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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0004

DIANE SIGISMONDI JUDY,
Plaintiff Below, Petitioner

v.)

**EASTERN WEST VIRGINIA
COMMUNITY AND TECHNICAL
COLLEGE,**
Defendants Below, Respondents

Appeal from an order
of the Circuit Court of Hardy
County (20-C-28)

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Petitioner's Reply Brief

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STATEMENT OF THE CASE

Diane Judy was replaced as the Commercial Driver's License Instructor at Eastern West Virginia Community and Technical College (hereinafter referred to as Eastern).

The circuit court examined Respondent's claim of qualified immunity (see pages 101-102 of Appendix) and found that the West Virginia Human Rights Act is clearly the established statutory law in West Virginia (page 102 of Appendix).

The replacement instructor was younger and male. The trial court found as a matter of law that Ms. Judy was a member of a protected class due to her sex and age. (#19 of December 7, 2020 order, Appendix page 103).

The trial court likewise found that Ms. Judy's complaint alleged that Eastern was motivated, in part, to discriminate against her because of her age and gender. ("h" and "i" of the Court's analysis of Ms. Judy's complaint, Appendix page 98).

The trial court acknowledged that it was a discriminatory practice for any employer to discriminate against an individual with respect to compensation, hire, tenure terms, conditions or privileges of employment. (#16 of December 7, 2020 order, Appendix page 102-103). The court further acknowledged that discrimination means:

"to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age."

Additionally the trial court acknowledged that Eastern refused to renew Ms. Judy's contract and replaced her with a younger male instructor. (See "a", "e", "f", "g", "h", and "i" of the Court's December 7, 2020 order under "The complaint", Appendix page 97-98).

The trial court then concluded:

"The Court finds that Plaintiff is a member of a protected class due to her sex and age. However, the Court further finds that

Plaintiff has failed to state what equal opportunities she was denied because of her age or sex. The Court further finds that Plaintiff has not explicitly stated what action Eastern took that was an “adverse decision,” other than alleging that Eastern informed her she would no longer be needed as a CDL Instructor.”

“Nevertheless, the Court further finds that even if Eastern made an adverse decision, Plaintiff has failed to state any allegations that, but for her protected status, the adverse decision would not have been made. The Court further finds that just because the current CDL Instructor at Eastern is male and younger than Plaintiff, does not mean that Plaintiff has pleaded an actionable HRA claim. The Court further finds it appears beyond doubt that Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. The Court is mindful that motions to dismiss are viewed with disfavor and rarely granted. Keeping that standard in mind, the Court has construed the allegations in the *Complaint* as true, but finds Plaintiff has not alleged sufficient facts that, but for Plaintiff’s protected status, Eastern’s alleged adverse decision of no longer using Plaintiff as a CDL Instructor, would not have been made.”

“Therefore, the Court concludes that the allegations in the *Complaint* are not an actionable claims against Eastern under the HRA for age or sex discrimination. As a result, the Court concludes Plaintiff has failed to establish a violation of clearly established statutory law pursuant to A.B. Furthermore, the Court finds Plaintiff has failed to allege that Eastern’s actions toward her were fraudulent, malicious, or oppressive, pursuant to A.B. In sum, the Court concludes that Eastern is entitled to qualified immunity.”

REPLY ARGUMENT

Respondent asserts the following arguments within its response:

- (A) Petitioner did not plead sufficient facts to overcome its claim of a qualified immunity;
- (B) Replacing Petitioner with a male can not create a reasonable inference of gender discrimination;

(C) Replacing Petitioner with a younger person can not create a reasonable inference of age discrimination; and

(D) Petitioner must do more than show a reasonable inference that Respondent was motivated by an illicit reason for replacing Ms. Judy with a younger male individual. Ms. Judy addresses each issue below.

