COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2001-CA-001105

COLUMBIA GAS OF KENTUCKY, INC. APPELLANT

v. APPEAL FROM THE FAYETTE CIRCUIT COURT
ACTION NO. 99-CI-3699

JAMES M. WELLS, ET AL APPELLEES

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BRIEF FOR APPELLEES

SUBMITTED BY:

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Certificate Required by CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail, postage prepaid, on this _____ day of December 2001: Hon. Thomas L. Clark, Fayette Circuit Court, 215 W. Main Street, Lexington, KY 40507; and Debra H. Dawahare, Wyatt Tarrant & Combs, 1700 Lexington Financial Center, Lexington, KY 40507. The undersigned does also certify that the record of appeal has been returned to the Fayette Circuit Court, Appeals Division on or before this date.

_____
Robert L. Abell

STATEMENT CONCERNING ORAL ARGUMENT

Appellant's brief makes no statement concerning oral argument. This case does not present any novel issue and appellees submit that whether oral argument should be held be left to the Court's discretion.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellees do not accept appellant'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 appellant 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. (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

Appellant 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. Appellant 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).

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[1] A transcript of the trial has been filed in the record. The prefix "TR I" refers to

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 appellant'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). Appellant 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

Appellant'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 principally claimed that appellant'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).

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the March 19, 2001, transcript and the prefix "TR II" refers to that of March 20, 2001.

[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).

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

Appellant'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 appellant notes in its brief, Wells had a union representative, George Russell, representing him regarding this matter. However, appellant'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 appellant'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). Appellant'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 appellant'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 appellant notes in its brief, *Brief for Appellant 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 appellant'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 appellant 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, appellant'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 appellant'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). Appellant 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).

ARGUMENT

POINT 1

CONTRARY TO APPELLANT'S PRINCIPAL ARGUMENT IN POINT I OF ITS BRIEF, THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO PROPERLY CONCLUDE THAT COLUMBIA GAS' PROFFERED REASON FOR DISCHARGING WELLS WAS FALSE, PRETEXTUAL AND CONTRARY TO ITS OWN POLICIES.

The jury properly rejected as unbelievable and pretextual appellant's proffered reason for discharging Wells. First, the evidence established that what was reported up the chain of command from Hatton to Tigges and on to Kelly - that Wells tried to hug Hardin and she had to push him off – did not happen. Indeed, appellant retreated from that scenario at trial and in its brief neither mentions it nor Hatton's responsibility for creating it and passing it along. Second, while appellant claims that Wells' touching of Hardin on the shoulder warranted, as a matter of policy, his termination, Tigges' testimony and an e-mail she authored in February 1999 right after the events indicate otherwise. Appellant omits this evidence from its brief. Third, appellant's changing explanations for firing Wells is itself evidence of pretext. Fourth, appellant's violations of Wells' rights and departures from the due process manual are proof of pretext. Fifth, the very different way that appellant handled the Farris incident is proof of pretext.

Accordingly, the jury properly concluded that appellant offered only a false and pretextual reason for Wells' discharge. Therefore, the trial court should be affirmed.

Appellant makes half-hearted arguments that it should have been granted summary judgment on Wells' age discrimination claim and that Wells failed to prove a *prima facie* case of discrimination. These are without merit and can be disposed of quickly. First, the denial of a motion for summary judgment on grounds that a fact issue exists is not reviewable on appeal. *Bell v. Harmon*, Ky., 284 S.W.2d 812, 814 (1955). Second, as appellant concedes, *Brief for Appellant at 11 fn. 9*, where a case is submitted to the jury, there is no appellate review of whether the plaintiff submitted a prima facie case of discrimination but only of whether the ultimate question of discrimination has been proved.[3]

Appellant's primary argument under Point I of its brief is that it should have been granted a directed verdict and/or a judgment notwithstanding the verdict, because the evidence was insufficient for the jury to properly find that appellant's proffered reasons for deciding to discharge Wells were false and pretextual.

This Court must view the evidence in the light most favorable to Wells. "[T]he considerations governing a proper decision on a motion for a judgment notwithstanding 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

[3] The proof of a *prima facie* case is related to the ultimate proof of discrimination. "[E]vidence that bears upon elements of the prima facie case can also come into play in assessing the ultimate question of discrimination." *Kovacevich v. Kent State*, 224 F.3d 806, 827 (6th Cir. 2000); *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).

