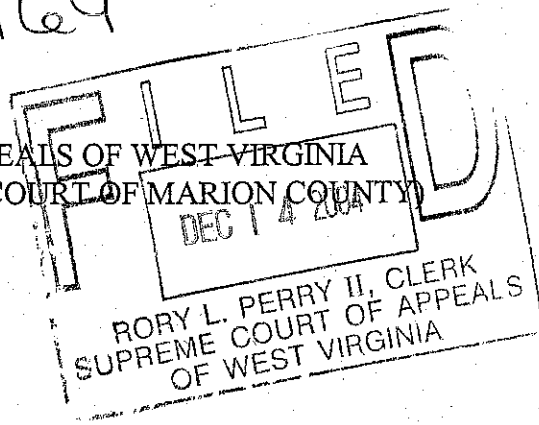


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THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
(ON APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY)



WAYMAN R. FRAVEL, and
W. KEITH WYCKOFF,

Appellants,

v.

APPEAL NO. 040890

SOLES ELECTRIC COMPANY, INC.,

Appellee.

APPELLANTS' BRIEF

The appellants, Wayman R. Fravel and W. Keith Wyckoff, request that this Court reverse the judgment entered by the Circuit Court of Marion County on January 7, 2004, and remand the action for a new trial. The January 7, 2004 judgment order resulted from a November 14, 2003 jury verdict in favor of the Soles Electric Company, Inc. in a wrongful discharge action filed by Mr. Fravel and Mr. Wyckoff.

I.
THE KIND OF PROCEEDING AND NATURE
OF THE RULING IN THE LOWER TRIBUNAL

This is a civil action that was filed by Mr. Fravel and Mr. Wyckoff after they were laid off by Soles Electric Company and never recalled for employment, despite the fact that other employees who had been laid off were called back to work – and despite the fact that Soles Electric Company hired new employees without calling back either Mr. Fravel or Mr. Wyckoff.

The case was tried to a jury on November 13 and 14, 2003. The jury returned a verdict for Soles Electric Company, and the Circuit Court entered judgment based on that verdict.

Mr. Fravel and Mr. Wyckoff filed a timely motion for a new trial, which the Circuit Court denied by Order entered on January 7, 2004.

This Court accepted the appellants' petition for appeal on November 15, 2004.

II.
STATEMENT OF THE FACTS OF THE CASE

A. Mr. Fravel And Mr. Wyckoff.

Wayman Fravel and Keith Wyckoff were long-term employees of Soles Electric Company. It is undisputed that both had solid work records and, unlike the overwhelming majority of employment cases, Soles Electric Company could conjure through the discovery process no negative evidence or information regarding either of them.

Mr. Fravel's official title was "laborer." He had evolved into a jack-of-all-trades position with Soles Electric Company, primarily using his electrical skills.

Mr. Wyckoff was a welder at the time his employment ended. In 13 years of employment, he had worked in various positions with Soles Electric Company.

B. The Workers' Compensation Injuries.

Both Mr. Fravel and Mr. Wyckoff suffered injuries while working for Soles Electric Company. Although in an industrial setting injuries are not uncommon, Mr. Fravel and Mr. Wyckoff were members of a small group of Soles Electric Company employees who suffered injuries that resulted in total expenditures in excess of \$10,000.¹ Mr. Wyckoff suffered his injury (specifically, a work-related hernia) in 1997. Mr. Fravel suffered a back injury in 1999.

C. The Soles Electric Company Layoff Procedure.

It is undisputed that Soles Electric Company has no formal, structured process for the selection of employees for layoff. No reasons are identified other than "lack of work." It is further

¹ A copy of the Policy Claim Loss Report containing the total costs relating to workers' compensation injuries from July 1, 1995 to April 9, 2002 is attached hereto as "Exhibit A."

undisputed that Soles Electric Company contemplates that layoffs will not be permanent, and that employees will be called back to work when business circumstances justify a recall.

D. The Layoff Of Wayman Fravel.

Soles Electric Company laid off Wayman Fravel in March 2000, based solely on a supposed "lack of work." It is undisputed that Soles Electric Company called back other laborers and hired multiple new laborers following the lay off of Mr. Fravel – and that Soles never called Mr. Fravel back to work.²

E. The Layoff Of Keith Wyckoff.

In September 2000, Soles Electric Company opted to reduce its work force from two welders to one. Soles Electric Company selected Mr. Wyckoff for layoff. It is undisputed that Soles Electric Company did not offer any alternative positions to Mr. Wyckoff, despite his qualifications and experience, and that Soles Electric Company never offered Mr. Wyckoff any of the positions for which other employees were called back to work and/or for which new employees were hired.

