

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

MARTHA KNOTTS,

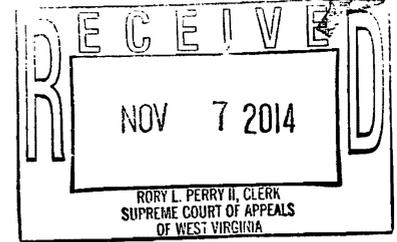
Petitioner,

v.

No. 14-0752

GRAFTON CITY HOSPITAL,

Respondent.



**BRIEF AMICUS CURIAE OF UNITED MINE WORKERS OF AMERICA AND THE WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION**

The sole issue upon which your amicus curiae United Mine Workers of America and West Virginia Employment Lawyers Association wish to comment is the reliance by the Circuit Court on this Court's ill-advised per curiam opinion Young v. Bellofram Corp., 227 W. Va. 53, 703 S.E. 2d. 560 (2010). As discussed herein below Young is contrary to United States Supreme Court precedent, as well as more recent decisions of this Court. Additionally, Young flies in the face of common experience and is contrary to the remedial policies motivating the West Virginia Human Rights Act. It should be overruled in favor of the United States Supreme Court's position as set forth in O'Connor v. Consolidated Coin Caterers, 517 U.S. 308, 116 S. Ct. 1307 (1996)

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307 (1996), has been cited by the West Virginia Supreme Court of Appeals several times, the first in 1996, shortly after the opinion was issued, then in 2011 and finally in 2012. The 1996 West Virginia Supreme Court of Appeals opinion referring to O'Connor is Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996). In Conrad the proposition for which the Court cites O'Connor is that the absence of co-workers who complained about sexual harassment does not preclude a plaintiff from bringing a claim of sexual harassment: In other words, in Conrad this Court cited

O'Connor for the proposition that "me too" type evidence is not necessary to establish a prima facie case of sexual harassment. Id., at 371-372. Conrad indicates the West Virginia Supreme Court's agreement with O'Connor generally.

The 2011 discussion of O'Connor by this Court is found in W. Va. Am. Water Co. v. Nagy, 2011 W. Va. LEXIS 183 (June 15, 2011). Nagy is a memorandum decision affirming a jury verdict in favor of Plaintiff James A. Nagy in an age discrimination case against West Virginia American Water Company. Plaintiff Nagy was 54 years of age when terminated. Id., at 2. The Circuit Court's "Conclusions of Law"- affirmed by the West Virginia Supreme Court and incorporated into its opinion in Nagy - included this discussion of O'Connor:

c. Instruction Regarding Age of Replacement Employees

The Company argues that the Court erred in instructing the jury that "the age of the person or persons who replaced Mr. Nagy is not relevant in your determination as to whether Mr. Nagy's age was a motivating factor for his termination."

Nevertheless, the Company's assertion that the age of the replacement employee is relevant under West Virginia law is misplaced. The Company has cited no authority in support of its position that the instruction was contrary to West Virginia law, and this Court is unaware of any decision which requires a plaintiff in an age case to prove that a replacement employee was younger.

Moreover, in O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), the U.S. Supreme Court plainly held that an age-discrimination plaintiff need not demonstrate that he or she was replaced by someone outside of the protected class to make a prima facie case. Specifically, the high Court held:

The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.

O'Connor, 517 U.S. at 312. Indeed, the Court went so far as to say that, there can be no greater inference of age discrimination (as opposed to '40 or over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old. O'Connor, 517 U.S. at 312.

Since O'Connor, many courts have held that there simply is no requirement to prove that the replacement employee is outside the protected class. See, e.g., E.E.O.C. v. Bath Iron Works Corp., No. Civ. 97-255-P-H, 1999 U.S. Dist. LEXIS 10600, WL 33117082, \*6 (D.Me. Feb. 8, 1999) (citing O'Connor, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433) (age discrimination plaintiff need