(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.

A jury may properly return a verdict for a plaintiff in an employment discrimination case where the plaintiff establishes a *prima facie* case and that the employer's proffered reason for the negative employment action is pretextual. "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 factfinder." *Kline v. TVA*, 128 F.3d 337, 347 (6th Cir. 1997). "If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn." *Shager v. Upjohn Company*, 913 F.2d 398, 401 (7th Cir. 1990). "A plaintiff does not need to introduce additional evidence of discrimination to prevail on merits." *Kline v. TVA*, *supra*. "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.

A jury can find an employer's proffered reason to be pretextual because it had no basis in fact, did not actually motivate the plaintiff's discharge, or was insufficient to motivate plaintiff's discharge. *Kline v. TVA*, 128 F.3d at 346.

The jury properly rejected, as factually false, appellant's claim that it terminated Wells' employment because he tried to hug Hardin and she had to push him away. Although Hatton reported to Tigges and it was passed along up the chain of command to

Kelly that Wells had attempted to hug Hardin and that she had to push him off, there was no proof presented at trial indicating that anything close to this scenario happened. Moreover, Columbia Gas offered no explanation at trial as to how or why this erroneous report was passed along. Accordingly, the jury could properly reject this proffered reason as pretextual.

The jury also properly rejected appellant's claim that its policies mandated Wells' discharge because he admitted touching Hardin on the shoulder and discussing with her where she worked. Tigges testified that Wells' mere touching of Hardin on the shoulder was not alone a "capital offense" warranting Wells' termination. (Tigges TR I at 58). Furthermore, Tigges authored an e-mail to Kelly on February 18, 1999, indicating that Wells' touching of Hardin and discussing with her where she worked did not justify his termination as a matter of appellant's policy. (Plaintiff's Exhibit 7). Accordingly, the jury could conclude that this proffered reason was insufficient under appellant's policy.

The jury could also conclude that appellant's retreat from claiming that Wells had tried to hug Hardin and she had to fight him off to claiming that it fired him for touching her on the shoulder innocently and conducting a friendly discussion with her, including where she worked, established the pretextual nature of its assertion. An employer's changing rationales for an employment action can itself be proof of pretext. *Thurman v. Yellow Freight Systems, Inc*., 90 F.3d 1160, 1167 (6th Cir. 1996); *Edwards v. U.S. Postal Service*, 909 F.2d 320, 324 (8th Cir. 1990); *Schmitz v. St Regis Paper Co.*, 811 F.2d 131, 132-33 (2nd Cir. 1987).

The jury could properly view Hatton's actions as probative of age discrimination. First, inquiries about an employee's retirement intentions may be evidence of

discriminatory motive in some circumstances. *See Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104 (9th Cir. 1991); *Braverman v. Penobscot Shoe Company*, 859 F.Supp. 596 (D. Me. 1994); *Rottersman v. CBS, Inc.*, 726 F.Supp. 484 (S.D.N.Y. 1989). Second, contrary to appellant's arguments that Hatton did not participate in the decision to terminate Wells, the evidence at trial established that Hatton was responsible for wrongfully and erroneously reporting that Wells had tried to hug Hardin and she had to push him away and thus participated in the process of Wells' termination. Moreover, Johnson indicated that Columbia Gas had initiated numerous attempts to induce early retirement by employees. (Johnson TR II at 18, 20-21). The jury could conclude that Hatton's interest in Wells' retirement intentions and his false reporting of Hardin's complaint served appellant's intention to eliminate yet another older than 55 employee from its workforce.

The jury could also properly conclude that appellant departed from its ordinary policies and procedures by denying Wells the rights supposedly afforded him by the just cause manual. Wells' right to be advised of the charge against him was violated because Hatton made up the information that Hardin's report was that Wells had tried to hug her and she had to push him off. Wells' right to confront his accuser was violated because he and his representative were forbidden upon pain of termination from even attempting to contact Hardin in any way. This contrasts very starkly with how Columbia Gas handled Farris' situation in which they totally disregarded the complaint against him out of fear that his rights might not be fully honored. Where an employer departs from what are supposed to be its established policies, a jury can infer discriminatory intent. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267

(1977)("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures, too, may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached."); *Graefenhain v. Pabst Brewing Co.,* 827 F.2d 13, 21 (7th Cir. 1987)(failure to comply with reduction in force policy); *Bethea v. Levi Strauss Co.*, 827 F.2d 355, 359 (8th Cir. 1987)(failure to follow lay off policy).

