

SUPREME COURT OF APPEALS OF WEST VIRGINIA

HERMAN CAMPBELL, individually and
d/b/a IRENE'S BAR,

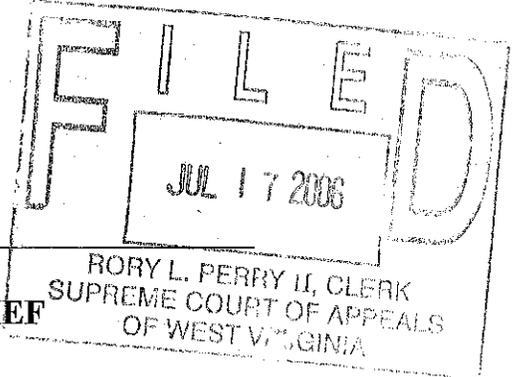
Appellant,

vs.

PATTY KALANY and
ROBERT KALANY,

Appellees.

Supreme Court No.: 33078



APPELLEES' RESPONSE BRIEF

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INDEX

I.	JURY VERDICT ISSUES	1
II.	ATTORNEY FEE ISSUES	5
III.	CONCLUSION	12
IV.	CERTIFICATE OF SERVICE	14

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APPELLEES' RESPONSE BRIEF

I. JURY VERDICT ISSUES

Ohio County is approximately sixteen (16) miles wide, east to west. Historically, on the west side of the County travelers would cross the Ohio River at Wheeling Island where a landmark suspension bridge still in use. The pioneers that settled the West traveled through Wheeling and crossed the river there buying supplies, Conestoga wagons and the like. To get to the bridge or before that, the ferry that went to the island, the travelers from the east traveled the "National Road," now known as Route 40, to settle the West.

At the other end of the County, the east end, West Virginia borders on Pennsylvania at the town of West Alexander, historically a "dry" town. To this day travelers and locals drive into the most eastern "town" of Ohio County, West Virginia, i.e., Valley Grove and frequent "watering holes" like Irene's Bar owned by Appellant, Herman Campbell.

During the trial in this matter Irene's Bar was likened to the television show "Cheers" where "everybody knows your name." However, testimony revealed that Irene's Bar would have been the x-rated version of Cheers for the profanity alone.

There are few jobs in Valley Grove and Patty Kalany was a bartender at Irene's Bar. She lived several miles away up Dog Hollow and her transportation to work was Herman Campbell driving to her home in the mornings to pick her up and take her to work. Her husband would pick her up after her day shift and drive her home. Herman Campbell lives above the Bar with his wife. The flavor of the "wild west" has remained at Club Irene through Herman Campbell who sometimes comes downstairs to have drinks in his fancy leather coat and cowboy hat. Herman Campbell is also known as "Dirty Herman, the Cereal Killer." He testified that this nickname came about because one evening after he and his wife went upstairs after having several drinks, he pulled out a .44 magnum handgun and mentioned that he hadn't ever shot it. His wife challenged him to shoot it and he shot a hole through a cabinet in the kitchen. When the police arrived they found out that a box of cereal inside the cabinet had a hole in it from the .44 caliber slug. Clint Eastwood plays Dirty Harry in Hollywood movies and carries a .44 magnum. Hence, Herman Campbell obtained the nickname "Dirty Herman, the Cereal Killer."

Although there was a sign in the Bar that said "No Profanity," there was testimony that Herman Campbell regularly used the F- - - word and the C- - - word in the presence of female employees and patrons. Patty Kalany admittedly did not complain about the language. She did not complain about Herman Campbell rubbing up against her behind the bar or his comments that he would have liked to marry her if he was younger. She took these all as "jokes" and "part of her job" as a bartender.

The jury found that Patty Kalany did not make a claim of sexual harassment in her work place.

However, one evening Herman Campbell came up behind Patty Kalany, grabbed her head and kissed her on the mouth. She testified that his breath was foul with liquor and cigars. She told him not to do it again and he told her to keep it as their little secret. However, Patty Kalany told her husband and Mr. Kalany confronted Herman Campbell about it. The two men shook hands as if they had an understanding, however, Herman Campbell never placed Patty Kalany back on the work schedule, effectively firing her without saying the words.

The jury found that Herman Campbell retaliated against Patty Kalany.

In Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997), the West Virginia Supreme Court of Appeals acknowledged that a discharged employee may “maintain a common law claim for retaliatory discharge against her employer based upon alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State” Syl. Pt. 8, Williamson Supra. (Emphasis added.)

