No. 11-0694 – *CSX Transportation, Inc. v. Angela Smith*

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OF WEST VIRGINIA

Ketchum, C.J., dissenting:

I strongly disagree with the majority opinion. In hostile work environment sexual harassment cases, occasional vulgar banter "does not rise to the level of actionability until after there has been a *significant accumulation of incidents.*" *Hanlon v. Chambers*, 195 W.Va. 99, 112, 464 S.E.2d 741, 754 (1995). (Emphasis added).

The plaintiff's hostile *work* environment claim consisted of one boorish comment that she overheard during a telephone call. This single comment falls far short of the "significant accumulation" of offensive workplace conduct that Justice Cleckley discussed in *Hanlon*. Aside from the single comment made over the telephone, the remaining incidents the plaintiff relied upon to support her hostile *work* environment claim occurred outside of the workplace. These incidents should not have been considered because doing so places an unfair and unmanageable duty on an employer to monitor its employees outside of the workplace. Because the plaintiff could not sustain a *prima facie* hostile work environment claim and because the defendant was prejudiced by an erroneous jury instruction, I respectfully dissent.

A. A Single Comment Is Not Sufficient to Create an Abusive Work Environment

To establish a hostile work environment sexual harassment claim, a plaintiff must prove that: (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputable on some factual basis to the employer. *See* Syllabus Point 5, *Hanlon*, *supra*.

CSX was entitled to entry of judgment on the hostile work environment claim because the single comment the plaintiff overheard at work was not so severe or pervasive that it created an abusive work environment. As a general rule "more than a few isolated incidents are required" to sustain a hostile work environment claim. *Kimzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997). The United States Supreme Court has stated that "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment . . . These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal citation omitted). Conduct that is merely offensive is not actionable. *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 21 (1993). Instead, the workplace must be permeated with "discriminatory intimidation,

ridicule and insult" that are sufficiently severe or pervasive to alter the conditions of employment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).[1]

In *Baskerville v. Culligan Intern. Co*., 50 F.3d 428, 430-31 (7th Cir. 1995), Judge Posner discussed the factual line between vulgarity and harassment. He stated that sexual harassment claims are:

> [N]ot designed to purge the workplace of vulgarity. Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures (citations omitted) . . . On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc*., 510 U.S. at 23.

In the case *sub judice*, the plaintiff was working in Grafton, West Virginia, when she overheard an inappropriate comment during a telephone call with Clay Newsome, a CSX employee located in Clifton Forge, Virginia. The comment was made by another

[1]The Supreme Court has stated that "ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing are not sufficient." (citations omitted). *Faragher*, *supra*, 524 U.S. at 788.

CSX employee in Clifton Forge, Virginia, Wes Knick. This comment was not directed at the plaintiff, it was made to Newsome who had his speakerphone on during the telephone conversation. *Harris*, *Faragher*, and *Meritor* establish that a single comment is generally not sufficient to establish a hostile work environment claim. Knick's single comment was a "mere offensive utterance" and does not come close to satisfying the severe/pervasive element this Court set forth in *Hanlon*.

B. Alleged Non-Workplace Harassment

The circuit court erred by finding that two non-workplace incidents, coupled with the single derogatory comment, were sufficient to establish a *prima facie* hostile work environment claim. The plaintiff testified that she received harassing phone calls at home and that someone came to her house, knocked on her door, and aggressively shouted for her to come outside. The plaintiff could not identify the person responsible for these non-workplace incidents. Assuming, *arguendo*, that Wes Knick made the phone calls and knocked on the plaintiff's front door, these acts should not have been imputed to CSX because this Court has never held that an employer is liable for its employees' actions that occur outside of the workplace, that are beyond the employees' scope of employment. Requiring employers to monitor its employees outside of the workplace would create an Orwellian nightmare: employers would be tasked with the unmanageable burden of

constantly monitoring its employees, while employees' private lives would be subject to constant invasion and heightened scrutiny.

A number of courts considering this issue have concluded that employers are not liable for its employees' actions outside of the workplace. For instance, in *Duggins v. Steak 'N Shake, Inc.*, 3 Fed. Appx. 302, 311 (6th Cir. 2001), the court considered whether an employer in a hostile work environment sexual harassment claim could be held liable for a restaurant employee allegedly raping a co-worker at a private party that occurred outside of the workplace. The court stated:

> Although the Sixth Circuit has not addressed this issue, other courts have held that generally an employer is not liable for the harassment or other unlawful conduct perpetrated by a non-supervisory employee after work hours and away from the workplace setting. *See*, *Candelore v. Clark County Sanitation District*, 975 F.3d 588, 590 (9th Cir. 1992). *See also*, *McGuinn-Rowe v. Foster's Daily Democrat*, 1997 WL 669965 (D.N.H. July 10, 1997) (unpublished decision), *Temarali v. Rubin*, 1997 WL 361019 (E.D.Pa. June 20, 1997) (unpublished decision). However, when an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991).

Similarly, the Tenth Circuit held that offensive comments made by a supervisor to a co-worker at a wedding reception were not actionable because the conduct occurred outside of the workplace. *See, Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997). The Fifth Circuit considered this issue in *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510-11 (5th Cir. 2003), and concluded that "a harassment claim, to be

cognizable, must affect a person's working environment." The court in *Gowesky* excluded comments a supervisor made over the phone because the plaintiff was not in the workplace when these comments were made.

