

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32754

**REGGIE LEE PHILYAW, Plaintiff Below,
Appellant**

vs.

**EASTERN ASSOCIATED COAL CORP.,
Defendant Below, Appellee**

Hon. Robert A. Burnside, Judge
Circuit Court of Raleigh County
Civil Action No. 04-C-238B

BRIEF OF THE APPELLEE

Counsel for Appellant

Richard Neely, Esq.
WV State Bar ID No.
Neely & Hunter
159 Summers Street
Charleston, WV 25301
Telephone (304) 343-6500

John D. Wooton, Esq.
WV State Bar ID No. 4138
P. O. Drawer A
Beckley, WV 25801
Telephone (304) 255-2188

Counsel for Appellee

Ancil G. Ramey, Esq.
WV State Bar ID No. 3013
Jeffrey K. Phillips, Esq.
WV State Bar ID No. 5730
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

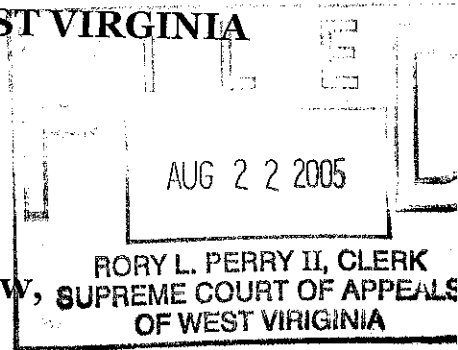


TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
III. DISCUSSION OF LAW	
A. A DE NOVO STANDARD OF REVIEW APPLIES TO THIS APPEAL ...	10
B. AS NEITHER THE RECORD NOR THE BRIEF OF THE APPELLANT CONTAIN ANY REFERENCE TO CONDUCT WHICH OCCURRED WITHIN TWO YEARS OF THE FILING OF HIS COMPLAINT, PHILYAW'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS PLAINLY BARRED BY THE STATUTE OF LIMITATIONS	12
C. THE CIRCUIT COURT PROPERLY DETERMINED THAT PHILYAW'S SUBJECTIVE FEAR OF REPRISAL FAILED TO SATISFY THE FIRST PRONG OF TRAVIS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS	19
IV. CONCLUSION	32

TABLE OF AUTHORITIES

CASES

<i>Bowyer v. Hi-Lad, Inc.</i> , No. 31697 (W. Va. Dec. 3, 2004)	10
<i>Clark v. Coats & Clark, Inc.</i> , 990 F.2d 1217 (11th Cir. 1993)	27
<i>Collins v. SWVA, Inc.</i> , 2005 WL 1639305 (S.D. W. Va.)	14
<i>Cook v. Heck's Inc.</i> , 176 W. Va. 368, 342 S.E.2d 453 (1986)	22-23
<i>Courtney v. Courtney</i> , 186 W. Va. 597, 413 S.E.2d 418 (1991)	21
<i>Courtney v. Courtney</i> , 190 W. Va. 126, 437 S.E.2d 436 (1993)	21
<i>Crain v. Lightner</i> , 178 W. Va. 765, 364 S.E.2d 778 (1987)	1
<i>Dikcis v. Indopco, Inc.</i> , 1997 WL 211218 (N.D. Ill. 1997)	17-18
<i>Dzingski v. Weirton Steel Corp.</i> , 191 W. Va. 278, 445 S.E.2d 219 (1994)	22, 25-26
<i>Fala v. Perrier Group of America</i> , 2000 WL 688175 (E.D. Pa.)	17
<i>Furman v. CompuCom Systems, Inc.</i> , 2004 WL 1672314 (N.D. Tex.)	30
<i>Geddes v. County of Kane</i> , 121 F. Supp. 2d 662 (N.D. Ill. 2000)	18
<i>Glickstein v. Neshaminy School Dist.</i> , 1997 WL 660636 (E.D. Pa. 1997)	17
<i>Harless v. First Nat'l Bank in Fairmont</i> , 169 W. Va. 673, 289 S.E.2d 692 (1982)	19, 23

<i>Harmon v. Higgins</i> , 188 W. Va. 709, 426 S.E.2d 344 (1992)	14-15
<i>Harriston v. Chicago Tribune Co.</i> , 992 F.2d 697 (7th Cir. 1993)	27
<i>Hartleip v. McNeilab, Inc.</i> , 83 F.3d 767 (6th Cir. 1996)	29
<i>Healy v. MCI Worldcom Network Service, Inc.</i> , 2005 WL 1837148 (E.D. Cal.)	16
<i>Hines v. Hills Dept. Stores, Inc.</i> , 193 W. Va. 91, 454 S.E.2d 385 (1994)	22
<i>Honaker v. Smith</i> , 256 F.3d 477 (7th Cir. 2001)	27
<i>Hosaflook v. Consolidation Coal Co.</i> , 201 W. Va. 325, 497 S.E.2d 174 (1997)	22, 24
<i>Johnson v. Hills Dept. Stores, Inc.</i> , 200 W. Va. 196, 488 S.E.2d 471 (1997)	22, 24
<i>Kanawha Valley Power Co. v. Justice</i> , 181 W. Va. 509, 383 S.E.2d 313 (1989)	21, 22
<i>Kennedy v. St. Francis Hospital</i> , 225 F. Supp. 2d 128 (D. Conn. 2002)	17
<i>Keyes v. Keyes</i> , 182 W. Va. 802, 392 S.E.2d 693 (1990)	21
<i>Love v. Georgia-Pac. Corp.</i> , 209 W. Va. 515, 550 S.E.2d 51 (2001)	22
<i>McCammon v. Oldaker</i> , 205 W. Va. 24, 516 S.E.2d 38 (1999)	14, 15-16
<i>Miller v. Linden</i> , 172 Ill. 3d 594, 527 N.E.2d 47, 122 Ill. Dec. 675 (1988)	28
<i>Monak v. Ford Motor Co.</i> , 95 Fed. Appx. 758 (6 th Cir. 2004)	16-17

<i>Ponton v. Scarfone</i> , 468 So. 2d 1009 (Fla. Ct. App. 1985)	
<i>Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.</i> , 196 W. Va. 692, 474 S.E.2d 872 (1996)	3
<i>Retherford v. AT&T Communications of Mountain States, Inc.</i> , 844 P.2d 949 (Utah 1992)	27-28
<i>Southland Corp. v. Bartsch</i> , 522 So. 2d 1053 (Fla. Ct. App. 1988)	28
<i>Staples v. Bangor Hydro-Elec. Co.</i> , 561 A.2d 499 (Me. 1989)	29
<i>State v. Bosley</i> , 159 W. Va. 67, 218 S.E.2d 894 (1975)	1
<i>Tanner v. Rite Aid of W. Va., Inc.</i> , 194 W. Va. 643, 461 S.E.2d 149 (1995)	20, 21, 23
<i>Travis v. Alcon Laboratories, Inc.</i> , 202 W. Va. 369, 504 S.E.2d 419 (1998)	10, 14, 19-20, 22, 23, 32
<i>Turner v. McQuarter</i> , 79 F. Supp. 2d 911 (N.D. Ill. 1999)	18
<i>United States of America ex rel. Barrett v. Columbia Healthcare Corp.</i> , 2005 WL 1924187 (S.D. Tex.)	30
<i>Walton v. Nalco Chemical Co.</i> , 272 F.3d 13 (1st Cir. 2001)	29
<i>Wayne County Bank v. Hodges</i> , 175 W. Va. 723, 338 S.E.2d 202 (1985)	21
<i>Williamson v. Harden</i> , 214 W. Va. 77, 585 S.E.2d 369 (2003)	20, 23
<i>Yoho v. Triangle PWC, Inc.</i> , 175 W. Va. 556, 336 S.E.2d 204 (1985)	21

RULES

R. Civ. P. 56 6

R. Civ. P. 56(e) 1, 3, 4

OTHER

RESTATEMENT (SECOND) OF TORTS § 46, cmt. (d) 20-21

RESTATEMENT (SECOND) OF TORTS § 46(1) 19

“Plaintiff’s belief that he was in a predicament with no comfortable solution does not support a cause of action for intentional infliction of emotional distress. *Travis* makes it clear that an action for infliction of emotional distress is not a means to resolve life’s difficult problems, because life is full of them.”¹

I. INTRODUCTION

The Appellee, Eastern Associated Coal Corp. [Eastern], files its brief in response to a brief by the Appellant, Reggie Lee Philyaw [Philyaw], in an appeal from an order entered by the Honorable Robert A. Burnside, Judge of the Circuit Court of Raleigh County [Judge Burnside], awarding Eastern summary judgment on Philyaw’s suit for intentional infliction of emotional distress [IIED].²

Eastern believes that summary judgment was properly awarded because (1) Philyaw did not file suit until well more than two years after (i) Eastern allegedly engaged in any extreme and outrageous conduct and (ii) Philyaw alleged that he began suffering emotional

¹Summary Judgment Order at 6.