The Appellant suggests that since the jury found that Patty Kalany did not make her claim of sexual harassment that the jury could not make a finding of retaliation. Nothing is further from the truth as the “**or**” boldfaced and part of Syl. Pt. 8 of Williamson above provides that “sexual harassment” **or** “retaliation” are separate and distinct. The West Virginia Supreme Court proposed jury instructions and Code of State Regulations § 77-4-2.4 to 2.5 instruct that for “sexual harassment” to be sufficiently severe or pervasive, it should involve “unwelcome physical touching, unwelcome and consistent sexual innuendo or physical contact and unwelcome and offensive encounters.” Patty Kalany testified truthfully that she thought the foul language and Herman Campbell’s normal actions were part of the job and that she didn’t complain. The jury made a fair decision in refusing to award her on her claim for sexual hostile work environment.

However, the jury found that there was sufficient evidence for the retaliation claim. Public policy of West Virginia prohibits an employer “from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Act. Syl. Pt. 11, in part Hanson v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995) and Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23, 32 (1997). Patty Kalany expressed opposition to Herman Campbell, her boss, kissing her. He retaliated. He is liable.

Appellant argues that the Verdict Form was confusing for the jury. Appellees first argue that it was not confusing and the jury made intelligent selections for a proper verdict which Circuit Judge Martin Gaughan upheld. Judge Gaughan did not abuse his discretion.

Appellees’ second argument is that if there was any problem with the Verdict Form it was “invited error” by the Appellant. A view of the Appellees’ Proposed Verdict Form filed February 28, 2005 and Appellant’s Proposed Verdict Form filed February 28, 2005 shows that the Appellant’s form was the one that was used with only minor modifications of a few words. Appellees’ counsel and Appellant’s counsel met and worked for hours the Sunday before the trial on jury instructions and obtained agreement, greatly assisting the trial Court. At the end of the day the Verdict Forms were discussed and each side negotiated modification of their forms with Appellant’s form needing less modification due to the fact that the Court had ruled that the statutory discrimination claims were dismissed. Attached hereto is Appellant’s Verdict Form with modifications written in as Exhibit 1 and Appellees’ Verdict Form with the beginnings of modifications as Exhibit 2. It is plainly clear that the Verdict Form used by the Court was originally drafted by the Appellant and if there was an error caused by it, it was invited by Appellant Herman Campbell .

A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.

Syl. Pt. 6, Page v. Columbia Natural Resources, Inc., 198 W. Va., 378, 480 S.E.2d 817 (W. Va. 1996).

II. ATTORNEY FEE ISSUES.

Mrs. Kalany should be awarded attorney fees because (1) Employees of employers who are **not** subject to the Act (because they do not employ twelve or more persons within the state for twenty or more calendar weeks in the calendar year) are not afforded Equal Protection under West Virginia Human Rights Act compared to employees of employers subject to the Act, and (2) under West Virginia Code 5-11-9(7)(A), Herman Campbell is a “person” who engaged in “reprisal.”

Under the Act the Court has the discretion to award costs to the complainant/employee. In pertinent part, the Act at West Virginia Code § 5-11-13(c) states: “. . . In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.” The Act defines costs as including attorneys fees. WV Code § 5-11-3(c); Syl. pt. 5, Shafer v. Kings Tire Service, Inc., 215 W. Va. 169, 597 S.E.2d 302 (2004).

In this case, which is not under the Act, the Appellees prevailed under the common law cause of action for retaliatory discharge. West Virginia’s common law cause of action for retaliatory discharge mirrors the Act. A plaintiff-employee must overcome the same burdens and elements to prove common law retaliatory discharge or retaliatory discharge under Act. The only reason the Act did not apply to this case is because the Court ruled the Appellant did not satisfy the definition of “employer” in the Act at § 5-11-3(d). Specifically, West Virginia Human Rights Act, §5-11-3(d), states:

The term "employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year: Provided, That such terms shall not be taken, understood or construed to include a private club; Specifically, the Court ruled that the defendant did not employ twelve (12) or more persons within the statutorily provided time frame.

The public policy reason plaintiffs get costs/attorney fees under the Act is the same reason a plaintiff should get attorney fees under a common law claim of retaliatory discharge. . . .[S]ex discrimination and sexual harassment in employment contravene the public policy of this State. . . .” See Syl. Pt. 8, Williamson v. Greene, 200 W.Va. 421, 490 S.e.2d 23 1997).

In Williamson the West Virginia Supreme Court held that:

Even though a discharged at-will employee has no statutory claim for retaliatory discharge under W.Va. Code, 5-11-9(7)(c) [1992] of the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within th state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed, as required by W.Va. Code, §511-3(d) [1994], the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated [***4] in the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq. Syl. Pt. 8, Williamson, supra.

