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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANGEL WATKINS, :
Plaintiff : Case No.
Vs. :
PROFESSIONAL SECURITY BUREAU, :
LIMITED :
Defendant : 98-2555

Proceedings of the Fourth Circuit Court
of Appeals, taken on Thursday, September 23,
1999, at the Fourth Circuit Court of Appeals,
Richmond, Virginia, transcribed by Wesley J.
Armstrong, Notary Public.

Transcribed by:
Wesley J. Armstrong

1 APPEARANCES:

2

3 Judges Wilkins, Niemeyer, and Traxler

4

5

6 APPELLANTS:

7 Alvin Dwight Pettit, Esquire

8

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10 APPELLEES:

11 Brian William McAlindin, Esquire 12

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1 PROCEEDINGS

2 THE COURT: Mr. Bryant? I'm sorry,
3 Mr. Pettit?

4 (Appellant Alvin Pettit, Esquire
5 appeared before the court).

6 THE APPELLANT: Yes, Your Honor, thank
7 you. Good morning to the court.

8 THE COURT: Good morning.

9 THE APPELLANT: May it please the court,
10 I'm accompanied by Ms. Karen Kendrick of my
11 office, who also sat in for the district court.
12 We represent the appellant in this matter,
13 Ms. Angel Watkins. If I can briefly give the
14 court some background as to what has transpired,
15 this case came on for trial in the district court
16 in Baltimore City and was tried before a jury for
17 approximately three days of facts, the jury
18 stayed out for approximately a day, and this
19 court, the district court in fact basically
20 vacated the verdicts on a motion for judgment of
21 a new trial.

1 Also the court, the district court
2 denied that the, it was agreed that the case
3 would be bifurcated upon the jury coming in with
4 a verdict of liability of \$62,000 I think some
5 three hundred odd dollars in compensatory
6 damages. The court upon hearing an argument
7 denied on motion, a Rule 50 motion, denied
8 admitting the case to the jury for in fact
9 punitive damages.

10 We basically are here today, Your
11 Honor, the jury had come back and found for the
12 defendant in terms of quid pro quo, but found for
13 the plaintiff in determinance of a hostile work
14 environment and also for retaliatory discharge.
15 The jury, the motion for new trial was predicated
16 on the basis that it was an inconsistency between
17 quid pro quo and the other verdicts of the jury
18 in favor of the plaintiff.

19 This is a case, Your Honor, involving a
20 young lady who worked for the defendant in and
21 around 1996, coming to work in 1995, and was an

1 exemplary employee, and who alleges that in May
2 of 1996 she was unlawfully touched, an unwelcome
3 sexual advance, being touched on the breast and
4 also grabbed upon the breast and also the
5 supervisor, who was the manager for the region,
6 the regional manager Mr. Kelly, in fact attempted
7 to put his hands into her pants.

8 She reported this both to her site
9 supervisor in and around July and also to her,
10 the supervisor above the site supervisor in and
11 around August of that same year. In and around
12 September of 1996 when she was called in to
13 discuss some various matters of which she
14 believed it would be this matter but later told
15 it was a personnel matter, she was terminated in
16 her testimony by the same person who in fact who
17 had assaulted her.

18 She indicated at that meeting that
19 Mr. Kelly had not just assaulted her but he in
20 fact had raped her, and in fact she did not go to
21 the authorities because of fear of reprisals, but

1 at that point in time during the discussion on
2 September 16th she indicated that she would be
3 going to the authorities for both the rape charge
4 and to prosecute him, and that in fact at that
5 point in time she was told by Mr. Kelly, the same
6 person who had been charged, that she was fired.

7 She was later called by her supervisor
8 Mr. Nikolai a day or two later and indicated that
9 she had been charged for other reasons other than
10 the alleged rape and sexual advances. Mr. Kelly
11 I might add was also terminated thereafter for
12 pretextual reasons we would argue which had
13 nothing to do with the position of the appellate,
14 and in fact believed that it had nothing to do
15 with the rape.

16 We argued, Your Honor, we raised to the
17 court that the lower court had misconstrued
18 Burlington, which had just come out that prior
19 time. We raised the prongs of our attack were
20 several fold. The first prong of the attack that
21 in Burlington says that if there's an unwelcome

1 sexual advance, of which in this case there was,
2 which leads to a tangible personnel action, then
3 we do not have to deal with the affirmative
4 defenses that arise in a hostile work environment
5 where you have severe and pervasive sexual
6 activity.

7 So our first thrust in this case is in
8 a reading of Burlington that the district court
9 erred in that there should never have been a
10 requirement for the affirmative defense to come
11 forward, that in fact the tangible personnel
12 action was the termination of Ms. Watkins. I
13 believe it argued that she was terminated for
14 other reasons. This was the same argument in the
15 quid pro quo argument, but we argued that the
16 facts are so clear that number one that the
17 sexual advance, the unwanted actions took place,
18 Mr. Kelly was a major supervisor, a regional
19 supervisor, and that he terminated her on the
20 16th when she in fact indicated to him that he
21 did not, was not going to abuse her again, she

1 was not going to submit to any sexual favors, and
2 that's when he tells her in the record to sit
3 down and shut up and she does not and she says
4 etc., etc., etc., which is just indicated, and
5 she says, he says to her you're fired, get out,
6 you're stupid, etc., etc.

