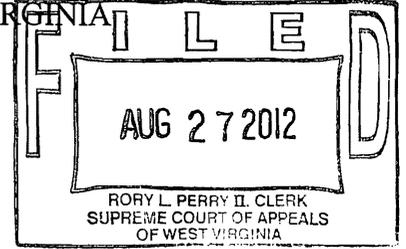


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JWCF, LP, (formerly known as  
Baker Installations, Inc.), a foreign  
Corporation conducting business in  
West Virginia, Defendant Below,  
Petitioner



vs.) No. 12-0389

Steven Farruggia, Plaintiff Below,  
Respondent.

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PETITIONER'S REPLY BRIEF

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Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *Stan.L.Rev.* 983, 1017 (1991). Therefore, in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer. While we can imagine egregious facts from which a discharge in this context could still be proven to have been discriminatory, it is likely that the compelling nature of the inference arising from facts such as these will make cases involving this situation amenable to resolution at an early stage.

*Proud*, 945 F.2d at 797-798. We find the reasoning in *Proud* persuasive.

*Johnson*, 219 W.Va. at 324-25, 633 S.E.2d at 269-70. The same reasoning applies in the case *sub judice*, where an employee who was terminated for good cause was rehired by the same employer. After the employee was injured, that same employer voluntarily allowed the employer to work at a light-duty position that the employer was under no obligation to provide. When this proved too much for the employee, and the employee required additional surgical treatment, the employee was once again permitted to return to work on a light-duty basis after surgery.

Although this sequence of events does not share the hired-and-soon-fired analysis emphasized in *Proud v. Stone*,<sup>2</sup> it must be noted that the *Proud* case recognizes a compelling and potentially dispositive inference that demands a heightened level of proof from a plaintiff. Here, the standard is whether the evidence was sufficiently probative that it should have been admitted and whether its absence resulted in substantial prejudice. The evidence of JWCF's lenient treatment of the Respondent was relevant to both the determination of liability, i.e., whether

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<sup>2</sup> It should also be noted that the courts have applied the reasoning of the *Proud* decision where the time period at issue ranged from several months to a few years. See, e.g., *Murray v. United Food & Commercial Workers Union*, 100 Fed. Appx. 165, 174 (4<sup>th</sup> Cir. 2004) (seventeen-month span); *Taylor v. Va. Union Univ.*, 193 F.3d 219 (4<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000) (eight months); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5<sup>th</sup> Cir. 1996) (four years); *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 959 (4<sup>th</sup> Cir. 1996) (twenty-one months).

JWCF had retaliated against the Respondent, and to the issue of punitive damages. It would also have rendered the Respondent's trial testimony on the issue of retaliation less credible.

Contrary to Respondent's argument, JWCF did not stipulate that it would not refer to relevant aspects of Mr. Farruggia's prior employment history. JWCF recognized that evidence of drug use was prejudicial and that it could not be mentioned as the basis for Mr. Farruggia's prior termination for cause. However, any ruling or stipulation that drug use would not be mentioned did not preclude the presentation of evidence that Mr. Farruggia had been rehired after being terminated for good cause. The reasoning applied in the *Johnson* and *Proud* cases supports Petitioner's position that such evidence was relevant, probative, and that its exclusion constituted an abuse of discretion.

#### CONCLUSION

Wherefore, for the reasons set forth above, and in its original Brief previously filed in this matter, Petitioner, JWCF, LP, requests that the Court reverse the trial court's denial of judgment as a matter of law, and grant the Petitioner judgment in its favor as set forth herein, or, in the alternative, that the Court reverse the trial court's denial of Petitioner's motion for a new trial, on the grounds that the jury verdict was clearly contrary to law and against the weight of the evidence, or alternatively, on the grounds that a new trial is warranted due to the erroneous or otherwise improper procedural and evidentiary rulings of the trial court, and that the Petitioner be granted such other and further relief as the Court may deem proper.

JWCF, LP

By Counsel,

  
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vs.) No. 12-0389

Steven Farruggia, Plaintiff Below  
Respondent.

