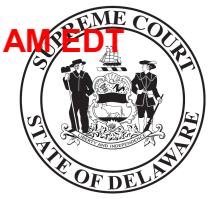
EFiled: Aug 02 2013 11:41AM EDT
Filing ID 53366128
Case Number 598,2012



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANA MILLER,	)	
	)	No. 598, 2012
Plaintiff Below	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF DELAWARE	)	
DEPARTMENT OF PUBLIC SAFETY	)	
	)	
Defendants Below	)	
Appellees.	)	

APPEAL FROM AN ADVERSE JURY VERDICT RESULTING FROM IMPROPER JURY INSTRUCTIONS AND FROM AN OPINION AND ORDER ENTERED IN THE SUPERIOR COURT OF THE STATE OF DELAWARE AT C. A. NO. 08C-07-231

APPELLANT DIANA MILLER'S REPLY BRIEF

JEFFREY K. MARTIN, ESQUIRE (#2407)
MARTIN & ASSOCIATES, P.A.
1508 Pennsylvania Avenue, 1-C Wilmington, DE 19806
302-777-4680 | jmartin@jkmartinlaw.com | *Attorney for Appellant*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

Federal Court Opinions

Delaware State Opinions

Rules

I. STATEMENT OF FACTS[1]

Plaintiff takes issue with Defendant's portrayals of Plaintiff and Mr. John Laird in its Statement of Facts. Facts contrary to the State's depiction of the two principal actors and the conduct attributed to them, omitted in the State's brief, are presented below:

The State represented that Plaintiff initiated sexual intercourse with Mr. Laird while at her home. SAB @ 10[2]. Plaintiff testified that she did not initiate sexual relations. A207.

The State represented that the trip to Mexico was "plaintiff's idea." SAB @ 8. This statement is directly contrary to the trial court's recitation of the facts adduced at trial when the court stated, "Cissy Laird brought up the idea of a girls' trip to Mexico." A642. Plaintiff testified that it was Cissy Laird's idea to go to Mexico when she told Ms. Miller, "I love to travel and, you know, you and I can go and have a girls trip." A181, 187.

---

[1] Plaintiff's presentation of facts herein was made necessary by Defendant's assertion that it presented facts "in the light most favorable to the State as the prevailing party at trial." The obvious attempt was to smear Plaintiff's character as was done in the summary judgment briefing and was admonished by the trial court. *Miller v. State*, 2011 Del. LEXIS 160 @ 24 (Del. Super. April 6, 2011). Plaintiff recognizes that the Court may view the facts in the light most favorable to the State but believes that, in accordance with Delaware briefing standards, that the facts must be fairly presented based upon the evidence adduced at trial.

[2] State's Answering Brief at page 10. Hereafter, SAB will be used to refer to the State's Answering Brief.

The State cited Cissy Laird's testimony that at no time did she tell Plaintiff that Plaintiff could have sex with John Laird. SAB @ 8. Plaintiff testified that Cissy Laird insisted that her husband sleep in Plaintiff's bed at Plaintiff's home and that Plaintiff take a bath with her husband. A204, 206. In Mexico, Cissy Laird chastised Plaintiff for not "living up to [Plaintiff's] end of the bargain and I [Plaintiff] was to go upstairs and I was to have sex with him."A240.

The State cited only Mr. Laird's testimony that he did not have sex with Plaintiff in Mexico. SAB @ 10. This testimony was directly refuted by Plaintiff's testimony wherein she stated that they had sexual relations in Mexico. A239.

The State was critical of Plaintiff's use and frequency of text messages without referencing the text messages that Mr. Laird sent to Ms. Miller, either by their impropriety (the impropriety of the text messages was acknowledged by John Laird) or their sexually explicit content. A brief sampling of Mr. Laird's text messages sent to Ms. Miller is as follows:

> "Will avoid sex until you are ready."
>
> "Good, I want you."
>
> "Thanks, I want you for dessert."A234.

