Opinion, Case No.23045 David J. Hosaflook & Kathryn Hosaflook v. The Consolidation Coal Company, et al.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1997 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

Appeal from the Circuit Court of Monongalia County

Honorable Robert B. Stone, Judge

Civil Action No. 92-C-589

AFFIRMED

Rehearing Granted: February 19, 1997

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JUSTICE McHUGH delivered the Opinion of the Court.

Participating in opinion after rehearing was granted: CHIEF JUSTICE WORKMAN, JUSTICE McHUGH, JUSTICE DAVIS, JUSTICE STARCHER, JUSTICE MAYNARD.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "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).

2. "'Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.' Syl. pt. 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 3, Cannelton Industries, Inc. v. Aetna Casualty & Surety Co. of America, 194 W. Va. 203, 460 S.E.2d 18 (1994).

3. "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." Syl. pt. 2, in relevant part, Morris Memorial Convalescent Nursing Home, Inc. v. Human Rights Commission, 189 W. Va. 314, 431 S.E.2d 353 (1993).

4. """'The primary object in construing a statute is to ascertain and give effect to the intent of the legislature.' Syl. Pt. 1, Smith v. State Workmen's Compensation Comm., 159 W. Va. 108, 219 S.E.2d 361 (1975)." Syl. Pt. 2, State ex rel. Fetters v. Hott, 173 W. Va. 502, 318 S.E.2d 446 (1984).' Syllabus point 2, Lee v. West Virginia Teachers Retirement Board, 186 W. Va. 441, 413 S.E.2d 96 (1991)." Syl. pt. 2, Francis O. Day Co., Inc. v. Director, Division of Environmental Protection, 191 W. Va. 134, 443 S.E.2d 602 (1994).

5. "'Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.' Syl. Pt. 4, State v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 107 S.E.2d 353 (1959)." Syl. pt. 3, Byrd v. Board of Education of Mercer Co., 196 W. Va. 1, 467 S.E.2d 142 (1995).

6. In order to establish a prima facie case of handicap discrimination pursuant to W. Va. Code, 5-11-9 [1992] of the West Virginia Human Rights Act, which provides that it is unlawful "[f]or any 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 . . . handicapped[,]" a claimant must prove, inter alia, that he or she is a "qualified handicapped person" as that term is defined in 77 C.S.R. 1-4.2 [1991]. 77 C.S.R. 1-4.2 [1991] defines "qualified handicapped person" as "an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." Furthermore, 77 C.S.R. 1-4.3 [1991] defines "able and competent" as "capable of performing the work and can do the work[.]" An individual who can no longer perform the essential functions of a job either with or without reasonable accommodation and, thus, who is receiving benefits under a salary

continuance plan which does not provide otherwise, is not performing the essential functions of a job by being a benefit recipient. Therefore, that person is not a "qualified handicapped person" within the meaning of the West Virginia Human Rights Act.

7. "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." Syl. pt. 6, Harless v. First National Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982).

8. "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." Syl. pt. 2, Dzinglski v. Weirton Steel Corp., 191 W. Va. 278, 445 S.E.2d 219 (1994).

McHugh, Justice:

The appellants, David J. Hosaflook and Kathryn Hosaflook, appeal the January 12, 1995 order of the Circuit Court of Monongalia County which granted summary judgment for the appellees, Consolidation Coal Company (hereinafter "Consol"); Ronald Stovash, the vice-president of Consol's Fairmont operations; and Thomas Simpson, the superintendent of Consol's Robinson Run Mine, an underground coal mine located in Monongalia County. The circuit court granted summary judgment after concluding that the appellants failed to establish a prima facie case of handicap discrimination under the West Virginia Human Rights Act, set forth in W. Va. Code, 5-11-1, et seq., and failed to set forth facts which would constitute the tort of outrage.

As we will explain more fully below, this case is before us on a second rehearing. Upon reconsideration for a second time, we affirm the January 12, 1995 order of the circuit court.

I

Facts

David Hosaflook began working for Consol in 1975 as an hourly employee in its Robinson Run Mine and continued in that position until 1990 when Consol offered him

a salaried position of mine foreman which he accepted. Soon after his promotion, Hosaflook and his supervisors noticed that he was experiencing problems at work such as stumbling, bumping into things, and having trouble completing the required paperwork. However, at that time Hosaflook did not know why he was experiencing these problems.

In August of 1991 Consol conducted its annual performance evaluations of all of its salaried employees for merit pay purposes. Hosaflook's evaluation made him one of the lowest ranked salaried employees at the Robinson Run Mine.

