No. 26962 -- Ira Timothy Stone v. St. Joseph's Hospital of Parkersburg

Justice Scott, concurring:

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OF WEST VIRGINIA

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OF WEST VIRGINIA

I am in full agreement with the ultimate conclusion reached by the majority; however, there was simply no reason for the majority to embark on the lengthy discussion (approximately thirteen pages of the opinion) of federal and state law from other jurisdictions to reach that conclusion. A more direct and succinct review of our existing statutes and corresponding state regulations clearly allows the Appellee to bring the action he did. See W. Va. Code § 5-11-3(m) (1998) and W. Va. C.S.R. § 77-1-2.8 (1994). Likewise, the provisions of West Virginia Code § 5-11-9 (1998) clearly support the fact that, in this case, the Appellant's use of a light duty program was insufficient to prove that the employer had engaged in illegal disability discrimination.

Accordingly, there is no legal justification for the majority's disavowal of a longstanding practice of this Court to follow federal law in discrimination cases. After all, our statutes concerning discrimination are largely modeled after federal statutes. Thus, the pattern and practice of this Court have been to follow the federal courts' interpretation of various statutory provisions, except where there are substantive distinctions between the language used in the state statute as compared with the federal statue. This practice has been recognized by the Court in Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995), holding modified on other grounds by Dodrill v. Nationwide Mut. Ins. Co., 201 W. Va. 1, 491 S.E.2d 1 (1996), wherein we stated that "[w]e have consistently held that cases brought

under the West Virginia Human Rights Act, W.Va.Code, 5-11-1, *et seq*., are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise." 193 W. Va. at 482-83, 457 S.E.2d at 159-60 (citing West Virginia University v. Decker, 191 W.Va. 567, 573, 447 S.E.2d 259, 265 (1994)(adopting disparate impact test established by United States Supreme Court in interpreting Title VII of the Civil Rights Act of 1964 "simply because uniformity in these matters is valuable *per se*"); Conaway v. Eastern Associated Coal Corp., 178 W.Va. 164, 169, 358 S.E.2d 423, 428 (1986) (deciding requirements necessary for age discrimination case and acknowledging that "most courts have looked to McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (a race discrimination case) for authority")); see also Health Management, Inc. v. Lindell, ___ W. Va. ___, ___, 528 S.E.2d 762, 765 n.4 (W.Va. 1999); West Virginia Human Rights Comm'n v. Wilson Estates, Inc., 202 W.Va. 152, 158, 503 S.E.2d 6, 12 (1998);[1]

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[1]The precedent of this Court following federal discrimination law was well-documented in Wilson Estates, wherein we acknowledged that

> [t]his Court has consistently looked to federal discrimination law dealing with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1994) when interpreting provisions of our state's human rights statutes. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 482, 457 S.E.2d 152, 159 (1995) (noting that "cases brought under the West Virginia Human Rights Act are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise"); West Virginia University v. Decker, 191 W.Va. 567, 573-74, 447 S.E.2d 259, 265-66 (1994) (altering disparate impact test previously established based on 1991 amendments to Title VII which shifted burden of pr0oduction and persuasion to employer to prove that particular employment practice or policy is "job related" and "consistent with business necessity"); Slack v. Kanawha County Housing and Redevelopment Auth., 188 W.Va. 144, 153-55, 423 S.E.2d 547, 556-558 (1992) (defining elements of constructive discharge cases by adopting majority view of federal decisions decided under both Title VII

Hanlon v. Chambers, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995). "Where, however, there are substantive distinctions between the language used by the two statutes, we have inferred a State legislative intent to diverge from the federal law and have ruled accordingly." 193 W. Va. at 483, 457 S.E.2d at 160 n 9. (citing Chico Dairy Co. v. West Virginia Human Rights Comm'n, 181 W.Va. 238, 382 S.E.2d 75 (1989); West Virginia Human Rights Comm'n v. United Transp. Union, Local 655, 167 W.Va. 282, 280 S.E.2d 653 (1981)).

Based upon our well-established practice, I am, therefore, perplexed by dicta in the majority opinion that this Court has only followed federal law in the discrimination arena "on occasion." To the contrary, this Court has routinely looked to and followed federal law when interpreting and applying statutes relating to discrimination.

I am further concerned by dicta in the majority opinion which "recognize[s] that the West Virginia Human Rights Act, as created by our Legislature and as applied by our courts and administrative

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> and Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*.); Frank's Shoe Store v. Human Rights Commission, 179 W.Va. 53, 58-59, 365 S.E.2d 251, 256-57 (1986) (citing Pregnancy Discrimination Act amendment to Title VII and United States Supreme Court decision interpreting that amendment as basis for holding that discrimination based upon pregnancy constitutes illegal sex discrimination under West Virginia Human Rights Act); see also Paxton v. Crabtree, 184 W.Va. 237, 250, 400 S.E.2d 245, 258 n. 26 (1990) (observing that "we have adopted federal precedent when we believed it was compatible with our human rights statute").

202 W. Va. at 158, 503 S.E.2d at 12.

agencies, represents an independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence." This dicta could be interpreted by readers as suggesting that we reject in wholesale fashion the historical approach taken by this Court in looking to federal discrimination law for guidance where the statutory language at issue is substantially similar. See Barefoot, 193 W. Va. at 482, 457 S.E.2d at 159. The dicta, however, is just that. It is not a holding by this Court and should not be interpreted as such. I, therefore, suggest that both the circuit courts and the Bar continue to utilize this Court's well-established practice of following federal discrimination law where statutory language is substantially similar.