KIMBERLY E. APPLEBY, Plaintiff, v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, CALEDONIA STATE PARK and ARTHUR ILE, Defendants, C.P. Franklin County Branch, Civil Action, A.D. 1997–264

Sexual Harassment — Punitive Damages — Battery — Excessive Damages

1. Under the Civil Rights Act, punitive damages will only be allowed if the evidence shows malice or reckless indifference.

2. No malice or reckless indifference is present where an employer, upon learning of allegations of sexual harassment, takes the complainant's statement, conducts an investigation and transfers the harassing employee.

3. Trial court should set aside jury verdict when it indicates passion, partiality, or corruption, ignores the court's instructions, makes a clear mistake, etc.

4. There are two types of sexual harassment: quid pro quo sexual harassment and hostile work environment sexual harassment.

5. Quid pro quo sexual harassment is present when submission to unwelcome sexual advances is made a precondition to the job or employment decisions.

6. A plaintiff may prevail on a claim for hostile work environment sexual harassment when he/she proves that there was intentional, pervasive discrimination based on gender, that he/she was detrimentally affected as a reasonable person of the same gender would be and respondeat superior liability exists against the employer.

7. For an employer to avoid liability under the theory of respondeat superior in a hostile work environment sexual harassment claim, it must take effective remedial action upon learning of the harassment.

8. While an employer may avoid punitive damages for its subsequent remedial actions, it does not necessarily follow that it has taken effective remedial action as a matter of law on a hostile work environment sexual harassment claim.

9. An employer does not take effective remedial action when its investigation focuses on the plaintiff's conduct, it does not interview the harasser and does not inform the plaintiff that the harasser was transferred.

10. When a harassing employee is found not liable for battery, his/her employer may still be liable for hostile work environment sexual harassment because there are different elements to be met under each claim and physical contact is not required by both actions.

11. A trial court may reduce a jury award of damages when the award shocks the court's conscience.

Appearances:
Charles E. Ganley, Esq.
Mike Fisher, Attorney General, and
Daniel J. Doyle, Senior Deputy Attorney General
H. Anthony Adams, Esq.

OPINION AND ORDER

Walker, P.J., September 28, 2000

Case History

On June 9, 1997, Plaintiff Kimberly E. Appleby filed a complaint against Defendant Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "Commonwealth"), alleging sexual harassment and retaliation. The complaint also named Arthur Ile as a defendant, alleging battery and intentional infliction of emotional distress. Trial was held on the matter on March 23 and 24, 2000, and the plaintiff prevailed solely on the claim against the Commonwealth for sexual harassment and was awarded a sum of twenty thousand dollars ($20,000) in damages.

Both parties filed timely post-trial motions, each advancing three (3) separate arguments. Briefs were submitted to the court and oral argument was held on September 7, 2000.

Discussion

The court has consolidated both motions presented and will address each of the arguments raised by both parties in turn within the foregoing opinion and order.

I. Plaintiff's Post-Trial Motions

Plaintiff asserts that the jury was wrongfully precluded from considering punitive damages, that the trial court should have allowed her to submit a special verdict form to the jury and that a new trial is warranted on the sexual harassment claim against the Commonwealth because plaintiff was precluded from admitting evidence of her complaints made prior to September 1995.

A. Punitive Damages

Plaintiff first submits that the jury wanted to award punitive damages against the Commonwealth, but were deprived the opportunity. As support, she offers the fact that the jury interrupted its deliberation to ask the court if the administrators could be held liable. The court disagrees that this question so obviously requests punitive damages against the Commonwealth so much as it may request personal damages against specific state employees, an issue not raised instantly.

Punitive damages against the Commonwealth were correctly excluded from consideration as a matter of law because the evidence showed no

malice or reckless indifference on its part, as required by the Civil Rights Act. See 42 U.S.C. §1981a(b)(1). In fact, the evidence shows that once plaintiff's employer was informed of Mr. Ile's conduct early in September of 1995, it thereafter took some positive action by taking her statement on September 7, 1995, conducting an investigation of the matter during the course of that month and eventually transferring Ile as a result of the investigation. Certainly this behavior does not meet the standard required by the Act, hence the court need not determine whether the Commonwealth is immune from punitive damages altogether under the Act.

B. Special Verdict Form

Plaintiff has presented an unavailing argument of form over function. The record clearly shows that the court properly instructed the jury as to compensatory damages, lost wages and future wages. While plaintiff would have preferred that the jury physically had the categories of damages before them for reinforcement purposes, the court is satisfied that the jury charge served its purpose and was effective standing alone.

C. Pre-1995 Complaints

As the court already explained in its March 2, 2000, opinion, the plaintiff's prior complaints against other employees made from 1986 to 1992 were irrelevant and beyond the parameters of the litigation because her complaint was limited to the alleged harassment by Ile alone.

II. Defendant Commonwealth's Post-Trial Motions

The Commonwealth, alternatively, has presented post-trial motions contending that the jury's verdict is unsupported by the record and contrary to the law, that the verdict against the Commonwealth is inconsistent with the jury's verdict on the battery claim against Arthur Ile and that the jury award was excessive and unsupported by the evidence.

A. Prompt, Effective Remedial Action

Defendant Commonwealth first argues that it cannot be liable because, as a matter of law, it took prompt and effective remedial action early in September of 1995 by first investigating the matter and then taking appropriate disciplinary action with Mr. Ile. The court, however, is cautioned to only upset a jury's decision if "the injustice of the verdict should stand forth like a beacon." *Elza v. Chovan*, 396 Pa. 112, 118, 152 A.2d 238, 240 (1959). A jury verdict may be set aside "only when it is so inadequate as to indicate passion, prejudice, partiality, or corruption, or that the jury disregarded the instructions of the court, or in some instances, where there was a vital misapprehension or mistake on the part of the jury, or where it

clearly appears from uncontroverted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff, or, according to some of the cases, where, otherwise, there has been an evident failure of justice to the plaintiff, or where the award is so inadequate that it should not be permitted to stand." *Rutter v. Morris*, 212 Pa.Super. 466, 469-470, 243 A.2d 140, 142 (1968).

