay or lost wages. Second, the

Defendant argued that a member of the jury, Cindi Greathouse, failed to disclose relevant and material information in response to an inquiry by the Court during *voir dire*. Finally, the Defendant argued that following trial, the Defendant was informed that other members of the jury, Mary Blair and Denise Cicone, were prejudiced against David Denham, the former human resources director of the city of Wheeling, who was involved in the hiring decision at issue in this case and who was a trial witness on behalf of the Defendant.

The Court heard arguments from both sides and now finds that the *Motion for a New Trial* is granted. The Defendant alleged that Ms. Greathouse failed to disclose that she initiated a lawsuit against her former employer; that she was a party to a class action lawsuit; and that a default judgment was previously entered against her. Upon review of the transcript from the *voir dire* proceedings on October 20, 2010, the Court finds that in response to the question, “[have] you, any member of your family or close friends ever participated in a criminal or civil case either as a plaintiff or defendant?”, Cindi Greathouse answered that she was convicted of a crime in Magistrate Court. In response to the question, “[h]ave you or any members of your immediate family ever been in or filed a lawsuit?”, Ms. Greathouse responded that she had “had a workers’ comp. issue [that] ... settled out of court.”

Additionally, the Court finds that Cindi Greathouse testified at the December 17, 2010 hearing that she thought she disclosed the lawsuit against her employer when she told the Court that she was involved in a “workers’ comp. issue”. Ms. Greathouse also testified that she did not disclose the class action lawsuit because she did not think she was actually involved in the lawsuit. Ms. Greathouse explained that after reviewing the

class action literature she realized that she did not suffer from any of the adverse symptoms listed and therefore assumed that she was not a part of the lawsuit. Ms. Greathouse also testified that she did not disclose the default judgment because she did not know about it. The Court finds, however, that Ms. Greathouse's failure to disclose the class action and the default judgment did not prejudice the Defendant and would not have been relevant to the Defendant's voir dire.

In regard to Ms. Greathouse's alleged failure to disclose the lawsuit against her former employer, the Court finds that although Ms. Greathouse did not intentionally deceive the Court, she did fail to disclose certain information which would have been vital to the Defendant in making a motion to strike for cause and in exercising her preemptory strikes. The information that Ms. Greathouse failed to disclose involved a lawsuit against her former employer under the deliberate intent statute wherein she recovered monetary damages from her employer. The Court finds that Ms. Greathouse referred to the lawsuit as a workers' compensation claim, but did not disclose anything about the lawsuit. The Court finds that this failure to disclose prejudiced the Defendant and impaired the Defendant's right to a fair trial. The Court therefore grants the Defendant's Motion for a New Trial. The Court finds that Ms. Greathouse's failure to disclose is sufficient to warrant a new trial and therefore the Court does not reach the other grounds alleged by the Defendant in her Motion for a New Trial.

Finally, the Court takes up the Plaintiff's *Motion for Attorneys' Fees and Costs*. The Court orally granted, in part, the Motion for Fees and Costs at the December 17th hearing but now finds that this issue is mooted due to the granting of a new trial. The

Court therefore vacates its previous finding in that regard and denies the Motion for Attorneys' Fees and Costs.

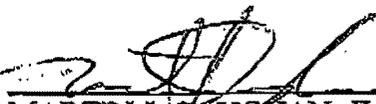
WHEREFORE, it is **ORDERED**, **ADJUDGED**, and **DECREED** that Defendant's *Motion for Judgment Notwithstanding the Verdict* is **DENIED**.

It is further **ORDERED** that the Defendant's *Alternative Motion for a New Trial* is **GRANTED** and a new trial is Ordered.

It is further **ORDERED** that the Court's previous ruling in regard to the Plaintiff's *Motion for Attorneys' Fees and Costs* is vacated and is now **DENIED** in light of its ruling on the Motion for a New Trial.

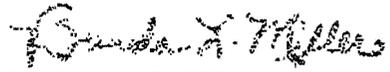
The Clerk of the Circuit Court shall forward attested copies of this Order to all counsel of record.

ENTERED this 29th day of December 2010.



MARTIN J. GAUGHAN, JUDGE
FIRST JUDICIAL CIRCUIT

Copy, Justice



Circuit Clerk

R. Kasserman

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

ALBERT POSTLEWAIT,

Plaintiff,

v.

