IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

_____

No. 22165

_____

MARY JANE BAREFOOT, ADMINISTRATRIX
OF THE ESTATE OF GRACE LAMBERT,
Plaintiff Below, Appellee

v.

SUNDALE NURSING HOME, JERRY BAIR,
AND NANCY EDGELL,
Defendants Below

SUNDALE NURSING HOME,
Appellant

Appeal from the Circuit Court of Monongalia County
Honorable Larry V. Starcher, Judge
Civil Action No. 92-C-82

REVERSED

Submitted: October 4, 1994
Filed: December 8, 1994

Calvin Willi Wood, Esq.
Fairmont, West Virginia
Attorney for Appellee

Richard M. Yurko, Jr., Esq.
Jill Oliverio, Esq.
Steptoe & Johnson
Clarksburg, West Virginia
Attorneys for Appellant

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE BROTHERTON did not participate.
RETIRED JUSTICE MILLER sitting by temporary assignment.
JUSTICE McHUGH and JUSTICE CLECKLEY concur, and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "'In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W.Va. Code § 5-11-1 et seq. (1979), the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made.' Syl. pt. 3, Conaway v. Eastern Associated Coal Corp., 178 W.Va. 164, 358 S.E.2d 423 (1986)." Syllabus Point 1, Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992).

2. "In view of the language and purpose of the Human Rights Act, W.Va. Code 5-11-1 [1967] et seq., as it now stands, and the language of this Court in Guyan Valley Hospital, Inc. v. West Virginia Human Rights Comm'n, 181 W.Va. 251, 382 S.E.2d 88 (1989), we now hold that there is a cause of action for 'disparate impact' that applies equally to all claims arising under W.Va. Code, 5-11-1 [1967] et seq., including age based discrimination." Syllabus Point 1, West Virginia University v. Decker, ___ W. Va. ___, 447 S.E.2d 259 (1994).

3. "In proving a prima facie case of disparate impact under the Human Rights Act, W.Va. Code 5-11-1 [1967] et seq., the plaintiff bears the burden of (1) demonstrating that the employer uses a particular employment practice or policy and (2) establishing that such particular employment practice or policy causes a disparate impact on a class protected by the Human Rights Act. The employer then must prove that the practice is 'job related' and 'consistent with business necessity.' If the employer proves business necessity, the plaintiff may rebut the employer's defense by showing that a less burdensome alternative practice exists which the employer refuses to adopt. Such a showing would be evidence that employer's policy is a 'pretext' for discrimination." Syllabus Point 3, West Virginia University v. Decker, ___ W. Va. ___, 447 S.E.2d 259 (1994).

4. "'Disparate impact in an employment discrimination case is ordinarily proved by statistics[.]' Syl. pt. 3, in part, Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W.Va. 251, 382 S.E.2d 88 (1989)." Syllabus Point 2, Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992).

Per Curiam:

Sundale Nursing Home appeals the decision of the Circuit Court of Monongalia County upholding a jury verdict awarding Mary Jane Barefoot, Administrator of the Estate of Grace Lambert, $32,000 because of Sundale's alleged discriminatory discharge of Ms. Lambert. On appeal, Sundale asserts several assignments of error including that Ms. Lambert failed to establish a prima facie case showing discrimination. Because we agree that a prima facie case showing discrimination was not established, we reverse the circuit court.

I

On January 14, 1991, Theresa L. Ratcliffe, a Nursing Assistant employed by Sundale, reported that Ms. Lambert, another Nursing Assistant employee, had struck the patient with whom they both were working, causing a skin tear in his arm. The matter was reported to Nancy L. Edgell, the Director of Nursing. After

[1]Ms. Lambert filed this suit about six months after her discharge from Sundale. Upon Ms. Lambert's death, Ms. Barefoot, her daughter and administrator of her estate, was substituted as plaintiff.

[2]Ms. Ratcliffe, who has moved to Florida, did not testify but according to her sworn affidavit Ms. Ratcliffe saw Ms. Lambert strike

informing Jerry W. Bair, Sundale's Administrator and other administrators, Ms. Edgell interviewed Ms. Ratcliffe, the floor nurse who examined the patient and Ms. Lambert. Ms. Edgell also reviewed the patient's medical records and visited the patient where she observed the skin tear on his arm. According to Ms. Edgell, Ms. Lambert said that "she didn't cause the skin tear but she did not refute the fact that she had struck the resident." In an unrelated matter before a State Employment Security Administrative Law Judge, Ms. Lambert gave the following testimony:

> I did not put the skin tear on the man and all I did was tap him on the top. He had his fist like this. So, this is the way that he comes into my stomach; and I just tapped him on the top of the hand. I did not hurt the man. He never even said "ouch" and that was just to calm him down from hitting me the fifth time in the stomach and if I had of put a skin tear on him, I would have gone straight to the nurse but I did not put a skin tear on the man.