²It is important to note what Philyaw has done following entry of the order which is the subject of this appeal. On the same day the petition for appeal was filed, well after the entry of summary judgment, Philyaw filed documents with the Circuit Court, including deposition transcripts of two witnesses, Edward Hartsog and David Ashby, that were not before Judge Burnside at the time of his ruling. [Ex. A]. Moreover, Philyaw’s brief is replete with references to “proffers” of evidence at the summary judgment hearing but (1) no transcript of such hearing was ever requested by Philyaw; (2) no transcript of the hearing appears in this Court’s record; and (3) a “proffer” of evidence is insufficient, without any accompanying R. Civ. P. 56(e) affidavit, which was never filed in this case, to create a genuine issue of material fact. It is both unfair to Judge Burnside and Eastern, for matters to be considered that were not properly presented to the Circuit Court. In Syllabus Point 2 of *State v. Bosley*, 159 W. Va. 67, 218 S.E.2d 894 (1975), this Court explained that “[t]he appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record.” Also, this Court has held that, ““This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.” Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958).” Syl. pt. 2, *Duquesne Light Co. v. State Tax Dept.*, 174 W. Va. 506, 327 S.E.2d 683 (1984), cert. denied, 471 U.S. 1029, 105 S. Ct. 2040, 85 L. Ed. 2d 322 (1985).” Syl. pt. 2, *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987). Thus, Eastern would ask this Court to disregard the references to these matters that were never before the Circuit Court.

distress after such alleged conduct³ and (2) Philyaw did not allege that Eastern actually committed any separate and discrete act of extreme and outrageous conduct, but merely contended that he suffered from severe stress because of his subjective perception of Eastern's allegedly unreasonable expectations regarding his job performance.

One reason for the absence of evidence supportive of his IIED claim is that Philyaw's primary claim, during the course of the litigation, was not for intentional infliction of emotional distress, but was one for deliberate intent. He spent little effort developing or arguing the claim and it was only after it became clear that he could not sustain his deliberate intent claim that he turned to his IIED claim. If this Court will review the evidence placed before Judge Burnside, on the issue of Philyaw's IIED claim, however, it will conclude, as did Judge Burnside, that no rational trier of fact could find that Eastern intentionally inflicted emotional distress on Philyaw.

Rather, at best, the evidence was that Philyaw experienced stress over the years as a result of his subjective belief, not based upon any specific directive, that Eastern wanted him to bend or break any rules necessary to ensure compliance with federal dust standards at Philyaw's mine. This Court has held, however, that such evidence is insufficient to sustain a claim of intentional infliction of emotional distress. Therefore, the Circuit Court properly granted summary judgment to Eastern.

³Although the Circuit Court never reached the issue of the statute of limitations, because it held that Philyaw's evidence was insufficient to satisfy the objective test of *Travis* for extreme and outrageous conduct, Eastern asserted such issue in its summary judgment motion, and cross-assigns the issue as error to the extent that it was not addressed by the Circuit Court.

II. STATEMENT OF FACTS

Because Philyaw's brief references matters that were never before Judge Burnside, this Court should disregard the statement of facts contained in his brief which is replete with references to such materials.

Philyaw's brief references expert opinions,⁴ but there are no expert deposition testimony or affidavits in the record. Indeed, if this Court will look at the record, it will see that the only experts identified by Philyaw were (1) an economist; (2) a vocational expert; and (3) a retired mine inspector.⁵ Moreover, the retired mine inspector was withdrawn by Philyaw, prior to the award of summary judgment, after he was unable to produced the

⁴For example, Philyaw states, "The Report of Dr. Ahmed D. Faheem . . . clearly shows that Mr. Philyaw's mental collapse was directly related to his stress at work," Brief at 4, but Dr. Faheem was never designated as an expert witness; no affidavit by Dr. Faheem was ever offered; and no deposition testimony of Dr. Faheem was ever placed in the record. Moreover, Philyaw references, "[P]laintiff's disclosure of . . . Mr. Sam Gross," Brief at 12, but concedes that Mr. Gross was never deposed and no affidavit was offered regarding his testimony, *id.* Eastern never stipulated, as represented in Philyaw's brief, that "Mr. Gross would make an affidavit consistent with his expert disclosure." Brief at 12. Indeed, no Sam Gross or Sam Grose was ever designated as an expert witness by Philyaw and, therefore, there was no "expert disclosure" by Mr. Gross/Grose to which a stipulation could be made. Rather, both before and after summary judgment was awarded, Philyaw designated a "Sidney Valentine" as his expert. When the Court reviews Philyaw's response to Eastern's motion for summary judgment, it will find no reference to a Mr. Gross/Grose, but only discussions of Mr. Valentine, Response at 6-7. Indeed, if the Court will compare the text of Philyaw's response to Eastern's summary judgment motion with his initial brief filed with this Court, it will find that they are nearly word-for-word, with Mr. Gross' name merely substituted for Mr. Valentine. [Ex. B]. Therefore, unless "Sam Gross" is an alias of "Sidney Valentine," it appears that what Philyaw represents to the Court are not the opinions of an expert, but are the opinions of Philyaw's counsel. In any event, Eastern sought repeatedly to take Mr. Valentine's deposition, but Philyaw failed to produce him. More critically, Philyaw never filed a Rule 56(e) affidavit seeking additional time to offer Mr. Valentine or Mr. Gross/Grose for deposition or to file an affidavit of his/their anticipated testimony. Unless this Court intends to overrule *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996), it should disregard all references to anything other than the deposition testimony that was placed before Judge Burnside at the time the summary judgment motion was argued and decided.

⁵Philyaw did not even name a psychiatrist, psychologist, or physician who would substantiate his claims of severe emotional distress. Thus, other than his own self-serving testimony, no expert witness would offer any opinion testimony regarding causation.

expert for deposition, allegedly because of the witness' illness, but then again designated, after entry of the summary judgment order, when Philyaw apparently realized that he needed an expert in conjunction with his allegations on appeal. This Court will look in the record in vain for the sworn testimony of any expert. This Court will also look in the record in vain for any Rule 56(e) affidavit seeking additional supplementation of the record with such testimony. There was simply no expert opinion evidence before Judge Burnside in any form and there is no such evidence before this Court.

Philyaw also references fact witness deposition testimony, but the fact witness deposition testimony in the record before Judge Burnside was very limited,⁶ and did not support Philyaw IIED claims. The only two deposition transcripts in the record prior to the entry of summary judgment were from Philyaw⁷ and Terry Gene Hudson,⁸ both of whom

⁶For example, Philyaw references the "anticipated" testimony of Richard Goodwin, Brief at 7 n.1, but Mr. Goodwin was never deposed, despite Eastern's repeated efforts to secure his deposition; no affidavit by Mr. Goodwin was ever offered; and no deposition testimony of Mr. Goodwin was ever placed in the record. Philyaw also references the "deposition of Eastern representative of David Carl Ashby," Brief at 8, 10, 11, but Mr. Ashby's deposition transcript was never before Judge Burnside; indeed, it was not filed until Philyaw filed his petition for appeal. Philyaw references the "Rule 30(b)(7) Deposition of Eastern representative Danny Ray Spratt," Brief at 8, but Mr. Spratt's deposition transcript appears nowhere in the record before this Court.

⁷With respect to Philyaw, it is important to note that only a portion of his deposition transcript was before Judge Burnside at the time summary judgment was awarded, and that portion was attached as an exhibit to Eastern's summary judgment motion. This is significant because, after the summary judgment order had already been entered, Philyaw filed his entire deposition transcript. In his brief, however, Philyaw makes many references to deposition testimony that were never before Judge Burnside:

"If Eastern fired Mr. Philyaw, he became nothing more than a laborer, but so long as he held his job, he earned over \$71,000 per year. See Deposition of Reggie Lee Philyaw, p. 109." Brief at 6.

"At this time, Mr. Philyaw, according to his deposition testimony, was required to: (See Deposition of Reggie Lee Philyaw, pp. 75-80)." Brief at 11.

undermined, rather than supported any cause of action for intentional infliction of emotional distress.

A lawyer's representations to a court are not sufficient to create genuine issues of material fact as a lawyer's statements to a jury would not be entitled to any evidentiary value; rather, in order to create a genuine issue of material fact, a party must have "evidence," i.e., sworn testimony and exhibits, from which a rational trier of fact could infer facts that, if true, would support a cause of action. Such was woefully absent in this case

"The fact that Eastern was subtle about how it instructed Mr. Philyaw to aid and abet in the killing and maiming of coal miners (as the Trial Judge actually held) does not detract from the fact that if Mr. Philyaw didn't commit federal felonies, he would be fired. (See, Philyaw Deposition, p. 109;" Brief at 16.

None of these deposition transcript pages were placed in the record until after the summary judgment order was entered.

⁸The only deposition transcript submitted by Philyaw in conjunction with Eastern's summary judgment motion was that of Terry Gene Hudson, who completely contradicted the allegation by Philyaw's counsel that Eastern engaged in any improprieties with respect to dust samples:

Q. All right. Now, Mr. Philyaw has testified that after the grand jury investigation in the early 1990s, to the best of his knowledge, there was no pressure placed on safety employees in any way, let me use the word manipulate – but I'm happy to substitute that word if you think it's pejorative – there were no efforts to in any way manipulate the dust sampling in those years and that manipulation was resumed in or about 1998, at least at Harris. Can you explain the reason for the hiatus after the grand jury investigation and then the resumption in 1998?

* * *

THE WITNESS: I'm not aware of any hiatus or any manipulation.

