IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1996 Term

No. 23045

DAVID J. HOSAFLOOK and KATHRYN HOSAFLOOK,
Plaintiffs Below, Appellants,

v.

THE CONSOLIDATION COAL COMPANY,
RONALD STOVASH and THOMAS SIMPSON,
Defendants Below, Appellees

Rehearing
Appeal from the Circuit Court of Monongalia County
Honorable Robert B. Stone, Judge
Civil Action No. 92-C-589

REVERSED AND REMANDED

Submitted: May 28, 1996
Rehearing Granted: September 12, 1996
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JUSTICE ALBRIGHT delivered the Opinion of the Court.
JUDGE RECHT sitting by temporary assignment.

SYLLABUS BY THE COURT

1. When an employee is discharged from his job because of a handicapped condition, as defined by the West Virginia Human Rights Act, W.Va. Code § 5-11-1, *et seq.*, and a term of employment is participation in a salary continuation plan and one of the results of termination of employment is cessation of that participation, it may be readily concluded that the termination of the employment because of the handicap resulted in discrimination in the terms of employment by reason of a handicap.

2. If discriminatory conduct is prohibited by the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq.* (1990), then the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, *et seq.*, does not pre-empt the prohibition of West Virginia's Human Rights Act, W.Va. Code § 5-11-1, *et seq.*, of the same discriminatory conduct. The term "discriminate" includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of

an individual with whom the qualified individual is known to have a relationship or association[.]" 42 U.S.C. § 12112(b)(4) (1990).

Albright, Justice:

This case is before us on rehearing after we affirmed the ruling of the Circuit Court of Monongalia County granting the appellees a summary judgment and Justice Cleckley filed a vigorous dissent. Upon reconsideration, we are of the opinion that the judgment of the circuit court should be reversed for the reasons set forth below.

FACTS

Appellant, David Hosaflook, began working for Consol in 1975 as an hourly employee at the Robinson Run Mine, which is an underground coal mine in

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[1]The Honorable Arthur M. Recht resigned as Justice of the West Virginia Supreme Court of Appeals effective October 15, 1996. The Honorable Gaston Caperton, Governor of the State of West Virginia, appointed him Judge of the First Judicial Circuit on that same date. Pursuant to an administrative order entered by this Court on October 15, 1996, Judge Recht was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing October 15, 1996, and continuing until further order of this Court.

Monongalia County, West Virginia. Mr. Hosaflook left the hourly work force in 1990 to accept the salaried position of section foreman. As a foreman, he was assigned to underground work at Robinson Run Mine. Mr. Hosaflook acknowledges that from the beginning he had difficulty performing the tasks required of supervisors. He asserts that the difficulties he encountered, which can be summarized as stumbling and bumping into things and problems with paperwork required by the job, resulted from a handicap, the gradual deterioration of his vision.

In August of 1991, Consol followed its annual practice of conducting performance evaluations of all salaried employees in the Northern West Virginia Region. Performance evaluations assessed a salaried employee's performance during the preceding year, in this instance, August 1, 1990, through July 31, 1991. Evaluations were used for merit pay raise purposes. Although a reduction in force at the mine central to this case occurred later, appellees assert that, at the time of the performance evaluations, a reduction in force was not being planned, and Mr. Hosaflook was not then considered a handicapped person.

When the 1991 performance evaluations were completed Mr. Hosaflook was one of the lowest ranked salaried employees at the Robinson Run Mine, due in large measure to the difficulties he had been encountering as a result of what was later

identified as the deterioration in his vision. His total score on the evaluation was 99 out of a possible 160.

In November, 1991, Mr. Hosaflook began to recognize that the difficulties he was experiencing arose from his vision problem. For a time, he kept the problem to himself. However, on February 5, 1992, he was diagnosed with retinitis pigmentosa (R.P.), which is a degenerative eye condition that eventually culminates in total and permanent blindness. Mr. Hosaflook claims he spoke to a supervisor, Denver Johnson, and a personnel officer, Mark Schiffbauer, and told them he had been diagnosed with R.P. and needed the name of a specialist to see regarding the diagnosis. Apparently he did not discuss the details and severity of the disease at that time. Consol contends that these inquiries regarding a specialist did not result in the company being aware of Mr. Hosaflook's disability at that time.

