

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Quentin T. Goddard,
Plaintiff Below, Petitioner**

vs) No. 11-1608 (Greenbrier County 09-C-157)

**Greenbrier Hotel Corp.,
Defendant Below, Respondent**

FILED

March 12, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Quentin T. Goddard, by counsel, Rick Holroyd, appeals the circuit court's order entered October 20, 2011, granting respondent's motion for summary judgment. Greenbrier Hotel Corp., by counsel Ashley C. Pack, filed a response in support of the circuit court's order.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

On July 10, 2007, a female employee of respondent spoke to a security officer to report that petitioner inappropriately touched her. Petitioner swatted the female employee on the posterior with a shoehorn. Pending an investigation, respondent suspended petitioner. By October of 2007 the investigation was completed and respondent found that the allegations were substantiated. In accordance with its "zero tolerance" policy of sexual harassment, petitioner was terminated on October 30, 2007. Petitioner brought suit for discrimination claims under the West Virginia Human Rights Act, West Virginia Code § 5-11-1, *et seq.*, for sex discrimination and discrimination against a disability or perceived disability. On October 20, 2011, the circuit court granted respondent's motion for summary judgment on all counts, holding that, as a matter of law, petitioner is not similarly situated to the person he alleges was treated differently because of her sex and that petitioner is not disabled.

Petitioner does not deny that he inappropriately touched his coworker on July 10, 2007, but argues that his termination was discriminatory, either based on sexual discrimination or discrimination based on an alleged disability, and not the unwanted touching. Specifically, for the sex discrimination charge, petitioner argues that he was treated differently from a similarly situated female employee – the employee he inappropriately touched. Petitioner argues that this woman sat on the lap of another male co-worker and made the male co-worker uncomfortable. Respondent argues that petitioner is not similarly situated because, unlike petitioner, the female employee had no complaints lodged against her and no previous record of unwanted touching.

Petitioner also argues that his firing was based on discrimination for a disability to his back. Petitioner received a work-related injury to his back in 2003 and missed work due to the injury for several months at various times between 2003 and 2007. The West Virginia Workers' Compensation Office of Judges awarded him an 8% permanent partial disability impairment for the injury. Petitioner argues that the back problem was a disability covered by the Act: a "physical impairment which substantially limits one or more of [petitioner's] major life activities. The term 'major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, [and] learning. . . ." W. Va. Code § 5-11-3(m). Petitioner argues that his back problem substantially limits his walking because he occasionally needs to rest for ten to fifteen minutes after walking for a half hour, and that he was terminated a few weeks after returning from being off work due to back problems. Respondent argues that petitioner is not disabled under the Act as a matter of law because he was able to do his work after returning from being away, he could still walk but just needed rest afterward, and that any impairment is temporary in nature, for six- to eight-month periods. Further, respondent argues that petitioner's termination was not based on any perceived disability.

The Court has carefully considered the merits of each of petitioner's arguments as set forth in his petition for appeal. This Court reviews a circuit court's entry of summary judgment under a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Finding no error in the circuit court order granting summary judgment, the Court incorporates and adopts the circuit court's detailed and well-reasoned "Order Granting Greenbrier Hotel Corporation's Motion for Summary Judgment," dated October 20, 2011, insofar as it addresses the assignments of error appealed herein, and directs the Clerk to attach the same hereto.

Pursuant to Rules 8 & 24 of the Rules of Appellate Procedure, the petitioner is directed to reimburse to the respondent the cost for producing the appendix. This Court has determined that the appendix is relevant to the issues raised on appeal and, therefore, the cost is taxed on appeal. The Court directs the Clerk to prepare and certify an itemized statement of said costs as taxed to be included in the mandate.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 12, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA
QUENTIN T. GODDARD,

Plaintiff,

v.

Civil Action No. 09-C-157
Honorable Joseph C. Pomponio, Jr.

GREENBRIER HOTEL CORPORATION,

Defendant.

ORDER GRANTING GREENBRIER HOTEL CORPORATION'S
MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on June 28, 2011, on Greenbrier Hotel Corporation's ("The Greenbrier") Motion for Summary Judgment. For the reasons set forth below, the Court hereby GRANTS the Motion and ORDERS that this case be retired from its docket.

I. Findings of Fact

The Court hereby FINDS that the following facts are undisputed:

1. Plaintiff was hired by The Greenbrier as a Cottage Houseman on or about September 17, 1980. In that position, he was paired daily with a female Room Attendant to clean an assigned section of cottages outside of the main hotel.

