

No. 33355     *Colgan Air, Inc. v. West Virginia Human Rights Commission and Rao Zahid Khan*

**FILED**

**December 6, 2007**

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

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

I write separately to join Justice Albright's separate opinion. While the record supports Mr. Khan losing his pilot's license, I believe that the record supports that Mr. Khan should be afforded some remedy for the horrific abuse to which he was subjected in the course of his employment. Mr. Khan repeatedly reported the abuse to his supervisor, Captain Mayers, the lead pilot situated in Huntington with Mr. Khan. When he received no relief, Mr. Khan then reported the abuse to Chief Pilot Mike Kelly, located in the Manassas, Virginia office. Only then did Colgan Air take actions designed to terminate the abuse.

I also write separately to discuss my actions during the oral argument of this case.

Courts of appeal do not take evidence, and do not see and hear witnesses testify. Courts of appeal operate on the sterile paper record that was created in a court below – in this case, the West Virginia Human Rights Commission. Courts of appeal are supposed to be guided by pure reason and fairness, interpreting the law and applying it to facts printed in the lower-court record.

This Court is, then, supposed to be swayed by logic, reason, and justice, not passionate appeals to our inner instincts, wishes and beliefs. The final rulings of this Court, in each case, are printed and enshrined in official reporters that will line the walls of law

offices for years to come; accordingly, the Court's reasoning must not only fairly apply to the case currently before the Court, but must apply fairly to cases not yet envisaged in the decades and centuries to come.

But, time and again, lawyers appear before this Court and act as though they are presenting arguments to a jury. They raise their voices, pound the podium, wave documents in the air, and engage in all sorts of histrionics. These lawyers also engage in subtler appeals to bias. Lawyers often bring their clients into the courtroom and implicitly dare the Court to apply reason and logic in a way that is detrimental to their client's case. These lawyers often forget they are talking, not to a jury, but to five judges who were once themselves lawyers who engaged in histrionics before juries. And the members of the Court are – theoretically – looking for clarification and understanding of the tepid legal issues contained by a case.

This case presented, in my view, just such histrionics. This case was argued at Marshall University, before a large crowd composed mostly of college students interested in seeing how the third branch of government conducts business. Counsel for the appellant, Mark Dombroff, stridently argued to the Court in a finger-pointing, “I dare you to rule this way” presentation to the Court.

Mr. Dombroff also brought with him his firm's<sup>1</sup> junior associate, Shaleeza Altaf. A young attorney, Ms. Altaf is – like Mr. Khan – of Pakistani descent. In my many

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<sup>1</sup>The firm is Dombroff Gilmore Jaques & French, P.C.

years as a circuit and appellate judge, I have often heard the junior associate who tags along with the senior partner jokingly referred to as a “bag carrier,” on the presumption that the junior associate’s job is to do all the hard work for the partner. The junior associate not only carries the senior partner’s briefcase, the junior associate also does all of the research, writing and legwork for which, it is presumed, the senior partner takes all the credit. In many cases we see, a senior partner appears to argue the case while a junior associate sits beside him/her at counsel’s table. So, in a typical case, Ms. Altaf’s presence would have been unremarkable.

But, in this case, Mr. Dombroff right out of the gate conceded that Mr. Khan had been exposed to the nastiest forms of discrimination by his fellow pilots, in part because of his Pakistani descent. Mr. Dombroff vociferously argued that what Mr. Khan’s co-workers did to him was, while despicable, totally unknown to Colgan Air’s senior management. Mr. Dombroff’s argument was, essentially, that Colgan Air never engaged in discrimination, only certain bad apples in its employ engaged in discrimination. But, Mr. Dombroff’s argument took a personal form: he argued that “we” think Mr. Khan was a victim of pernicious misconduct, that even so “we” didn’t discriminate, and “we” got rid of the bad apples as soon as Mr. Khan drove all the way to Manassas, Virginia, to report the discrimination.

And at this point, Ms. Altaf’s presence looked very much out of place. Ms. Altaf didn’t look like the junior associate who did all the work on the case; instead, she looked like a prop or window dressing for Mr. Dombroff’s argument that “we” didn’t do

anything to discriminate against Mr. Khan because of his Pakistani origin and, therefore, “we” shouldn’t have to pay Mr. Khan any money for his suffering.

For that reason, at the close of Mr. Dombroff’s argument I asked if Ms. Altaf was of Pakistani descent. When Mr. Dombroff answered in the affirmative, the audience giggled when I responded “I thought so,” because it appears that some members of the neophyte audience had also been thinking the same thing.

I did not ask this question intending to embarrass Ms. Altaf because of her national origin; I intended to emphasize that Mr. Dombroff’s argument style had crossed the line from reasoned to theatrical. My question did not reflect bias against Colgan Air, or bias against people of Pakistani origin; it reflected a bias against pomposity by lawyers appearing before appellate tribunals.

My reputation for promoting diversity in all aspects of the workplace and our social lives is well known. But, in hindsight, there may have been more artful ways for me to have asked the question and explained my thinking. I therefore apologize to Ms. Altaf; no offense was intended to her by my actions.

Still, I believe that the evidence in this case strongly supported the Commission’s finding of overt discrimination against Mr. Khan by Colgan Air’s employees; that the discrimination was timely reported to Colgan Air’s management; and that management dallied and did nothing, until Mr. Khan took extraordinary actions to get relief. I therefore believe that the Commission was correct in awarding him monetary damages and attorney fees for this discrimination.