

No. 30362 - Betty A. Tiernan v. Charleston Area Medical Center, a West Virginia Corporation

FILED

December 5, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

In this proceeding, the circuit court granted summary judgment to Charleston Area Medical Center (hereinafter referred to as “CAMC”) after finding no disputed material issues of fact existed to support Ms. Tiernan’s claims of retaliatory discharge and breach of employment contract. The majority opinion reversed summary judgment on both theories of liability. As to the retaliatory discharge theory, I believe the circuit court failed to view the evidence in the light most favorable to Ms. Tiernan as the nonmoving party.¹ Consequently, I concur in the majority’s decision to reverse summary judgment on the retaliatory discharge theory.² However, I believe the circuit court was correct in granting summary judgment on Ms. Tiernan’s breach of employment contract claim. Therefore, for the reasons set out below, I

¹*See Pritt v. Republican Nat’l. Comm.*, 210 W. Va. 446, 453 n.9, 557 S.E.2d 853, 860 n.9 (2001), *cert. denied*, ___ U.S. ___, 123 S. Ct. 71, ___ L. Ed. 2d ___ (2002). (“[W]hen deciding a motion for summary judgment, the reviewing tribunal ‘must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion.’” (quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995))).

²I also concur in the majority’s decision not to revisit the substantive issues that were conclusively resolved in *Tiernan v. Charleston Area Medical Center, Inc.*, 203 W. Va. 135, 506 S.E.2d 578 (1998).

dissent from the majority's decision to reverse summary judgment on the breach of employment contract claim.

***A. The Majority Opinion Misconstrued the Facts
on the Breach of Employment Contract Theory***

Ms. Tiernan alleged that she was terminated because of her criticisms of CAMC's policies. The record is clear. Ms. Tiernan was an at-will employee with CAMC. As a consequence, "[e]ither party could terminate the at-will employment with or without cause and no cause of action would accrue." *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 310, 270 S.E.2d 178, 182 (1980). On the other hand, "[c]ontractual provisions relating to discharge or job security may alter the at will status of a particular employee." Syl. pt. 3, *Cook v. Heck's, Inc.*, 176 W. Va. 368, 342 S.E.2d 453 (1986). In this case, Ms. Tiernan alleged that her at-will employment status was altered because she had a contractual agreement with CAMC that prevented CAMC from terminating her as a result of her criticisms of its policies. The majority opinion found that material issues of fact existed as to whether such an agreement was made. I disagree.

To find disputed material issues of fact on the breach of employment contract claim, the majority opinion had to distort relevant facts. The majority opinion erroneously concluded that "Ms. Tiernan allege[d] that a CAMC management representative stated, at a meeting Ms. Tiernan attended, that 'nurses had every right to speak to newspaper reporters and

that he would not retaliate if they [nurses] chose to speak up.”” This rendition of the facts is not supported by the record.

Ms. Tiernan made no claim that the contractual agreement was made directly with her or other nurses at a meeting. In fact, the record clearly shows that Ms. Tiernan based her contractual agreement on a statement which was reported in an article printed by *The Charleston Daily Mail* on April 8, 1994.³ In that article, a CAMC official was reported as

³The summary judgment order of the circuit court addressed this issue in the following manner:

Plaintiff claims that a statement by George Velianoff, CAMC’s Nursing Administrator, quoted in an article in *The Charleston Daily Mail* on April 8, 1994, created an oral contract between her and the hospital upon which she relied as a term and condition of her employment. The *newspaper article which Plaintiff contends created an oral contract* of her employment quoted Mr. Velianoff as saying that nurses have every right to talk to newspaper reporters and he would not retaliate if they chose to speak up. . . .

Plaintiff claims that she relied upon the statement by Mr. Velianoff in the newspaper article to form the understanding of the terms and conditions of her employment. However, the newspaper article upon which Plaintiff relies to support her claims cannot constitute a basis for an oral contract of employment for several reasons. Consequently, Plaintiff’s claims fail as a matter of law and must be dismissed.

(Emphasis added.) Notwithstanding this clear finding of the evidence by the circuit court, the majority opinion contended that Ms. Tiernan was personally informed at a meeting that there would be no retaliation against CAMC employees for speaking out about CAMC’s policies. Giving the majority opinion the benefit of doubt, it may be possible that the majority opinion simply misinterpreted a passage from a set of interrogatories Ms. Tiernan responded to during discovery. In those interrogatories, Ms. Tiernan responded to a question as follows: “Mr. Velianoff stated nurses had every right to talk to newspaper reporters and that he would not retaliate if they chose to speak up.” I do not find this statement to mean that Ms. Tiernan is contending that she was personally told this information at a meeting. The statement is

stating that CAMC employees would not be retaliated against for speaking out about CAMC policies. The newspaper article was the only evidence presented by Ms. Tiernan to show an alleged contractual agreement. As a consequence of this single piece of unsubstantiated evidence, the majority opinion holds that material issues of fact were in dispute as to whether CAMC made an agreement with Ms. Tiernan that prevented her termination for voicing her disapproval of CAMC's policies.

The majority decision on this issue establishes a dangerous precedent. Under the majority opinion, employers can now be contractually bound to their employees for any type of statement allegedly made by them that is reported in newspapers. I do not believe the law of contracts, as developed in Anglo-American jurisprudence, permits an employment agreement to be formed based upon unsubstantiated statements printed in a newspaper. Prior to the decision in this case, our employment contract law had gone no farther than to find that “[a]n employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons.” Syl. pt. 6, *Cook*, 176 W. Va. 368, 342 S.E.2d 453. The decision in the instant case takes the formation of employment contracts in West Virginia outside the universe of Anglo-American law “to a place where no [reasonable person] has ever gone before.” *Star Trek: Episode Introduction* monologue.

consistent with what she read in a newspaper and what she argued before the circuit court.

In view of the foregoing, I concur in the majority decision regarding Ms. Tiernan's retaliatory discharge claim. However, I respectfully dissent from the majority's decision concerning Ms. Tiernan's breach of employment contract claim. I am authorized to state that Justice Maynard joins me in this separate opinion.