Hudson Depo. at 30. Over and over again, throughout his deposition, Mr. Hudson refuted any allegations that Philyaw was threatened, pressured, or otherwise encouraged to violate federal law, and that Eastern violated federal law. Rather, Mr. Hudson testified that Eastern made every effort, cooperating with federal authorities, to ensure its mines' compliance with federal dust standards. Philyaw's arguments to the contrary are pure fantasy and have no evidentiary basis in the record before this Court.

and this Court should not permit Philyaw's counsel to base an appeal on what counsel represents to this Court witnesses will say. Rather, all litigants should be held to the standards reflected in R. Civ. P. 56 and this Court's decisions interpreting those standards.

The facts before Judge Burnside were contained in his order⁹ which states as follows:

It is undisputed that Plaintiff was employed by Defendant from 1974 to March 13, 2002.¹⁰ At the times pertinent herein, Plaintiff's job assignment was safety supervisor for the Defendant's underground coal mining operations. In general terms, Plaintiff's duty under this assignment was to take the steps necessary to keep the operations within safety compliance standards pursuant to the governing regulations. The issues specific to the present action involve the Plaintiff's responsibility for Defendant's compliance with dust control regulations.

It is also undisputed that during the period of time in the late 1980s, the Defendant engaged in activities with respect to dust sampling procedures that attracted the attention of the United States Attorney. While the matter was under investigation, the Plaintiff was subpoenaed to appear before the federal grand jury that was investigating Defendant's conduct. The evidence in the present case was unclear as to whether Plaintiff was a target of the federal grand jury. It is not disputed, however, that for a period of about three years ending in 1993, the Plaintiff believed that he was a target, and he had a valid concern that he might be indicted on an allegation that he participated in tampering with dust samples. Defendant pled guilty to a misdemeanor in 1993, upon which the investigation

⁹It is important to note that the Brief of the Appellant does not dispute any of Judge Burnside's findings. Rather, it pieces together facts, non-facts, and matters never submitted to Judge Burnside, in order to create the impression of a reality that never existed, i.e., that Eastern directed Philyaw to do anything illegal or improper necessary to comply with federal dust standards. Indeed, there was no reason for Eastern to have Philyaw do anything illegal or improper for the final four years of his employment because, as Judge Burnside noted, "By 1998, the dust sampling methods had been changed so that it was not possible to tamper with the samples in the same manner as had occurred prior to 1993." [Summary Judgment Order at 2]. Philyaw's allegations of any misconduct on the part of Eastern after 1998 are pure fabrication and have absolutely no evidentiary basis in the record.

¹⁰Philyaw filed suit against Eastern two years after he resigned his employment.

and prosecution came to an end insofar as it concerned the Plaintiff.¹¹

Afterward, Plaintiff continued to work for Defendant. By 1998, the dust sampling methods had been changed so that it was not possible to tamper with the samples in the same manner as had occurred prior to 1993.

Plaintiff claims that in the period following 1998,¹² he was required by Defendant to manipulate the dust sampling environment so that the dust samples would be cleaner than the routine working environment. Plaintiff concedes that he was never specifically instructed to engage in this manipulation,¹³ but he asserts that such instruction was implied in Defendant's communication to him that he would be fired if he allowed the mine to go out of compliance. Plaintiff testified in his deposition that he thought this communication constituted an instruction to manipulate the testing

¹¹Accordingly, as Philyaw's suit was not filed until 2004, well beyond any one or two-year statute of limitations, nothing that occurred prior to 1993 is of any consequence in this action.

¹²Philyaw admitted below that nothing happened to him between 1993 and 1997 related to his suit against Eastern. (*See, e.g.*, Pl.'s Resp. to Def.'s Req. for Interrog. No. 2; R. Philyaw Depo. at 99.)

¹³Indeed, Philyaw's own allegations and evidence before the Circuit Court was that Eastern required Philyaw to ensure that the proper ventilation was in place. (Pl.'s Resp. to Def.'s Req. for Interrog. No. 2.) He admitted that he was responsible for ensuring that the water pressure that formed part of the dust suppression system was sufficient and that the water sprayers were in good working order. *Id.* Moreover, his own evidence was that Eastern required the safety department (1) to ensure that haul roads were wet down; (2) to ensure that the dust suppression equipment on the belt line and crusher was in working order; (3) to maintain the scrubber as appropriate; and (4) to ensure that dust filters were installed as necessary on appropriate equipment. *Id.* Eastern also required him to accompany the miner assigned to wear the monitoring equipment for an entire shift in order "to bring the mine back into compliance." (Compl. ¶ 7.) And, as Philyaw acknowledged in this Complaint, continued out-of-specification dust levels would result in the statutorily-required five-shift monitoring. (Compl. ¶ 9.) Philyaw's presence was necessary, his own Complaint alleges, to detect and correct any violations of the dust suppression plan that might have resulted in the high dust readings, and, also as noted, to monitor and, if necessary, adjust the sampling equipment. (Compl. ¶ 9.) On occasion, Philyaw acknowledged in his deposition, he would also take a portable dust meter into the mine and, when he discovered dust levels greater than allowed, would momentarily remove the affected employees from the area, correct the problem, and immediately return the employees to their work. (R. Philyaw Depo. at 66-67.) Perhaps Philyaw's job was subjectively difficult, at times, but challenging working conditions do not support a cause of action for intentional infliction of emotional distress.

environment to make sure the test samples were clean.
Plaintiff's responsive brief, p. 9.

Plaintiff claims that upon that understanding of the meaning of the Defendant's communications, he engaged in manipulation of the testing environment that violated the regulations.¹⁴ He believed that this conduct exposed himself to federal investigation and possible indictment similar to that which occurred prior to 1993. Although the Plaintiff has not asserted a claim arising from the events prior to 1993, he argues that those events must be understood because they created the context in which his claim for the post-1998 intentional infliction of emotional distress must be evaluated.

The Court will accept, for argument's sake, that the Plaintiff believed that the communication constituted an instruction to break the law. The weakness in Plaintiff's position, in the context of a claim for intentional infliction of emotional distress, is that Plaintiff points to no overt conduct of the Defendant.¹⁵ Plaintiff relies entirely on his subjective interpretation of Defendant's communication. That subjective interpretation finds some support in Plaintiff's experience with the federal grand jury prior to 1993, but it remains subjective.

It must be recalled that the communication was that the Defendant told Plaintiff that he would be fired if the mine went out of compliance. Plaintiff, as characterized by his counsel, was not an ordinary laborer. He was neither a rank-and-file employee whose work was routine, nor was he in the level of management where fundamental policy decisions are made and unmade. He was in middle management, which carries with it the burden that he must by the use of his own independent judgment, skills, independent thinking and creativity accomplish a difficult goal set by his superiors – or be fired.

¹⁴There is a wide gulf between his brief's hyperbole and Philyaw's own deposition testimony. Philyaw testified in his deposition, for example, that nothing that Eastern asked him to do to ensure low dust levels was other than what his normal job function would otherwise require. (R. Philyaw Depo. at 47.)

¹⁵This Court will note that Philyaw's Brief is devoid of any reference to any overt conduct by Eastern to support his claim, which is one not of negligent infliction of emotional distress, but intentional infliction of emotional distress.

The admonition of which Plaintiff complains is precisely that: if you do not accomplish the assigned goal you will be fired. That command is strict, demanding, and perhaps unreasonable, but it is a legitimate demand of an employer.

Although Plaintiff believes it to be so, it is not clear on the present record that Plaintiff's activities violated MSHA regulations. An administrative procedure existed, consisting of a so-called §103(g) complaint, by which that determination could have been made, but Plaintiff did not implement it.¹⁶ During oral argument, Plaintiff's counsel explained that the Plaintiff did not utilize this administrative procedure because he believed the Defendant would fire him for doing so, but on a pretext such that he would have no recourse. For the purpose of analyzing this motion for summary judgment, the Court will assume that the activities in which Plaintiff engaged did violate MSHA regulations. If that is true, it is not dispositive of the issue here. This issue is framed in the context of Plaintiff's claim that the Defendant engaged in conduct which supports an action for the intentional infliction of emotional distress.

[Summary Judgment Order at 1-3] [Emphasis and footnotes supplied].

Based upon these undisputed issues of fact, Judge Burnside engaged in the following well-reasoned analysis:

Travis summarizes this analytical framework as follows: "Whether conduct may reasonably considered outrageous is a legal question, and whether conduct is in fact outrageous is for jury determination." *Travis*, at 378.

¹⁶In Circuit Court, Philyaw attempted to excuse his failure to file a § 103(g) complaint by saying that he thought such complaints were "just for union people that thought that they were being abused and . . . the way I understood it was for me to file it, I would have to be dismissed . . ." (R. Philyaw Depo. at 44.) Of course, § 103(g) contains no such requirements. *See, e.g.*, 40 C.F.R. § 43.7(a) ("A representative of miners or, where there is no such representative, a miner, who has reason to believe that a violation of the act or a mandatory health or safety standard exists, or an imminent danger exists, may notify an authorized representative of the Secretary in writing prior to or during an inspection conducted by such representative of any violation of the act or mandatory health or safety standard or of any imminent danger which he or she has reason to believe exists in the mine being inspected. . ."). Indeed, it was undisputed that MSHA has a toll-free telephone number for confidential or even anonymous reporting of such complaints.

Travis requires that we focus on the Defendant's conduct, as charged by the Plaintiff, and determine whether that conduct might be found to be within the scope of element (1) [of *Travis*]. . . . There is no doubt, however, that the Defendant has the right, as the employer of an at-will employee, to demand the unreasonable and to fire him if it is not accomplished. A reasonable person might conclude that such conduct by an employer is bad business judgment, counterproductive, or perhaps foolish, but it is clearly not "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency."