F. The Claims.

Mr. Fravel believes that the decision to lay him off and to not call him back to work constitutes discrimination on the basis of his workers' compensation claim. Mr. Wyckoff believes that the decision to lay him off and to not call him back to work or to offer him other positions constitutes discrimination on the basis of his workers' compensation claim and discrimination on the basis of his age, since he is over the age of 50 and the employees who were recalled and hired after his layoff were much younger.

² Responses to Interrogatory No. 4 and Interrogatory No. 6 from the second set of interrogatories to Soles Electric Company lists the persons recalled and the persons newly hired since September 1, 2000. A copy of these responses are attached hereto as "Exhibit B."

G. The Dismissal Of Mr. Wyckoff's Retaliation Claim.

Prior to trial, the Circuit Court dismissed Mr. Wyckoff's claim for workers' compensation retaliation. In an Order dated July 31, 2003, the Circuit Court explained that "Mr. Wyckoff's lay off in March 2000 was simply too far removed temporally from his workers' compensation claim in the Summer of 1997 to support a jury finding of a causal connection." (Opinion Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment of 7/31/03 [hereinafter "Opinion Order"] at 8.)³

H. The Jury Instructions.

In crafting the instructions to be given to the jury, the Circuit Court declined to utilize instructions aimed at enabling the jury to understand the realities of employment discrimination lawsuits, in which the employer rarely if ever admits to having illegal motives for its decision. For example, based on the case of Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 704, 403 S.E.2d 717, 721 (1991), Mr. Fravel and Mr. Wyckoff offered the following instruction: "Indeed, employers who discriminate against employees who have filed workers' compensation claims rarely broadcast their intentions to the world. Employers who engage in conduct of this kind may be expected to try to avoid detection and they typically will try to accomplish their objections by subtle, rather than obvious means." The Court elected, however, not to give this instruction to the jury, and Mr. Fravel and Mr. Wyckoff properly preserved their objection. (Transcript of Plaintiffs' Objections

³ The Circuit Court also noted in the Opinion Order that "there is no evidence of the employer's criticism of Mr. Wyckoff's work performance or harassing conduct at the time of the layoff." (Id. at 8.) However, the same observation could have been made as to Mr. Fravel's claim for workers' compensation retaliation. The only difference is that Mr. Fravel's workers' compensation claim was filed much closer in time to the layoff than was Mr. Wyckoff's workers' compensation claim.

to Court's Charge at 2.)⁴ During the conference regarding the jury instructions, the Circuit Court explained that the language would be excluded because, even though it comes from a decision of the West Virginia Supreme Court of Appeals, "It's not a syllabus point." (Transcript of Excerpt of Trial at 10.)⁵

Mr. Fravel and Mr. Wyckoff also offered the following instruction, which was adapted from the case of Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 74, 479 S.E.2d 561, 584 (1996):

[I]t is possible that subconscious or stereotypical thinking motivated Soles Electric Company to take adverse action against [Mr. Fravel and Mr. Wyckoff] and for example, Soles Electric Company management employees could testify quite honestly that they did not consider Mr. Fravel's work-related injury or Mr. Wyckoff's age in making the decision to lay them off and not recall them. Yet, they might still be able to prove pretext by showing that management unconsciously considered these factors in terminating their employment, while at the same time, calling back from layoff other employees and hiring new employees.

(Transcript of Plaintiff's Objections to Court's Charge at 2.) The Court elected not to give the instruction, and Mr. Fravel and Mr. Wyckoff properly preserved their objection.

Finally, Mr. Fravel and Mr. Wyckoff offered the following language from Skaggs, 198 W. Va. at 72 n.21 , 479 S.E.2d at 582 n.21:

Because discrimination is essentially an element of the mind, there probably will be very little direct proof available. Gone are the days, if, indeed, they ever existed, when an employer freely will admit to taking adverse action against an employee for illegal reasons.

⁴ Copies of the relevant pages from the Transcript of the Objections to the Court's Charge are attached hereto as "Exhibit C."

⁵ Copies of the relevant pages from the Transcript of Excerpt of the Trial are attached hereto as "Exhibit D."

(Id. at 3.) Again, the Court decided not to give the instruction, and Mr. Fravel and Mr. Wyckoff preserved their objection.

In contrast, the Circuit Court gave Soles Electric Company's instruction regarding the so-called "business judgment" rule, advising the jury that "[w]hether the defendant's decision seemed fair or wise to you is not a basis upon which you may rely in finding that the defendant unlawfully discriminated against the plaintiffs." Mr. Fravel and Mr. Wyckoff preserved their objections to this instruction. (Id. at 3.)

