

Maynard, J., Dissenting Opinion, Case No.23463

Cheryl L. Vandevender v. Sheetz, Inc. & Karen Foltz

No. 23463 - Cheryl L. Vandevender, Plaintiff Below, Appellee v. Sheetz, Inc., a Pennsylvania corporation, Defendant Below, Appellant and Karen Foltz, Defendant Below, Appellee

Maynard, Justice, dissenting:

Cheryl Vandevender was essentially out of work for four weeks. She also suffered other minor mistreatment. For this, she received \$123,866 in compensatory damages, \$170,000 for noneconomic damages, and almost 2.7 million dollars in punitive damages! The total verdict was a few dollars shy of three million dollars! In the majority opinion, this Court upholds over 2-1/2 million dollars of that verdict, including the outrageous sum of \$2,232,740 in punitive damages. I strongly dissent because I believe that punitive damages are not recoverable for West Virginia Human Rights Act and Workers' Compensation Act violations.

The majority declines to address the issue of whether the Human Rights Act and Workers' Compensation Act violations provide for punitive damages because the appellant failed to raise this issue below. However, because it is clear that these acts do not specifically authorize punitive damage awards and our case law indicates that punitive damages are not an element of damages under the Human Rights Act, I believe that the circuit court was totally without the jurisdiction to order such an award.

In addition to an order of reinstatement and back pay, the Human Rights Act provides that a court may order "other legal and equitable relief as the court deems appropriate" for violations of Human Rights Act discrimination provisions. W.Va. Code §5-11-13(c). Although, the Workers' Compensation Act does not address the relief available for workers' compensation discrimination, I believe that it would not differ from the relief available under the Human Rights Act. According to *Dobson v. Eastern Associated Coal Corp.*, 188 W.Va. 17, 24, 422 S.E.2d 494, 501 (1992), "other legal and equitable relief" means that a plaintiff bringing a discrimination claim may generally recover damages available in tort. In *Harmon v. Higgins*, 188 W.Va. 709, 711, 426 S.E.2d 344, 346 (1992), however, this Court noted that the trial court had treated the sexual harassment case as a Harless⁽¹⁾ action and not as a Human Rights Action, and stated that "punitive damages . . . are allowed in a Harless-type case but are not an element of damages under the Human Rights Act. In *Guevara v. K-Mart Corp.*, 629 F.Supp. 1189, 1190-91 (S.D. W.Va. 1986), Judge Haden noted that the case was pled as a Harless action rather than under the Human Rights Act, and stated that the plaintiff's "requested elements of damage are more extensive than those available under the [Human Rights Act]. For example, she seeks an award of punitive damages equal to the claimed amount of compensatory damages." This Court should be consistent in its statements of the law and hold here that punitive damage awards are not applicable under the Human Rights Act and the Workers' Compensation Act. Based upon the absence of a clear legislative statement that punitive damages are recoverable and the language in the cases cited above, I believe that punitive damages are not recoverable in this case.

It is clear that the appellee was treated badly by the appellant, and that the appellant should have to pay her a fair amount of damages. However, the operative word here is "fair." The appellee was awarded \$293,866.00 in compensatory and noneconomic damages for missing essentially four weeks of work and for the appellant's other mistreatment of her, and I do not believe that this was improper, and it seems fair. But even if a punitive damages award were authorized here, an award of \$2,232,740 is simply too much under the facts of this case. The task of determining what constitutes an excessive punitive damages award, in light of due process guarantees, is extremely difficult, and not given to bright line rules. Admittedly, I do not have all the answers in making such a determination, and frankly, I can't

presently state what the terms of a good rule should be. I am reminded, however, of United State Supreme Court Justice Potter Stewart's comment that although he could not define hard-core pornography, "I know it when I see it."⁽²⁾ Likewise, I know an excessive punitive damages award when I see one, and I see one here. I would call this one hard-core. Therefore, I dissent.

1. Harless v. First National Bank in Fairmont, 162 W.Va. 116, 124, 246 S.E.2d 270, 275 (1978) where this court explained that "[w]here the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge." (footnote omitted).

2. Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793, 804 (1964) (Justice Stewart concurring).