IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

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No. 25365

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CHARLES E. SMITH and
ANNETTE SMITH, his wife,
Plaintiffs below, Appellants,

v.

SEARS, ROEBUCK AND CO.,
a New York corporation doing business
in West Virginia; GREGORY BOND, as
store manager of Sears, Roebuck and Co.;
and GREGORY BOND, individually,
Defendants below, Appellees.

Appeal from the Circuit Court of Kanawha County
Hon. Paul Zakaib, Judge
Civil Action No. 92-C-4887

AFFIRMED

Submitted: January 13, 1999
Filed: May 19, 1999

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE STARCHER and JUSTICE McGRAW dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo.*" Syllabus Point 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995).

3. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963).

4. "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syllabus Point 5, *Jividen v. Law,* 194 W.Va. 705, 461 S.E.2d 451 (1995).

5. “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.”

Syllabus Point 3, *Conway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986).

Per Curiam:

The appellant and plaintiff[1] below, Charles E. Smith ("Smith"), appeals the entry of summary judgment by the Circuit Court of Kanawha County in favor of the appellees and defendants below, Sears, Roebuck and Company ("Sears") and Gregory Bond ("Bond"), a Sears store manager.

Smith sued the appellees, claiming, *inter alia*, that the appellees violated the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1 to -20, by engaging in age discrimination. The circuit court found that Smith had failed to establish a *prima facie* claim for age discrimination, and entered summary judgment in favor of the appellees. Smith contends that the circuit court erred in granting summary judgment. Following our review of the record and applicable law, we find that the circuit court did not err in granting summary judgment, and accordingly we affirm.

I.

In December of 1991, appellant Smith was employed as a commissioned salesperson in the Sears appliance department. Smith had been employed by Sears for 31 years and had an exemplary work record.

[1]The wife of Charles E. Smith, Annette Smith, joined her husband in the complaint filed against the defendants below and claimed a loss of consortium. Summary judgment was also entered dismissing Annette Smith's claim. Annette Smith did not appeal the dismissal of her consortium claim.

On December 28, 1991, Smith engaged in a heated argument with a fellow employee, Mr. Patton, while both were working at Sears. Smith and Mr. Patton left the sales floor and went outside to the parking lot to continue their discussion. Smith contends that he went outside with Mr. Patton to settle him down where no customers were present.

A physical altercation occurred between the two men once they were in the parking lot. There were no witnesses to the altercation. Smith contends that he was attacked by Mr. Patton, and did not retaliate, but instead reported the incident to the Sears department manager before going to the hospital to receive treatment for his injuries. Mr. Patton stated that when he and Smith went outside, Smith grabbed Mr. Patton by the neck.

Sears conducted an inquiry into the altercation. The inquiry resulted in both Smith and Mr. Patton being terminated from their employment with Sears. Both Smith and Mr. Patton were over the age of 50 and were receiving full benefits when they were terminated. Sears replaced both Mr. Patton and Smith with employees under the age of 40 who were not entitled to receive such benefits.

Smith sued Sears in the Circuit Court of Kanawha County on September 14, 1992, alleging various causes of action,[2] including age discrimination under the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1 to -20.

[2]In his suit against Sears, Smith additionally made claims for breach of contract, loss of consortium, failure to provide a safe work place, negligent hiring and retention,

By order dated March 16, 1998, the circuit court granted the defendants' motion for summary judgment on Smith's claims for age discrimination, breach of contract and loss of consortium. Smith appeals only the order of summary judgment on the claim of age discrimination.

II.

We review the granting of summary judgment under the standard set forth in Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), where we held that "[a] circuit court's entry of summary judgment is reviewed *de novo.*" We have held that:

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

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defamation, false light, intentional infliction of emotional distress, negligent infliction of emotional distress, and breach of the covenants of good faith and fair dealing.

By order dated October 25, 1995, the Circuit Court of Kanawha County granted the defendants' motion for summary judgment on Smith's claims of failure to provide a safe work place and negligent hiring and retention. By order dated December 19, 1995, the Circuit Court granted the defendants' motion for summary judgment on Smith's claims for defamation, false light, intentional infliction of emotional distress, negligent infliction of emotional distress and breach of covenants of good faith and fair dealing. Smith does not appeal these dismissals.

Pursuant to Rule 56(c) of the *West Virginia Rules of Civil Procedure*, summary judgment is appropriate when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Accordingly, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). *In accord*, Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syllabus Point 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995); Syllabus Point 3, *Evans v. Mutual Mining*, 199 W.Va. 526, 485 S.E.2d 695 (1997).

We have also held that:

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Syllabus Point 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). *In accord*, Syllabus Point 2, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997).

