Circuit Court for Baltimore City
Case No. 24-C-13-005664

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1717

September Term, 2016

BALTIMORE CITY COMMUNITY COLLEGE

v.

MARCELLUS JACKSON

Leahy,
Shaw Geter,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 8, 2019

Before us in this appeal is the question of whether a former employee of an executive branch agency may sustain claims for wrongful discharge and hostile work environment based on his reporting of alleged illegal conduct, when he did not pursue the administrative remedies set forth in the Maryland Whistleblower Law[1], and after his whistle-blower claims were dismissed.

The Circuit Court for Baltimore City granted summary judgment in favor of Baltimore City Community College (BCCC) on the whistle-blower claims because the employee, Marcellus Jackson, failed to pursue the statutory remedies. Nonetheless, the court permitted the jury to consider Jackson's claims for hostile work environment and abusive discharge, based on the same underlying conduct – the report by Jackson to an internal auditor of suspected criminal conduct. Following a jury verdict, the Circuit Court for Baltimore City entered judgment against appellant BCCC, in favor of appellee Jackson, in the amount of $1,200,000.

Also implicated in this appeal is the question of whether the court erred in permitting the jury to consider, and award, punitive damages against BCCC, which asserts its status as a state agency and entitlement to sovereign immunity from punitive

[1] Md. Code (1993, 2015 Repl. Vol., 2017 Supp.), §§ 5-301, *et seq*. of the State Personnel and Pensions Article (SPP).

damages. Also at issue is whether BCCC can be liable for compensatory damages that exceed the limitations of the Maryland Tort Claims Act.[2]

In this appeal, BCCC presents three questions for our consideration which we have recast for clarity:

1. Did the trial court err in submitting Jackson's wrongful discharge and hostile work environment claims to the jury after having dismissed his whistle-blower claim?

2. Did the trial court err in awarding punitive damages against BCCC, a state agency protected by sovereign immunity?

3. Were the compensatory damage awards duplicative?

We answer the first question in the affirmative; hence, we need not reach questions two and three.

BACKGROUND

Jackson was hired by BCCC in January of 2012 as the Director of Workforce Development/Community Education Services, with the charge of creation of new business contacts for the College. He was an exempt at-will employee, serving at the pleasure of BCCC's president. On June 8, 2012, Jackson's employment was terminated. In September 2013, Jackson filed suit, initially naming as defendants: BCCC; Carolane Williams, the president and agent of BCCC; Lucious Anderson, vice president of the BCCC business education division; and Ida Sass, associate director of the BCCC

[2] Md. Code (1984, 2014 Repl. Vol.), §§ 12-101, *et. seq.* of the State Government Article (SG).

workforce development and community education department. His claims included: discrimination based on race, sex, and age; hostile work environment; respondeat superior; wrongful termination; civil conspiracy; and tortious interference with contractual relations. The complaint was subsequently amended five times, ultimately to include additional claims for violations of retaliation and whistle-blower statutes.

After dismissing the action as to the three individual defendants and the claims that pertained only to them, the circuit court granted partial summary judgment in favor of BCCC, leaving only the hostile work environment claim[3] and the claim for wrongful termination, which had been brought pursuant to the Whistleblower statute.[4]

The jury returned a verdict in favor of Jackson, finding that BCCC created a hostile work environment and wrongfully terminated him as a result of his having reported suspected criminal activity. The circuit court entered judgment against appellant, BCCC, in favor of appellee, Jackson, in the amount of $1,200,000, of which $800,000 were punitive damages. BCCC's subsequent motions for judgment

[3] Although Jackson cites no legal authority under Count 1 for the hostile work environment claim, he does include the relevant legal authority in the preliminary pages of the complaint. The hostile work environment claim is governed by the State employment discrimination statute, Md. Code (1984, 2014 Repl. Vol.), § 20-606 of the State Government Article (SG).