2. On May 12, 2003, Plaintiff suffered a work-related back injury that caused him to be off work periodically, and for several months at a time. Between 2003 and 2007, The Greenbrier freely granted him leave to deal with this injury, and it also allowed him to return to his position immediately upon his release to return to work with no issues or problems.

3. During the course of Plaintiff's employment, The Greenbrier maintained a "zero tolerance" policy against discrimination, harassment and retaliation in the workplace, which prohibited unwelcome conduct of a physical, verbal or visual nature that creates a hostile or

offensive environment in the workplace. Plaintiff was aware that such conduct could lead to termination of his employment.

4. On September 10, 2007, Plaintiff violated The Greenbrier's "zero tolerance" policy when he admittedly committed an act of unwanted physical contact with his section partner, Room Attendant Esther Miller. While cleaning a cottage known as South Carolina F, Plaintiff picked up a shoehorn, and while Ms. Miller was bent over in front of him, he "swatted her on the butt and...said, there's your spanking you're always hollering for... ."

5. Ms. Miller reported this incident to Greenbrier Security Officer Paul Fogus, who took her to see Vernon Rivers, then the Director of Housekeeping, where she recounted these events.

6. Mr. Rivers suspended Plaintiff pending investigation by The Greenbrier's Security Department, which was conducted by Security Director James Rohan.

7. Mr. Rohan began his investigation by taking a written statement from, and conducting an interview of, Ms. Miller. Ms. Miller provided the following written statement:

On September 7, 07, me and Quentin were riding in the van going to our section. I was warm that morning and I had unbuttoned two of my buttons on my outer shirt. I was wearing a tank top underneath, (which most Room Attendants do when they are warm). Quentin grabbed my shirt and asked me what was underneath the tank top, I grabbed the side of my shirt out of his hand and told him I was wearing a pink tank top and that's all he needed to know.

On Sept 10, 07 in the morning I again had my shirt the same way, and Quentin told me it looked very sexy that way, so I buttoned back my shirt, he said why did you do that? I said because I wanted to. He took a shoehorn and hit me on the butt with it, and I said ouch, Quentin quit doing that. He said didn't it feel good. I said no it hurt, he said no I mean didn't it feel good in other ways. I said no. Quentin has continuously been asking me when I was going to give him some, I said never and stop asking.

Mr. Rohan also reviewed The Greenbrier's Policy Against Discrimination, Harassment and Retaliation, as well as Plaintiff's personnel file.

8. On October 12, 2007, Mr. Rohan interviewed Plaintiff, with Mr. Rivers, Assistant Labor Relations Manager Chad George, Union Steward Wally Reynolds and Local 863 Business Manager Peter Bostic also being present. In that interview, Plaintiff admitted that he had swatted Ms. Miller on the backside with a shoehorn and had told her "there's your spanking." Mr. Rohan also asked Plaintiff about his interaction with other Room Attendants, and Plaintiff explained that he had never been told by any of them that he should stop touching them. At the conclusion of this meeting, Plaintiff was informed that he would remain suspended during the course of this investigation.

9. In addition to his interviews of Ms. Miller and Plaintiff, Mr. Rohan interviewed thirty-one (31) other individuals employed in the Housekeeping Department in September and early October in order to determine the veracity of Ms. Miller's allegations and Plaintiff's response to those allegations. During these interviews, Mr. Rohan heard from a number of other Cottage Housekeeping employees that Plaintiff had engaged in unwanted touching and other behavior of a sexually harassing nature, including an incident with former employee Gerry Dowdy that had resulted in some verbal counseling of Plaintiff for sexual harassment issues. However, none of these incidents had actually resulted in a formal complaint to management.

10. On October 3, 2007, after the conclusion of his first round of interviews, Mr. Rohan scheduled another meeting with Plaintiff, for which then-Director of Labor Relations Jonathan Winebrenner was present, as were union representatives Mr. Bostic and Mr. Reynolds. In this second meeting, Mr. Rohan confronted him with the results of his interviews, giving him the opportunity to explain or refute the allegations of Ms. Miller and the reports of other

employees. Plaintiff again confirmed that he had swatted Ms. Miller on the backside with a shoehorn and made a comment about giving her the spanking she had been seeking, but he denied that he had engaged in any other offensive conduct other than the general "joking around" that occurred by and amongst most Cottage Housekeeping employees. Mr. Rohan also inquired as to why he had not mentioned the counseling over the Gerry Dowdy incident in their previous interview, even though he had been asked directly about these kinds of issues. Plaintiff responded that this incident just never entered his mind.

