

SUPREME COURT OF KENTUCKY

NO. 2002-SC-000870-D

COLUMBIA GAS OF KENTUCKY, INC.

MOVANT

v. **RESPONSE TO MOTION TO SUPPLEMENT MOTION
FOR DISCRETIONARY REVIEW**

JAMES M. WELLS, ET AL

RESPONDENTS

COURT OF APPEALS
NO. 2001-CA-001105

FAYETTE CIRCUIT COURT
NO. 99-CI-3699

SUBMITTED BY:

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Certificate Required by CR 76.12(6)

The undersigned does hereby certify that copies of this *Response to Motion to Supplement Motion for Discretionary Review* were served upon the following named individuals by mail, postage prepaid, on this _____ day of September, 2003: Hon. George M. Geoghegan, III, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas L. Clark, Fayette Circuit Court, 120 N. Limestone Street, Lexington, KY 40507; and Debra H. Dawahare, Wyatt Tarrant & Combs, 250 W. Main Street, Suite 1600, Lexington, KY 40507.

Robert L. Abell

Respondents, James M. Wells and his counsel of record, Robert L. Abell, pursuant to CR 76.20(5) tender this response to the Motion for Discretionary Review filed by Columbia Gas of Kentucky, Inc.

Respondents agree and adopt the statements in paragraphs No. 1-4 in movant's Motion.

COUNTERSTATEMENT OF MATERIAL FACTS

Appellees do not accept Movant's statement of the case, which omits important facts and evidence. The following is essential to a fair and adequate statement of the case.

Wells' Routine Service Call to Hardin's Residence

Plaintiff James M. Wells was employed by Movant Columbia Gas of Kentucky, Inc. as a serviceman, and he was dispatched, late on the night of February 15, 1999, to Hardin's residence to reconnect her gas service. Hardin followed Wells about and they chatted amiably as he went about his work. (Hardin TR I 129, 131; J. Wells TR II at 121 - 123).¹ Part of this discussion was that Hardin worked as a waitress at a Bob Evans Restaurant in Lexington. (Hardin TR I at 129.). Wells asked, as part of this friendly discussion, that if he came to restaurant would Hardin "take care" of him. (Id. at 129-130). Hardin understood this merely to mean would she be Wells' waitress if he happened to come to the restaurant. (Id. at 130).

Wells completed his work, gathered his tools and equipment and prepared to leave. Hardin followed Wells to the door, thanking him for coming out and restoring her gas service. Wells touched Hardin on the shoulder in acknowledgement of her thanks.

¹ A transcript of the trial has been filed in the record. The prefix "TR I" refers to the March 19, 2001, transcript and the prefix "TR II" refers to that of March 20, 2001.

(Hardin TR I at 131; J. Wells TR II at 123). Hardin acknowledged that Wells did not proposition her. (Hardin TR I at 132-133). She added that Wells neither tried to hug her nor tried to pull her toward him. (Id. at 132). Wells took care to shut the gate to Hardin's yard, as she reminded him from the door, and completed his paperwork. (J. Wells TR II at 124).

Hardin's Plot To Make Something Out of Nothing

The following day Hardin went to work at Bob Evans and there made false and outlandish statements about a Columbia Gas man that had come to her house the night before. Steve Settles was a regular for breakfast at the time and was present that morning. Hardin claimed she had threatened a Columbia Gas man with calling the police, that she was going to call his supervisor on him and that she was going to sue both Columbia Gas and the man as well. (Settles TR II 38-39, 50-51). Her plot formed, Hardin contacted Columbia Gas following her shift and reported a complaint. (Hardin TR I at 139).

Columbia Gas' False Distortion of Hardin's Complaint

Movant omits from its brief the evidence at trial that it claimed to Wells, during the process leading to Wells' termination, that Hardin had reported that he had tried to hug her and she had to push him away. Movant also omits that no evidence was presented at trial supporting this falsehood and that it did not even attempt to explain why it asserted this false charge against Wells.

Greg Hatton, who was Wells' immediate supervisor, took Hardin's complaint. According to Hatton, Hardin reported that Wells had hugged her. (Hatton TR I at 6, 27). Hardin, by contrast, denied telling Hatton that Wells tried to hug her. (Hardin TR I at

140). Hardin also denied that she told Hatton that she had to push Wells away. (*Id.*) Hatton was unaware of anything else that Hardin reported that he believed to violate any Columbia Gas policy. (Hatton TR I at 7). Hatton conceded that Hardin had not told him that she had been sexually harassed by Wells. (*Id.* at 24-25).