not prove age of replacement employee was outside protected class); Dahl v. Battelle Memorial Institute, No. 03AP-1028, 2004 Ohio 3884, WL 1631677, \*3 (Ohio App. Dist. July 22, 2004) (O'Connor "rejected the requirement...that a plaintiff allege that he was replaced by someone outside the age group."); Stith v. Chadbourne & Parke, LLP., 160 F.Supp.2d 1, 11-12 (D.D.C. 2001) ("O'Connor...unanimously rejected the argument that an age discrimination plaintiff must prove, as part of the prima facie case, that he or she was replaced by someone outside the protected class."); McCafferty v. Cleveland Bd. of Educ., 133 Ohio App. 3d 692, 729 N.E.2d 797, 807 (Ohio App. Dist. 1999) (any requirement that the replacement be younger than forty, was rejected in O'Connor); Barber v. CSX Distribution Services. 68 F.3d 694, 699 (3rd Cir. 1995) ("There is no magical formula to measure a particular age gap and determine if it is sufficiently wide to give rise to an inference of discrimination..."); E.E.O.C v. McDonnell Douglas Corp., 191 F.3d 948, 951 (8th Cir. 1999) (a plaintiff can make a prima facie case of disparate treatment by showing that he or she was replaced by a younger employee, whether or not the younger employee was also within the protected class of employees aged 40 or older). Accordingly, [this Court] finds that the instruction was proper. W. Va. Am. Water Co. v. Nagy, 2011 W. Va. LEXIS 183 (W. Va. June 15, 2011)

The quotation above is from this Court's Appendix to its opinion in Nagy. The Appendix quotes the Kanawha County Circuit Court's order denying the employer's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial.

This Court's most recent citation to O'Connor is found in Vetter v. Town of Moorefield, 2012 W. Va. LEXIS 551 (June 22, 2012). In Vetter the Court considered the plaintiff's appeal from a summary judgment ruling dismissing the plaintiff's age discrimination complaint against the City of Moorefield. This Court issued a very brief memorandum opinion in Vetter, adopting and incorporating by reference the findings of the Circuit Court. Id., at 2. The Circuit Court noted that the governing law regarding age discrimination was framed by the United States Supreme Court's decision in O'Connor:

That while the Court in O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S. 308, 116 S. Ct. U.S. 308, 116 S. Ct. 1307, 134 L. Ed 2d 433 (1996) held that there is "no magic age gap", it is note-worthy that the Plaintiff was replaced

by Steve Reckart, age 53, and a member of the protected class. Vetter v. Town of Moorefield, 2012 W. Va. LEXIS 551 (W. Va. June 22, 2012)<sup>1</sup>

Thus, in all three decisions by this Court addressing O'Connor the Court has accepted O'Connor as authoritative.

However, in the order appealed from herein the Circuit Court relied upon Young v. Bellofram Corp., 227 W. Va. 53, 705 S.E.2d 560 (2010), and ignored the decisions of this Court citing O'Connor approvingly as described above. In Young this Court considered the employer's appeal from a ruling finding that the employer was motivated in terminating the Plaintiff based upon her age and gender. This Court reversed the Circuit Court's ruling in favor of the Plaintiff, finding that neither age nor gender motivated the Plaintiff's termination. The Young Court's discussion of the Plaintiff's age discrimination claim begins by setting forth the prima facie case for a claim of employment discrimination as articulated in syllabus point 3 of Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164, 358 S.E.2d 423 (1986).

The Young Court then noted that, in sustaining a finding for the Plaintiff, that the Circuit Court had relied upon the employer's treatment of Plaintiff's co-worker Mr. Shuman, who was over forty; Plaintiff Young was sixty. The Young Court concluded that, because Mr. Shuman was over forty, his comparatively "lenient treatment . . . cannot sustain Ms. Young's age discrimination claim." The Young Court stated: "because Mr. Shuman was over the age of forty and also in Ms. Young's protected age class, the allegation by Ms. Young that Mr. Shuman received more lenient treatment fails to show evidence of age discrimination." Young v. Bellofram Corp., 227 W. Va. 53, 60 (2010).

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<sup>1</sup>The Vetter Court also noted: "It is particularly noteworthy that Vetter's replacement was 53 given the fact that Vetter himself was 55 years of age at termination". Id.

Young contains no discussion of O'Connor, nor of this Court's decision in Conrad v. ARA Szabo, which appeared to have approved of O'Connor. Similarly, there is no discussion of Young in the post- Young decisions (Nagy and Vetter) approving and adopting as correct O'Connor's approach to age discrimination.

