No. 25335 - Fairmont Specialty Services v. W.Va. Human Rights Comm'n and Irma Voyle

Davis, Justice, dissenting:

I respectfully dissent to the majority's conclusion that FSS did not take prompt and effective remedial action in response to plaintiff's allegations of hostile work environment. The record reflects an employer well-aware of its obligations to keep its workplace free of discriminatory conduct and further reveals, an employer, who acted with alacrity and concern each time the plaintiff actually made a complaint.

In an obvious effort to make the facts of this case fit the law it created, the majority has omitted numerous facts from its opinion. For example, the majority repeatedly refers to twenty-five separate instances of complaints plaintiff made to her immediate supervisor, Mr. Parker. Yet, the majority fails to disclose the fact that, of these twenty-five complaints, only *one* involved any type of discriminatory reference. Mr. Parker testified that the only time plaintiff voiced concern about Mr. Fluharty's utterance of an ancestral slur occurred in April, 1996. Every FSS employee, and even plaintiff herself, testified that the first time she ever complained to management about an ethnic slur was April 1996. While the majority wishes to paint a picture of a plaintiff who was continuously presenting legitimate complaints of discriminatory conduct to management that were ignored, the record proves otherwise. Mr. Parker's testimony concerning the much-discussed twenty-five complaints was that all but one of these

complaints involved instances of petty workplace bickering between two co-employees.[1] In an effort to color FSS as a bad employer, the majority has improperly enhanced the quantitative nature of the complaints made by plaintiff. Moreover, the majority has completely disregarded the critical distinction between those employee complaints that are properly the subject of a discrimination action and thus, require a prompt and effective employer response, and those complaints which do not invoke the protections of employment discrimination law.

[1] Examples of this behavior to which Mr. Parker testified included, "Butch [Fluharty] took my boxes" or "Butch took my fork truck."

Critically, the record reflects and the ALJ properly found, that the first instance when FSS management was placed on notice as to any ethnic slurs having been made by Mr. Fluharty against plaintiff was when plaintiff made management aware of the lunchroom comments that Mr. Fluharty made on April 6, 1998. The response of FSS to plaintiff's complaint concerning this incident reveals an employer intent both on complying with the investigatory requirements imposed upon it and ensuring that this incident would not be repeated. On the very date that plaintiff made FSS aware of Mr. Fluharty's lunchroom invective comments about her (April 8, 1996), her employer immediately launched an investigation into the matter. Mr. Noechel first checked with plaintiff's supervisor, Mr. Parker, who was unaware of the incident, and then spoke with two other employees about the incident. He then confronted Mr. Fluharty, who admitted making the remark,[2] and informed Mr. Fluharty that "it was a very serious offense that he had committed" and that the company had specific rules proscribing such conduct. Mr. Fluharty was advised to stay away from plaintiff, to which he agreed, and he was informed that upon the plant manager's return from vacation, the matter would be further addressed. Mr. Noechel took specific action to separate plaintiff and Mr. Fluharty by

[2]The majority fails to note that Mr. Fluharty explained, in discussing the matter with Mr. Noechel, that he only made the offensive comments after being baited by other co-employees and that he never meant them nor intended for them to get back to the plaintiff. During this discussion, Mr. Fluharty informed Mr. Noechel that a source of his problem with the plaintiff was her constant criticism of the quality of his job performance. The ALJ found that "[i]t was basically undisputed that complainant was not very tolerant of what she perceived to be mediocre or poor work habits in others."

altering their work schedules so that they would not be at the plant at the same time for the next several days.

Upon the return of the plant manager, Mr. Roberts, a third-level disciplinary notice[3] was issued to and signed by Mr. Fluharty, which made clear that it was a "final warning" and that further inappropriate behavior would result in "necessary disciplinary action up to and including discharge." While the majority criticizes this discipline as essentially meaningless,[4] the majority fails to appreciate the dilemma faced by employers when they are presented with employee complaints. If an employer acts too severely and immediately discharges an employee, it is promptly "rewarded" with a wrongful discharge suit.[5] Moreover, the majority appears completely incognizant of the fact that this complaint concerning the April 6, 1996, lunchroom incident was the first such incident which invoked the protections of the West Virginia Human Rights Act ("Act"), West Virginia Code §§ 5-11-1 to -20 (1999). Because plaintiff's cause of action is

[3]The first two levels are respectively, a verbal warning and a written warning. Level four is an immediate suspension pending discharge and level five is discharge.