[4] Md. Code (1993, 2015 Repl. Vol., 2017 Supp.), §§ 5-301, *et seq*., of the State Personnel and Pensions Article (SPP).

notwithstanding the verdict and for a new trial were denied, resulting in the filing of this appeal.[5]

DISCUSSION

Standard of Review

We review the circuit court's interpretation and application of Maryland statutory and case law under a *de novo* standard. *Baltimore County v. Aecom Servs., Inc.*, 200 Md. App. 380, 397 (2011). Denial of a motion JNOV made following a jury verdict is reviewed to determine the legal sufficiency of the evidence to generate a jury question. *Prince George's Cty. v. Morales*, 230 Md. App. 699, 711-12 (2016).

"'A motion for judgment notwithstanding the verdict [JNOV] under Rule 2-532 tests the legal sufficiency of the evidence.'" *Francis v. Johnson*, 219 Md. App. 531, 563 (2014) (quoting *Gallagher v. H.V. Pierhomes, LLC*, 182 Md. App. 94, 101 (2008)). "'[A] party is entitled to judgment notwithstanding the verdict … when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense.'" *Francis*, 219 Md. App. at 563 (quoting *Elste v. ISG Sparrows Point, LLC*, 188 Md. App. 634, 648 (2009)).

Appellant's Motion to Dismiss Appeal

Preliminarily, we consider Jackson's argument that, because BCCC filed a motion to revise the judgment pursuant to Rule 2-535 after it had filed its notice of appeal, and

[5] BCCC also moved to revise the judgment to correct the duplicative award of compensatory damages. At the time of briefing of this appeal, that motion was pending before the circuit court.

with the disposition of that motion still pending before the circuit court, this Court should dismiss the appeal as "nugatory and premature."

However, this Court has held that:

> Typically, the mere filing of an appeal from the judgment does not strip the trial court of its revisory power. When a party has filed a Md. Rule 2-535 (a) revisory motion more than ten days after the entry of the judgment but within the thirty-day deadline for doing so and also has filed a notice of appeal, he will not [be] put to an immediate election as between the motion and the appeal.

Armiger Volunteer Fire Co. v. Woomer, 123 Md. App. 580, 594-95 (1998) (internal citations and quotations omitted).

Jackson's motion to dismiss the appeal is without merit.

The Whistleblower Claim - Hostile Work Environment

Jackson's complaint, as amended, was primarily filed under the statutory authority of Maryland's anti-discrimination law[6] and the Maryland Whistleblower Act.[7] The court granted BCCC's motion for summary judgment as to the whistleblower claim. State Government § 20-606(a) prohibits employers from discriminating against employees based on, inter alia, their race, sex, or age. Whereas, SPP § 5-305, as relevant to this appeal, prohibits an employer or supervisor from retaliating against an employee for making a protected disclosure.

[6] SG § 20-606.

[7] SPP §§ 5-301, *et seq*.

State Government § 20-606 makes clear that the conduct prohibited by an employer is limited to discrimination based on "the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment[.]" SG § 20-606(a)(1)(ii). The circuit court granted judgment in favor of BCCC on Jackson's claim of age discrimination. The other two claims – discrimination based on his race and sex – were submitted to the jury.

The jury rejected Jackson's race and sex discrimination claims but found that BCCC had subjected him to a hostile work environment and wrongfully terminated him based on his "attempt to address criminal activity/scheme within his unit."[8]

[8] Here, we set out the verdict sheet submitted to the jury, and the jury's answers to each question:

1. Do you find by a preponderance of the evidence that the Baltimore City Community College created an [sic] hostile Work environment toward Mr. Marcellus Jackson based on:

    a. Race **No**
    b. Gender **No**
    c. His attempt to address criminal activity/scheme within his unit: **Yes**

* * *

3. Do you find by a preponderance of the evidence that the Baltimore City Community College wrongfully terminated Mr. Marcellus Jackson based on:

    a. Race **No**
    b. Gender **No**
    c. His attempt to address criminal activity/scheme within his unit: **Yes**

The statutory whistleblower language provides that "[a]n employee in the State Personnel Management System who seeks relief for a violation of § 5-305 of this subtitle may elect to file: (1) a complaint under § 5-309 of this subtitle; or (2) a grievance under Title 12 of this article." SPP § 5-307(a). Because Jackson did not avail himself of the administrative remedies provided by § 5-107(a), his whistleblower claims were dismissed by a grant of partial summary judgment. Jackson neither appealed nor cross-appealed from the circuit court's entry of summary judgment.

