

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

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**EDNA FORBES,**

Plaintiff-Appellee

Vs.

Wilson Chancery No. 9325

**WILSON COUNTY EMERGENCY  
COMMUNICATION DISTRICT 911  
BOARD and W. J. MCCLUSKEY,**

C.A. No. 01A01-9602-CH-00089

Defendants-Appellants

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FROM THE WILSON COUNTY CHANCERY COURT  
THE HONORABLE C. K. SMITH, CHANCELLOR

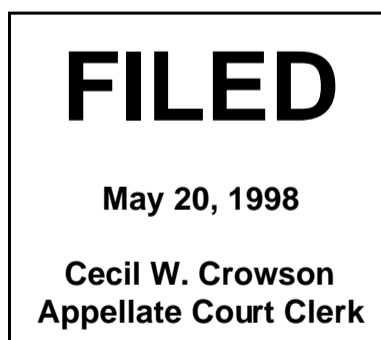
*ON REMAND FROM THE SUPREME COURT*

W. Gary Blackburn, Blackburn, Slobey, Freeman & Happell  
of Nashville, For Appellants

Margaret L. Behm, Anne C. Martin, Dodson Parker & Behm  
of Nashville, For Appellee

***REMANDED TO THE TRIAL COURT***

Opinion filed:



**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCURS:  
ALAN E. HIGHERS, JUDGE**

**HOLLY KIRBY LILLARD, JUDGE**

This case, remanded to this Court by the Supreme Court, involves an action brought pursuant to the Tennessee Open Meetings Act and the Tennessee handicap discrimination statute. Plaintiff Edna Forbes (Forbes) alleged that Defendant Wilson County Emergency

Communication District 911 Board and Defendant W.J. McCluskey violated these statutes by conducting a secret meeting in which they decided to demote her because of a handicap.<sup>1</sup> Following a jury trial, the trial court entered judgment on the jury verdicts which found violations of both statutes. Forbes was awarded \$65,975.00 in back pay, \$38,675.00 in front pay, \$250,000.00 damages for humiliation and embarrassment, \$50,000.00 for punitive damages, plus reasonable attorney's fees and litigation costs. The trial court denied the defendants' Motion for a New Trial and/or to Alter and Amend.<sup>2</sup> The defendants appealed, presenting issues of liability under both statutes and damages.

In a decision filed September 13, 1996, we held that the defendants violated the Open Meetings Act, T.C.A. §§ 8-44-101 *et seq.* (1993 & Supp. 1997). *Forbes v. Wilson County Emergency Communication Dist. 911*, No. 01A01-9602-CH-00089, 1996 WL 518073 (Tenn. App. Sept. 13, 1996). Finding that the defendants' adverse employment action was void in light of its violation of the Open Meetings Act, we held that there was no demotion, and plaintiff was reinstated to her supervisor position. *Id.* at \*4. Therefore, we held that because there was no demotion, plaintiff was not discriminated against "in the hiring, firing, and other terms and conditions of employment" as provided for in T.C.A. § 8-50-103 (A)(1993).<sup>3</sup> Therefore, we pretermitted consideration of the damage awards for discrimination. *Id.*

In an opinion filed April 13, 1998, the Tennessee Supreme Court reversed our decision to the extent that we held that Forbes could not recover for handicap discrimination, and held that "a discriminatory decision made in violation of the Open Meetings Act can serve as the basis for a discrimination suit even though the decision is later declared void for violating the Open Meetings Act." *Forbes v. Wilson County Emergency Dist. 911 Bd.*, No. 01S01-9702-CH-00026, 1998 WL 166142, \*2 (Tenn. Apr. 13, 1998). After addressing several issues pretermitted by our holding, the Supreme Court remanded the case to this Court to consider the sole issue of whether the award of \$250,000.00 for humiliation and embarrassment was

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<sup>1</sup> For a more in depth discussion of the facts of this case, *see Forbes v. Wilson County Emergency Dist. 911 Bd.*, No. 01S01-9702-CH-00026, 1998 WL 166142 (Tenn. Apr. 13, 1998).

<sup>2</sup> Counsel for Wilson County also orally moved for a remittitur following the trial, but this request was denied.

<sup>3</sup> Judge Lillard wrote separately to dissent to this aspect of the decision. *Forbes*, 1996 WL 518073 at \*4-7 (Lillard, J. concurring in part and dissenting in part).

excessive. *Id.* at \*4.