[4]Despite the fact that the suspension was without a loss of pay, this disciplinary measure is nonetheless a formal measure of discipline. When you consider that this discipline, which indicated that the next step could be discharge, was issued in response to the very first instance of ancestral-based comments, the discipline does not appear the "slap on the wrist" that the majority would have us believe. Moreover, without this formal disciplinary notice, FSS would not have been permitted to discharge Mr. Fluharty in October 1996.

[5]Like many employers who attempt to comply with employment discrimination laws, FSS was in fact sued by Mr. Fluharty for wrongful discharge.

limited to ancestral discrimination[6] and because the ALJ found,[7] and the record supports this determination, that April 6, 1996, was the first time that FSS was made aware of any ancestral-based comments being made by Mr. Fluharty, the discipline that was issued against Mr. Fluharty on April 23, 1996, is the launching point from which any examination of the appropriateness of FSS's remedial efforts can be analyzed.

The majority's attempt to go back to April 1995 as the first instance of discriminatory conduct for purposes of examining the reasonableness of FSS's actions is without support and against established principles of appellate review. As a rule, this Court does not apply the law in such a fashion as to prejudice the litigants when we depart from well-ensconced legal precepts. See Bradley v. Appalachian Power Co., 163 W.Va. 332, 350, 256 S.E.2d 879, 889 (1979) (discussing need to apply law prospectively where substantial public issues arising from statutory or constitutional interpretations are involved that represent a clear departure from prior precedent). Moreover, it is axiomatic that an employer's obligation to take remedial action in conjunction with employment discrimination matters is prompted by an actual complaint of the subject discriminatory conduct. See Watts v. New York City Police Dep't, 724 F.Supp. 99, 108 (S.D.N.Y. 1989). Unless the employer had reason to know of the conduct and ignored acting upon such information, the investigatory process required by law does not begin

[6]This is a key distinction that the majority overlooks.

[7]Even the Commission did not find that plaintiff reported discriminatory remarks at an earlier date; the Commission concluded only that FSS could have discovered the discrimination had it conducted a proper investigation.

until a complaint has been made. In this case, there is no dispute by even the Commission that the April 1996 lunchroom incident was the first time plaintiff reported ancestral-based discriminatory conduct by Mr. Fluharty. To suggest, as does the majority, that Mr. Fluharty's use of the term "bitch" in April 1995, based on the improper gender connotations associated with that remark, triggered the duty of FSS to employ remedial measures is both specious and clearly misguided. The law is not so one-sided, nor should it be, as to permit a plaintiff to bring a cause of action predicated on one-type of conduct, but to hold the employer liable with regard to its actions for conduct that was not the subject of the complaint and was not actionable under this State's anti-discrimination laws.

Where the majority goes seriously astray is in its fundamental misconception that anti-discrimination laws were intended to completely eliminate any and all bickering and even profanity from the workplace.[8] As the United States Supreme Court has made clear, "Title VII does not prohibit all verbal or physical harassment in the workplace."

[8]The majority turns a blind eye to the ALJ's finding that in May 1996 plaintiff was informed that, through the investigation FSS conducted into the April 6, 1996, lunchroom incident, it was revealed that she frequently used vulgar language in the workplace. One male employee, Dave Lambert, reported that plaintiff "can be very crude and used filthy language . . . she cusses more than any women or men that I've been around." Another co-worker of plaintiff, Ms. Scritchfield, stated that plaintiff always called her "crazy bitch" instead of using her name. FSS management informed plaintiff that she needed to curb her use of profanity in the workplace. The ALJ observed that plaintiff "did not deny using crude and vulgar language."

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).[9] Rather, it is directed only at prohibited discriminatory conduct. See id. As Justice Scalia explained in the context of a same gender sexual harassment claim,

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'

[9]This Court has repeatedly pronounced that we analyze cases brought under the Act consistent with the manner in which federal anti-discrimination laws are applied, barring statutory distinctions or other compelling reasons. See Hanlon v. Chambers, 195 W.Va. 99, 112, 464 S.E.2d 741, 754 (1995).