The Plaintiff's subjective interpretation of the Defendant's words do not change the result. *Travis* requires, and logically so, that we focus on the conduct of the Defendant and apply a reasonably objective standard to it. If summary judgment must be denied on the sole basis that Plaintiff subjectively understood the words to mean that he was being instructed to violate the law, the gatekeeping function of the *Travis* analysis could not operate.

* * *

Plaintiff's belief that he was in a predicament with no comfortable solution does not support a cause of action for the intentional infliction of emotional distress. *Travis* makes it clear that an action for the intentional infliction of emotional distress is not a means to resolve life's difficult problems, because life is full of them.

Summary Judgment Order at 5-6 [Emphasis supplied]. Consequently, he properly awarded summary judgment to Eastern.

III. DISCUSSION OF LAW

A. A *DE NOVO* STANDARD OF REVIEW APPLIES TO THIS APPEAL.

"A circuit court's entry of summary judgment is reviewed *de novo*.' Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 5, *Bowyer v. Hi-Lad, Inc.*, No. 31697 (W. Va. Dec. 3, 2004). In this case, pursuant to *Travis v. Alcon Laboratories, Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998), the Circuit Court entered

summary judgment for Eastern, as there was no genuine issue of material fact regarding whether Philyaw satisfied the objective test for determining whether Eastern's conduct was "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency." Thus, a *de novo* standard of review applies to this appeal.

Applying this *de novo* standard, particularly if this Court considers the state of the record before Judge Burnside at the time the summary judgment order was entered, it is clear that Eastern was entitled to judgment as a matter of law because (1) none of Philyaw's allegations involved any conduct by Eastern within two years of the filing of his suit and (2) there was no objective evidence that Eastern's conduct was "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency" as required in a suit for intentional infliction of emotional distress. Eastern challenges Philyaw, in his reply brief, to point to any sworn testimony before Judge Burnside at the time the summary judgment order was entered to substantiate a single instance of "extreme and outrageous conduct" on the part of Eastern within the two-year period prior to his filing suit. Moreover, Eastern challenges Philyaw, in his reply brief, to point to any sworn testimony before Judge Burnside at the time the summary judgment order was entered regarding (1) any specific and discrete conduct by Eastern, directed towards Philyaw, which "was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency;" (2) any specific and discrete conduct by Eastern, directed towards Philyaw, which indicated that Eastern "acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from [its] conduct;" (3) any specific and discrete conduct by Eastern, directed towards Philyaw, which "caused" him "to suffer emotional distress;" and (4) any specific and discrete proof that "the emotional

distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.” The state of the sworn testimony before Judge Burnside at the time Eastern’s summary judgment motion was filed, argued, and decided, created genuine issues of material fact for none of these elements of an IIED claim.

Philyaw had an ample opportunity to develop an appropriate evidentiary record to survive Eastern’s summary judgment motion, but simply failed to do so, and should not be permitted, at this late stage, to secure a jury trial based upon completely unsubstantiated allegations by his counsel that Eastern is a bad company and that Philyaw suffered severe emotional distress as a result. Unless Philyaw can satisfy the standards for an IIED claim, on appeal, by pointing to evidence in the record at the time summary judgment was awarded, this Court should affirm the judgment of the Circuit Court of Raleigh County.

B. AS NEITHER THE RECORD NOR THE BRIEF OF THE APPELLANT CONTAIN ANY REFERENCE TO CONDUCT WHICH OCCURRED WITHIN TWO YEARS OF THE FILING OF HIS COMPLAINT, PHILYAW’S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS PLAINLY BARRED BY THE STATUTE OF LIMITATIONS.¹⁷

As previously noted, Philyaw’s last date of employment with Eastern was March 13, 2002. The instant suit was not instituted by him until March 9, 2004, almost two full years after termination of his employment. Importantly, not a single one of the communications Philyaw contends are actionable occurred within the two years immediately prior to the filing of his suit. Specifically, the Brief of the Appellant references “the late 1980’s,” Brief

¹⁷In his brief, Philyaw claims, quite incredibly, that “Statute of Limitations Issue not Raised Below,” Brief at 17. This is patently false. On page 12 of Eastern’s summary judgment motion, in the heading of its final argument, it stated, “In Any Event, The Statute of Limitations Bars Plaintiff’s Claim.” Plainly, Eastern argued that Philyaw’s claims were barred, under *McCammon*, because his suit was filed more than two years after he alleged that any actionable conduct occurred.

of the Appellant at 7, which is obviously more than two years before 2004 and “about 1998,” *id.*, which is obviously more than two years before 2004. Nowhere in the record is there any reference to a single act by Eastern occurring on or after March 9, 2004, which would constitute “extreme and outrageous conduct.” Accordingly, under this Court’s prior decisions, Eastern is entitled to judgment as a matter of law.

If, as Philyaw argues, he was subjected to outrageous conduct on the part of Eastern, it should not have been too difficult for him to remember at least one incident which occurred within two years of his filing suit. To the contrary, he admitted in his discovery responses that, “Due to the amount of time that has passed since [his] employment,” he could no longer remember who made “vituperative” comments or engaged in “disparagement.” (Pl.’s Resp. to Def.’s Req. for Interrog. No. 10.). Moreover, he presented no deposition testimony to Judge Burnside identifying a single act by Eastern alleged to have been “extreme and outrageous” within the two-year period immediately preceding his suit. Rather, all he could reference, not through sworn testimony, but through a proffer by his attorney, was that in the early 1980s, Eastern allegedly created a stressful work environment as a result of its alleged efforts to avoid federal dust standards and the investigation of those efforts. This is the very purpose of statutes of limitation, however, to prevent stale claims from being asserted against which a meaningful defense is unfairly handicapped by the passage of time. Thus, it is clear that Philyaw’s IIED claim is time-barred.¹⁸

¹⁸Because Judge Burnside ruled that Philyaw failed to meet the first prong of the *Travis* test, he never reached the issue of the statute of limitations. To the extent necessary, however, Eastern cross-assigns the issue as error pursuant to R. App. P. 10(f).

This Court has held that a cause of action for intentional infliction of emotional distress arising from an employment relationship accrues not upon termination of the employment relationship, but from the date of the allegedly outrageous conduct:

In claims for intentionally or recklessly inflicted emotional distress that arise from the termination of employment, the two-year statute of limitation for personal injuries begins to run on the date of the last extreme and outrageous conduct, or threat of extreme and outrageous conduct, which precipitated the termination of employment.

Syl. pt. 8, *Travis, supra*; see also *McCammon v. Oldaker*, 205 W. Va. 24, 33, 516 S.E.2d 38, 47 (1999) (“If a tort of outrage claim can arise from the bringing of a lawsuit, an issue which we do not reach in this case, it is reasonable that the two-year limitation period begins to run on the date of the last extreme and outrageous conduct.”) (emphasis supplied); *Collins v. SWVA, Inc.*, 2005 WL 1639305 (S.D. W. Va.). Plainly, under *Travis*, it is not the “termination of employment” which triggers the running of the statute of limitations; rather, it is the “date of the last extreme and outrageous conduct.” Here, Philyaw can identify no extreme or outrageous conduct on the part of Eastern which occurred within two years of the filing of suit; thus, unless this Court intends to overrule *Travis* and its progeny, Eastern was entitled to the entry of judgment on Philyaw’s IIED claim.

In *Travis*, the following discussion of the facts of *Harmon v. Higgins*, 188 W. Va. 709, 383, 426 S.E.2d 344, 433 (1992), makes this abundantly clear:

In *Harmon*, the plaintiff last had contact with her allegedly harassing supervisor on September 24, 1986, but did not terminate her employment until September 30, 1986 when she had a disagreement with another employee. We held that the plaintiff’s filing of her suit on September 27, 1988 was outside the two-year statute of limitation, because the last offensive contact or threat of offensive contact which precipitated the termination of employment occurred on September 24, 1986.

[Emphasis supplied]. See also *McCammon*, *supra* at 33, 516 S.E.2d at 47 (“Because we find that any outrageous conduct by the defendants must have occurred no later than September 7, 1993, a tort of outrage claim based on this conduct had to be brought prior to September 7, 1995 in order to be timely. The plaintiff, however, did not bring her tort of outrage claim against the defendants until January 23, 1996, well beyond the two-year limitation period. Accordingly, we find that the plaintiff’s tort of outrage claim is time-barred.”).

In *McCammon*, this Court rejected the “continuing tort” notion of an IIED claim. The factual predicate for the tort of outrage claim in *McCammon* was the alleged prosecution of a fabricated medical malpractice action. Following a favorable resolution of such litigation in which a surveillance videotape of the plaintiff played a critical role, the defendant physician sued the plaintiff’s attorneys for malicious prosecution and the tort of outrage. The plaintiff’s attorneys, now defendants in the malicious prosecution/tort of outrage suit, moved to dismiss the tort of outrage claim, contending that the last outrageous act could only have occurred during the course of the unsuccessful litigation in trial court. The defendant physician, on the other hand, now a plaintiff in the suit against the attorneys, contended that the tort of outrage was “continuing,” and that her cause of action did not accrue until she ultimately prevailed on appeal. After reaffirming the “date of the last extreme and outrageous conduct” test of *Travis*, this Court stated as follows:

The determination of the exact date the last outrageous conduct occurred in a tort of outrage claim arising from the institution of a lawsuit would necessarily be determined on a case by case basis. In the instant case, it is not necessary to make this determination. It is sufficient, rather, for us to conclude that any outrageous conduct in the instant case occurred prior to or on the date of the ultimate termination, in the trial court, of the action complained of, which was in September 1993. We believe that the defendants’ act of appealing the adverse circuit

court judgment on behalf of their clients after this date did not constitute the kind of extreme and outrageous conduct contemplated in a tort of outrage claim.

