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OF WEST VIRGINIA

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No. 25335 - Fairmont Specialty Services v. The West Virginia Human Rights Commission and Irma P. Voyle

Starcher, C. J., concurring:

I fully concur with the majority opinion. I write separately to address several factors that are involved in this case in greater detail.

Administrative Law Judge Mike Kelly found that the appellee, Ms. Voyle, had been harassed by her co-worker, Mr. Fluharty, and that the harassment involved and was based in substantive part upon Ms. Voyle's national origin. The ALJ specifically stated:

> I conclude as a matter of law that Irma P. Voyle showed by a preponderance of the evidence that Mr. Fluharty's conduct towards her was unwelcome. While it is fair to state that Ms. Voyle "gave as good as she got" when it came to average workplace bickering over duties and equipment, and perhaps at times enjoyed being verbally confrontational with co-workers, Mr. Fluharty's conduct clearly exceeded the normal and became *frightening, menacing, insulting and most unwelcome*.

(Emphasis added.)

The ALJ also stated:

> I conclude as a matter of law that Mr. Fluharty's conduct, at least in significant part, was due to Ms. Voyle's Mexican ancestry. I base this conclusion on his use of the term "Mexican" in a disparaging and insulting tone *when threatening Ms. Voyle's physical safety* and when discussing her with co-workers.

(Emphasis added.)

Then, the ALJ concluded:

> I conclude as a matter of law that Mr. Fluharty's conduct was sufficiently severe and pervasive to alter Ms. Voyle's conditions of employment. In making a determination on this issue, I apply by analogy the HRC regulations on sexual harassment, and particularly 6 W.Va. C.S.R. § 77-4-2, which provides that:
>
> > 2.4. In determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive, the Commission will consider;
> >
> > 2.4.1. Whether it involved unwelcome physical touching;
> >
> > 2.4.2. Whether it involved verbal abuse of an offensive or threatening nature;
> >
> > 2.4.3. Whether it involved unwelcome and consistent sexual innuendo or physical contact; and
> >
> > 2.4.4. The frequency of the unwelcome and offensive encounters.

In applying these criteria, the ALJ concluded that Fluharty's actions and threats against Ms. Voyle were unwelcome and that they consisted of threats against her person, bizarre antics, hostility and anger, and that they were sufficiently severe to cause Ms. Voyle, who the ALJ characterized as a "reasonable person," to see her work environment as abusive. He also found that the behavior "clearly exceeded the normal and became frightening, menacing, insulting and most unwelcome." The ALJ also found that Fluharty's conduct, at

least in significant part, was due to and directed at disparaging Ms. Voyle's Mexican ancestry.

These findings of fact by the ALJ have been upheld by the Commission. It was only the ALJ's legal conclusion as to employer liability for the actions of a co-worker that was overturned by the Commission. The ALJ, stating that it was a "close call that could have tipped the other way," concluded that the employer "did the right thing" by ultimately firing the harasser. The Commission concluded to the contrary -- that the employer's firing the harasser, 18 months after the first report of harassment, did not constitute the swift remedial response that is required by the legislatively promulgated regulations and previous case law on this issue.

On that issue (that the employer's response to illegal harassment was not consistent with the law) the Commission reversed the ALJ. The Commission awarded Ms. Voyle $3,277.45 in incidental damages and $11,406.18 in attorney's fees.

The dissent misunderstands the majority opinion's language, about what should have triggered an adequate investigation of the illegal harassment in which Mr. Fluharty was engaging.

The ALJ's recommended decision, the record and exhibits, and even the employer's position are in accord, and there is no dispute, that FSS first knew that Scott Fluharty had called Irma Voyle a "bitch" in the early Spring of 1995. The Commission further concluded that the words "Mexican bitch" were also known of at that time. Everyone agrees that the words "Mexican bitch" and "lazy Mexican" were used later, and that Mr.

Fluharty's actions became steadily more threatening, menacing and harassing -- to such a degree that he was ultimately fired.