523 U.S. at 80 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993)); see also Quick v. Donaldson Co., 895 F.Supp.1288, 1296 (S.D. Iowa 1995), judgment rev'd on other grounds, 90 F.3d 1372 (8th Cir. 1996) (observing that while "[u]nder Title VII, employers have an affirmative duty to maintain a working 'environment free of discriminatory intimidation, ridicule, and insult[,]'" they do not have a corresponding affirmative duty "to maintain a working environment free of all non-discriminatory juvenile mischief and immature behavior") (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)). Both the Commission and the majority fail to grasp the fact that harassment that is actionable requires "disadvantageous terms or conditions of employment." Harris, 510 U.S. at 25 (Ginsburg, J., concurring).[10]

[10]FSS argued that plaintiff offered no testimony that Mr. Fluharty's comments or conduct adversely affected her job performance and that plaintiff similarly offered no evidence that she sought counseling or treatment for work-related stress associated with his comments or conduct. While neither of these factors is determinative on the issue of hostile work environment, it clearly is evidence as to whether the workplace was sufficiently permeated with discriminatory conduct by Mr. Fluharty to have constituted actionable ancestral-based harassment. See Hathaway v. Runyon, 132 F.3d 1214, 1223 (8th Cir. 1997) (stating that "'the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered'" and rejecting employer's contention that plaintiff had to offer evidence of medical or psychiatric injury to succeed on her claim) (quoting Harris, 510 U.S. at 25, Scalia, J., concurring); Harris, 510 U.S. at 23 (stating that whether harassing conduct at issue "unreasonably interferes with an employee's work performance" is one of five factors to consider in determining whether work environment is hostile).

Much of what transpired between plaintiff and Mr. Fluharty, and upon which the majority relies, is either conduct that anti-discrimination laws was never aimed at preventing or does not meet the test of whether "a reasonable person in the plaintiff's position would find [the conduct] severely hostile or abusive."[11] Oncale, 523 U.S. at 82. To illustrate, Mr. Parker testified that only one of the twenty-five complaints registered by plaintiff concerning Mr. Fluharty concerned a comment about her ancestry. Thus, the majority wrongly castigates FSS for the other twenty-four complaints with regard to its failure to act. Another critical element of a workplace harassment claim that the majority completely overlooks is the requirement that a plaintiff's work situation be examined through the subjectivity of the individual plaintiff in determining whether the environment was indeed hostile or abusive. See Harris, 510 U.S. at 21-22 (stating that plaintiff must show both that offending conduct created an objectively hostile environment and that she subjectively perceived her working conditions as abusive). A simple review of plaintiff's testimony raises a critical question as to whether plaintiff subjectively viewed her work environment as hostile or

[11]Given well-established principles of appellate review which require upholding administrative findings of fact provided such findings were supported by substantial evidence, I do not dissent to the ALJ's determination that a hostile work environment was created by Mr. Fluharty's conduct. Clearly, once ancestral slurs were in fact made, the ALJ could have properly made such a finding. Because the majority wrongfully relies on instances of non-discriminatory conduct to fault FSS for its remedial efforts, I must, however, point out the critical foundational underpinnings for a discrimination claim. It is only through such an examination of discrimination law that the error in the majority's reasoning can be fully appreciated.

abusive. Plaintiff testified that she "wasn't scared of him [Mr. Fluharty]."[12] She stated, further, that "I knew Fluharty was weird, and [when] nobody was around him, he was always in the corner laughing, doing stupid things." In addition, plaintiff testified "I was never around him that much."[13] This was partly because Mr. Fluharty worked straight day shift (7 a.m. to 3 p.m.) and plaintiff worked a rotating twelve-hour shift. Plus, after the initial training of Mr. Fluharty in March 1995, these two employees never worked directly with each other. They would encounter each other only in the lunchroom or if one individual specifically sought out the other one. Given this admission concerning their limited contact, it is difficult to view plaintiff's testimony that Mr. Fluharty called her a "Mexican bitch" on one hundred occasions, but only did so out of the presence of other co-employees, with anything but skepticism. The ALJ concluded that plaintiff had clearly exaggerated the number of times Mr. Fluharty had made ethnic slurs against her.[14]

[12] This testimony arguably negates whether plaintiff actually felt physically threatened by Mr. Fluharty's comments.

