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THE GREATER OF TWO EVILS: DISCOVERY ABUSE IN THE CASE BEHIND NORTH COUNTRY
BY LINDSAY PETERSEN

I. INTRODUCTION

With the release of the film North Country, there has been a renewed interest in the case behind the movie. The movie tells the story of a woman who endures intense sexual harassment while working in Minnesota iron mines and decides to speak out, despite strong opposition. This eventually leads to the nation's first class action sexual harassment lawsuit. Jenson v. Eveleth Taconite Co. is famous for its depiction of egregious sexual harassment and the women who fought against it, but the story of the abuse the women suffered at the hands of the court is lesser-known. Despite arguments that this case revolutionized sexual harassment law, a careful examination of the history of the case, the abusive discovery practices employed, and the negative results of these practices reveals that the case did not improve the condition of the women involved, but instead destroyed them emotionally.

II. HISTORY

The history of this case illuminates its negative impact. Although the case was settled in 1998, the events that led up to the settlement began in 1974, when several large steel companies reached an agreement with the government to make up for past discrimination. Many women were then lured to work in the mines because of high wages. One of those women was Lois Jenson, who began working for Eveleth Taconite in 1975. It soon became evident that the female

1 Lindsay Petersen is a junior at Brigham Young University majoring in Marriage, Family, and Human Development. She is planning to attend law school after graduating from BYU. Lindsay is from Carmel, Indiana.

workers were unwelcome. They faced intense sexual harassment from some male workers, including insults, groping, threats, physical intimidation, graffiti in the mines, and other forms of harassment.\(^3\) Sexual discrimination in promotion practices and general attitude was also a problem.\(^4\) Jenson notified company supervisors and union representatives, but no one would help her. Her tires were slashed after she sent a letter to the Minnesota Human Rights Department.\(^5\)

The state finally stepped in and ordered one of the mine’s part-owners to pay $11,000 in damages to Jenson, but the company refused to do so. Jenson’s attorney filed suit in the U.S. District Court of Minneapolis and asked that the case be given class action status, which the judge granted. This made history because it was the first-ever sexual harassment case to be designated a class action. In the liability phase of the trial, the judge decided that the mining company was liable because it did not prevent the sexual harassment. The company was ordered to educate its workers about sexual harassment and create new company policies regarding it.

The injustice the women faced from the court began when Patrick McNulty, a former federal magistrate, was assigned to be Special Master for the trial and therefore appointed to determine what to award the women in damages. By way of background, McNulty was a 71-year-old former federal magistrate who Jenson’s lawyer believed was given the case to make up for having to step down from his previous position before he would have liked to. Also, Jenson’s attorney was told by a female lawyer that once, while she was trying a case in his presence, McNulty “made a pass at her.” However, Jenson’s lawyer had no proof of this claim and therefore, could take no action.\(^6\)

It soon became evident that McNulty did not have a clear concept of burden of proof for this case. Did the women have to

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\(^4\) Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1290 (8th Cir. 1997).

\(^5\) The Real Case Behind “North Country,” supra note 3.

\(^6\) Clara Bingham & Laura Leedy Gansler, Class Action: The Landmark Case that Changed Sexual Harassment Law 277-78 (2002).
prove that the work environment at the mines caused the damage of mental anguish, or did the company have to prove that it did not? Jenson's lawyer felt that the women's only responsibility at this point was to show that the sexual harassment had affected them in the way it would have affected a reasonable woman. The defense lawyers argued that the plaintiffs had to prove that their emotional anguish was caused by the work environment and not something else.7

McNulty seemed confused on the issue of burden of proof. When asked for a ruling on the issue, he “rolled his eyes toward the ceiling, slowing rocking his head back and forth.” Jenson’s lawyer later said of this strange mannerism, which McNulty repeated often at court, “It was extraordinary. As though he did not know how to rule, and perhaps God would tell him...And, in fact, he did not know how to rule. He was in over his head.”8 Ultimately, McNulty decided in favor of the mines. The subsequent appellate opinion (which will be discussed later in greater detail) states, “Confusion about the correct burden of proof set in at the early stages of discovery...Somehow, and without explanation...the Special Master found it was plaintiffs who had the burden to show aggravation of a pre-existing condition, and that under Minnesota law 'the damages recoverable are limited to additional injury directly caused by the aggravation.'”

Problems of unsound legal thinking continued to cause problems in this case. The appellate opinion also states, “In conclusion, we find that by whatever synergistic reasoning utilized, the Special Master did not apply proper principles of causation to plaintiffs’ claims of emotional harm. We believe the Special Master’s erroneous approach played a significant and unfortunate role in limiting plaintiffs’ damages.”