CERTIFICATE OF SERVICE

I, Barbara G. Arnold, counsel for Petitioner, hereby certify that service of the foregoing,  
PETITIONER'S REPLY BRIEF, was made upon counsel of record, by depositing a true copy  
thereof, in the United States mail, on the 27<sup>th</sup> day of August, 2012 in an envelope addressed as  
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Black’s Law Dictionary 1189 (6<sup>th</sup> ed. 1990)

## STATEMENT OF THE CASE

### Respondent's improper use of materials not included in the Appendix Record

As an initial matter, the Petitioner notes that the Respondent did not rely solely upon the Appendix Record (A.R.) pursuant to W.Va. R. App. P. 7; nor did Respondent move for leave to file a supplemental appendix as permitted under Appellate Rule 7(g), but rather, in addition to any citations to the Appendix Record, and without explanation, simply cites to the pages of a "Trial Transcript," reference to which is abbreviated as "TR" in the Respondent's Brief. (Respondent's Brief at 3). As of the date of this Reply Brief, the Petitioner is unaware of any attempt by the Respondent to conform to the provisions of Appellate Rule 7 in relation to the submission of additional material from the record below through use of a supplemental appendix or otherwise.

References to the "Trial Transcript" or "TR" are found at pages 3-4, 10-12, and 20.<sup>1</sup> Therefore, although the Petitioner replies here to certain points raised in the Respondent's Brief that are supported by such references, in an effort to protect its interests in this matter as may be necessary, Petitioner also files, simultaneously with the filing of the instant Reply Brief, its "Petitioner's Motion to Strike Portions of Respondent's Brief or for Sanctions."

### Procedural History

As may be apparent, the Petitioner disputes Respondent's characterization of evidence pertaining to Mr. Farrugia's prior employment history with JWCF as "immaterial" (Respondent's Brief at 1), for the reasons previously argued in Petitioner's Brief. Such evidence

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<sup>1</sup> Respondent appears to rely upon the "Trial Transcript" to support argument relating to (1) settlement of a workers' compensation claim and the alleged effect of this lump-sum settlement on JWCF's intentions toward and treatment of Mr. Farrugia (Respondent's Brief at 3-4, 10-11); (2) Respondent's contention that he unilaterally and voluntarily returned to his former work duties, despite the fact that he never obtained a medical release and the fact that he was never formally reassigned to such work; (Respondent's Brief at 11-12); and (3) Respondent's late disclosure to his own counsel, over the weekend prior to trial, of new economic information and his most recent employment history (Respondent's Brief at 20).

was not irrelevant, but tended to show that JWCF had treated Mr. Farruggia with reasonable consideration inconsistent with his allegations, rendering Respondent's evidence of JWCF's motives and intentions substantially less credible. The simple fact that JWCF had made a significant effort to return Mr. Farruggia to work, when it could have terminated its relationship with him for good cause, tended to negate the Respondent's charges that, subsequently, JWCF knowingly decided to violate his rights as an employee.

The Respondent also appears to misstate certain related aspects of the proceedings below in relation to such evidence. Respondent refers to a motion *in limine* to exclude "evidence relating to his prior drug use and evidence pertaining to Farruggia's employment history[.]" (Respondent's Brief at 1). However, review of the Appendix Record, including the page cited by the Respondent, shows that prior employment history was never mentioned and that the motion *in limine* was expressly aimed at drug-use evidence. (A.R. at 1318-20, 1403-04).

To the extent that Respondent states that Petitioner's economics expert was excluded "because he failed to provide a report of his opinions" (Respondent's Brief at 1), the portion of the record that is cited provides no support for that statement if it is intended to suggest that a report was specifically required by the trial court. In the proceedings below, counsel for JWCF explained to the trial court, at some length, that any failure to timely disclose expert opinions, in a report or otherwise, was due largely if not entirely to Respondent's failure to provide, in the normal course of discovery, adequate economic and financial information upon which such opinions could be based. (A.R. at 1207-12). More particularly, Respondent did not allow reasonable access to his own economics expert, William E. Cobb. (A.R. at 1208-12, 1259-62).

The trial court simply did not accept this explanation for the failure of JWCF's expert to disclose opinions. (A.R. at 1404).

#### Statement of Facts

Contrary to Respondent's contention that he was never informed "that his position as a progress evaluator would end at some point" (Respondent's Brief at 3), he was informed in writing that the position was "**strictly temporary and in no way constitute[d] a full[-]time position[.]**" (A.R. at 846). Respondent has admitted that he received the relevant document. (A.R. at 333). The Respondent does not dispute JWCF's contention that it was under no obligation to create a light-duty position for him, but could have properly refused to provide work for Mr. Farruggia until he demonstrated his fitness for his former work or a comparable position were such a position available. Thus, when JWCF eliminated the light-duty position, it eliminated a position that it had expressly identified as temporary in nature from the outset, and that it had no obligation to create or continue. (A. R. 846.)