Although Young has been cited in four decisions by this Court, only one of those is pertinent to the O'Connor holding regarding comparator employees over 40 in an age discrimination case. That lone case is a memorandum decision, Riggleman v. Pilgrim's Pride Corp of W.Va. Inc., 2013 W. Va. LEXIS 760 (June 24, 2013). Therein the Court considered the appeal of Roger Riggleman from summary judgment entered in favor of Pilgrim's Pride Corporation of West Virginia on the Plaintiff's disability and age discrimination claims. In Riggleman the Court's treatment of the age issue is a passing reference. It is not clear that the age of any comparator employee cited by Riggleman was pertinent to this Court's decision affirming the dismissal of his claims<sup>2</sup>.

From the review of this Court's jurisprudence above it appears that Young is an outlier. The discussion therein of the age of the comparator employee is contrary to the views of federal and state courts which have considered the issue following O'Connor. To the extent that Young

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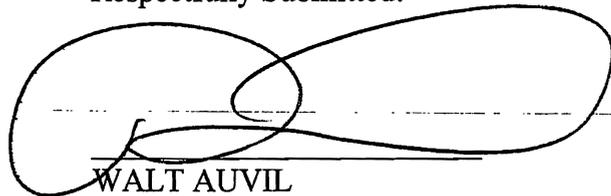
<sup>2</sup>Vetter v. Town of Moorefield, while relying upon O'Connor, also cites Young v. Bellofram for the general proposition that the prima facie case in a disparate treatment claim is made up a showing that the Plaintiff is a member of a group protected by the West Virginia Human Rights Act, that the Plaintiff was subjected to an adverse employment decision and that a comparator employee outside of the protected group at issue was treated significantly differently than was the Plaintiff when both were engaged in similar conduct. As discussed in O'Connor, Nagy and Vetter this prima facie case formulation cannot be applied mechanistically in an age discrimination context.

is contrary to the United States Supreme Court's decision in O'Connor, Young should be overruled. Petitioner Knotts collects state court decisions from Massachusetts, Pennsylvania, Texas, Louisiana and Michigan applying O'Connor to state law age discrimination claims. There is certainly nothing in either the West Virginia Human Rights Act or in the decisions of this Court (other than the ill-advised Young decision) which would lead to a different result than that reached by the United States Supreme Court in O'Connor.

Further, Young flies in the face of logic and common sense. Followed to its logical conclusion, Young would disallow as irrelevant evidence in an age case of an employer's replacement of a sixty-five year old employee with a forty year old. Common experience would indicate that an otherwise competent sixty-five year old employee of long tenure being replaced by a forty year old new hire would be relevant to a claim of age discrimination. This factually common scenario in West Virginia is contemplated by O'Connor and ignored by Young.

For all of these reasons your Amicus Curiae respectfully requests that the decision of the Circuit Court in the above-styled matter be reversed, that Young be overruled, that this Court adopt the rule set forth in O'Connor by the United States Supreme Court.

Respectfully Submitted:



WALT AUVIL  
Counsel for Amicus Curiae  
State Bar No. 190  
Rusen & Auvil, PLLC  
1208 Market Street  
Parkersburg, WV  
(304) 485-3058

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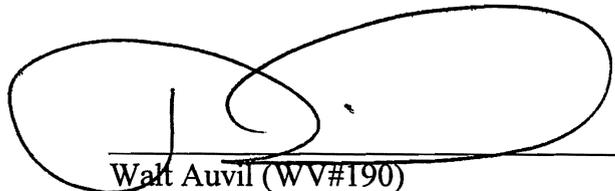
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CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of November, 2014, I served the foregoing "Motion for Leave to File Brief Amicus Curiae" and "Brief Amicus Curiae of United Mine Workers of America And The West Virginia Employment Lawyers Association" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Mario R. Bordogna  
Vanessa L. Goddard  
1085 Van Voorhis Road, Suite 400  
PO Box 1616  
Morgantown WV 26507-1616

Allan N. Karlin/Sarah Montoro  
Allan N. Karlin & Associates  
174 Chancery Row  
Morgantown, WV 26505



Walt Auvil (WV#190)  
Counsel for Amicus Curiae  
Rusen & Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
(304)485-3058