When factual determinations made by a jury have been approved by the trial judge, an appellate court may only set aside these factual findings in the absence of any material evidence in the record to support the verdict. *Jackson v. Patton*, 952 S.W.2d 404, 405 (Tenn. 1997). Thus, an appellate court should be “more deferential” to a trial court that approves a jury’s award of damages as opposed to a trial court that modifies a jury’s damage award. *Coffey v. Fayette Tubular Prods.*, ||| ||| .|| ||||, ||| .|| ||||. ||||| In *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125 (Tenn. 1980), our Supreme Court said:

The trial judge’s approval of a jury verdict invokes the material evidence rule with respect to all other issues of fact and we know of no reason why that rule should not have the same effect when that approval includes the amount of the award. That action by the trial judge means that he has accredited the testimony of the witnesses on the issue of damages and has evaluated the evidence as supporting the amount awarded. Nevertheless, when the question of remittitur is raised, the Court of Appeals has the duty to review the proof of damages and the authority to reduce an excessive award. But when the trial judge has approved the verdict, the review in the Court of Appeals is subject to the rule that if there is any material evidence to support the award, it should not be disturbed.

*Id.* at 129; *see also Coffey*, 929 S.W.2d at 331 n.2.

Tennessee’s handicap discrimination statute, T.C.A. § 8-50-103, incorporates the rights and privileges of the Tennessee Human Rights Act. Under this act, a plaintiff may recover damages for “humiliation and embarrassment.” T.C.A. § 4-21-306 (a)(7) (Supp. 1997). We first note that under the statute, humiliation and embarrassment is included as an element of recoverable damages, and the jury in the instant case was specifically instructed to consider this element separately. In *McDowell v. Shoffner Indus. of Tenn., Inc.*, No. 03A01-9301-CH-00030, 1993 WL 262846 (Tenn. App. July 13, 1993), this Court discussed the award of such

emotional damages under the Human Rights Act with regard to a discharged employee.

**Damages for humiliation and embarrassment, if occasioned by the unlawful discharge, may be awarded under the Human Rights Act. The amount is peculiarly within the province of the jury subject to the rule of reasonableness, and necessarily depends on the articulation of personal shame experienced by the discharged plaintiff together with the jury's perception of his sensitivities.**

***Id.* at \*4.**

The proof in the instant case has established that at the time of her termination, Forbes was fifty-five years old and nearing her career. Forbes testified that when she was notified by letter that she had been terminated, she experienced "a complete mental and emotional breakdown." She asserted that she suffered a brief collapse and was absolutely unable to get going, or to be able to properly present a resignation. Forbes testified as follows:

I was I received this letter [indicating her termination], I recall it -- I just recall it's believe or not I had received, after working as hard as I had and the type of work that I was for BDO, and what they had done to me.

It was a real -- I can't explain exactly what goes through in a situation like this. I'm absolutely had to go to a doctor. I went to the doctor on Monday three days. I was in a situation of being that I didn't really know what I was having an out, and sometimes I didn't even know what.

I'm just a one of those out. I recall it's believe, I can't go any body was still read from the other situation that I had had. Then all of this on top of it really did cause a lot of pain, a lot of headache, and I just -- I've never experienced a situation like this before.

Forbes testified that the termination adversely affected her self-confidence and her ability to make decisions. In addition, Forbes stated that she had difficulty mingling with friends and others in the community, because she was concerned that they would not understand her job. Forbes testified:

I got to the point that I recall it's go to about, I recall just walk in and walk out. I recall -- about the -- the first time I got out, I realized that I needed to leave the house, and I went to I want, I don't know I want to I want, I recall it's get out of my [sic]. I had to turn around and come back home. It's still affecting me quite a bit.

Forbes further testified that she suffers from insomnia every night as a result of her termination. This testimony was reinforced by testimony of Forbes's daughter, Cindy Deora, who also stated that Forbes "is absolutely depressed" after her termination. Deora also testified:

She just isn't the same. I can hear, she always liked to cook and go out and walk and see the usual things like that. And she just sat around just like and -- she just didn't have a lot to think, I think.

Other witnesses employed by BDO testified that they were "shocked" when they heard that Forbes had been terminated, but they did not describe Forbes's reaction.

The Federal Jury verdict that the jury's award of \$100,000 for her humiliation and embarrassment is excessive,

since Fisher did not offer any evidence from a psychologist or psychologist regarding her alleged emotional injury. The defendant asserts that Fisher did not allege that she was prescribed any long-term medication and that she failed to document that her life activities were controlled beyond a short period of time. Thus, the defendant claims that the verdict can only be explained by the jury's ageism and prejudice.

The defendant cites *Campbell v. Rust Eng'g Co.*, 1991 Tenn. App. LEXIS 0011 (1991) (1991 Tenn. App. LEXIS 0011), in *Campbell* a laid-off employee brought a claim against his employer pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-626, *et seq.*, and the Tennessee Human Rights Act. On other issues, the defendant appealed the magistrate's failure to reduce the jury's award of \$100,000 for the plaintiff's humiliation and embarrassment injuries and the Human Rights Act. Although the decision does not discuss or reject the plaintiff's emotional injury as caused by his layoff, the court states that "[t]he evidence used to support the jury's award to plaintiff's testimony that the layoff 'has a quite a bit' and that he was humiliated and embarrassed because he was laid-off employees with her should have only a small.' *Id.* at 11. The Third Circuit noted that:

Plaintiff suffered an aggravated injury as a result of his layoff. Further, the injuries he suffered were more than normally associated with being laid-off, i.e., mental anguish in excess of being employed.