7 We say, Your Honor, that this, the
8 tactic of personnel action that was contemplated
9 in Burlington, that that tactical personnel
10 action, then at that point in time the judge
11 erred by even applying the affirmative defenses
12 that Burlington goes in, that there was no basis,
13 a factual basis for the affirmative defenses to
14 arise. However, if the court goes to the next
15 nexus —

16 THE COURT: I thought the jury ruled
17 against you on that.

18 THE APPELLANT: No, the jury ruled
19 against us on quid pro quo.

20 THE COURT: Well, I thought that's what
21 you just described.

1 THE APPELLANT: No, no. I'm appearing
2 to say, judge, I think that that's where the
3 court is making a major error. I think that the
4 court, the district court construes that the
5 retaliatory action because it's not quid pro quo,
6 if you said quid pro quo, in other words you make
7 a sexual demand and then that demand is not
8 acquiesced to, and then you retaliate by firing
9 the employee or having an adverse personnel
10 action, then that in fact is the tangible
11 personnel action.

12 In the retaliatory argument which the
13 jury did find for us, the jury I think
14 outraged all of us, the court as well as
15 counsel, I think the jury understood. The jury
16 was saying that the retaliatory discharge is
17 because she in fact filed the complaint with her
18 supervisors in and around July and August, and
19 therefore the retaliatory action of the adverse
20 personnel action may not have been quid pro quo
21 for the denial of the sexual advances, but was in

1 fact retaliatory for her having filed the
2 complaint.

3 THE COURT: And the evidence of that is
4 because she was terminated a few weeks after she
5 made her complaint?

6 THE APPELLANT: Exactly. She made the
7 complaint --

8 THE COURT: That's the evidence —

9 THE APPELLANT: I'm sorry?

10 THE COURT: That sequence is the only —

11 THE APPELLANT: Yes, Your Honor, she
12 made the complaint in and around July and August,
13 and she had been referred to as an absolute good
14 employee. In fact, Mr. Nikolai referred to her
15 as his little angel.

16 THE COURT: What other evidence have you
17 got other than temporal proximity between the
18 time of the filing of the complaint and her being
19 fired? What other evidence is there of that it
20 was retaliatory?

21 THE APPELLANT: Well, we argued that it

1 was retaliatory, Your Honor, on the basis that it
2 was the same man that in fact according to her
3 weight of the evidence or her testimony is the
4 same man that in fact had raped her. This is the
5 same person that in the conversation in the
6 colloquy between the two.

7 THE COURT: Are you talking about
8 Mr. Kelly?

9 THE APPELLANT: Mr. Kelly, and when she
10 goes into that room on the 16th the testimony is
11 that Mr. Kelly is in control of that meeting, not
12 Mr. Nikolai. Her conversations were totally with
13 Mr. Kelly, and that the outbreak comes
14 immediately, and if you take the testimony in the
15 light most favorable to her we have to assume
16 that it's a factual question for the jury, which
17 should not have been disturbed, as to whether or
18 not they believed her versus Mr. Nikolai, who
19 said we fired her because she was not a good
20 employee and she had deteriorated in such a rapid
21 time I think that that is an issue which is not

1 believable, because how do you deteriorate from
2 my little angel to an employee who deserves to be
3 fired within a period of two or three months?

4 I think it becomes obviously a fact for
5 a jury to question as to whether or not the jury
6 could determine that this retaliatory firing was
7 in fact for her filing the complaint. She had
8 filed the complaint with two supervisors. She
9 told Mr. Nikolai and she told Ms. Dowling. She
10 told Ms. Dowling first and Ms. Dowling told
11 Mr. Nikolai and Mr. Nikolai told Mr. Fisher, and
12 so obviously Mr. Fisher contacted according to
13 the record Mr. Kelly, and they in fact knew, but
14 my argument, Your Honor, is that is the adverse
15 personnel action, and the Supreme Court never
16 distinguishes between whether or not the adverse
17 personnel action has to be one of quid pro quo or
18 retaliatory.

19 The Supreme Court leaves it open that
20 an adverse personnel action negates the raising
21 of the two affirmative defenses, but if we

1 leapfrog over that and go to the area of the two
2 affirmative defenses, if we say for example the
3 egregious conduct and the pervasive and the
4 irrational conduct is the rape, or at that point
5 in time it's not a rape when she makes the
6 complaint, but the going into her pants and the
7 feeling of her breast, if that is in fact the
8 conduct then we have to look then as to whether
9 or not there was a policy or whether or not there
10 was an opportunity to in fact prevent and
11 correct, and whether she took advantage of it.

12 We would assert again that looking at
13 the facts most favorable to the nonmoving party,
14 and that would be Ms. Watkins, we have to see,
15 Your Honor, if it was a jury question the fact
16 there was no policy whatsoever, and I would
17 direct this court's attention explicitly to page
18 200, I think it's 235, 230 — to Mr. Fisher's
19 testimony, and in Mr. Fisher's testimony on
20 direct examination, I cross examined him
21 vigorously in terms of whether or not there was

1 any type of policy whatsoever, and the court can
2 read in my cross examination, I don't have time
3 to go into it here with my time running out, but
4 I asked him what policy, what personnel policy
5 exists, sir, in 1996, and he says policy, what
6 policy, a policy, and I'm paraphrasing, we had,
7 we have a video now, we had something in writing
8 from our manager, so obviously even the manager,
9 the vice president of operations did not know of
10 a policy of when this incident took place.