McNulty collected 7,469 pages of testimony, culminating in an extensive Report and Recommendation of 416 pages.11

7 Id. at 311.
8 Id. at 311-12.
9 Jenson, 130 F.3d at 1293.
10 Id. at 1295.
11 Id. at 1290.
In the report, McNulty insultingly said that the women were “histrionic,” and he made public personal matters.\textsuperscript{12} He did award the women funds, but only about $10,000 per person.\textsuperscript{13} In the opinion, it states, “Plaintiffs assert the damages awards do not make the women whole and are totally inadequate and ‘shocking.’”\textsuperscript{14}

As previously stated, the women decided to appeal. The National Organization for Women became involved in the situation by filing an amicus brief stating that McNulty held biased views against women. The decision by McNulty was overturned by the Eighth Circuit Court of Appeals.\textsuperscript{15} The court called for a trial de novo regarding damages and, understandably, requested that there not be “further reference to any Special Master” and added, “In view of the record, we hesitate to introduce any new fact finder into the case.”\textsuperscript{16} Finally, right before the start of the jury trial, Eveleth Mines settled with 15 women on December 30, 1998, awarding the group $3.5 million in damages.\textsuperscript{12}

After this settlement, the women were worse off than they had been, and they left the case feeling empty and defeated. In Class Action, a book about the case by Clara Bingham and Laura Leedy Gansler, it states, “They wanted an apology from the company. They wanted credibility in a community that did not trust them. They wanted to be believed. Now they felt that they had sold themselves out. They felt unsatisfied, and for many of them, it had nothing to do with the amount of money they received.” The women attempted to move on with their lives, but the scars left by the debilitating court experience and the discovery in particular would never fully heal.\textsuperscript{17}

\textsuperscript{12} The Real Case Behind “North Country,” supra note 2.
\textsuperscript{14} Jenson, 130 F.3d at 1291.
\textsuperscript{15} The Real Case Behind “North Country,” supra note 2.
\textsuperscript{16} Jenson, 130 F.3d at 1304.
\textsuperscript{17} Bingham & Gansler, supra note 6, at 378.
III. DISCOVERY PRACTICES

The abusive manner and system of discovery was particularly degrading and emotionally harmful to the women involved. Much of it was intrusive and simply did not pertain to the case. The defendants turned to many sources to find information on the life events of the women, including abuse, abortions, medical histories, sexual relationships, and experiences that took place during childhood. The appellate opinion states, “We would agree that much of the discovery (e.g., domestic abuse, earlier illnesses, and personal relationships, etc.) was not relevant or was so remote in time, that it should not have been allowed. Plaintiffs sought protective orders, but the Special Master denied the requested orders.”

Interrogatories sent to the claimants asked about all the names the claimants had ever used, names and addresses of every doctor ever seen, dates the women were examined, and treatments received. There were also questions about childhood, marriage, children, and social relations. The lawyers representing the women refused to provide this extensive list and instead cut the lifelong medical history to only the time that they worked for Eveleth Mines. They also only gave the health care providers’ names and the reason for seeing them. Even cut down, all of the information amounted to 16 pages. To add to all of this, McNulty decided on a very aggressive schedule for discovery, only six months. This short time frame made it difficult for the women to deal with the stress and pressure associated with the demands of discovery.

The defense tried to obtain the medical records in various ways and then subpoenaed the health care providers, including some not even listed, and gave them a one-week deadline. The plaintiffs lawyers were angry with the defense’s demands for the women’s records. They wanted to screen the records before handing them over to the defense. Also, the medical providers squabbled over confidentiality. The defense asked the judge who ruled during the liability phase, and who still was supervisor over McNulty, to force the production

18 Jenson, 130 F.3d at 1292-1293.
19 Bingham & Gansler, supra note 6, at 283-84.
of medical records. The defense reportedly said, “When a plaintiff places her mental or psychological condition at issue, a defendant is entitled to discover the plaintiff’s entire medical records in order to determine ‘whether other stressful situations’...were responsible for any emotional distress, rather than what happened at Eveleth Mines.”

The judge decided that the defense could request the lifelong medical records. He ordered the plaintiffs to produce releases. He required that all records be produced except for the few that were specifically objected to. The judge threatened claim dismissal if these conditions were not met. With this ruling, the women could not be protected from intrusive requests such as “Relate all the experiences of your marriage relating to your divorce.” The women could refuse to answer, but they would be forced to stop pursuing the claim.