Id. at 33, 516 S.E.2d at 47. Likewise, in the instant case, because Eastern was never alleged to have engaged in any "extreme and outrageous conduct" within two-years prior to the filing of Philyaw's suit, his IIED claim is plainly barred by the statute of limitations.

Other courts have rejected efforts by employees to file IIED claims within the period of limitations using the employment termination as the accrual date. In *Healy v. MCI Worldcom Network Service, Inc.*, 2005 WL 1837148 (E.D. Cal.), for example, an employee filed an IIED claim within two years of the termination of his employment, but more than two years after the outrageous conduct, an alleged threat of termination if he filed a disability claim. Under these circumstances, the court held that his IIED claim was time-barred:

A cause of action for intentional infliction of emotional distress ("IIED") accrues and the statute of limitations begins to run once plaintiff suffers severe emotional distress as a result of outrageous conduct on part of defendant. See West's Ann. Cal. Civ. Proc. Code § 340(3); *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 889, 6 Cal. Rptr. 2d 151 (1992). Where, as here, the IIED claim arises out of defendants' alleged false representations that he could not be terminated without putting his disability benefits in jeopardy and failing to terminate him as promised by the separation agreement, courts have held that the statute of limitation begins to accrue when the plaintiff is put on inquiry notice that the defendant will not perform that contract. See, e.g., *Averbach v. Vnesheconombank*, 280 F. Supp. 2d 945, 958 (N.D. Cal. 2003).

Id. at *11. See also *Monak v. Ford Motor Co.*, 95 Fed. Appx. 758 (6th Cir. 2004)(employee was aware of her alleged mistreatment by coworkers as it occurred and contemporaneously experienced its emotional impact, and therefore four-year statute of limitations applied as

to each incident underlying employee's claims for intentional infliction of emotional distress, under Ohio law, and claims based on incidents that occurred more than four years before complaint was filed were time-barred, notwithstanding employee's contention that tort was ongoing one, such that her claim did not accrue until final incident of mistreatment that marked her inability to handle the resulting distress); *Kennedy v. St. Francis Hospital*, 225 F. Supp. 2d 128 (D. Conn. 2002)(Connecticut law intentional infliction of emotional distress (IIED) claims by former employee against former employer accrued, and three-year statute of limitations began to run, not upon termination of employment, but when employer lowered score on evaluation, telephoned employee's minor son and communicated confidential information regarding employee's health to son, and surveilled employee following submission of worker's compensation claim); *Fala v. Perrier Group of America*, 2000 WL 688175 at *14 (E.D. Pa.)(“Under Pennsylvania law, the statute of limitations for the tort of intentional infliction of emotional distress is two years. *Bartanus v. Lis*, 480 A.2d 1178, 1186 (Pa. Super. 1984). Therefore, Ms. Fala may not base this claim upon incidents which occurred before June 29, 1999, the date she filed her Complaint.”); *Glickstein v. Neshaminy School Dist.*, 1997 WL 660636 at *14 (E.D. Pa. 1997)(“The defendants point out that the last direct act of sexual harassment occurred in May or June of 1992, and Glickstein filed her original Complaint on or about September 12, 1996. (See Def.'s Mot. at 14). Although Glickstein alleges in her complaint that the defendants continued to retaliate against her until the present, the Court finds her claim time-barred because she has alleged no acts of sexual harassment within two years of the date she brought suit.”); *Dikcis v. Indopco, Inc.*, 1997 WL 211218 at *8 (N.D. Ill. 1997)(“Dikcis premises his emotional distress claim on a 1993 instruction from his superiors, but did not

file suit until September 1996, at least two years and nine months later. Although not discussed in Count II, any other conduct on the part of Indopco that could have caused Dikcis emotional distress occurred at the very latest in March 1994, after Dikcis' February termination, when he discovered that the company had never filed a workers' compensation claim on his behalf. Dikcis does not allege any contact with Indopco after this date, which still predates his complaint by two years and six months. Consequently, Dikcis' emotional distress claim is time-barred.”).

Likewise, courts have rejected the theory, espoused by Philyaw, that the statute of limitations for an IIED claim are extended as long as the effects of the outrageous conduct continue to be felt. *See, e.g., Geddes v. County of Kane*, 121 F. Supp. 2d 662, 666 (N.D. Ill. 2000)(“However, a continuing violation is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation.”); *Turner v. McQuarter*, 79 F. Supp. 2d 911, 918 (N.D. Ill. 1999)(“A continuing violation is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. *Id.* Here, even if we read the complaint quite generously, it includes no allegations of any conduct by McQuarter after her actions ‘placing Plaintiff in reasonable fear of losing her university scholarship’ for the fall term in 1996 (cplt., ¶ 30). Plaintiff avers that the relationship continued as long as it did because of plaintiff’s own fear that McQuarter could block her graduation. This is insufficient to allege the kind of continuing wrong identified in *Hyon.*”). As both the record and Philyaw’s brief are completely devoid of even an allegation that

Eastern engaged in any specific tortious act on or after March 9, 2002,¹⁹ two years before the filing of his complaint, his suit is plainly barred by the two-year statute of limitations.

C. THE CIRCUIT COURT PROPERLY DETERMINED THAT PHILYAW'S SUBJECTIVE FEAR OF REPRISAL FAILED TO SATISFY THE FIRST PRONG OF *TRAVIS* FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In Syllabus Point 6 of *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982), this Court first held that, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."²⁰ In Syllabus Point 3 of *Travis*, this Court further refined the requirements for this cause of action as follows:

In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress,²¹

¹⁹In his response to Eastern's motion for summary judgment, all Philyaw could muster was an conclusory allegation that, "It was on 13 March 2002 that Mr. Philyaw understood the nature and extent of his injury and that Eastern would do nothing to help him, which makes 13 March 2002 the 'date of injury.'" Response at 4. Of course, as this Court held in *Travis*, a IIED cause of action arises not from the "date of injury," but from the last date of outrageous conduct. Because Philyaw does not allege that any conduct occurred within the two years immediately preceding the filing of his complaint, his suit is barred by the applicable statute of limitations.

²⁰This formula is derived directly from Section 46(1) of the RESTATEMENT (SECOND) OF TORTS, which provides, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

²¹Although not addressed in Judge Burnside's order, Philyaw also failed to satisfy this second prong of the *Travis* test; indeed, in his response to Eastern's summary judgment motion, Philyaw himself asserted that, "[EACC]'s primary intent was simply to defeat the federal law and not to injure Mr. Philyaw." Response at 12. Thus, he cannot meet his burden under the "intentional" requirement as a matter of law.

or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

[Emphasis supplied].

In *Tanner v. Rite Aid of W. Va., Inc.*, 194 W. Va. 643, 650, 461 S.E.2d 149, 156 (1995), this Court discussed the very high threshold for an IIED claim:²²

The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"²³

²²"This Court has explained that the tort of outrage is synonymous with intentional or reckless infliction of emotional distress." *Williamson v. Harden*, 214 W. Va. 77, 81, 585 S.E.2d 369, 373 (2003)(citing *Tanner, supra*).

²³This formulation is derived from comment (d) to Section 46 of the RESTATEMENT (SECOND) OF TORTS, which provides as follows:

The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

(emphasis supplied); see also *Tanner*, *supra* at 651, 461 S.E.2d at 157 (explaining why trial courts must demand “such strict proof of unprecedented and extreme misconduct”); *Keyes v. Keyes*, 182 W. Va. 802, 805, 392 S.E.2d 693, 696 (1990) (explaining that the plaintiff’s burden in a IIED case is “a high standard indeed”). This is because, as this Court observed in *Keyes*, the tort of outrage is “a slippery beast, which can easily get out of hand without firm judicial oversight.”²⁴

community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous!”

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one’s feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 47 Harvard Law Review 1033, 1053 (1936).

Plainly, Philyaw’s evidence does not meet this standard.

²⁴This Court has noted, “The law intervenes only where the distress is so severe that no reasonable [person] could be expected to endure it.” *Kanawha Valley Power Co. v. Justice*, 181 W. Va. 509, 513, 383 S.E.2d 313, 317 (1989) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. j) (alteration in *Kanawha Valley Power Co.*); *id.* (“liability may be imposed for outrageous conduct only where the distress that results is more than the ‘transient’ and ‘trivial’ distress that necessarily accompanies life among other people”). See also *Courtney v. Courtney*, 186 W. Va. 597, 600-01, 413 S.E.2d 418, 421-22 (1991) (*Courtney I*) (reversing dismissal of outrage claim because of extreme nature of alleged conduct; noting that “conduct that is merely annoying, harmful of one’s rights or expectations, uncivil, mean-spirited, or negligent does not constitute outrageous conduct”), *rev’d on other grounds*, *Courtney v. Courtney*, 190 W. Va. 126, 437 S.E.2d 436 (1993) (*Courtney II*); *Keyes*, *supra* (finding that conduct, while mean-spirited and petty, did not rise to required level of outrageousness); *Wayne County Bank v. Hodges*, 175 W. Va. 723, 338 S.E.2d 202 (1985); *Yoho v. Triangle PWC, Inc.*, 175 W. Va. 556, 336 S.E.2d 204 (1985).