THE CITY OF WHEELING,

Defendant.

CIVIL ACTION NO. 07-C-29
(Judge Martin J. Gaughan)

CIRCUIT COURT
OF OHIO COUNTY
2010 NOV 18 PM 3 45
BRENDA L. MILLER

JUDGMENT ORDER

On October 20, 2010, this matter came on for trial. A jury was selected, counsel gave opening arguments and Plaintiff began to present evidence. The trial resumed on October 21, 2010, and, after Plaintiff presented his case in chief, the defense moved for judgment as a matter of law which the Court denied. The defense presented its case in chief, the jury was given instructions of law, counsel gave closing arguments, the jury deliberated and returned the following verdict:

VERDICT FORM

Interrogatory No. 1

We find in favor of Albert Postlewait on his age discrimination claim.

YES √ NO

Interrogatory No. 2

If you answered "NO" to Interrogatory No. 1, please go to the end of this Verdict Form, have your foreperson sign and date it and contact the Bailiff.

If you answered "YES" to Interrogatory No. 1, please set forth the amount of damages Plaintiff, Albert Postlewait, is entitled to for any or all of the following:

Past lost retirement benefits: \$ 99,164.98

Emotional distress, embarrassment,
humiliation, depression or anxiety;

\$ 1,219.28

Julie Joseph
Foreperson

10/21/10
Date

Counsel for the parties declined to have the jury polled and the jury was sent to the jury room. The Court indicated that the Verdict Form appeared to comply with law and gave the parties an opportunity to make motions. There were no motions by Plaintiff, but Defendant made a motion to set aside the verdict, and the Court acknowledged that it would allow the Defendant to address that in post-trial motions.

Pursuant to West Virginia Code § 56-6-31 requiring interest on "wages" and the fact that the past lost retirement benefits are "wages" as defined by the instructions given to the jury and by West Virginia Code, § 21-5-1(c) and (l), the statutory interest rate was 10% per annum at the time the cause of action accrued, being when Gary Weichman was selected for the equipment mechanic position instead of Albert Postlewait on August 29, 2005, the prejudgment interest of 10% per annum on \$99,164.98 is \$9,916.50 which divided by 365 days per year calculates to \$27.168493 per day. Accordingly, the prejudgment interest is calculated as follows:

<u>Dates</u>	<u>Interest</u>
8/29/05 to 8/28/06	\$ 9,916.50
8/29/06 to 8/28/07	\$ 9,916.50
8/29/07 to 8/28/08	\$ 9,916.50
8/29/08 to 8/28/09	\$ 9,916.50
8/29/09 to 8/28/10	\$ 9,916.50
8/29/10 to 10/21/10 (53 days x \$27.168493)	\$ <u>1,439.93</u>
Total Prejudgment Interest	\$51,022.43

Accordingly, based on the calculations, the Court does

ORDER that Albert Postlewait is awarded judgment against the City of Wheeling in the amount of \$51,022.43 in prejudgment interest. The Court does also

ORDER that Albert Postlewait is awarded judgment against the City of Wheeling in the amount of \$100,384.26, plus post judgment interest after October 21, 2010, and court costs.

The Clerk is ordered to forward copies of this Judgment Order to all counsel of record.

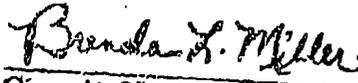
Enter this 15th day of Nov, 2010.

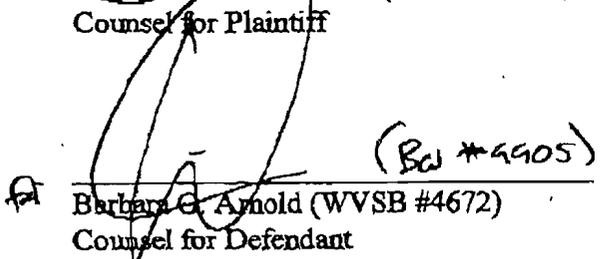

MARTIN J. GAUGHAN, JUDGE

APPROVED FOR ENTRY BY:

A copy, Teste:


Ronald Wm. Kasserman (WVSB #1958)
Counsel for Plaintiff


Circuit Clerk


(Bw #4905)
Barbara G. Arnold (WVSB #4672)
Counsel for Defendant