While Plaintiff submits that these factual statements (and other factually incomplete statements offered by the State) may not be relevant to the issues in this appeal, Plaintiff was compelled to respond to this continued character assassination

which directly contravened Judge Herlihy's specific admonition set forth in the summary judgment opinion. *Miller* @ 24. Despite the State's attempts to vilify Plaintiff's conduct and thereby implying that John Laird was a victim, there was an ample factual basis for the court to characterize John Laird's conduct as "reprehensible." A649.

II. ARGUMENT

A: THE LOWER COURT'S SEXUAL HARASSMENT INSTRUCTION WAS FATALLY FLAWED BECAUSE IT CONTAINED THE ELEMENT OF ADVERSE TANGIBLE EMPLOYMENT ACTION.

In support of this argument, Plaintiff asserts three irrefutable statements:

1. **Plaintiff did not present any evidence of adverse tangible employment action as this was never an issue in this case.** The trial court so held and the parties both agreed that this issue was never in the case below. A419, 422.
2. **The model jury instruction used by the court did not apply to *quid pro quo* harassment cases wherein there is no evidence of adverse tangible employment action.** Despite the State's arguments to the contrary, the Third Circuit Model Rules specifically provide that, "Instruction 5.1.3 [the form used by the trial court for the final jury instruction on the elements for Plaintiff's harassment claim] is designed for use in cases that involve a tangible employment action." B559.
3. **A *quid pro quo* harassment claim need not involve evidence of an adverse tangible employment action.** *Id.* The argument put forth by the State is that adverse tangible employment action

("ATEA") is a necessary element of Plaintiff's harassment claim. This argument is belied by the Third Circuit Model Jury Instructions, the same instructions that the State set forth as the appropriate standard for this case. B559.

In referring to these instructions, the State misconstrued the Comments under the model instruction to conclude that ATEA is a necessary element of the *prima facie* case of sexual harassment. SAB @ 17. The Comments do, however, state that questions remain as to the proper analysis of a harassment claim such as the instant claim wherein there was submission to sexual advances without ATEA. B560.

Plaintiff's pretrial submission of jury instructions was derived from the lower court's summary judgment opinion that was issued on April 6, 2011. *Miller* @ 2. While concluding that Plaintiff's *quid pro quo* harassment claim should not be dismissed, the court set forth the standard by which this claim would be evaluated at the time of trial. Thus, Plaintiff's proffer of the appropriate jury instruction was the law of the case. The court set forth various alternative terms as the test for harassment:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes *quid pro quo* sexual harassment when "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is

> used as the basis for employment decisions affecting such individual.
>
> Under this test, the consequences for an unfavorable response by the harassed to the sexual advances must be sufficiently severe as to **alter the harassed employee's** "compensation, terms, **conditions**, or privileges **of employment**,"[3] **or** to "deprive or tend to deprive [him or her] of employment opportunities or otherwise **adversely affect his [or her] status as an employee** (emphasis supplied)."[4] Not every insult, offensive or negative comment amounts to a Title VII claim. Additionally, objectionable conduct attributable to an employer is not always sufficient to alter an employee's terms, conditions, or privileges of employment and is thus not always sufficient to violate Title VII.[5] However, the consequences need not be so severe that they amount to economic or tangible discrimination. *Id*.

From the court's standards set forth *supra* and consistent with the facts of the case, Plaintiff fashioned the third element of the *prima facie* case as, "Captain Laird's sexual harassment altered the condition of Miss Miller's employment or adversely affected her status as an employee." The State opposed this proposed instruction because it did not include ATEA.

The court in its April 2011 summary judgment opinion makes no mention of an ATEA element for the *quid pro quo* sexual harassment. Indeed, the court concluded that, "the consequences [of *quid pro quo* harassment] need not be so severe that they amount to economic or tangible discrimination." This dramatic change in the standard for sexual harassment as evidenced by the final jury instruction certainly could not have been foretold by the court's earlier opinion.

---

[3] *Robinson v. City of Pittsburgh*, 120 F.3d 1286 @ 1296; 42 U.S.C. 2000e-2(a)(1).
[4] *Robinson*, 120 F.3d at 1296; 42 U.S.C. 2000e-2(a)(2).
[5] *Robinson*, 120 F.3d at 1296.

