

No. CASE #: 73559-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Ava Levine, Respondent

v.

Creative Change Counseling Inc., Appellant

King County No. 12-2-20209-5 SEA

BEFORE THE HONORABLE THERESA DOYLE

BRIEF OF APPELLANT

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STAUTES, RULES AND OTHERS

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I. ASSIGNMENTS OF ERROR

1. Reversal is required because the evidence does not support a claim of discrimination.

2. Reversal is required because the evidence does not support the damages award given by the trial court

3. Reversal is required because the Plaintiff was not entitled to general damages because she failed to make a request for general damages in her complaint.

4. Reversal is required because the Plaintiff was not entitled to special damages because she failed to make a request for special damages in her complaint.

5. Reversal is required because there are clearly superseding causes that caused the Plaintiff to suffer damages.

Statement of the Case

The Plaintiff alleged that all the Defendants violated the Washington Law Against Discrimination (WLAD) RCW 49.60 et. seq. by discriminating against her because of her sexual orientation and religion. She also claimed discrimination due to a disability under WLAD and

asserted Whistleblower Protection Under the RCW 43.70.075. The trial Court held that the Plaintiff did not prove by a preponderance of the evidence her claims for discrimination due to her disability, her religion and her whistleblower/retaliation claim. See Memorandum decision. The trial Court did find that the Defendants Creative Change Counseling Center (CCCC), Forest Woodley and Sylvia Woodley discriminated against Ava Levine because of her sexual orientation because they failed to reinstate her into her supervisory position after she sent a letter stating she understood the release of information laws under Health Insurance Portability and Accountability Act (HIPAA). The trial Court dismissed the claims against Janet White and Dan Owen who were board members of CCCC. See Judge Doyle's Memorandum decision.

However, there was no proof offered that Ms. Ava Levine ever fulfilled the other conditions of her demotion as set forth in the disciplinary letter dated July 16, 2011. See CP 14 exhibit 6. When Ms. Levine was terminated from CCCC, she was given two weeks severance pay.

After her employment ended with CCCC, Ms. Levine then obtain employment with Valley Cities in February 2012 and in September 2012 she was terminated from her employment at Valley Cities.

III. STATEMENT OF ISSUE

1 Whether this Court should overturn the trial court's verdict because the evidence does not support a cause of action of discrimination?

2. Whether this Court should overturn the trial court's verdict because the evidence does not support the damages award given by the trial court?

3. Whether this Court should overturn the trial court's verdict because the Plaintiff was not entitled to general damages because she failed to make a request for general damages in her complaint?

4. Whether this Court should overturn the trial court's verdict because the Plaintiff was not entitled to special damages because she failed to make a request for special damages in her complaint?

IV. Authority and Argument

A. Washington Law Against Discrimination

1. Claims Under WLAD

Plaintiff did not prove her case for discrimination.

When analyzing WLAD discrimination claims, Washington courts apply the burden-shifting protocol developed by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). Under this protocol, the Plaintiff must first present a prima facie case of discrimination. If the Plaintiff does this, a “legally mandatory, rebuttable presumption’ of discrimination temporarily takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation” for its actions. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001) (quoting *Tex. Dep’t of Comty. Affairs v. Burdine*, 450 U.S. 248, 254, n. 7, 101 S. Ct. 1089, 67 L.Ed. 207 (1981)).

The trial Court in this case held that the plaintiff’s initial demotion was not a pretext but a legitimate interpretation of the HIPAA and therefore the court found

that the demotion was appropriate. See Judge Doyle's Memorandum decision at p. 5. However, the trial Court went on to hold that Ms. Levine should have been reinstated after her letter of July 26, 2011. However, the Court states in their decision that Mr. Woodley testified that Ms. Levine refused to do any work after her demotion. See Judge Doyle's Memorandum decision at p. 5. The Defendants gave Ms. Levine time off until August 8, 2011 to evaluate her position with the organization and tell them what her role she would like to play within the organization and when she returned she stated that she did not know and as such they terminated her employment at that point. See CP 15 Exhibit 15 Termination letter. The letter states that Ms. Levine was given two weeks severance pay, something that is not required by law.

The Court erred in finding that the defendants continued the demotion after the July 26, 2011 letter but she was terminated because she did not see a role for her with the organization. First, she only states that she read and understood the release of information laws under HIPAA. The letter does not state that she reviewed and

understood the King County Managed Care Policy and Procedure as she was directed. See CP 14 Exhibit 6. Nor does the July 26, 2011 letter demonstrate that she understood the law as set forth under HIPAA. There is nothing noted in the record that occurred from the July 26, 2011 to the date of her termination that turned what the Court viewed as a legitimate employment decision to one that was later determined to be pre-textual. Without that evidence, the trial Court cannot point to that would change a legitimate demotion into an discriminatory act. Thus, the trial Court erred and therefore the verdict finding discrimination should be overturned.

