

Attorney Fees

Commonwealth Court Awards Attorney Fees in HIV Bias Case

BY BEN PRESENT

Of the Law Weekly
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A panel of the Commonwealth Court has decided to award attorney fees to a woman after ruling that a Pennsylvania assisted living facility, found to have discriminated against the woman because she is HIV positive, filed a frivolous appeal.

In awarding attorney fees and delay damages, the court affirmed that Walnutport, Pa., assisted living facility Canal Side Care Manor and its owner did discriminate against the woman by denying her a place in the facility because she had HIV, affirming a decision by the Pennsylvania Human Relations Commission.

The unanimous three-judge panel noted Canal Side seemed to "wholly ignore" the opinion issued by the commission, which had initially heard the discrimination case. The panel also ruled the center missed the mark on several rules of appellate procedure, including the omission of "virtually every relevant fact" regarding the woman's daylong stay at the center, in dismissing the center's appeal and awarding the woman attorney fees.

In its petition for appeal, Judge Patricia A. McCullough wrote for the panel, Canal Side questioned whether the commission erred by applying the *McDonnell Douglas* burden-shifting analysis in its decision.

However, McCullough said in a 21-page opinion, the commission permissibly used direct evidence, in contrast

to the *McDonnell Douglas* test, to prove discrimination in *Canal Side Care Manor v. Pennsylvania Human Relations Commission*.

McCullough also dismissed arguments by Canal Side averring they had a legitimate, nondiscriminatory reason — urinary incontinence — to deny the woman a spot in the facility and that the commission erred when it awarded her \$50,000 in damages plus interest.

The case stems from litigation filed by Queen D., the sister of G.D. According to the opinion, G.D. is an HIV-positive woman who also suffers from personality disorders and severe urinary incontinence.

According to McCullough, a case manager for Step by Step (a group home where G.D. used to live), failed to disclose the severity of G.D.'s incontinence and, per Step by Step's policy, did not disclose G.D.'s HIV status when applying for the woman's transfer to Canal Side.

When G.D. moved into Canal Side in January 2008, staff members noticed her clothes were urine-soaked and an evaluation in the medication room revealed she had HIV, McCullough said.

Canal Side's owner, co-defendant Lakshmi Kademani, came into the medication room where G.D. admitted she was taking medication for HIV,



McCullough

McCullough said.

"Kademani then told G.D. she had 24 hours to leave the facility," McCullough said the commission found.

In April 2008, Queen D. filed a complaint alleging Canal Side violated Section 5(h) of the Pennsylvania Human Relations Act when it evicted G.D. and that Kademani "aided and abetted" the eviction.

In addition to the \$50,000 award, the commission also imposed a \$5,000 civil penalty on the center and Kademani.

Because direct evidence was cited, the Commonwealth Court affirmed the decision regarding discrimination.

Canal Side also argued that no damages should be awarded because G.D.'s bipolar disorder caused her depression, as opposed to her being forced to leave the center.

It alleged that, because the Step by Step case manager did not disclose G.D.'s HIV in the application process, a "material misrepresentation" of her condition had occurred, McCullough said the center's brief alleged.

But McCullough rejected this argument on similar grounds to the discrimination matter.

"Suffice it to say that in making this argument [the] petitioners again ignore the commission's findings and the factors the commission considered in concluding that \$50,000 is 'appropriate to compensate G.D. for the humiliation and embarrassment she suffered which was neither transient nor trivial,'" McCullough said, citing the commission's decision.

In its discussion on awarding G.D.

attorney fees and delay damages, the court said G.D.'s case was similar to the 2003 Commonwealth Court decision in *Zwibel v. Department of Transportation* in that Canal Side seemed to ignore the opinion issued by the commission.

Although the commission decided the case based on direct evidence and explained the *McDonnell Douglas* analysis did not apply, Canal Side's state of questions on appeals asked whether the commission erred in determining that its actions were discriminatory when they provided a reason setting forth otherwise — the urinary incontinence.

"We explained in *Allison Iv. Pennsylvania Human Relations Commission* that direct evidence may be sufficient to support a finding of discrimination, and, although [the] petitioners cite *Allison* for the applicable scope of review, they ignore the remainder of that decision," McCullough said.

