No. 22165 -- Mary Jane Barefoot, Administratrix of the Estate of Grace Lambert v. Sundale Nursing Home, Jerry Bair, and Nancy Edgell

Cleckley, J., dissenting:

The majority's opinion commits several egregious errors that will, if not corrected, threaten to rewrite important elements of employment discrimination law in this State and seriously increase the burden imposed on plaintiffs to prove human rights violations. Thus, I dissent.

I.

The majority's basic holding, that the judgment below must be reversed because plaintiff failed to establish a prima facie case, is flatly inconsistent with United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983), in which the United States Supreme Court applied Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Prior to the case at bar, we consistently have striven to construe the West Virginia Human Rights Act, W. Va. Code, 5-11-1 (1967), et seq., to coincide with the federal courts' interpretation of Title VII,[1]

[1]E.g., West Va. University v. Decker, ___ W. Va. ___, 447 S.E.2d 259 (1994); Conaway v. Eastern Associated Coal Corp, 178 W. Va. 164, 358 S.E.2d 423 (1986).

at least where our statute's language does not direct otherwise.[2]

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[2]Where there are substantive distinctions between the language used by the two statutes, we have inferred a State legislative intent to diverge from the federal law and have ruled accordingly. E.g., Chico Dairy Co. v. W. Va. Human Rights Commission, 181 W. Va. 238, 382 S.E.2d 75 (1989); W. Va. Human Rights Commission v. United Transp. Union, Local 655, 167 W. Va. 282, 280 S.E.2d 653 (1981).

In Aikens, the Supreme Court held that once a defendant responds to the plaintiff's case-in-chief and all the evidence is in, the prima facie case loses its legal impact. The parties on appeal argued whether the district judge, ruling after a bench trial, had used the wrong elements for a prima facie case of discriminatory failure to promote. Because the case "was fully tried on the merits," the Supreme Court thought it "surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. . . . [B]y framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non." 460 U.S. at 714, 103 S. Ct. at 1481, 75 L.Ed.2d at 409. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The . . . [trial] court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'" 460 U.S. at 715, 103 S. Ct. at 1482, 75 L.Ed.2d at 410, quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1093, 64 L.Ed.2d 207, 215 (1981).

[3]The majority's failure to discuss the impact of Rule 301 of the West Virginia Rules of Evidence is also a grave error. The majority's opinion grants the defendant a judgment as a matter of law. Once a prima facie case has been established, and I believe the plaintiff has clearly demonstrated this, the burden of production passes to the defendant. Under St. Mary's Honor Center v. Hicks,

Thus, this Court's sole task on review is to determine whether the evidence supported a reasonable jury conclusion that the defendant intentionally discriminated against Ms. Lambert. See St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993). Because the jury found that the plaintiff bore her burden, we can reverse the circuit court only if we find that the jury's decision was clearly erroneous. Mildred L.M. v. John O.F., __ W. Va. __, __ S.E.2d __ (No. 22037 12/8/94) (the task of an appellate court on review of a jury's verdict is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below).

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___ U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993), a prima facia case creates a presumption of discrimination in favor of the plaintiff and, thus, the plaintiff is entitled to the benefit of Rule 301 (the federal and West Virginia rules are identical). Under Rule 301, once a presumption enters the case, the case cannot, as a matter of law, be dismissed. Rather, it is incumbent on the trial court to submit the case to the trier of facts for final resolution. Legislative history of Rule 301 supports this interpretation. The final Conference Report explaining Rule 301 states that "[u]nder the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief." Eric D. Green and Charles R. Nesson Federal Rules of Evidence at 42 (1994). Properly interpreted, Rule 301 precludes a court from granting a judgment as a matter of law against a party to whom the benefit favors. See II Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, § 3-2(B), pg. 174 (3rd ed. 1994).

Even though Aikens tells us that the prima facie case is irrelevant at this stage, I nevertheless feel compelled to correct the majority's complete failure to follow State and federal precedent regarding the prima facie case. Because I fear circuit courts might rely upon the majority's errors and too easily dismiss human rights cases at the summary judgment or directed verdict stage, I must demonstrate that the majority's opinion is an anomaly.