Sharon Williamson and Patty Kalany, if successful in their common law claims for retaliatory discharge should be given the same protection as employees who sue under the Act. They should be able to claim attorney fees and costs. This is especially true as retaliation always contemplates an element of intent. “[T]he tort of retaliatory discharge carries with it a sufficient indicia of intent.” Page v. Columbia Natural Resources, 198 W.Va. 378, 396, 480 S.E.2d 817 (1996).

A well established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Nelson v. West Virginia Public Employees Insurance Board, 171 W.Va. 445, 441, 300 S.E.2d 86, 92 (1983) and Bowling v. Ansted Chrysler-Plymoth-Dodge, Inc., 188 W.Va. 468, 474, 425 S.E.2d 144(1992).

At Syl. Pt. 6, *Casteel v. Consolidation Coal Co.*, 181 W. Va. 501, 383 S.E.2d 305 (1989) the West Virginia Supreme Court stated:

When the relief sought in a human rights action is primarily equitable, "reasonable attorneys' fees" should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate--the lode-star calculation--and (2) allowing, if appropriate, a contingency enhancement. The general factors outlined in Syllabus Point 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 165 (1986) should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and (2) the allowance and amount of a contingency enhancement.' Syllabus Point 3, *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989).

When presented with the issue of awarding attorney fees, the West Virginia Supreme Court stated in *Rice v. Mike Ferrel Ford, Inc.*, 184 W. Va. 757, 403 S.E.2d 774 (1991), "The trial court should also take into consideration the purpose of awarding attorneys' fees in actions such as this."

The previously quoted language from *Rice* was supported by the following footnote:

In *Duval v. Midwest Auto City, Inc.*, the court observed that the provisions of the Odometer Act allowing the recovery of attorney's fees "are a response to legislative recognition that, as a practical matter, **in many situations, the amount of damage under the Act will be so small that few attorneys will pursue his client's case with diligence unless the amount of the fee be proportionate to the actual work required, rather than the amount involved.**" See also *Fleet Investment Co. v. Rogers*, 620 F.2d at 793. Footnote 7, *Rice v. Mike Ferrel Ford, Inc.*, 184 W. Va. 757, 403 S.E.2d 774

(1991). [Emphasis added.]

The West Virginia Supreme Court specifically recognized that:

The goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain the legal counsel necessary to vindicate their rights. Full enforcement of the civil rights act requires adequate fee awards.

Bishop Coal Co. v. Salyers, 181 W. Va. 71, 80, 380 S.E.2d 238, 247 (1989) [Emphasis added].

Syllabus point 4 of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156

(1986) is fairly detailed and provides:

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Here Patty Kalany was awarded \$7,824.00 in economic damages by the jury for common law sexual discriminatory retaliatory discharge. The Circuit Court awarded over \$57,000.00 at a maximum hourly rate of \$175.00 per hour, without any enhancement of the hourly rates for the contingency nature of the case. There was no abuse of discretion.

A sixteen (16) year old girl fondled by her boss at the corner pizza shop that has only five employees should have the same and equal protection of the law, including the right to attorney fees, as an executive career woman passed up for a promotion in a major corporation because of her sex. Attorney fee awards will serve the public policy of West Virginia to take all sexual discrimination and harassment out of the workplace, even for employers with less than twelve employees.

When an employer violates an employee's basic, cherished rights and liberties as provided by West Virginia human rights law, then that employer, regardless of how many persons employed, should be held responsible for all damages provided under West Virginia law.

The Fourteenth Amendment of the United States Constitution, after declaring that no state shall make any law which shall abridge the privileges of citizens of the United States adds: "Nor deny to any person within its jurisdiction the equal protection of the laws." Equal protection guarantees that similarly situated individuals will be dealt with in a similar manner by the government. Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner; the claimed discrimination must be a product of state action as distinguished from a purely private activity. 4C Miches Jurisprudence, Constitutional Law, Section 126, Page 404-405.

The classification of employees whose employers have twelve or more employees as opposed to employees whose employers have less than twelve employees is an unconstitutional classification in the Human Rights Act. No compelling state interest is served by the classification. In fact, the only compelling state interests, i.e., a workplace free of hostile sexual discrimination, requires that there be no classification of this nature.

Under the Fourteenth Amendment to the Federal Constitution providing that all persons shall have equal protection of the laws, the rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and of others, when there is no public necessity for such discrimination is unconstitutional and void. See State v. Goodwill, 33 W.Va. 179, 10 S.E. 285 (1889) and 4C Miches Jurisprudence, Section 127 Constitutional Law, Page 439.