The jury could also conclude that appellant's handling of the Farris situation was proof of age discrimination directed at Wells. Appellant's argument that Wells was not similarly situated to Farris and therefore his case no proof relevant to Wells' is without merit. First, "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." *Graham v. Long Island Rail Road*, 230 F.3d 34, 39 (2d Cir. 2000). Moreover, to the extent that this question requires the jury to engage in interpretive factfinding, this is precisely its role. *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814, 822 (1992). To be similarly situated the employees should be similar in all material aspects. *Graham*, 230 F.3d at 39-40. Having the same supervisor, as appellant urges, is not necessary and an independent examination of the factors relevant to each case should be made. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir 1998).

Appellant's arguments that Farris is not similarly situated to Wells are contradicted by the testimony of their own employees. First, Kelly described the offense of both Farris and Wells as having engaged in inappropriate conduct. (TR I at 108, 112). Second, Johnson, appellant's human resources director, testified that its workplace rules for servicemen were identical regardless of where they reported to work and who their

supervisor may be. (TR II at 7). Third, Kelly testified that appellant's policies had not changed from February 1999 through the time of trial in March 2001. (TR I at 98). Fourth, appellant completely omits mention that Tigges testified that Hardin withdrew her complaint against Wells. Thus, the workplace rules for Wells and Farris were the same, both were alleged to have violated the rules by "inappropriate conduct," the identity of their supervisor made no difference, the complainant against each stated their desire to withdraw their complaint and yet only Wells, the substantially older worker was fired, while Farris suffered no discipline. Notably, appellant does not argue that Farris' reported conduct was less egregious than that attributed to Wells. The jury could certainly conclude that Farris and Wells were similarly situated in all material respects and also conclude that Wells was subjected to age discrimination. *Meyers, supra.* Accordingly, the trial court should be affirmed.

POINT 2

CONTRARY TO APPELLANT'S CONTENTIONS IN POINT II OF ITS BRIEF, EVIDENCE REGARDING THE FARRIS INCIDENT WAS PROPERLY ADMITTED BY THE TRIAL JUDGE.

The trial court properly admitted the evidence concerning Johnny Farris. Subsequent conduct may prove discriminatory motive in a prior employment decision. Appellant informed the trial court that it had known of Farris for about a year and its claimed prejudice was from the content of his testimony, not his addition to the witness list. Farris repudiated on cross-examination the testimony appellant claims was unfairly prejudicial to it. Accordingly, because there was no abuse of discretion by the trial court in allowing the Farris evidence to be introduced, appellant's arguments for reversal are without merit.

This Court reviews the trial court's admission of the evidence concerning Johnny Farris only on an abuse of discretion standard. *Young v. J.B. Hunt Transp*., 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." *Commonwealth v. English*, Ky., 993 S.W.2d 941, 945 (1999).

The evidence regarding Farris was relevant to proving the pretextual nature of appellant's claims about its workplace rules and how they were applied discriminatorily to Wells. 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). 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 employer's intent at the time of the decision); *Stratton v. Dep't of Aging*, 132 F.3d 869 (2d 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"); *Schanzer v. United Tech. Corp.*, 120 F.Supp.2d 200, 213 (D.Conn. 2000)(admitting evidence of ages of persons hired 14 months after plaintiff's dismissal as probative of age discrimination). Contrary to appellant's contentions and as these cases recognize, the Farris incident is probative of how Wells' age motivated or influenced appellant's decision to terminate his employment.

Bingman v. Natkin & Co., 937 F.2d 553 (10th Cir. 1991), which was cited to the trial court and which approved admission of evidence of a termination one year after the plaintiff's, is consistent with these foregoing evidentiary principles. Appellant's argument is simply without merit and contrary to established authority. The trial judge's decision admitting this evidence was consistent with sound legal principles, as set forth in the foregoing authorities, and therefore was not an abuse of discretion.