Respondent also states that "JWCF never required him to produce a full release statement from his treating physician prior to returning to his former job as a cable installation technician." (Respondent's Brief at 3). This characterization is ambiguous and potentially misleading. It may be taken as implying that JWCF had a formal obligation to inform Mr. Farruggia that he would not be able to return to normal duties until he produced a full release from a physician. The Respondent never cites a legal authority that holds that an employer has such an obligation.

In concluding a paragraph supported only by citations to a "Trial Transcript," Respondent baldly states that "JWCF managers met on November 12, 2007 and agreed to eliminate any jobs

for Farruggia[.]” (Respondent’s Brief at 3). This plain and provocative statement is supported by no citation whatsoever once again. The Petitioner is aware of no evidence that would indicate that such a meeting took place, and Respondent offers none. Respondent also states that he was “terminated from employment with no explanation[;]” but this is contradicted by an “Employee Termination Notice” signed by Mr. Farruggia, plainly indicating an involuntary layoff. (A.R. at 1433).

#### ARGUMENT

1. As the Respondent failed to present prima facie evidence of his ability to perform his former duties, he cannot claim retaliatory discharge pursuant to W. Va. Code § 23-5A-3(b) and the trial court erred in not granting JWCF’s motion for judgment as a matter of law.

As previously noted in Petitioner’s Brief, Respondent Steven Farruggia alleged retaliatory discharge and was required to show that retaliation had occurred pursuant to W. Va. Code § 23-5A-3. In his responsive brief, Respondent contends, and purports to show, that he presented substantial evidence at trial, which evidence was sufficient to prove his case. A substantial portion of his argument is not supported by citations to the Appendix Record filed in the instant appeal. However, even if his argument is presumed supportable, it fails to address a relevant and dispositive issue.

The Respondent had suffered a compensable injury, had been off work, and had returned to work at a temporary light-duty position that JWCF had no duty to provide. As plainly set forth in the Statement of Facts, he had not been reinstated to his former position or to a comparable position as he had not recovered sufficiently from his injury or from his subsequent corrective surgery. A medical examination in October of 2007 documented his continuing problems and inability to perform his former work duties. In November of 2007, when his light-duty position

was terminated for lack of need, he had not provided JWCF with a physician's release stating that he was physically capable of returning to work at his former position. He never provided JWCF with such a release at any subsequent time. Nevertheless, Respondent argues as if there is no question that he was discharged after he had shown, pursuant to the applicable law, that he was qualified to be reinstated. W. Va. Code § 23-5A-3(b) (LEXIS 2012).

Referring to subsection (b) of § 23-5A-3, this Court has observed that an employee has the burden of proving through competent medical evidence that he has recovered from his compensable injuries and is capable of returning to work and performing his job duties. *Bailey v. Mayflower Vehicles Sys.*, 218 W. Va. 273, 278, 624 S.E.2d 710, 715 (2005). This is exactly what the Respondent failed to show at trial, and again fails to show in his responsive brief. Respondent simply skips over the single most important issue, that he was never covered by the terms of W. Va. Code § 23-5A-3(b) and thus, as a matter of law, cannot have been subject to a retaliatory discharge. Instead he attempts to emphasize evidence that is purportedly relevant to show JWCF's motivation and intent to retaliate, albeit without significant citation to the Appendix Record. (Respondent's Brief at 10-12, repeatedly citing "TR"). While Respondent admitted he never obtained a medical release (A.R. at 303-04), he argues, that "he had returned to his former job as a cable installation technician **on his own** and performed the job without assistance." (Respondent's Brief at 12 (emphasis added)). Reference to that portion of the Appendix Record cited by the Respondent shows that Mr. Farruggia testified at trial that he performed normal cable installation work on a single day, November 20th. (A.R. at 304-05).

If Mr. Farruggia's testimony is taken seriously, it must be noted that it is inconsistent with the extensive evidence of record, documented in the Petitioner's original Statement of Facts.

(Petitioner's Brief at 4-9). There is ample evidence relating to Mr. Farruggia's medical condition, the opinions of his medical providers as to his inability to perform what had been his former work duties, and Mr. Farruggia's refusal of physical therapy and his own documented opinion that even light-duty work might be beyond his abilities. (Petitioner's Brief at 7-8). There is no evidence that Mr. Farruggia informed JWCF that he believed he had recovered from his injuries, nor that he requested a return to his former work duties at any time prior to the elimination of the temporary light-duty position due to lack of need for light-duty work. At least one of Respondent's medical providers specifically testified that, as a matter of actual practice, it was very uncommon to return to "full duty" work without receiving a medical release, and that Mr. Farruggia had never requested a release. (A.R. at 243-45). To the extent that Mr. Farruggia attempts to shift the burden to his employer, stating that JWCF never specifically requested a physician's release, JWCF never had a reason or an opportunity to inform Mr. Farruggia that a full medical release would be necessary, even if it is assumed for the sake of argument that Mr. Farruggia could have reasonably, under the circumstances, thought otherwise.