Because of the nature of the tort of outrage or intentional infliction of emotional distress, the court plays a critical role in determining whether the evidence meets an objective test for outrageousness. Thus, in Syllabus Point 4 of *Travis*, this Court held:

In evaluating a defendant's conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.

[Emphasis supplied]. Consequently, this Court has had many occasions to either affirm the award of judgment as a matter of law in IIED cases or enter judgment as a matter of law in such cases upon appeal. *See, e.g., Love v. Georgia-Pac. Corp.*, 209 W. Va. 515, 550 S.E.2d 51 (2001)(affirming summary judgment where conduct failed objective outrageousness test); *Hosaflook v. Consolidation Coal Co.*, 201 W. Va. 325, 343, 497 S.E.2d 174, 192 (1997)("we find the tort of outrage is not established as a matter of fact or law"); *Johnson v. Hills Dept. Stores, Inc.*, 200 W. Va. 196, 488 S.E.2d 471 (1997)(affirming directed verdict for defendant); *Kanawha Valley Power Co. v. Justice, supra* (affirming summary judgment where conduct failed objective outrageousness test); *Hines v. Hills Dept. Stores, Inc.*, 193 W. Va. 91, 454 S.E.2d 385 (1994)(reversing jury verdict for plaintiff for same reason); *Dzingski v. Weirton Steel Corp.*, 191 W. Va. 278, 445 S.E.2d 219 (1994), *overruled in part on other grounds, Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W. Va. 318, 547 S.E.2d 256 (2001); *Cook v. Heck's Inc.*, 176 W. Va. 368, 376, 342 S.E.2d 453, 461 (1986) ("The evidence in the case before us did not pass the Restatement's litmus

test. Therefore, the trial judge's action in granting the motion for a directed verdict was proper."). Likewise, this was an appropriate case for summary judgment.

The first *Travis* element requires conduct that is "more than unreasonable, unkind or unfair" *Travis, supra* at 375, 504 S.E.2d at 425 (quoting *Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 383 (10th Cir. 1988), cert. denied, 489 U.S. 1080 (1989)). "[T]he hallmark of this tort, "as noted by this Court in *Harless, supra* at at 695, 289 S.E.2d at 704, "is intentional and outrageous conduct." "The liability clearly does not extend to mere insults, threats, annoyances, petty oppressions, or other trivialities," this Court remarked in *Tanner, supra* at 651, 461 S.E.2d at 157, "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt." [Emphasis supplied]. As Judge Burnside properly determined, Philyaw's *subjective* beliefs that Eastern expected him to violate the law did not satisfy this *objective* test of outrageous conduct. This Court has previously engaged in similar analyses.

In *Williamson, supra* at 82, 585 S.E.2d at 374, this Court rejected a cause of action for outrage where the plaintiff alleged that the defendant had testified falsely in a trial, noting as follows:

It is common for the two sides in any trial to disagree on the testimony of a particular witness. Because of nature of our adversarial system of justice, it is very likely that both sides will not agree on the facts and circumstances of their dispute. The court system simply could not function if it permitted a losing party to sue an adverse witness for the tort of outrage simply because the losing party feels the witness testified falsely or

inaccurately. In the absence of specific evidence to the contrary, we must presume that witnesses testify truthfully. The lower court, well aware of this reality, believed that Dr. Williamson's claim should be dismissed, and we find no reason to disagree with that decision.

[Footnote omitted]. Likewise, in the instant case, Philyaw and Eastern have a fundamental disagreement regarding whether (1) Eastern ever even *implied* that Philyaw should violate federal law in order to comply with the applicable dust standards and (2) Philyaw violated any federal law in an effort to secure such compliance after 1998. Such "disagreement," as in *Williamson*, simply does not support a cause of action for the tort of outrage.

This case is also similar to *Hosaflook v. Consolidation Coal Co.*, *supra*. The plaintiff in *Hosaflook* accepted the defendant's long-term disability benefits, like Philyaw, then instituted a suit claiming that the defendant engaged in the tort of outrage by subjecting him to a reduction-in-force. This Court rejected Hosaflook's IIED claim, holding that his subjective belief that he was singled out because of his disability did not satisfy the objective test for the cause of action: "[A]lthough it may seem unkind for an employer to terminate an individual with a handicap who cannot perform the essential functions of a job either with or without reasonable accommodation as part of a reduction in force, this action, in and of itself, does not as a matter of law support a claim for the tort of outrage." *Id.* at 337, 497 S.E.2d at 186.²⁵ Likewise, as recognized by Judge Burnside in the instant case, merely because Philyaw felt pressured by Eastern's expectation regarding his mine's compliance with federal dust standards, and subjectively believed that he was to do anything necessary,

²⁵See also *Johnson*, *supra* at 200, 488 S.E.2d at 475 (plaintiffs' subjective distress caused by conduct of defendant's employees who were conducting an investigation of suspected shoplifting did not meet objective standard for tort of outrage).

including breaking the law, in order to ensure such compliance, does satisfy the objective test for the tort of outrage.

Finally, in *Dzinglski*, *supra* at 284, 445 S.E.2d at 225, which arose from the employment context and was authored by Philyaw's counsel when he was a Justice of this Court, it was noted:

Because of its heavy emphasis on the severity of the defendant's behavior, the tort of outrage is a somewhat nebulous cause of action. Unlike most intentional torts, the relative ease of establishing the victim's injury is not counterbalanced by any specific definition of the behavior that will lead to liability. Instead, liability for intentional infliction of emotional distress arises whenever the defendant's conduct is found to be outrageous. See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 51 (1982). The Restatement's description of the prohibited conduct, provides very little guidance to the potential defendant:

Liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

[Emphasis supplied and footnote omitted].²⁶

In *Dzinglski*, as in the instant case, the plaintiff was an employee who filed suit against his employer for the tort of outrage arising from his alleged mistreatment. Specifically, *Dzinglski* was the subject of an internal investigation by his employer of allegations that he had taken kickbacks from its customers. *Id.* at 281, 445 S.E.2d at 222.

²⁶The author of the opinion further observed, "This Court has yet to decide a case where a defendant's conduct was found to be sufficiently outrageous to satisfy the requirements for the tort of outrage or intentional infliction of emotional distress." *Id.* at 285, 445 S.E.2d at 226.

Indeed, Dzinglski was suspended from employment during the investigation. *Id.* at 282, 445 S.E.2d at 223. Eventually, though the claims against him could not be substantiated, Dzinglski was honorably discharged from his employment. *Id.* Setting aside a verdict for \$650,000 based upon Dzinglski's claims of intentional infliction of emotional distress and tort of outrage, this Court held:

The facts of the case before us do not rise to the level of conduct necessary to satisfy the tort of outrage. When Mr. Lawson apprised Weirton Steel of improprieties by one of its management employees, Weirton Steel did what it is the right and indeed the obligation of any employer to do: it investigated the allegations of impropriety. The actions taken by Weirton Steel in its investigation were wholly appropriate under the circumstances: (1) an internal audit and interviewing of Valley Systems employees; (2) suspension of Mr. Dzinglski, with pay, pending the investigation; (3) preparation of internal memoranda setting forth the results of interviews and the internal audit; and (4) private meetings with Mr. Dzinglski apprising him of the allegations made against him and affording him the opportunity to affirm or deny such allegations.

It is difficult to see how these actions, all of which were conducted in the context of an internal investigation into company mismanagement could conceivably constitute outrageous conduct. We find that the manner by which Weirton Steel effected Mr. Dzinglski's discharge was far from outrageous and that Weirton Steel's motivations for the discharge were proper. Although we are not unsympathetic to the distress doubtless suffered by Mr. Dzinglski, we find that the distress stemmed from the discharge itself and not from the investigatory process coincident with the discharge. Therefore, the trial court erred in finding that Weirton Steel's investigation into Mr. Dzinglski's alleged improprieties constituted the tort of outrage.

Id. at 286, 445 S.E.2d 227. Likewise, in the instant case, it was not unreasonable for Eastern to expect Philyaw, as its safety supervisor, to ensure his mine's compliance with federal dust standards. Philyaw was unable, despite every opportunity, to identify a single

incident in which anyone at Eastern specifically instructed him to violate federal law if necessary to ensure such compliance. Rather, at most, Philyaw testified that he felt pressured and subjectively believed that Eastern wanted him to do whatever was necessary. Clearly, unless this Court wants to give management employees the defense of not "I was only following orders," but "I did what I thought I needed to do," it will not sanction Philyaw's cause of action by reversing the summary judgment properly awarded by the Circuit Court.