Appellant's argument that the trial court abused its discretion by granting Wells' motion to add Farris to the plaintiff's witness list is likewise without merit. First, the Farris evidence was relevant and probative. Second, there was no surprise or unfairness to appellant. Appellant's counsel indicated that it was not the timing of the matter that prejudiced it but the content of the evidence. Moreover, appellant's counsel declined the trial court's invitation to move for a continuance. No mention was made below that doing so would jeopardize the availability of any witnesses. In sum, appellant suffered no surprise from the Farris evidence or his testimony and declined an opportunity for a continuance. Accordingly, the trial judge's decision was neither arbitrary nor unfair but simply one that allowed material evidence to be presented to a jury. There was no error.

Appellant's argument that Farris' testimony that he "got the impression from his supervisor Charles Knuckles that he would be punished if he testified on Wells' behalf" was unduly prejudicial is self-contradictory and without merit. On cross-examination Farris conceded that Knuckles didn't say he would be punished if he got involved in the Wells case, conceded that Knuckles didn't say he would be punished if he showed support for Wells, conceded that Knuckles' warning was to not get accused as was Mr. Wells, conceded that he was not concerned about retaliation from Mr. Knuckles and

conceded that he and Knuckles "get along just fine." (Farris TR II at 91 – 92). The bottom-line on Farris' testimony on this point was that no threat of retaliation had actually been made by Knuckles, that what was said by Knuckles was an admonishment to avoid any accusation as was made against Mr. Wells, and that Farris and Knuckles enjoyed a friendly relationship. This testimony helped appellant rather than hurt it. Indeed, beyond offering a conclusory assertion that it was prejudiced appellant offers nothing. Farris' testimony on this point was so unhelpful to the plaintiff that no mention was made of it in the plaintiff's summation. Accordingly, Farris' testimony that Knuckles gave him friendly advice to stay out of trouble is no grounds for reversal.

POINT 3

CONTRARY TO APPELLANT'S ARGUMENTS IN POINTS III AND IV OF ITS BRIEF, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE ABOUT ALLEGED COMPLAINTS ABOUT WELLS WHICH, ACCORDING TO KELLY, HAD NOTHING TO DO WITH THE DECISION TO TERMINATE WELLS' EMPLOYMENT.

The trial judge properly excluded evidence from Judith Christopher and Wilson Hensley regarding other complaints about Wells. Kelly unequivocally isolated this evidence as irrelevant to appellant's decision to terminate Wells. That testimony undercuts appellant's claim that Christopher's and Hensley's evidence was "inextricably intertwined"; Kelly says otherwise. Indeed, appellant simply ignores the basis by which the evidence was excluded – the clear, unequivocal testimony of its chief executive officer.

Kelly unequivocally testified that Christopher's complaints about Wells were not "credited in any way in terms of contributing to a decision by Columbia Gas to terminate Mr. Wells' employment[.]" (Kelly deposition at 18). Similarly, Kelly testified

unequivocally that nothing other than Hardin's complaint was considered in reaching the decision to terminate Wells. (Kelly deposition at 21). Kelly affirmed this testimony at trial. (Kelly TR I at 109). This evidence, according to Kelly's unequivocal testimony, simply did not bear procedurally or substantively on the decision to terminate Wells' employment.

Kelly's unequivocal testimony wholly undercuts appellant's assertion, *Brief for Appellant at 18*, that Christopher and Hensley were "key participants" in appellant's investigation. Not according to Kelly, appellant's chief executive officer. Likewise, Kelly's unequivocal testimony forecloses appellant's argument that the Christopher and Hensley evidence was "inextricably intertwined with other evidence essential to the case." Again, not according to Kelly, whose testimony indicates that all complaints except Hardin's were put aside and not considered.