---

a patient.

According to Sundale's personnel manual the first offense penalty for "[a]buse of resident, use of obscene or abusive language, striking, threatening, or harassing a resident" is discharge. Ms. Lambert's personnel file contained Mrs. Lambert's signed receipt acknowledging that she had received Sundale's personnel manual and that she had read and understood Sundale's personnel policies. Following Sundale's investigation of the alleged incident, Sundale dismissed Ms. Lambert for striking a resident.

Following her June 14, 1991 dismissal, Ms. Lambert filed this suit on January 24, 1992 alleging that she was discharged because she was female, over 40 years old and a Native American. On January 31, 1992 while this suit was pending, Ms. Lambert died of cardiac arrest and Ms. Barefoot was substituted as plaintiff.

At trial Ms. Barefoot attempted to establish a prima facie case by asserting both disparate treatment and disparate impact issues. Ms. Barefoot alleged that Ms. Lambert's discharge was

[3]The record contains testimony that before Ms. Lambert tapped or struck the resident, he had punched her several times in the lower abdomen, which was alleged to have caused the pain that lead to Mrs. Lambert's final hospitalization. However, no workers' compensation claim was filed and no private cause of action exists under the Occupational Safety and Health Act, 29 U.S.C. § 651-678, for an allegedly unsafe working condition. See Handley v. Union Carbide Corp., 804 F.2d 265, 266 (4th Cir. 1986).

discrimination because two others, who had struck patients, were not fired and because within a six to eight month period, Sundale fired all five of their Native American employees.

After the jury returned a verdict against Sundale awarding Ms. Barefoot $32,000, and the circuit court denied Sundale's motion to set aside the verdict or grant a new trial, Sundale appealed to this Court.

II

Sundale's primary assignment of error is that Ms. Barefoot failed to establish a prima facie case of discrimination under the West Virginia Human Rights Act, W. Va. Code 5-11-1 [1967] et seq. W. Va. Code 5-11-9 [1992] provides, in pertinent part:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . .
> (1) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and

[4]At the conclusion of the testimony on behalf of Ms. Barefoot, the circuit court granted a directed verdict on behalf of Ms. Edgell and Mr. Bair and dismissed them as defendants.

> competent to perform the services required even if such individual is blind or handicapped. . . .

W. Va. Code 5-11-3 [1994] provides the following definitions:

> When used in this article:
>
> . . .
>
> (h) The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, handicap or familial status and includes to separate or segregate;
>
> . . .
>
> (k) The term "age" means the age of forty or above. . . .

In order to prevail in a discrimination case, a plaintiff must establish a prima facie case of discrimination; the elements of which were outlined in Syl. pt. 3, Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164, 358 S.E.2d 423 (1986), which provides:

> In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W.Va. Code § 5-11-1 et seq. (1979), the plaintiff must offer proof of the following: (1) That the plaintiff is a

[5]The 1994 amendments to W. Va. Code 5-11-3 did not affect the discrimination or age definitions.

> member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made.

In accord West Virginia University v. Decker, ___ W. Va. ___, ___, 447 S.E.2d 259, 263 (1994); Syl. pt. 1, Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992). Direct proof of discrimination is not essential; rather, under Conaway, a plaintiff may offer alternative evidence. Conaway, 178 W. Va. at 170-71, 358 S.E.2d at 429-430; Dobson, 188 W. Va. at 20, 422 S.E.2d at 497.

After a prima facie case is presented, the "burden would shift to the employer to show some nondiscriminatory reason for the decision." Conaway, 178 W. Va. at 171, 358 S.E.2d at 430; Decker, ___ W. Va. at ___, 447 S.E.2d at 263.

In this case, the first prong of Conaway's test is satisfied because Ms. Lambert was a 61-year-old Native American female when she was discharged. The second or "adverse decision" prong is also satisfied because Sundale admits to discharging Ms. Lambert. However, the third or "but for" prong, which is the most difficult to satisfy, is not proven in this case.