Mary Tigges, who was a human resources consultant for Columbia Gas, testified that Hatton reported to her that Hardin complained that Wells had hugged her and that she had to push him away. (Tigges TR I at 54-55). Tigges passed this report along to her superiors, Lori Johnson, who was Movant's human resources manager, and Joseph Kelly, its chief executive officer (*Id.* at 54-55). No one testified or claimed at trial that anything like this had occurred. In fact, Hardin specifically testified that it had not. (Hardin TR I at 132). Movant did not explain why Hatton passed on this false and incorrect information or why it was passed on by Tigges to Johnson and Kelly.

Hardin's Claims Against Columbia Gas, Hardin's Plot Unravels and She Withdraws Her Complaint About Wells

Movant's brief omits two key points: (1) that Hardin sued Columbia Gas for disclosing her name to Wells and causing her to become embroiled in its proceedings against him;² and, (2) Hardin told Tigges that she wanted to withdraw her complaint.

Hardin alleged five causes of action against Columbia Gas: fraudulent misrepresentation, negligence, breach of contract, breach of duty of fair dealing and negligent retention. (R 17-22 Answer, Counter-Claim and Cross-Claim). Hardin

² Hardin also asserted a claim against Wells. Tellingly and although this whole matter supposedly arose from an allegedly offensive touching of Hardin by Wells, Hardin's claim against Wells was not for battery but for abuse of process. (R 16-17 Answer, Counter-Claim and Cross-Claim).

principally claimed that Movant's agents had wrongfully disclosed her identity to Wells and caused her to become embroiled in its goings-on against him.

Settles lived next door to another Columbia Gas employee, Doug Kinder, and reported to him what he had heard Hardin say at Bob Evans. (Settles TR II at 40). Kinder then got in touch with Greg Hatton and Mary Tigges and told them what Settles had heard. (Kinder TR II at 59-60).

Tigges contacted Hardin about whether she had called the police. During this conversation, Hardin, seeing her plot of shaking some money out of Columbia Gas by a specious claim unraveling, informed Tigges that she wanted to withdraw her complaint against Wells. (Tigges TR I at 38).

Columbia Gas' Violations of Wells' Rights and Its Departures From Its Own Procedures

Movant's brief omits that it violated Wells' due process rights and its own procedures and policy manual with regard to his termination.

A "just cause" manual, which provided Wells with certain due process rights, was applicable to Wells' situation. (Tigges TR I at 34; Plaintiff's Exhibit 1). These rights included the right to be informed of the charges against him, the right to confront his accusers, and the right of representation by counsel or a union representative. (Tigges TR I at 45).

Columbia Gas violated Wells' rights to notice of the charges against him and to confront his accusers. First, Wells was told that Hardin's complaint, as passed up from Hatton to Tigges and on to Johnson and Kelly, was that Wells had tried to hug her and she had to push him away. (Tigges TR I at 54-55; J. Wells TR II at 125, 132-133). Hardin, of course, testified specifically that this had not happened and that she had not

told Hatton it had. (Hardin TR I at 132, 140). No explanation was given as to why Hatton and Tigges falsely represented Hardin's complaint. Tigges also said that Wells had improperly discussed Hardin's workplace with her, a reference that Hardin said occurred during a friendly discussion. (Hardin TR I at 129, 131).

Columbia Gas forbade Wells from even trying to contact Hardin and try to straighten out the misinformation that it was coming forward with. As Movant notes in its brief, Wells had a union representative, George Russell, representing him regarding this matter. However, Movant's brief omits mention of an e-mail Tigges authored on February 22, 1999, stating that any contact of Hardin by Russell would subject him "to disciplinary action up to and including discharge." (Plaintiff's Exhibit 2).

The Johnny Farris Evidence

Johnny Farris was also employed by Columbia Gas as a serviceman. Farris was substantially younger than Wells, being 47 to Wells' 57.

According to Movant's human resources director, Lori Johnson, that Farris worked out of Winchester and for a different supervisor than Wells made no difference to Columbia Gas' workplace rules and policies. (Johnson TR II at 7). Movant's chief executive officer, Joseph Kelly, affirmed that these rules and policies had not changed at all between February 1999 and trial. (Kelly TR I at 98). Kelly described both Wells and Farris as having violated Movant's workplace rules by engaging in "inappropriate conduct." (Kelly TR I at 108, 112).

