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

JAMES M. WELLS PLAINTIFF

vs. **PLAINTIFF'S MEMORANDUM *CONTRA* DEFENDANT'S MOTION FOR A NEW TRIAL**

COLUMBIA GAS OF KENTUCKY, INC., et al DEFENDANT

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Plaintiff James M. Wells tenders this memorandum *contra* the motion of defendant Columbia Gas of Kentucky, Inc. for a new trial. Defendant mostly restates arguments that have already been presented to and correctly rejected by this Court. Defendant supplements these contentions with factual arguments that were properly rejected by the jury.

In reviewing the issues raised by the Defendant's motion, the Court must ascribe to the evidence all reasonable inferences and deductions which support Well's position. *Meyers v. Chapman Printing Co., Inc.,* Ky., 840 S.W.2d 814, 821 (1992).

ARGUMENT

POINT 1

THE COURT CORRRECTLY ADMITTED THE TESTIMONY AND EVIDENCE REGARDING JOHNNY FARRIS.

The Court has already rejected defendant's first argument on this point. Defendant repeats that evidence regarding Johnny Farris' situation should have been excluded because those events occurred after Well's termination. The Court before trial has already twice rejected this argument. That ruling should again be reaffirmed for the reasons

already of record.

Defendant's second argument is that the Farris evidence should have been excluded because Wells did not plead a disparate treatment theory. Defendant provides no authority that Wells is required to plead some specific language that would satisfy defendant and put it on notice that Wells may sustain his age discrimination claim by proof of disparate treatment. Defendant claims it had no notice such a theory was present in this case. However, defendant argued in support of its motion for summary judgment that Wells had failed to present any proof of disparate treatment to sustain his age discrimination claim. *Defendant Columbia Gas of Kentucky, Inc.'s Motion for Summary Judgment on claims of James M. Wells* at pp. 13-14. Defendant obviously concluded this theory was adequately presented to the Court and argued against it. After having already argued against this theory, defendant cannot now seriously claim it did not know about it. Defendant's third argument is that evidence of the Farris evidence was irrelevant. This argument too has already been rejected by the Court for the reasons already of record.

Defendant's fourth argument is that Farris was untimely identified. Defendant can show no prejudice on this point. First, Farris was not a surprise witness to defendant. Defendant's managing agents knew of and participated in the Farris events. Defendant's human resources manager, Lori Johnson, testified in detail about the precise nature of the complaint against Farris by the customer. Indeed, Johnson knew more about Farris' situtation than Farris. Second, prior to trial defendant was twice offered by the court a continuance to ameliorate any possible prejudice and those offers were declined. Third, defendant's claim that it would perhaps lose valuable witnesses if the trial were continued is hollow. Except for Charles Nuchols, whose testimony was more helpful to plaintiff than to

defendant, all of the other witnesses at trial were called in plaintiff's case-in-chief. Accordingly, defendant's argument is without merit.

Defendant's fifth argument is that Farris was not sufficiently similarly situated to Wells. On this point, Defendant wishes to rewrite the evidence. Defendant states that Wells and Farris "worked in different towns and were under the direction and control of different supervisors." The evidence at trial demonstrated clearly that this made absolutely no difference and the policies were the same in every town and under every supervisor. Defendant argues that the "conduct complained of was different." The testimony at trial from Lori Johnson was that Farris had grabbed his private parts and threatened to expose himself to a customer. The jury could have viewed Farris conduct as far more severe than Wells, especially since Hardin testified that her complaint was not really based upon Wells patting her on the shoulder. Moreover, Defendant's witnesses characterize both Wells and Farris as having engaged in "inappropriate conduct." The jury could have concluded that Farris and Wells were similarly situated in all relevant aspects and that Wells' age was a substantial and motivating factor for his different treatment.

Defendant next argues that the complaints against Farris and Wells arose in different circumstances. Defendant presented no evidence at trial to support this position. Moreover, it makes no sense that their policies would differ pending upon how information of misconduct came to their attention. This argument is without merit.

Defendant argues that it treated Wells different because there were other complaints about him. Such other complaints, as Defendant's witnesses unequivocally stated, had nothing to do with any action taken against Wells. The termination notice, which was admitted as Plaintiff's Exhibit 8 and is attached hereto, refers only to matters happening at

the Hardin residence. Defendant gave no credit to and did not consider any other alleged complaint in firing Wells.

Defendant incredibly argues that Hardin was cooperative and willing to participate in the investigation. This ignores the fact that Hardin sued Defendant because Defendant had involved her in the process. Moreover, Defendant ignores the testimony of its own witness, Tigges, that Hardin said she wanted to withdraw her complaint.

Defendant's sixth argument is that Farris' testimony about the threats made about becoming involved with Wells' case should not have been admitted. First, such threats constitute an illegal employment practice in violation of KRS 344.280 (5). Second, proof of other discriminatory practices is relevant in sustaining a plaintiff's discrimination claim. *Kentucky Center for the Arts v. Handley*, Ky.App, 827 S.W.2d 697, 701 n.5 (1992). Third, proof of threats directed at witnesses is probative of discriminatory intent. *Donellon v. Fruehauf Corp.*, 794 F.2d 598, 601 (11th Cir. 1986). Accordingly, defendant's contentions on this point are without merit.

