No. 28461 - Barbara L. Seymour v. Pendleton Community Care and Michael Judy

FILED
July 6, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 6, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring, in part, and dissenting, in part:

This Court has steadfastly held that verdicts made by a jury are to remain, for the most part, undisturbed by the court in which they sit. "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." Syl. pt. 1, *Addair v. Majestic Petroleum Co.*, 160 W. Va. 105, 232 S.E.2d 821 (1977).[1] For this reason, I concur with the Court's decision in this case that the circuit court erred by reducing the jury's punitive damages award when the evidence sufficiently supported such an award. Therefore, I agree with the majority's ultimate decision to reverse and remand this case for further proceedings to reinstate the jury's verdict in this regard.

I do not agree, though, with my brethren's subsequent determination that Ms. Seymour attempted to mitigate her damages. First, such a conclusion is simply unnecessary to the Court's decision

---

[1]*See also* Syl. pt. 2, *Walker v. Monongahela Power Co.*, 147 W. Va. 825, 131 S.E.2d 736 (1963) ("'When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.' Point 4, Syllabus, *Laslo v. Griffith*, 143 W. Va. 469[, 102 S.E.2d 894 (1958)]."). *But see* Syl. pt. 2, *Keiffer v. Queen*, 155 W. Va. 868, 189 S.E.2d 842 (1972) ("'A verdict of a jury will be set aside where the amount thereof is such that, when considered in the light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case.' Syllabus, Point 3, *Raines v. Faulkner*, 131 W. Va. 10[, 48 S.E.2d 393 (1947)].").

of this case. It is true that a plaintiff in a wrongful discharge action is required to mitigate his/her damages arising therefrom by seeking other employment. However, the employee's mitigation duty is obviated when a judge or jury concludes that the employer acted maliciously in wrongfully discharging said employee

> *Unless a wrongful discharge is malicious*, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Syl. pt. 2, *Mason County Bd. of Educ. v. State Superintendent of Schs.*, 170 W. Va. 632, 295 S.E.2d 719 (1982) (emphasis added). In the case *sub judice*, such a finding was, in fact, made as the jury's award of punitive damages was based upon a finding of malice or other wrongful conduct equivalent thereto.[2] Thus, the malice with which the defendants acted in wrongfully discharging Ms. Seymour obviated her duty to mitigate her damages and renders the Court's discussion thereof unnecessary to its ultimate decision of this case.

Moreover, I disagree with the majority's determination that Ms. Seymour did, in fact, attempt to mitigate her damages. Such a finding is just plain wrong. On the contrary, the record evidence before this Court requires the opposite conclusion, *i.e.*, that Ms. Seymour's efforts did not constitute the

---

[2]*See generally* Syl. pt. 4, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982) ("'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).").

mitigation required of a plaintiff employee in a wrongful discharge case who seeks an award of back pay. In the *Mason County* case, we explained *vis-a-vis* mitigation that "the wrongfully discharged employee who has not secured employment must be prepared to demonstrate that he or she did not make a voluntary decision not to work, but rather used reasonable and diligent efforts to secure acceptable employment." 170 W. Va. at 638, 295 S.E.2d at 725-26.[3]

Here, even if the resolution of the instant appeal required a finding of mitigation, which, given the jury's finding of malice, it does not, there is absolutely no evidence that such mitigation occurred. As the majority plainly points out in its statement of facts, Ms. Seymour, herself, testified that she failed to take any affirmative steps to find employment comparable to her prior position: "I've watched the paper, and I've kept my eye on things -- and kept an eye for what's out there, and kept my eyes open. I just haven't gone to apply." Maj. Op. at 2. Given the previously stated requirement that a wrongfully discharged employee must use "reasonable and diligent efforts" to obtain replacement employment, *Mason County*, 170 W. Va. at 638, 295 S.E.2d at 726, and Ms. Seymour's admitted failure to do so, the majority's determination to the contrary blatantly ignores the evidentiary record upon which such a conclusion is based. With this result, I cannot and do not agree.

---

[3]*Accord* Syl. pt. 4, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990) ("Once a claimant establishes a prima facie case of [employment] discrimination and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of diligence shifts to the defendant. The defendant may satisfy his burden only if he establishes that: *(1) there were substantially equivalent positions which were available; and (2) the claimant failed to use reasonable care and diligence in seeking such positions*." (emphasis added)).

Accordingly, for the foregoing reasons, I respectfully concur, in part, and dissent, in part.