COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT—8TH DIVISION
CIVIL ACTION NO. NO. 99-CI-3699

JAMES M. WELLS PLAINTIFF

vs. **PLAINTIFF'S MEMORANDUM *CONTRA* DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

COLUMBIA GAS OF KENTUCKY, INC., et al DEFENDANTS

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Plaintiff James M. Wells tenders this memorandum *contra* the motion of defendant Columbia Gas of Kentucky, Inc. for judgment notwithstanding the verdict. Defendant's contentions are without merit and its motion should be overruled.

Defendant's motion must be considered by this Court viewing the evidence in the light most favorable to Wells, the prevailing party at trial. "[T]he consideration is covering a proper decision on a motion for a judgment not withstanding the verdict are exactly the same as those first presented on a motion for a directed verdict at the close of all of the evidence." *Cassinelli v. Begley,* Ky., 433 S.W.2d 651, 652 (1968). "[T]he court must draw all fair and rational inferences from the evidence in favor of the plaintiff and the evidence of such parties' witnesses must be accepted as true[.]" *Id*. at 655.

ARGUMENT

POINT 1

CONTRARY TO DEFENDANT'S ASSERTION, WELLS PROVED AT TRAIL THAT HIS AGE WAS A SUBSTANTIAL AND MOTIVATING FACTOR FOR THE TERMINATION OF HIS EMPLOYMENT.

Defendant's lengthy discussion of "Plaintiff's Burdens of Proof and Persuasion" and the *Askin v. Firestone Tire & Rubber Co.* case is misguided and erroneous. First,

defendant urges that *Askin* establishes a framework by which a trial judge can assess on a post-trial motion whether the plaintiff put on proof sustaining his *prima facie* case. However, the Sixth Circuit has repeatedly held that a trial court may not revisit on a post-verdict motion the issue of whether an employment discrimination plaintiff has proven a *prima facie* case. *Kovacevich v. Kent State University*, 224 F.3d 806, 821-826 (6th Cir. 2000); *EEOC v. Avery Dennison Corporation*, 104 F.3d 858, 861 (6th Cir. 1997)("Following a trial on the merits, the district court, therefore, cannot return to a consideration of whether plaintiff has proven its *prima facie* case."). Accordingly, if Sixth Circuit law controlled this case, it would require defendant's motion be summarily overruled. There is no basis for this Court to adopt a different approach; therefore, defendant's motion should be overruled.

Defendant argues that Wells was not sufficiently similarly situated to Johnny Farris. Defendant incorporates on this point the arguments raised in its *Defendant's Memorandum In Support of Motion for New Trial*. Plaintiff likewise incorporates the arguments asserted in *Plaintiff's Memorandum Contra Defendant's Motion for New Trial*.

The contentions that defendant does make undercut its position. It states "Columbia Gas will never know with any certainty what conduct Farris engaged in." It was demonstrated at trial that defendant did not know and could not state what conduct Wells had supposedly engaged in toward Hardin, although in summation it urged that he had been untruthful about it. It was also demonstrated at trial that defendant had been untruthful about what Wells' alleged conduct was. It was reported up defendant's hierarchy that Wells had tried to hug Hardin and she had to push him off her; this clearly

and indisputably did not happen. It was also demonstrated at trial that defendant was much clearer about the misconduct reported against Farris.

Defendant says it was not possible for it to investigate the Farris incident. That argument makes no sense as defendant could at least state what the complaint about Farris had been; it could not state what the complaint by Hardin about Wells had been. The jury could find that it actually investigated the Farris complaint more accurately than it did Hardin's against Wells.

Defendant also argues that a difference existed because Wells admitted to having patted Hardin on the shoulder. Its witness, Tigges, testified at trial that that alone did not warrant Wells be terminated according to defendant's policy. Thus, the testimony from defendant's own agent supported the jury's finding that this conduct did not, according to defendant's own policies, warrant Wells' termination. This point was argued without objection in plaintiff's summation and apparently accepted by the jury.

