Case No. 23-ICA-118

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MELISSA K. BOND
Petitioner and Plaintiff Below,
v.
UNITED PHYSICIANS CARE, INC.
DBA SALEM FAMILY HEALTHCARE
Respondent and Defendant Below.

Civil Action No. 22-C-176
In the Circuit Court of Harrison County, West Virginia
(The Honorable Christopher McCarthy, Judge)

REPLY BRIEF OF PETITIONER MELISSA K. BOND

Erika Klie Kolenich, Esq. (9880)
Klie Law Offices, P.L.L.C.
21 E. Main Street, Suite 160
Buckhannon, West Virginia 26201
(304) 472-5007
ehklie@klielawoffices.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

Petitioner renews all of her arguments from Petitioner's Brief to support that this Court should reverse the decision below and remand this matter for discovery to commence. Additionally, Petitioner replies to Respondent's Response Brief herein to further clarify her arguments.

A. The COVID-19 Jobs Protection Act was never meant to preclude Petitioner's disability discrimination and failure to accommodate claims below as is evident when considering the totality of the circumstances.

Respondent has relied on only the Covid-19 Jobs Protection Act in arguing its immunity, not citing a single case in support. In contrast, Petitioner has provided this Court with case law in her Petitioner's Brief. In making its singularly focused argument, Respondent still fails to fully consider the act. As a case that Respondent cited during a different argument in its brief provides, "[i]n ascertaining legislative intent, effect must be given to each part of the statute and to the statute ***as a whole*** so as to accomplish the general purpose of the legislation." Syl. Pt. 2, *State v. White*, 188 W. Va. 534, 535, 425 S.E.2d 210, 211 (1992) (internal citations omitted) (emphasis added). "A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." *Id*. at Syl. Pt. 1.

Here, Respondent failed to consider the act as a whole because it did not fully address the following:

(b) It is the purpose of this article to:

…
(2) Provide assurances to businesses that reopening will not expose them to ***liability for a person's exposure to COVID-19***.

W.Va. Code § 55-19-2(11) (emphasis added).

This clearly stated purpose shows that the act was not meant to limit discrimination suits. Instead, the act was meant to limit suits where the plaintiffs had contracted COVID-19 while in the business or medical facility. Respondent buried this part of the act in a footnote.

Additionally, the COVID-19 Jobs Protection Act clearly was not created to fly in the face of West Virginia's long standing statute preventing discrimination. This statute is the West Virginia Human Rights Act which celebrates its 62nd birthday this year. The West Virginia Human Rights Act states "[i]t is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment. . . Equal opportunity . . . is hereby declared to be a human right or civil right of all persons. . . ." W.Va. Code § 5-11-2. This language does not leave room for doubt. If this Court were to find that Respondent and the lower court have properly interpreted the COVID-19 Jobs Protection Act, this Court would be finding against case law stating that statutes should be read "to make it accord with the spirit, purposes and objects of the general system of law." This Court would also be finding that the West Virginia Human Rights Act is limited so long as employers can claim that the COVID-19 Jobs Protection Act applies to the claim, even just tangentially.

Regarding Respondent's point that Petitioner did not make an Americans with Disabilities Act (ADA) claim, she did not and Petitioner's Brief did not claim that she did. Petitioner cited the ADA in her brief to illustrate that the COVID-19 Jobs Protection Act, as Respondent suggests it be interpreted, would fly in the face of this nation's foremost authority on disability discrimination law. From a policy standpoint and from simply reading the act and case

law, this Court should find that the COVID-19 Jobs Protection Act does not preclude Petitioner's disability discrimination and failure to accommodate claims.

B. Even if the COVID-19 Jobs Protection Act applied to disability discrimination and failure to accommodate claims, Petitioner's claims would fall within the actual malice exception.

In arguing that the actual malice exception does not apply, Respondent was unable to point to any applicable law. This is largely because Respondent relied on case law from stages of litigation which require a higher standard of review than the Motion to Dismiss. For example, Respondent cited a summary judgment decision, *Pritt v. Republican Nat. Comm.,* 210 W. Va. 446, 449, 557 S.E.2d 853, 856 (2001). Importantly, parties are allowed to discover evidence before a motion for summary judgment while parties only have a chance to make pleadings before a motion to dismiss. Of course, Petitioner could not meet the standards that Respondent is proposing; the lower court robbed her of her opportunity to do so in ordering that her case be dismissed before discovery.