The depositions that they faced from the defense were up to eight hours long and very invasive. *Class Action* states: “The point of the depositions...was to find out everything traumatic or disturbing that had ever happened to the women. That meant hours and hours of mind-numbing detailed questions about each woman’s life, starting with birth.” These questions included: “Have you ever been tested for HIV or AIDS? Does your husband have any problems with alcohol or drugs?...Does he read *Playboy*?...Have you ever hit your husband? Have your children ever run away?...Have any of your brothers or sisters had financial problems?... Given the average life lived on the Iron Range, many of the questions were answered in the affirmative.” The depositions lasted 41 days. The questioning was emotionally draining on the women. One claimant was dying of Lou Gehrig’s disease, and the questionnaires repeatedly sent her into tears.

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20 Bingham & Gansler, *supra* note 6, at 284-86.
21 *Id.* at 287.
22 *Id.* at 290.
23 *Id.*
24 *Id.* at 291.
25 *Id.* at 292.
26 *Id.* at 294-95.
The defense also sought to depose the fathers of Jenson's children.\textsuperscript{27} Jenson's first child was conceived through date rape, and the second was born out of wedlock after the father had ended the relationship. Jenson had kept the first child, but gave the second for adoption when she realized she could not care for both.\textsuperscript{28} The father of her first child had not been in contact with Jenson for over 25 years. Her lawyers felt there could be no other reason to depose him except to embarrass Jenson and to attempt to get her to drop the lawsuit so that her first child would not find out about his father and how he was conceived. One of the lawyers said that the defense's "insistence on deposing these men showed the absolute abusiveness of the discovery... The burden should have been on them to establish the relevance of their testimony, but it wasn't. It was on Lois to show the irrelevance, which she could not do." The claimant's attorneys fought this, but the depositions were allowed.\textsuperscript{29} When the man that raped Jenson was deposed, he stated that he did not remember her and that he had been told that the defense was attempting to discredit Jenson.\textsuperscript{30}

The defense chose Barbara Long, a mental health expert, to evaluate the claimants. Long was known for finding that victims of abuse and sexual harassment had emotional disorders before the harassment took place.\textsuperscript{31} After investigating Jenson, Long reported that Jenson was pursuing the lawsuit mostly for money and blamed Jenson's harassment on her "engaging, charming and manipulative" behavior. Long also said that much of the harassment at work was due to the culture of Iron Range.\textsuperscript{32} Jenson was deposed again and again.\textsuperscript{33} The defense's plan was clearly to discredit the women in order to either cast doubt on their claims or force them to drop the case.

Certainly, the injustice of these abusive and invasive discovery practices is evident. An examination of the medical

\textsuperscript{27} Bingham & Gansler, supra note 6, at 296.
\textsuperscript{28} Id. at 9-11.
\textsuperscript{29} Id. at 296-97.
\textsuperscript{30} Id. at 302-03.
\textsuperscript{31} Id. at 297.
\textsuperscript{32} Id. at 299-300.
\textsuperscript{33} Id. at 302.
and personal histories of the plaintiffs was warranted to an extent. However, the draining depositions, the personal nature of the questions, and the obvious attempt to discredit the women involved was unnecessary, as was later determined in the appeal.\textsuperscript{34}

IV. NEGATIVE RESULTS

After the invasive discovery was completed, the women were left emotionally debilitated. They had little to show for their embarrassment because almost nothing was done to change the work environment. In the first ruling in November 1995, the Special Master issued an insulting Report and Recommendation that subjected the women to even more poor treatment: “The 416-page report was worse than anything they could have imagined, and they had imagined that it would be bad. McNulty came as close as he could to awarding them nothing.” The women were awarded $182,500 in total, with individual awards ranging from $3,000 to $25,000. In other sexual harassment cases at the time, plaintiffs were commonly awarded $200,000 and higher.\textsuperscript{35} McNulty decided to rule out all expert witnesses, saying that “experts know no more than judges about what causes mental change—which is to say they know almost nothing.” He decided to base his decision about whether they had suffered from the harassment completely on the women’s testimony. Because he felt that they did not prove that they were sexually harassed or that the work environment damaged them, he ruled against the women in burden of proof.\textsuperscript{36}

The women were discouraged by the ruling and the small awards, but the bitter tone of the report sharpened the sting: “…Hostility toward the women…oozed from nearly every paragraph of the report.”\textsuperscript{37} McNulty also stated that those who claim sexual harassment generally exaggerate and misconstrue “reasonably expectable interpersonal conflicts in sexual terms.” He was not

\textsuperscript{34} Bingham & Gansler, \textit{supra} note 6, at 363.
\textsuperscript{35} \textit{Id.} at 346.
\textsuperscript{36} \textit{Id.} at 346-47.
\textsuperscript{37} \textit{Id.} at 347.
The Greater of Two Evils

convinced of any more mental harm than temporary anger and embarrassment. In the report, he was very bitter toward the women, particularly Jenson. He said that she tended to be dramatic and to "skirt around the whole truth."38 Worst of all for Jenson, her rape was spoken of openly in the report, even though she was told it would be kept under seal. He said that Jenson had mischaracterized the rape, and that in reality, it was consensual. Other intimate things that the women had testified about were included in the report. These personal details were now released to the public and readily available on the Internet.39

After the discovery was completed, Jenson’s "spirit was broken." The draining process had impacted every part of her life, and she felt isolated from her friends and family.40

V. OPPOSING VIEWPOINTS

Some argue that this case can be praised for making improvements in working conditions. However, the suffering the women endured was the greater of the two evils.

