IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 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

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

AFFIRMED

Submitted: May 28, 1996
Filed: July 11, 1996

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE CLECKLEY concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. A salary continuance plan is not a "job" within the meaning of the regulation, 6B WV CSR 77-1-4.2, and therefore the receipt of benefits under such a plan does not constitute the performance of services under section 9 of the West Virginia Human Rights Act, W.Va. Code § 5-11-1 *et seq.* (1992).

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

3. The four elements of the tort of outrage 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.

Albright, Justice:

Appellants, David Hosaflook and Kathryn Hosaflook, appeal an order granting summary judgment to appellees, Consolidated Coal Co. (Consol), Ronald Stovash, Vice-President of Consolidation Coal Co.'s Fairmont Operations, and Thomas Simpson, Superintendent of the Robinson Run Mine. Summary judgment was granted to Consol on January 12, 1995, by the Circuit Court of Monongalia County, West Virginia. Appellants claim the lower court erred in holding that Mr. Hosaflook was not a "qualified handicapped person" within the meaning of the West Virginia Human Rights Act, W.Va. Code § 5-11-1 *et seq.*, and in holding that the facts of this case do not support a claim for the tort of outrage.

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 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

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[1]In this opinion, we refer to the appellees collectively as Consol.

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 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

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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

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.

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considered.

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.* (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.

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Appellants appeal that judgment to this Court.

STANDARD OF REVIEW

The controlling 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.

SUBSTANTIVE ISSUES

In the appeal, appellants first contend that the lower court erred in holding that Mr. Hosaflook was not a "qualified handicapped person" within the meaning of the West Virginia Human Rights Act, W.Va. Code § 5-11-1 *et seq.* Appellant concedes that under W.Va.

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[3]West Virginia Code § 5-11-9(1) (1992) states:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by
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> the United States or the state of West Virginia or its agencies or political subdivisions:
>
> (1) For 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 blind or handicapped: Provided, That it shall not be unlawful discriminatory practice for an employer to

Code § 5-11-9(1) individuals are protected from discrimination only if they meet two requirements: (1) the person must be handicapped within the meaning of the act, and (2) if the individual meets the definition of "handicap", the employer must not discriminate against him if he is "able and competent to perform the services required" by his employment.

Appellant then argues that the lower court erred in finding he could not perform the services required. He claims that he is not required to perform the services of a coal mine foreman, but rather only the services required to remain on the salary continuance

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> observe the provisions of any bona fide pension, retirement, group or employee insurance or welfare benefit plan or system not adopted as a subterfuge to evade the provisions of this

program. Appellant does not contend he should be allowed to continue employment as an active coal miner.

Appellee argues that the services required of Mr. Hosaflook were those attendant upon the position of mine foreman, not the passive function of being eligible for salary continuance, and that Mr. Hosaflook could not perform the essential functions of his job, that being mine foreman. Therefore, appellees contend, Mr. Hosaflook was not a qualified handicapped person. The circuit court found that appellant's job was that of a section foreman in an underground coal mine and held that "under no circumstances could the plaintiff be considered a 'qualified handicapped person' at the time of his layoff on April 1, 1992." We agree and affirm the ruling of the trial court.

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subdivision[.]

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(1):

> 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 WV CSR § 77-1-4.2; W.Va. Code § 5-11-9 (1992). In considering this definition and whether Mr. Hosaflook is "able and competent to perform the services required", we find it necessary to determine whether salary continuance is a "job", or whether, as appellees contend, the services required for the purposes of applying the Human Rights Act to this case are the services of a mine foreman.

Black's Law Dictionary 835 (6th ed. 1990) defines "job" as " [a] specific task or piece of work to be done for a set fee or compensation[;] [e]mployment position[.]" The United States Supreme Court set forth three essential elements of "work" in *Jewell*

Ridge Coal Corp. v. Local No. 6167, etc., 325 U.S. 161, 89 L.Ed. 1534, 65 S.Ct. 1063 (1945): (1) physical or mental exertion; (2) the exertion is controlled or required by the employer; and (3) the exertion pursued is necessarily and primarily for the benefit of the employer and his business (quoting *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 88 L.Ed. 949, 64 S.Ct. 698 (1944)).