The difficulty can be traced to the third prong of the analysis we set forth in Conaway, that "but for the plaintiff's protected status, the adverse decision would not have been made." 178 W. Va. at 170, 358 S.E.2d at 429. Use of the "but for" language in that test may have been unfortunate, at least if it connotes that the plaintiff must establish any thing more than an inference of discrimination. But the Conaway decision itself disavowed any

[4]There is precedent in retaliation cases for using a formula for the prima facie case similar to Conaway's. E.g., Jennings v. Tinley Park Community Consol. School District No. 146, 864 F.2d 1368 (7th Cir. 1988); EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, (9th Cir. 1983). In that context, courts have described the prima facie showing as evidence that the plaintiff engaged in protected activity, that the plaintiff suffered an adverse employment decision, and that there was a causal link between the protected activity and the adverse decision. As we have said, that link "can be proven by direct or circumstantial evidence, or by inferential evidence, or by a combination of evidence." Fourco Glass Co. v. State Human Rights Comm'n., 179 W. Va. 291, 293, 367 S.E.2d 760, 762 (1988). In any event, these retaliation cases reinforce the point: the plaintiff's burden in making a prima facie case is merely to establish an

desire to require more: "What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." 178 W. Va. at 170-71, 358 S.E.2d at 429-30. Moreover, Conaway expressly noted that it was not overruling our decisions in Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983), which had used the federal test formulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), or State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 174 W. Va. 711, 329 S.E.2d 77 (1985), which had used a variation on the McDonnell Douglas standard. Rather, Conaway said its general test was inclusive of the analysis in those cases.

When Conaway is read with this backdrop, it becomes clear that the plaintiff in this case offered a prima facie case; in fact, depending upon how one wants to break down the facts, she offered two. Plaintiff alleged a discriminatory discharge and adduced

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inference that discriminatory motive entered into the decision.

evidence that: (1) she was a member of a protected class (Native American); (2) she provided competent, capable, and loyal service to her employer; (3) she was discharged; and (4) she was replaced by someone not of her protected class. These facts, standing alone, create an inference of discrimination. If the decision is not explained, we would suspect the employer had an illicit motive; a fair and rational employer does not fire an employee who is performing adequately and then hire someone totally new to replace the discharged worker. Of course, the employer might have a rational explanation for its action. But that is the function of the prima facie case; it is designed to smoke out the defendant and force it to come forward with some explanation for its action. E.g., Conaway, supra; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). In this case, the plaintiff supported the skeletal prima facie case with evidence that the employer also purged all other members of plaintiff's class from its workforce over a period of six to eight months. Thus viewed, the plaintiff clearly established an inference of discrimination, and the circuit court was correct in requiring the defendant to offer

[5] For purposes of simplicity, and because racial or ancestral discrimination appears to be plaintiff's strongest claim, I am limiting my analysis to this ground as the basis for the alleged discrimination.

a legitimate nondiscriminatory reason for its discharge decision or face a directed verdict.

The defendant in this case, of course, did respond. It offered that the plaintiff was terminated because she hit a patient at the nursing home. Undoubtedly, that would be (if believed by the jury) a legitimate, nondiscriminatory reason. But that explanation also gave rise in this case to a second possible prima facie case. That is, the plaintiff offered evidence that other employees, who were not members of her protected class, had hit patients but were not discharged. This meets the prima facie case outlined in Syllabus Point 2, in part, of Logan-Mingo Mental Health Agency, which Conaway expressly reaffirmed:

> "A complainant in a disparate treatment, discriminatory discharge case . . . may meet the initial prima facie burden by proving, by a preponderance of the evidence, (1) that the

[6]The ensuing discussion in the text could also be analyzed as proof of pretext. See, e.g., McDonnell Douglas, supra. Whether the evidence is assessed as a separate prima facie case or as pretext does not really matter. The only real issue for us to decide at this stage of the litigation is whether the plaintiff sustained her burden of proving that her race or ancestry entered into the employer's decision to discharge her.

[7]Indeed, Conaway described the Logan-Mingo formula as "a very useful, workable test for unequal treatment of employees." 178 W. Va. at 171, n. 16, 358 S.E.2d at 430, n. 16.

[8]This part of the Logan-Mingo analysis, requiring the plaintiff to prove the prima facie case by a preponderance, could be misleading. As I have described in Part I, once the evidence is in, the prima

> complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct."

Accord, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 96 S. Ct. 2574, 49 L.Ed.2d 493 (1976). This prima facie burden is precisely what the plaintiff offered in this case.

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facie case loses its significance. Thus, the only stages at which the prima facie case technically has any impact are on summary judgment and directed verdict motions. At those stages, the circuit court may grant a defendant's motion only if no reasonable jury could find the existence of a prima facie case. A plaintiff's motion should be granted only if no reasonable jury could fail to find that the plaintiff had proved a prima facie case and that the defendant's explanations are either not legitimate or are unsupported by the evidence.

