

No. 31062 – *Margaret Ways, et al. v. Imation Enterprises Corp., et al.*

FILED

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

McGraw, J., dissenting:

What the plaintiffs allege in this case is that a company decided it wanted to reduce its long-term obligations by shedding many of its long-term employees. According to the plaintiffs below, when the plant was still operating under 3M, about 17 employees were black, and about 40 were women, and many were over age 40. The plaintiffs claim that after the plant was “spun off” to Imation and then closed and reopened as Spectratech, approximately three women and zero black people worked there, and the percentage of older workers had dropped significantly. Had 3M simply announced it was laying off most women, most older men, and all blacks, it would have been met with outrage. But now that this result has been reached via different methods, outrage is in short supply.

The majority cites several new syllabus points from the *Rezulin* case, including those on commonality and typicality, but then finds that the plaintiffs in this case do not meet those tests. I disagree. As quoted by the majority: “A common nucleus of operative fact is usually enough to satisfy the commonality requirement. The threshold of ‘commonality’ is not high, and requires only that the resolution of common questions affect all or a substantial number of class members.” Syl. pt. 11, in part, *In Re: West Virginia Rezulin Litigation*, ___ W. Va. ___, ___ S.E.2d ___ (No. 30958, ___, 2003). Here, the entire potential class

worked at the plant, and all have ended up without their jobs as a result of the company's efforts to reduce its workforce. I believe that the common question of whether or not the employers' activity violated our Human Rights Act is sufficient to meet this threshold.

The majority then quotes the *Rezulin* again, noting that "Rule 23(a)(3) only requires that the class representatives' claims be typical of the other class members' claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." *Id.* at syl. pt. 12, in part. While there are factual variations in this case relating to what should have protected the plaintiffs (*i.e.*, race, sex, or age), there is no variation in the damages suffered by the plaintiffs; all are without their former jobs. Furthermore, all of their claims are based on the same remedial theory – that an employer must comply with our Human Rights Act when terminating employees.

This Court has explained before that, though a given employee may not be member of a protected class, he or she may still join a lawsuit filed by fellow workers who are members of a protected class and who claim discrimination under our Human Rights Act. That is to say, that if an employer fires a few young male employees to make it more difficult to prove the employer is in fact firing all of its older male employees in violation of the Human Rights Act, those younger employees are still victims of discrimination:

Collateral victims of discrimination are entitled to relief under West Virginia Code § 5-11-9(7) (1999) upon establishing that the employer has engaged in an unlawful discriminatory practice, such as activities designed to cause economic loss. Such collateral victims are properly included as Plaintiffs in a cause of action initiated by other victims of discrimination under the West Virginia Human Rights Act.

Syl. pt. 10, *Bailey v. Norfolk & Western Ry. Co.*, 206 W. Va. 654, 527 S.E.2d 516 (1999).

As in *Bailey*, the plaintiffs in this case are claiming that the employer attempted to mask illegal, discriminatory deeds with apparently legal and non-discriminatory actions. What plaintiffs claim may or may not be true - that is a question for the finder of fact. However, they do not have to prove the merits of their claim to have their class certified.

I believe the plaintiffs have demonstrated sufficient commonality and typicality to have their class certified by the lower court. Therefore, I must respectfully dissent to the majority opinion.