[13]This testimony clearly went to the critical issue of whether the conduct was "severe or pervasive," Harris, 510 U.S. at 22.

[14]The majority, of course, downplays this lack of credibility finding.

The majority wrongly accepts as facts conclusions that the Commission made in order to reverse the decision of the ALJ. For example, the majority accepts the Commission's conclusion that given the small size of the plant (eighty employees), everyone had to know about Mr. Fluharty's discriminatory conduct. The record, however, is devoid of testimony that supports this self-serving conclusion. Moreover, inherent to this conclusion is a wholesale acceptance of plaintiff's testimony concerning the one-hundred instances of ancestral slurs, concerning which the ALJ expressly found no credible evidence, and a concomitant dismissal of the evidence offered by FSS that April 1996 was the first time that it was made aware of any ancestral invective involving plaintiff. Another conclusion that the Commission reached was that the absence of any reference whatsoever in plaintiff's personal calendar was not indicative of whether Mr. Fluharty had failed to make ancestral slurs on one-hundred occasions.[15] This conclusion simply flies in the face of reason and common sense. Its strains credibility to suggest, as the ALJ found, that an individual, such as plaintiff, who made notations correspondent to even the most petty of incidents would have chosen not to denote in some manner multiple instances of ancestral slurs being made against her by Mr. Fluharty.[16]

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[15]The Commission decided that because such comments were necessarily insulting in nature, plaintiff would have logically refrained from recording the same.

[16]ALJ found as a matter of fact

> [g]iven that Ms. Voyle made daily entries in her diary/calendar, and given her obvious propensity to record workplace disputes of even a petty nature (e.g. entry on 11

July 1995: "Pudding [her name for employee] said cutting tags was not his job"), I find it very unlikely that Mr. Fluharty could have made repeated insulting references to complainant's ancestry in 1995 without Ms. Voyle making even one entry in her calendar about such ethnic slurs, other than her reference to "ugliness" in March.

Were it not for the majority's wrongful reliance on portions of the record without giving any weight to the evidence presented by FSS, it would not have been necessary to discuss the foundational flaws upon which the majority relies in reaching its conclusion. See supra note 10. The real crux of this dissent is my firm conviction that the employer in this case took remedial efforts that were both prompt and reasonably calculated to eliminate the harassment at issue. See Saxton v. AT & T Co., 10 F.3d 526, 536 (7th Cir. 1993) (stating that while employer could have done more to remedy the effects of the harasser's conduct from plaintiff's perspective, "Title VII requires only that the employer take steps reasonably likely to stop the harassment"). Each and every time that FSS received complaints from plaintiff concerning Mr. Fluharty[17] that involved matters other than petty workplace bickering, it promptly looked into the matter.[18] Where those complaints were discriminatory in nature, FSS conducted the thorough investigation that is required by law. To summarize the actions of FSS, as the ALJ expressly found,

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[17] Although the majority implies that Mr. Fluharty had previously engaged in discriminatory conduct with regard to other employees, the record states only that Mr. Fluharty had problems getting along with his co-workers.

[18] The majority cites one instance when Mr. Parker apparently indicated to plaintiff that he forgot to report an incident to higher management. Although plaintiff testified that she accorded no ill-will to Mr. Parker with regard to this failure to report, the majority would have us believe that this was evidence of management's complicity in the harassment. The ALJ found that this complaint, based on the entry in plaintiff's calendar--"Butch trying to irritate me"--did not include any ethnic slur. Thus, the failure of Mr. Parker to report the incident, which appears to fall in the same category as the other previously discussed more "petty" incidents, certainly does not warrant the majority's inference that FSS management ignored or failed to act upon complaints registered by plaintiff.

> (1) when plaintiff first complained of Mr. Fluharty's harassment in March 1995, he was verbally reprimanded by management after it investigated the complaint even though plaintiff made no reference to any remarks based upon her ancestry;
> (2) when plaintiff next complained of an April 1995 lunchroom incident, which occurred outside her presence, Mr. Fluharty was given an official verbal warning;
> (3) when plaintiff next complained of an April 1996 lunchroom incident, which also occurred outside her presence, Mr. Fluharty was given a "final warning;" and
> (4) when plaintiff next reported the "staring" incidents in October 1996, which occurred after Mr. Fluharty had been warned to stay away, Mr. Fluharty was fired.

