No. 26350 - Kenneth M. Rodriguez v. Consolidation Coal Company

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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, J., concurring, in part, and dissenting, in part:

I agree with the majority's determination that the trial court did not commit reversible error in this case regarding mitigation of damages; but, I do believe that error occurred in the method used in calculating prejudgment interest. I write separately, therefore, to express my view that this Court needs to revisit and further develop the areas of our law regarding mitigation of damages and prejudgment interest.

As the majority correctly states, the burden regarding the mitigation of damages was on Consolidation Coal Company ("CCC") to establish that there were substantially equivalent positions available to Mr. Rodriguez and Mr. Rodriguez failed to use diligence in seeking such positions. See Syl. Pt. 4, Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). It is clear that CCC failed to properly preserve any alleged error regarding the issue of mitigation of damages for appellate review.

With that said, I think that CCC raised an important argument regarding a back pay award for the time a plaintiff spends pursuing a full-time education. Consideration should be given to whether the plaintiff is reaping a double recovery which is inconsistent

with the make-whole approach to compensatory damages. I agree with CCC's assertion that back pay should not be awarded to a plaintiff who voluntarily exits the job market to become a full-time student.

In fact, other jurisdictions which have addressed this precise issue have similarly held that an award of back pay to a full-time student is a double recovery. The United States Court of Appeals for the Tenth Circuit in Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) addressed the issue of whether the district court had abused its discretion by not including the time the plaintiff attended school in the computation of the back pay award. Id. at 267. The Tenth Circuit upheld the trial court's decision, stating

> If a discharged employee accepted employment elsewhere, there is little doubt that this would cut off any back pay award. If not, the employee would be receiving a double benefit for the same period of time. Likewise, when an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school also would be like receiving a double benefit.

Id. at 267-68; accord Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985); Washington v. Kroger Co., 671 F.2d 1072, 1079 (8th Cir. 1982); see Williams v. Trans-World Airlines, Inc. 507 F.Supp. 293, 305 (W.D.Mo. 1980), aff'd in part, rev'd in part on other grounds and remanded, 660 F.2d 1267 (8th Cir. 1981) (holding that plaintiff not entitled to back wages for any period of time spent as full-time student); United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union 46, 328 F.Supp.429, 444 (S.D.N.Y. 1971) (stating that plaintiff who chose not to work, but to attend school "may not be deemed to have been

'ready, willing and available,' and thus eligible for compensatory pay . . ."); see also Currieri v. City of Roseville, 123 Cal. Rptr. 314, 319 (Cal. Ct. App. 1975) ("'It would seem the duty of mitigation is a continuing duty, within reasonable limits of course, and that to seek and attend to a full time non-paying occupation [e.g. attending school] is not within the concept of mitigation.'"); cf. Floca Homcare Health Servs., Inc., 845 F.2d 108, 113 (5th Cir. 1988) ("The student is compensated for the time in school by the opportunity for future earnings in the new career and thus suffers no damages during that period. To allow front pay for this period would compensate the person twice.").

As noted by the Fourth Circuit Court of Appeals in Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (4th Cir. 1985), however, consideration must be given to whether a plaintiff simply chooses to attend school exclusively or whether the plaintiff is working in addition to attending school. Id. at 1275-76. As the Fourth Circuit noted:

> We take notice that the vast majority of full-time college students could not hold down a full-time job, and that in the usual case when one decides to attend college on a full-time basis, it does curtail his present earning capacity and effectively removes him from the employment market. So we subscribe to the general rule as laid down in the Taylor case. But here the facts are quite different. [The plaintiff] . . . remained in the job market which is shown conclusively by the fact that he did maintain a full-time job during all the time he was in college. Prior to obtaining that job, he had unsuccessfully looked for work for a year and had accepted summer employment for less pay than he was making with . . . [the defendant company]. It is no use to say that . . . [the plaintiff] could have obtained a better job had he looked. He looked for a year. [The defendant company] . . . has offered no proof of any better job available

> during the time that . . . [the plaintiff] held his full-time job with the country club as well as attending college full-time. . . . [W]e do not think he should be penalized merely because he attended college during the time he was so employed. That would seem to us to place a penalty on diligence.

Id. at 1276.

