No. 23045 - David J. Hosaflook and Kathryn Hosaflook v. The Consolidation Coal Company, Ronald Stovash and Thomas Simpson

Cleckley, Justice, dissenting:

I initially indicated my separate opinion would be a concurrence. After a closer look at the record and the facts developed below, however, I find it necessary to dissent. Justice Potter Stewart once remarked that "[i]n these circumstances the temptation is strong to embark upon a lengthy apologia." Boy's Markets Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 90 S. Ct. 1587, 26 L.Ed.2d 199 (1970). These remarks somewhat underscore the stress I feel when I must confess at this time that initially I was in error ever to agree with the result reached by the

circuit court. However, like Justice Stewart, I will take refuge in an aphorism of Justice Felix Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Henslee v. Union Planters National Bank & Trust Co., 335 U.S. 589, 69 S. Ct. 290, 93 L.Ed.259 (1949) (Frankfurter, J., dissenting). This case presents an excellent opportunity for this Court to close a loophole in our Human Rights Act (Act) with respect to all forms of employment discrimination, and especially to those purveyed against persons with disabilities. Unfortunately, the reasoning used and the result reached by the circuit court opened the hole, and the majority has refused to close it. Thus, I respectfully dissent.

In presenting this appeal, Mr. Hosaflook argued that his termination violated the Act's ban on employment discrimination against persons with disabilities and that the termination constituted the tort of outrage. Although I will address each issue to some extent, I will primarily confine my dissent to the discrimination issue raised by the appellant.

The circuit court ruled that Mr. Hosaflook failed to carry his burden of establishing a prima facie showing of unlawful handicap discrimination and that summary judgment on this claim was therefore appropriate. In affirming the circuit court's ruling on this claim, the majority has concluded that Mr. Hosaflook failed to satisfy

the second element of a prima facie case of handicap discrimination, i.e., establishing that he is a qualified handicapped person.

In my opinion, Mr. Hosaflook did put forth a prima facie case. West Virginia Code, 5-11-9(1) (1992), of the Human Rights

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[1]In Syllabus Point 2, Morris Nursing Home v. Human Rights Commission, 189 W. Va. 314, 431 S.E.2d 353 (1993), we indicated, in relevant part, that:

> "In order to establish a case of discriminatory discharge under W. Va. Code, 5-11-9 [1989], with regard to employment because of a handicap, the complainant must prove as a prima facie case that (1) he or she meets the definition of `handicapped,' (2) he or she is a `qualified handicapped person,' and (3) he or she was discharged from his or her job...."

The majority has assumed, without analysis, that Mr. Hosaflook is "handicapped" within the meaning of the Act. I will not take up this

Act makes it an "unlawful discriminatory practice" for an employer "to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or handicapped[.]" The Salary Continuance Program (SCP), in which Mr. Hosaflook was a participant at the time of his termination, was clearly part of the Consol package constituting the "compensation, hire, tenure, terms, conditions or privileges of employment." If, as the plaintiff alleged, Consol decided to terminate his SCP benefits because of his handicap, then it discriminated against him with regards to the terms, conditions or privileges of his employment.

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assumption.

The majority, however, seizes on the language in Code, 5-11-9(1), that limits unlawful discrimination to cases in which the individual is "able and competent to perform the services required," and on the derivative requirement in the regulations and our case law that a plaintiff claiming handicap discrimination must show the he or she can perform the essential functions of the job. The majority looked to Black's Law Dictionary for the definition of "job" and to a pair of decisions under the Fair Labor Standards Act, Jewell Ridge Coal Corp. v. Local No. 6167, 325 U.S. 161, 65 S. Ct. 1063, 89 L.Ed.2d 1534 (1945), and Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S. Ct. 698, 88 L.Ed. 949 (1944), to define "work." Using those authorities, the majority concluded

that "job" means physical or mental exertion, controlled by the employer, for compensation. Continuing its exercise in logic, the majority then deducts that Hosaflook must lose because he could not perform the job of an underground foreman, and because the SCP did not require him to exert any effort or submit to the company's control, and was therefore not a job.