She added Canal Side insisted the incontinence was a "compelling problem" in removing G.D., which stood in contrast to the commission's findings.

"Moreover, while there is no question that the commission is the final arbiter of witness credibility and evidentiary weight, [the] petitioners' scant argument is fairly characterized, in its entirety, as a mere challenge to the commission's credibility determinations," McCullough said.

"We emphasize that [the] petitioners' essential assertions are supported only by Kademani's testimony, despite the fact that the commission considered the

See 'Bias' on Page 11

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...aspects of people's lives," she said, adding, "It's very important for Pennsylvania's voters to learn as much as they can about these candidates."

Like Stabile, Wecht said he's tried to facilitate this by traveling around the state informing prospective voters about what appellate courts actually do.

"I suppose if I had \$3 million in my bank account I could do something to try to deal with [voter indifference] more meaningfully, but what I can do at the micro level is meet as many voters as I can," he said.

Like the Superior Court candidates, Boockvar said "nonstop travel" has taken her to 55 of the 67 counties across the state since her campaign began.

She said she has spent a large portion of that time explaining to voters why they should care about appellate court races.

"One of the challenges about running for judge is that people have so little information about what the courts do and

people's ears tend to perk up once they find out the Commonwealth Court handles land use and environmental cases, including issues related to the Marcellus Shale, as well as collective bargaining and unemployment and workers' compensation cases.

"The more I talk about the issues and how they impact people's lives, the more engaged people become," she said. "I've definitely noticed a difference between people's interest before I speak versus their interest after I speak."

Covey said she's had a similar experience in her travels around the state, particularly when she informs voters that the Commonwealth Court handles everything from labor relations cases to banking and insurance cases.

"You see them light up because they do understand those different matters," she said, adding that people are often surprised to find out that the Commonwealth Court has the final word on the majority of those cases.

The court also awarded counsel fees and delay damages because Canal Side's appellate brief did not conform to state rules of appellate procedure.

Specifically, McCullough said, Canal Side's brief did not include text of the commission's order as required by Rule 2115, its summary of the argument ("which asserts facts not supported by the record," McCullough added) exceeded two pages, thus violating Rule 2118, and, "significantly," rather than setting all facts necessary to be known under Rule 2117, the petitioners' statement of the case "omits virtually every relevant fact related to G.D.'s stay at

decades.

"After 30 years of practice, I believe I do know what a good judge and a bad judge is," he said, adding that while Wecht has spent time on the bench, he has not spent nearly as much time in private practice or performing pro bono work.

Stabile's background includes working as a trial attorney in the Office of the Attorney General's tort litigation unit and clerking for former Commonwealth Court Judge Alexander F. Barbieri.

He is currently the managing partner of Dilworth Paxson's Harrisburg office.

Wecht, meanwhile, emphasized to voters that he is the only candidate with judicial experience, as well as the only candidate to have written at a scholarly level.

"I think it's important for an appellate court candidate to have a scholarly interest in the law," he said.

Before joining the Allegheny County bench, Wecht served as Allegheny County's register of wills and clerk of Orphan's Court.

...the management project, who has worked as a legal services attorney in Wyoming, Susquehanna, Sullivan and Lehigh counties and has also run a private practice with her husband, touted to voters her "broad background in the areas of law the Commonwealth Court hears."

Covey, who was, according to a GOP press release, the first woman to serve on the Pennsylvania Labor Relations Board, a post to which she was appointed in 2002 by then-Gov. Mark S. Schweiker, focused on her experience working for a state administrative agency in a "quasi-judicial" role.

She also pointed to her time spent in two national firms as well as her most recent position as head of her own firm to illustrate her understanding of how law firms operate.

Both Covey and Boockvar were rated "recommended" by the JEC.

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Bias

continued from 3

numerous contradictions in Kademani's testimony in detail ... and concluded that, "[c]onsidered as a whole, the record reveals that Kademani's lack of credibility on so many levels is blatantly obvious," she added, citing the commission's opinion.