11 So I think it's very arguable to a jury
12 that a policy did not in fact exist, and whether
13 or not she availed herself of it, the question in
14 availing herself of it is reasonable. Did she
15 make a reasonable attempt to avail herself of a
16 policy, and she has indicated that she knew of no
17 policy, that she was never told of a policy, that
18 she was never given anything in the handbook.
19 She was never given a handbook, or she was never
20 given any regulations. There was never anything
21 posted, that she went to, the only thing that she

1 could do was go to Ms. Dowling and go to her
2 supervisor to report it, and then the
3 investigation goes right back to the person who
4 in fact was the person who was alleged to have
5 raped her.

6 THE COURT: I thought there was a policy
7 in that handbook.

8 THE APPELLANT: There was a policy
9 submitted, but what I'm saying to this court,
10 Your Honor, is that a factual question for the
11 jury had to exist is whether or not that they
12 believe that that policy was really in existence
13 and whether or not that policy was distributed to
14 the employees, and the jury in this case --

15 THE COURT: What is the evidence that
16 the policy was not a company policy?

17 THE APPELLANT: On my cross examination,
18 well, it was direct examination, I called him as
19 my witness because I took his deposition back in
20 1995, and in 1995 he had no idea, so I took his
21 deposition in 1996, he had no idea what policy

1 existed or what I was talking about, and that's
2 why I direct the court to read my cross
3 examination of him. It's not cross, my direct
4 examination —

5 THE COURT: Who's him?

6 THE APPELLANT: Mr. Fisher. He's the
7 vice president. He's the manager who was
8 supposed to have all the knowledge about policy,
9 what have you. I took his deposition before he
10 took the stand and called him as my witness, as
11 Ms. Watkins' witness, and he had no idea about a
12 policy whatsoever. So it became a factual
13 question, Your Honor, and the jury chose to
14 construe that factual question in favor of
15 Ms. Watkins that a policy did not exist.

16 The Supreme Court says even if a policy
17 exists there's still other factors that we have
18 to look at, and none of these factors came to
19 arise in this case as we looked at the case that
20 this court dealt with in 1995 I think it was, the
21 Cavalier Hotel. Nothing existed there

1 whatsoever, and in here I'm saying if it existed
2 it was a ruse, it was a pretext, and the jury
3 chose to believe otherwise.

4 Moving very quickly, Your Honor, we
5 also submit that the punitive damages --

6 THE COURT: You're moving pretty quick.

7 THE APPELLANT: I'm watching this kind
8 of — the punitive damages aspect we submit that
9 should have gone to the jury, if you look at the
10 cases, the latest case because the case that we
11 rely upon now wasn't even before, the Colestead
12 case had not even been ruled upon, but now
13 Colestead comes out, and it says basically okay,
14 if there's a punitive damage situation it meant
15 that the conduct doesn't have to be egregious,
16 but you need to develop a total record and look
17 at all the facts, and we would submit here that
18 in Colestead they remanded back, but in this case
19 the court never allowed the facts to go to the
20 court of the egregious conduct.

21 We submit the fact that by the fact

1 that there was no basic investigation, and I
2 would like to bring this really to the court's
3 attention, the key here is that another woman had
4 complained about Mr. Kelly before Ms. Watkins.
5 Another lady, a Ms. Odom, had complained of
6 sexual advances to her, or sexual harassment, and
7 nothing was done, and so --

8 THE COURT: Did she complain before
9 your --

10 THE APPELLANT: Yes — I'm sorry, Your
11 Honor.

12 THE COURT: Did she complain before your
13 client —

14 THE APPELLANT: Yes, Your Honor. I'm
15 sorry.

16 THE COURT: Let me try it one more
17 time. Did she complain before your client stated
18 she had been raped?

19 THE APPELLANT: Yes, Your Honor. She
20 complained even before the complaint. She
21 complained prior to my client complaint even of

1 the toughing of the breasts and into the pants.
2 Ms. Odom had filed a complaint against Mr. Kelly
3 and nothing had been done in terms of curing the
4 situation. Then we have a situation where
5 Mr. Kelly is allowed to remain on the job, no
6 protection is put between him and any other
7 female employees, they know now that there are
8 two complaints, and then we have a situation that
9 the meeting that's set up on the 16th of
10 September which allows Mr. Kelly to in fact
11 terminate her we have to argue is surely
12 egregious conduct that should have been subject
13 to the jury's consideration, even to the fact
14 that whether or not there was a pretextual firing
15 of Ms. Kelly, of Ms. Watkins, that should have
16 gone to the jury.

17 Whether or not there was a potential
18 cover up by saying that Mr. Kelly was dismissed
19 for other reasons other than the violations of
20 these ladies' rights, that this was such an
21 indifference, a callous indifference to the

1 rights of, the federally protected rights of
2 Ms. Watkins, that this surely should have been
3 submitted to the jury in terms of whether or not
4 punitive damages was appropriate, and I think
5 Colestead which came out later reinvigorates and
6 reestablishes that principle that the district
7 court judge in this instance was obviously wrong
8 for his failure to do so.

9 THE COURT: I just want to, I'm probably
10 going to ask the same question again because I
11 just want to make sure I'm clear on this, the
12 testimony was that complaints were made by
13 Ms. Odom before any of these things happened to
14 Ms. Watkins?

15 THE APPELLANT: To my best recollection
16 of my examination when I asked Ms. Dowling that
17 question specifically at the trial, she indicated
18 yes.