On the other hand, a circuit court could, to assist the jury in analyzing a complicated set of facts, instruct the jury by explaining the Conaway three step analysis (prima facie case/legitimate, nondiscriminatory reason/pretext). In that context, the circuit court's instructions could appropriately require the plaintiff to prove the prima facie elements by a preponderance of the evidence. Alternatively, the circuit court could simply instruct the jury that the plaintiff's burden is to prove, by a preponderance, that the alleged illicit motive contributed to the employer's adverse action against the plaintiff. Once proven, the plaintiff must prevail unless the defendant can show by a preponderance that the same decision would have been made in the absence of the discriminatory motive. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989), superseded by the 1991 Civil Rights Act, see Stender v. Lucky Stores, Inc., 780 F.Supp. 1302 (1992); Adams v. Nolan, 962 F.2d 791 (8th Cir. 1992); Hodgon v. Mt. Mansfield Co., Inc., 160 Vt. 150, 624 A.2d 1122 (1992).

III.

The majority's response to the plaintiff's showing leads it to further error. The Court focuses on two other incidents of employees who allegedly hit a patient but were not discharged. It concludes that "neither incident forms the basis for a discrimination complaint because both of the employees accused of striking a patient were within a protected class." This is outrageous! The first comparison employee was a black female--not a Native American. Does the majority assume that all minorities are the same? If the employer does not discriminate against a Black, or an Hispanic, or a whatever, that it does not and cannot discriminate against some other minority? The majority's bizarre and myopic view of prejudice is based on neither reality nor the law. As a matter of law, unless the comparison employee was a Native American, she was not a member of the plaintiff's class. So long as the employee was not a Native American, it is irrelevant whether she was black, white, yellow, or purple.

The second comparison employee, Ms. Edgell, was a member of a protected class, the Court decides, because she testified, without substantiation, that she had "Native American heritage" from her grandmother's side "back about six generations." It is not clear

whether that is six generations back from her grandmother or from Ms. Edgell. Here, the majority fails to consider that an employer could discriminate against an individual who is obviously and predominantly a member of a racial minority but would not discriminate against one who is somewhere between 1/64 and 1/256 minority blood (depending upon where those six generations start). If an employer disciplines the former but not the latter when both have engaged in similar conduct, that is prima facie evidence of racial or ancestral discrimination, and unless it is explained, such disparate treatment violates the Human Rights Act.

Moreover, the jury may very well have disbelieved Ms. Edgell that she, too, had Native American ancestry. Certainly, the defendant offered no evidence to support Ms. Edgell's ancestral claim. Although we cannot tell from the record, the jury may also have taken into account the witnesses' (both Ms. Barefoot's, a relative of the decedent-plaintiff, and Ms. Edgell's) physical appearance. This record fails to justify a conclusion that no reasonable jury could disbelieve Ms. Edgell.

IV.

The record also fails to warrant the conclusion that no reasonable jury could conclude there had been a discriminatory discharge. One could reasonably argue from the record (which is

all it takes to sustain a jury verdict) that: Ms. Edgell was not believable; Ms. Lambert did not abuse the patient; the incident was conveniently (and pretextually) blown way out of proportion; Ms. Lambert was a very conscientious and loyal employee; an employee with her work history would normally have been given the benefit of the doubt; the employer failed to investigate meaningfully into the charge but merely seized the opportunity to get rid of Ms. Lambert; the employer's failure to discipline others for similar conduct evidenced pretext; and the employer was on a mission to purge Native Americans from its workforce.

This line of reasoning does not follow inexorably from the record, but it does follow reasonably. And under the appropriate standard of review, that is enough. Indeed, reversing this case violates the limitations imposed on judges by the right to trial by jury in Article III, § 13 of the West Virginia Constitution.

V.

I fully agree with the Court's conclusion that the plaintiff failed to establish a claim of disparate impact. The contention that the defendant's discharge decisions had a disparate impact does not adequately focus on a particular employment practice or policy. Moreover, even if the claim is narrowed to challenge only the employer's rule that hitting a patient is *per se* a dischargeable offense, the plaintiff has failed to show a disparate impact, and I am extremely skeptical that such a rule, if evenhandedly applied, would ever create a disparate racial impact.

I do, however, dissent from the Court's gratuitous conclusion that the defendant made out a business necessity defense. While the defendant's proffered reason for the discharge, that the plaintiff hit a patient, is clearly a nondiscriminatory reason and is job related, I do not think this record warrants a conclusion that a *per se* rule is necessary. The Court's casual conclusion on this matter creates the impression the business necessity defense is easily established and is similar to the defendant's burden in responding to a disparate treatment *prima facie* case. I disassociate myself from any such implication. A defendant can sustain the business necessity defense only by bearing the burden of proving through evidence (and not merely judicial intuition) that

its challenged employment practice is both related to its employees' ability to do the job in question and is necessary to achieve an important employer objective.

VI.

Because of the errors discussed above, I dissent. I am authorized to say that Justice McHugh joins in this dissent.