In Conaway, we said that the "but for" prong

> . . . [w]ill cause controversy. Because discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. 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. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others. [Footnotes omitted.]

Conaway, 178 W. Va. at 170-71, 358 S.E.2d at 429-30.

A.

In this case, Ms. Barefoot attempted to satisfy the "but for" prong by showing both disparate treatment and disparate impact. Although Ms. Barefoot and others testified that various co-workers at Sundale treated Ms. Lambert differently, no evidence was presented that Sundale's administrators were aware of, encouraged or approved of the different treatment. Ms. Barefoot also maintained that two employees, who had struck patients, were not discharged. However, unlike Ms. Lambert, neither of the other employees admitted to striking a patient. According to Ms. Barefoot, one case involved a Black female under the age of forty and the other case involved Ms. Edgell, the Director of Nursing, a female over the age of forty

---

[6]In Decker, we noted that, "[d]isparate treatment is applicable to claims of intentional discrimination, as opposed to claims that a facially neutral practice is having disparate impact upon a protected class." Decker, ___ W. Va. at ___, 447 S.E.2d at 262-63.

[7] According to Ms. Barefoot's witnesses, Ms. Lambert's discriminatory treatment included: (1) Co-workers insulted Ms. Lambert's religious beliefs by an explicit show of affection in the staff break room; (2) Co-workers made fun of the pick-up truck driven to work by Ms. Lambert and Ms. Barefoot; (3) Co-workers failed to ask Ms. Lambert to be in the Christmas play; and (4) Co-workers failed to include Ms. Lambert and other Native Americans in social events held outside work.

with some Native American heritage. In the first case, the abuse was not documented, there were no eyewitnesses, and the employee denied striking the patient. Even one of Ms. Barefoot's witnesses testified that she did not believe that the employee in the first case struck a patient.

In the second case, Ms. Barefoot, who allegedly witnessed the abuse incident involving Ms. Edgell, kept silent about the incident until her testimony in this case. Ms. Edgell denied ever striking or abusing a patient and noted that at the time of the alleged incident she was performing administrative work and was not assigned to any floor responsibilities. No other evidence of the alleged incident was presented.

Even if Ms. Barefoot's allegations were true, neither incident forms the basis for a discrimination complaint because both

---

[8]Ms. Edgell testified that her Native American heritage came from her grandmother's side back about six generations. However, Ms. Edgell did not know if her family was "listed on the common rolls of the 1925 Act" and did not know or practice any Native American customs or religion.

[9]This same witness for Ms. Barefoot testified that she was an older female employee of Sundale and had never been treated differently that other employees and had not seen Ms. Lambert treated differently.

[10]In her deposition, Ms. Barefoot said she was not aware of anyone who had slapped a patient who was not discharged.

of the employees accused of striking a patient were within a protected class, and neither was discharged. Both alleged incidents involved persons similar to Mrs. Lambert, that is females who are members of minorities, one of whom was also over forty years old. We, therefore, find that Ms. Barefoot does not satisfy Conaway's "but for" prong under a disparate treatment theory.

B.

Ms. Barefoot also maintained that over a period of six to eight months, Sundale fired all five their Native Americans employees, beginning with Ms. Lambert. Recently in Decker, ___ W. Va. at ___, 447 S.E.2d at 265, we reaffirmed that "there is cause of action for 'disparate impact' that applies equally to all claims arising under W. Va. Code, 5-11-1 [1967] et seq." Ms. Barefoot's allegations that Sundale discharged all of its Native American employees raises the disparate impact issue, which "[u]nlike disparate treatment analysis, which turns on illegal motive,. . .

[11]The record shows that Ms. Lambert, a loyal employee who had filled in when needed, had also volunteered her services at Sundale. Although Sundale's discharge of a loyal employee could be considered to show a want of compassion, Sundale's action is not a violation of employment law.

turns on discriminatory effect." Decker, ___ W. Va. at ___, 447 S.E.2d at 264. Syl. pt. 1, Decker, states:

> In view of the language and purpose of the Human Rights Act, W.Va. Code 5-11-1 [1967] et seq., as it now stands, and the language of this Court in Guyan Valley Hospital, Inc. v. West Virginia Human Rights Comm'n, 181 W.Va. 251, 382 S.E.2d 88 (1989), we now hold that there is a cause of action for 'disparate impact' that applies equally to all claims arising under W.Va. Code, 5-11-1 [1967] et seq., including age based discrimination.