Defendant's second argument, which incorrectly asserts that Wells produced no evidence of pretext, misstates the law in at least two ways. First, Defendant argues that after an employer articulates a non-discriminatory reason for the termination, "the Plaintiff may not rely on his prima facie evidence, but must introduce additional evidence of age discrimination." This is at least partially incorrect. "[E]vidence that bears upon elements of the prima facie case can also come into play in assessing the ultimate question of discrimination." *Kovacevich, supra,* 224 F.3d at 827. *See also Reeves v. Sanderson Plumbing Products, Inc.* 120 S.Ct. 2097, 2111 (2000)(taking into account the evidence supporting the Plaintiff's prima facie case as part of its consideration of the "ultimate questions" of intentional discrimination).

Second, defendant appears to argue that in rebutting the employer's proffered non-discriminatory reason, the plaintiff must in the course of demonstrating its pretextual nature also submit some additional evidence of discrimination. Defendant again relies upon *Askin* for an argument that the Sixth Circuit and the United States Supreme Court have since rejected. "Once a plaintiff establishes its *prima facie* case, this, along with disbelief of the defendant's proffered reasons for the negative employment action, will permit a finding of discrimination by the fact finder. *Kline v. TVA,* 128 F.3d 337, 347 (6th Cir. 1997). "A plaintiff does not need to introduce additional evidence of discrimination to prevail on merits." *Id*. "Thus, a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing,* 120 S.Ct. at 2109. In *Reeves*, the Supreme Court likewise held that the lower court had erred "in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." *Id.* Accordingly the defendant's contention that a plaintiff must produce additional evidence of discrimination once an employer has come forward with some explanation is without merit and has been soundly and thoroughly rejected.

Defendant also incorrectly argues that Greg Hatton had nothing to do with and did not influence the decision to terminate his employment. First, Defendant quotes from trial testimony by Joe Kelly about how he relied upon Hatton's actions. Hatton's trial testimony demonstrated that he misreported what Hardin's complaint had been and that the decision actually rested upon incorrect information that he provided. The trial evidence also demonstrated that Hatton had inquired of Plaintiff's retirement plans.

The jury could properly conclude that Hatton was part of the age bias motivating the adverse decision to terminate Wells' employment.

As Defendant notes pretext can be demonstrated by proof that the proffered reason was insufficient to justify the action according to the employer's policy. The jury could conclude, as was argued in the plaintiff's summation, that Wells patting of Hardin's shoulder was an insufficient basis, according to defendant's own policies, to terminate his employment. Defendant's agent, Tigges, testified that such behavior was not itself a capital offense demanding termination. Furthermore, the evidence at trial demonstrated that the discussion concerning Hardin's workplace occurred during the course of an amiable discussion between the two as Hardin herself testified. Accordingly, the jury could have found that Wells conduct was insufficient to warrant the action taken, according to defendant's policies.

The jury could also have concluded that defendant's proffered reason had no basis in fact. It was demonstrated at trial that defendant asserted that Wells had tried to hug Hardin and that she had had to fight him off. It was likewise demonstrated that no such thing ever occurred. Accordingly, the jury could find that Defendant's proffered reason had no basis in fact. Therefore, the jury could find that the Defendant's proffered reason was pretextual.

Defendant's arguments misstate the law and rest ultimately on fact arguments rejected by the jury. Accordingly, the Defendant's arguments are without merit and its motion should be overruled.

POINT 2

KENTUCKY LAW DOES NOT REQUIRE WELLS TO PURSUE OR

EXHAUSE ANY REMEDIES UNDER ANY UNION CONTRACT.

Defendant's argument that Wells must pursue and exhaust remedies under union contract is without merit. The decisions in *Bednarek v. Local Union* 227, Ky.App., 780 S.W.2d 630 (1989); *Kirkwood v. Courier Journal*, Ky.App., 858 S.W.2d 194 (1993), and *McNeal v. Armour & Co.*, Ky.App., 660 S.W.2d 957 (1983), established that an employee may pursue in circuit court statutory rights against discrimination prior to, or even simultaneous with, pursuing grievance procedures provided in a collective bargaining agreement. These controlling authorities, which defendant again omits from its discussion, render defendant's argument without merit. Accordingly, defendant's motion should be overruled.

CONCLUSION

For all the foregoing reasons and based upon the evidence presented at trial, defendant's motion for judgment notwithstanding the verdict should be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I verify that a true and correct copy of the foregoing was hand-delivered this____

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