Plaintiff advanced a claim of sexual harassment against the Commonwealth, of which there are two classes: quid pro quo and hostile work environment. *Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir. 1995). A quid pro quo sexual harassment claim may prevail if a plaintiff proves by a preponderance of the evidence that submission to unwelcome sexual conduct is made a precondition to the job and future employment decisions. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 782 (1st Cir. 1990). Plaintiff has instead claimed that the Commonwealth is liable under the hostile work environment theory.

In a Title VII or Pennsylvania Human Relations Act (PHRA) sexual harassment suit against an employer for hostile work environment, a plaintiff must prove: (1) that he/she suffered intentional discrimination because of his/her sex, (2) that the discrimination was regular and pervasive, (3) that he/she was detrimentally affected by the discrimination, (4) that a reasonable person of the same sex would be detrimentally affected by the discrimination and (5) respondeat superior liability existed against the employer. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990). In order to avoid liability under the theory of respondeat superior, the present issue disputed by the Commonwealth, an employer must take effective remedial action once on notice or constructive notice of a hostile work environment. *Knabe v. The Boury Corp.*, et al., 114 F.3d 407 (3rd Cir. 1997).

While the Commonwealth did take some requisite action after put on formal notice by the plaintiff and thus avoid punitive damages for outright indifference, the court agrees with plaintiff that the jury may have reasonably concluded that the nature and quality of those actions were essentially ineffectual and hence provided plaintiff no meaningful relief. The jury could have quite reasonably determined that the Commonwealth's handling of the matter was simply not acceptable in this particular case inasmuch as the result offered plaintiff no beneficial solace.

After first suffering the harassment from Ile and the likely embarrassment in reporting it to her male superiors, plaintiff then had to endure an investigation in which she may have been made to feel like she was the party at fault. Indeed, the testimony presented by Miss Moseley

shows that she did not even interview Ile. Moreover, the obvious solution of moving Ile was not even conveyed to plaintiff. This court thus finds that rational people may decide that such actions taken by the Commonwealth were not "reasonably calculated to prevent future harassment" and provide the plaintiff relief in that both the investigation and remedy afforded by the Commonwealth in the instant matter were inadequate.

B. Arthur Ile's Battery

The Commonwealth next suggests that its liability cannot be reconciled with the jury's decision that Ile committed no battery. At first blush, the argument may appear to be logical, but battery and liability against an employer for sexual harassment are two different causes of action with different legal requirements. It is as if the Commonwealth suggests that quid pro quo or hostile work environment sexual harassment claims are sort of like lesser-included-offenses within a battery action; if the battery claim is unsuccessful the plaintiff is barred from recovery under the harassment claims as well. Not so. Instead, battery is a tort action which requires intent to cause harmful or offensive contact with another, or intent to cause a reasonable and immediate apprehension thereof which in fact results in direct or indirect bodily contact. See Restatement (Second) of Torts §18.

A hostile work environment, alternatively, is present when "unwelcome sexual advances, requests for sexual favors, and other **verbal** or physical conduct of a sexual nature has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment." *Chamberlin v. 101 Realty, Inc.*, at 782 (1st Cir. 1990) [emphasis added]. Likewise, the elements detailed in *Andrews* above mention nothing of a battery requirement.

On the surface, the clear distinction between battery and hostile work environment is that the former requires some physical contact with the plaintiff, while the latter may or may not entail some physical contact. Therefore, under Title VII or the PHRA, the jury in this matter could have reasonably surmised that the salacious comments, the lewd display of body organs and demands for sex created a hostile work environment for plaintiff — without any physical contact whatsoever. But that is of no particular consequence, for the Commonwealth must appreciate that its liability is not for the creation of the hostile work environment. Mr. Ile's actions, physical or verbal or both, created the hostile work environment and the Commonwealth has been found liable because it did not afford effective remedial action to cure the problem.

C. Excessive Damages

Damages awarded by a jury may be reduced by the court only when the award is so plainly excessive and exorbitant as to shock the court's conscience or where it suggests that the jury was guided by factors such as passion, prejudice or corruption. *Haines v. Raven Arms*, 536 Pa. 452, 455, 640 A.2d 367, 369 (1994); *Krysmalski by Krysmalski v. Tarasovich*, 424 Pa.Super. 121, 147, 622 A.2d 298, 312 (en banc), appeal denied, 535 Pa. 675, 636 A.2d 634 (1993). In its final argument, the Commonwealth contends that the twenty thousand dollars ($20,000) awarded by the jury was "excessive," but its argument is integrally intertwined with its steadfast conviction that its actions constituted an effective remedy. However, because the jury reasonably found the Commonwealth liable for maintaining a hostile work environment, it follows that some award to plaintiff may be justified. Further, there is no immediate reason to conclude that the jury did anything other than thoughtfully render its decision in light of the evidence presented by the parties and the instructions on the law given by the court.

ORDER OF COURT

September 28, 2000, upon consideration of each party's post-trial motions, the briefs submitted to the court and the oral arguments presented to the court, it is hereby ordered that Plaintiff Kimberly Appleby's post-trial motions are denied and Defendant Commonwealth of Pennsylvania's post-trial motions are likewise denied as the court upholds both the verdict and award rendered by the jury.

Franklin County Legal Journal

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