In November of 1991 Hosaflook realized that the difficulties he was experiencing (the stumbling, bumping into things, and inability to complete the required paperwork on time) arose from a vision problem which he kept to himself for a period of time. On February 5, 1992, Hosaflook was diagnosed with retinitis pigmentosa (hereinafter "R.P."), a degenerative eye condition that eventually leads to permanent blindness. Hosaflook spoke to his supervisor, Denver Johnson, and a personnel officer, Mark Schiffbauer, and told them he had been diagnosed with R.P. and needed to see a specialist.

In the early part of 1992 Ronald Stovash, Consol's vice-president of Fairmont operations, determined that a reduction in force among salaried employees at the Robinson Run Mine was necessary.[(1)] It was decided that twenty salaried positions would be eliminated. Thus, in early March of 1992 Consol informed all of its salaried employees of the impending reduction in force at a meeting attended by Hosaflook. Consol explained at this meeting that its intention was to use the lowest scores from the 1991 evaluation performances to select those subject to the reduction in force if enough salaried employees did not voluntarily retire.

On March 25, 1992, Hosaflook delivered to Consol a letter from his optometrist, dated the same day, describing the severity of his eye problem. The letter stated that Hosaflook should not work in an underground mine again due to his eye condition and thus, should be put on long-term disability. Hosaflook states that he and Consol knew at this time that he would never be able to work underground again as a result of his eye condition.

Because Consol's long-term disability plan does not provide benefits until one year after the onset of a total disability, Hosaflook was immediately put on Consol's salary continuance plan which is regulated under the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. 1001, et seq. The salary continuance plan provides incremental continuation of an employee's salary and benefits during periods of short-term illness and disability. The plan expressly states that an employee on the salary continuance plan remains subject to a reduction in force.

On April 1, 1992, Consol terminated Hosaflook's employment as part of the reduction in force. This action resulted in the termination of Hosaflook's benefits under the salary continuance plan.[(2)] Hosaflook asked Simpson if he could remain on the salary

continuance plan because of his eye condition. Additionally, Mrs. Hosaflook called Schiffbauer and requested that Consol leave her husband on the salary continuance plan until the long-term disability program took effect. Both Simpson and Schiffbauer relayed these requests to Stovash who refused to reconsider the decision to include Hosaflook in the reduction in force. Thereafter, Hosaflook filed suit against Consol alleging that his discharge constituted unlawful discrimination against a handicapped person and that the manner of discharge constituted the tort of outrage.

Procedural History

The circuit court granted summary judgment for Consol in a January 12, 1995 order after concluding that Hosaflook could not show that he was a "qualified handicapped person" under the West Virginia Human Rights Act. The circuit court came to this conclusion after determining that Hosaflook could not perform the essential functions of the job in question (mine foreman) either with or without reasonable accommodation. Additionally, the circuit court held that there were no facts surrounding Hosaflook's discharge which indicated that the discharge was carried out in an outrageous manner. Hosaflook appealed the circuit court's decision to this Court.

In our first opinion, which was filed on July 11, 1996, we affirmed the circuit court's January 12, 1995 order with Justice Cleckley dissenting. Thereafter, this Court granted Hosaflook's petition for rehearing and subsequently withdrew the original opinion and filed an opinion on December 10, 1996, in which we reversed the circuit court's January 12, 1995 order and remanded the case to the circuit court. Consol then petitioned for rehearing, and this Court granted yet another petition for rehearing. On March 18, 1997, we reheard the case. We now withdraw the second opinion. The following opinion will establish the principles in this case.

II

At the outset, we express our concern over not resolving this case in the prior two opinions. However, as Justice Cleckley stated in his dissent to the first opinion " [w]isdom 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. 595, 600, 69 S. Ct. 290, 293, 93 L. Ed. 259, 264 (1949) (Frankfurter, J., dissenting).

Standard of Review

We are mindful 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). We have recognized that courts should be cautious in granting summary judgment in employment discrimination cases. Conrad v. Ara Szabo, ___ W. Va. ___, ___, 480 S.E.2d 801, 809 (1996). However, this does not mean that summary judgment is never available in these cases:

Although we refuse to hold that simply because motive is involved that summary judgment is unavailable, the issue of discriminatory animus is generally a question of

fact for the trier of fact, especially where a prima facie case exists. The issue does not become a question of law unless only one conclusion could be drawn from the record in the case. In an employment discrimination context, the employer must persuade the court that even if all of the inferences that could reasonably be drawn from the evidentiary materials of the record were viewed in the light most favorable to the employee, no reasonable jury could find for the plaintiff.