*Id.* at 11. Consequently, the Court vacated the award to the plaintiff and instructed the jury to reduce the award to \$100,000.

In *Harris v. Dominion Bank of Middle Tenn.*, 1991 Tenn. App. LEXIS 0011 (1991) (1991 Tenn. App. LEXIS 0011), a laid-off employee brought a claim against his former employer pursuant to the Human Rights Act, alleging that he was discriminated against because of his age. The jury awarded a general verdict to the defendant and awarded the plaintiff \$100,000, which constituted \$100,000 to the plaintiff's humiliation and embarrassment injuries.<sup>4</sup> *Id.* at 11, 12. Citing *Campbell, supra*, the defendant argued that the plaintiff was required to "prove more than the humiliation and embarrassment typically associated with being laid-off." *Id.* at 11. The court, however, rejected that "no reason indication that the legislature intended to restrict remedies for humiliation and embarrassment by requiring contribution or by requiring a higher degree of proof." *Id.*

The only testimony offered by the plaintiff in *Harris* regarding his humiliation and embarrassment injuries was as follows:

[testimony by Plaintiff (employee)] I was often humiliated and embarrassed

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<sup>4</sup> Although the verdict did not expressly delineate that \$100,000.00 was attributable to the plaintiff's humiliation and embarrassment injuries, this was deduced from the fact that expert testimony demonstrated that the plaintiff was owed \$204,254.00 for lost wages and benefits. *Id.* at \*3.

generators and in fact life I can't even [plead with]! I have my own psychological well-being like!

Answer: Well, probably one of the scariest positions I have ever been in because I can't let a company develop out in the wilderness. I didn't have any income and I'm pretty bad, willing to be the age that I was not to suddenly find out you no longer have a job.

Question by Mr. Day: Did you have a problem sleeping?

Answer: Well, I didn't have a problem sleeping to the best I can remember, but that problem is--you know, it's a little bit annoying to get out in the night and people that you're still in the back and you're not.

Question by Mr. Day: Did you have to tell people, 'The bear team is out, I no longer have a job'?

Answer: That's true.

Question by Mr. Day: How did that make you feel?

Answer: It didn't make you feel good.

**Id.** at 9. Finding that the award of \$100,000 for these injuries was 'clearly excessive,' the Court suggested a new figure to \$10,000. **Id.** Citing *Campbell supra*, the Court stated that the plaintiff 'did not suffer any aggravated injuries; the linear lacerations she sustained were a well-known hazard of being a job.' **Id.**

In the instant case, it is uncontested that Forbes suffered pain for continuing to work without any other symptoms as a result of her ear infection and ear discomfort. As in *Campbell* and *Harris*, Forbes testified that the adverse workplace extraction eventually caused her. *See Campbell supra*, at 9; *Harris supra*, at 9. Likewise in these cases, Forbes claimed that she was socially embarrassed by the adverse workplace extraction. *See id.* at 9; *Campbell supra*, at 9.

Unlike the other cases in *Campbell* and *Harris*, Forbes never explicitly testified to have tested. However, Forbes, a born and bred hunter and avid outdoors enthusiast, testified that she was a professional hunter, thus, would likely be more prone to ear-related injuries due to her unique sensitivities. *See McDowell supra*, at 9. Unlike the plaintiffs in the other extant cases, Forbes testified that she suffered from a relapsing and remitting condition as a result of her ear infection and that she suffered from sinusitis. Forbes, moreover, did not proffer evidence that she was receiving any long-term treatment from professionals for her ear infection and ear discomfort, nor did she describe any particular instances of linear lacerations.

Although we believe that a substantial evidence exists by which the jury could conclude that Forbes suffered from ear infection and ear discomfort, we find that no substantial evidence exists to support an award of \$100,000 for these injuries. *Ellis*, 444 F.3d at 111.

After a thorough review of the record, we suggest a new figure of \$100,000 for Forbes's ear infection and

no longer entitled to wages, and the judgment is reduced to \$14,000.00. As ordered by the Supreme Court, the case is remanded to the trial court for such further proceedings as may be necessary including determination of an award of attorney's fees on appeal. Costs of the appeal are assessed against defendant.

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**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCUR:**

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**ALAN E. HIGHERS, JUDGE**

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**HOLLY KIRBY LILLARD, JUDGE**