

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIELLE J. BRANDON : CIVIL ACTION  
v. :  
COMMONWEALTH OF PENNSYLVANIA, NO. 95-5597  
DEPT OF PUBLIC WELFARE, et al. :

**MEMORANDUM OF DECISION**

THOMAS J. RUETER  
United States Magistrate Judge

March 11, 1998

Presently before the court are plaintiff's motion for a new trial pursuant to Fed. R. Civ. P. 59, and the individual defendants'<sup>1</sup> application for attorneys' fees from plaintiff pursuant to 42 U.S.C. § 1988(b) (Document No. 174). For the reasons explained below, the court will deny both motions.<sup>2</sup>

**I. Plaintiff's Motion for a New Trial.**

**A. Standards Governing Rule 59 Motions.**

The decision to grant or deny a new trial pursuant to Fed. R. Civ. P. 59(a)(1) is in the sound discretion of the district court. Blancha v. Raymark Ind., 972 F.2d 507, 513 (3d Cir. 1992) (citing Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)). See also 11 Charles Alan Wright et al., Federal Practice and Procedure: Civil § 2803 at 47-8 (2d ed.

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<sup>1</sup> The individual defendants who filed this application are: Laverne Alford, Daniel Green, Richard Szczurowski, and Zachary Sams.

<sup>2</sup> Plaintiff did not order the transcript of the trial, as required by Local Rule 7.1(e). Nonetheless, the court denies plaintiff's motion for a new trial on the merits rather than for lack of prosecution.

1995)(same). However, a district court may order a new trial only if there has been a prejudicial error of law; that is, any error, defect or other act must effect the substantial rights of the parties. Andrews v. C.O.I.M. Grabowski, 1997 WL 698136, at \*2 (E.D. Pa., Nov. 4, 1997); Fed. R. Civ. P. 61.

As discussed in greater detail below, plaintiff's motion for a new trial alleges that this court committed two evidentiary errors. A motion for a new trial on the basis of alleged trial error requires two inquiries: first, whether an error was in fact committed; and second, whether that error was so prejudicial that refusal to grant a new trial would be "inconsistent with substantial justice." Bhaya v. Westinghouse Elec. Corp., 709 F.Supp. 600, 601 (E.D. Pa. 1989) (citing Fed. R. Civ. P. 61), aff'd, 922 F.2d 184 (3d Cir. 1990). "With respect to an evidentiary error, the test under the second inquiry is that a new trial must be granted unless 'it is highly probable that [the erroneous ruling] did not affect the [objecting party's] substantial rights.'" Id. (quoting McQueeney v. Wilmington Trust Co., 779 F.2d 916, 928 (3d Cir. 1985)).

**B. Plaintiff's Motion for New Trial.**

Plaintiff states two grounds in her motion as a basis for a new trial. First, plaintiff argues that a new trial should be granted because the court erred in refusing to estop defendants from denying that plaintiff suffered from post traumatic stress disorder and that this condition was work related. (Pl's. Mot. for New Tr. at 19.) More specifically, plaintiff contends that this court erred when it excluded evidence of plaintiff's receipt of workers' compensation benefits. Second, plaintiff contends that she is entitled to a new trial because it was error for the court to refuse to permit plaintiff to introduce the testimony of Georgetta Smith. (Pl's. Mot. for New Tr. at 32.)

**1. Evidence Relating to Plaintiff’s Receipt of Workers’ Compensation**

**Benefits.** Plaintiff argues that defendants, in particular the Commonwealth of Pennsylvania Department of Public Welfare, admitted that plaintiff was totally disabled from all work due to work related post traumatic stress disorder. Plaintiff claims that the Department of Public Welfare made this admission in November, 1995, when it and plaintiff entered into a “Supplemental Agreement” for the issuance of workers’ compensation. (Pl’s. Mot. for New Tr. at 20-2.) Plaintiff asserts that defendants Department of Public Welfare and Zachary Sams took an inconsistent position when they argued in the instant litigation that plaintiff did not suffer from post traumatic stress disorder and, if she did suffer from a psychological condition, it was not work related. (Pl’s. Mot. for New. Tr. at 23-4.) Plaintiff claims that it was error for the court not to judicially or collaterally estop defendant from denying that plaintiff suffered from work related post traumatic stress disorder.