Application of the statute is limited "to all employees and State employees who are applicants for positions in the Executive Branch of State government, including a unit with an independent personnel system." SPP § 5-301. *See also Montgomery Cty. Pub. Sch. v. Donlon*, 233 Md. App. 646, 669 (2017) (concluding "as a matter of statutory construction, the [whistle-blower statute] does not apply to public school teachers employed by county boards of education because they are not employees of the executive branch" (footnote omitted)).

Notwithstanding the limitations of whistleblower claims under the statute, the Court of Appeals has "determine[d] that 'the Legislature had created a cognizable statutory interest in the ability to report crimes or testify at an official proceeding without fear of retaliation' sufficient to sustain a wrongful discharge claim, but only if the employee had reported to an appropriate law enforcement or judicial officer." *Parks v. Alpharma, Inc.*, 421 Md. 59, 80 (2011) (quoting *Wholey v. Sears*, 370 Md. 38, 59 (2002)). *Accord Lawson v. Bowie State Univ.*, 421 Md. 245, 257 (2011) (holding that

"the protected disclosure must 'evidence an intent to raise an issue with a higher authority who is in a position to correct the alleged wrongdoing'" (quoting *Dep't of Natural Resources v. Heller*, 391 Md. 148, 170 (2006))). Jackson made no such report to a law enforcement officer or judicial officer, or to a higher authority. He reported the alleged criminal activity to the BCCC's internal auditor, Lyllis M. Green, not to an officer with authority to "correct the alleged wrongdoing." *Lawson*, 421 Md. at 257 (quoting *Heller*, 391 Md. at 170). Green's responsibility as the internal auditor was limited to investigations and reporting to the management at BCCC for guidance as to further action to be taken, if any.

At trial, Green explained her job responsibilities as being "responsible for: reviewing various processes; identifying internal control weaknesses, or any areas that would cause an organization to fall below the desired result; make an assessment; report the information; and work with management to help resolve or mitigate the weakness." Further, that she reports on "irregularities within the organization," and "although [her] audits are internal and they are for the management at [BCCC], the report itself can be reviewed by the external auditors, including the financial auditors that come every year, and the legislative auditors that come every three years."

She also described for the court her exchange with Jackson concerning the allegations of criminal activity:

> I had a conversation with Mr. Jackson. I don't believe - - you could call it a formal meeting, but I was physically located in BCED (Business and Continuing Education Division). And he became aware of a situation

> that he wanted to share with me; and we did have a conversation about that, yes.
>
> * * *
>
> Yes, Mr. Jackson had a concern that, as he put it, the College was in the certificate-selling business. That certificates were being issued for programs in BCED without the students having completed the courses.
>
> * * *
>
> Yes. It was a problem, but we had already identified it earlier on. However, I was appreciative of what he shared with me.
>
> * * *
>
> Well, it would just lead us down another path to get substantiation and evidence. Because I can't really, in good conscious, write a report about hearsay. I have to substantiate it.
>
> I have to get the reports. I have to do the review. And I have to make an assessment. And based on the assessment, if the statements previously made are correct, then, yes, that could become a part of the report.

It is clear from Green's testimony, she was neither a law enforcement officer or a judicial officer and could not correct any wrongdoing. As such, Jackson's report to her was not a protected disclosure under the whistleblower statute.

Finally, and more concisely, the question presented is whether, Jackson's whistleblower claims having been dismissed, the same underlying allegations may be offered to support a jury verdict based on creation of a hostile work place discrimination. We hold that they may not. The court erred in allowing the jury to consider the alleged whistleblower conduct in resolving the claims for hostile work environment by including option "c" on the verdict sheet for its deliberation.

