No. 17-0039 - *Martinez v. Asplundh Tree Expert Co.*

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OF WEST VIRGINIA

LOUGHRY, C. J., concurring, joined by KETCHUM, J.:

The Legislature, in enacting West Virginia Code § 55-7E-3, commendably sought to eradicate West Virginia's outlier status regarding unmitigated back and front pay in employment claims and thereby eliminate an unjustifiable windfall to plaintiffs. The duty of an injured plaintiff to mitigate damages is a long-standing and universally recognized principle that *Mason County Board of Education v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982), obliterated, thereby creating a blight on our state's wrongful discharge law. West Virginia Code § 55-7E-3 further recognizes the surreptitious manner in which *Mason County* was extended to allow not only unmitigated back pay, but front pay as well. *See Peters v. Rivers Edge Mining, Inc*., 224 W.Va. 160, 184, 680 S.E.2d 791 (2009) (applying *Mason County* to front pay award in absence of new syllabus point). This statute laudably imposes a legislative check on the Court's prior attempts at "judicial legislation." Properly venerating the clarity of the statute and its intended reach, the majority succinctly concludes that damages are not vested rights and that the Legislature clearly intended the statute to affect every award of damages from the effective date of the statute. Therefore, I concur with the majority's conclusion that West Virginia Code § 55-7E-3 and West Virginia Code § 55-7-29, which limits punitive damages, are remedial statutes applicable to causes of action that accrued and/or were filed prior to the statute's effective date.

The Legislature left little doubt of its intentions in enacting West Virginia Code § 55-7E-3. In its declaration of purpose, the Legislature stated:

> The citizens and employers of this state are entitled to a legal system that provides adequate and reasonable compensation to those persons who have been subjected to unlawful employment actions, a legal system that is fair, predictable in its outcomes, and a legal system that functions within the mainstream of American jurisprudence. . . . The goal of compensation remedies in employment law cases is to make the victim of unlawful workplace actions whole, including back pay; reinstatement or some amount of front pay in lieu of reinstatement; and under certain statutes, attorney's fees for the successful plaintiff.

W.Va. Code § 55-7E-2(a)(2) and (3). However, the Legislature noted that "[i]n West Virginia, the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states. This lack of uniformity in the law puts our state and its businesses at a competitive disadvantage." *Id.* at § 55-7E-2(a)(4). Accordingly, it enacted this statute with the precise objective to eliminate unmitigated front and back pay, and expressly indicated by the absence of any provision to the contrary, that this injustice would be abolished concurrent with the effective date of the statute.

Front pay has been aptly described as requiring "a sensitivity to the competing interests of the employee, on the one hand, in being made whole and the employer, on the other hand, in being spared the duty to subsidize a prospective windfall." *Quinlan v.*

Curtiss-Wright Corp., 41 A.3d 739, 749 (N.J. App. Div. 2012). Observing that the duty to mitigate damages in wrongful discharge cases is "rooted in an ancient principle of law," the United States Supreme Court has held that federally-based employment claims "require[] the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied." *Ford Motor Co. v. E. E. O. C*., 458 U.S. 219, 231-32 (1982). The rationale underlying the duty to mitigate is obvious: "Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198 (1941). Accordingly, the legislative foreclosure of unmitigated front and back pay returns West Virginia to the mainstream of jurisprudence on such awards and equitably prohibits employer subsidy of "prospective windfall[s]." *Quinlan*, 41 A.3d at 749.

The equity of West Virginia Code § 55-7E-3 notwithstanding, it is clear that the majority's conclusion that the statute applies to damages awards rendered for actions accruing and/or filed before the statute's enactment is likewise sound. "[P]rocedural and remedial laws generally do not affect vested rights, which are property rights that the Constitution protects like any other property. Such procedural and remedial laws that do not

affect vested rights should be enforced as they exist at the time judgment is rendered." *City of Austin v. Whittington*, 384 S.W.3d 766, 790 (Tex. 2012) (citations omitted); s*ee also* 16A C.J.S. Constitutional Law § 498 ("Unless the remedy is one that is expressly protected by a constitutional provision, there is no vested right to a particular remedy, and existing remedies may be changed or abolished provided a substantial remedy remains.").

With respect specifically to statutes affecting remedies that are enacted while matters are pending, "[i]t is well established that a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages." *Am. Bank & Trust Co. v. Cmty. Hosp*., 683 P.2d 670, 676 (Cal. 1984); s*ee also* 16A C.J.S. Constitutional Law § 499 ("A statute which relates merely to matters of remedy may be made applicable to pending proceedings at any time before the final judgment of the court becomes effective."). Indeed, the Fourth Circuit has observed, "[p]rocedural statutes that affect remedies are generally applicable to cases pending at the time of enactment." *Koger v. Ball*, 497 F.2d 702, 706 (4th Cir. 1974). As the United States Supreme Court long-ago explained,

> [c]onsidering the Act . . . as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.

Sampeyreac v. United States, 32 U.S. (7 Peters) 222, 239, 8 L.Ed. 665 (1833).

Furthermore, the notion that particular categories of damages are not "vested rights" is well-recognized. The defining characteristics of a "vested right" has been explained as follows: "[A] right has not vested until it is so perfected, complete, and unconditional that it may be equated with a property interest." *White v. Sunrise Healthcare Corp*., 692 N.E.2d 1363, 1366 (Ill. App. Ct. 1998). As the *White* court further explained:

> Because not all expectations are vested rights, a new law is not retroactive "just because it relates to antecedent events, or because it draws upon antecedent facts for its operation." *United States Steel Credit Union v. Knight*, 32 Ill.2d 138, 142, 204 N.E.2d 4 (1965). . . . [T]his is especially true of statutes that leave substantive rights in place and change only the procedures and remedies used to enforce those rights. Most directly pertinent here, the case law leaves no doubt that, prior to judgment, a plaintiff has no vested right to a statutory penalty such as [] punitive damages[.]

692 N.E.2d at 1366; s*ee Weingrad v. Miles*, 29 So. 3d 406, 416 (Fla. Dist. Ct. App. 2010) (finding plaintiff "had no vested right to a particular damage award").

The foregoing technical analysis notwithstanding, a plain reading of the statutes at issue demonstrates their applicability and operation. The applicability of the statutes was made clear in the Legislature's precise use of the term "award": "Any *award* of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff." W.Va. Code § 55-7E-3(a) (emphasis added); "An *award* of punitive damages may only occur . . . " W.Va. Code 55-7-29(a) (emphasis added); "The amount of punitive damages that may be *awarded* in a civil

action . . .” W.Va. Code 55-7-29(c) (emphasis added). Clearly, the Legislature contemplated application of the statutes to any “award” of such damages, a defined event that occurs only at trial. Even without the necessity of the “vested right” analysis, the statutes’ plain language demonstrates that, as of its effective date, any *award* of back pay or front pay must be reduced in accordance therewith and punitive damages may only be awarded in compliance with West Virginia Code § 55-7-29. “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). That is to say, “[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed.” *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999).

The Legislature’s message is clear: unmitigated front pay and back pay are no longer permitted in West Virginia as of the effective date of the statute. Likewise, limitless punitive damages are no longer available. The Legislature could use no plainer language to convey to the public, litigants, and the courts that West Virginia’s outlier status with regard to unrestrained damages awards is not only inequitable and legally imprudent, but harmful to the state and, therefore, its citizens; and that it intends to foreclose such awards immediately. Accordingly, I respectfully concur.