**a. Judicial Estoppel.<sup>3</sup>** The doctrine of judicial estoppel is an

equitable doctrine invoked by a court in its discretion. As our Court of Appeals has stated:

Judicial estoppel, sometimes called the “doctrine against the assertion of inconsistent positions,” is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding. It is not intended to eliminate all

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<sup>3</sup> Plaintiff did not request this court to exercise its discretion under the doctrine of judicial estoppel at the trial. Plaintiff raised this issue for the first time in her motion for new trial. The court cannot consider this new theory which was never advanced at trial. See Sinclair v. Long Island R.R., 985 F.2d 74, 78 (2d Cir. 1993); Browzin v. Catholic Univ. of Am., 527 F.2d 843, 849 n.10 (D.C.Cir. 1975). Even assuming that plaintiff timely raised this argument, its application is not warranted in this case. Moreover, plaintiff’s reliance upon McNemar v. Disney Store, Inc., 91 F.3d 610, 617 (3d Cir. 1996), may be misplaced. Our Court of Appeals has criticized this opinion and warned against its misapplication. See Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 nn.3, 4, 5 (3d Cir. 1997). See also Daliessio v. Depuy, Inc., 1998 WL 24330, at \*6 (E.D. Pa., Jan. 23, 1998)(same).

inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from “playing ‘fast and loose with the courts.’”

Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996)

(quoting Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953) (citation omitted)). The application of judicial estoppel requires a two part inquiry: (1) is the party’s present position inconsistent with one previously asserted in a judicial proceeding; and (2) if so, did the party assert either or both of the inconsistent positions in bad faith? Id. at 361; Daliessio, 1998 WL 24330, at \*6. “Only if both prongs are satisfied is judicial estoppel an appropriate remedy.” Ryan Operations, 81 F.3d at 361.

In the instant matter, defendants did not assert an inconsistent position in a previous judicial proceeding. Evidence that the Department of Public Welfare and plaintiff entered into an agreement that resulted in plaintiff receiving workers’ compensation, does not establish an inconsistent statement for the purposes of judicial estoppel. In her motion for a new trial, plaintiff states that defendants Department of Public Welfare and Sams did not contest her claim for workers’ compensation. (Pl’s. Mot. for New Tr. at 31.) However, it is unclear under what circumstances the Commonwealth entered into the workers’ compensation agreement. The Department of Public Welfare could have entered into that agreement for any number of reasons,<sup>4</sup> including compassion for plaintiff’s alleged disability. Based on the sparse record before the court, this court cannot construe the Commonwealth’s action as a stipulation to the veracity of plaintiff’s complaints.

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<sup>4</sup> The “Supplemental Agreement” between plaintiff and the Department of Public Welfare consists of a preprinted form and is attached as Exhibit C to plaintiff’s motion for a new trial.

Moreover, even if the Department of Public Welfare and defendant Sams did assert inconsistent positions, plaintiff has not proven that they were asserted in bad faith. Consequently, this court finds that it did not commit an error when it did not judicially estop defendant from denying plaintiff suffered from work related post traumatic stress disorder, and plaintiff's motion for a new trial on this ground must be denied.

**b. Collateral Estoppel.** Plaintiff argues that the prior workers' compensation determination that plaintiff suffered from work related post traumatic stress disorder has preclusive effect in a Title VII action. The party asserting collateral estoppel or issue preclusion, in this case the plaintiff, bears the burden of proving its applicability to the case at hand. Dici v. Commonwealth of Pa., 91 F.3d 542, 548 (3d Cir. 1996). Issue preclusion is appropriately invoked if:

(1) the issue decided in the prior adjudication was identical with the one presented in the later action, (2) there was a final judgment on the merits, (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior action.

Id. Plaintiff asserts that each of these elements has been established. (Pl's. Mot. for New Tr. at 30-1.)

This court, however, is no more persuaded by plaintiff's arguments now, than it was at the time of the trial.<sup>5</sup> Rather, the court is guided by Dici, in which the Third Circuit Court of Appeals stated in pertinent part as follows:

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<sup>5</sup> By order dated September 17, 1997 (Document No. 135), this court denied plaintiff's motion in limine to collaterally estop defendants from denying that plaintiff suffered a psychic work-related injury.