Appellees contend that a determination that a reduction in force among salaried employees at the mine was necessary was first made in early 1992 by Ronald Stovash, Consol's Vice-President of Fairmont Operations. Eventually, it was determined

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[2]A reduction of hourly employees occurred in August, 1991. At that time, a reduction of salaried employees was not being considered.

that a total of twenty salaried positions would be eliminated at Robinson Run Mine. In early March, 1992, all salaried personnel at the mine were notified of the impending reduction at a meeting that Mr. Hosaflook attended. Prior to that meeting, Consol had ranked the salaried work force based on the 1991 performance evaluation scores, and the salaried employees were told at the meeting of Consol's intention to use the scores to select those to be discharged. Mr. Hosaflook's position as one of the lowest ranked foremen made his layoff a virtual certainty. At the meeting, it was explained that twenty individuals would be involuntarily laid off from the Robinson Run Mine unless there were enough volunteers for early retirement. Mr. Hosaflook concedes that the selection of persons to be included in the reduction in force was based on the evaluation scores, with possibly one exception.

On March 25, 1992, Mr. Hosaflook delivered to Consol a letter from his eye doctor, dated that same day, describing the severity of his vision problem. The letter stated Mr. Hosaflook could never work underground again and should be placed on long-term disability. The letter advised that the progression of the disease would lead to eventual blindness. Mr. Hosaflook was placed on Consol's Salary Continuance Program, a benefit program federally regulated under the Employee Retirement Income Security Act of 1975, 29 U.S.C. §§ 1001, *et seq*. (1974) (ERISA). The salary continuance program provided for incremental continuation of an employee's salary and benefits during periods of short-term illness and disability, in part as a bridge between the onset of

disability and qualification for long-term disability benefits provided by Consol as an employment benefit. The salary continuance program, as adopted by Consol, expressly states that an employee on salary continuance remains subject to a reduction in force. Consol also treats employees on the salary continuance program as remaining on the work force for the site to which they were last assigned prior to the disability or illness giving rise to the use of the salary continuance program.

On April 1, 1992, the reduction in force was made. Under Consol's policies, the employment relationship between a salaried employee and the employer is terminated when a reduction in force is effected, and, pursuant to the express terms of the salary continuance program, separation by reason of a reduction in force also removes the employee from the salary continuance program. Incident to this reduction in force, Mr. Schiffbauer and Mr. Simpson met with Mr. Hosaflook to explain that he had been terminated, as a result of the reduction in force, due to job performance. Mr. Hosaflook and his wife, Kathryn Hosaflook, requested that he remain on the salary continuance program despite his termination. This message was relayed to Ronald Stovash, who had made the final determination to include Mr. Hosaflook in the force reduction. The request was denied.

The Hosaflooks, appellants here, filed this action in the Circuit Court of Monongalia County, alleging that Mr. Hosaflook's discharge constituted unlawful

discrimination against a handicapped person and that the manner of discharge constituted the tort of outrage, from which Mr. Hosaflook suffers severe emotional distress.

Consol filed a motion for summary judgment, which the circuit court granted. The court's January 12, 1995 order states, "[p]laintiff filed this action alleging that he was wrongfully terminated in violation of the West Virginia Human Rights Act in that he contends that at the time of his discharge he was an otherwise qualified handicapped person. Additionally, the plaintiff contends that the facts surrounding his discharge were so outrageous that those facts constituted the tort of outrage." The court found that "[c]learly the doctor's diagnosis and prognosis demonstrate that the plaintiff could no longer safely perform the job for which he was hired after the onset of retinitis pigmentosa. Accordingly, under no circumstances could the plaintiff be considered a 'qualified handicapped person' at the time of his layoff on April 1, 1992." After discussing the difference between a claim for wrongful discharge and a claim for outrageous conduct, the court stated:

> In this case no construction of the facts surrounding the implementation of the discharge support a contention that the discharge was implemented in an outrageous manner. The plaintiff testified that he was called into an office, was told that he was being discharged, was advised of benefits available to him and nothing more. He was not singled out, embarrassed, threatened, verbally abused, ridiculed or humiliated.