The party that moves for summary judgment, "has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syllabus Point 6, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Consequently, summary judgment should be denied, "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams*, 194 W.Va. at 59, 459 S.E.2d at 336 (*quoting Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951)).

With these principles in mind, we turn to the issue in this case -- whether the circuit court erred in granting summary judgment on Smith's age discrimination claim.

Smith contends that Sears engaged in age discrimination, in violation of the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1 to -20, when Sears terminated Smith's employment. We have stated that to successfully defend against a motion for summary judgment in a Human Rights Act discrimination claim, "the plaintiff must make some showing of fact which would support a prima facie case for his claim." Syllabus Point 2, *Conway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986).

In Syllabus Point 3 of *Conway* we defined the elements of a *prima facie* case for age discrimination as follows:

> 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.

In accord, Syllabus Point 1, *Dobson v. Eastern Associated Coal Corp.*, 188 W.Va. 17, 422 S.E.2d 494 (1992); *West Virginia University v. Decker,* 191 W.Va. 567, 571, 447 S.E.2d 259, 263 (1994).

In the instant case, Smith satisfied the first two elements required by *Conway.* Smith was over the age of 50 when he was terminated by Sears and thus was a member of a protected class as set forth in *W.Va. Code,* 5-11-3(k) [1998].[3] Additionally, Sears obviously made an adverse decision concerning Smith when Sears terminated his employment.

It is the satisfaction of the third requirement set forth in *Conway* -- whether the decision to terminate Smith was motivated by Smith's age -- that is at issue here.

In addressing the third requirement of *Conway*, this Court has stated:

> The first two parts of the test are easy, but the third will cause controversy. Because discrimination is essentially an element of the mind, there will probably be very little direct

[3]*W.Va. Code,* 5-11-3(q) [1981], in effect when the altercation occurred, provided that: "The term age means 'age' forty through sixty-five, both inclusive[.]" *W.Va. Code,* 5-11-3 was rewritten in 1992 and 1998. The applicable provision is now denominated as subparagraph (k), and provides: "The term 'age' means the age of forty or above[.]"

> 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 the 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.

Conway 178 W.Va. at 170-171, 358 S.E.2d at 429-430 (footnotes omitted).

In response to appellees' motion for summary judgment, Smith produced for the circuit court a transcript of a surreptitiously recorded telephone conversation that Smith allegedly had with Carl Blackburn, a retired Director of Human Resources for Sears. Blackburn had assisted the management of Sears in the investigation of the altercation between Smith and Mr. Patton. During this conversation, Mr. Blackburn speculated that Smith might have been fired to protect Sears from the potential of an age discrimination suit by Mr. Patton, who was substantially older than Smith. Mr. Blackburn hypothesized that if Sears had fired Mr. Patton but not Smith, Sears would be exposing itself to a lawsuit.[4]

[4]While Blackburn stated in the taped conversation that it was obvious that Smith had been punched, Blackburn went on to say that it could not be proven that Smith did not start the altercation by grabbing Patton and that Patton had not simply acted in self-defense. Blackburn conceded that theoretically, it would not be fair for two people to lose their jobs if only one of them was guilty; however, Blackburn also stated that because he could not decide who was telling the truth between Smith and Patton, both

men would have to lose their jobs.

Blackburn also stated during the taped conversation that both Smith and Patton had left the sales floor and were involved in an altercation which Blackburn felt constituted willful misconduct by both of the men.

Smith also produced affidavits from several employees of Sears. These employees stated that they had observed Sears engage in practices that allegedly forced out older employees in favor of younger lower paid employees.[5]

Upon a review of the entire record we find that Smith failed to show any sort of nexus between Sears' decision to terminate Smith and a discriminatory reason. In the instant case, just as in *Conway*, there was no admission made, no unequal treatment was alleged, and no statistics were presented. Smith did not provide evidence which would sufficiently link Sears' decision to terminate Smith and Smith's status as a member of a protected class so as to give rise to a *prima facie* inference that the decision was based on an illegal discriminatory criterion. *Conway,* 194 W.Va. at 170-171, 358 S.E.2d at 429-430.

Construing the undisputed facts in a light most favorable to Smith, the evidence shows that Smith left the sales floor of his employer Sears, while he was scheduled to work, thereby neglecting his assigned duties. Sears conducted an investigation, and both men who left their positions that day were fired. Smith, as a member of a protected class listed under the *W.Va. Code,* 5-11-3(k) [1998], was not treated differently than the other employee who left his position. Smith failed to demonstrate a link between his termination and his age.

[5] However, co-workers of Smith stated in their depositions that it was their understanding and belief that Smith had been fired as a result of the altercation between Smith and Patton and that the age of Smith was not a factor in his termination.

III.

The judgment of the Circuit Court of Kanawha County is affirmed.

Affirmed.