B. There was no Proof of Emotional Damages

Plaintiff and Shauna Levine scant offered testimony regarding the symptoms the Plaintiff was suffering from however they stated that they were having problems in their relations and Ava Levine was also having other problems. Their testimony was not sufficient proof to support a claim for emotional distress. Under RCW 49.60, proof of discrimination results in a finding of liability. The plaintiff, once having proved discrimination, is required to offer

proof of actual anguish or emotional distress in order to have those damages included in recoverable costs pursuant to RCW 49.60. See *Dean v. Metropolitan Seattle*, 104 Wn.2d 627,641, 708 P.2d 393 (Wash 1985). As set forth above, we do not believe there is proof of discrimination and in addition, there was no proof offered by the Plaintiff to show actual anguish or emotional distress. Even if it is shown that they offered proof of emotional distress, that emotional injury would have to have ended once the Plaintiff started working for Valley Cities. It is without question that the Plaintiff must have endured emotional distress and anguish as a result of her termination from Valley Cities in September 2012; after which she never was able to overcome this distress and anguish and never returned to the work place due to the stress from her job at Valley Cities. Also, a year later she was required to be involuntarily committed to Harborview for her mental distress and anguish. This was not true after her employment ended with CCCC and it cannot be said that her employment at CCCC caused her mental anguish and thus the verdict should be overturned.

C. Evidence of Special and General Damages should have been excluded.

Plaintiff failed to plead for special damages in her amended complaint according to CR 9(g) and therefore any evidence about special damages must be excluded. General damages" are those which are the natural and necessary result of the wrongful act or omission asserted as the basis for liability. They are presumed by or implied in law to have resulted from the injury. " *Jensen v. Torr*, 44 Wn. App. 207, 214, 721 P.2d 992 (Wash. App. Div. 1 1986). The prayer for damages was not specific enough to enable the Plaintiff to introduce evidence of pain and suffering at trial because the Plaintiff failed to make such a prayer for general damages. See *Jensen* at 414. Therefore, any evidence of pain and suffering or general damages should have been excluded. However, in the trial Court's decision, the Court made an award of \$200,000.00 in emotional distress damages which, are general damages. Because the Plaintiff failed to request these damages in her pleading she should not have been awarded these damages. Therefore

the verdict must be overturned as it relates to general and special damages.

D. Proximate Casue

Ms. Ava Levine's employment with CCCC was not the proximate cause of her emotional distress. Ms. Ava Levine's employment ended with CCCC on August 8, 2011. See Judge Doyle's Memorandum decision at p. 7. She was subsequently employed at Valley Cities on February 15, 2012 and was terminated from that position with Valley Cities in September 2012. See Judge Doyle's Memorandum decision at p. 7-8. While Ms. Ava Levine states that she was experiencing anxiety, insomnia, stress, and inability to focus after her termination from CCCC, she did not provide any medical evidence to support a diagnosis or treatment of these conditions. The only "medical documentation" that she provided in support of her case was documents relating to her involuntary commitment proceeding on September 2, 2013. See CP 18 Exhibits 57-58. This occurred over two years after her employment ended with CCCC. Prior to her involuntary commitment, she was fired from her job with Valley Cities

in September 2012. Just one year prior to her involuntary commitment.

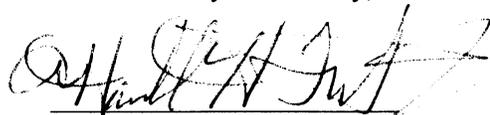
Proximate cause is a cause which in a natural and continuous sequence, unbroken by a new, independent cause, produces the event, and without which that event would not have occurred. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 87 P.3d 757, 763-64 (Wash. 2004). Whether an act may be considered a superseding intervening cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant. *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 442, 739 P.2d 1177 (1987). It can not be said that CCCC could reasonably have foreseen that Ms. Ava Levine would be terminated from her newly found position of employment with Valley Cities, for a matter totally unrelated to her employment at CCCC. Her termination from Valley Cities could not have been and was not in any way, reasonably foreseeable by CCCC and it has to be classified as a superseding intervening cause that was sufficient to relieve CCCC, Mr. Woodley and Mrs.

Woodley of any liability for Ms. Ava Levine's mental distress and anguish condition which appears to have occurred as a result of her termination from her position with Valley Cities. Therefore, the trial Court's verdict must be overturned.

V. CONCLUSION

For the reasons stated above, this Court must overturn the trial Court's decision by finding there was no discrimination and setting aside the trial Court's verdict and award.

Respectfully Submitted this 25th day of January,
2016.

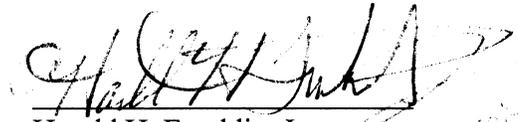

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CERTIFICATE OF SERVICE

I, Harold H. Franklin, Jr., certify under penalty of perjury of the laws of the State of Washington, that on January 25, 2016, I delivered and/or mailed to Seth Rosenberg of The Rosenberg Law Group at 500 Union Street, 500 Union St Ste 510 Seattle, WA 98101-4068 and to the Mark Walters of Reed Walters Pruet, LLC at 10900 NE 4th Street, Suite 2300, Bellevue, WA 98004, the following document:

1. Appellants' Brief

Dated this 25th day of January, 2016 at Renton,
Washington.


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