As we stated in [Swineford v. Snyder County Pennsylvania, 15 F.3d 1258 (3d Cir. 1994)], “[u]nder [Odgers v. Commonwealth Unemployment Compensation Board of Review, 514 Pa. 378, 525 A.2d 359 (1987)], reviewing courts must look beyond the superficial similarities between the two issues to the policies behind the two actions. Only where the two actions promote similar policies will the two issues be identical for purposes of issue preclusion.” Swineford, 15 F.3d at 1267 -68. We believe that Pennsylvania courts would apply this reasoning to the workmen’s compensation proceeding in Dici’s case. The policy of Title VII is to achieve equality of employment opportunities and remedy discrimination in the workplace. By contrast, Pennsylvania’s workmen’s compensation law is designed to define the liability of employers for injuries to employees occurring in the course of employment. Moreover, the procedures utilized in workmen’s compensation proceedings differ from those employed in the federal court. For example, “[n]either the board nor any of its members nor any referee shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation ...” 77 Pa. Cons. Stat. Ann. § 834 (1991). Given this court’s admonition that “[r]easonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel,” [Gregory v. Chehi, 843 F.2d 111, 121 (3d Cir. 1988)] ..., we find that issue preclusion should not apply to the facts of Dici’s case.

Dici, 91 F.3d at 551. See also University of Tennessee v. Elliott, 478 U.S. 788, 796 (1986).

(“Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims.”)<sup>6</sup> In consideration of the fundamental policy and procedural differences between Pennsylvania’s workers’ compensation laws and Title VII, the issues decided by the Bureau of Workers’ Compensation are not the same as the issues presented in the instant litigation and collateral estoppel is not applicable in this situation.

**2. Testimony of Georgetta Smith.** At trial, plaintiff sought to introduce the testimony of Georgetta Smith, a former coworker at the Bensalem Youth Development Center

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<sup>6</sup> Plaintiff’s reliance on the Federal Full Faith and Credit Act, 28 U.S.C. § 1738(1994) is misplaced. See Univ. of Tennessee v. Elliott, 478 U.S. 788, 794 (1986) (Section “1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative fact finding at issue in this case.”) See also Dici, 91 F.3d at 547-48 (same).

(“BYDC”), as evidence of defendant Sams’ motive and intent under Fed. R. Evid. 404(b) . Plaintiff states that Ms. Smith was prepared to testify that she witnessed an act by defendant Sams which she considered to be child abuse and that Mr. Sams pressured her to prepare a fraudulent report concerning the incident. (Pl’s. Mot. for New Tr. at 32-3.) Plaintiff argues that this testimony was relevant to “establish Sams’ motive for intimidating female staff, such as plaintiff, from ‘snitching’ on him, or any other male BYDC worker who chose to physically abuse the students.” (Pl’s. Mot. for New Tr. at 34-5.) Plaintiff further argues that Sams’ motive was relevant because “it is probative of Sams’ guilt as to plaintiff’s First Amendment retaliation claim, and is always relevant to an accused’s guilt.” Id. at 34.

When deciding to admit evidence of “other acts” under Fed. R. Evid. 404(b), a trial court initially must consider two issues: first, whether the evidence is logically relevant, under Rules 404(b) and 402, to any issue other than the defendant’s propensity to commit the crime, wrong or bad act; and second, whether under Rule 403 the probative value of the evidence outweighs its prejudicial effect. “The trial court has significant leeway in making both determinations.” United States v. Himelwright, 42 F.3d 777, 781 (3d Cir. 1994).

The court exercised its discretion and refused to admit the “other acts” evidence in plaintiff’s case in chief because the evidence was not similar to the allegations plaintiff made against defendant Sams regarding the Quay Muir incident. At trial, plaintiff admitted that defendant Sams never directed her to change the substance of any report she wrote, in particular the report concerning her allegations against Quay Muir. This contrasts with the proffered testimony of Georgetta Smith who stated that at some unspecified date, she witnessed an alleged act of child abuse by Sams and others. Ms. Smith claims that at Sams’ request, she falsified the

report concerning this incident. According to the Commonwealth, Ms. Smith was later terminated from employment at the Bensalem Youth Development Center because she was derelict in her duties with two offenders who escaped from the facility. According to Ms. Smith, the real reason she was fired was because she was present when Sams and others committed the acts of child abuse.

Importantly, Ms. Smith never said she was fired or retaliated against for truthfully reporting about child abuse, as plaintiff claims in this case. On the contrary, Ms. Smith participated in a cover-up with Sams, according to her sworn affidavit. Thus, Ms. Smith's proffered testimony was not relevant to show Sams' motive or intent in allegedly retaliating against plaintiff.