In similar fashion, Respondent's contention that he "[o]n his own, because he was able, [he] returned to full duty as a cable installer in early November 2007[.]" (Respondent's Brief at 3 (emphasis added)), is an ambiguous mixture of implied but unstated law and purported fact. Even if it presumed for the sake of argument that Mr. Farruggia actually performed what had been his former work duties on a single day in November, apparently without bothering to inform anyone of the sudden improvement in his physical condition, there is no basis to conclude that he could have returned to work as a cable installer on a full-time basis, or that his employer could have reasonably required that he do so.

In practical terms, he had previously attempted to return to light-duty work soon after his original injury and found that he could not continue. (Petitioner's Brief at 4; A.R. at 902). He had surgery in July of 2007 (A.R. at 1226). He was again provided with light-duty work; but, in late September, Mr. Farruggia indicated in writing that he was declining physical therapy as the proposed program was too strenuous, that he was undertaking "non strenuous" work on a trial basis only, and that he was still in a great deal of pain. (A.R. at 845). In early October, only a few weeks prior to Mr. Farruggia's so-called return to cable installation work "on his own," Dr. Mir conducted an independent medical evaluation of Mr. Farruggia. At that time, Dr. Mir observed that Mr. Farruggia suffered from back pain "all the time" and noted that "[f]ollowing surgery his symptoms are worse. Any activity increases his symptoms." (Petitioner's Brief at 8-9; A.R. at 1227). Dr. Mir stated plainly that "[p]atient still needs further follow-up and treatment," and recommended an additional neurosurgical opinion, outpatient physical therapy over a period of six weeks, and treatment by injection if further surgery was not deemed appropriate. (A.R. at 1230).

How the Respondent could have believed that he could effectively choose to secretly reinstate himself to his former position is difficult to imagine; but, assuming for the sake of argument that the Respondent did decide "on his own" that he could perform normal cable installation work, for a day, his decision had no legal effect. There was no formal recognition that he was medically fit to return, nor any understanding that he could be required to perform such work by his employer. Absent a physician's release, or significant evidence deemed to be the legal equivalent of a physician's release, the Respondent could not, as a matter of law, demand that he be returned to his former duties or a comparable position. As the Respondent appears to

have kept his virtually miraculous recovery, given the continued problems revealed in his October IME evaluation, a secret, thus giving his employer no opportunity to even consider reassigning him prior to the termination of his temporary light-duty position, he failed to make a prima facie case for his reinstatement and cannot claim the protection of W. Va. Code § 23-5A-3(b). As Respondent never, even after the termination of the light-duty position, obtained a physician's release, he has no basis to argue that JWCF should have eventually rehired him.

Although Respondent correctly observes that, strictly speaking, the relevant statute does not absolutely require that an employee provide a medical release to show the ability to perform normal work duties, Respondent fails to consider the practical effect of the statute's plain language. In pertinent part, the statute states: "A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment **shall be prima facie evidence** that the worker is able to perform such duties." W. Va. Code § 23-5A-3 (LEXIS 2012) (emphasis added). Given the meaning of the term "prima facie," *see, e.g.*, Black's Law Dictionary 1189 (6<sup>th</sup> ed. 1990), a physician's release is properly seen as the minimum evidence necessary to make the employee's case, provided there is no contrary evidence deemed sufficient to disprove it. Thus, if Respondent admits that he provided no physician's release, he must provide alternative proof that is at least convincing and trustworthy as such a release. The Respondent plainly fails at this task, as a matter of law. His bare statement that, one day in November, he unilaterally, "on his own," decided that he was able to return to what had been his normal duties as a cable installer, makes little sense and has no legal effect. That this decision would have been totally inconsistent with his most recent medical evaluation, including his own statements to Dr. Mir, in early October, suggests that his testimony is less than credible, but even

if his testimony is presumed credible for the sake of argument, it does not meet the same level of proof as a physician's release, and is not sufficient as a matter of law. Thus, Respondent's evidence on this point is inadequate, and, as a matter of law, JWCF cannot be held to have violated the relevant statute on retaliatory discharge. On this basis alone, the dismissal of the Respondent's claim, and judgment as a matter of law in favor of JWCF was warranted.

2. As the Respondent failed to present prima facie evidence of his ability to perform his former duties as required by W. Va. Code § 23-5A-3(b), the trial court erred in not granting JWCF's motion for a new trial as the verdict finding for the Respondent was clearly contrary to law and against the weight of the evidence.