When the record is properly culled, as reflected by the ALJ's findings above, this case was not one where a plaintiff made repeated complaints of discriminatory conduct and the employer simply looked the other way. To the contrary, on each and every occasion that plaintiff complained to management about non-petty incidents involving Mr. Fluharty, FSS investigated the incident and imposed progressive discipline, from verbal warnings up to and including discharge.

Despite the majority's recitation of the Snell factors for considering whether the employer's remedial efforts were appropriate,[19] the majority omits reference to specific factual findings that the ALJ made on this issue:

> (a) There was no offensive or hostile physical contact;

[19]Those factors are: the gravity of the harm, the nature of the work environment, the degree of acquiescence in the harassment by the supervisors, the promptness of the employer's responsive action, and the apparent sincerity of the employer's actions. See Snell v. Suffolk County, 782 F.2d 1094, 1104 (2nd Cir. 1986).

> (b) There was no overt act against plaintiff's physical safety or a threat to do imminent bodily harm;
> (c) The offensive conduct was infrequent, spread over a period from March 1995 to October 1996, with considerable gaps between some of the incidents;
> (d) There was no credible evidence that any supervisor acquiesced in the harassment;
> (e) The plant manager, Mr. Roberts, personally involved himself in resolving the issue and appeared sincere in wanting the harassment to stop;
> (f) Much, but certainly not all, of the animosity between the two amounted to no more than workplace bickering; and
> (g) The efforts of respondent to deal with Mr. Fluharty after reported incidents of harassment were sincere and effective.

Thus, rather than the eighteen-month period of continuous harassment that the majority describes, what occurred instead was several incidents followed by lengthy intervals during which no offensive conduct was reported. Critically, within six months of the first instance when FSS was informed by plaintiff of ancestral-based invective, Mr. Fluharty was fired. Downplaying this relatively short-time period, the majority prefers instead to place undue emphasis on the fact that Mr. Fluharty's termination followed plaintiff's filing of a complaint with the Commission.

I wish to make clear that I do not condone the conduct or remarks that Mr. Fluharty made with respect to plaintiff. His behavior was clearly offensive as ethnic epithets, just like racial slurs, are repugnant to civilized society and should not be tolerated in the workplace, whether through direct or indirect means. What the majority ignores, however, is the fact that federal as well as state anti-discrimination laws are not codes of civility. See Oncale, 523 U.S. at 81; Indest v. Freeman Decorating, Inc., 164

F.3d 258, 265 (5th Cir. 1999) (stating that "Title VII . . . cannot guarantee civility in the American workplace but, at its best, inspires prophylactic measures to deter unwanted . . . harassment"). Employers, much as they would like, simply cannot rid the workplace of all instances of inappropriate employee behavior. See Quick, 895 F.Supp. at 1296. This Court has previously recognized in Hanlon that where employers have in place clear policy that both proscribes harassment in the workplace and establishes "an effective mechanism for receiving, investigating, and resolving complaints of harassment," "the employer has done all that it can do to prevent harassment, and the employer cannot be charged with responsibility for the victim's failure to complain." 195 W.Va. at 108, 464 S.E.2d at 750.

The majority has effectively thwarted this critical limitation on imposing vicarious liability on employers for co-worker harassment. Despite the fact that FSS had written rules in place prohibiting workplace harassment and rules which governed complaint making, the majority holds FSS liable for conduct that occurred before FSS was ever made aware or had reason to be aware of any ancestral nature to the "animosity" between plaintiff and Mr. Fluharty. See also Indest, 164 F.3d at 265 (discussing how prompt complaints by a plaintiff "can thwart the creation of a hostile work environment"). Despite the clear pronouncement in Meritor that employers should not be held automatically or strictly liable for hostile work environment cases, the majority's decision appears to do just that. 477 U.S. at 72. As FSS perceptively cautioned, the majority's decision to uphold the Commission's findings puts this State's employers on notice that

unless they immediately terminate any employee found to have used, even on a single occasion, any derogatory term based on race, gender, ethnicity, ancestry, or other protected classification, they will be found to be in violation of this State's anti-discrimination laws. And we wonder why it is so difficult to attract new employers to this State?

I am authorized to state that Justice MAYNARD joins me in this dissent.