As a consequence, appellants brought this appeal, and after our initial decision the parties again briefed and argued the matter before us.

STANDARD OF REVIEW

The ultimate issue on appeal is whether the trial court appropriately granted summary judgment to Consol. This Court has stated that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment should be granted when the moving party shows there is no genuine issue as to any material fact and he or she is entitled to judgment as a matter of law.

"In determining on review whether there is a genuine issue of material fact between the parties, this Court will construe the facts 'in a light most favorable to the losing party[.]'" *Alpine Property Owners Association, Inc., v. Mountaintop Development Company*, 179 W.Va. 12, 17, 365 S.E.2d 57, 62 (1987) (*quoting Masinter v. Webco Co.*, 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980)).

SUBSTANTIVE ISSUES

We are of the opinion that appellant, David J. Hosaflook, may have been a "Qualified Individual with a Disability" who was "able and competent, with reasonable accommodation, to perform the essential functions of the job[.]" 6B W.Va. C.S.R. § 77-1-4.2; W.Va. Code § 5-11-9 (1992). Before rehearing, we had focused on appellant's claim, restated by his counsel at oral argument on rehearing, that Mr. Hosaflook's employment was that of "salary continuance" and not section foreman.

This Court continues to believe that Mr. Hosaflook's employment at the time of his discharge was that of section foreman. It is undisputed that, under the terms of his employment, Mr. Hosaflook was expected to perform the usual duties of a section foreman *unless* he had qualified for and been awarded admission into the "salary continuance plan" offered by appellant. It is also undisputed that in the event Mr. Hosaflook qualified for the "salary continuance plan", he was entitled to salary continuance benefits for up to one year as one of the terms of his employment, unless he was discharged from his employment as a section foreman. The plan provided that if Mr. Hosaflook was discharged from his employment as a section foreman,

his compensation from the salary continuation plan would end. Finally, during Mr. Hosaflook's time on the salary continuance plan, we perceive that his only duties included such things as keeping the employer advised of his condition and doing anything appropriate to improve his medical condition.

In support of their decision to terminate his employment, appellees rely entirely on Mr. Hosaflook's perceived inability to adequately perform the usual tasks of a section foreman. Specifically, they rely on a performance evaluation done some time before the decision was made to reduce the force at the mine where Mr. Hosaflook worked before going on salary continuance. Mr. Hosaflook's poor performance in that employment was both what qualified him for salary continuation and what caused the termination of his employment. In short, his eyesight condition, retinitis pigmentosa (R.P.), allowed him to be assigned to the salary continuation plan and is said to have interfered with his performance as a section foreman to such an extent that he received a low performance evaluation of his work in that position. Appellants acknowledge that under their internal systems,

Mr. Hosaflook's place of employment continued to be considered as located at the mine, at which he no longer performed any services. In sum, we conclude that, at the time of his discharge, Mr. Hosaflook was employed as a section foreman at the mine where his performance was previously evaluated and that one of the terms of that employment was qualification for the salary continuation plan under certain circumstances which his eyesight problems satisfied.

We next confront the question of whether Mr. Hosaflook's termination from employment and consequent discontinuance in the salary continuation plan was discriminatory under the Human Rights Act. On the record before us, there is no dispute that the poor performance evaluation resulted from the eyesight problems. Therefore, on our review of the summary judgment rendered below, we indulge the inference that Mr. Hosaflook was discharged from his job as section foreman because of his eyesight problems, a handicapped condition under the Human Rights Act. Since one of the terms

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[3]West Virginia Code § 5-11-3(m) (1994), defines handicap as follows:

of that employment was participation in the salary continuation plan and one of the results of the termination of Mr. Hosaflook's employment was the cessation of that participation, we believe that it may be readily concluded that the termination of employment because of the handicap resulted in discrimination in the terms of employment by reason of a handicap.