Unfortunately, the majority failed to follow that reasoning to its logical conclusion. If the Court had, it would realize that it has essentially written disability protection plans, such as the SCP, out of the Human Rights Act. For in order to qualify for SCP, an employee must be disabled from performing his regular assignments. Thus, if "job" and "services required" are limited to the majority's narrow

reading, then an employer could, without Human Rights Act liability, decide to eliminate (for example) all black foremen from its SCP rolls because, by definition, those employees on SCP are unable to perform the services of a foreman. Such a case is no different from what Mr. Hosaflook has alleged, i.e., that he was selected for elimination because of his membership in a protected class -- the class of handicapped persons. I find that result -- allowing discrimination against persons with disabilities in the administration of a program to insure against the effects of a disability on the rationale that the persons are not entitled to statutory protection because they are disabled from working -- to be not only bizarre, but also antithetical to the purposes of the Human Rights Act explicitly set forth by the Legislature in W. Va. Code 5-11-2 (1989). If the Act is read as the

majority says it should be, it would afford no relief to an individual receiving temporary disability benefits when his employer says to him, "We are terminating your employment and your benefits because you have a disability."

To avoid such an anomalous and unseemly result, the Act must be applied with greater sensitivity to the context in which its terms are used and with greater deference to the legislative purposes. Although authorities such as dictionaries and the case construing

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[2] The case of an individual who is receiving benefits under a permanent disability or retirement plan might present a different analysis because in that case the employment relationship may have terminated. We need not, at this time, consider the implications of such circumstances because here Mr. Hosaflook clearly was a Consol employee at the time of the adverse decision was made. See n. 2, infra.

other statutes can provide relevant insights, blind reliance on them makes for an overly formalistic method of interpretation. "Work" under the Fair Labor Standards Act, for example, may not be equivalent to "services required" or "job" under the Human Rights Act and its regulations when the divergent legislative contexts and purposes are taken into account. In this case, then, we must interpret the relevant terms with an awareness that the Legislature has declared that discrimination in employment "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code 5-11-2; see also

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[3] Reliance on Jewell Ridge and Tennessee Coal, however, is rather questionable since Congress quickly overruled those decisions by enacting the Portal-to-Portal Act, 29 U.S.C. §§ 251-62. See Battaglia v. General Motors Corp., 169 F.2d 254, 255, 258 (2nd Cir. 1948).

Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995). Thus, the statute, and particularly its language in § 5-11-9 defining unlawful discriminatory practices, must be read so as to maximize the chances of eliminating the prohibited biases from the spectrum of employment decisions. At the same time, we must not apply the law in such a way as to unduly restrict management discretion. See United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S.3 193, 99 S. Ct. 2721, 61 L.Ed.2d 480 (1979); Skaggs v. Elk Run Coal Co., Inc., __ W. Va. __, __ S.E.2d __ (1996) (No. 23178 7/11/96). Considering those legislative purposes, and the context in which the disputed terms appear, I believe that "services required" and "job" should be determined by reference to the particular employment contract, i.e., to what employers and employees believe to be are their

respective obligations to each other. Such an interpretation would promote the Act's purposes and would facilitate application of the Act both by those it regulates and by those it protects.

Applying that approach, I find the Human Rights Act to apply to Mr. Hosaflook's termination from SCP. Consol has, in effect, said to its management personnel, if you become disabled and if you abide by our terms, we will pay you a salary for up to one year. Those terms become the job; and in this case that has meaning. While on Consol's SCP, an employee is required to do all that is necessary to recover from the injury suffered. This necessarily involves mental and physical exertion by the employee, e.g., keeping medical appointments, attending and taking part in physical and/or

mental health therapy sessions. This is contrary to the majority's conclusion that being on SCP was a virtual state of vegetation. The majority laments that the employer does not control the activities or time of the employee that is on SCP. I disagree. The appellees have a vested interest in knowing whether an employee on SCP is moonlighting on another job or surfing on a California wave. See Davenport v. Epperly, 744 P.2d 1110 (Wy. 1987) (employee on salary continuance plan fired after being caught hunting). While on SCP, Mr. Hosaflook was not free to moonlight on another job; nor was he free to keep the appellees in the dark regarding his progress or lack of progress in recovering from his disability. See Beauford v. Father Flanagan's Boy's Home, 241 Neb. 16, 486 N.W.2d 854 (1992) (employee removed from salary continuance plan for failing to allow

employer's physician to examine her). In other words, Mr. Hosaflook's time and activities were controlled by the appellees so long as he remained on SCP. Moreover, while the appellees may have kept Mr. Hosaflook listed as a foreman, he was to be paid as a member of SCP, i.e., his salary was in increments of a foreman's salary, not the full salary he would have received as a foreman. In the event that an employee was on SCP for a year and showed no signs of recovery from the disability, that employee's status would change to long term disability. Thus, the SCP was part of the employment contract between Consol and Mr. Hosaflook, with