19 THE COURT: I just couldn't, that wasn't
20 clear to me from reading the record. That's what
21 I wanted to clear up.

1 THE APPELLANT: I'm sure it's there and
2 I know that I asked her, because we attempted to,
3 we would have gotten it in through Ms. Odom, but
4 Ms. Odom at that point in time did not
5 participate in the trial for reasons which are
6 not on the record here of course, but that's why
7 I put, I put, I put Ms. Dowling on the stand. I
8 put Mr. Nikolai on the stand to in fact establish
9 that fact that there had been a prior sexual
10 complaint prior to anything arising from
11 Ms. Watkins.

12 THE COURT: Can I ask you something
13 about Mr. Fisher? I'm looking at his testimony
14 here and it looks to me like he said not only
15 were there policies against this contained in the
16 policy book, there was also a policy posted in
17 the office and that these policies were —

18 THE APPELLANT: From what I'm saying to
19 the --

20 THE COURT: Were policies against sexual
21 harassment.

1 THE APPELLANT: And what I'm saying to
2 the court, Your Honor, in terms of making it a
3 jury question, that's why I called Mr. Fisher,
4 because he said that, and then if you go to pages
5 200, go past 200, I go from 200 to 205 where I
6 specifically cross examine him and say sir, in
7 your deposition if there was a policy, how can
8 you give me a deposition a year before and have
9 no knowledge, no reference to a policy
10 whatsoever, yet in this trial you come in and say
11 a policy exists. I think that generated an issue
12 of fact, and the jury chose to believe that there
13 wasn't a policy, and if there was one nobody else
14 knew about it except somebody other than
15 Mr. Fisher, and I ask to court to look at those
16 pages of my examination of Mr. Fisher. Thank
17 you.

18 THE COURT: Thank you very much. Is it
19 McAlindin?

20 (Appellee Brian McAlindin, Esquire
21 appeared before the court.)

1 THE APPELLEE: Yes, Your Honor. May it
2 please the court, I am Brian McAlindin, counsel
3 to the Kelly Professional Security Bureau,
4 Limited. I think it's most appropriate first in
5 the analysis of this appeal to look at the basis
6 for the court below granting the judgment
7 notwithstanding the verdict but with respect to
8 the retaliatory discharge claim which the jury
9 did find in favor of plaintiff for, because that
10 helps us understand and address the issue of
11 whether or not the separate defenses as
12 articulated in Eller and Farrager are applicable
13 here.

14 The key issue is not simply whether
15 there was an adverse employment action taken in
16 terms of whether or not Ms. Watkins was
17 discharged. We know that she was terminated.
18 The question is was that termination for a
19 nonpretextual reason, did it have a valid basis
20 wholly unrelated to the protected activity that
21 she is entitled to engage in, that protected

1 activity being complaining about sexual
2 harassment which subsequent to all these events
3 was far more severe and significant than she
4 initially indicated.

5 Notwithstanding that, on September 16th
6 she was called into a meeting for the purpose of
7 being fired. The record was undisputed and
8 unequivocally clear that she was being terminated
9 for an explicit gross misconduct, a breach of
10 company policy which included among other things
11 leaving her post, and in the company manual, and
12 it's in the record, that violation in and of
13 itself merited termination.

14 THE COURT: When you say the record is
15 clear, you mean this testimony that she was being
16 called to the meeting to be discharged?

17 THE APPELLEE: Yes, sir. That was the
18 purpose of that meeting. The day before at
19 Bennett House, a client of my client, she had
20 been the guard on duty.

21 THE COURT: What if the jury didn't

1 believe it?

2 THE APPELLEE: I don't know if they
3 didn't believe it. I think that they —

4 THE COURT: She says I was called to a
5 meeting and they had some, I was told that I owed
6 favors and I said well, I reported this to the
7 EEOC and to the police. Well, you're fired,
8 that's what she said.

9 THE APPELLEE: She said a lot of
10 things. She denied, she denied in her direct
11 examination that the meeting addressed the
12 Bennett House issue at all. However, she
13 conceded on cross examination that there were a
14 lot of things that were going on and that the
15 Bennett house topic was being discussed, and I
16 will grant you that she denies that Mr. Dinacola
17 was the entity who conducted that meeting and who
18 advised her that she was terminated, and she
19 contends that the messenger was Mr. Kelly, the
20 gentleman who she alleges had previously sexually
21 harassed her.

1 However, notwithstanding that, even if
2 it was Mr. Kelly, grant her that because we have
3 to give her, all of these inferences have to be
4 viewed in the light most favorable to her in
5 reviewing this JNOV, Mr. Kelly still separate and
6 apart from a complaint that she had made about
7 "protected activity" had and was obligated to
8 terminate her under the policies of this company
9 for the conduct that she had engaged in, and even
10 if we assume it was Kelly as she alleges, and I
11 submit to you the record overwhelmingly says it
12 wasn't, but for the purposes of this hearing we
13 have to do that.

14 THE COURT: I mean no, the policy
15 doesn't say if you leave your post you're going
16 to be fired, does it?

17 THE APPELLEE: Yes, it does, sir.

18 THE COURT: It says that period?

19 THE APPELLEE: That was in the record
20 and it's in the company manual, and that was why
21 she was terminated.

1 THE COURT: If you leave your post
2 you're going to be fired, or if you engage in
3 gross misconduct you're going to be fired?