Since the Christopher and Hensley evidence was irrelevant to the proceedings against Wells and were not considered in any way, the evidence was irrelevant to the issues in the case. All the evidence could hope to accomplish was to paint Wells as a bad person; in other words, as a person with bad character. Evidence is not admissible to prove someone's bad character in general. *West v. Mason*, 2 Ky.Opin. 316 (1868). "Where the pleadings in an action raise an issue of fact rather than one of character of a party, evidence of that party's character is irrelevant and therefore inadmissible." *Ellis v. Ellis*, Ky.App., 612 S.W.2d 747, 748 (1981). Accordingly and as Kelly's testimony established that Christopher's and Hensley's evidence was irrelevant to any issue in the case, the trial court properly exercised its discretion in excluding such inadmissible character evidence.

POINT 4

APPELLANT'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 CIRCUIT COURT.

Appellant 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, appellant does not even attempt to argue how its proposed instruction could be reconciled with Kentucky's "bare-bones" approach to jury instructions. Furthermore, appellant omits mention that it presented its "business judgment" argument in summation to the jury.

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.

Appellant's trial counsel informed the jury at the beginning of the defense summation that its job was decide only whether Wells had been discriminated against because of his age and that "[i]t's not your job to second-guess Columbia's business decisions in this circumstance." (TAPE 22/8/01/VCR/22 #3 9:06:50 – 9:07:10). The jury considered this contention and, in accordance with its instructions, found that appellant was guilty of age discrimination. Accordingly, appellant presented its "business judgment" argument to the jury but it was rejected. Therefore, there is no merit to appellant's present argument.

POINT 5

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

Appellant's arguments that the jury should not have been instructed on punitive damages offer only conclusory assertions unsupported by the evidence.

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.*

The evidence at trial demonstrated conscious wrongdoing. First, appellant 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, appellant 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 appellant 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 appellant claims 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, appellant's witnesses could not even state what Hardin's complaint was, although they testified that Wells was fired based upon it. Fifth, while appellant urged that what Wells admitted warranted his termination, its own witnesses, most specifically Tigges, testified that it did not. Sixth, appellant has engaged a concerted effort to remove employees fifty-five and over from its work force. Seventh, while appellant 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 appellant 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 appellant.

POINT 6

THE JURY INSTRUCTIONS PROPERLY PRESENTED THE MITIGATION OF DAMAGES ISSUE TO THE JURY AND THE COURT CORRECTLY REJECTED APPELLANT'S 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." (R. 567). This instruction tracks that in 2 Palmore Kentucky Instructions to Juries § 53.01 (2001 Cumulative Supplement).

Appellant's trial counsel informed the jury that "[t]he law imposes on someone a duty to minimize their damages," (TAPE 22/8/01/VCR/22 #3 9:31:44 – 50), and argued that Wells had "completely failed to mitigate his damages." (*Id.* at 9:31:39 – 43). The jury was properly instructed on Wells' duty to mitigate his damages. Appellant's trial counsel argued to the jury that Wells had not diligently endeavored to mitigate his back pay losses. The jury disagreed and found otherwise. Appellant's contention is without merit and provides no basis for reversal.

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. v. Golightly*, 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, appellant's argument is without merit and provides no basis for reversal.

POINT 8

THE JURY'S VERDICT WAS SUSTAINED BY SUFFICIENT EVIDENCE.

The jury disagreed with appellant's view of the evidence. The evidence supporting the verdict has been adequately described above. This Court, as was observed in *Meyers v. Chapman Printing Co.,* "must respect the opinion of the trial judge who heard the evidence" and who overruled both appellant's motions for a directed verdict and for judgment notwithstanding the verdict. 840 S.W.2d at 821.

POINT 9

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH REGARD TO THE ATTORNEY'S FEES, EXPENSES AND COSTS AWARDED APPELLEES.

Appellant makes two arguments in Point X of its brief regarding the fees, costs and expenses awarded Wells pursuant to KRS 344.450. First, appellant argues that Wells provided only one claim compensable under KRS 344.450, and the attorney's fees should be further reduced. Second, appellant argues that the trial court should have conducted or undertaken more extensive or particularized fact-finding. Neither argument has any merit.

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 appellant complains about. Appellant 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.

CONCLUSION

Appellant presents no substantial reason for reversal on any issue. The parties presented the relevant evidence to the jury and it returned a verdict for the plaintiff; appellant disagrees with the jury but offers no reason justifying reversal. Accordingly and for all the foregoing reasons, the judgment of the Fayette Circuit Court should be **affirmed** in its entirety**.**

Respectfully submitted,

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