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

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OF WEST VIRGINIA

Albright, Justice, concurring, in part, and dissenting, in part:

I agree with the majority that Mr. Khan should not be reinstated to a pilot position based upon his performance on the flight proficiency testing, governed by federal FAA standards. However, I respectfully dissent from the majority's holding that Mr. Khan is not entitled to any remedy for the harassment he endured.

The majority premises its holding upon its judgment that knowledge of the harassment was not attributable to management. The procedure established by Colgan Air for the reporting of harassment, reviewed by Mr. Khan when he received training, instructed that an employee should report offensive conduct to the immediate supervisor or the director of personnel. Colgan Air maintains that Mr. Khan's immediate supervisor was Chief Pilot Mike Kelly, located in the Manassas, Virginia, office. However, in responding to the harassment against him, Mr. Khan reported to Captain Mayers, the Lead Pilot for Colgan Air situated in Huntington with Mr. Khan. As the majority recognizes, the Lead Pilot occupies an administrative position as liaison between the Huntington flight crews and the Chief Pilot stationed at Colgan's headquarters in Manassas, Virginia. Colgan Air ultimately contends

that Mr. Khan failed to give sufficient notice of the harassment since he did not inform the proper person that the offensive behavior was occurring.

Consequently, the question for this Court is whether Mr. Khan unreasonably failed to avail himself of the employer's established procedures for reporting and correcting harassing behavior and in so doing denied himself the protections created thereby. I disagree with the majority's resolution of that issue and believe that knowledge of workplace harassment should have been held to be attributable to upper management under the circumstances present in this case. The Human Rights Commission accurately made such a finding, and the majority was incorrect to disturb findings of fact that were not clearly wrong.

Mr. Khan was stationed at the Tri-State Airport in Huntington, West Virginia, and contends that he endured harassment from August 2000 to July 2001. He contends that he complained to Captain Mayers[1] about the harassment approximately twenty-five times. Although Captain Mayers maintains that he told Mr. Khan to contact the Chief Pilot, Mr. Khan states that Captain Mayers never informed him that he should refer the complaints to the Chief Pilot in Manassas and always led Mr. Khan to believe that the issue would be resolved. Furthermore, the testimony of Ms. Pam Jarrell revealed that she personally

[1]Colgan Air maintains that Captain Mayers had no management authority or responsibility, despite the fact that he was the highest-ranking employee at the Huntington site.

informed Mary Finnigan, Vice President of Personnel and Marketing in the Manassas office, of Mr. Khan's harassment as early as March or April 2001.

In *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995), this Court held as follows:

> Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result. When the source of the harassment is a person's co-workers and does not include management personnel, the employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response.

195 W.Va. at 108, 464 S.E.2d at 750. Application of that standard to this situation requires a dual analysis: first, whether the offending individuals are agents or supervisors, and second, whether Mr. Khan notified his immediate supervisor and when management personnel learned of the harassment.

The record supports a conclusion that the harassing individuals can accurately be characterized as individuals who exercised supervisory control[2] over Mr. Khan, despite

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[2]Mr. Khan was employed as a first officer, and the offending individuals were all captains. Mr. Khan contends that these individuals exercised supervisory control over him to the extent that they could control his activity and their judgments concerning his performance could impact his employment. For instance, one of the captains, Terry Riley, had refused to pass Mr. Khan on a simulator training machine. Captain Jimmy Galbrath had (continued...)

Colgan Air's contention that they are merely coworkers. That is, as *Hanlon* instructs, a distinction of significant import in the determination of employer liability. If the offending individuals are indeed supervisors, *Hanlon* makes it clear that there is liability imputed to the employer.

One federal court has observed that "[d]etermining whether an employee is a supervisor as opposed to a mere co-worker has been a tricky business for courts." *Schele v. Porter Mem. Hosp.*, 198 F.Supp.2d 979, 989 (N.D. Ind. 2001). As explained by the New Jersey court in *Entrot v. BASF Corp.*, 819 A.2d 447 (N.J. Super. 2003), "[t]he federal courts appear to have split into two camps, one focusing on power to make key personnel decisions and the other on power to direct on-the-job activities." 819 A.2d at 456. In *Entrot*, the court noted that "supervisory status depends on the nature of the employer's delegation of authority to the harassing co-worker. If the co-worker had the authority to control the work environment, any harassing behavior by him or her will cause the employer to be liable." 819 A.2d at 454.

As the New Jersey court explained in *Heitzman v. Monmouth County*, 728 A.2d 297 (N.J. Super. 1999), "[a]n employer is generally liable for a hostile work

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[2](...continued)
caused a disciplinary notation to be placed in Mr. Khan's file regarding his landing approach.

environment created by a supervisor because the power an employer delegates to a supervisor 'to control the day-to-day working environment' facilitates the harassing conduct." 728 A.2d at 302, quoting *Lehmann v. Toys 'R' Us, Inc*., 626 A.2d 445, 462 (N.J. 1993).