A separate problem with the jury instructions flows from the manner in which the Circuit Court delivered the instructions. Rather than piecing together a unitary charge that touches on all relevant issues separately with the language proffered by each party woven into the final text, the Circuit Court read all of the instructions provided by Mr. Fravel and Mr. Wyckoff (with revisions), and the Circuit Court then read all of the instructions provided by Soles Electric Company (with revisions).

III.
THE ASSIGNMENT OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH IT WAS DECIDED IN THE LOWER TRIBUNAL

A. Whether, in a claim for workers' compensation discrimination, the claim may proceed despite the passage of three years between the filing of the claim and the termination of employment, where the employer previously had no business reason to impose a layoff in the terminated employee's department?

(The Circuit Court answered this question in the negative.)

B. Whether, in an employment discrimination case, the jury instructions created an unfair advantage for the employer by: (1) omitting language offered by the employee, which was intended to ensure that a "meaningful and lucid" charge was given on the issue of liability; (2) including language offered by the employer instructing the jury not to consider whether the decision "seemed fair or wise" in reaching a decision as to liability; and/or (3) failing to give the entire charge regarding liability in a unitary manner, with language offered by both parties woven into a single statement of the law on each issue to be considered.

(The Circuit Court answered this question in the negative.)

IV.
POINTS AND AUTHORITIES RELIED UPON,
A DISCUSSION OF THE LAW, AND THE RELIEF PRAYED FOR

A. Mr. Wyckoff's Workers' Compensation Claim Should Have Been Permitted To Proceed.

As the Circuit Court observed in the Order dismissing Mr. Wyckoff's claim for workers' compensation retaliation, a prima facie case for workers' compensation discrimination requires proof that: "(1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act . . .; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee." (Opinion Order at 7 (quoting Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 701, 403 S.E.2d 717, 718 (1991) (syllabus point 1)).) The Circuit Court likewise recognized that "[b]ecause of the usual lack of direct evidence [of discrimination], courts have looked to a variety of factors. Proximity in time of the claim and the firing is relevant, of course." (Id. (quoting Powell, 184 W. Va. at 704, 403 S.E.2d at 721).)

The Circuit Court concluded that the passage of nearly three years between the date of the injury and the date of the layoff was too extensive to justify a finding that the decision to terminate Mr. Wyckoff's employment violated the law against discrimination on the basis of the filing of a workers' compensation claim. This conclusion, however, does not take into account the complete range of circumstances relating to the layoff.

It is undisputed that, prior to Mr. Wyckoff's layoff, Soles had two full-time welders. Thus, prior to September of 2000, Soles Electric Company had no reason to lay off one of its two

welders. Instead, the supposed need to downsize the work force by one welder did not arise at any time after the date of Mr. Wyckoff's injury through and until September of 2000.

Consequently, the question that needs to be addressed in this context is whether a claim for workers' compensation discrimination should be dismissed as a matter of law based solely on the amount of time that elapses between the injury and the termination notwithstanding evidence that the employer previously had no reason to take adverse action against the employee. Surely, the law does not allow illegal motives to infect decision-making merely because a certain amount of time has gone by between protected activity and termination of employment. Instead, the passage of time should be one of the factors that the jury fairly considers. Any other rule would encourage employers to "bide their time" as to an employee who has filed a workers' compensation claim, complained about sexual harassment, or engaged in any other behaviors that might raise the ire of management – but for which retaliation is morally and legally forbidden.

B. The Jury Instructions Gave An Unfair Advantage To The Defense.

In Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 77, 479 S.E.2d 561, 587 (1996), this Court observed that the trial court in discrimination cases should "bear in mind that the jury's role is the recreation of what happened and should strive to charge it in ways that are meaningful and lucid." As this Court further explained:

The form and language of jury instructions are committed to the sound discretion of the trial court. We would hope, however, that the trial court would use that discretion to avoid repetitious statements of the law that could create an unintended advantage for one side or the other. This is especially true when the inferences to be drawn from the overall evidence are conflicting and could lead to different results.

198 W. Va. at 78, 479 S.E.2d at 588.

In this case, Soles Electric Company's proposed jury instructions contained multiple references to and variations of the so-called "business judgment" rule, a concept that has been mentioned in several decisions of this Court – but not articulated in any syllabus points. E.g., Skaggs, 198 W. Va. at 78, 479 S.E.2d at 588 (addressing in a footnote the propriety of a "business judgment" instruction, after this Court decided that a new trial was required on other grounds). In this case, the final charge incorporated a lengthy passage from Soles Electric Company's proposed instructions, which paraphrased the relevant portion of the Skaggs opinion regarding the business judgment rule. In contrast, and as explained above, the Circuit Court declined to include within the charge certain language proffered by Mr. Fravel and Mr. Wyckoff, which likewise was based on statements contained in Skaggs and other decisions of this Court. (See supra p. 5-7.)

