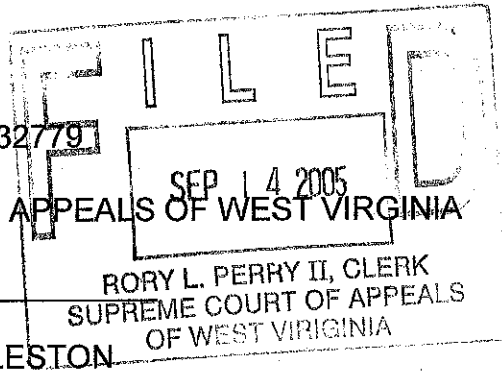


NO. 32779



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

HOLLY D. HELDRETH,

Plaintiff-Appellant,

v.

///

Civil Action No. 02-C-782-3

DR. ALI A. RAHIMIAN and
REGIONAL WOMEN'S HEALTH
CARE, INC.,

Defendants-Appellee.

APPELLEE'S BRIEF

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TABLE OF CASES AND AUTHORITIES RELIED UPON

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KIND OF PROCEEDING

This is an appeal from a decision of the Trial Court by the plaintiff contesting the amount of attorneys' fees awarded by the Circuit Court in a sexual harassment case filed by the plaintiff against her employer.

The plaintiff sought \$43,085.00 in attorneys' fees in addition to 40% of the jury verdict. The Trial Court awarded \$8,617.00 in additional attorneys' fees and \$3,328.87 in expenses.

STATEMENT OF THE FACTS

The plaintiff, a female office employee, had been employed by the defendant, Regional Women's Health Care, Inc., a multi-doctor group as a receptionist and appointment secretary for 16 months. Dr. Rahimian was the only physician who practiced at the Clarksburg office of Regional Women's Health Care, Inc. Two female employees in addition to plaintiff worked in Dr. Rahimian's office.

Dr. Rahimian works one day a week in a clinic in Philippi. As he left the Philippi clinic he attempted to call the Clarksburg office where plaintiff was supposed to be working alone that day and got no answer. His testimony was that he was angry with plaintiff when he got to the office and reprimanded her for not answering the telephone. Plaintiff did become upset over the reprimand and Dr. Rahimian then apologized to her after his anger subsided. Dr. Rahimian denied making any sexual advances but did give plaintiff a Depo-Provera injection in the hip at the plaintiff's request, which required plaintiff to pull down the pants she was wearing.

Plaintiff continued to work for 3 days; never mentioned any incident to her co-employees and the co-employees did not see anything unusual in the plaintiff's

actions even though the plaintiff testified that she continually cried on the few days that she worked thereafter.

Women's Regional Health Care, Inc. dissolved between the date of the alleged incident and the trial of the case.

In addition to other damages the plaintiff sought \$27,205.38 in lost income and the jury awarded her \$6,300.00 in lost income and \$5,000.00 for emotional distress.

The trial lasted three days including jury selection and jury deliberation.

Trial preparation included the usual things such as interrogatories to the parties, depositions of the parties and depositions of 3 witnesses.

The plaintiff's attorney sought to obtain \$175.00 per hour plus his 40% contingent fee.

The plaintiff's attorney's time records upon which he based his claim for fee contains such entries as:

Preparation of witness list and exhibit list – a total of 6.40 hours

Legal research concerning statute of limitations – 1.20 hours

Research concerning whether acceptance of payment of judgment precludes appeal – 1.20 hours

Also included in plaintiff's attorney's time records was at least 30.50 hours for post-trial activity such as attempting to obtain additur to the verdict and preparation for filing for attorneys' fees.

**POINTS AND AUTHORITIES RELIED UPON
AND DISCUSSION OF LAW**

This case is not one that was (1) novel or difficult (2) that required any unusual skill (3) precluded other employment (4) had a time limitation imposed by the

client (5) had any significant result for the plaintiff (6) did not meet the requirement of an undesirable case (7) there was no length of relationship between the plaintiff and her attorney other than employment in this case and (8) the experience and representation of the plaintiff's attorney in this case is unknown to defendant.

See *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986).

The plaintiff in this matter is asserting that the "Trial Court erred in awarding only 20% of the requested attorneys' fees, and abused its discretion in applying a 'ratio' or 'percentage' method." Their basis for this assertion is that the Trial Court failed to examine the reasonableness of the fees according to the factors outlined in Syl. Pt. 4, *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). This, however, is not the case. In the second paragraph of his opinion on page four of the Order Regarding Plaintiff's Motion for Attorney's Fees and Expenses, Judge Matish expressly states that "Considering the factors in Syllabus Point, 4 Pitrolo, (see footnote, page 3) the awarded attorneys' fees are reasonable for this case." In light of this the Trial Court did not abuse its discretion and therefore the plaintiff's argument is without merit.