Id. As we have held in the past, '[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.' Syl. pt. 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Syl. pt. 3, Cannelton Industries, Inc. v. Aetna Casualty & Surety Co. of America, 194 W. Va. 203, 460 S.E.2d 18 (1994). See also W. Va. R. Civ. P. 56.

The West Virginia Human Rights Act

The first issue is whether Hosaflook may maintain an action of handicap discrimination under the West Virginia Human Rights Act set forth in W. Va. Code, 5-11-1, et seq. He claims that his handicap is a result of his eye condition and that Consol[(3)] unlawfully terminated him as part of a reduction in force because of that handicap.

The West Virginia Human Rights Act provides that "[i]t shall be an unlawful discriminatory practice . . . [f]or any 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 . . . handicapped[.]" W. Va. Code, 5-11-9(1) [1992] (emphasis added). When determining whether an employer has unlawfully discriminated against a handicapped employee, the employee must first establish a prima facie case of handicap discrimination.

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.[(4)]

Syl. pt. 2, in relevant part, Morris Memorial Convalescent Nursing Home, Inc. v. Human Rights Com'n, 189 W. Va. 314, 431 S.E.2d 353 (1993) (adopting standards set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)) (footnote added). See also Skaggs v. Elk Run Coal Co., Inc., ___ W. Va. ___, 479 S.E.2d 561 (1966). At issue is whether Hosaflook has, as a matter of law, proven all of the elements of a prima facie case of handicap discrimination.

As required by syllabus point 2 of Morris Memorial Convalescent Nursing Home, Inc., supra, Hosaflook must first prove that he is "handicapped." In that all the parties agree that his eye condition is a handicap, Hosaflook is a "handicapped" person within the meaning of the West Virginia Human Rights Act. Id. at syl. pt. 2. See W. Va. Code, 5-11-3(m)(1) [1992] (defines the term "handicap").(5)

The parties disagree, however, on whether Hosaflook has proven the second element articulated in syllabus point 2 of Morris Memorial Convalescent Nursing Home, Inc.: whether Hosaflook is a "qualified handicapped person" under the West Virginia Human Rights Act. The term "qualified handicapped person" has been defined by the West Virginia Human Rights Commission (hereinafter the "Commission") as "an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." 77 C.S.R. 1-4.2 [1991].(6) The phrase "able and competent" means "with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a serious threat of injury to the health and safety of either the individual, other employees, or the public." 77 C.S.R. 1-4.3 [1991].(7)

Consol maintains that Hosaflook, by his own admission, cannot presently and will not in the future ever be able to perform the job of mine foreman, either with or without reasonable accommodation. 77 C.S.R. 1-4.2 and 1-4.3 [1991]. Thus, it is Consol's contention that as a matter of law Hosaflook is not a "qualified handicapped person" within the meaning of the West Virginia Human Rights Act.

Though Hosaflook concedes that he will never again be able to work underground as a mine foreman, he essentially maintains that neither the West Virginia Human Rights Act nor its corresponding rules require him to perform the "services required," W. Va. Code, 5-11-9(1) [1992], of a mine foreman. Rather, he argues the West Virginia Human Rights Act and its corresponding rules only require that he perform the "services required" to remain on the salary continuance plan. Plainly stated, Hosaflook argues that his "job" was that of "benefit recipient" rather than that of "mine foreman."

We disagree with Hosaflook's interpretation of the West Virginia Human Rights Act.

""The primary object in construing a statute is to ascertain and give effect to the intent of the legislature.' Syl. Pt. 1, Smith v. State Workmen's Compensation Comm., 159 W. Va. 108, 219 S.E.2d 361 (1975)." Syl. Pt. 2, State ex rel. Fetters v. Hott, 173 W. Va. 502, 318 S.E.2d 446 (1984).' Syllabus point 2, Lee v. West Virginia Teachers Retirement Board, 186 W. Va. 441, 413 S.E.2d 96 (1991).

Syl. pt. 2, Francis O. Day Co., Inc. v. Director, Division of Environmental Protection, 191 W. Va. 134, 443 S.E.2d 602 (1994). "'Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.' Syl. Pt. 4, State v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 107 S.E.2d 353 (1959)." Syl. pt. 3, Byrd v. Board of Education of Mercer Co., 196 W. Va. 1, 467 S.E.2d 142 (1995). Moreover, an administrative rule

authorized by statute is subject to the statutory rules of construction. See, e.g., Habursky v. Recht, 180 W. Va. 128, 375 S.E.2d 760 (1980).[8]

As previously noted, W. Va. Code, 5-11-9(1) [1992] expressly states that it is unlawful for an employer to discriminate against an individual who "is able and competent to perform the services required" because of his or her handicap. (emphasis added). The Human Rights Commission has elaborated on the above statutory language in 77 C.S.R. 1-4.2 [1991] by expressly stating that a "qualified handicapped person" is an individual who "is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." (emphasis added). "Able and competent" has been defined as "capable of performing the work and can do the work[.]" 77 C.S.R. 1-4.3 [1991]. (emphasis added).