Finally, the evidence was admissible was not rendered inadmissible by KRE 403. First, contrary to defendant's contentions, the evidence was admissible and probative on the issue of defendant's discriminatory intent. *Handley, supra; Donellon, supra*. Second, any prejudice to the defendant from this evidence was warranted by its probative force. Its admission was in no way unfairly prejudicial to defendant.

POINT 2

THE COURT PROPERLY EXCLUDED EVIDENCE OF ANY ALLEGED MISCONDUCT BY PLAINTIFF OTHER THAN THAT ALLEGED BY DEFENDANT KATHY HARDIN.

The court has already objected Defendant's argument that it should have been

permitted to introduce testimony about other allegations of misconduct by Wells, even though those things had nothing to do with its decision. Plaintiff incorporates the argument set forth in the *Plaintiff's Motion In Limine to Exclude All Testimony and Evidence of Any Alleged Misconduct by Plaintiff Other Than That Alleged by Defendant Kathy Hardin.*

Defendant quotes from trial testimony by Joseph Kelly, its CEO, which states that the decision to terminate Wells was based on the investigation of Hardin's complaint. As defendant asserts "Hardin's complaint was the ultimate reason for Columbia Gas's decision to terminate Wells." Defendant proceeds to argue that Kelly materially changed and altered at trial his previous testimony that only Hardin's complaint was considered relative to Wells' termination. If so, this would appear to be an end run around the court's pre-trial ruling and utterly without merit.

Defendant states that "witness after witness for Wells attacked Columbia's investigation." The primary witnesses who testified about the investigation at trial were defendant's own agents, Tigges, Johnson, Kelly and Hatton. It is true that defendant's investigation of Hardin's complaint, which was the purported basis for defendant's action, evidenced conscious wrongdoing. First, the only person who actually discussed Hardin's complaint with her was Hatton, who could not even state what her complaint had been. Second, although Hardin's complaint most emphatically was not that Wells tried to hug her and that she had had to fight him off, that was the complaint that was reported from Hatton to Tigges and Johnson and then to Kelly. Third, while Kelly testified at trial that he relied upon an investigation done by other people, he had no idea what the conclusions of that investigation were. He could not even testify how Mr. Wells had supposedly touched Ms. Hardin. The evidence about matters that Columbia Gas did not credit and did not consider

as it unlawfully terminated Well's employment were correctly deemed irrelevant by the Court and properly excluded. That ruling should again be reaffirmed.

POINT 3

THE COURT PROPERLY EXCLUDED THE TESTIMONY OF WILSON HENSLEY.

The material weakness in defendant's argument that Wilson Hensley's testimony should have been admitted is that Hensley could not give any testimony about any prior report of sexual misconduct against Wells against Wells. At best Hensley could have testified that a customer made a complaint of indeterminate nature that was withdrawn. Moreover, Hensley's testimony was properly excluded both because he could not testify about any report of misconduct of a sexual nature and, even if he could, such report or misconduct had no role, according to defendant's managing agents, with defendant's decision to terminate Wells' employment.

As was argued to the jury in the plaintiff's summation and without objection by defendant, Hardin, according to defendant's agent, Tigges, asked to withdraw her complaint, as was done by the complainant against Farris. Contrary to defendant's contentions, Farris and Mr. Wells were not treated the same. Mr. Wells was fired and Farris was returned to work. This argument by defendant is without merit. Its motion should be overruled accordingly.

POINT 4

DEFENDANT'S PROPOSED "BUSINESS JUDGMENT" INSTRUCTION, WHICH HAS NO SUPPORT IN KENTUCKY LAW AND IS CONTRARY TO THE BARE-BONES APPROACH, WAS CORRECTLY REJECTED BY THE COURT.

Defendant cannot find any support – even by the most stretched analogy -- in Kentucky law supporting its contention that the court erred in rejecting its proposed "business judgment" jury instruction. Moreover, defendant does not even attempt to argue how its proposed instruction could be reconciled with Kentucky's "bare-bones" approach to jury instructions.

The Supreme Court has repeatedly made clear that jury instructions in this state adhere to a "bare-bones" approach. *Ball v. E.W. Scripps Co.,* Ky., 801 S.W.2d 684, 691 (1990); *Young v. J.B. Hunt Transportation*, Ky., 781 S.W.2d 503, 506 (1983). "To provide the detail which would otherwise be missing, we have held that "[t]his skeleton may then be fleshed out by counsel on closing argument." *Young,* 781 S.W.2d at 506*, quoting Rogers v. Kasdan,* Ky., 612 S.W.2d 133, 136 (1981). Descriptive of the approach we take to instructions and argument is a passage from *Collins v. Galbraith,* Ky., 494 S.W.2d 527 (1973), as follows:

> In conclusion, it may be well to mention that whenever counsel feels that jurors might draw inferences that are not warranted by the specific terminology of the instructions, his opportunity to guard against it comes in the closing argument. If instructions are to be kept concise and to the point, as they should be, their supplementation, elaboration and detailed explanation fall within the realm of advocacy. Contrary to the practice in some jurisdictions, where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to confine the judge's function to the bare essentials and let counsel see to it that the jury clearly understands what the instructions mean and what they do not mean.