Also, consideration must be given to whether a plaintiff, even though in school full-time, remains willing to drop out of school or to reduce the number of hours spent in school if a job becomes available. See Hanna v. American Motors Corp., 724 F.2d 1300, 1308 (7th Cir.), cert. denied, 467 U.S. 1241 (1984) ("[W]e agree with the district court that . . . [the plaintiff] enrolled in school only because that 'alternative . . . was better than anything else [he] had going for him at the moment[,]'" and while attending school, plaintiff "applied for and was at all times ready, willing, and available to accept employment comparable to that of [the defendant company]."); Mers v. Dispatch Printing Co., 529 N.E.2d 958, 965 (Ohio App Ct 1988) ("There was competent, credible evidence to support the jury's finding that . . . [the plaintiff] was available to work while attending college. Therefore, the calculation of the back pay . . . should include the period when . . . [the plaintiff] attended college. . . .").

Accordingly, the law regarding mitigation of damages should be that when a plaintiff voluntarily chooses to exit the job market solely to pursue an education as a full-time student, rather than to use reasonable care and diligence seeking substantially equivalent

employment positions to the one lost by the plaintiff, that plaintiff should not be allowed to recover any back pay for the time spent as a full-time student.

The only other issue I address concerns the way prejudgment interest is calculated on back pay awards. If any case presented this Court with the opportunity to offer guidance and to fairly and finally resolve the law regarding the calculation of prejudgment interest on back pay awards, this was the case. In the instant case, however, the majority skirted the issue by determining that the trial court did not abuse its discretion in awarding prejudgment interest from the date Mr. Rodriguez was discharged under the law as it currently exists. I believe that the majority should have gone the extra mile in this case and have reexamined whether our prior decision in Grove ex rel Grove v. Myers, 181 W. Va. 342, 382 S.E.2d 536 (1989), is really applicable to back pay awards.

In Grove, the plaintiff father brought an action on behalf of his son and himself against a motorist for injuries his son sustained when his bicycle collided with the defendant's automobile. A jury trial was held and the jury returned a verdict awarding the plaintiff the full amount of his medical bills, as well as damages for pain and suffering and for scarring. There were no damages awarded for back pay. Id. at 345, 382 S.E.2d at 539. We held that, in a personal injury action, prejudgment interest should begin to run from the date the injury is inflicted. Id. at 343, 382 S.E.2d at 537, Syl. Pt. 2.

This Court has never taken the opportunity to address the issue of when prejudgment interest should begin to run on back pay awards. Other courts which have decided this issue have upheld the calculation of prejudgment interest from the date each payment of salary to the plaintiff became due. See Wilson v. AM Gen. Corp., 979 F.Supp. 800, 802 (N.D.Ind. 1997) (stating that "pre-judgment interest figure [was calculated] by averaging . . . [the plaintiff's] total income over the entire period in question on a monthly basis"); Zerrilli v. New York City Transit Auth., 973 F.Supp. 311, 317 (E.D.N.Y. 1997) (stating that prejudgment interest on back pay award "is to be calculated based upon the actual month-by-month award"); Greenway v. Buffalo Hilton Hotel, 951 F.Supp. 1039, 1063 (W.D.N.Y 1997), aff'd as modified on other grounds, 143 F.3d 47 (2d Cir. 1998) (stating that "'[t]he objective of fully compensating the plaintiff is best effectuated by dividing the jury's back pay award evenly over the relevant time period for the purposes of calculating prejudgment interest.'"); Taylor v. Central Pa. Drug and Alcohol Servs. Corp., 890 F.Supp. 360, 377 (M.D.Pa. 1995) (allowing calculation of prejudgment interest on back pay award "as if paid monthly for period from 7/1/91 to 10/31/93"); Ryan v. Ratheon Data Sys. Co., 601 F.Supp. 243, 254 (D. Mass. 1984) (allowing calculation of prejudgment interest on back pay award from the dates payments were due to date judgment entered).

Therefore, I believe this Court's continued reliance on the Grove decision for cases involving back pay is inappropriate, because back pay was never an issue in that case. Prejudgment interest on back pay awards should be calculated from the date each payment

became due. Under this method, using the instant case as an example, prejudgment interest on Mr. Rodriguez' back pay award would be calculated by dividing the back pay award of $175,000 by the twenty-three months between Mr. Rodriguez' date of discharge and the date of the jury verdict. This method is not only practical, but is also a better reflection of the prejudgment interest to which a plaintiff is actually entitled. Further, the method is not a mathematical nightmare which would be overburdensome on the trial court.