It can be said that because the McNulty ruling was so unjust, it was easier to get it overturned. One of Jenson’s lawyers said, "The level of venom in the report was both extremely disheartening and heartening at the same time, because in it lay the possibility for redemption."41 However, after so many personal details about the women had been revealed, not only in court, but to the general public, it would be impossible to ever be made whole. A look at the case, overall, reveals many meaningful precedents, the most prominent of which was the establishment of the first sexual harassment class action suit.

According to some sources, the outcome of the liability portion of the trial, which held companies accountable for sexual harassment, fundamentally impacted sexual harassment law by

38 Bingham & Gansler, supra note 6, at 346-47.
39 Id. at 351-52.
40 Id. at 345.
41 Id. at 352.
inspiring more class action cases. The case inspired more women to fight for their rights, such as those involved in the 1996 class action case brought against Mitsubishi on charges of sexual harassment, the Merrill Lynch sexual discrimination class action case, and a new case in which female Wal-Mart employees are suing by means of class action on the basis of sexual discrimination. This kind of case is used by the Equal Employment Opportunity Commission as it deals with the accountability of companies. Also, this case influenced the passage of federal and state laws for the protection of workers.

Despite these arguments, research has shown that Jenson did not change sexual harassment law by inspiring the certification of more class action cases. After the case received class action status, it was predicted that the case would inspire a flood of class action sexual harassment cases. However, a study of sexual harassment cases filed between 1986 and 1995 showed that “in contrast to well-publicized accounts of class action lawsuits in the media, only three of the approximately five hundred cases involved a class action.” Also, a search of sexual harassment cases from 1995 to 2002 reveals only ten class action cases. Despite predictions that it would inspire many more class action cases and Class Action’s claim that the case “set many important precedents,” some evidence shows that it did not revolutionize sexual harassment law.

Even the few positive results did not justify or lessen the abuse and embarrassment endured by the plaintiffs during the suit. Despite the praise that this case receives from media such as Class

42 Bingham & Gansler, supra note 6, at 346-47 at 382.
44 The Real Case Behind “North Country” supra note 3.
46 Id.
48 Hart, supra note 45, at 285.
49 BINGHAM & GANSLER, supra note 6, at 382.
Action and the movie North Country, it practically destroyed the women who fought for their rights. Trying to change societal problems comes with a price, but the injustice and abuse that the women suffered was beyond any necessary payment. At one point during her questioning by a psychiatrist, Jenson was asked about the personal impact of the litigation. She replied that she had learned much of the legal system and the potential cruelty of courts and attorneys. She also felt that calling her rapist should be illegal. At an anniversary dinner for the law firm that had worked with Jenson, many people praised her for what she had done, but she had a difficult time feeling any pride. According to Class Action, "One lawyer from Duluth shook Lois's hand and said, 'Do you know how many women you've helped?' The truth was, she didn't. Despair was what she knew, and she had held steadfastly to it." In spite of the advances the case brought about, the injustice suffered by the women because of the discovery abuse was greater.

VI. CONCLUSION

In conclusion, it can be said that Jenson v. Eveleth Taconite Co. did not deliver justice, but instead, the abusive discovery practices used therein actually made it worse for the women involved. The ways in which both the case and the women were affected by the abuse will continue to stand as a witness to the abuse that was endured. The case history, the discovery practices themselves, the results of the discovery, and a look at opposing viewpoints show that the women suffered a great injustice by our legal system through discovery abuse in this case. Whatever success came from this case, the women were affected in a way that can never be repaired. The appellate opinion states quite pointedly, "If our goal is to persuade the American people to utilize our courts as little as possible, we have furthered that objective in this case. If justice be our quest, citizens must receive better treatment."
Although this case did not deliver justice, it can now act as a call for reform and improvement. Attention must be paid to the follies of the lawyers and the Special Master when they forgot that the law exists to serve people and not itself. Although this case did more harm than good to the women involved, it can serve some purpose if it is seen as both a revelation and a warning. The bittersweet resolution of this difficult case is aptly described in the words of Jenson's lawyer: "It was an important case. If it were not for the toll it took on the women...it would have been a great case."53

53 Bingham & Gansler, supra note 6, at 377.