The plaintiff would also ask this Court to make its determination based upon decisions of the Fourth Circuit. Specifically, the plaintiff cites *Brodziak v. Runyon*, 145 F. 3d 194 (4th Cir. 1998) for the proposition that under federal anti-discrimination law courts have rejected the 'percentage' or 'ratio' methods. Plaintiff fails to point out, however, that the Fourth Circuit Court of Appeals in the case of *Randall v. Prince*

George's County, 302 F. 3d 188 (4th Cir. 2002) explained their decision in *Brodziak* by stating the following:

"The [plaintiffs] contend that, under *Brodziak* a court must focus on whether the successful and unsuccessful claims are related to one another, and that it should not focus solely on the success rate. The plaintiff's observe that their claims arose from the same set of operative facts, and they maintain that the court thereby erred in penalizing them for their success rate. In this contention, the plaintiff's misapprehend our decision in *Brodziak*. **That decision in no way undermined the Court's mandate in *Hensley* that the most critical factor in calculating a reasonable fee award is the degree of success obtained.** In *Brodziak*, we merely reiterated...that a court may not use purely mathematical comparison between the number of claims pressed and the number prevailed upon to calculate a fee award."

The Court went on to hold that where the lower court makes "pertinent observations" regarding the other factors involved in its determination of fee awards, there is no abuse of discretion. Again, on page four of the Circuit Courts Order, Judge Matish, in addition to taking the *Pitrolo* factors into consideration, makes other pertinent observations regarding his decision. For this reason the plaintiff's reasoning is misplaced and her argument is without merit.

While the Human Rights Act provides for the awarding of attorney's fees, it is not mandatory and is subject to limitations of reasonableness and successful litigation. The plaintiff in her Brief cites *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667 (2003) and *Farley v. Zapata Coal Corp.*, 167 W. Va. 630, 281 S.E.2d 238 (1981) for the proposition that "attorney's fees should be awarded to the prevailing plaintiff as a matter of course". Both cases, however, deal with the Wage Payment and Collection Act, and not the West Virginia Human Rights Act. The Court, in these cases, makes

this statement based on what they say is the intent of the Legislature in enacting the Wage Collection Act.

“Both the Wage Payment and Collection Act and our mechanics’ lien statutes are designed to protect the laborer and act as an aid in the collection of compensation wrongfully withheld. Working people should not have to resort to lawsuits to collect wages they have earned. When, however, resort to such action is necessary, the Legislature has said that they are entitled to be made whole by the payment of wages, liquidated damages and costs, including attorney fees. If the laborer were required to pay attorney fees out of an award intended to compensate him for services performed, the policy of these statutes would be frustrated.”

Hollen v. Hathaway Electric, Inc., 213 W. Va. 667, 584 S.E.2d 523 (2003).

Therefore, these cases are easily distinguishable from the case at bar. In *Hollen* and *Farley*, the plaintiffs were suing to recover withheld wages, a situation that would clearly frustrate the Legislative intent. In the instant case the plaintiff is not being compensated for services performed and therefore, no frustration.

As a general rule each litigant bears his or her own attorney’s fees absent a contrary rule of Court or express statutory contractual authority for reimbursement. *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208 (1999).

Defendant would submit that plaintiff’s attorney had a contingent fee agreement with the plaintiff and never intended to charge her \$43,085.00 plus expenses if the case was lost.

However, the West Virginia Human Rights Act does provide for awarding of reasonable attorney’s fees. W. Va. Code § 5-11-13. The plaintiff cites *Bishop Coal Co. v. Salyers, Inc.*, 181 W. Va. 71, 380 S.E.2d 238 (2000) for the proposition that the attorney’s fees allowed were substantially more than the award. However, it should be pointed out that this was a case before the Human Rights Commission where the Court

held that the Human Rights Commission was limited in the amount of damages it could award and had no authority to award damages other than lost wages; that awards of mental anguish, pain and suffering, humiliation, aggravation or inconvenience are issues constitutionally entrusted to juries. In the case at bar, the jury had the opportunity to make any reasonable award for these damages that it chose. Consequently, it would be more appropriate to allow attorney's fees in a forum where the claimant's damages are limited rather than in cases tried before a jury, where the jury presumably took into consideration in its award that the plaintiff's lawyer would get a percentage of the award.

A losing defendant cannot be saddled with attorney's fees that are unreasonably large. When a complaint sets forth distinct causes of action so that the facts supporting one are entirely different from the facts supporting another, and then fails to prevail on one or more such distinct causes of action... attorney's fees for the unsuccessful causes of action should not be awarded. *Bishop Coal v. Slayers, Inc.*, *Supra*

It is submitted that the plaintiff did not prevail on the count of "quid pro quo", "Assault and Battery" and "Wrongful Discharge under Harless".

Plaintiff cites *Chevy Chase Bank v. McCamont*, 204 W. Va. 295, 512 S.E.2d 217 (1998) for the proposition that if attorney's fees are awarded that the Court must make findings to support the reasonableness of the fee.

The *Chevy Chase Bank* case was brought under the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101. In that case the Trial Court did not award attorney's fees and the Supreme Court upheld the Trial Court and


held that where no attorney's fees are allowed the Trial Court is not required to make findings of why fees were not awarded.

It is therefore submitted that the Trial Court was plainly right and did not err in its award of attorney's fees or abuse its discretion in calculating that award.

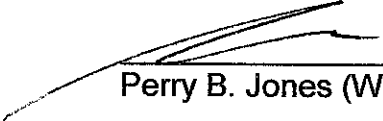
WHEREFORE, the defendant respectfully asks that the trial court's decision be affirmed.

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By:



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REGIONAL WOMEN'S HEALTH
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Defendants-Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2005, I served the foregoing Appellee's Brief upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed to said counsel of record at his respective address:

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