4 THE APPELLEE: Leaving the post that,
5 Mr. Fisher was questioned extensively on this, I
6 believe Mr. Dinacola may have been as well, but
7 that is among the items in the company manual
8 that is considered gross misconduct for which
9 there is not a stepped disciplinary process.

10 For example, while she may have been an
11 exemplary employee at one time, this record is
12 also overwhelmingly clear that for several
13 months, about four or so, she was not an
14 exemplary employee, but rather had been the
15 subject of numerous and continued disciplinary
16 infractions for which she was written up, she was
17 spoken to. They included a variety of things.

18 THE COURT: I want you to help me get
19 addressed because this is a jury question, they
20 heard the witnesses, and I understand there are
21 two different versions as to what happened at

1 that meeting.

2 THE APPELLEE: No, sir.

3 THE COURT: And then Nikolai says Kelly
4 didn't say a word.

5 THE APPELLEE: I'm —

6 THE COURT: She says Kelly said a lot of
7 words.

8 THE APPELLEE: Let me see if I can
9 articulate why it is not a jury question, because
10 assuming what she says is true, that Mr. Kelly is
11 the messenger and he said you're fired, it
12 doesn't matter if he was terminating her for the
13 violation of company policy which constituted
14 gross misconduct, and even in the best light that
15 we view her testimony he never said to her I'm
16 firing you because you're accusing me of raping
17 you. She doesn't say that he said that. She
18 simply says that he says sit down, I'm not done
19 with you, you're dumb, you're stupid, you're
20 fired. Now, that may be boorish, that may be
21 rude, but even in her best light that evidence

1 does not support —

2 THE COURT: Well, I thought her best
3 light would be that she's complaining to the EEOC
4 and to the police and is pressing charges, and
5 then this next sequence of events is okay, you're
6 fired.

7 THE APPELLEE: She says she's
8 complaining to them, and again I mean, that is
9 her first advice to my client that she's
10 complaining to these entities, because the record
11 doesn't bear that out. The record bears out that
12 she complained to these entities after her
13 termination on or about September 18th.

14 THE COURT: Well, same thing. I'm going
15 to complain to the police, I'm going down to see
16 the police and I'm going to press charges. Oh,
17 okay, you're fired. I'm not suggesting that
18 happened. I'm just saying that's the testimony
19 in her best light.

20 THE APPELLEE: I don't quite read her
21 testimony that way, judge.

1 THE COURT: Okay.

2 THE APPELLEE: And I just have to say to
3 the court on that score we have to go back to
4 direct, to her testimony, because I read it to
5 suggest that that was her retort to being fired,
6 that I'm going to police, you're going to jail
7 and all of that other stuff, so that is frankly
8 why it's clear to me and I think it should be
9 clear from this record that the district court
10 granted the JNOV on the retaliatory discharge
11 because there was an articulated undisputed basis
12 for her discharge, and the mere fact that
13 someone, this is very important from a policy
14 standpoint too, an employee who complains of
15 sexual harassment or discrimination ought not
16 then have carte blanche authority to run wild in
17 their employment.

18 That would be contrary to all public
19 policy. Even if one is a complainant about
20 sexual harassment or discriminatory activity, an
21 employer still must have the authority to enforce

1 the rules that affect that employment for the
2 protection of the company and for the protection
3 of the co-employees.

4 That being said, judge, we then have to
5 go, we go to the basis of the JNOV on the hostile
6 work environment issue. We have to look at the
7 self defenses and the two elements that
8 constitute the self defenses under Burlington
9 versus Eller and Farrager. It is almost
10 remarkable for one to argue that this company did
11 not have a sexual harassment policy and that it
12 was not clear, explicit that it articulated what
13 sexual harassment is, that it is prescribed, that
14 it will not be tolerated, that it will be
15 investigated, and that action will be taken on
16 behalf of anyone who claims to be aggrieved by
17 sexual harassment.

18 In addition, the confidentiality of the
19 victim is also assuring the policy to be
20 protected and there is a procedure to be followed
21 in order to initiate this investigatory and

1 corrective practice, that it's undisputed that it
2 was in the manual. There was a claim by
3 appellant in his argument that Mr. Fisher had no
4 knowledge of it, but I refer the court to 196 and
5 197, the direct examination by counsel of
6 Mr. Fisher, where it says the actual policies and
7 rules and regulations were put out by our human
8 resources department to each of our offices, my
9 responsibility would be to see that the material
10 did get to each office and that it was properly
11 passed on to staff and employees. He identifies
12 what it is. It's at page 500 of the appendix,
13 the page, the relevant page from my client's
14 company handbook.

15 THE COURT: But didn't Ms. Watkins say
16 she didn't get it? I mean, was she --

17 THE APPELLEE: She says I didn't get
18 it. She did. "I didn't get it."

19 THE COURT: So how do you factor that
20 in?

21 THE APPELLEE: The way I factor it in is

1 assume that she didn't as she claims receive her
2 personal copy of a company handbook. The
3 undisputed testimony is also that it is located
4 at every site. She worked at four, at least four
5 different sites during the course of her
6 employment. It is also reviewed in training.
7 Now she says I didn't get training, but in her
8 personnel manual there are tests, there are
9 different things that are done as part of the
10 training process. In addition to that it was
11 disseminated separately by way of a company
12 memorandum, and that's at 501 in the appendix,
13 issued by the president of the company, it
14 reiterates the policy that was also distributed
15 to employees and posted in the office and posted
16 at all posts say, or guard posts or locations,
17 most prominently posted on the wall next to the
18 window where you pick up your paycheck.