Other courts have recognized that although whether a plaintiff has suffered severe emotional distress is subjective, whether the alleged conduct is sufficient outrageous to support a cause of action for intentional infliction of emotional distress is objective. *See, e.g., Honaker v. Smith*, 256 F.3d 477, 490 (7th Cir. 2001) ("Whether conduct is extreme and outrageous is judged on an objective standard, based on the facts of the particular case."); *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1229 (11th Cir. 1993) ("Whether conduct is sufficiently outrageous and egregious to support a claim is a question of law governed by an objective standard: the evidence must show that reasonable persons might find the presence of extreme and outrageous conduct. *Id.* 409 S.E.2d at 838. Conduct is not extreme and outrageous simply because it is unkind or causes someone's feelings to be hurt. *Peoples v. Guthrie*, 199 Ga. App. 119, 404 S.E.2d 442, 444, cert. denied, (Ga. May 15, 1991)."); *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993) ("We judge the facts of each particular case by an objective standard to determine whether the alleged conduct was extreme and outrageous."); *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949, 976 n.17 (Utah 1992) ("For the guidance of the bench and bar, we make clear that while the standard for determining whether a plaintiff has experienced emotional

distress is subjective, the standard for determining the outrageousness of the alleged conduct is objective. Consequently, a plaintiff claiming intentional infliction of emotional distress must show both that a reasonable person would consider the alleged conduct to be outrageous and that the plaintiff actually experienced subjective severe emotional anguish because of this objectively outrageous conduct.”); *Miller v. Linden*, 172 Ill. 3d 594, 597, 527 N.E.2d 47, 49, 122 Ill. Dec. 675 (1988)(“The determination of whether words or conduct are actionable in character is to be made on an objective rather than a subjective standard, from common acceptance.”); *Southland Corp. v. Bartsch*, 522 So. 2d 1053, 1056 (Fla. Ct. App. 1988)(“Further, the subjective response of the person who is the target of the actor's conduct does not control the question of whether the tort occurred.”). Because the issue of whether the conduct meets the high threshold required, it is a matter of law, not a matter of fact. *See Ponton v. Scarfone*, 468 So. 2d 1009, 1011 (Fla. Ct. App. 1985)(“The threshold test to be followed in assessing behavior claimed to constitute the ‘intentional infliction of emotional distress’ is whether such behavior is ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.’ In applying that standard, it is manifest that the subjective response of the person who is the target of the actor's conduct is not to control the question of whether the tort occurred. Rather, an evaluation of the claimed misconduct must be undertaken to determine, as objectively as is possible, whether it is ‘atrocious, and utterly intolerable in a civilized community.’ *Id.* That burden falls to the judiciary--it is a matter of law, not a question of fact. *Id.*”). Philyaw's evidence is simply too weak to satisfy this objective standard.

The fact that an employee may experience emotional distress or feel pressured by working conditions does not give rise to a cause of action for intentional infliction of

emotional distress or the tort of outrage. *See Walton v. Nalco Chemical Co.*, 272 F.3d 13 (1st Cir. 2001)(employer that had allegedly threatened employee's livelihood and professional reputation by attempting to pressure him to accept a buy-out package and allegedly subjected employee to undue humiliation by transferring his sales accounts to a less experienced employee and promulgating an allegedly false and demeaning job-performance review, and had repossessed company property from employee in the presence of his family and neighbors, had not engaged in "extreme and outrageous conduct," as required for employee's claim of intentional infliction of emotional distress under Maine law); *Staples v. Bangor Hydro-Elec. Co.*, 561 A.2d 499, 501 (Me. 1989)(holding that supervisor, who humiliated employee during staff meetings, demoted him without cause, and falsely accused him of professional incompetence, had not engaged in "extreme and outrageous" conduct); *Hartleip v. McNeilab, Inc.*, 83 F.3d 767 (6th Cir. 1996)(even if coworker threatened employee's employment stability, applied pressure on her on weekly basis to engage in conduct that employee had no interest in pursuing, constantly called and wrote to employee, and discussed sexual fantasies with other employees about her, causing employee psychological grief and triggering unspecified "physical maladies," his conduct was not sufficiently outrageous to support claim of intentional infliction of emotional distress under Michigan law);

Philyaw never alleged that Eastern directed him to break the law. Rather, at best, Philyaw alleged that, subjectively, he believed that Eastern expected him to break the law if it were necessary to avoid violating federal dust standards. A subjective belief that one's employer expects illegal conduct obviously does not satisfy the objective standard of extreme and outrageous conduct.

For example, in *United States of America ex rel. Barrett v. Columbia Healthcare Corp.*, 2005 WL 1924187 (S.D. Tex.), the plaintiff/employees sued for intentional infliction of emotional distress, claiming that they were pressured by their employer into violating federal law with respect to insurance claims. Applying the same analysis as Judge Burnside in the present case, under factually circumstances much more compelling for the plaintiff/employees, the court held as follows:

Additionally, under clearly applicable law, the kind of work-related disagreements and pressure that Goodwin allegedly experienced does not approach the level necessary to raise a fact issue as to intentional infliction of emotional distress. To be liable for intentional infliction of emotional distress, an actor's conduct must be "extreme and outrageous." See *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993). "Extreme and outrageous" conduct is that which is "atrocious," "beyond the bounds of decency," and "utterly intolerable in a civilized society." *Id.* at 734. In the employment context, a claim for intentional infliction of emotional distress will not be supported by the broad range of conduct labeled as "mere employment disputes." *Id.* As the Fifth Circuit stated in *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31 (5th Cir. 1992):

In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are pleasant for the employee. Neither is termination.... An employer will not be held liable for exercising its legal right to terminate an employee, "even though he is well aware that such [action] is certain to cause emotional distress."

Id. at 34. Defendants' motion for summary judgment on this independent claim is granted.

Id. at *24.

Similarly, in *Furman v. CompuCom Systems, Inc.*, 2004 WL 1672314 (N.D. Tex.), the plaintiff/employee, like Philyaw, sued after the termination of his employment, claiming that he suffered severe emotional distress as a result of feeling pressure to break the law in order to keep his job. Rejecting this as a basis for an IIED claim, like Judge Burnside, the court held as follows:

Furman also contends that Sidwell "intentionally subjected [him] to severe emotional distress by making unwarranted criticisms which formed the false basis for his termination, including the outrageous choice of losing his employment or committing criminal acts which could have resulted in [his] imprisonment and/or other criminal penalties." Third Am. Compl. at 13 ¶ 21. CompuCom counters that Furman's claim for intentional infliction of emotional distress fails, as a matter of law, because he cannot demonstrate that CompuCom engaged in extreme or outrageous conduct. The court agrees.

To maintain a claim for intentional infliction of emotional distress, Furman must show that: (1) CompuCom acted intentionally or recklessly; (2) CompuCom's conduct was extreme and outrageous; and (3) CompuCom's conduct caused him severe emotional distress. *Ward v. Bechtel Corp.*, 102 F.3d 199, 203 (5th Cir. 1997) (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex.1993)). Conduct is "outrageous," for purposes of an intentional infliction of emotional distress claim, "if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community." *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993). "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." *Id.* at 243.

Viewed in a light most favorable to Furman, his allegations and evidence, even if true, simply do not rise to the level necessary to show that CompuCom's conduct is outrageous in the sense that it exceeds all bounds of decency such that it would be totally unacceptable in a civilized society. The conduct attributable to CompuCom was no more than what is expected in a typical employment dispute.

Id. at *7.

Likewise, in the instant case, Philyaw's evidence that he subjectively felt pressured to violate law in order to comply with federal dust standards simply does not satisfy the requirement of "extreme and outrageous conduct" necessary for an IIED claim. Thus, Judge Burnside properly awarded summary judgment.

IV. CONCLUSION

As Judge Burnside sagely observed, "Plaintiff's belief that he was in a predicament with no comfortable solution does not support a cause of action for intentional infliction of emotional distress. *Travis* makes it clear that an action for infliction of emotional distress is not a means to resolve life's difficult problems, because life is full of them." [Summary Judgment Order at 6]. The first prong of the *Travis* test for IIED is an objective test, to be applied by the court, not a subjective test, to be applied by the trier of fact. As this Court has previously held in similar circumstances on so many occasions, Philyaw's subjective emotional distress in the face of Eastern's reasonable expectation that he was to ensure compliance with federal dust standards simply does not satisfy that objective test. Moreover, as demonstrated herein and never refuted with a single specific allegation of any affirmative act occurring within the two years immediately preceding Philyaw's suit, his IIED claim is barred by the applicable statute of limitations.

WHEREFORE, the Appellee, Eastern Associated Coal Corp., respectfully requests that this Court affirm the award of summary judgment.

**EASTERN ASSOCIATION COAL
CORP.**

By Counsel



Ancil G. Ramey, Esq.
WV State Bar ID No. 3013
Jeffrey K. Phillips, Esq.
WV State Bar ID No. 5730
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

NEELY & HUNTER

Lawyers

159 SUMMERS STREET

CHARLESTON, WEST VIRGINIA 25301-2134

304-343-6500

FAX 304-343-6528

April 5, 2005

Hon. Janice Davis
Raleigh County Circuit Clerk
Raleigh County Courthouse
Beckley, WV 25801

Re: Philyaw v. Eastern Associated Coal Corp.
Civil Action No.04-C-238-B

Dear Ms. Davis:

Please find enclosed the following documents for filing in the above-styled matter:

DEPOSITION OF TERRY GENE HUDSON
DEPOSITION OF EDWARD HARTSOG
DEPOSITION OF DAVID ASHBY
DEPOSITION OF REGGIE PHILYAW
PLAINTIFF'S IDENTIFICATION OF EXPERT WITNESSES

Thank you for your assistance in this matter.