West Virginia Code § 5-11-3(h) (1994) states:

> The term "handicap" means a person who:
>
> (1) Has a mental or physical impairment which substantially limits one or more of such person's major life activities. The term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;
>
> (2) Has a record of such impairment; or
>
> (3) Is regarded as having such an impairment.

> The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, handicap or familial status and includes to separate or segregate[.]

This Court has declared the necessary elements one must meet in order to establish a *prima facie* case of handicap discrimination pursuant to W.Va. Code § 5-11-9(*l*):

> 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.

Morris Nursing Home v. Human Rights Commission, 189 W.Va. 314, 318, 431 S.E.2d 353, 357 (1993).

In the case at bar, only the second element of this test is at issue. In applying the provisions of W.Va. Code § 5-11-9, a "Qualified Individual with a Disability" has been defined by regulation as "an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job[.]" 6B

W.Va. C.S.R. § 77-1-4.2; W.Va. Code § 5-11-9 (1992). The impact of our conclusion is that at least for the remaining period for which Mr. Hosaflook qualified for the salary continuance plan, he was a qualified individual with a disability able to perform the essential functions required of the position as section foreman, which, in his case, required only participation in such salary continuance plan. Accordingly, his case survived summary judgment under those circumstances. Whether Mr. Hosaflook could show himself to be a "qualified individual" after the expiration of the salary continuance plan may be doubtful, but we leave that for development by the parties and further consideration by the trial court.

There remains the question of whether such discrimination was intentional. Intentional discrimination arises from "deliberately treating individuals differently because of different individual traits." *Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission*, 181 W.Va. 251, 253, 382 S.E.2d 88, 90 (1989).

"'Illegal discrimination' means treating individuals differently because of some individual trait that the law says can't legitimately be considered. Examples of such traits are race, age, sex, and handicap." *Id.*

We understand the claim of appellees to be that the employer was unaware of the eyesight problem at the time the discharge decision was made and announced and that appellants contend otherwise. Again, on review of summary judgment, we treat the facts in the light most favorable to the non-movant. Accordingly, we conclude on the record before us that appellants may make out a *prima facie* case of intentional discrimination upon the evidence they propose to adduce.

Next appellees assert that we are barred by the doctrine of pre-emption from permitting West Virginia courts to consider a claim based on discrimination in the salary continuation plan because such a claim is controlled solely by federal law under the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (1974) (ERISA). Indeed on oral argument, we understood appellees to concede that

the discharge of Mr. Hosaflook under the circumstances he asserts occurred and the consequent discontinuation of the salary continuation plan would make out a claim under our Human Rights Act but for pre-emption flowing from ERISA. Consistent with that position, appellees said in their rehearing brief:

> Accordingly, if a black employee presented evidence that he was discharged because of race while receiving salary continuance, that employee would unquestionably state a *prima facie* case of race discrimination.

We believe that the ERISA pre-emption issue is governed by the principles stated by the United States Supreme Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the Act "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan[.]" In *Shaw*, the employers contended that § 514(a) pre-empted a state human rights law that said pregnancy must be included in the conditions covered by medical benefits plans. The Court agreed with the employers

that the human rights law "related to" a benefits plan within the meaning of § 514(a) and that it was, therefore, pre-empted unless the state law came within one of the exceptions. The Court concluded that the state law came within the exception of § 514(d) of the Act, which provides that the pre-emption clause in subsection (a) shall not "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." The Court then referred to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1964), which prohibits (*inter alia*) discrimination in employment on the basis of pregnancy. *Id.*, 701(k), 42 U.S.C. 2000e(k). The Act also establishes an enforcement scheme that mandates deferral to state anti-discrimination agencies and laws. 706(c), 708, 42 U.S.C. 2000e-5 and 2000e-7. The *Shaw* Court thus concluded that an ERISA pre-emption of all state laws regulating discrimination in benefits plans would, in fact, impair the operation of Title VII. Accordingly, the Court held that ERISA does not pre-empt state anti-discrimination laws insofar as they prohibit conduct that is also prohibited by Title VII. Such state laws are, however,

pre-empted to the extent that they prohibit conduct that is not also prohibited by Title VII.

