

35447

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MARY J. WELLS,

Plaintiff,

v.

KEY COMMUNICATIONS, L.L.C.,
d/b/a WEST VIRGINIA WIRELESS,
and DENNIS BLOSS,

Defendants.

Civil Action No.: 06-C-312
(Honorable James C. Stucky)

CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

2009 SEP 24 AM 8:35

FILED

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

On September 2, 2009, the parties appeared, by counsel, before this Court on Plaintiff's Motion for a New Trial. Upon consideration of the arguments of counsel and the various briefs and pleadings filed by the parties in connection with this matter, the Court hereby DENIES Plaintiff's Motion for a New Trial. In reaching this holding, the Court makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1. On April 30 2009, Defendants Key Communications and Dennis Bloss¹ filed a "Motion in Limine to Exclude Evidence Regarding Alleged Discrimination Against Other Employee." That motion focused on an employee named Alfred Nelson.

2. After considering the pleadings and arguments of counsel in regard to Defendants' "Motion in Limine to Exclude Evidence Regarding Alleged Discrimination Against Other Employee," the Court granted Defendants' motion on June 11, 2009. In the Order entered by the Court on this Motion, the Court ordered that Plaintiff was prohibited from introducing any

¹ Dennis Bloss was voluntarily dismissed from the case by Plaintiff prior to the trial of this matter.

testimony, evidence or arguments of counsel regarding alleged discrimination against Alfred Nelson because such evidence was both irrelevant and unfairly prejudicial to Defendants.

3. The evidence in the record at the time of the Court's ruling on Defendants' Motion in Limine, and to date, shows that:

- a. Plaintiff worked on the Administrative/Sales side of the business at Key Communications.
- b. Alfred Nelson worked on the Operations side of the business.
- c. Linda Martin and/or Dennis Bloss were involved in the decision to terminate Plaintiff.
- d. James Williams and/or Ron Doyle were involved in the decision to terminate Alfred Nelson.
- e. Any alleged discrimination against Nelson was dissimilar from Plaintiff's situation.

4. Beginning on June 15, 2009, a jury trial was held in this matter. During the course of the five-day trial, Plaintiff's overall trial theme was based on her contention that the poor performance of the Sales Department at Key Communications demonstrated Key Communications' alleged discriminatory intent against her. In support of her trial theme, Plaintiff presented evidence regarding Plaintiff's termination, the termination of Sales Manager Bob Wilson, and the overall makeup of the Administrative/Sales side of the business at Key Communication. Plaintiff argued that Key Communications' poor sales record demonstrated that its retention of Sheila Wilson (instead of Plaintiff) and hiring of Dennis Bloss (while terminating Bob Wilson) was based on age instead of work performance and/or abilities. No such parallel

exists with respect to Nelson's termination. Nelson had nothing to do with sales functions at Key Communications, which was the entire focus of Plaintiff's case.

CONCLUSIONS OF LAW

A. Standard of Review

A new trial should be granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. Morrison v. Sharma, 200 W.Va. 102, 488 S.E.2d 467 (1997).

B. Evidence Relating to Nelson's Termination Was Properly Excluded By This Court Because Such Information Was Irrelevant and Unduly Prejudicial, and It would Have Confused and Mislead the Jury.

1. In McKenzie v. Carroll Int. Corp., 216 W.Va. 686, 692, 610 S.E.2d 341, 347 (2004), the West Virginia Supreme Court of Appeals acknowledged that there are limitations to the admissibility of evidence of age discrimination against other employees and that incidents that are too dissimilar from a plaintiff's situation are not relevant. See also Mendelsohn v. Sprint/United Mgmt. Co., 587 F.Supp. 2d 1201 (D. Kan. 2008)(applying, on remand, the principles set forth by the United States Supreme Court in Sprint/United Mgmt. Co. v. Mendelsohn, 128 S.Ct. 1140 (2008)); Schrand v. Federal Pac. Elec. Co., 851 F.2d 152 (6th Cir. 1988).

2. In this case, the evidence in the record shows that any alleged incident of discrimination against Nelson was too dissimilar from Plaintiff's situation because Plaintiff was employed on a different side of the business than Nelson and was discharged by different supervisors than those involved in the decision to discharge Nelson.

3. Additionally, the Nelson evidence was not relevant in assessing Key Communication's alleged discriminatory intent against Plaintiff because the decision to

discharge Nelson from employment could not logically or reasonably be tied to the decision to discharge Plaintiff from employment. Instead, the decision to discharge Nelson and the decision to discharge Plaintiff were two separate and distinct decisions that were made by different supervisors in connection with two separate and distinct departments at Key Communications.

4. Accordingly, this Court did not commit any error by excluding the Nelson evidence because such evidence was irrelevant, unduly prejudicial, and would have confused and mislead the jury.

C. This Court's Decision to Exclude the Nelson Evidence Was Not Inconsistent with Substantial Justice.

1. Pursuant to Rule 61 of the West Virginia Rules of Evidence, “[n]o error in either the admission or exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” W.Va.R.E. 61.

2. In this case, as set forth more fully above, this Court did not make any error in refusing to admit the Nelson evidence. Moreover, to the extent that Plaintiff has claimed an error, such alleged error was not “inconsistent with substantial justice.”

3. Plaintiff's overall trial theme was that the poor performance of the sales department at Key Communications (and especially the poor performance of Sheila Wilson and Dennis Bloss) demonstrated that Key Communications was retaining (and hiring) employees based on their age instead of on their job performance and/or abilities.

4. Any evidence relating to Nelson's termination would not have been applicable to Plaintiff's claim and/or her overall trial theme in this matter (and would not have supported any inference that Plaintiff's termination was discriminatory).

5. Accordingly, this Court's decision to exclude the Nelson evidence clearly did not affect any of Plaintiff's substantial rights and was not inconsistent with substantial justice.

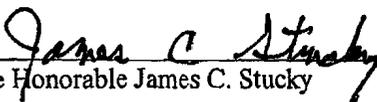
For the above-mentioned reasons, this Court hereby **DENIES** Plaintiff's Motion for a New Trial and **FINDS** that the evidence relating to Nelson's termination was properly excluded by this Court because such information was irrelevant, unduly prejudicial and would have confused and misled the jury. The Court further **FINDS** that the exclusion of the Nelson evidence did not affect any of Plaintiff's substantial rights and was consistent with substantial justice.

The Clerk of the Court is directed to send certified copies of this Order to the following counsel of record:

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J. Michael Ranson
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ENTERED this 22 day of Sept., 2009.

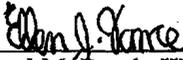

The Honorable James C. Stucky

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, DANNY B. GAYSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COUNTY THIS 22
DAY OF Sept. 2009.

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared by:



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