Sincerely,


Richard Neely

Enclosure: as stated

cc: Jeffrey Phillips, Esq.



In the Circuit Court of Raleigh County, West Virginia

Reggie Lee Philyaw
Plaintiff

Civil Action No. 04-C-238B

vs.

Judge Burnside

Eastern Associated Coal Corp., a West
Virginia Corporation;

Defendant

JURY TRIAL DEMANDED

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

I. Introduction

The facts of this case are outrageous: Plaintiff Reggie Philyaw was employed by Eastern Associated Coal Company from 4 November 1974 until 13 March 2002-- a period of roughly twenty-eight years. Mr. Philyaw is a high school graduate with a local community college associate's degree; primarily, however, Mr. Philyaw's ability to earn a good living was entirely dependent upon his on-the-job training with Eastern as a safety supervisor and his experience in the mines. If Eastern fired Mr. Philyaw, he became nothing more than a laborer, but so long as he held his job, he earned over \$71,000 per year.

As a condition of his employment, however, Eastern required Mr. Philyaw to violate the federal mine safety law. Specifically, Mr. Philyaw was required to manipulate the dust samples provided to MESA during two periods of his employment, namely all during the 1980's and then again beginning about 1998.



HUNTER
S STREET
STON
31-2134
-6500

Deposition of David Caryl Ashby, Defendant's 30(b)(7) representative, pp. 10-12.) With this number of persons targeted, it can be reasonably inferred that management at Eastern completely understood that there was tampering with dust disks in the 1980's.

Yet, Mr. Philyaw was sent a letter indicating that if he admitted to committing any illegal acts, he would be cut off from company help and bankrupted by paying his own legal fees. (See, letter of Thomas L. Clarke to Reggie Philyaw dated 25 January 2005, Exhibit II.) This, obviously, was an admonition to lie to the grand jury, and upon deposition of Mr. Ashby I asked whether he could produce a similar letter that had ever been sent to a senior management employee and no letter has been forthcoming. (See, Ashby Deposition, pp. 21-22)

Yet, although knowing that his employer would not support him if he followed orders, violated the law, and then got caught helped contributed to Mr. Philyaw's overall level of stress, the proximate cause of Mr. Philyaw's breakdown were the actions taken by the Defendant beginning in or about 1998. (See, Report of Dr. Faheem, Exhibit I.) At this time, Mr. Philyaw, according to his deposition testimony, was required to: (1) follow a miner around with a hand-held dust monitor and remove him from areas where there was excessive dust; (2) provide "extra" maintenance on the water mechanisms for dust suppression that was not provided normally; (3) cooperate in the shutting down of a shift during which monitoring was occurring when the minimum amount of coal was mined when normally more coal was produced on a shift; and (4) generally take steps artificially to reduce the amount of dust in the vicinity of a monitoring miner.

B. Facts for Trial

In Plaintiff's disclosure of expert witnesses, Plaintiff has disclosed Mr. Sidney

Valentine, 506 Robert Street, Summersville, WV 26651, who served as a Federal Mine Inspector between 1971 and 1994. Mr. Valentine, whom Defendant has chosen not to depose, has been offered to testify to the nature of the mining regulations and that if Plaintiff's testimony is believed, Plaintiff was required to falsify mine safety information. (Mr. Philips, counsel for Defendant, has agreed to stipulate that if asked Mr. Valentine would make an affidavit consistent with his expert disclosure.) Mr. Valentine will testify that what Mr. Philyaw was required to do was entirely improper and probably constituted a felony. Mr. Valentine will testify that 30 Code of Federal Regulations Part 70-2(l) which provides:

Production Shift means (1) with regard to a mechanized mining unit, a shift during which material is produced, or (2) with regard to a designated area of a mine, as shift during which material is produced and routine day-to-day activities are occurring in the designated area. [emphasis added]

is generally known to require that **NO** intervention on the part of management or anyone else be allowed to interfere with the monitoring of operations as they routinely and normally occur. Therefore, Mr. Valentine will opine that if Mr. Philyaw was required to do the things about which he has testified, then he was breaking the law. And, as this Honorable Court will judicially notice, if the dust pumps were returned to MHSAs through the mails or through any commercial express service, or if information concerning tests conducted were returned to Defendant through the mails, then there was a violation of the Federal Mail Fraud statute cited above.

Requiring a person to commit a felony, as a condition of saving his wife or children, or as a condition of keeping his job so that he can support his wife and children, is obviously the intentional infliction of emotional distress. How severe the distress is probably depends on the psychological make-up of the person. Thus Dillinger would be less distressed than Jimmy Carter

if his wife were held hostage and he were required to rob a bank. But in this case we know that the distress to Mr. Philyaw was "severe" because (1) he suffered a mental breakdown, and (2) his mental health professionals have testified that the breakdown's proximate cause was anxiety at work. (See, Dr. Faheem's Report, Exhibit I)

But this case is also an intentional injury case arising from a knowing violation of a generally accepted safety standard in the mining industry. W.Va. Code 23-4-2 [1994] Under this Code provision, it is necessary to prove:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and the strong possibility of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong possibility of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule, regulation, whether cited or not, or of a commonly accepted and well known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and,

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

C. The Intentional Injury Standards One by One

Obviously, this is a unique case in the annals of Mandolitis cases and it certainly does not fall in the standard profile. But unique as it may be, every requirement for a statutory "intentional injury" action is present in this case. Furthermore, the Defendant has attempted to trivialize this

IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS

REGGIE LEE PHILYAW,

Appellant

On Appeal from the
Circuit Court of Raleigh County
Civil Action No. 04-C-238B

DOCKET NO. 32754

v.

EASTERN ASSOCIATED COAL CORP.,
a West Virginia Corporation

Appellee

BRIEF OF APPELLANT

Richard Neely
Neely & Hunter
159 Summers St.
Charleston, WV 25301
(304) 343-6500
Counsel for Appellant

NEELY & HUNTER
59 SUMMERS STREET
CHARLESTON
W VA 25301-2134
(304) 343-6500

Facts for Trial

In Plaintiff's disclosure of expert witnesses, Plaintiff disclosed Mr. Sam Gross, who served as a Federal Mine Inspector and supervisor. Mr. Gross, whom Defendant had not yet deposed at the time this motion for summary judgment was granted, has been offered to testify to the nature of the mining regulations and that if Plaintiff's testimony is believed, Plaintiff was required to falsify mine safety information. (Mr. Philips, counsel for Defendant, has agreed to stipulate that if asked Mr. Gross would make an affidavit consistent with his expert disclosure.) Mr. Gross will testify that what Mr. Philyaw was required to do was entirely improper and probably constituted a felony. Mr. Gross will testify that 30 Code of Federal Regulations Part 70-2(1) which provides:

Production Shift means (1) with regard to a mechanized mining unit, a shift during which material is produced, or (2) with regard to a designated area of a mine, as shift during which material is produced and routine day-to-day activities are occurring in the designated area. [emphasis added]

is generally known to require that NO intervention on the part of management or anyone else be allowed to interfere with the monitoring of operations as they routinely and normally occur. Therefore, Mr. Gross will opine that if Mr. Philyaw was required to do the things about which he has testified, then he was breaking the law. And, as this Honorable Court will judicially notice, if the dust pumps were returned to MHSa through the mails or through any commercial express service, or if information concerning tests conducted were returned to Defendant through the mails, then there was a violation of the Federal Mail Fraud statute cited

above.

Requiring a person to commit a felony, as a condition of saving his wife or children, or as a condition of keeping his job so that he can support his wife and children, is obviously the intentional infliction of emotional distress. How severe the distress is probably depends on the psychological make-up of the person. Thus Dillinger would be less distressed than Jimmy Carter if his wife and children were held hostage and he were required to rob a bank. But in this case we know that the distress to Mr. Philyaw was "severe" because (1) he suffered a mental breakdown; (2) his breakdown was so severe and obvious that even the parsimonious Social Security Administration gave him a total disability award; and, (3) his mental health professionals have testified that the breakdown's proximate cause was anxiety at work. (See, Dr. Faheem's Report, Exhibit I to Plaintiff's Response to Defendant's Motion for Summary Judgment.)

3. Assignments of Error

The Court erred when he concluded that as a matter of law Eastern's action did not and could not constitute the intentional infliction of emotional distress.

4. Points and Authorities Relied upon and Discussion of the Law,

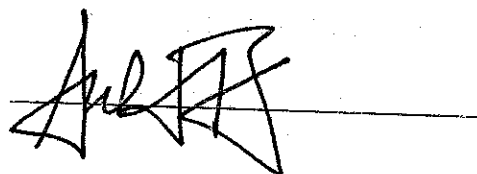
There are numerous cases over the past ten years that involve the "intentional infliction of emotional distress." Indeed, as cited by the trial court, a recent case is Travis v. Alcon Lab. Inc., 202 W.Va. 369, 504 S.E.2d 419 (1998), which roughly summarizes our law. The relevant syllabus points of Travis are:

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that the foregoing "Brief of the Appellee" was served upon counsel of record on August 22, 2005, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Richard Neely, Esq.
NEELY & HUNTER
310 Summers Square
159 Summers Street
Charleston, WV 25301-2134

John D. Wooton, Esq.
P. O. Drawer A
Beckley, WV 25801

A handwritten signature in black ink, appearing to read "Ancil G. Ramey", is written over a horizontal line.