The Circuit Court based its decision to exclude the proffered quotations of Mr. Fravel and Mr. Wyckoff from Skaggs and other decisions on the fact that such language does not appear in a syllabus point. (See supra p. 6.) Thus, as an initial matter, the use of dicta from Soles Electric Company's proposed instructions and the refusal to incorporate similar statements from the instructions proposed by Mr. Fravel and Mr. Wyckoff created an unfair advantage for Soles.

The Circuit Court's practice of pasting together the plaintiff's proposed instructions and the defendant's proposed instructions likely enhanced the employer's advantage. In discrimination cases, the instructions regarding liability should be incorporated into a single statement of the law, balancing the "meaningful and lucid" instructions offered by the plaintiff against those offered by the defendant within the same portion of the charge. By giving what essentially amounted to a "double charge," with the entire body of the instructions proposed by Mr. Fravel and Mr. Wyckoff followed by the entire body of Soles Electric Company's proposed

instructions, the jury did not have the benefit of a unitary, comprehensive instruction regarding the critical issue of liability.

Finally, the charge contained a statement that essentially placed a “double burden” on Mr. Fravel and Mr. Wyckoff. In Matheny v. Fairmont General Hospital, 212 W. Va. 740, 742, 575 S.E.2d 350, 352 (2002), this Court held at Syllabus Point 5 that “when the jury charge in a negligence action includes an instruction stating the plaintiff’s burden of proof, it is reversible error for the court to also include in the charge an instruction informing the jury of a presumption that the defendant has acted in accordance with the appropriate standard of care or duty.”

This principle should be applied with equal force in employment discrimination cases, especially in light of the Supreme Court’s observations in Skaggs regarding the importance of jury charges that are meaningful and lucid, but that do not give either side an unintended advantage. Based on the fluid, fact-intensive nature of employment discrimination cases, an instruction creating the kind of “double burden” that the Supreme Court prohibited in the Matheny decision could come in many forms.

Here, the final charge contained language that amounted to the creation of a presumption that the decision of the defendant to lay off (and never recall) Mr. Fravel and Mr. Wyckoff was legal and valid. Specifically, the charge warned the jury that “whether the defendant’s decisions seem fair or wise to you is not a basis upon which you may rely in finding that the defendant unlawfully discriminated against the plaintiffs.” Contra Skaggs, 198 W. Va. at 74, 479 S.E.2d at 584 (recognizing that proof the employer acted “incorrectly or foolishly . . . would clearly be relevant in proving pretext”).

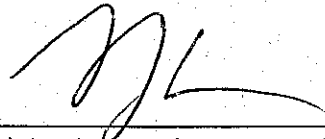
Such a statement obscures to the point of irrelevance proper statements from the portion of the charge offered by Mr. Fravel and Mr. Wyckoff regarding the fact that a finding of discrimination may be based upon the elimination of legitimate explanations for the decision, and regarding the fact that pretext may be found based upon the fact that the reasons offered by Soles Electric Company for its conduct are not credible. A vague-but-thin line exists between explanations that seem unfair or unwise and explanations that are not believable. Indeed, the fact that a decision strikes the jury as unsound or nonsensical rightly should be considered in its assessment as to whether the proffered explanation is worthy of credence.

Put simply, the giving of an instruction to the jury that “whether the defendant’s decisions seem fair or wise is not a basis upon which [it] may rely” in determining whether discrimination occurred is incorrect – and it is no different than giving to the jury in a negligence case an instruction that it should presume that the defendant acted prudently and properly. If anything, the instruction given in this case goes a step farther by telling the jury that certain evidence that could lead to a finding of ultimate liability should not be considered at all. The end result, if this outcome is permitted to stand, is that employees must prove discrimination without having at their disposal the ability to persuade the jury that evidence of unfair or unwise decision-making can (and should) be considered in assessing whether the decisions seem unfair or unwise because they are a pretext for discrimination.

V.
CONCLUSION

For the reasons set forth above, petitioners Wayman R. Fravel and W. Keith Wyckoff request that this Court reverse the judgment entered by the Circuit Court of Marion County and remand this action for a new trial.

Dated the 13th day of December, 2004.



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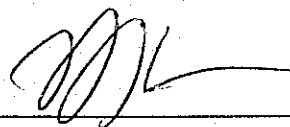
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2004, I served two copies of the foregoing "Appellants' Brief" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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