In Decker, we noted that the 1991 amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. shifted the burden of production and persuasion to the employer to show that an employment practice, which had a disproportionate adverse impact on a protected trait, is "both 'job related' and 'consistent with business necessity'. [Footnote omitted.]" Decker, ___ W. Va. at ___, 447 S.E.2d at 264. Based on the 1991 amendments, we abandoned the disparate impact test of Guyan, supra, and, instead held:

> In proving a prima facie case of disparate impact under the Human Rights Act, W.Va. Code 5-11-1 [1967] et seq., the plaintiff bears the

> burden of (1) demonstrating that the employer uses a particular employment practice or policy and (2) establishing that such particular employment practice or policy causes a disparate impact on a class protected by the Human Rights Act. The employer then must prove that the practice is 'job related' and 'consistent with business necessity.' If the employer proves business necessity, the plaintiff may rebut the employer's defense by showing that a less burdensome alternative practice exists which the employer refuses to adopt. Such a showing would be evidence that employer's policy is a 'pretext' for discrimination.

Syl. pt. 3, Decker.

In this case, Ms. Barefoot must first prove the existence of a particular employment practice or policy that causes a disparate impact on a class protected by the Human Rights Act. Once Ms. Barefoot shows the discriminatory effect of Sundale's practice or policy, then Sundale must prove the practice is "job related" and "consistent with business necessity." In order to show the alleged

discriminatory effect of Sundale's practice or policy, Ms. Barefoot testified about Ms. Lambert's discharge and three other discharges, two discharges allegedly for union activity and Ms. Barefoot's own discharge allegedly for patient abuse. Ms. Barefoot acknowledged that only one of the persons allegedly discharged for union activity was a Native American and did not provide any information about the fifth discharge. Ms. Barefoot did not present any evidence comparing the discharge rate of the Native Americans to the general discharge rate.

Sundale's Administrator, Jerry Bair testified that Sundale did not discharge all of its Native American employees and that three Native Americans were currently employed at Sundale. Mr. Bair acknowledged that one Native American was discharged for insubordination in the heat of a union organizing campaign, one was a temporary summer employee who left at the end of summer, and one was fired for excessive absenteeism. Mr. Bair testified that of those three, he knew only one to be a Native American and he was

[12]In this case, Ms. Barefoot attempted to show that Sundale's discharge policy had a disparate impact. Arguably Sundale's total discharge policy is too broad to be consider "a particular employment practice or policy" as required by Decker's first prong. If we consider the "particular . . . policy" to be discharge for first offense patient abuse, the record contains no evidence that this more narrow policy resulted in a disparate impact. See supra, Part II A.

the temporary summer employee. According to Mr. Bair, Ms. Barefoot's discharge was the result of an investigation of patient neglect by an outside agency. As a result of the investigation Ms. Barefoot's nursing assistant's license was revoked; however, Ms. Barefoot is appealing the decision.

In Syl. pt. 2, Dobson, supra, we stated that "[d]isparate impact in an employment discrimination case is ordinarily proved by statistics[.]' Syl. pt. 3, in part, Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W.Va. 251, 382 S.E.2d 88 (1989)." See also Syl. pt. 3, Dobson ("it is not an abuse of discretion for the circuit court to allow the use of such statistical evidence if the defendant has the opportunity to rebut the same").

In this case, Ms. Barefoot did not meet her burden of establishing that Sundale's policy caused a disparate impact on a protected class. Ms. Barefoot offered no statistical evidence comparing the protected class to the non-protected class and her anecdotal evidence concerning the other discharges was insufficient as a matter of law. We also note that Sundale's practice of discharging an employee on the first offense for striking a patient is clearly "job related" and "consistent with business necessity."

Because we find that Ms. Barefoot did not establish a prima facie case of discrimination, we need not and decline to address Sundale's other seven assignments of error.

For the above stated reasons, the decision of the Circuit Court of Monongalia County is reversed.

Reversed.

[13]Sundale's other assignments of error include: lack of proof that the non-discriminatory reason for discharge was a pretext, improper jury verdict form and instructions, errors in the admission of evidence, insufficient evidence to support the damage award and prejudice caused by opposing counsel's improper conduct.