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[4] There is no question that Mr. Hosaflook was an "employee" within the meaning of the Act at the time of his discharge. After all, the case arose because Consol believed it had to reduce the number of its employees. It would be odd, indeed, for a reduction in force to be accomplished by laying off individuals who were no longer

responsibilities on both sides. Mr. Hosaflook's responsibilities under that contract became, for the duration of his eligibility for SCP, the "services required" by the employer and thus constituted his "job."

Two options confronted Mr. Hosaflook in terms of his future with Consol: (1) remaining on the short-term disability plan for a year and then switching to the long-term disability program, or (2) removal from the short-term disability program with reassignment to an above-ground position. Both options were

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employees.

[5] As the preceding discussion makes clear, I would find that the responsibilities and limitations Consol imposes on its employees for them to receive SCP make it a "job," even under the majority's definition of that term.

[6] Rather than accommodating Mr. Hosaflook's handicap

consistent with the terms or privileges of being on the short-term disability program. And both the circuit court and the majority have failed to consider that Mr. Hosaflook was "able and competent" to pursue either option.

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by determining whether above-ground foreman duties were available, the appellees fired him. We recently held in Syllabus Point 4 of Skaggs v. Elk Coal Company, Inc., __ W. Va. __, __ S.E.2d __ (No. 23178 7/11/96), that:

> "If the employee cannot be accommodated in his or her current position, however it is restructured, then the employer must inform the employee of potential job opportunities within the company and, if requested, consider transferring the employee to fill the open position."

Although it would not be surprising in a RIF context that there would not be any openings, the record here does not compel that conclusion. In any event, openings could have become available after the RIF and prior to the end of the Hosaflook's one year on SCP that he may have

Thus, Mr. Hosaflook stated a prima facie case: (1) he had a disability; (2) he was an employee qualified to continue under Consol's SCP and qualified, with accommodation, for above-ground employment; and (3) he was terminated. That, by itself, was enough to create an inference of discrimination, which, barring unequivocal and unrebutted evidence of a legitimate employer explanation for the termination, should have required the circuit court to reject the defendants' motion for summary judgment. Because the lower court held that Mr. Hosaflook was not a qualified person with a disability and could not invoke the statute's protections, it never reached the issue of whether the defendant had an unequivocal and unrebutted

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been, with accommodation, qualified to perform.

explanation that defeated the prima facie case. Nevertheless, the majority has based its decision, in part, on the theory that there was no triable issue of fact on the question of discriminatory intent. I disagree with that conclusion, and thus feel compelled to explain why this case should go to trial.

The record includes evidence that bolsters the inference of discrimination created by the prima facie case, and that drew into question Consol's responsive explanation. As the majority explains, the appellees' justification for terminating Mr. Hosaflook was that their decision was based on foremen performance evaluations that were done for the period 1990-91. That evaluation period, however, coincided with the onset of Hosaflook's eye disease and thus

resulted in a low, perhaps artificially low, performance score for him. Nevertheless, when Consol learned of Mr. Hosaflook's handicap and of its impact on his performance evaluation score, it failed to reconsider the score's reliability as a measure of his competence and effort.