Id. at 531.

Defendant's proposed "business judgment" instruction is contrary to the "bare bones" approach and completely unsupported by Kentucky Law. Defendant was able to adequately present this argument to the jury and it was rejected. Accordingly, Defendant's

argument is without merit.

POINT 5

WHERE THE EVIDENCE PRESENTED AT TRIAL SHOWED CONSCIOUS WRONGDOING BY DEFENDANT, THE JURY WAS PROPERLY INSTRUCTED THAT IT COULD CONSIDER PUNITIVE DAMAGES.

Defendant's arguments that the jury should not have been instructed on punitive damages engages is a highly selective rewrite of the trial testimony.

The key element in deciding whether punitives 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.*

The evidence at trial demonstrated conscious wrongdoing. First, defendant violated its own 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, defendant 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 defendant 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 defendant urged that the complainant 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, defendant's witnesses could not even state what Hardin's complaint was, although they testified that Wells was fired based upon it. Fifth, while defendant urges that what Wells admitted to warranted his termination, its own witnesses, most specifically Tigges, testified that it did not. Sixth, contrary to defendant's representations, the Defendant has engaged a concerted effort to remove employees fifty-five and over from its work force. Seventh, while Defendant 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. Eighth, defendant manifested the consciousness of its wrongdoing by the threats to Farris and others if they became involved in Wells' case. In sum, the jury could find that defendant systematically violated its own policies and procedures in proceeding to fire Wells and recklessly disregarding his rights. Accordingly, the Court correctly instructed the jury on punitive damages and the jury correctly found in Wells' favor and accessed punitive damages against defendant.

POINT 6

THE JURY INSTRUCTIONS PROPERLY PRESENTED THE MITIGATION OF DAMAGES ISSUE TO THE JURY AND THE COURT CORRECTLY REJECTED DEFENDANT'S PROPOSED "MITIGATION OF DAMAGES" INSTRUCTION.

Defendant also fails to present any Kentucky authority supporting its proposed mitigation of damages instruction. The jury was properly instructed that it should reduce from any award of back pay to Wells "any compensation, including fringe benefits, during that period of time that he has received from other employment or could have earned through the exercise of reasonable diligence to secure other employment." This instruction

tracks that in the Palmore treatise. *See* 2 Palmore Kentucky Instructions to Juries § 53.01 (2001 Cumulative Supplement).

The jury was properly instructed on Wells' duty to mitigate his damages. Defense counsel had opportunity to argue on this point in summation; the jury rejected those arguments. Defendant's contention is without merit. Accordingly, its motion should be overruled.

POINT 7

THE PUNITIVE DAMAGES AWARDED BY THE JURY WERE NOT EXCESSIVE.

The evidence supported the punitive damages awarded. The jury awarded punitive damages totaling $50,000, some $65,000 less than it awarded in compensatory damages. The Supreme Court has rejected arguments that punitive damages were excessive in cases where the punitive damages were a multiple of the compensatory damages. *See Owens Corning Fiberglas Corp.,* Ky., 976 S.W.2d 409 (1998)(rejecting argument that award of $435,000 in punitive damages was excessive where $290,000 awarded in compensatory damages); *Hanson v. American National Bank & Trust Co.*, Ky., 865 S.W.2d 302 (1993)(rejecting argument that award of $5,775,000 in punitive damages was excessive where $1,665,000 awarded in compensatory damages). Accordingly, the punitive damages awarded here do not at first blush cause the mind to conclude that they was returned under the influence of passion or prejudice by the jury. *Davis v. Graviss,* Ky., 672 S.W.2d 928, 932 (1984). Accordingly, defendant's argument is without merit and its motion should be overruled.

POINT 8

THE JURY'S VERDICT WAS SUSTAINED BY SUFFICIENT EVIDENCE.

The Court has already twice rejected defendant's motion for a directed verdict, which is the same argument it again repeats here. For the reasons previously stated on behalf of plaintiff and by the Court, defendant's motion should again be overruled.

CONCLUSION

For all of the foregoing reasons, defendant's motion should be in its entirety overruled.

Respectfully submitted,

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ROBERT L. ABELL
HAMILTON, HOURIGAN & ABELL, PLLC
145 West Main Street, Suite 200
P.O. Box 240
Lexington, Kentucky 40588-0240
(859) 253-3141
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I verify that a true and correct copy of the foregoing was hand-delivered this ____ day of April 2001 to the following:

Debra H. Dawahare, Esq.
Wyatt, Tarrant & Combs
1700 Lexington Financial Center
Lexington, KY 40507

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Attorney for Plaintiff