We note that participation in the salary continuance program simply does not involve work and that, there being no work to be performed, there are no services required. Said another way, there is no evidence here that Mr. Hosaflook provided any services or did any work to remain on the salary continuance program. No physical or mental exertion was required to obtain the salary continuance. There is no evidence that what Mr. Hosaflook did with

his time while receiving salary continuance was controlled or required by the employer. There being no evidence of mental or physical exertion as a condition of receiving salary continuance, there is no evidence that Mr. Hosaflook's activities while receiving salary continuance were pursued for the necessary and primary benefit of his employer. The basic premise of salary continuance is that one is not able to work, and not able to provide the services required by a job from which one is excused, while still receiving all or part of his or her salary. Salary continuance does not fit the definition or fulfill the requirements of a "job" or "work".

We agree with the circuit court's conclusion that, at the time of his discharge, appellant's job was that of a section foreman. That position requires services to be performed, services involving

physical or mental exertion, controlled by the employer and pursued to its benefit. By reason of Mr. Hosaflook's disability, it appears he was neither able nor competent to perform those services at the time of his discharge. We note that appellants do not argue before us that Mr. Hosaflook might have been able to continue his work as a mine foreman had appellees provided a "reasonable accommodation" to enable him to perform the essential functions of that job. Rather, we have before us only the claim that participation in the salary continuance program is itself a job requiring services that Mr. Hosaflook was able and competent to perform. For the reasons just discussed, we cannot agree. Accordingly, we hold that a salary continuance plan is not a "job" within the meaning of the regulation, 6B WV CSR 77-1-4.2, and therefore the receipt of benefits under such a plan does not constitute the performance of services under

section 9 of the West Virginia Human Rights Act, W.Va. Code § 5-11-1 *et seq.* (1992).

As an additional argument, appellee states that the company did not know of appellant's handicap until after the decision was made to lay him off, and that, as a matter of law, the decision could not have been motivated by a discriminatory intent. While there is a dispute as to the effect of Mr. Hosaflook's first inquiry regarding the need for an eye specialist to diagnose and treat the disabling condition, there is no dispute that Consol was not provided with a physician's diagnosis of appellant's condition until March 25, 1992, three weeks after the March 1, 1992 meeting announcing performance-based layoffs. The layoffs were based on performance evaluations conducted months before anyone, including appellant, realized the extent of appellant's disability. We agree with appellee

that these circumstances do not disclose any basis for the employee's termination other than a perceived poor performance record.

Appellant next argues that he stated facts sufficient to present his claim of intentional infliction of emotional distress to a jury. Appellant contends his termination was outrageous because appellee included him, a sixteen-year employee with R.P., in a reduction in force as a result of job performance, without attempting to ascertain whether there was a relationship between his poor job performance and his eye condition.

Appellee argues that the claim of outrageous conduct flows from the economic impact of the discharge and is, therefore, duplicative of the wrongful discharge claim. Appellee asserts that

with regard to the claim of outrageous conduct, the circuit court properly held that appellee was entitled to summary judgment as a matter of law. We agree and affirm the ruling of the court.

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.

When we consider the facts that surround the termination of employment in this case, we find the tort of outrage is not established as a matter of fact or law. Appellant was discharged due to a reduction in force, based on a performance evaluation that was conducted prior to anyone realizing he had a handicapping condition. All salaried employees were informed of an impending reduction in the salaried work force and were told the reduction would take place based on the performance evaluations. The force reduction rankings were completed at that time. Consol, at best, had only very limited information regarding the severity of appellant's vision problem and its sad prognosis.

When appellant was discharged, he was called into an office and was told he was being discharged and was advised of the benefits

available to him. We find that appellant has presented no evidence that the company's behavior surrounding the discharge was so "atrocious" as to be "utterly intolerable in a civilized community" or "so extreme and outrageous as to exceed all possible bounds of decency." This Court believes that the trial court did not err in ruling, "There is simply no construction of these facts that would constitute the tort of outrage. Accordingly, the plaintiff's claim of outrageous conduct must [] fail."

Appellee argues that appellant's claims, including the claim that he was improperly terminated from salary continuance, are pre-empted by the Employee Retirement Income Security Act of 1975, 29 U.S.C. §§ 1001, *et seq.* (ERISA). In light our holding herein, we find it is not necessary to reach the pre-emption issue.

For the reasons set forth above, the order of the Circuit Court of Monongalia County is affirmed.

Affirmed.