Depending upon the nature of their handicaps and employment, a substantial number of handicapped employees will not fare as well as their peers on performance evaluations unless reasonable accommodations were made for the effects of their handicap. In this case, no accommodation was made for Hosaflook

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[7]The evidence clearly established that Mr. Hosaflook did not have problems
with his vision until around the time that he was promoted to foreman. Dr. Murray indicated in an affidavit "that the work problems Mr. Hosaflook experienced are consistent with the

during 1990-91 because neither he nor Consol were then aware of the need for it. According to Mr. Hosaflook, an employer who was not hostile to persons with disabilities would have reconsidered, or even rejected as unreliable, any evaluations done of him in 1990-91. Moreover, an employer who <u>was</u> hostile to persons with disabilities would seize on the opportunity to remove such individuals when presented with a facially neutral reason (the RIF + evaluations) -- thus avoiding the costs of future accommodations and of other responsibilities commonly associated with the employment of such individuals. Had a reassessment of his work been performed, Mr. Hosaflook contends, it would have prompted a nondiscriminating employer to place him above the RIF cut-off line for discharge.

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manifestation of [retinitis pigmentosa] symptoms."

Consequently, a reasonable trier of fact could conclude that the appellees purposefully eliminated him through the RIF because of his disability rather than continuing him on the SCP or accommodating his handicap in an above-ground position.

In sum, Mr. Hosaflook is a handicapped person who was (1) given a job performance evaluation by the appellees at a time when he and they were unaware of his handicap; (2) the handicap manifested itself during the period that the evaluation covered; (3) the evaluation produced a score diminished by his handicap; and (4) the evaluation was neither disregarded nor reconsidered, but was instead used against him to effect his termination. Although Mr. Hosaflook could perform above ground, the appellees made no effort

to determine if a vacancy existed to which Mr. Hosaflook could have been reassigned. Although these facts do not inexorably lead to the

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[8] The Supreme Court defined the term "otherwise qualified" and discussed the importance of considering reasonable accommodations in determining whether a handicapped individual is otherwise qualified for the job in School Board of Nassau County v. Arline, 480 U.S. 273, 287 n. 17, 107 S. Ct. 1123, 1131 n. 17, 94 L.Ed.2d 307, 321 n. 17 (1987):

> "`An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.' Southeastern Community College v. Davis, 442 U.S. 397, 406 [99 S.Ct. 2361, 2367, 60 L.Ed.2d 980] (1979). In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question. 45 CFR Sec. 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those

inferences of discrimination that Mr. Hosaflook would have us draw, I do think they follow reasonably. Accordingly, I believe he should have his chance to convince a jury of his case.

> functions. Ibid. Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, Southeastern Community College v. Davis, 442 U.S.,

at 412 [99 S.Ct. at 2370], or requires 'a fundamental alteration in the nature of [the] program,'" id., at 410 [99 S.Ct. at 2369].

[9]The second issue raised is whether Mr. Hosaflook's facts could support a cause of action for intentional infliction of emotional distress or the tort of outrage. The majority contends that, because Mr. Hosaflook was fired simultaneously with other salaried employees, there was nothing improper in the method of carrying out the termination. In my concurring opinion in Hines v. Hills Department Stores, Inc., 193 W. Va. 91, 98, 454 S.E.2d 385, 392 (1994) (per curiam), I pointed out that the essential elements of this cause of action are as follows:

> "The four elements of the tort can be

> summarized as: (1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it."

In my judgment, the facts of this case established sufficient evidence to forestall summary judgment on this cause of action.

The majority contends that the appellees had limited knowledge about Mr. Hosaflook's vision impairment prior to firing him, therefore, there was nothing "outrageous" about their conduct. The majority has narrowed the full force of the evidence to reach its conclusion. I read the evidence as fully showing that the appellees were aware of the severity of Mr. Hosaflook's eye impairment prior to terminating him. This is quite clear from the fact that he was placed on SCP. The totally unacceptable aspect surrounding the

termination is that it came only a few days after Mr. Hosaflook was placed on SCP. This is the crux of the "outrage" in this case. Further, the evidence surrounding this matter was equally conflicting on both sides, with neither side having evidence any more persuasive than the other -- this equipoised position is one of the classic "material factual disputes" that inhibit summary judgment. "[S]ummary judgment is appropriate only if the record reveals no issue of material fact and the movant demonstrates an entitlement to judgment as a matter of law." Powderidge Unit Owners Association v. Highland Properties, Ltd., __ W. Va. __, __, __ S.E.2d __, __ (No. 23105 6/14/96) (slip op. at 7), citing W.Va.R.Civ.P. 56(c).