Wrongful Termination

Maryland law permits an employer to discharge an at-will employee without cause. *Adler v. Am. Standard Corp*., 291 Md. 31, 35 (1981) (citing *State Comm'n on Human Relations v. Amecom Div. of Litton Sys., Inc.*, 278 Md. 120 (1976)).[9] The tort of wrongful discharge arose to "provide a remedy for an otherwise unremedied violation of public policy." *Wholey*, 370 Md. at 52. The General Assembly has created a comprehensive statutory process for the protection of employees from employers' adverse actions when they report suspected criminal activity. *See* SPP §§ 5-301, *et seq.*

Analysis of this issue is best guided by the recent decision by the Court of Appeals in *Yuan v. Johns Hopkins Univ*., 452 Md. 436 (2017). Therein, the Court of Appeals explained that "[f]or an at-will employee to establish wrongful termination 'the employee must be discharged, the basis for the employee's discharge must violate some clear mandate of public policy, and there must be a nexus between the employee's conduct and the employer's decision to fire the employee.'" 452 Md. at 451 (quoting *Wholey*, 370 Md. at 50–51). In *Yuan*, a researcher formerly employed by Johns Hopkins University filed suit against the university alleging wrongful discharge for reporting a violation by another researcher of a federal regulation prohibiting research misconduct. 452 Md. at 446. In its analysis, the Court determined that "[a]n employee fired for retaliation for reporting a violation of a state or federal law is alone insufficient to establish a valid wrongful discharge claim based on public policy." *Id*. at 451-52. For support, the Court

[9] An exception to the rule exists where such discharge is barred by a clear mandate of public policy. *See Adler*, 291 Md. at 35-36. No such policy has been put forward in this appeal.

relied on *Parks v. Alpharma, Inc*., *supra*, and *Makovi v. Sherwin-Williams Co*., 316 Md. 603 (1989).

The *Parks* Court explained the need for a narrow application of the public policy exception for at-will terminations:

> "If a court were to announce that the FDA's regulations were all sources of Maryland public policy, an employee could immunize himself against adverse employment action simply by reporting an alleged violation of any regulation. And the narrow wrongful discharge exception, carefully carved out by the Maryland courts, would then supplant the general at will employment rule."

Yuan, 452 Md. at 452 (emphasis omitted) (quoting *Parks*, 421 Md. at 86-87). Thus, the Court determined that "[a] court must look to the 'accepted purpose behind recognizing the tort in the first place: to provide a remedy for an otherwise unremedied violation of policy.'" *Id*. (quoting *Parks*, 421 Md. at 79).

In its analysis, the Court also relied on the principles it had previously established in *Makovi v. Sherwin-Williams Co*., *supra*. In *Makovi*, the Court recognized the purpose of the right to a wrongful discharge cause of action and the importance of understanding that purpose when determining if a violation has occurred. In its discussion of *Makovi*, the *Yuan* Court acknowledged that

> "the generally accepted reason for recognizing the tort" of wrongful discharge is "vindicating an otherwise civilly unremedied public policy violation." On the other hand, where a statute already has its own remedy, "allowing full tort damages to be claimed in the name of vindicating the statutory public policy goals upsets the balance between right and remedy struck by the Legislature in establishing the very policy relied upon."

Yuan, 452 Md. at 453 (quoting *Makovi*, 316 Md. at 626).

In *Makovi*, the Court determined that the petitioner was not entitled to pursue a cause of action for wrongful termination where there was an adequate statutory remedy available.

In sum, Jackson's claims based upon his whistleblowing activity were not before the jury and are not before this Court. The record supports the correctness of the trial court in its grant of summary judgment on that count, from which Jackson has sought no further relief. Because those claims are now absent as the basis of his theory of recovery, and because there exists no "otherwise civilly unremedied public policy violation" – the General Assembly having provided such in its enactment of SSP §§ 5-301, *et seq.* – we hold that it was error for the trial court to permit the jury to speculate on the whistleblower conduct as a basis for a finding of hostile workplace conduct or for a finding of wrongful termination.

Further, the record does not support a nexus between Jackson's conduct and BCCC's decision to fire him. As Green's testimony established, the allegations of criminal conduct had already been reported and Jackson's shared "concern" of the matter, merely offered support to substantiate the initial report.

Because the conduct complained of that might have been remedied under the Maryland Whistleblower Law, but was not, does not include the necessary elements to support a claim of wrongful termination, we hold that the evidence was legally insufficient to generate a jury question.

Having concluded, on the lack of sufficiency of the evidence grounds, that the verdict cannot stand, we need not discuss the damages question presented by appellant and governmental immunity questions.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; COSTS ASSESSED TO APPELLEE.