The commission appointed a three-member hearing-panel, which issued a 51-page decision with 182 findings of fact. The commission subsequently adopted those facts, McCullough said.

Canal Side and subsequent withdrawal from the facility," McCullough wrote.

"It includes no reference to HIV, any of the commission's 182 findings or the commission's explicit credibility determinations set forth in its lengthy and detailed analysis."

Canal Side's attorney, Garrett R. Benner of Bethlehem firm Benner & Piperato, declined to comment on the court's decision or its thorough opinion of his appeal. But G.D.'s attorney, Ronda B. Goldfein of the AIDS Law Project of Pennsylvania, said the decision was more about justice for her client than it was any legal standards apparently missed by her

opponent.

"This isn't in our eyes about their lawyers doing a bad job," Goldfein said. "This is about a terminally ill woman who was treated unfairly. All facts and law clearly demonstrated impermissible discrimination and that's what this is about."

Goldfein did add that, while delay can sometimes be an acceptable strategy in litigation, stalling in cases with a terminally ill plaintiff is "unconscionable."

Shannon Powers, a spokeswoman for the commission, said the majority of matters the commission deals with are

See 'Bias' on Page 12

Bias

continued from 11

employment cases. Such cases, she said, only allow for actual damages, as op-

posed to damages for embarrassment and humiliation.

Housing cases, however, allow for damages based on embarrassment.

"To deny someone a place to live because they have a disability, particularly

HIV, is an egregious violation of the law," Powers said.

Ben Present can be contacted at 215-557-2315 or bpresent@alm.com. Follow him on Twitter @BPresentTLI.

(Copies of the 21-page opinion in

Canal Side Care Manor v. Pennsylvania Human Relations Commission, PICS No. 11-4349, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.) •

V&S

continued from 7

Court and Case No.:

2:06-cv-04986-JD.

Judge:

Jan E. DuBois.

Type of Action:

Civil rights.

Injuries:

False imprisonment. Intentional infliction of emotional distress.

Plaintiff's Attorneys:

Daniel A. Silverman, Law Offices of Daniel Silverman & Associates, Philadelphia.

Defense Counsel:

Sarah Hart, Philadelphia District Attorney's Office; Michael B. Pullano, Weber Gallagher Simpson Stapleton Fires & Newby, Philadelphia.

Comment:

A material witness kept in jail by a Philadelphia prosecutor despite a three-month delay in a murder case will be paid \$255,000 by Philadelphia authorities and \$20,000 by the Defender Association of Philadelphia for violations of her constitutional rights, the attorney representing the witness reported.

This summer, the 3rd U.S. Circuit Court of Appeals, affirming U.S. District Judge Jan E. DuBois, determined that former Philadelphia Assistant District Attorney Gina Smith had no immunity from a civil rights lawsuit alleging that material witness Nicole Schnyder was jailed for nearly seven weeks because Smith failed to inform the court that the murder trial was delayed by several months.

"No reasonable prosecutor would think that she could indefinitely detain an innocent witness pending trial without obtaining reauthorization," U.S. Circuit Judge D. Brooks Smith wrote in *Schnyder v. Smith* on behalf of the panel of Chief Judge Theodore A. McKee

and visiting Judge Richard G. Stearns of the District of Massachusetts.

The panel rejected qualified immunity for Smith this summer. In a prior ruling, the 3rd Circuit had ruled against absolute immunity for Smith, now a partner at Ballard Spahr.

Smith was represented by the Philadelphia District Attorney's Office. Prosecutor Sarah Hart declined comment on the settlement Oct. 25.

Schnyder's detention was authorized by Philadelphia Common Pleas Court Judge Rayford Means, but Smith did not comply with Means' request that he be informed if there were any continuances in the murder trial or if the case broke down, *The Legal* previously reported.

"Ms. Schnyder is very pleased to secure a fair measure of compensation for the nightmare she experienced after all these years of legal wrangling by the District Attorney's Office," said Daniel A. Silverman, of the Law Offices of Daniel Silverman & Associates.

"Speaking as her lawyer, her representative, I'm very pleased the 3rd Circuit Court of Appeals and Judge DuBois on the District Court saw through their attempt to insulate themselves from liability by claiming legal immunities that simply did not exist."