Even if Ms. Smith's testimony had some relevance, the court properly excluded it as being unfairly prejudicial to Sams under Fed. R. Evid. 403, and because it would have caused undue delay since defendant Sams planned to call at least three new witnesses to establish that Smith's testimony was false. Moreover, the court did allow plaintiff to cross-examine defendant Sams regarding the particulars of Smith's allegations, but pursuant to Fed. R. Evid. 608(b) prohibited plaintiff from introducing extrinsic evidence to counteract Sams' testimony given during the cross examination. Accordingly, the court did not abuse its discretion in prohibiting Ms. Smith's testimony and therefore the motion for new trial must be denied.

## **II. Individual Defendants' Application for Attorneys' Fees.**

### **A. 42 U.S.C. § 1988(b).**

In 42 U.S.C. § 1988(b), Congress authorized the discretionary award of a reasonable attorney's fee to a "prevailing party". Section 1988(b) provides:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983 ... title VI of the Civil Rights Act of 1964 ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Courts have awarded attorneys' fees to prevailing defendants, as well as plaintiffs, under this statute. See Yaron v. Township of Northampton, 1991 WL 137167 (E.D. Pa. July 18, 1991), vacated in part, 963 F.2d 33 (3d Cir. 1992); Lacy v. General Elec. Co., 558 F.Supp. 277 (E.D. Pa. 1982), aff'd, 786 F.2d 1147 (3d Cir. 1986). The standard articulated by the courts is that attorneys' fees may be awarded to the prevailing party in a civil rights action when the claim was "frivolous, unreasonable or without foundation". Yaron, 1991 WL 137167, at \*5 (citing Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978); Hughes v. Rowe, 449 U.S. 5 (1980)). Courts have described this standard as "stringent". Id. While an award of attorneys' fees to a defendant does not require that plaintiff acted in bad faith, a defendant is not automatically entitled to fees under the statute simply because the plaintiff failed to prevail. Id.

**B. Individual Defendants' Application for Fees.**

The individual defendants argue that all of plaintiff's claims were groundless, frivolous or unreasonable. In support of this contention, defendants note that prior to trial and, after plaintiff rested her case at trial, this court dismissed the claims against three defendants, i.e., Green, Alford, and Szczurowski. The court dismissed the claims against these three defendants because plaintiff failed to prove that these three supervisors should be liable for the conduct of their subordinate, defendant Sams. Notwithstanding these dismissals, this court does not find that plaintiff's entire case was frivolous, unreasonable or without foundation so as to warrant the award of attorneys' fees to defendants. Supervisory liability under 42 U.S.C. § 1983 is difficult

to establish. See Andrews v. Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). Although plaintiff failed to meet her exacting burden of proof against the three supervisors, this shortcoming does not justify an award of attorneys' fees to defendants.

Moreover, this court found that there was sufficient evidence for the jury to decide the claims against defendant Sams and the Commonwealth. Indeed, plaintiff presented evidence, which, if believed, showed that defendant Sams, and others, retaliated against her for reporting misconduct by Quay Muir. This consisted of her own testimony and corroborative testimony of witnesses and documents. The alleged acts of retaliation included the placement of a dead rat with a "snitch" note at plaintiff's home, as well as acts of vandalism directed towards her automobile. Ms. Brandon also presented evidence that she was physically assaulted on two occasions in retaliation for the exercise of her First Amendment rights. Furthermore, plaintiff also presented sufficient evidence from which a jury could find the Commonwealth of Pennsylvania liable for failure to take steps to end the sexual harassment directed towards plaintiff. Most of these issues raised by plaintiff involved credibility determinations and weighing of evidence by the jury. The fact that plaintiff was unable to persuade the jury to find for her on these issues does not mean that her claims were frivolous, unreasonable or without foundation. The request for attorneys' fees must therefore be denied.

Accordingly, for all of the above reasons, it is hereby

**ORDERED**

1. Plaintiff's motion for a new trial pursuant to Fed. R. Civ. P. 59 is

**DENIED**; and

2. The individual defendants' application for attorneys' fees from plaintiff pursuant to 42 U.S.C. § 1988(b) (Document No. 174) is **DENIED**.

BY THE COURT:

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THOMAS J. RUETER  
United States Magistrate Judge