Johnson testified that Columbia Gas received a complaint from a customer that Farris, while on a service call to her residence, "had touched his genital area and made a statement ... about how easy it is for him to whip it out, and then something about the

type of underwear that he wore being silk.” (Johnson TR II at 12). Unlike Wells, who was immediately suspended without pay (J. Wells TR II at 136), Farris was suspended with pay. (Johnson TR II at 12). Similar to what Hardin told Tigges, this customer indicated that she withdrew her complaint against Farris. (Johnson TR II at 15-16). Johnson explained that the customer’s withdrawal of her complaint made it impossible for Columbia Gas to proceed with Farris’ termination because Farris’ right to confront his accuser, as provided for in the just cause manual and as was denied Wells, would be violated and there would be no evidence available to proceed against Farris. (Johnson TR II at 16). Johnson indicated that she knew that Hardin had indicated that she wanted to withdraw her complaint prior to Wells’ termination. (Johnson TR II at 16-17). Johnson explained that Columbia Gas had to evaluate Wells’ and Farris’ cases differently because of the differences in their age; she explained that Wells, who was over 55, would be eligible to retire early, while Farris, who was substantially younger and less than 55, would surely fight his termination. (Johnson TR II at 17).

Farris appeared to testify initially, as Movant notes in its brief, *Brief for Movant at 17*, that he drew the impression from statements by his supervisor, Charles Knuckles, that he would be punished by Columbia Gas if he became a witness in Wells’ case. (Farris TR II at 73-74). Farris retreated from this testimony on cross-examination by Movant’s trial counsel, conceding that Knuckles didn’t say that he would be punished if he supported Wells, that Knuckles’ warning was actually about not getting accused as Wells had been, that he was not concerned about retaliation from Knuckles and that he and Knuckles “get along just fine.” (Farris TR II at 91-92). Knuckles also testified that no threat of retaliation had been made.

Kelly's Unequivocal Testimony That Only Hardin's Complaint Was Relevant to Wells' Termination and Wells' Motion *In Limine*

While Movant complains that the trial court excluded testimony from Judith Christopher and Wilson Hensley of other alleged incidents of misconduct by Wells, it nowhere mentions in its brief the unequivocal testimony from Kelly that was the basis for the trial court's exclusion of this evidence.

Kelly testified unequivocally that Christopher's complaints about Wells had nothing to do with his firing:

Q: Were the allegations made by Ms. Christopher against Mr. Wells credited in any way in terms of contributing to a decision by Columbia Gas to terminate Mr. Wells' employment?

A: No, sir, they were not.

(Kelly deposition at 18.)

Furthermore, Kelly made crystal clear that only Hardin's complaint related to Wells' termination:

Q: Was there anything else that you considered in reaching that decision, other than the complaint made by Ms. Hardin?

A: No, sir.

(Kelly deposition at 21; TAPE 22/8/01/VCR/15 3/16/01 9:19:45 – 9:20:00). Kelly acknowledged this testimony at trial. (Kelly TR I at 109).

Wells moved *in limine* that evidence of other alleged misconduct by Wells be excluded as irrelevant and inadmissible character evidence. (R. 508-511). The trial court reviewed Kelly's deposition and based on his "unequivocal" testimony excluded any other evidence of complaints about Wells except Hardin's. (TAPE 22/8/01/VCR/15 3/16/01 9:25:40-9:26:00).

Columbia Gas' Complaint About the Content of Farris' Testimony

When Wells moved to add Johnny Farris to its witness list, Movant's trial counsel indicated that it "wasn't too scared" of Farris' testimony and had known of his situation for about a year. (TAPE 22/8/01/VCR/6 3/12/01 13:03:58 – 13:04:18). Subsequently, the trial judge, after overruling Movant's motion to reconsider the ruling allowing Farris to testify, invited a motion for a continuance from Columbia Gas if necessary to allay any prejudice. (TAPE 22/8/01/VCR/15 3/16/01 9:32:50 – 9:34:15). Movant through counsel replied that the prejudice to it was from the content of Farris' testimony, not from his addition to the witness list. (*Id.* at 9:34:15 – 9:34:28).

COUNTER STATEMENT OF QUESTIONS OF LAW PRESENTED

This case presents no novel issue or one of first impression. It involves routine evidentiary rulings grounded on well-settled evidentiary law. The questions of law presented by Movant's motion are correctly stated as follows:

1. Where evidentiary treatises and case law recognize that subsequent conduct is relevant and probative of discriminatory motive in a prior employment decision in an employment discrimination case, whether the trial court abused its discretion in admitting such evidence at trial.

