

No. 091635

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

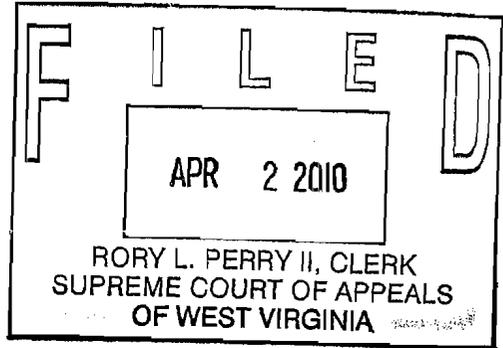
MARY J. WELLS,

Appellant and
Plaintiff Below,

v.

KEY COMMUNICATIONS, L.L.C.,
d/b/a/ West Virginia Wireless,

Appellee and
Defendant Below.



APPELLANT'S REPLY BRIEF

Comes now your appellant, Mary J. Wells ("Appellant"), by counsel, and makes her very brief reply to the *Brief of Appellee Key Communications, LLC., d/b/a West Virginia Wireless* heretofore filed herein.

In its brief, Appellee argues that the two terminations decision were unrelated and wholly disconnected, and therefore evidence of one should not be admissible to demonstrate intent or motive of the other. Appellee also continues to state that Appellant is misstating the record. Both assertions are simply without merit.

The law in West Virginia is clear that non-litigant employees may testify about age discrimination they experienced at the hands of their employers. In Syllabus Point 2 of McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004), the West Virginia Supreme Court of Appeals held: "In an action brought for employment discrimination, a plaintiff may call witnesses to testify specifically about **any** incident of employment discrimination that **the witnesses believe** the defendant perpetrated against them, so long as the testimony is **relevant to the type of employment discrimination** that the plaintiff has alleged." (emphasis added). The termination of Alfred Nelson falls squarely within the rule enunciated in McKenzie. Mr. Nelson believed he experienced age discrimination at the hands of the Appellee. Indeed, in that case, this Court found "that it was reversible error for the trial court to preclude Mr. McKenzie from calling witnesses to testify about their own alleged experiences with age discrimination by Carroll." Id., at Syl. Pt. 1.

Before this Court, Appellee works overtime to create a new standard, or a more stringent standard, than the McKenzie standard. Before the trial court, Appellee flatly denied that the decision to terminate Alfred Nelson involved Linda Martin. In fact, because of the in-court denials by counsel for the Appellee, counsel for the Appellant submitted excerpts of sworn testimony to the trial court to show that Linda Martin was, in fact, involved in the decisions to terminate both Appellant and Alfred Nelson and that her husband and co-owner, Robert Martin, was also involved. Despite Appellee's

continued claims that Appellant misstates the record and ignores the finding of facts by the Court, the testimony shows otherwise. (See **EXHIBIT C** to *Appellant's Brief*). More importantly, the Appellee's assertion is simply a red herring, as the McKenzie rule does not require the same decision-maker be involved in the terminations. Instead, the McKenzie rule permits Appellant to call witnesses to testify "specifically about **any** incident of employment discrimination that **the witnesses believe** the defendant perpetrated against them, so long as the testimony is **relevant to the type of employment discrimination** that the plaintiff has alleged." Syllabus Point 2, in part, McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004). It is the type of discrimination that is pivotal for the introduction of the evidence. It is the Appellee's burden to prove that the incident is too dissimilar, and that issue should be determined by the jury.

As to the other issues argued in Appellee's brief, the Appellant stands on her initial brief filed herein. All relevant evidence is admissible. Nonlitigant employees may testify about age discrimination they experienced at the hands of their employers. McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004). A party is entitled to a new trial if there is a reasonable probability that the jury's verdict was affected or influenced by trial error. Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374, 194 W.Va. 97 (1995). The trial court should have granted Appellant a new trial, pursuant to West Virginia Code § 56-6-28 and Rule 59 of the *West Virginia Rules of Civil Procedure*.

The Appellant respectfully requests that this Court reverse the Circuit Court of Kanawha County and remand the action with directions that it be reinstated on the docket of the lower court for a new trial.

MARY J. WELLS
By Counsel



George B. Morrone III, Esquire (WVSB #4980)
J. Michael Ranson, Esquire (WVSB #3017)
RANSON LAW OFFICES, PLLC
1562 Kanawha Blvd., East
Post Office Box 3589
Charleston, West Virginia 25336-3589
(304) 345-1990
Counsel for Appellant

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CERTIFICATE OF SERVICE

I, George B. Morrone, III, counsel for Appellant, hereby certify that I have served a true and exact copy of the foregoing APPELLANT'S REPLY BRIEF on the defendants' counsel of record via United States Postal Service, on **April 1, 2010** as follows:

Samuel M. Brock, III, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd. East
Charleston, WV 25321-0273

Roman Lifson, Esq.
Christian & Barton, LLP
909 E. Main Street, Suite 1200
Richmond, VA 23219


George B. Morrone, III