19 So we have to assume from this record
20 that she made fifty some odd visits to that
21 location and it is incredulous to assume that she

1 did not have the opportunity to read it. It was
2 there to be read along with other important
3 notices regarding the terms and conditions of
4 employment.

5 THE COURT: Didn't she testify she
6 didn't see that?

7 THE APPELLEE: Pardon me?

8 THE COURT: Didn't she testify she never
9 saw it?

10 THE APPELLEE: She said I didn't see
11 it.

12 THE COURT: Was she saying it's not
13 there or was she saying she didn't realize —

14 THE APPELLEE: She didn't say it wasn't
15 there. She didn't see it. She never read it.
16 That would not alone however be enough to reverse
17 the court below its JNOV on this issue of whether
18 we have a policy and it's disseminated. I mean,
19 the handbook itself are the terms and conditions
20 of her employment under Wooley and other cases.

21 THE COURT: All right, let me get you to

1 switch gears just a second.

2 THE APPELLEE: Sure.

3 THE COURT: This Ms. Odom's alleged
4 complaints, what's your position on that and the
5 effect that that has on the analysis?

6 THE APPELLEE: You raised a very
7 important question earlier, and your question was
8 did Ms. Odom's complaint precede the alleged
9 sexual harassment is the way I heard your
10 question, and the answer to that is no. This
11 record is I believe silent on that issue.

12 THE COURT: There's very little in it.

13 THE APPELLEE: However, Ms. Odom — and
14 this record is silent on that. However, Ms.
15 Watkins' complaint, it's hard to pinpoint the
16 exact date but apparently it was on or about May
17 24th or 23rd thereabouts, late May. Ms. Odom had
18 been deposed in this case, this case had been
19 consolidated with Ms. Odom's case for the
20 purposes of discovery, and she testified that she
21 made a complaint also to Ms. Dowling on the

1 Monday following Father's Day of this same year,
2 which would have been on or about June 10th of
3 the same year after the claimed fondling or rape,
4 however you want to accept Ms. Watkins' version,
5 it was after that event, and that's important
6 because Ms. Odom's complaint could not trigger
7 this process in a way which could have prevented
8 the assault that was occasioned on Ms. Watkins.
9 It was after the fact.

10 THE COURT: I couldn't fathom why if it
11 had in fact happened before that it wasn't a huge
12 deal in the trial.

13 THE APPELLEE: I cannot — all sides of
14 course are free to call her as a witness. It was
15 not, we did not have the burden of proof except
16 on the elements of the affirmative defense. Her
17 testimony wasn't necessary to prove the elements
18 we needed to prove in this matter.

19 THE COURT: Okay.

20 THE APPELLEE: The plaintiff had
21 significant reason to want to call her. I cannot

1 articulate or understand why they would not do
2 that. That's up to them. That's their trial
3 strategy. The same is true of frankly of
4 Mr. Kelly. He wasn't called. I could say from
5 the standpoint of my client he was a former
6 employee whom we had terminated for poor
7 performance, and as a practical matter it would
8 have been much to expect that he would have come
9 in and been one of the best witnesses my client
10 has ever had in their career, but we didn't need
11 him and that's why we didn't call him because we
12 only needed to show that we had a policy, that it
13 complied with the requirements set forth in Eller
14 and Farrager, which any fair reading of it surely
15 indicates that it does, and that the plaintiff
16 failed to avail herself of that complaint
17 process, or rather that the employee unreasonably
18 failed to take advantage of any preventive or
19 corrective opportunities by the employer or to
20 avoid harm otherwise.
21 Why if this conduct was as egregious as

1 it later became in her later version this was not
2 reported in the absence of a policy? You don't
3 need a policy to know that if you are raped it is
4 wrong and to know that it would be in your best
5 interests and in the best interests to the safety
6 of others to report that to someone, particularly
7 the employer. For reasons that are never quite
8 clear it is not until at least three months later
9 that a suggestion of sexual harassment arises,
10 and even when it does it is far afield from what
11 is claimed after she was terminated.

12 With respect to the issue of trial,
13 obviously it's our position that the district
14 court's decision below on the JNOV should not be
15 disturbed. The court did rule in the alternative
16 that a new trial ought to be, in the event I
17 suppose that this panel were to reverse that
18 decision that a new trial is granted, because the
19 only thing you can draw from that is what the
20 district court judge is saying when you do weigh
21 the credibility, you know, if I can borrow a

1 phrase, this dog don't hunt, this just doesn't
2 make a lot of sense, and when you weigh the
3 credibility, clearly in his mind this verdict was
4 against the weight of the evidence so as to
5 result in a miscarriage of justice and a new
6 trial on liability would be warranted.

7 Of course if there's no liability in
8 the first instance punitive damages would not
9 follow, the court below is correct in granting
10 the directed verdict on the issue of punitive
11 damages as there was zero evidence of any
12 recklessness or maliciousness on the part of my
13 client, and I think that's very well wrapped up
14 just in looking at the policy and in the efforts
15 that they —

16 THE COURT: What did your client do when
17 the complaint was received about Ms. Watkins?

18 THE APPELLEE: The following day the
19 supervisor, or Ms. Dowling immediately issued a
20 report, these are in the record, they appear —

21 THE COURT: You can just summarize that

1 if you like.