What the majority opinion says is that the employer was on notice of entirely unacceptable harassing language and conduct early on, and that had FSS done even a minimally adequate investigation, FSS would have appreciated the full extent of Mr. Fluharty's harassment. That is, the repeated, menacing use of hostile and derogatory words, such as "bitch," put the employer on notice that the workplace was tainted with unacceptable harassment. The discussion of gender slurs in the majority opinion is purely directed to the employer's duty to investigate, and not to a substantive claim of gender discrimination. Nothing in the majority decision grants Ms. Voyle a claim for gender discrimination.

The dissent also suggests that the majority opinion would create a strict liability standard unlike anywhere in the country, and would force employers to fire an alleged harasser after only one report of an "inappropriate" term. This completely misstates the majority opinion, which is soundly based on previous cases from this Court.

The standard for employer liability for the actions of co-worker harassment has been set out in the Commission's legislatively promulgated regulations in the analogous area of sexual harassment, that state:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) *knew* or *reasonably should have known of such conduct*, or expressly or impliedly authorized or ratified such conduct. As a defense an employer may show that it took timely and appropriate corrective action regarding such conduct.

West Virginia Human Rights Commission's Legislative Rules Regarding Sexual Harassment, 6 W.Va. C.S.R. § 77-4-3.2. (1992) (emphasis added). Subsequent to the promulgation of these regulations, the United States Supreme Court in *Burlington Industries, Inc. v. Ellereth*, 524 U.S. ___, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. ___, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), have recognized that such "timely and appropriate action" defenses constitute affirmative defenses that must be pled and proven.

In Syllabus Point 8 of *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995), this Court recognized the duty of an employer to provide a workplace free from discriminatory harassment, from whatever source. Further, the Court stated that if the harassment is perpetrated by someone other than a supervisor, an employee can state a claim for relief against an employer on the basis of a hostile work environment created by one or more subordinate employees if the employer *knew or should have known* about the offending conduct, and failed to take "swift and effective measures" reasonably calculated to end the harassment. *Hanlon*, Syllabus Point 9.

This Court in *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996), dealt with a scenario much like that of this case, in relation to harassment based on gender. We addressed a dispute between an employee's assertions that she reported sexual harassment, and management's assertion that she did not specifically state that it was "sexual harassment," by looking at the behavior and the context of the workplace. We stated, "Moreover, to the extent plaintiff complained about the sexually loaded remarks and

touching, the employer's awareness of the gender basis for the harassment could be reasonably inferred." 178 W.Va. at ___, 480 S.E.2d at 812. The *Conrad* opinion went on to state:

> [k]nowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with . . . [the West Virginia Human Rights Act] would be aware of the conduct.

Similarly, the record in the instant case shows that an employer intent on complying with the West Virginia Human Rights Act would have been aware early on that Mr. Fluharty was seriously harassing Ms. Voyle, and upon a minimal investigation would have been aware that the harassment contained a substantial component of ethnic baiting. The record also clearly shows that FSS did not fire Fluharty until *after* Ms. Voyle filed her case with the Commission, and *after* they met in Charleston at a fact-finding conference.[1] In fact, it was only *after* Ms. Voyle filed her claim that management instructed Fluharty not to speak to her. It was only when Fluharty blatantly harassed her again, that he was finally terminated, *more than 18 months after he first harassed her and the employer first knew of the harassment.*

[1]The notes of this meeting of management with Fluharty, dated September 6, 1996, record the following advice to Fluharty: "Scott, I thought you should know if you haven't already heard thru rumor mill that we had to go to Chas. to an investigation hearing on the matter of Irma Voyle's harassment claims. . . . I'd like to offer some friendly advice, I'd suggest you avoid any contact with Irma at all. . . . *Advise us if you feel as though anyone is harassing you in any way*." (Emphasis added.)

The testimony from co-workers who heard Fluharty's pejorative and vile language about Ms. Voyle not only bolstered her claim that he did indeed use such language, but also that it created a hostile environment. The evidence is clear that she heard plenty of it. Testimony on what Ms. Voyle did not hear actually supports her credibility. Such evidence is relevant and was properly accepted. In this case, the ALJ referred to testimony about Fluharty's ranting outside the hearing of Ms. Voyle to confirm the tie to her national origin.[2] Also, such testimony shows conclusively that the employer should have known what was happening in its workplace.