2. Where the similarity of Wells and Farris is a fact question and there is no evidentiary basis supporting the assertions by movant that they were not, whether there was sufficient evidence for a jury to view Wells and Farris as similarly situated given the relevant circumstances conceded to by movant.

3. Where Movant's chief executive officer unequivocally testified that nothing besides Hardin's complaint was considered relevant to firing Wells, whether the

trial court abused its discretion by excluding as irrelevant evidence that movant itself represented itself to be irrelevant.

4. Where movant neither requested nor was denied an evidentiary hearing and sufficient evidence was submitted to the trial court to support its order regarding fees and costs, whether the trial court abused its discretion.

5. Where the evidence indicated conscious wrongdoing by movant in systematic violation of its policies, whether the jury was properly instructed that it could consider punitive damages.

COUNTERSTATEMENT TO “REASONS FOR GRANTING REVIEW”

- I. Where evidentiary treatises and case law recognize that subsequent conduct is relevant and probative of discriminatory motive in a prior employment decision in an employment discrimination case, the trial court did not abuse its discretion in admitting such evidence.**

Contrary to movant’s assertion, this case does not present any issue of first impression or otherwise regarding whether “a plaintiff may file a lawsuit on the basis of events that have yet to happen and then offer such events as evidence of desperate treatment.” Motion for Discretionary Review at 6.

Movant’s complaint in Point I of its motion is the admission of evidence concerning Johnny Farris. This presents a routine evidentiary question as to whether the trial court abused its discretion in admitting the evidence. *Young v. J.B. Hunt Trans., Ky.*, 781 S.W.2d 503, 509 (1989). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire & Rubber Co. v. Thompson, Ky.*, 11 S.W.3d 575, 581 (2000).

The trial court did not abuse its discretion in admitting this evidence. First, the evidence regarding Farris was relevant to the issue of intent. It is a matter of horn book law that subsequent conduct is relevant and probative of an actor's disposition or policy on a prior date. *See* 2 Wigmore on Evidence §§382, 437 (Chadbourn Rev. 1979). Kentucky courts have long recognized and honored this basic evidentiary principle. _____ . Moreover, many courts have applied this principle in employment discrimination cases, recognizing that subsequent conduct may prove discriminatory motive in a prior employment decision. *See McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) (Observing that an employer's actions after the date of an adverse employment decision may be probative of the employer's intent at the time of the decision); *Stratton v. Dep't of Aging*, 132 F.3d 869, ___ (2nd Cir. 1997) (evidence that younger employees were hired as long as 25 months after plaintiff's termination could support inference of pretext, given that asserted reason for the layoff had been the need to cut costs); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *Cert. denied*, 480 U.S. 916 (1986) ("subsequent conduct may prove discriminatory motive in a prior employment decision"); *Shchanzer v. United Tech. Corp.*, 120 F. Supp. 2d 200, 213 (D. Conn. 2000) (admitting evidence of ages of persons hired fourteen months after plaintiff's are probative of age discrimination.)

Contrary to movant's contentions and as these authorities recognize, the Farris evidence is probative of movant's intent and motive in terminating Wells' employment. Indeed, movant's human resources manager testified that Wells being aged over 55 and Farris being only 47 was a critical fact in how movant handled the situations regarding both. (_____). Notably, movant omits mention of this damaging testimony.

Both the trial court and the Court of Appeals have ruled in conformance with long established, widely accepted evidentiary principles. There was no abuse of discretion by the trial court and the Court of Appeals has correctly affirmed the trial court.

The hypothetical situations suggested by Movant are not presented in this case. The issue that is squarely presented is a routine evidentiary matter. It is doubtful that they would ever be presented in any case and it would appear an unsound basis for this court to grant review to address hypothetical and highly unlikely scenarios invented by the movant.

II. Because the issue of whether two employees are “similarly situated” is a fact issue for the jury and there is no evidentiary basis supporting the assertions by movant that they were not, there was sufficient evidence for the jury to correctly view Wells and Farris as similarly situated given the relevant circumstances conceded to by movant’s witnesses.

Contrary to movant’s assertions, the pretextual nature of movant’s claims regarding the basis for terminating Wells’ nearly 40 years of employment was shown in many and varied ways. Pretext is proven in three general ways: (1) _____; (2) _____; and, (3) _____.