Our resolution of whether Hosaflook is a "qualified handicapped person" under the West Virginia Human Rights Act hinges on the meaning of the following phrases: "perform the services required," W. Va. Code, 5-11-9(1) [1992], "perform the essential functions of the job in question," 77 C.S.R. 1-4.2 [1991], and "capable of performing the work and can do the work," 77 C.S.R. 1-4.3 [1991]. We conclude that the "ordinary and familiar significance and meaning," Byrd at syl. pt. 3, in relevant part, of these phrases do not support Hosaflook's argument that his job is now that of "benefit recipient" rather than "mine foreman." To argue that merely receiving benefits is a "job" or "work" is tenuous at best.[9]

Indeed, as noted by Consol, other courts addressing this issue have come to the same conclusion. For example, in Equal Employment Opportunity Commission v. CNA Insurance Companies, 96 F.3d 1039 (7th Cir. 1996), the court addressed whether a plaintiff had a right to bring a claim under the American with Disabilities Act of 1991 (hereinafter the "ADA"), found in 42 U.S.C. 12101, et seq.[10] The plaintiff, who suffered from a mental disability, asserted that her employer unlawfully limited her long-term disability coverage to twenty-four months rather than to unlimited coverage which applies to physical disabilities. The plaintiff was on long-term disability because she could not return to work due to her mental disability.

The Court of Appeals of the Seventh Circuit explained that the employee must show that she was a "qualified individual with a disability" before she could assert her claim under the ADA. That term was defined in the ADA as "'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that [the] individual holds or desires.'" Id. at 1043 (quoting 42 U.S.C. 12111(8)). The issue in CNA Insurance Companies was whether "a person who is no longer able to hold an 'employment position' fits within" the definition of a "qualified individual with a disability." Id. at 1043.

The Equal Employment Opportunity Commission (hereinafter the "EEOC") argued that the plaintiff's "employment position" was that of a "disability benefit recipient." Id. at 1043. Thus, "[b]ecause [the insurer] imposes no job-related duties on any of the beneficiaries of its long-term disability plan, [the plaintiff] by definition can perform

the essential functions of her position: there are none, other than collecting the benefit checks for as long as she is entitled to do so." Id. at 1043-44.

The Court of Appeals rejected the EEOC's argument:

We need not tarry long on the argument that the status of 'benefit recipient' fits within the definition of someone filling an 'employment position,' as required by 42 U.S.C. 12111(8). An 'employment position' is a job. Someone might be applying for a job, in which case 102 commands that job application procedures and hiring procedures must not be discriminatory. Or that person might be a current employee, in which case 102 protects her against discrimination in advancement, discharge, compensation, job training, and all other terms, conditions, and privileges of employment. . . . This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

Id. at 1044 (citations omitted).[(11)]

Similarly, in Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987), cert. denied, 485 U.S. 938 (1988), the court was confronted with whether a totally disabled employee is an "otherwise qualified handicapped person" under the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. The plaintiff in Beauford filed for disability insurance benefits after informing her employer that she was no longer able to perform her job of teaching school because of her mental and physical problems. The plaintiff asserted that her problems arose out of the pressures of her teaching job. After her employer discontinued her salary and benefits, the plaintiff sued, alleging handicapped discrimination in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.[(12)]

The United States Court of Appeals of the Eighth Circuit concluded that because the plaintiff was no longer able to perform the essential functions of the job in question, she was not a "qualified person" under the Rehabilitation Act:

[S]ection 504 was designed to prohibit discrimination within the ambit of an employment relationship in which the employee is potentially able to do the job in question. Though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, this sort of discrimination is simply not within the protection of section 504.

Id. at 771.[(13)] But see Leonard F. v. Israel Discount Bank of New York, No. 95 Civ. 6964, slip op. at 6 (S.D.N.Y. Sept. 24, 1996) (The court found the following opinion of the EEOC to be noteworthy: The plaintiff meets the definition of a "qualified individual with a disability" because "the relevant 'employment position' in any case involving post-employment fringe benefits, is the position actually occupied by the plaintiff, that of benefit recipient[.]").