11. Based on this intensive investigation, Mr. Rohan made the following determinations:

- (a) On September 10, 2007, while working in the South Carolina F cottage, Plaintiff inappropriately swatted Ms. Miller on the backside with a long plastic shoehorn.
- (b) In or around 2003, a former employee named Gerry Dowdy complained of an "unwanted touching" by Plaintiff to her Housekeeping Department supervisor, Sam Holliday, who counseled Plaintiff on this issue.
- (c) Within the last ten years, Plaintiff has engaged in the unwanted touching of Room Attendant Patti Green.
- (d) Within the last two years, Plaintiff has engaged in the unwanted touching of Esther Miller.
- (e) Within the last ten years, five current Room Attendants (Ms. Miller, Ms. Green, Merrill Johnson, Anna Viney and Suzy Kirk) and one former Room Attendant (Gerry Dowdy) claim they have been subject to repeated unwanted touching by Plaintiff and have repeatedly told him to stop.
- (f) Plaintiff provided untruthful statements in response to questions from Mr. Rohan about engaging in "unwanted touching" and whether any Room Attendant had ever complained to him or told him to stop touching them.

These findings led Mr. Rohan to the conclusion that Plaintiff had, in fact, engaged in sexual harassment.

12. Mr. Rohan's report also noted that occasional inappropriate language and behavior has been exhibited by many different employees in the Cottage Housekeeping area, including Ms. Miller. However, no other employees had made a specific complaint to management of an unwanted touching or other form of sexual harassment by a co-employee. Ms. Miller had made such a complaint, and that complaint was substantiated by both Plaintiff's own admission and the interviews of many other employees within the department.

13. At the conclusion of his investigation, Mr. Rohan reported his findings and submitted his report to Bruce Rosenberger, Vice President of Human Resources, and Mr. Winebrenner, who were charged with the ultimate decision of what discipline to impose upon Plaintiff. As there was no question that Plaintiff had violated the "zero tolerance" policy through his unwanted touching of Ms. Miller, and because The Greenbrier has terminated the employment of an offending employee in each instance where the allegations of an unwanted touching in a formal complaint to management were substantiated, The Greenbrier terminated Plaintiff's employment, effective September 11, 2007.

CONCLUSIONS OF LAW

1. Plaintiff advances two theories in this action under the West Virginia Human Rights Act ("WVHRA"), W. Va. Code §5-11-1 *et seq.* – that he was the victim of unlawful discrimination on the basis of his gender and/or an alleged or perceived disability. Each of these claims fails as a matter of law.

2. In order to make a *prima facie* case of traditional gender discrimination under the West Virginia Human Rights Act, Plaintiff must demonstrate that (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the adverse employment action was taken under an inference of discrimination based on the Plaintiff's membership in the

protected class; i.e., that the employer treated similarly-situated employees outside of his class (in this case, females) more favorably than he was treated. Syl. Pt. 5, Waddell v. John Q. Hammons Hotel, Inc., 212 W. Va. 402, 572 S.E.2d 925 (2002); see also Hughes v. Brown, 20 F.3d 745 (7th Cir. 1994).

3. Plaintiff has attempted to demonstrate that there is an inference of discrimination between his membership in a protected class and The Greenbrier's decision to terminate his employment through the use of a comparator, Esther Miller. Plaintiff contends that, because Ms. Miller also engaged in inappropriate conduct, she should have received some discipline equivalent to that received by Plaintiff.

4. When attempting to prove a *prima facie* case of discrimination through comparators, the individuals used for comparison must be "similarly situated." See Mayflower Vehicle Systems, Inc. v. Cheeks, 218 W. Va. 703, 715, 629 S.E.2d 762, 774 (2006). Plaintiff's reliance upon the alleged disparity in The Greenbrier's decision to discharge him and its alleged failure to discipline Ms. Miller is legally insufficient, as Ms. Miller and Plaintiff are not "similarly situated."

5. Plaintiff bears the burden of proving that the chosen comparator is similarly-situated. Smith v. Allen Health Sys., Inc., 302 F.3d 827, 835 (8th Cir. 2002); see also Radue v. Kimberly Clark, Corp., 219 F.3d 612, 617 (7th Cir. 2000) (in disciplinary cases where a plaintiff claims to be disciplined more harshly than a similarly situated employee, plaintiff must show that he is similarly situated with respect to performance, qualifications and conduct).

6. Whether Plaintiff has introduced sufficient evidence of similarity is an appropriate issue for the Court to address on a motion for summary judgment. See, e.g., Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1994) (affirming summary judgment for the employer

where the plaintiff was not similarly situated); see also Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992) (affirming summary judgment for the employer where the employee had not shown similarity in all respects with comparators).