In *Dinkins v. Charoen Pokphand USA, Inc*., 133 F.Supp.2d 1254 (M.D. Ala. 2001), the Alabama court rejected a proposed requirement that an individual must have the power to hire, fire, or discipline in order to be characterized as a supervisor. 133 F.Supp.2d at 1266. Rather, the *Dinkins* court found that an individual may be deemed a supervisor if he is empowered "to recommend tangible employment actions if his recommendations are given substantial weight by the final decisionmaker or to direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or undesirable tasks." *Id*.

This approach has been adopted by the Equal Employment Opportunity Commission in its enforcement guidelines, wherein an individual qualifies as an employee's supervisor if "the individual has authority to undertake or recommend tangible employment decisions affecting the employee" or if "the individual has authority to direct the employee's daily work activities." EEOC, Enforcement Guidance: Vicarious Employer Liability for

Unlawful Harassment by Supervisors, http://www.eeoc.gov/policy/docs/harassment.html (last modified June 21, 1999).

In *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904 (E.D. Tenn. 2003), the United States District Court for the Eastern District of Tennessee addressed the definitional issue and reasoned as follows:

> [A]n employee does not qualify as a "supervisor" for purposes of Title VII employer vicarious liability unless he or she is placed by the employer, formally or informally, in a position of superior authority and possesses some significant degree of control over the hiring, firing, demotion, promotion, transfer, or discipline of subordinates. Supervisory status is not a formulaic question of title, but a particularized inquiry into the nature and extent of the authority bestowed upon an employee by an employer. The authority entrusted in a supervisory employee need not be plenary or absolute, but it must encompass, in some significant way, the power to initiate, recommend, or effect tangible employment actions affecting the economic livelihood of the supervisor's subordinates.

286 F.Supp.2d at 918.

The United States District Court for the Eastern District of Texas, in *Hayes v. Laroy Thomas, Inc*., 2007 WL 128287 (E.D. Tex. 2007), analyzed the reasoning of cases addressing this issue and ultimately adopted the *Browne* approach, defining supervisor broadly enough to encompass not only individuals with the power to hire and fire but also

individuals with power to affect the economic livelihood of subordinates. Specifically, the *Hayes* court held:

> The Court, having reviewed the relevant case law and arguments of the parties, is of the opinion the most appropriate definition of "supervisor" is the one provided in summary by the court in *Browne*. . . . This definition requires more than just daily supervision of daily work activities and work assignments. However, it acknowledges that the authority entrusted to the supervisory employee need not be absolute; it can encompass the power to initiate, recommend, or effect tangible employment actions.

2007 WL 128287 at *16.[3]

In discussing the perils of the narrow definition of supervisor, a concurring opinion in *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498 (7th Cir. 2004), explained as follows:

> Cases like this one suggest that we ought to re-examine the criteria we have articulated for identifying supervisors. The standard that this circuit has established has the allure of drawing a bright line between those who have the power to make formal employment decisions and those who do not. But it excludes from the category of supervisor those employees who, although lacking final authority to hire, fire, promote, demote, or transfer the plaintiff, nonetheless enjoy substantial authority over the plaintiff's day-to-day work life. To that extent, it is a standard that arguably does not comport with the realities of the workplace. And to the extent that employers with

[3]Courts evaluating the parameters of the definition of "supervisor," as used in the context of determining employer liability, have not been consistent. Some courts have adopted various forms of narrower definitions. *See, e.g., Noviello v. City of Boston*, 398 F.3d 76, 95 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004).

> multiple worksites vest the managers of such sites with substantial authority and discretion to run them but reserve formal employment authority to a few individuals at central headquarters, *our standard may have the practical, if unintended, effect of insulating employers from liability for harassment perpetrated by their managers.*

359 F.3d at 510 (Rovner, Judge, concurring) (emphasis provided).

In the case sub judice, the majority of this Court resolved *both* components of this question in favor of Colgan Air, finding that the offending individuals were not acting in a supervisory role *and* that Mr. Khan did not report to the proper "immediate supervisor," since Mr. Khan reported only to Captain Mayers rather than to management personnel in Manassas, Virginia. Captain Mayers was the Lead Pilot in Huntington, he was apprised of this harassment repeatedly, and he assured Mr. Khan that the matter would be dealt with. To hold that Mr. Khan failed to adequately report the harassment under these circumstances is a disingenuous exercise in semantics. Further, by failing to acknowledge that the offending personnel were acting in a supervisory role, this Court's conclusions have perpetuated, as Judge Rovner observed above, the "practical, if unintended, effect of insulating employers from liability for harassment perpetrated by their managers." *Rhodes*, 359 F.3d at 510 (Rovner, Judge, concurring).