Movant claims that it made its decision to fire Wells based on either his admission or Hardin’s story. The trial evidence showed that it did not know what Hardin’s story was, although what was relayed up the line as her story was not her story. In short, what movant claimed Hardin’s story to be was untrue. Since pretext is shown by there being no basis in fact to support the assertion and there is no basis in fact, as even movant grudgingly admits, _____, this was demonstrated. _____.

Furthermore, contrary to movant’s assertions, testimony from its own witnesses and

exhibits generated by them demonstrated that movant did not consider Wells' admissions a sufficient basis to terminate him under their policies. _____.

Contrary to movant's assertions, "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." *Graham v. Long Island Railroad*, 230 F.3d 34, 39 (2nd Cir. 2000).

Even if this Court were to view the issue of whether an employee is "similarly situated" to another as not a pure question of fact, it is at least a mixed question of law and fact. This Court in *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W. 2d 814, 822 (1992), ruled that such questions in Kentucky are properly resolved by a jury. While movant discounts *Meyers* because it most directly involved a mixed question of law and fact arising in a sexual harassment case, that is a distinction without a difference: *Meyers* recognizes that mixed questions of law and fact presented in employment discrimination cases are to be resolved by the jury, which is what happened here.

Finally, while movant urges this Court to adopt the analysis in *Smith v. Leggett Wire Co.*, 220 F.3d 750 (6th Cir. 2000), the very criteria cited in *Smith* are either irrelevant or the evidence presented weighs completely against movant's position. *Smith* says similarly situated employees must deal with the same supervisor; Columbia Gas' witnesses testified that the identity of the supervisor made no difference.

What movant argues as differentiating or mitigating circumstances have no evidentiary basis. First, Kelly described the offense of both Farris and Wells as having engaged in inappropriate conduct. (TR I at 108, 112). Second, movant's human resources director testified that his workplace rules for servicemen were identical regardless of where they reported to work and who their supervisor was. (TR II at 7).

Thus, while Smith imposes some requirement that the relevant employees have the same supervisors, Movant's agents here testified that this did not make any difference. Furthermore, they testified that both Wells and Farris were subject to the same standards and they characterized their conduct in identical terms.

There is no evidentiary basis for what movant claims are "differentiating or mitigating circumstances" between Wells and Farris. No witness testified that it made any difference to movant how the complaints regarding Farris and Wells came to Movant's attention. Such differentiating circumstances cannot arise from the invention of counsel. _____. Second, contrary to movant's suggestion that Hardin was willing to participate in its proceedings against Wells, the testimony was unequivocal from movant's agent Tigges, that Hardin said she wanted to withdraw her complaint. Furthermore, Hardin sued Columbia Gas on five different causes of action for involving her in its action against Wells, a critical fact movant omits while asserting that it could rely on Hardin to support it. Finally, Kelly, Movant's chief executive officer, testified unequivocally that no other matters besides Hardin were considered relevant to Wells.

III. The trial court did not abuse its discretion in excluding as irrelevant evidence that Columbia Gas's chief executive officer unequivocally testified was irrelevant.

Contrary to Movant's contention in Point III of its motion, it was allowed to present all the information upon which it based its decision to terminate Wells. Movant here contends that the trial court abused its discretion in excluding evidence about other matters pertaining to Wells. Movant does not state, however, the basis for the trial court's ruling, which was the "unequivocal" deposition testimony of its chief executive officer, Kelly. Kelly's relevant deposition testimony was as follows:

Q: Were the allegations made by Ms. Christopher against Mr. Wells credited in any way in terms of contributing to a decision by Columbia Gas to terminate Mr. Wells' employment?

A: No, sir, they were not.

(Kelly deposition at 18.)

Furthermore, Kelly made crystal clear that only Hardin's complaint related to Wells' termination:

Q: Was there anything else that you considered in reaching that decision, other than the complaint made by Ms. Hardin?

A: No, sir.

Kelly acknowledged this testimony at trial. (TR II at 109).

Movant does not state in its motion the trial court's basis for excluding the evidence movant claims should have been admitted. That basis was the clear, unequivocal testimony of its chief executive officer.

IV. THERE WAS NO ABUSE OF DISCRETION IN THE AWARD OF FEES AND COSTS.

Neither the Court of Appeals nor the trial court misapplied the law with regard to the fees and costs awarded Wells. Movant makes factually unsupported assertions and says nothing about the law.

