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

Maynard, Justice, dissenting:

I dissent in this case for three reasons. First, I believe that the appellant reasonably accommodated the appellee's disability. Second, I believe that punitive damages are not recoverable under West Virginia's Human Rights Act. Finally, even though the majority concludes that punitive damages are available under the Act, such damages should not be recoverable under the facts of this case.

At the outset, I note that I agree with the majority's holdings in Syllabus Points 3 and 4 that a "qualified disabled person" can include a person temporarily unable to perform the requirements of the person's job due to disability and that required reasonable accommodation may include a temporary leave of absence. These holdings appear to be in accord with the general view of courts. Also, as explained by the majority opinion, these holdings make sense. As aptly stated in Syllabus Point 3, the leave

of absence must be temporary, not indefinite; it must not impose an undue hardship upon an employer; and the purpose of the leave of absence must be for the purpose of recovery from or improvement of the disabling condition that gives rise to an employee's temporary inability to perform the requirements of his or her job.

In this case, I believe that the appellant made every reasonable effort to accommodate the appellee, and that the appellee's problems were caused by her own failure to keep the appellant informed of when and if she would return to work. In June or early July, 1996, when the appellee requested leave, her doctor submitted a form to the appellant stating that the appellee's anticipated return to work was "3/1/97??." This was an uncertain date nine months in the future. It is important to emphasize that the appellant's written policy provided for medical leave for up to 6 months, at full salary and benefits. Thereafter, an employee was eligible for continued "long-term disability" medical leave at a reduced salary. In addition, an employee's job would be kept open for him or her while on short-term disability benefits after which business demands may mandate that the position be filled. We can only presume that this "experienced,

well-paid, skilled employee" was aware of this policy. In November, 1996, the appellee again notified the appellant of her anticipated return date. Upon receipt of this notice, the appellant reminded the appellee by letter of its medical leave policy. Nevertheless, this well-paid employee with a desirable job failed to notify her supervisors of her intention to return to work.

Contrast the appellee's conduct with that of the appellant. When the appellee learned she was pregnant, she requested a temporary work assignment change to which the appellant readily agreed. Shortly thereafter, the appellant granted the appellee's requested medical leave of absence. At the close of the 6-month period, the appellant attempted to communicate with the appellee concerning whether or when she would return. All this time, the appellant was burdened with having to fill the appellee's position with another qualified person. Finally, the appellant ultimately rehired the appellee. In light of this, I believe that the appellant reasonably accommodated the appellee's disability.

Second, I disagree with the majority's holding on the availability of punitive damages under the Human Rights Act. In my recent dissent in *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 608, 490 S.E.2d 678, 695 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 883, 139 L.Ed.2d 871 (1998), I noted the general presumption that the Act does not provide for punitive damages.

> 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* 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." (Footnote omitted).

The majority's holding here is a significant departure from this general presumption.

Further, the plain language of the Act does not provide for punitive damages. The specific remedies provided for in W.Va. Code 5-11-13(c) (1998), which are reinstatement, hiring, granting of back pay, court costs and attorney fees, are designed to compensate the victims of unlawful discrimination for their resulting injuries. On the other hand,

> [t]he compensation of an injured party for his or her losses is not the purpose of punitive damages. "Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong." Syllabus Point 1, *O'Brien v. Snodgrass,* 123 W.Va. 483, 16 S.E.2d 621 (1941).

State ex rel. State Auto Ins. v. Risovich, 204 W.Va. 87, ___, 511 S.E.2d 498, 503-504 (1998). Therefore, the insertion of punitive damages into W.Va. Code § 5-11-13(c), as being included in "other legal and equitable relief," plainly is not in accord with the purpose and text of that code section; it is inconsistent with this Court's previous statements; and it amounts to nothing more than judge-made law.

Finally, even if the Human Rights Act provided for punitive damages, such damages would not be appropriate under the facts of this case. According to our law:

> 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 vindictive damages; these terms being synonymous.

Syllabus Point 4, *Mayer v. Frobe,* 40 W.Va. 246, 22 S.E. 58 (1895), *overruled in part on other grounds by Garnes v. Fleming Landfill, Inc.,* 186 W.Va. 656, 413 S.E.2d 897 (1991). In determining whether the appellant acted with the requisite state of mind to be liable for punitive damages, it is

helpful to review the recent United States Supreme Court decision in *Kolstad v. American Dental Association,* No. 98-208, 1999 WL 407481 (June 22, 1999). In *Kolstad,* the Supreme Court determined that to be liable for punitive damages under Title VII, one must show that the employer acted with malice or reckless indifference which "pertain to the employer's knowledge that it may be acting in violation of federal law." *Kolstad,* at *6. The Supreme Court concluded that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* Applying this standard to the instant facts, no reasonable jury could conclude that the appellant knew that it may be acting in violation of the Human Rights Act by replacing the appellee. The appellant had in place a generous medical leave policy no doubt designed to accommodate the temporary disabilities of employees. The appellant replaced the appellee in accordance with the terms of this policy.

The majority, however, appears to justify the award of punitive damages by intimating that the appellee's supervisor, Dr. Abedi, persuaded management to replace the appellee because of his intolerance of the appellee

and her high-risk pregnancy. Apparently the majority believes the appellant is vicariously liable for the state of mind of Dr. Abedi. This reasoning, however, is problematic. In *Kolstad,* the Supreme Court stated that "[t]he common law has long recognized that agency principles limit vicarious liability for punitive awards." *Kolstad,* at *10. The Supreme Court further said:

> Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII . . . is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages -- that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." Restatement (Second) of Torts, supra, § 909, at 468, Comment b. Where an employer has undertaken such good faith efforts at Title VII compliance, it "demonstrat[es] that it never acted in reckless disregard of federally protected rights." 139 F.3d, at 974 (Tatel, J., dissenting); see also Harris, 132 F.3d, at 983, 984 (observing that, "[i]n some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages[.]"

Kolstad, at *12.

In this case, the appellant had a written policy designed to accommodate the temporary disabilities of employees. The appellant's action toward the appellee was based on the provisions of this policy. There is no evidence whatsoever that management replaced the appellee because of a reckless or malicious state of mind. Further, under *Kolstad,* it is improper to award punitive damages against the appellant based on Dr. Abedi's state of mind. This Court, therefore, should have reversed the award of punitive damages. Accordingly, for the reasons stated above, I respectfully dissent.