The case at bar concerns disability discrimination, which is not governed by Title VII, but by the Americans with Disabilities Act (ADA), 42 U.S.C. 12101, *et seq.* (1990). Nevertheless, we concluded that *Shaw*'s reasoning and holding control here because the ADA uses precisely the same enforcement scheme as Title VII, with mandated deferral to state agencies. Section 107(a), 42 U.S.C. 12117(a) states:

> The powers, remedies, and procedures set forth in Sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Thus, if the allegedly discriminatory conduct in this case is prohibited by the ADA, then ERISA does not pre-empt our Human Rights Act's prohibition of the same. Appellant alleges he was discharged because of his disability, conduct which clearly violates the ADA. The term "discriminate" includes

"excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 102(b), § 42 U.S.C. 12112(b)(4). Even if appellant's case is characterized as discrimination against a person with a disability in the administration of the salary continuance plan, that exclusion from a benefit is "discrimination" that is barred by the ADA. *Id.* *See Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). As a result, we believe that the discrimination claim in this case is not pre-empted by ERISA.

Accordingly, we believe it necessary to reverse the judgment of the lower court and remand this matter for further proceedings, including trial. We are advised that Mr. Hosaflook has received disability benefits from or through his employer because of his eyesight problems. Since it is not clear on the present record that Mr. Hosaflook could have been a "qualified individual" after the period of salary continuation, the

discrimination in this case may be limited by the period of time between discharge and the expiration of the salary continuance plan. Nevertheless, we conclude for the reasons stated that appellants ought to have the opportunity to pursue their discrimination claim so the outcome will be determined.

Appellants also asserted a claim for the tort of outrage which was rejected by the lower court when summary judgment was granted below.

A claim for wrongful discharge and a claim for the tort of outrage may both exist in an employment-related case. However, the claims differ and are indeed separate claims. This Court distinguished between the two claims in syllabus point 2 of *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), which states:

> The prevailing rule in distinguishing a wrongful discharge claim from an outrage claim is this: when the employee's distress results from the fact of his discharge --e.g., the embarrassment and financial loss stemming from the plaintiff's firing -- rather than from any improper conduct on the part of the employer in effecting the discharge, then no claim for intentional infliction of emotional distress can attach. When, however, the employee's distress results from the outrageous manner by which

> the employer effected the discharge, the employee may recover under the tort of outrage. In other words, the wrongful discharge action depends solely on the validity of the employer's motivation or reason for the discharge. Therefore, any other conduct that surrounds the dismissal must be weighed to determine whether the employer's manner of effecting the discharge was outrageous.

The tort of outrage was first defined by this Court in syllabus point 6 of *Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982), which states:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Justice Cleckley enlarged on the definition of outrage and summarized the four elements of the tort in his concurrence in *Hines v. Hills Department Stores, Inc.*, 193 W.Va. 91, 98, 454 S.E.2d 385, 392 (1994) (per curiam), 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.

Given our reconsideration of appellant's claim of discrimination under the Human Rights Act and the principles upon which we have based that reconsideration, we are of the opinion that upon trial sufficient evidence may be adduced to permit this cause to go to the jury. We note that the issue of whether the discharge of Mr. Hosaflook was intentional and the award of benefits shortly after the discharge may well be the controlling factors in that determination. Those other factors suggest that the trial court may once again, at an appropriate stage in the proceedings, determine that the claim of outrage is not sustained by the evidence. However, since we have reversed the summary judgment regarding the discrimination claim and have announced applicable principles with respect to that claim which may impact the full and fair development of the outrage claim, we believe

the matter of the validity of the claim for outrage is best committed at this time to further review by the trial court.

Accordingly, we reverse the judgment of the circuit court granting summary judgment on the claim of outrage and remand for such further proceedings as the law and the evidence may justify.

Reversed and remanded.