Finally, both the lower court and the State equated Plaintiff's proposed (and rejected as final) jury instruction with ATEA. However, given the definition provided in the instruction for ATEA ("defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits"), Plaintiff acknowledged that none of these factors applied to her but instead presented evidence to show that her workplace was a "living hell" and she was alienated from her co-workers. A428. There is no question that ATEA is a much higher standard, a standard that did not apply to Diana Miller.

B: GIVING CONCURRENT INSTRUCTIONS ON ADVERSE TANGIBLE EMPLOYMENT ACTION AND THE AVAILABILITY OF A COMPLETE AFFIRMATIVE DEFENSE WAS FATALLY DEFECTIVE.

The law is clear that the affirmative defense charged to the jury does not apply when there is an ATEA. Rather, the United States Supreme Court has held that when an employee suffers an ATEA as a result of a supervisor's discriminatory harassment, the employer is strictly liable for the supervisor's conduct. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). In this instance, the *Faragher*/*Ellerth* defenses do not apply. It is only when there is no ATEA that the employer may attempt to apply this complete affirmative defense. B559.

The State attempts to brush aside Plaintiff's argument that jury instructions requiring Plaintiff to prove that she was subjected to an ATEA while also charging the jury as to the State's affirmative defense was very prejudicial and constituted reversible error. The suggestion that the jury verdict sheet (finding against Plaintiff on the *prima facie* case of harassment) mooted this argument is, at best, naïve. There was no recognition by the State that the jury listened to the Court during the final instructions describe the State's affirmative defense and then took to the jury deliberation room, the written instructions identifying that the State had a complete defense if they met the standards of the defense. Prior to their

deliberation, the jurors listened as the State's attorney argued how the State had a complete defense because Plaintiff did not invoke the procedure for reporting sexual harassment.

Plaintiff respectfully submits that the State cannot have it both ways: on the one hand demanding that ATEA be part of Plaintiff's *prima facie* case of sexual harassment and by instructing the jury that the State has a complete affirmative defense. These are alternative arguments and were never intended to be used simultaneously.

C: PLAINTIFF WILL NOT RESPOND TO THE STATE'S ARGUMENT III BECAUSE IT IS PREMISED UPON THE FACT THAT THERE HAS BEEN A PROPER JUDICIAL DETERMINATION AS TO THE APPROPRIATE STANDARD FOR ESTABLISHING THE *PRIMA FACIE* ELEMENTS OF *QUID PRO QUO* SEXUAL HARASSMENT. THE STATE'S ARGUMENT THAT THE FACTS SUPPORT THE VERDICT, IN THE ABSENCE OF THIS STANDARD, IS THEREFORE FATALLY DEFECTIVE.

III. CONCLUSION

The lower court erroneously instructed the jury that Plaintiff needed to prove an adverse tangible employment action. This element is not necessary for a finding of sexual harassment and was not pled by Plaintiff. Also, erroneously, the court charged that Defendant had an affirmative defense that could not be charged conterminously with the *prima facie* element of adverse tangible employment action. For the foregoing reasons, Plaintiff respectfully requests that this case be remanded to Superior Court for a jury trial.

Respectfully submitted,

MARTIN & ASSOCIATES, P.A.

JEFFREY K. MARTIN
DE Bar I.D. No. 2407
1508 Pennsylvania Avenue, Ste. 1-C
Wilmington, DE 19806
(302) 777-4680
jmartin@jkmartinlaw.com
Attorney for Appellant

Date: August 2, 2013

CERTIFICATE OF SERVICE

I, Jeffrey K. Martin, counsel for Appellant in the above-stated matter, hereby certify that two true and correct copies of the foregoing ***Appellant Diana Miller's Reply Brief*** were served electronically on August 2, 2013 and copies provided thereby (and also served via regular U.S. Mail and electronic mail) to the following:

Michael F. McTaggart, I.D. No. 2682
Deputy Attorney General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400
Attorney for Defendant

MARTIN & ASSOCIATES, P.A.

/s/ Jeffrey K. Martin
JEFFREY K. MARTIN #2407
1508 Pennsylvania Avenue
Wilmington, DE 19806
(302)777-4680
jmartin@jkmartinlaw.com
Attorney for Appellant Diana Miller