A recent law journal article supports the view that courts should "exclude evidence of non-workplace conduct when evaluating hostile environment claims." Alisha A. Patterson, "None of Your Business: Barring Evidence of Non-Workplace Harassment for Title VII Hostile Environment Claims," 10 U.C. Davis Bus. L.J. 237, 257 (2010). After considering a number of different approaches courts have used when dealing with non-workplace harassment, the author offers the following conclusion:

> The plain language of Title VII's antidiscrimination protection is clear: Title VII only protects workers from workplace discrimination. In addition, admitting evidence of non-workplace conduct . . . conflicts with the agency principals governing Title VII. Moreover, a narrow interpretation of Title VII will discourage employers from implementing invasive, self-serving antiharassment policies.[2] The Supreme Court

[2]The author argues that in order to avoid liability in hostile work environment cases, some employers unnecessarily take:

> [I]ntrusive measures to regulate their employees' private lives. For instance, many employers prohibit fraternization or require employees to sign love contracts before dating. Faced with an allegation of harassment, some employers punish, demote, or fire the alleged harasser, rather than investigate the allegation. One employer fired an employee for discussing a racy episode of Seinfeld with his coworker. As a policy matter, courts should not adopt an interpretation of Title VII that exacerbates this trend. Imposing greater liability will encourage employers to use aggressive tactics to shield themselves from litigation at

(continued...)

> should grant certiorari and adopt the Sixth Circuit's narrow interpretation of Title VII. It should reaffirm that Title VII's protection against workplace discrimination means what it says - protection from discrimination at work.

Id. at 268.

In the present case, CSX conducted an immediate investigation after the plaintiff reported the derogatory comment. After interviewing all of the parties involved in the incident, CSX fired Knick, a 27-year employee of the company, from his management position, and allowed him to return to his non-management union position. This demotion resulted in a significant reduction in Knick's salary and benefits. CSX took swift remedial action to punish a longtime employee for a single comment he made in the workplace. This was a sufficient response. CSX had no control and no obligation to monitor Knick outside of the workplace.

Based on all of the foregoing, I believe it was error for the trial court to allow the plaintiff to support her hostile work environment claim with alleged incidents that occurred outside of the workplace.

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[2](...continued)

their employees' expense.

Id. at 266.

C. Erroneous Jury Instruction

The trial court gave an erroneous jury instruction that substantially lowered the plaintiff's burden of proof on her retaliatory discharge claim.[3] In Syllabus Point 6 of *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996), this Court explained what a plaintiff must prove in a retaliatory discharge claim:

> In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W.Va. Code, 5-1-1, *et. seq*., as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. (Citations omitted).

The plaintiff has the burden of establishing a *prima facie* case of retaliatory discharge. Justice Cleckley described the burden shifting scheme that applies once a plaintiff has established a *prima facie* case:

> [T]he employer must then come forward with reasons justifying a finding that unlawful discrimination was not the cause of the employment action. If the employer succeeds, the

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[3]This Court has previously held that "[i]t is always the duty of the trial court to instruct the jury on all correct principles of law. Instructing a jury on a correct statement of the law applicable to the case is essential to a fair trial." Syllabus Point 1, *Goodwin v. Hale*, 198 W.Va. 554, 482 S.E.2d 171 (1996). "When a jury verdict is premised upon an erroneous conclusion of law by the trial court, as stated in the judge's charge to the jury, it must be set aside." Syllabus Point 5, *State v. Morgan Stanley & Co., Inc*., 194 W.Va. 163, 459 S.E.2d 906 (1995).

> presumption of discrimination raised by the plaintiff's prima facie case showing "drops out of the picture." (citation omitted). Although the plaintiff has the ultimate burden of persuasion to demonstrate that the challenged employment discrimination was the result of illegal conduct by the employer, the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision. The plaintiff is only required to show that the reasons were not the only factors and that the prohibited factor was at least one of the motivating factors.

Hanlon, 195 W.Va. at 106, n.3, 464 S.E.2d at 748, n.3.

In the case *sub judice*, the trial court gave the plaintiff's instruction number seven over the defendant's objection. The instruction stated:

> The Court instructs the jury that proof of pretext can by itself sustain a conclusion that the defendant engaged in retaliation. Pretext means a false reason or motive advanced to hide the actual reason or motive. Therefore, if the jury disbelieves the defendant's explanation for its termination of the plaintiff, the jury may conclude that the logical explanation for the action was the plaintiff's complaints of harassment or her filing of a lawsuit.

The last sentence is an incorrect statement of law because it shifts the burden of proof to the defendant. This sentence instructs the jury that if it does not believe the employer's proffered reason for the termination, it can infer that the defendant engaged in retaliation. This leaves the mistaken impression that the defendant, not the plaintiff, has the burden of proof on this issue. The instruction Justice Cleckley set forth in *Hanlon* makes it clear that "the plaintiff has the ultimate burden of persuasion to demonstrate that the challenged employment discrimination was the result of illegal conduct by the employer."

Because this instruction shifts the burden away from the plaintiff, CSX is entitled to a new trial on the retaliatory discharge claim.

Therefore, for the reasons stated above, I dissent.