We find the analyses discussed above in CNA Insurance Companies and Beauford to be persuasive. Moreover, as previously indicated, the salary continuance plan expressly states that "[a]n employee receiving benefits under the Plan is subject to termination or a reduction in the work force as if this Plan were not in operation." The legislature has expressly stated "[t]hat it shall not be unlawful discriminatory practice for an employer to observe the provisions of any bona fide . . . employee insurance or welfare benefit plan or system[.]" W. Va. Code, 5-11-9(1) [1992]. Thus, W. Va. Code, 5-11-9(1) [1992], allows Consol to observe the express terms of its salary continuance plan and include in its reduction in force an individual, such as Hosaflook, who was on the plan. This Court is not unsympathetic to Hosaflook's plight. However, the West Virginia Human Rights Act does not protect an individual who, due to a handicap, is unable to perform the essential functions of a job either with or without accommodation.(14) See 77 C.S.R. 1-4.2 [1991]. We conclude, therefore, that Hosaflook is not a "qualified handicapped person" as that term is defined under the West Virginia Human Rights Act.(15) Accordingly, we hold that in order to establish a prima facie case of handicap discrimination pursuant to W. Va. Code, 5-11-9 [1992] of the West Virginia Human Rights Act, which provides that it is unlawful "[f]or any 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 . . . handicapped[,]" a claimant must prove, inter alia, that he or she is a "qualified handicapped person" as that term is defined in 77 C.S.R. 1-4.2 [1991]. 77 C.S.R. 1-4.2 [1991] defines "qualified handicapped person" as "an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." Furthermore, 77 C.S.R. 1-4.3 [1991] defines "able and competent" as "capable of performing the work and can do the work[.]" An individual who can no longer perform the essential functions of a job either with or without reasonable accommodation and, thus, who is receiving benefits under a salary continuance plan which does not provide otherwise, is not performing the essential functions of a job by being a benefit recipient. Therefore, that person is not a "qualified handicapped person" within the meaning of the West Virginia Human Rights Act.

Because Hosaflook could not prove a prima facie case of discriminatory discharge under W. Va. Code, 5-11-9 [1992], the circuit court's entry of summary judgment for Consol on this issue was appropriate.

The tort of outrage claim

The second issue is whether Hosaflook has stated facts sufficient to present his tort of outrage or intentional infliction of emotional distress claim to a jury. In his brief, he outlines the following facts which he maintains are sufficient to prevent summary judgment from being entered against him on this issue:

Consol knew Hosaflook, a sixteen-year employee, was going blind when it included him in the [reduction in force (hereinafter "RIF")]. Simpson then proceeded to tell Hosaflook that his RIF was the result of his job performance without any attempt to determine whether there was a relationship between his alleged poor performance and

his progressive vision loss. When it broke the news to Hosaflook, cutting him off disability benefits, it did not even tell him what if any benefit rights he might have. . . . Thus, Consol's approach to Hosaflook left him facing blindness with the clear idea that he had lost his ability to support his family because he had failed as a foremen. Hosaflook contends that, in a civilized society, employers do not treat any employees, let alone long term employees, in such a recklessly insensitive fashion.

Conversely, Consol maintains that Hosaflook's tort of outrage claim is duplicative of the wrongful discharge claim. More specifically, Consol asserts Hosaflook is essentially complaining that his emotional distress arises from his financial loss due to the termination of his benefits under the salary continuance plan. Furthermore, Consol asserts that Hosaflook has not identified any act by Consol, other than the fact that he was terminated as part of the reduction in force, which might provide a basis for his tort of outrage claim. We agree with Consol.

This Court has recognized that damages may be recovered for the tort of outrageous conduct or the intentional infliction of emotional distress: "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." Syl. pt. 6, Harless v. First National Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982). See also syl. pt. 3, Tanner v. Rite Aid of West Virginia, Inc., 194 W. Va. 643, 461 S.E.2d 149 (1995); syl. pt. 1, Dzinglski v. Weirton Steel Corp., 191 W. Va. 278, 445 S.E.2d 219 (1994).[(16)] We have made clear that "the tort of intentional infliction of emotional distress, which is based on 'outrageous conduct,' requires a strong showing of behavior that goes 'beyond all possible bounds of decency[.]'" Hines v. Hills Dept. Stores, Inc., 193 W. Va. 91, 98, 454 S.E.2d 385, 392 (1994) (Cleckley, J., concurring) (quoting Restatement (Second) of Torts 46 at 71-73 (1965)).

The following four factors generally must be proven by a plaintiff alleging the tort of outrage: "'One, the wrongdoer's conduct was intentional or reckless. . . . Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. . . . Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.'" Harless, 169 W. Va. at 694-95, 289 S.E.2d at 704 (quoting Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974)). See also Hines, 193 W. Va. at 98, 454 S.E.2d at 392 (Cleckley, J., concurring) (Justice Cleckley elaborated on the above four factors); Tanner, 194 W. Va. at 650 n. 10, 461 S.E.2d at 156 n. 10.

