

No. 32754 - Reggie Lee Philyaw v. Eastern Associated Coal Corporation.

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

Davis, C.J., concurring:

I concur with the holding of the majority. I have chosen to write separately, however, to point out a misapprehension in the dissenting opinion concerning the elements, set forth in *Travis*, pertaining to a cause of action for the intentional or reckless infliction of emotional distress. As the majority indicates, a plaintiff must meet a “high standard” to sustain such a claim. *Keyes v. Keyes*, 182 W. Va. 802, 805, 392 S.E.2d 693, 696 (1990).

Here, the Circuit Court properly focused on the first element of the cause of action, described in *Travis*, which requires that the defendant’s conduct be “atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency.” As *Travis* suggests, if the defendant’s conduct cannot be reasonably regarded as meeting that standard, then, even if the conduct is arguably unreasonable, the cause of action for the intentional or reckless infliction of emotional distress fails, and summary judgment is appropriate. *Travis*, 202 W. Va. at 375, 378, 504 S.E.2d at 425, 428. In this case, the Circuit Court so held and granted summary judgment in favor of Eastern Associated Coal Corp.

Appellant Philyaw was told by Eastern that he would be fired if he permitted the dust levels to render the Harris No. 1 Mine out of compliance with the federal mine and

safety regulations. That admonition, though bluntly stated, was consistent with Philyaw's duties as a safety supervisor to prevent harmful respirable dust at the Mine from exceeding the safety levels set forth in the regulations of the Mine Safety & Health Administration ("MSHA") of the United States Department of Labor. Not noted in the dissenting opinion, however, is the fact that, beyond the above admonition of his employer, Philyaw could point to no overt conduct of Eastern supportive of his claim. Nor does the dissenting opinion note that Philyaw had alternatives, other than violating the federal regulations, to control the dust levels at the Mine, such as through the enforcement of Eastern's dust ventilation plan. The federal regulations and the ventilation plan were created to protect the safety of the coal miners.

Finally, as stated in *Travis*, the third element of a cause of action for the intentional or reckless infliction of emotional distress requires that the emotional distress suffered by the plaintiff be "caused" by the defendant. *See, Napier v. Stratton*, 204 W. Va. 415, 418, 513 S.E.2d 463, 466 (1998) (the extreme and outrageous conduct must cause the emotional distress); *Burgess v. Gateway Communications*, 26 F.Supp.2d 888, 893 (S.D. W. Va. 1998) (the conduct of the defendant must cause the plaintiff to suffer emotional distress); 18 M.J. *Torts* § 2. (Matthew Bender & Co. 2005) (liability attaches when the emotional distress is caused by the extreme and outrageous conduct); 86 C.J.S. *Torts* § 69 (1997) (there must be "actual and proximate causation" of the emotional distress by the defendant's conduct). *See generally*, Sara L. Johnson, Annotation, *Liability of Employer*,

Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress, 52 A.L.R.4th 853 (1987). The majority opinion raises an issue regarding causation by suggesting that the federal regulations themselves and their inconsistent enforcement by the United States Department of Labor, rather than Eastern exclusively, may have contributed to Philyaw's mental breakdown. Although such an issue concerning causation is ostensibly a question for determination by a jury, it would not preclude the entry of summary judgment in this case in view of Philyaw's failure to establish the first element of a cause of action for the intentional or reckless infliction of emotional distress, as discussed above. Eastern's admonition to Philyaw was not "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency." Had the admonition been unclear or equivocal, the safety of the coal miners at the Harris No. 1 Mine could have been compromised. Thus, based upon the record before this Court, Eastern was entitled to judgment as a matter of law.

Accordingly, I respectfully concur with the majority opinion of the Court.