The dissent's citation to *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ___, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), is misplaced. *Oncale* does not offer any new standard of what constitutes a hostile environment. It merely reiterates the standard previously set out in a long line of cases from the United States Supreme Court beginning with *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Single, isolated remarks have never been found to themselves create a hostile environment. However, this case is not about a casual, inappropriate remark. In fact, one of Ms. Voyle's co-workers testified, and the ALJ credited this testimony, that if it were his mother being treated this way, he would have worried for her safety. Fluharty's behavior went on over a period of a year and a half. The employer clearly knew was going on and did not effectively

[2]Mr. Fluharty apparently liked to "vent" in front of co-workers about his physical threats against Ms. Voyle. In these ranting, he used the pejorative national origin-based language.

investigate or act to see that it stopped. The employer's defense that they took swift remedial action was an affirmative defense. They never proved that defense. The Commission correctly found and this Court has affirmed that Ms. Voyle should prevail on her claim against the employer.

Finally, it is worth noting just what is at stake and at issue in this case. Mrs. Voyle had to file a claim with a government agency to get any relief from her employer. After an arduous hearing process, she obtained a very modest and appropriate damages award of several thousand dollars.

The employer chose to exercise its absolute right to fully litigate the claim, including an appeal to this Court. The employer unsuccessfully argued before the Commission and before this Court that it did nothing negligent or wrong. The employer has strongly criticized the position taken by this Court regarding what sort of behavior triggers an employer's duty to investigate and take corrective action.

Here is the employer's position, as set forth in the employer's petition for rehearing:

> Are West Virginians people of such hypersensitivity that, unlike in every other state, where this rule would not apply, every unkind word must be immediately eradicated from the workplace? Life in the modern workplace, regrettably, can often result in co-worker tension. It is not uncommon for such tensions to arise even in an appellate court. The occasional, isolated use of such terms as "bitch," "bastard," or "son-of-a-bitch," is an important method of relieving such workplace tension, of "blowing off steam." If these terms, as the majority opinion appears to dictate, are completely banned from the West Virginia workplace, it is entirely possible that workers will

> resort to non-verbal forms of expressing their frustrations, fears, anxieties, and aggressions.
>
> Workplace violence, unfortunately, is a fact of life in contemporary society. Women disproportionately suffer from such workplace violence. Frequently, the perpetrators of workplace violence are those employees who kept their frustrations, fears, anxieties, and aggressions just below the surface, eventually erupting in a violent frenzy. Perhaps if those employees were better able to verbalize their concerns, their passive/aggressive tendencies would not have tragically resulted in the death or serious injury of their coworkers.
>
> In FSS's view, the majority opinion, by completely banning the use of terms such as "bitch," "bastard," or "son-of-a-bitch" from the workplace, will only contribute to increased workplace violence. Although Fluharty threatened violence and used inappropriate language to deal with his frustrations regarding Voyle's constant criticisms of his work, Fluharty never acted upon such threats. If Fluharty had worked in an environment where he knew that any verbal expression of such frustrations might result in his discharge, FSS firmly believes that it would have been more likely that Fluharty may have expressed those frustrations in physical terms.

Incredibly, the employer seriously argues in the foregoing quoted passages that the results of the majority opinion will be *more workplace physical violence against women*. In my 25 years on the bench, I have heard a lot of stupid "parading the horribles," but this bizarre argument may "take the cake."

Applying this twisted logic to the home front, I suppose that it's good for Dad and Mom, when stressed, to occasionally call little Johnnie or Janie some horrible, obscene name -- so as to prevent "physical" child abuse!

I resoundingly disagree with the employer's argument.

Toleration of unwelcome degrading slurs and taunts does not prevent violence -- it leads to violence. And in my opinion, one serious complaint to an employer by a female employee of being called a "bitch" triggers an absolute duty on an employer to investigate, and to take swift corrective action to prevent further occurrences.

The majority opinion does our State a great service, in firmly repudiating the employer's absurd position that an occasional unwelcome "bitch" (or worse) in the workplace is a healthy thing -- or put another way, that vicious language should be tolerated, and even welcomed -- to protect women from violence worse than mere words.

I am pleased that our Court, through the words of my esteemed former colleague Justice Margaret Workman, has spoken forcefully in this case. I wholeheartedly concur.

I am authorized to state that Justice McGraw joins in this concurrence.