2 THE APPELLEE: They appear toward the
3 end of the record in around like 400, 500 pages,
4 but Ms. Dowling wrote a written report, she
5 passed that on up to the chain of command to
6 Mr. Dinacola, who was an area supervisor.
7 Mr. Dinacola traveled to the location where
8 Ms. Watkins was located the following day,
9 interviewed her and tried to gain information
10 regarding the allegation, the perpetrator, any
11 witnesses.

12 He commenced an investigation
13 consistent with the type of issues that the EEOC
14 has suggested in guidelines ought to be
15 undertaken. He then wrote a report and passed
16 that up to the next level outside of Mr. Kelly,
17 who was a supervisor to him, to Mr. Fisher. He
18 didn't involve Mr. Kelly in the investigation of
19 the claim against him. He passed it outside him
20 up to Mr. Fisher. Mr. Fisher also conducted an
21 interview and directed Dinacola to do a

1 follow-up.

2 Fisher also, and I believe Dinacola as
3 well, interviewed the alleged perpetrator,
4 Mr. Kelly. It's important to keep in mind at
5 that time Mr. Kelly was out of work on disability
6 as a result of a motor vehicle accident that
7 occurred on or about June 10. He was, Mr. Kelly
8 was directed to have no contact with Ms. Watkins
9 while this matter was being investigated, and
10 they were comfortable that because he was out of
11 work at that time and anticipated to be for
12 several more weeks that would not occur. I can't
13 explain her claim that —

14 THE COURT: What was the final
15 resolution of the claim and within the company?

16 THE APPELLEE: Mr. Kelly? With respect
17 to Mr. Kelly?

18 THE COURT: Yes.

19 A. While he was, it had already been --
20 according to Mr. Fisher it had already been
21 determined that Mr. Kelly was being terminated

1 for poor performance. This, my client had made a
2 decision that they would not fire him while he
3 was out on disability. There's nothing in the
4 record why they made that decision. I think we
5 could infer that in today's world and in the
6 context of an employment liability lawsuit we can
7 see that this area is somewhat of an uncharted
8 mine field, that it was prudent for them to wait
9 for him to return back to work before they
10 terminated him, but he was terminated on
11 September 19th is the date that his termination
12 report is dated, and the reason was for poor
13 performance.

14 It was never conclusively determined
15 whether or not Ms. Watkins' allegations had merit
16 or not, but you can't fire him twice. There's a
17 complaint here that we didn't do enough. He's
18 already been fired. That's the ultimate penalty
19 that an employer can mete out. I see my time is
20 up, but that was the resolution of his
21 affiliation with my client.

1 THE COURT: Thank you very much.

2 THE APPELLEE: Thank you, Your Honor.

3 THE COURT: Mr. Pettit, anything
4 further?

5 (Appellant Pettit appeared before the
6 court.)

7 THE APPELLANT: Yes, Your Honor. Your
8 Honor, I can specifically address the — thank
9 you -- my attention to the question the court
10 raised on the examination of Ms. -- not
11 Mr. Nikolai but I'll just say for brevity Hazel,
12 Hazel, the immediate supervisor, in and around
13 what time was this conversation, I said did you
14 have a conversation, did you ever have an
15 occasion to talk to Ms. Odom yourself. This is
16 on page 20. Yes, I did. Yes, sir I did. And at
17 what time around was this conversation. That was
18 about a month before Ms. Angel Watkins talked to
19 me, and my question to her, you had talked to
20 Ms. Odom about a month before Ms. Watkins, and
21 the answer, uh-huh. And question, did she

1 personally indicate to you at that time that of
2 her own personally to complain in the allegations
3 that she had against Mr. Kelly. Answer, yes,
4 sir.

5 Now, if you go over to the testimony of
6 Mr. Nikolai when I put him on the stand, I asked
7 him I said, I led into it about the prior
8 complaints, and he says, I said going back to
9 this period of time in 1996 in the spring and
10 summer did you become aware of any other
11 complaints being made against Mr. Kelly by any
12 other employees of Professional Security Bureau?
13 Answer, I was asked by Mr. Fisher to fill out a
14 handwritten form about another guard who had
15 brought, allegedly brought charges against
16 Mr. Kelly and just if I saw anything improper
17 ever done or said. Question, I'm sorry, I
18 couldn't hear the last part. Answer, just to see
19 if I saw anything improper done or anything said
20 improper to the woman. Question, who was that
21 person. Answer, Kia Odom. That's on page 43 and

1 44.

2 THE COURT: That still places that after
3 the alleged conduct. In other words, the
4 argument that had they processed the Odom claim
5 they would have been able to prevent the incident
6 in this case, which I guess occurred in May, is
7 that right? Ms. Watkins —

8 THE APPELLANT: Ms. Watkins was in May.

9 THE COURT: Yes, but the question is
10 could the employer had if processed a prior
11 complaint prevented that incident from happening,
12 and I guess you concede that Odom didn't complain
13 until what, June of —

14 THE APPELLANT: No, I'm not saying that,
15 sir. I'm saying just the opposite.

16 THE COURT: That very first phrase you
17 read earlier was about a month before
18 Mrs. Watkins complained. Ms. Watkins didn't
19 complain until July, right?

