No. 25366 - Haynes v. Rhone-Poulenc, Inc.

Workman, Justice, concurring, in part, and dissenting, in part:

Although I agree with the majority's conclusion that punitive damages may be awarded in a case brought pursuant to the West Virginia Human Rights Act ("Act"), West Virginia Code §§ 5-11-1 to -20 (1999), provided that such action is filed in circuit court, I do not believe that the facts of this case rise to the level of conduct that is historically required to permit an award of punitive damages. In addition, the previously unsettled aspect of whether an individual, whose disability is limited temporally and who is not capable of currently performing his/her job duties, qualifies as a disabled person under the Act bodes strongly against an award of punitive damages in this case. In other words, it is in my mind unfair to allow punitive damages to stand against an employer on the basis of a legal premise only now being enumerated.

As we explained in Alkire v. First National Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996), the following rule is still valid for determining whether punitive damages can be awarded:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindicative damages; these terms being synonymous.

Id. at 129, 475 S.E.2d at 129 (quoting Syl. Pt. 4, Mayer v. Frobe, 40 W.Va.246, 22 S.E. 58 (1895)). Unlike the majority, I cannot reach the conclusion that the conduct at issue here--the termination of an employee pursuant to a company medical leave of absence

policy which promised to only hold open jobs for individuals on medical leave for six months--amounts to the wanton, willful, or reckless indifference that is necessary to permit an award of punitive damages.

Under the reasoning employed by the majority, employers in this State could be prevented from ever applying comparable provisions of their medical leave policies and will be required to hold open positions until some unknown date in the future when it strikes the fancy of the disabled employee to contact his/her employer or to just show up for work, as the plaintiff did in this case. While the majority seemingly obliterates any responsibility on the plaintiff's part as far as notifying her employer when she might be returning to work, I think it only fair that, when considering punitives, the plaintiff's actions be viewed from the employer's vantage point also. The plaintiff in this case took very little action to keep her employer apprised of her situation. As to an actual date when she might return, the employer had only one communication as to plaintiff's return date and that was provided in a form completed in November 1996 by plaintiff's physician.

Furthermore, I believe the majority should have given greater consideration to the recent decision of the United States Supreme Court in Kolstad v. American Dental Association, No. 98-208, 1999 WL 407481, __ U.S. __ (1999), in which the Court set forth various limitations on the awards of punitive damages under Title VII actions. See 42 U.S.C. § 2000e et seq. (1984). One of those factors is whether the "underlying theory of discrimination . . . [is] novel or otherwise poorly recognized." __ U.S. at __, slip op. at

*7. Never before have individuals such as plaintiff been recognized as disabled and therefore entitled to the protections of the Act. Previously, to qualify as disabled under the Act, an individual had to have been currently capable of performing his/her job with a reasonable accommodation. In this case, there was no dispute that plaintiff could not perform her job with any accommodation. For the first time, this Court has interpreted the Act to define a reasonable accommodation to include a temporary leave of absence. Because the majority clearly alters previously-established standards for entitlement to protections under the Act, it is highly inequitable to charge an employer for willful, wanton disregard of this State's laws--when the very law that the employer is found to have willfully ignored previously did not even include the plaintiff under its definitions of a disabled person.