7. According to the West Virginia Supreme Court of Appeals, when analyzing whether employees are similarly situated, "it must be considered whether the employees were 'engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" Mayflower Vehicle Systems, Inc. v. Cheeks, 218 W. Va. at 715, 629 S.E.2d at 774.

8. In this case, Plaintiff and Ms. Miller are not similarly-situated in terms of the conduct at issue. Plaintiff admittedly committed an unwanted touching when he struck Ms. Miller on the backside, resulting in her feeling uncomfortable enough to make a complaint to management and to request a new assignment. With respect to Ms. Miller, no complaint was ever made to management concerning her engaging in an unwanted touching or similar behavior. Because of these differences, Ms. Miller is not a similarly-situated comparator so as to support an inference of discrimination between Plaintiff's sex and The Greenbrier's decision to terminate his employment. Consequently, The Greenbrier is entitled to summary judgment on Plaintiff's gender discrimination claim.

9. In order to establish a *prima facie* case of disparate treatment based upon a disability under the West Virginia Human Rights Act, Plaintiff must prove the following: (1) that he is disabled; i.e. that he has a "mental or physical impairment which substantially limits one or more of such person's major life activities," W. Va. Code § 5-11-3(m)(1); (2) that he was discharged; and (3) that "but for" his disability, he would not have been discharged. Syl. Pt. 5, Waddell v. John Q. Hammons Hotel, Inc., 212 W. Va. 402, 572 S.E.2d 925 (2002) (quoting Syl.

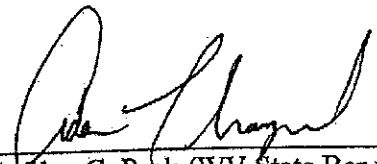
Pt. 3, Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164, 358 S.E.2d 423 (1986)). Plaintiff cannot make this *prima facie* showing because he is not "disabled" as a matter of law, and because there is no link between any alleged disability and The Greenbrier's decision to terminate his employment.

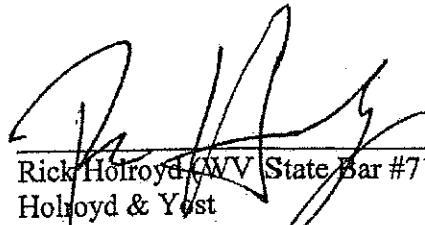
10. There is no evidence on the record to support an inference of discrimination between Plaintiff's alleged disability and the decision to terminate his employment. For four years, Plaintiff admits that The Greenbrier freely gave him time off for his back issues, and then placed him in the same position, at the same rate of pay, whenever he chose to return to work. Further, when asked about this claim in his deposition, Plaintiff could only offer his opinions and allegations as to how his disability was linked to the decision to terminate his employment – he admittedly had no supporting evidence. His unsubstantiated allegations cannot allow him to escape summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) ("It is well established that a summary judgment motion cannot be successfully opposed by unsubstantiated allegations..."). Accordingly, The Greenbrier is entitled to summary judgment on Plaintiff's disability discrimination claim.

11. Plaintiff has objected to these findings and conclusions and hereby preserves its right to appeal.


WHEREFORE, for the reasons stated above, the Court hereby GRANTS The Greenbrier's Motion for Summary Judgment, DISMISSES this Action with prejudice, and RETIRES this case from its docket. The Clerk is directed to send a certified copy of this Order to all counsel of record and any unrepresented parties.

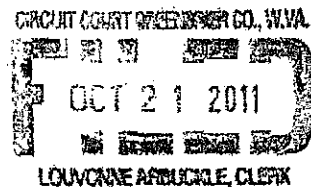
Agreed upon and submitted by:


Ashley C. Pack (WV State Bar #10477)
Adam L. Maynard (WV State Bar #9560)
Dinsmore & Shohl LLP
900 Lee Street, Suite 600
Charleston, West Virginia 25301
(304) 357-0900
(304) 357-0919 Facsimile
Counsel for Defendant Greenbrier Hotel Corporation

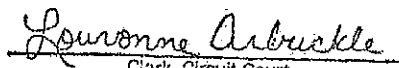

Rick Holroyd (WV State Bar #7117)
Holroyd & Yost
209 West Washington Street
Charleston, West Virginia 25302
(304) 343-7501
(304) 343-7505 Facsimile
Counsel for Plaintiff Quentin T. Goddard

Entered this 20th day of October, 2011


Joseph C. Pomponio, Jr., Judge
Circuit Court of Greenbrier County



A True Copy:
ATTEST:


Louvonne Arbuckle
Clerk, Circuit Court
Greenbrier County, WV

By _____
Deputy