20 THE APPELLANT: No, no, she
21 complained -- right. She, it happened --

1 THE COURT: It happened in May?

2 THE APPELLANT: She complained in July.

3 THE COURT: July, and right before she
4 complained Odom complained?

5 THE APPELLANT: Right.

6 THE COURT: That's in June.

7 THE APPELLANT: Well, it never says once
8 she complained the inference I talked — when
9 Ms. Dowling said pursuant to my question that she
10 came to me about a month prior to Ms. Watkins.

11 THE COURT: Right.

12 THE APPELLANT: She's talking about
13 Ms. Odom.

14 THE COURT: Okay. That's what I
15 understand.

16 THE APPELLANT: Right. So Ms. Odom was
17 there a month prior, the second complaint.

18 THE COURT: Ms. Odom was there in June
19 and Ms. Watkins was there in July?

20 THE APPELLANT: Yes.

21 THE COURT: But the incident —

1 THE APPELLANT: Well, I'm not sure that
2 Ms. Odom, I'm not sure that Ms. Odom was exactly
3 in June. We have spring according to Mr. Nikolai
4 and a month before, so that would give you June
5 if you look at Ms. Dowling's testimony.

6 THE COURT: All right.

7 THE APPELLANT: But it was a month
8 before according to Ms. Dowling and it was in the
9 spring according to Mr. Nikolai, but the point is
10 that they had knowledge of a prior complaint with
11 the same supervisor and did nothing to protect
12 any of the employees.

13 THE COURT: Well, they were both in
14 process. My question I suspect is with respect
15 to Ms. Watkins they did not have, there's no
16 evidence that they actually had knowledge of the
17 Odom complaint before Ms. Watkins was fondled?

18 THE APPELLANT: Yes, if Ms. Dowling
19 talked to her a month before Ms. Watkins went to
20 Ms. Dowling. At least that's what she says. She
21 says she talked to Ms. Watkins and then she --

1 THE COURT: We agree, I —

2 THE APPELLANT: Right, so she had
3 knowledge. They had knowledge about it before.

4 THE COURT: They had knowledge in June
5 about Ms. Odom's complaint. They had knowledge
6 in July about Ms. Watkins' complaint.

7 THE APPELLANT: Yes.

8 THE COURT: Okay, but the incident
9 happened when, in May, the first incident?

10 THE APPELLANT: The incident with
11 Ms. Watkins happened in May.

12 THE COURT: Right.

13 THE APPELLANT: But Ms. Dowling when
14 she went to talk to Ms. Watkins -- I mean to
15 Ms. Odom, that was a month before she talked to
16 Ms. Watkins.

17 THE COURT: Okay.

18 THE APPELLANT: So according to the
19 record they had knowledge of one complaint
20 already on record by the same man and did nothing
21 to safeguard any of the female employees.

1 THE COURT: Well, nothing happened to
2 Ms. Watkins after May, did it?

3 THE APPELLANT: No, but I don't think
4 that's the crux of the issue, Your Honor. I
5 think the crux of the issue --

6 THE COURT: Well, that was my question.

7 THE APPELLANT: Right.

8 THE COURT: All right, I'm satisfied. I
9 just wanted to know what the record shows.

10 THE APPELLANT: The Supreme Court says
11 that while policy in itself is not, you know, the
12 policy in itself is not a complete defense or the
13 policy in itself is not something that disposes
14 of the matter. We have to look to the
15 surrounding circumstances. Of course the issue
16 here Ms. Watkins said there's no policy
17 whatsoever in terms of meaning never seeing
18 anything.

19 Mr. Fisher I've already indicated to
20 the court of his responses, but if you look at
21 the collateral events taking place, there's

1 nothing here to in fact as the two standards if
2 you say that there had to be, there is an
3 affirmative defense that can be put forth here,
4 if you say there wasn't a tangible employment
5 action then we needed an affirmative defense,
6 then I think we look at these two areas of
7 whether or not there was something in place that
8 was made available to Ms. Watkins and whether she
9 was protected or what have you is set out in
10 Burlington and whether she was given the
11 apparatus of these procedures, and there's
12 nothing there.

13 There's nothing that was done when
14 Ms. Odom came, there was nothing done when Ms.
15 Watkins came, there was no procedure, there was
16 no adverse, they could have transferred
17 Mr. Kelly. Mr. Kelly was a regional office
18 manager. He was not just — I'm sorry.

19 THE COURT: That's all right. I just
20 want to say we understand your position very
21 well.

1 THE APPELLANT: Thank you very much,
2 Your Honor.

3 THE COURT: And I'm going to ask the
4 clerk to adjourn court until in the morning, and
5 then we'll come down and greet counsel.

6 COURT CLERK: The honorable court stands
7 adjourned until tomorrow at 8:30. God save the
8 United States and this honorable court.

9 (End of Case Four.) 10

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1 State of Maryland,
2 Prince George's County, to wit:
3 I, Wesley J. Armstrong, a Notary Public
4 of the State of Maryland, Prince George's County,
5 do hereby certify that the proceedings contained
6 on this audio tape were recorded stenographically
7 and transcribed by me, and this transcript is a
8 true record of the proceedings. I further certify
9 that I am not of Counsel to any of the parties,
10 nor an employee of Counsel, nor related to any of
11 the parties, nor in any way interested in the
12 outcome of this action.

13 As witness my hand and Notarial Seal
14 this 24th day of January, 2000.

15 _____
16 Wesley J. Armstrong
17 Notary Public

18 My commission expires: 01/01/2001 19

20

21