The District Attorney's Office brought in the Defender Association of Philadelphia as well as Laura Davis, a public defender, as third-party defendants from which to seek contribution in the event of recovery by Schnyder, Silverman said.

The association's liability counsel, Michael B. Pullano, said that as part of the settlement Davis is being dismissed from the matter with prejudice prior to any official resolution of the case.

Pullano declined further comment on the case.

The Defender Association did not have any responsibility for Schnyder's detention in the Philadelphia Prison System, Silverman said.

"The public defender's office are the heroes in the case," Silverman said. "Independently of whatever Gina Smith should have done they are the ones who got" his client out of jail.

According to court papers, Schnyder was an essential witness in the murder, rape and robbery trial of Michael Overby.

But Schnyder, who said she was threatened by Overby's family, had refused to testify, going so far as to pull a knife on a police detective when he attempted to arrest her for the purpose of compelling her appearance in court.

At Overby's second trial, prosecutors offered Schnyder's prior recorded statements, but the conviction was overturned because Schnyder's absence violated the Confrontation Clause.

At the third trial, Schnyder's presence was therefore absolutely necessary and attorney Smith therefore had her arrested and jailed as a material witness.

But Silverman argued that Smith never

told Means about the three-month delay of the third trial despite constant inquiries from Schnyder's family.

Ultimately, the family contacted Paul Conway, the chief of the Defender Association's homicide unit, who informed Means that Schnyder was still in jail. Means ordered her release soon after.

By then, Silverman said, Schnyder had been locked up for 54 days — 48 of them after the trial's continuance.

While held in jail, Schnyder missed the funeral of her father figure, Silverman said in an interview.

"Although plaintiff was transported to the funeral home, she was prohibited from attending the funeral. Indeed, at the sheriff's direction, all of her family members were ordered to be removed from the funeral home while a shackled plaintiff was hauled in to spend five minutes with her father's body," Silverman wrote in court papers.

— *Amaris Elliott-Engel, of the Law Weekly* •

PENNSYLVANIA BULLETIN

Below is the table of contents of the last issue of the Pennsylvania Bulletin, the official gazette of the Commonwealth. The Bulletin contains notices, regulations and other documents filed with the Legislative Reference Bureau, and supplements to the Pennsylvania Code. Courts are required to take judicial notice of the contents of the Bulletin.

Contents

PENNSYLVANIA BULLETIN, VOL. 41, NO. 43, OCTOBER 22, 2011

THE COURTS

APPELLATE PROCEDURE
Amendment of rules 531, 2113 and 2185 of the rules of appellate procedure; no. 215 appellate procedural rules doc. 6090

DISCIPLINARY BOARD OF THE SUPREME COURT
Current schedule of continuing legal education courses required for reinstatement under §§ 89.276 and 89.279 of the Disciplinary Board rules 6621

EXECUTIVE AGENCIES

DEPARTMENT OF BANKING
Notices
Actions on applications 5642
Maximum lawful rate of interest for residential mortgages for the month of November 2011 6044

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Notices
Applications, actions and special notices 5644
Availability of technical guidance 5719
Bid opportunity (2 documents) 5719
Storm Relief Grant funding 5720

DEPARTMENT OF LABOR AND INDUSTRY

INDEPENDENT REGULATORY REVIEW COMMISSION

Notices
Action taken by the Commission 5724
Notice of comments issued 5725
Notice of filing of final rulemakings 5726

INSURANCE DEPARTMENT

Notices
Janet Gutman, u/d/b/a World Insurance; order to show cause; doc. no. SC11-06-018 5726
Review procedure hearings under the Unfair Insurance Practices Act 5726

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking
Marketing and sales practices for the retail residential energy market 5624
Railroad transportation 5634

Notices
Gas service 5727
Pro forma intra-corporate transactions 5727
Service of notice of motor carrier applications 5727
Transfer of assets, abandon service and tariff changes 5728
Transfer of control 5729
Transfer control 5729
Transfer of indirect control 5729

STATE BOARD OF MEDICINE

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If you have a bad faith insurance case, *The Legal Intelligencer* can now