[J-53-2008] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MALLISSA L. WEAVER AND CHRIS A. WEAVER	:	No. 43 MAP 2007
	:	Appeal from the Order of the Superior Court entered on October 21, 2005 at No. 394 MDA 2005 vacating and remanding the Order of the Snyder County Court of Common Pleas, Civil Division, entered on February 23, 2005 at No. CV-0273-2003
v.	:	
WALTER W. HARPSTER AND JOHN K. SHIPMAN, INDIVIDUALLY AND T/D/B/A HARPSTER AND SHIPMAN FINANCIAL SERVICES, AND SUSQUEHANNA INSURANCE ASSOCIATES, INC.	:	885 A.2d 1073 (Pa. Super. 2005)
APPEAL OF: WALTER W. HARPSTER, INDIVIDUALLY AND T/D/B/A HARPSTER AND SHIPMAN FINANCIAL SERVICES AND SUSQUEHANNA INSURANCE ASSOCIATES, INC.	:	SUBMITTED: March 4, 2008

DISSENTING OPINION

MADAME JUSTICE TODD **Decided: July 20, 2009**

I respectfully, but vigorously, dissent. I believe the Pennsylvania Constitution, supported by statutory law, makes it unmistakably clear that the public policy of our Commonwealth simply does not tolerate invidious gender discrimination – here in the form of sexual harassment – with respect to continued employment. For the reasons stated more fully below, while I would reaffirm the vitality of the at-will doctrine in our Commonwealth, I believe that we should join other states that have considered similar issues and recognize a cause of action for wrongful discharge, for those individuals who fall outside of the coverage of the Pennsylvania Human Relations Act ("Human Relations

Act"),[1] to redress a termination that contravenes our Commonwealth's fundamental public policy against gender discrimination. Thus, I would affirm the order of the Superior Court.[2]

As explained by the Majority, for more than 100 years, the long-standing law that has consistently governed employer-employee relationships in our Commonwealth is the at-will doctrine. Henry v. Pittsburg & Lake Erie R.R. Co., 139 Pa. 289, 297, 21 A. 157 (1891). Under the at-will doctrine, it is generally true that an employer may terminate an employee at any time and for any reason. Id. The policies underlying the at-will doctrine are significant; among other attributes, the doctrine permits the employer to hire and retain the best personnel and allows the employer and the employee to enter into an uncomplicated and flexible relationship that can easily be terminated by either party. While the at-will doctrine continues to govern most employment relationships, parties may voluntarily limit the at-will doctrine through individual employment contracts. Additionally, statutory enactments may limit the reasons for which an employer may terminate the employment relationship.

Over 30 years ago, our Court also embraced a common law exception to the at-will doctrine in the form of a claim for wrongful discharge where an employee's termination contravenes a "clear mandate of public policy." Geary v. United States Steel Corp., 456 Pa. 171, 185, 319 A.2d 174, 181 (1974). As recognized by the Majority, in discerning whether there exists such a dominant public policy, our Court looks to the Pennsylvania Constitution, legislative enactments, and judicial decisions. Majority Opinion at 13; McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. 307, 316, 750 A.2d 283, 288 (2000). While the power of our courts to formulate pronouncements of public policy is

[1] 43 P.S. §§ 951-963.

[2] As does the Majority, I note that, for purposes of this appeal, we assume that sexual harassment of the type alleged in this case constitutes a form of gender discrimination under our Commonwealth's law. Majority Opinion at 3 n.4.

limited, "when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it . . . a court may constitute itself the voice of the community" and declare public policy. Mamlin v. Genoe (City of Philadelphia Police Beneficiary Ass'n), 340 Pa. 320, 325, 17 A.2d 407, 409 (1941).

The issue before us is whether there is a clear mandate of public policy against gender discrimination that serves as a foundation for the recognition of a common law claim for wrongful discharge for employees not covered by the Human Relations Act. Unlike the Majority, I find that explicit and clear mandate of public policy against termination based upon sex in our Constitution and statutory law which supports such a claim for wrongful termination.