In prior cases, we have made clear that an employment discrimination claim can lead to two separate actions: one for wrongful discharge and one for intentional infliction of emotional distress (or tort of outrage). See Dzinglski, supra. The first action involves the employment discrimination itself. Id. at 284, 445 S.E.2d at 225 (citing Farmer v. Carpenters, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977)). The second action involves the "outrageous manner in which the discrimination . . . , the discharge, was implemented[.]" Id. at 285, 445 S.E.2d at 226 (citing Farmer, supra).

Consol maintains that Hosaflook has alleged a wrongful discrimination claim rather than a tort of outrage claim. This Court has held that the two claims are to be distinguished:

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.

Syl. pt. 2, Dzinglski, supra. (emphasis added).

Hosaflook argues that it was outrageous for Consol to include a sixteen-year employee who was going blind and on the salary continuance plan in a reduction in force. Hosaflook has not identified any facts which suggest that Consol's conduct when effecting his discharge was outrageous. As the circuit court noted in its January 12, 1995 order "[Hosaflook] 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." Clearly, Hosaflook is claiming that his distress is the result of a wrongful discharge "rather than from any improper conduct on the part of the employer in effecting the discharge[.]" Id., in relevant part. Thus, we conclude that Hosaflook is essentially asserting a wrongful discharge claim rather than a tort of outrage claim.

As previously stated '[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.' Syl. pt. 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Syl. pt. 3, Cannelton Industries, Inc., supra. In that Hosaflook has not identified any facts which suggest that Consol's conduct when effecting the discharge was outrageous, this Court concludes that he has failed as a matter of law to make a sufficient showing on the essential elements of the tort of outrage claim. Accordingly, we conclude that the circuit court properly granted summary judgment for Consol on this issue.[(17)]

III

Whether or not it is undesirable for a company to discharge, as part of a reduction in force, an employee who is permanently disabled and who is on a salary continuance plan is not policy for this Court to set. The West Virginia Human Rights Act simply

does not protect such an employee if he or she is unable to perform the essential functions of a job either with or without reasonable accommodation. More specifically, we conclude that the legislature did not intend for an individual, who can no longer perform the essential functions of a mine foreman either with or without reasonable accommodation, and thus, who is receiving benefits under a salary continuance plan, as a "qualified handicapped person" under the West Virginia Human Rights Act.

Moreover, although it may seem unkind for an employer to terminate an individual with a handicap who cannot perform the essential functions of a job either with or without reasonable accommodation as part of a reduction in force, this action, in and of itself, does not as a matter of law support a claim for the tort of outrage. Accordingly, based on all of the above, we affirm the January 12, 1995 order of the Circuit Court of Monongalia County.

Affirmed.

1. Consol had already discharged some of its hourly employees as a result of a reduction in force.

2. Hosaflook's termination from employment did not affect his eligibility to receive benefits from the long-term disability program.

3. In this opinion we will refer to the appellees collectively as "Consol."

4. There are two theories of employment discrimination: the disparate impact theory and the disparate treatment theory, the latter of which is currently at issue. Morris Memorial Convalescent Nursing Home, Inc. v. Human Rights Com'n, 189 W. Va. 314, 317, 431 S.E.2d 353, 356 (1993). Under the disparate treatment theory, West Virginia courts apply the standards enunciated in the United States Supreme Court case of McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), which standards form the framework of syllabus point 2 of Morris Memorial Convalescent Nursing Home, Inc. quoted above.

Subsequently, in Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995) and in Skaggs v. Elk Run Coal Co., Inc., ___ W. Va. ___, 479 S.E.2d 561 (1996), we elaborated on the McDonnell Douglas test. Justice Cleckley explained that to establish a prima facie case of disability discrimination, the plaintiff must show that he is a disabled person within the meaning of the law, that he is qualified to perform the essential function of the job (either with or without reasonable accommodation), and that he has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises.

Skaggs, ___ W. Va. at ___ n. 22, 479 S.E.2d at 581 n. 22 (citations omitted).

When a complainant establishes a prima facie case of handicap discrimination [t]he

burden then shifts to the employer to rebut the complainant's prima facie case by presenting a legitimate nondiscriminatory reason for such person's discharge. If the employer meets this burden, the complainant must prove by a preponderance of the evidence that the employer's proffered reason was not a legitimate reason but a pretext for the discharge.