Where a party advances a number of claims and is successful on some but not all and counsel's time is devoted generally to the litigation as whole, the court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1993). Use of a mathematical approach comparing the total number of issues with those prevailed upon to determine a reasonable fee is improper; the court should assess whether the relief justified the expenditure of attorney time. *Id.* at 435 n.11. Excellent results normally warrant a fully compensatory fee, encompassing all hours expended on

the litigation. *Id.* at 435. On the other hand, where counsel's time can be identified as devoted to claims unrelated to those on which plaintiffs succeeded, no fee should be awarded as to the unsuccessful, unrelated claims. *Id.* The court must consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case. *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981)(en banc), *cert. dismissed*, 453 U.S. 950 (1981), *overruled on other grounds*, 790 F.2d 1174 (5th Cir. 1986); *Williams v. Roberts*, 904 F.2d 634, 640 (11th Cir. 1990). The trial court's order complied with these requirements.

The Supreme Court has admonished that employment discrimination cases should not spawn extensive collateral litigation regarding attorneys' fees and related issues. *Meyers v. Chapman Printing Co.*, 840 S.W.2d at 825-826. The trial court was presented with a sworn affidavit regarding the costs and expenses Movant complains about. Movant made no demand for an evidentiary hearing that was denied. The trial court did not abuse its discretion, and the award of fees, costs and expenses should be affirmed in its entirety.

V. THE OVERWHELMING EVIDENCE OF MOVANT'S SYSTEMATIC AND DELIBERATE DISREGARD FOR WELLS' RIGHTS SUPPORTS THE PUNITIVE DAMAGES AWARD.

The key element in deciding whether punitive damages are appropriate is malice or conscious wrongdoing. *Simpson County Steeplechase v. Roberts*, Ky.App., 898 S.W.2d 523, 525 (1995), *citing Fowler v. Mantooth*, Ky., 683 S.W.2d 250, 252 (1984). Malice may be implied from outrageous conduct and need not be express so long as the conduct is sufficient to evidence conscious wrongdoing. *Id.* Punitive damages are properly awarded in employment discrimination cases where there is evidence of systematic violation of the defendant's policies. *See Madison v. IBP, Inc.*, 257 F.3d 780,

795-96 (8th Cir 2001)(submission of punitive damages issue to jury appropriate where, even though company had anti-discrimination policy and procedures, those procedures were not followed by managers).

The evidence at trial demonstrated conscious wrongdoing and supported the jury's verdict. As the Court of Appeals observed, the evidence established movant's systematic violation of its policies. First, movant violated its policy and Wells' right to be informed of the nature of Hardin's complaint when it misrepresented the nature of the complaint made by Hardin. While she specified that she made no complaint of sexual harassment, defendant misrepresented her complaint to be one where Wells had supposedly tried to hug her and she had had to fight him off. Second, movant violated its own policies and Wells' "confrontation" right to at least inquire of Hardin by threatening Wells and anyone on his behalf with being fired if they even tried to contact Hardin. Third, while movant made much of the fact that the complaint against Farris had been withdrawn, its own agent, Tigges, testified that Hardin wanted to withdraw her complaint and yet defendant proceeded to fire Wells anyway. Fourth, while movant claims that the complaint against Farris could not be counted on to support it if it had fired Farris, it actually got sued by Hardin for getting her involved by firing Wells. Fifth, movant's witnesses could not even state what Hardin's complaint was, although they testified that Wells was fired based upon it. Sixth, while movant urged that what Wells admitted warranted his termination, its own witnesses, most specifically Tigges, testified that it did not. Sixth, movant has engaged a concerted effort to move employees fifty-five and over from its work force. Seventh, while movant says that Wells personnel file indicates that he retired, this is disingenuous and evidence at trial was clear that defendant

terminated his employment and plaintiff's Exhibit 8 demonstrates this. In sum, the jury could find that movant systematically violated its own policies and procedures in proceeding to fire Wells and recklessly disregarding his rights. Accordingly, the trial court correctly instructed the jury on punitive damages and the jury correctly found in Wells' favor and assessed punitive damages against movant. Movant simply disagrees with the jury's view of the evidence.

CONCLUSION

This case simply presents routine issues. Movant raises three points (I, III, and IV) arguing that the trial court abused its discretion. However, both the trial court and the Court of Appeals have ruled consistently with well-established case law. Movant misstates the law as to Point II it raises and simply disagrees with the jury's view of the evidence. Movant essentially reargues its view of the evidence in Point V of its motion and ignores the proof of its systematic violation of its own policies and conscious wrongdoing. There is no basis for this Court to expend its limited resources in this case and, therefore, the motion for discretionary review should be **DENIED**.

Respectfully submitted,

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