As the Respondent was never able to qualify for reinstatement pursuant to the express terms of § 23-5A-3(b), JWCF's motion for judgment as a matter of law should have been granted and Mr. Farruggia's claims dismissed with prejudice. For the same reasons, as stated above, the jury verdict was contrary to the applicable law and against the weight of the evidence, as it was expressly based upon the conclusion that JWCF had improperly "failed to reinstate [Steven Farruggia] to his former or comparable position with [JWCF]" (A.R. at 4). There is no need to show in some detail that the trial court failed to consider the evidence in an appropriate manner, as the error is plain given the nature and substance of the evidence at issue. The Respondent never qualified, pursuant to the terms of the applicable statute, for reinstatement. As there was and is no relevant evidence sufficient to make a prima facie case on the Respondent's behalf, JWCF's motion for a new trial should have been granted, and the trial court committed reversible error in denying that motion.

3. In relation to economic evidence, the Petitioner was denied a fair opportunity to meet the Respondent's expert testimony, through either cross-examination or the presentation of contrary expert testimony.

Petitioner has previously argued that it was improperly subjected to trial by ambush when the trial court refused to continue trial while nevertheless allowing the presentation of evidence relating to Steven Farruggia's most recent employment conditions, including salary and wage information, despite the fact that Mr. Farruggia had not disclosed that information prior to trial. Respondent now contends that his counsel was informed of the new evidence on the weekend immediately prior to trial, and that "[a]s soon as [Respondent's counsel] learned of Farruggia's change in employment, [he] notified JWCF's attorney about it." (Respondent's Brief at 5). Respondent also states that his counsel "also informed defense counsel [of the new evidence] just prior to the start of trial." (Respondent's Brief at 20).

The record shows that Respondent's counsel did not inform JWCF's counsel "as soon as" he was informed of the new evidence, nor on the Monday prior to the start of trial. (A.R. at 288-90, 293). In fact, when the existence of the new evidence was revealed in the course of trial, Respondent's counsel argued, as justification for the failure to disclose, that he had no duty to supplement discovery with the new information. (A.R. at 294). At that time, JWCF's counsel argued that adequate preparation for cross-examination of Mr. Farruggia's expert economist, William Cobb, was impossible. (A.R. at 295-96).

Finally, to the extent that Respondent contends that the Petitioner has not shown how it was harmed by the presentation of the late disclosed economic evidence, the Respondent appears to ignore how the trial court had dealt with the Petitioner's expert. As the Respondent had failed to provide the economic information necessary for adequate trial preparation, the trial court could have excluded all of William Cobb's economic testimony, just as Petitioner's expert had been excluded, thus substantially reducing the Respondent's damages. In the alternative, through a

continuance or in the course of a new trial, the trial court could have granted the Petitioner the opportunity to fully prepare for cross-examination and to present the testimony of its own economics expert. Such a ruling would not only be both reasonable and consistent with the entire thrust of the modern Rules of Civil Procedure, but would have ensured the fairness that is to be afforded to all parties.

4. Evidence of JWCF's prior treatment of Steven Farruggia was both relevant and probative in relation to the issues of liability and punitive damages and its exclusion constituted an abuse of discretion.

Although admittedly occurring in the context of an age discrimination claim, this Court has recognized that evidence of behavior on the part of a defendant employer that is inconsistent with the discrimination claim against that defendant has significant evidentiary value and relevance in the defendant's favor. In *Johnson v. Killmer*, 219 W.Va. 320, 633 S.E.2d 265 (2006), this Court discussed the issue at some length.

The case of *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991) illustrates Ms. Johnson's evidentiary problem.

In *Proud*, the plaintiff was hired by the defendant as a Chief Accountant. At the time of the hiring, the plaintiff was 68 years old. Within six months of being hired, the plaintiff was fired because of poor work performance. The plaintiff thereafter filed an action in federal court alleging that he was terminated because of his age. During the trial of the case, the district judge dismissed the action at the close of the plaintiff's case-in-chief. On appeal, the Fourth Circuit Court of Appeals affirmed. In doing so, the Court of Appeals explained:

In assessing whether [plaintiff] established that age was a motivating factor for his discharge, we focus on the undisputed fact that the individual who fired [plaintiff] is the same individual who hired him less than six months earlier with full knowledge of his age. One is quickly drawn to the realization that "[c]laims that employer animus exists in termination but not in hiring seem irrational." From the standpoint of the putative discriminator, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." Donohue &