Invidious classifications are forbidden by West Virginia's constitution in the same manner as by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979).

A ruling awarding attorney fees in this case does not require the Circuit Court to find the West Virginia Human Rights Act Commission definition of employer to be unconstitutional. Rather, the Court can apply the remainder of the statute in an equal way to avoid the unconstitutional result of unequal protection under the law.

West Virginia Code, §5-11-9(7)(a) states as follows:

It shall be an unlawful discriminatory practice, unless based upon a bonafide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of West Virginia or its agencies or political subdivisions:

...

(7) for **any person**, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:

(A) **engage in any** form of threats or **reprisal**, or to engage in, or hire, or conspire with others to commit acts or activities of any

nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet and cite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section; . . . (Emphasis added.)

Accordingly, Herman Campbell as a "person" or "employer" was precluded from the unlawful discriminatory practice of "reprisal" against Patty Kalany for the purpose of causing her "economic loss". The jury found that he retaliated against Patty Kalany for complaining about him kissing her and reporting it to her husband. Herman Campbell admitted on the stand that the moment he heard Robert Kalany mention the kiss to him that he decided to "permanently" lay Patty Kalany off.

Mr. Campbell, as an individual, can be held accountable for the unlawful discriminatory practice of "reprisal" or retaliation. "Reprisal" has been defined as "a retaliatory act". Webster's Ninth New College Dictionary, 1984. The more modern definition of "reprisal" is "an attack or other action intended to inflict injury in return for an injury suffered: retaliation." Webster's II New Riverside Dictionary Revised Edition, 1996.

Please remember that West Virginia Code, §5-11-9(7)(A) makes it a discriminatory "for any person, employer . . . or" others to engage in "reprisal." Accordingly, an employer guilty of retaliation could be subject to the Act. Faced with the same type of statutory construction in a common law case of employment discrimination where the employer did not meet the definition of an "employer" under the statute which required fifteen (15) or more employees, the Court of Appeals of Maryland held as follows:

We hold, therefore, that Article 49B, §14 provides a clear statement of public policy sufficient to support a common law cause of action for wrongful discharge against an employer exempted by Article 49B, §15(b). §15(b) merely excludes small employers from the administrative process of the act, but does not exclude them from the policy announced in §14. The general assembly did not intend to permit small employers to discriminate against their employees, but rather intended to promote a policy of ending sex discrimination statewide. Molesworth v. Brandon, 341 MD 621, 672 A.2d 608, 616 (1996).

The Court explained as follows:

Public policy in Section 14, by its own language, prescribes discrimination in employment by “any employer.” [Emphasis added.] If the term “employer” in Section 14 were meant to refer only to employers as defined in §15(b), the term “any” would be unnecessary. We seek to read statutes “so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.” Montgomery County v. Buckman, 333 MD 516, 524, 636 A.2d 448 (1994). Thus, §14 applies to “any employer”, including those exempted in §15(b).

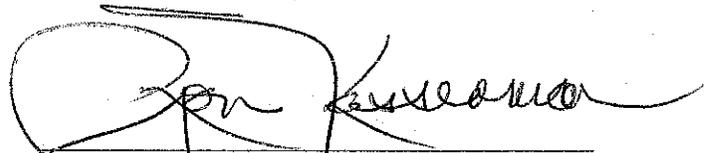
A similar reading of the West Virginia statute that would avoid the constitutional problems of equal protection is that a small employer may be excluded from the administrative process of the Human Rights Commission, and only to be required to respond to claims of discrimination in the Circuit Court. Of course, once the discrimination is shown, the attorney fee issue is entirely within the Circuit Court’s discretion pursuant to West Virginia Code, §5-11-13(c).

III. CONCLUSION

Patty Kalany respectfully requests that this Supreme Court affirm Judge Gaughan’s ruling upholding the jury verdict and award of fees so that she may return to the Valley Grove

community made whole by the Public Policy Law of West Virginia that protects women in employment.

Respectfully submitted,



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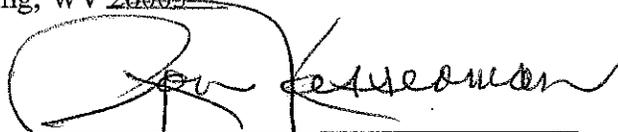
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CERTIFICATE OF SERVICE

Service of the foregoing Appellees' Response Brief was had upon the parties herein by mailing true and correct copies thereof by regular United States mail, postage prepaid and properly addressed to their counsel of record, this 14th day of July, 2006.

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