Our Commonwealth has long been in the vanguard of constitutional gender equality and has expressly set forth an explicit public policy against discrimination based upon sex. Specifically, in 1971, our state became the first to pass an equal rights amendment to its constitution. Our Constitution's Equal Rights Amendment specifically addresses sex-based equality and prohibits the abridgement of equality of rights under the law on the basis of sex. PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."). We explained, "[t]he thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction." Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974). Our Court further clarified, "[t]he sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman." Id. As then-Justice Stephen Zappala later emphasized, "[n]o more clear statement of public policy exists than that of a constitutional amendment. The passage of the Pennsylvania Equal Rights Amendment, Article I, § 28 is the expression of public policy." Clay v. Advanced

Computer Applications, 522 Pa. 86, 100, 559 A.2d 917, 924 (1989) (Zappala, J. concurring). Thus, it is beyond peradventure that our citizenry as a matter of public policy, explicitly reflected in our organic charter, does not tolerate gender discrimination.

Not only does our Constitution set forth a clear mandate of public policy against gender discrimination, but our legislature has made this manifest as well. The Human Relations Act, adopted in 1955 – 16 years prior to the Equal Rights Amendment – recognized the insidious nature of discrimination based upon gender. Specifically, the Human Relations Act provides that it is an unlawful discriminatory practice for an employer to, *inter alia*, discharge an individual on the basis of sex. 43 P.S. § 955.

The Majority expresses its agreement with Appellant Walter Harpster that it is the General Assembly which sets public policy in this arena, and that only employees who are employed by an "employer" – defined in the Human Relations Act, *inter alia*, as those employing four or more persons within the Commonwealth – are protected from discrimination. 43 P.S. § 954(b). Stated another way, the Majority determines that, as the public policy against gender discrimination announced in the Human Relations Act does not apply to smaller employers, employees of these employers may be subjected to discrimination without recourse.

Respectfully, I do not view the Human Relations Act in the same fashion. First, the language of the Human Relations Act is robust and broad in stating a clear mandate against gender discrimination. Indeed, the General Assembly could not have spoken more forcefully when it described the corrosive effect of invidious discrimination:

> Such **discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state** … [discrimination] deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, **thereby**

> **resulting in grave injury to the public health and welfare . . . .**

43 P.S. § 952(a) (emphasis added).

Moreover, the language employed by the General Assembly makes concrete a policy that transcends the particular employees subject to the statute. Specifically, the General Assembly's declaration of policy is not limited to employees of an employer as defined in the statute, but to the employment of "all individuals":

> It is hereby declared to be the public policy of this Commonwealth **to foster the employment of all individuals in accordance with their fullest capacities regardless of their** race, color, religious creed, ancestry, age, **sex,** national origin, handicap or disability, . . . **and to safeguard their right to . . . hold employment without such discrimination, to assure equal opportunities to all individuals** ….

43 P.S. § 952(b) (emphasis added).

Thus, the declaration of policy contained in the Human Relations Act undergirds our Constitution's clear mandate of public policy condemning discrimination that transcends those employees and employers that are subject to the statute.

Additionally, rather than reading the Human Relations Act as granting a license to smaller employers to discriminate, a more natural interpretation of the statute that fits more comfortably with the General Assembly's declaration of policy is a finding that the legislature only intended to place the administrative burdens and procedures contained in the Act upon certain larger employers that would be able to absorb the associated costs of such procedures. Specifically, under the Human Relations Act, a covered employer must not only comply with certain affirmative requirements, but, when faced with a claim of alleged discrimination, must comply with the administrative procedural scheme set forth in the statute and face the specter of a complaint brought by the Pennsylvania Human

Relations Commission on behalf of the employee, bringing with it the resources and power of the Commonwealth. While subjecting only larger employers to such burdens may be sound policy, it does not follow that, in doing so, the General Assembly intended to permit smaller employers to terminate an individual due to gender and leave the individual without recourse.

