

No. 11-0183 - *The Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation, and Stella Jones Inc. v. Jerold John Rice, Jr.*

FILED

**December 21, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

BENJAMIN, Justice, concurring

I concur in the Court’s judgment which affirms the finding that petitioner engaged in age-related discrimination against the respondent, Jerold John Rice, Jr., in violation of the West Virginia Human Rights Act. I also concur on the issue of the jury’s award of unmitigated *back pay* damages because the award is supported by our jurisprudence and the facts of the case. However, I dissent to the award of unmitigated *front pay* damages because this is unsupported by our jurisprudence. Furthermore, damages awarded in excess of that which compensates a plaintiff for actual loss based upon a finding that the defendant engaged in malicious conduct toward the plaintiff are, by their very nature, punitive. Therefore, for such damage awards, the jurisprudence of this Court related to the reasonableness of a punitive damages award should apply.¹

In the instant case, the jury was instructed at trial, based on *Mason County Board of Education v. State Superintendent of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982), that if it found Burke-Parsons-Bowlby Corporation (“BPB”) acted maliciously in

¹ In addition, as a matter of legal principle, I do not believe that a plaintiff should, in theory, be permitted to receive both an unmitigated pay award in excess of that which fully compensates the plaintiff for his or her actual loss and a punitive damages award based upon the same malicious conduct.

discriminating against Mr. Rice, then Mr. Rice had no duty to mitigate his damages.² The jury was also instructed that it was not required to reduce an award of back pay *or front pay* damages by any earnings and benefits that Mr. Rice had received or would have reasonably earned. Syllabus Point 2 of *Mason County Board of Education* provides the following:

Unless a wrongful discharge is malicious, a 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.

170 W. Va. 632, 295 S.E.2d 719 (emphasis added). This malicious discharge exception first articulated in *Mason County* has been reaffirmed as the law in West Virginia on other occasions since. *See* Syl. Pt. 7, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983); Syl. Pt. 3, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990); *Seymour v. Pendleton Community Care*, 209 W. Va. 468, 472-73, 549 S.E.2d 662, 666-67

²BPB alleges that in this case, based on its finding that it acted maliciously, the jury was permitted to award Mr. Rice \$142,659 in back pay damages and \$1,991,332.00 in front pay damages, without consideration of any offset based on Mr. Rice's actual income from his new employment or his reasonably expected future earnings. The jury was not required to consider Mr. Rice's actual employment with Johnson Insurance and his actual income of over \$40,000 annually, not including the benefits to which he was entitled. BPB alleges that the jury's award of almost twenty years of front pay goes far beyond the purpose of compensatory damages, making Mr. Rice whole for his actual or reasonably expected losses as a result of BPB's conduct, and is tantamount to punitive damages.

(2001)(per curiam); *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 184, 680 S.E.2d 791, 815 (2009). However, despite some *dicta* to the contrary, this Court has never, by syllabus point, extended the *Mason County* holding beyond back pay. Here, the Majority relies entirely on *Mason County* for its finding that there was no duty to mitigate front pay despite *Mason County*'s express limitation to back pay awards. This leap of law, without more, is improper.

The Majority opinion states that “the defendant’s identification of punitive damages with Rice’s compensatory award is like comparing apples and oranges.” I disagree. An award of damages in excess of that appropriate to fully compensate the plaintiff for the plaintiff’s actual loss based upon the defendant’s malicious conduct is a punitive damages award. I cannot believe that there can be reasonable disagreement on this.

The goal of punitive damages is deterrence. The rationale in *Mason County* for allowing unmitigated back pay awards in cases involving malicious conduct was “to discourage malicious discharges.” 170 W. Va. at 638, 295 S.E.2d at 725. To the extent that the goal in allowing an unmitigated damages award is to deter malicious discharges, such an award is in fact punitive, rather than compensatory, in nature. Such an award being punitive, rather than compensatory, in nature, the jury should, as a matter of due process, be required to consider the *Garnes/TXO* factors for assessing whether punitive

damages are excessive.³ Applying a *Garnes/TXO* analysis to these types of unmitigated

³This Court has held that when deciding whether to award punitive damages, a jury must consider several factors:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

Syl. Pt 3, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). We also enumerated additional criteria a trial court should consider when evaluating the correctness of a jury's award of punitive damages:

When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(continued...)

damage awards would assure that these types of awards are reasonably based and meet the requirements of due process. Where such an award is based on expert economic

³(...continued)

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

Syl. Pt. 4, *Garnes*, 186 W.Va. 656, 413 S.E.2d 897.

The Due Process Clause requires a jury to measure the entitlement to punitive damages by the amounts of harm suffered and prohibits "grossly excessive or arbitrary punishments." See *Perrine v. E.I. Du Pont De Nemours and Co.*, 2010 WL 1170661 (W.Va. 2010), citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). West Virginia's "punitive damages jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991)." See Syl. Pt. 7, *Alkire v. First Nat. Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996). The court must also examine the amount of the award under the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992).

testimony, like in the instant case, and the damages projected are found to be rationally based and not simply plucked from thin air, a reviewing court may still find an unmitigated damages award based upon malicious conduct to be reasonable.

For these reasons, I respectfully concur with and dissent to the Majority opinion.