(1) Qualified Immunity

As mandated by *West Virginia Board of Education v. Marple*, 236 W.Va. 654, 783 S.E.2d 75 (2015), the circuit court addressed Respondent's claim of a qualified immunity (pages 101-102 of Appendix). The circuit court concluded that:

Ms. Judy believed and asserted that Respondent was motivated, in part, to discriminate in violation of the West Virginia Human Rights Act (see page 98 of Appendix). The circuit court then found that Ms. Judy had alleged conduct which fell within the category of discretionary functions (page 101 of Appendix).

It is unclear what Respondent is asserting that the circuit court failed to do in examining its claim of qualified immunity. *Brown v. City of Montgomery*, 233 W.Va. 119, 755 S.E.2d 653, Syl. pt. 5 (2014) held that the Human Rights Act is the clearly established statutory law in West Virginia.

The circuit court utilized the *Marple* standard and found that Respondent's conduct involved otherwise a discretionary governmental function. Pursuant to *Marple*, Respondent is therefore entitled to no super immunity.

(2) Age and Gender Discrimination

It is undisputed that Ms. Judy was replaced by a younger male. West Virginia Code § 5-11-3(h) defines "discriminate" to mean to exclude from or fail to extend to, a person equal opportunities because of a protected class such as gender or age. *State ex rel. State of W.Va. Human Rights Com'n v. Logan-Mingo Area Mental Health*

Agency, Inc., 174 W.Va. 711, 329 S.E.2d 77, Syl. pt. 2 (1985) found that a prima facie case is created by showing that a nonmember of the protected group was treated more favorably. *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E.2d 152 (1995) found that to create a prima facie case of employment discrimination, a Plaintiff need only show a reasonable inference of discriminatory conduct.

Respondent relies upon two memorandum opinions: *Crites v. Eastern W.Va. Community and Technical College*, 2017 WL 1102792 and *Eagle v. Eastern W.Va. Community and Technical College*, 2017 WL 1102793. However of the five (5) justices deciding *Crites* and *Eagle*, only Justice Walker has survived. In her dissent, Justice Walker said:

“Specifically, I do not believe that my colleagues in the majority gave appropriate attention to our long-held rule regarding motions to dismiss:

The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

(3) “But for” Test

Ms. Judy showed that she is a member of two (2) protected classes: (a) over the age of forty (40); and (b) female. It is uncontested that Respondent excluded Ms. Judy from applying for the job she currently was performing and refused to extend to Ms. Judy the opportunity to continue in the job she was performing. In other words, Ms. Judy lost her job which is an adverse employment decision. Pursuant to *Barefoot*, Ms. Judy showed a prima facie case. Since Respondent failed to show beyond doubt that Ms. Judy could prove no set of facts in support of her claims which would entitle her to relief, the jury should decide the questions of fact.

CONCLUSION

A. Qualified Immunity

Pursuant to *Marple supra*, the circuit court examined Ms. Judy's complaint with a higher scrutiny. After examining Ms. Judy's complaint, the circuit court found that Ms. Judy alleged a violation of the West Virginia Human Rights Act which is a clear established law in West Virginia. Because Respondent's conduct involved a discretionary governmental function, Respondent was not entitled to a qualified immunity.

B. Age and Gender Discrimination

Ms. Judy is protected by the West Virginia Human Rights Act because she is over forty (40) and she is a female. Ms. Judy was replaced by someone outside her protected classes, a younger male. Pursuant to *Barefoot supra*, Ms. Judy created a reasonable inference that Respondent was motivated by an illegal animus.

C. Adverse Employment Decision

Respondent refused to allow Ms. Judy to apply for the job she currently was performing without any discipline. The failure to extend to Ms. Judy equal opportunities because of her age and/or gender was an adverse employment decision which by definition was discriminatory conduct.

This case must be remanded to allow a jury to determine the facts.

PETITIONER

By Counsel

A handwritten signature in blue ink, appearing to read "Harley O. Staggers, Jr.", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Harley O. Staggars, Jr., a practicing attorney, hereby certifies that a true copy of the **Petitioner's Reply Brief** has been served by United States Mail postage prepaid, on this the 7th day of June, 2021 upon the following:

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