Furthermore, a finding of a cause of action for those individuals who fall outside of the coverage of the Human Relations Act is entirely consonant with the conclusions reached by courts which have recognized a claim for wrongful discharge based upon a violation of public policy expressed in a state constitution, even when the state legislature has enacted an anti-discrimination statute which limits the size of the employer covered by the statute. See, e.g., Molesworth v. Brandon, 341 Md. 621, 672 A.2d 608 (1996) (upholding Maryland's common law cause of action for wrongful discharge of an employee based on sex discrimination against an employer with less than 15 employees where public policy against sex discrimination was evidenced by constitutional amendment, statutes, and executive order); accord Thurdin v. SEI Boston, LLC, 452 Mass. 436, 895 N.E.2d 446 (2008) (concluding employee may bring claim for sex discrimination under state equal rights act where employer was not covered by Massachusetts' state employment discrimination law); Collins v. Rizkana, 73 Ohio St. 3d 65, 652 N.E.2d 653 (1995) (recognizing common law tort claim for wrongful discharge in violation of Ohio public policy based upon statutory and judicial sources); Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997) (determining common law claim for retaliatory discharge based on sex discrimination in light of West Virginia's public policy found in state human relations act); Roberts v. Dudley, 140 Wn.2d 58, 993 P.2d 901 (2000) (finding claim for wrongful discharge in violation of Washington's public policy against gender discrimination based upon statutes and judicial decisions); but see Jarman v. Deason, 173 N.C. App. 297, 618 S.E.2d 776 (2005) (concluding no claim of wrongful discharge for age discrimination in

North Carolina relying on legislative prerogative but in absence of constitutional basis for public policy); Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc., 994 P.2d 1261 (Utah 2000) (same).

Finally, while I would recognize a claim for wrongful discharge for those individuals not covered by the Human Relations Act,[3] such a cause of action would be limited. Unlike a claim under the Human Relations Act which could assert a multitude of statutorily-defined discriminatory acts on the part of an employer, a cause of action for wrongful discharge would be just that – a claim limited to an assertion that one was terminated based upon gender in violation of our clear mandate of public policy against gender discrimination as expressed in our Constitution and statutory law.

In sum, unlike the Majority, I simply cannot ascribe to our General Assembly the intent to prohibit employers with four or more employees from terminating an individual by sexually harassing him or her, but to allow those employers with less than four employees to sexually harass an individual to the point of termination with impunity and without redress. Instead, I would reaffirm our Commonwealth's long-standing history as an at-will state, but I would also find that our Constitution, supported by relevant statutory law, provides a clear mandate of public policy that supports a common law action for wrongful discharge based upon gender discrimination for those individuals falling outside of the coverage of the Human Relations Act. For the above-stated reasons, I respectfully dissent and would affirm the order of the Superior Court.[4]

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[3] Those employees covered by the Human Relations Act must utilize the administrative procedures and remedies in seeking redress for alleged discrimination through the Pennsylvania Human Relations Commission. Clay, 522 Pa. at 92, 559 A.2d at 920.

[4] In footnote 10, the Majority asserts that the Human Relations Act is the "exclusive state law remedy for unlawful discrimination, *preempting* the advancement of common law claims for wrongful discharge based on claims of discrimination." Majority Opinion at 20 n.10 (emphasis added). In reaching this conclusion, the Majority does not engage in any (continued…)

Mr. Chief Justice Castille joins this dissenting opinion.

(…continued)
traditional preemption analysis, but, rather, references a 15-year-old federal district court case. While the terms of the Human Relations Act may "exempt" smaller employers from its coverage, there is no suggestion of preemption, and prior to today's decision, our Court has never addressed this issue. Moreover, the Majority's contention of statutory preemption avoids the thrust of what I believe to be the proper analysis: a limited common law claim for wrongful discharge based upon gender discrimination that is grounded upon public policy as plainly expressed in the Pennsylvania Constitution, not solely in the statute. Furthermore, in footnote 12, the Majority criticizes the dissenters for offering "without evidence" the proposition that "administrative compliance and litigation is more burdensome than litigation in courts." Majority Opinion at 21 n.12. There is no need for "evidence" to establish what the Majority already acknowledges in its opinion: there exists under the Human Relations Act *both* a mandatory administrative process *and* the specter of subsequent litigation in the courts. Majority Opinion at 17; 43 P.S. § 962(c). Thus, it is self-evident that having to first exhaust an administrative process and then litigate in the judicial system would be more burdensome and expensive than only litigating in the courts.