Respondent also cited a decision on a writ for prohibition which also is not comparable to the current case. This state's Supreme Court of Appeals stated, "[p]rohibition will lie to prohibit a case from proceeding to trial when the remedy of appeal is manifestly inadequate to protect against the chilling effect of allowing a suit to proceed because the complaint, as a matter of constitutional law, contains insufficient allegations to warrant interference with a citizen's right to free speech…" *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 342, 480 S.E.2d 548, 551 (1996). Here, there is a clear avenue for relief which will not impact Respondent's right to free speech. Petitioner can be made whole through economic damages associated with the loss of her job and benefits and punitive damages to discourage Respondent from acting similarly again. Another dissimilarity from *Suriano* in the current matter is that the plaintiff in *Suriano* stopped

prosecuting the matter for a period of years. *Id*. at 345. Here, Petitioner, plaintiff below, has prosecuted her claims, through counsel, by responding to the Motion to Dismiss below, appearing at a hearing below, filing a proposed order below, and making the present appeal.

Two more inapplicable decisions that Respondent cited, *Harte-Hanks Commc'ns, Inc. v. Connaughton* and *See Hayseeds, Inc. v. State Farm Fire & Cas.,* come from appeals of jury verdicts. *Harte-Hanks*, 491 U.S. 657, 666–67, 109 S. Ct. 2678, 2685, 105 L. Ed. 2d 562 (1989); *Hayseeds*, 177 W.Va. 323, 330-331, 352 S.E.2d 73, 80-81 (1986). Clearly, the standard applied after pleadings, discovery, and trial cannot be the standard to be applied here where there were only pleadings.

After citing these inapplicable cases, Respondent made a factual argument that Petitioner did not plead actual malice. It is true that Petitioner never said "actual malice" in her Complaint. However, it is untrue that she "failed to allege any facts that support an intentional act by Salem Family Healthcare that was done with actual malice." Resp. Br,, p. 11. As Petitioner laid out in her brief, she pled that Respondent knew of her disability preventing her from getting the COVID-19 vaccine because she informed them of it multiple times, and nevertheless Respondent terminated her for not getting a vaccine. Petitioner did plead the term "malice". This should have been enough given West Virginia's pleading standard, as discussed in Petitioner's Brief. Therefore, this Court should find that Petitioner should have survived the Motion to Dismiss, so she could begin discovery of facts to support her claim of malice.

C. The lower Court did impermissibly consider facts outside the Complaint.

Respondent has argued that the Circuit Court did not consider facts outside the Complaint in its order. This argument ignores that the Circuit Court's third sentence in the applicable order is "[h]aving reviewed the motion, the parties' briefs, ***oral argument***, and all pertinent legal

authorities…" Appx. at 050. The oral arguments included discussion of facts outside the Complaint. The Circuit Court did not explicitly exclude the part of the oral arguments pertaining to facts outside the Complaint. Therefore, the Circuit Court considered facts outside the Complaint.

CONCLUSION

Wherefore, Petitioner still requests that this Court REVERSE the decision below and REMAND the matter to allow for discovery.

Respectfully Submitted,
Melissa K. Bond,

/s/ Erika Klie Kolenich
Of Counsel,

Erika Klie Kolenich, Esq. (9880)
Klie Law Offices, P.L.L.C.
21 E. Main Street, Suite 160
Buckhannon, West Virginia 26201
(304) 472-5007
Facsimile: (304) 472-1126
ehklie@klielawoffices.com

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MELISSA K. BOND
Petitioner and Plaintiff Below,

v. Case No. 23-ICA-118

UNITED PHYSICIANS CARE, INC.
DBA SALEM FAMILY HEALTHCARE
Respondent and Defendant Below.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing "**Reply Brief of Petitioner"** was served upon the Respondent by this Courts electronic filing system this 30th day of August, 2023, to:

Jacqueline Sikora, Esq.
Brian Peterson, Esq
West Virginia United Health System, Inc.
1238 Suncrest Towne Centre Dr.
Morgantown, WV 26505
Counsel for Respondent

Respectfully Submitted,
Melissa K. Bond,

/s/ Erika Klie Kolenich
Of Counsel,

Erika Klie Kolenich, Esq. (9880)
Klie Law Offices, P.L.L.C.
21 E. Main Street, Suite 160
Buckhannon, West Virginia 26201
(304) 472-5007
Facsimile: (304) 472-1126
ehklie@klielawoffices.com