Syl. pt. 2, Morris Memorial Convalescent Nursing Home, supra, in relevant part (this portion of syl. pt. 2 is also based on the McDonnell Douglas test). We more recently stated:

In disparate treatment discrimination cases under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), a plaintiff proves a claim for unlawful discrimination if he or she proves by a preponderance of the evidence that a forbidden intent was a motivating factor in an adverse employment action. Liability will then be imposed on a defendant unless it proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.

Syl. pt. 6, Skaggs, supra. We note, however, that the case now before us concerns only whether Hosaflook has established a prima facie case of handicap discrimination.

5. The term "handicap" has been defined as a person who "[h]as 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[.]" W. Va. Code, 5-11-3(m)(1) [1992] (W. Va. Code, 5-11-3 was amended in 1994; however, the amendments do not affect the above discussion).

6. 77 C.S.R. 1-4.2 was rewritten in 1994. The major change was to replace the term "handicap" with "disability" in order to conform with the Americans with Disabilities Act of 1990, 42 U.S.C. 12111-12117. See 77 C.S.R. 1.1 [1994]. In any event, the changes in the definition of "qualified handicapped person" do not affect the discussion above.

7. 77 C.S.R. 1-4.3 was rewritten in 1994; however, the changes do not affect the above discussion.

8. The rules regarding discrimination against the handicapped found in 77 C.S.R. 1-1, et seq. were issued under the authority of W. Va. Code, 5-11-8(h) [1989] and W. Va. Code, 29A-3-1, et seq. of the State Administrative Procedures Act.

9. Moreover, Hosaflook's argument that his job is that of "benefit recipient" rather than that of "mine foreman" raises the issue of whether his claim would be preempted by ERISA, 29 U.S.C. 1001, et seq. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). More specifically, Hosaflook argues that because his job was that of "benefit recipient" all he had to do to perform the "essential functions of the job in question[,]" 77 C.S.R. 1-4.2 [1991], was follow the terms of the salary continuance plan. As noted previously, the plan expressly states that an employee

on salary continuance remains subject to a reduction in force. Hosaflook asserts that he should not have been included in the reduction in force while receiving benefits from the salary continuance plan for a permanent disability. Thus, notwithstanding that Hosaflook has repeatedly emphasized that he is not arguing that he was unlawfully terminated from the salary continuance plan, it appears that his real complaint in this case is that the terms of the salary continuance plan were unfair or were applied unfairly. Because Consol's salary continuance plan is regulated under ERISA, there is a question of whether ERISA would preempt Hosaflook's claim. However, given that this Court has concluded that Hosaflook has been unable to prove a prima facie case of handicap discrimination under the West Virginia Human Rights Act, we need not delve into this complicated preemption issue. See n. 15, infra.

10. In the past this Court has acknowledged that cases decided under the Federal Rehabilitation Act of 1973, found in 29 U.S.C. 701 et seq., have guided it in its decisions under the West Virginia Human Rights Act. See Morris Memorial Convalescent Nursing Home, Inc., supra. In that Congress "'drew upon and incorporated standards developed under the Rehabilitation Act'" when enacting the ADA, Eckles v. Consolidated Rail Corp., 890 F. Supp. 1391, 1403 (S.D. Ind. 1995) (citation omitted), aff'd, 94 F.3d 1041 (1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1318 (1997), we find that cases decided under the ADA are also helpful in deciding our cases under the West Virginia Human Rights Act. See also Maddox v. University of Tennessee, 62 F.3d 843, 846 n.2 (6th Cir. 1995). We also note that the McDonnell Douglas test is applicable to an ADA analysis. Pasquariello v. Medcentral Health Systems, 949 F. Supp. 532, 535 (N.D. Ohio 1996). See n. 4, supra (discusses the McDonnell Douglas test).

11. We understand the EEOC's argument; however, we cannot reconcile its argument in CNA Insurance Companies, supra and in similar cases with the plain meaning of the West Virginia Human Rights Act and the rules promulgated thereunder. Obviously, language changes to the Act and rules are within the purview of the legislature and the Commission.

12. 29 U.S.C. 794, as quoted in Beauford, 831 F.2d at 770 n. 1 states, in relevant part: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]"

13. We note that in Parker v. Metropolitan Life Insurance Co., 99 F.3d 181 (6th Cir. 1996) the court was confronted with determining whether a plaintiff, who could no longer work in her job due to her disability and who was receiving long-term disability benefits, was holding an employment position so as to be able to maintain an action under the ADA as a "qualified individual with a disability." The plaintiff argued that her "employment position" was that of a "benefit recipient." Therefore, she asserted that she could maintain an action under the ADA.

