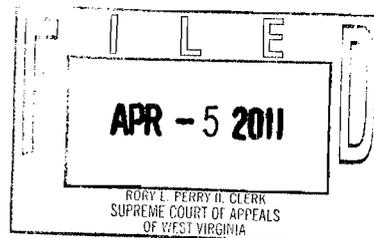


NO: 35761

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



**WILLIAM R. HUGGINS and
DENISE L. HUGGINS, Plaintiffs Below,**

Appellants,

vs.

C.A. No. 09-C-135

**THE CITY OF WESTOVER SANITARY
SEWER BOARD, a public agency, THE
CITY OF WESTOVER, a municipal
corporation; and DAVE JOHNSON, Defendants Below.**

Appellees.

APPELLANTS' REPLY TO APPELLEES' BRIEF

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1. POINTS AND AUTHORITIES RELIED UPON

A. Cases

Bailey v. Mayflower Vehicles Sys., Inc., 218 W. Va. 273, 624 S.E.2d 710 (2005) 3

Fravel v. Sole’s Elec. Co., 218 W. Va. 177, 624 S.E. 2d 524 (2005) 3

Powell v. Wyoming Cablevision Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991) 3

Sayre v. Roop, 205 W. Va. 193, 517 S.E.2d 290 (1999) 3,4

B. Statutes and Other Authorities

W. Va. Code § 23-5A-1 2

W. Va. Code § 23-5A-3 3,4

2. ARGUMENT

The fundamental issues present in this appeal are that:

- A. Plaintiff was clearly seeking a transfer, as was understood by his supervisor, the Defendant Dave Johnson.
- B. The mere termination of an employee drawing Workers’ Compensation is a violation of W. Va. Code § 23-5A-1 *et seq.*

The Appellees do not simply gloss over the incriminating reporting of the November 12, 2008 Sewer Board Meeting — they ignore it completely. And how could they do otherwise? That crucial piece of evidence undermines every primary defense contention to the effect that Mr. Huggins resigned (as opposed to requesting a transfer); that Dave Johnson had never agreed to accommodate Mr. Huggins’ desire for a transfer; or that Dave Johnson was powerless to effect a transfer from the Sewer Board to the City. Furthermore, it should be noted that the term “resignation” — much ballyhooed by the Appellees — never appears in the critical October 14, 2008 letter. (D.R. 8)

Clearly, the letter itself which speaks in terms of requesting a transfer coupled with Dave

Johnson's own statements at the Sewer Board Meeting are sufficient indicia that there were significant issues of fact which rendered an award of summary judgment improper. (D.R. 397, Exhibit 2 – attached audio CD of the November 12, 2008 hearing)

The Appellees' reliance on *Powell v. Wyoming Cablevision Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991) is misplaced. First of all, the Appellees completely overlook the fact that whether Mr. Huggins' "filing of a Workers' Compensation claim was a significant factor in the employer's decision to discharge" (Appellee's Brief, p. 8) is itself a question of fact that should have been left for jury to decide. Most importantly, though, the Powell case was decided on the basis of the original Workers' Compensation anti-discrimination statute, — which did not include W. Va. Code § 23-5A-3. That particular code provision was not enacted until 1990. In fact, the Powell Court acknowledges the clarification provided by that statute. *Id.*, footnote 10, at p. 705, 722. Subsequent cases continued to rely on Syllabus Point 1 of Powell. But, those have largely been in cases where an employee was discharged after his period of disability had ended. *See e.g., Bailey v. Mayflower Vehicles Sys., Inc.*, 218 W. Va. 273, 624 S.E.2d 710 (2005) (Plaintiff waited for two years after being released by doctor to reapply for old position); *Fravel v. Sole's Elec. Co.*, 218 W. Va. 177, 624 S.E. 2d 524 (2005) (Plaintiff was laid off from his job over three years after returning to work following a Worker's Compensation injury)

However in one case not cited by the Appellees that follows Powell, the employee's job was terminated while he was drawing Worker's Compensation. *Sayre v. Roop*, 205 W. Va. 193, 517 S.E.2d 290 (1999) In Sayre, the employee was a correctional officer who was injured on the job, and was receiving temporary disability worker's compensation benefits. 205 W. Va. at 195, 517 S.E.2d at 292. An agreement was reached between the employer and another correctional facility where

employees in good standing would be transferred to a new facility, and as a result, that the plaintiff would be laid off unless he could report to work prior to being released by his doctor. *Id.* at 198, 295. A jury found in favor of the employer, however, the Circuit Judge held that the verdict was against the clear weight of the evidence which proved that the employer discriminated against the plaintiff because he was terminated while on worker's compensation. This Court affirmed the Circuit Judge's ruling and cited W. Va. Code § 23-5A-3, stating that this section of the statute "generally prohibits the termination of an injured employee while off work for a compensable injury." *Id.* at 196, 293.

Here, Mr. Huggins' employment was terminated while he was drawing Workers' Compensation. Hence, he is entitled to the full benefit of the 1990 amendment which plainly and simply provides:

a) It shall be a discriminatory practice within the meaning of section one[§23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four [§ 23-4-1 et seq.] of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense.

W. Va. Code § 23-5A-3 (1990)

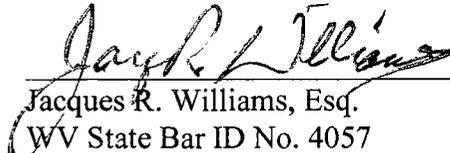
3. CONCLUSION

All of the Appellees' argument points overlook the fact that it should have been a jury question as to whether Mr. Huggins' October 14, 2008 letter was a "transfer request" or a "resignation letter." Similarly, if proof of a "significant factor" was necessary, that should have been a jury question, too. But in any event, the language of the statute is so plain as to make it clear that Mr. Huggins did not have to establish any evidence of "significant factor." Rather, the language of the statute is such that he should have prevailed on his own motion for partial summary judgment.

For these reasons, as well as others appearing from the record of this case, the Appellants

request that the ruling by the Court below be reversed and the case remanded to the Circuit Court of Monongalia County with directions to enter an Order granting the Appellants' Motion for Partial Summary Judgment, and directing that a trial be conducted as to the remaining issues.

Respectfully submitted this 4th day of April 2011.



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