No. 33078 - *Patty Kalany and Robert Kalany v. Herman Campbell, individually and dba Irene's Bar*

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

FILED
November 30, 2006
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I. The Retaliation Claim

I concur with the majority opinion's application of Syllabus Point 8 of *Williamson v. Greene*, 200 W.Va. 421, 490 S.E.2d 23 (1997). Retaliation or reprisal for filing a sexual harassment claim is actionable.

The majority properly points to the inherent difficulties in the proof of sexual harassment itself as one reason that a separate retaliation claim can be maintained without conclusive proof of the underlying harassment. Additionally, it should be noted that the law wants to encourage people to file claims *without fear of reprisal* for the act of filing itself.

If the rule were any different, an employer's lawyer could advise, "It's probably safe to fire a complaining employee if it appears they have little corroborating proof of the harassment." Whereas, the message that the law *wants* employers' lawyers to deliver is: "If someone makes a complaint about sexual harassment, don't fire them for making the claim – even if you think the claim cannot be easily proved."

It's not as "easy" to be an employer as it once was. Under modern employment discrimination law, employers must follow a number of "non-intuitive" rules about when they can and can't fire people. Behavior that was once normal or tolerated is now intolerable. Employment discrimination lawsuits are at best a blunt and imprecise

instrument to change behavior. But they are working, and are an important part of changing the workplace for the better.

II. Attorney Fees

I disagree with the majority opinion's statement that the "law does not permit us to make such an extension" – to allow the possibility of a fee award in common-law sexual harassment retaliation claims.

Of course the law "permits" such an extension. There is no statutory or constitutional obstacle to such an extension; common-law sexual harassment retaliation is by definition a common-law cause of action, where courts establish the elements of the action and the available remedies.

The fact that the legislature has exempted certain employers from statutory human rights act actions may well reflect a desire to limit small business' exposure, but that has not stopped this Court's recognition of common-law actions against small businesses; nor should it stop fee awards in appropriate common-law cases. After all, the legislature can have the "last word" anytime it wishes in this area. This Court need not strain to divine Legislative intent in an area where the Legislature has not spoken.

Whether this Court chooses to allow attorney fee awards in common-law employment discrimination cases is a matter of choice, not permission. Rather than claiming that it is not "permitted" to make such an extension, the majority should simply state openly

that it finds such an extension to be unjustified.

The majority has made its choice; mine would be a different one. I would allow the *possibility* of fee awards in common-law employment discrimination cases, in the discretion of the trial judge. The amount of actual damages in these cases is often quite low, in part because employees are generally required to mitigate their losses by getting another job. The public policy of encouraging those who suffer sexual harassment and retaliatory discharge to file claims is frustrated when attorneys will not take low-damages cases. A possible award of attorney fees thus furthers public policy.

Accordingly, I respectfully concur, in part, and dissent, in part.