The Court of Appeals of the Sixth Circuit disagreed: "Plaintiff's proposed construction of the statute is not persuasive. The concept of 'benefits recipient' as an 'employment position' relies on a convoluted construction of statutory language, which conflicts with the plain meaning of the words." Id. at 187.

However, on February 6, 1997 the United States Court of Appeals of the Sixth Circuit voted for rehearing of this case in banc. Parker v. Metropolitan Life Insurance Co., 107 F.3d 359 (6th Cir. 1997). Thus, the Parker case reported in 99 F.3d 181 was vacated. Reargument is scheduled for June 11, 1997.

14. In his petition for appeal Hosaflook expressly states that he does "not contend that he should be allowed to continue to work as a coal miner or to be transferred to some other position. . . . Unlike most cases, Hosaflook was not contending that he could continue to be a [mine foreman] with a reasonable accommodation. Rather, he contended that he should not be terminated from disability." Based on this statement, Hosaflook abandoned his argument that he wanted to be transferred to a job above ground as a reasonable accommodation for his disability.

If, however, Hosaflook had not abandoned his reasonable accommodation request, we note that in Coffman v. West Virginia Board of Regents, 182 W. Va. 73, 386 S.E.2d 1 (1988), we held that "[w]here a handicapped employee can no longer perform the essential functions of that position, reasonable accommodation does not require an employer to reassign him to another position in order to provide him with work which he can perform." Id. at syl. pt. 2, in relevant part. In Skaggs, supra, we overruled the above statement in Coffman in syllabus point 4 which states, in relevant part:

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. To the extent that Coffman v. West Virginia Board of Regents, 182 W. Va. 73, 386 S.E.2d 1 (1988), is inconsistent with the foregoing, it is expressly overruled.

However, we made clear that the above holding was not to be applied retroactively:

As the defendant rightly points out, however, the requirements we put in force today were not part of the West Virginia law at the time these employment decisions were made. In addition to Coffman's holding that there was no duty to consider and make available positions other than the one the plaintiff had at the time of his discharge, the Commission's rules that were in effect in May 1991 (and that remained in effect until May, 1994) specifically excluded transfer to an open position as a possible accommodation that could be required by the Human Rights Act. Under the circumstances, we are compelled to agree with the defendant that reversal based on a revised interpretation of the reasonable accommodation duty would be inappropriate. To apply our new ruling retroactively in this case would be unfair and would punish the defendant for what may have been an attempt to comply with the law as it existed at the

time of the plaintiff's discharge. Therefore, we hold that the ruling in this case will apply prospectively only.

Id. at ___, 479 S.E.2d at 580.

Likewise, when Consol made the decision to include Hosaflook in a reduction in force in 1992, the law "specifically excluded transfer to an open position as a possible accommodation that could be required by the Human Rights Act." Thus, Consol was not required to transfer Hosaflook to another position as a possible accommodation.

15. Consol notes that most persons on the salary continuance plan can perform their jobs either with or without reasonable accommodation. Consol further notes that when employees are put on the salary continuance plan, whether they have the flu, a broken arm, or R.P., they retain their title and are treated as an employee at the mine to which they are assigned. Lastly, Consol states that an employer does not have to provide a salary continuance plan to its employees. Although Consol recognizes that if it does provide such a plan it may not be provided in a discriminatory manner, Consol maintains that any actions brought alleging discriminatory conduct by Consol under the salary continuance plan would be preempted by ERISA, 29 U.S.C. 1001 et seq.. See n. 9, supra. 16. Our formulation of this cause of action was patterned after Section 46 of the Restatement (Second) of Torts (1965). See Tanner, 194 W. Va. at 650, 461 S.E.2d at 156; Dzinglski, 191 W. Va. at 283, 445 S.E.2d at 224.

17. Hosaflook argues that because his handicap affected his performance evaluation in 1991, Consol should not have used the 1991 scores when determining whether he would be included in the reduction in force. Hosaflook apparently argues that his performance as mine foreman should be reevaluated and his scores modified to take into account his handicap. Hosaflook points to no legal authority to support this argument.

On the other hand, Consol argues that an employer owes a handicapped employee a reasonable accommodation if one is available, but does not owe an employee "bonus points" on a performance evaluation.

As Hosaflook concedes, no reasonable accommodation is available in this case, as he is unable to perform the essential functions of a mine foreman either with or without reasonable accommodation. See n. 14, supra. Thus, because no reasonable accommodation would enable Hosaflook to perform the essential functions of his job as mine foreman, a reevaluation of his performance would be futile. Accordingly, we find Hosaflook's argument to be without merit.