

Starcher, J., concurring:

FILED
July 11, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 13, 2001
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I concur with the majority opinion, and with Justice Davis's separate reasoning that explains why the plaintiff in the instant case did not have a "duty to mitigate" and why the determinations of the jury should be respected. For the following reasons, I go a step further and extend the "respect for the jury" reasoning to the issue of mitigation -- which of course is a classic jury question.

The defendant was represented by able counsel at trial. Assuming *arguendo* that mitigation was an issue, the defendant had the burden of proving the plaintiff's failure to mitigate. The defendant's primary evidence on this issue was in the form of several newspaper advertisements that showed arguably similar regional job openings. According to the briefs (the record is not complete), when the plaintiff testified and was cross-examined, the defense could have confronted the plaintiff with those advertisements and questioned her about them -- but this was not done; instead, the defendant apparently followed the strategy of waiting until it presented its defense, and then introducing the advertisements as evidence.

Was the defendant then required to re-take the stand and explain on rebuttal with respect to each such advertisement why she did not apply for that job?

No, not if she chose to stand silent and take her chances on how the jury viewed that evidence. Moreover, presumably the defendant could have called the plaintiff to the stand and questioned her about the advertisements, as part of its own case, to show that she had not mitigated.

This Court is not going to change the settled rules of employment law by allowing employers to present job advertisements to a jury -- without even showing that the employee knew of the advertisements -- and then, based on the advertisements, arguing that the employee didn't mitigate as a matter of law because she didn't apply for those jobs.

When a jury concludes that an employment law plaintiff was doing nothing to seek comparable work, the plaintiff will pay the price.

But when, as in the instant case, six members of the community conclude, upon proper instructions from the Court and despite the able efforts of the defendant to persuade the jury otherwise, that a plaintiff who was badly mistreated by a defendant in fact made reasonable efforts to find a new job -- then the jury has the right to make an award to the plaintiff that this Court will sustain.