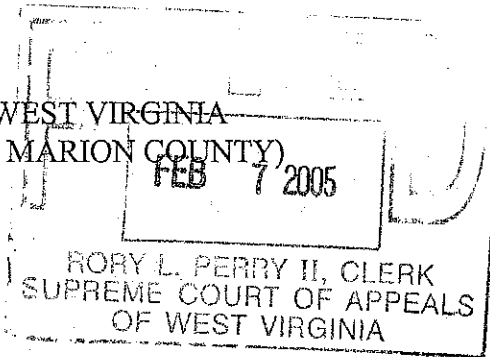


THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
(ON APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY)



WAYMAN R. FRAVEL, and  
W. KEITH WYCKOFF,

Appellants,

v.

SOLES ELECTRIC COMPANY, INC.,

Appellee.

APPEAL NO. 040890

32164

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APPELLANTS' REPLY BRIEF

The appellants, Wayman R. Fravel and W. Keith Wyckoff, submit this reply memorandum in support of their appeal of the Circuit Court's judgment order in this case. For the reasons set forth below and in the appellants' prior brief, errors regarding the jury instructions necessitate a new trial. Also, the workers' compensation discrimination claim of appellant Keith Wyckoff should be reinstated, and a trial should be permitted to proceed on this claim.

**I.**  
**ARGUMENT**

A. Mr. Wyckoff's Claim For Workers' Compensation Discrimination Should Be Reinstated.

The arguments of Soles regarding the dismissal of Mr. Wyckoff's workers' compensation claim are rebutted below.

1. Passage Of Time Should Not Be An Absolute Bar To A Claim For Workers' Compensation Discrimination.

As to the impropriety of summary judgment based solely on the passage of time between injury and layoff, Soles either does not comprehend Mr. Wyckoff's position, or it has chosen to feign misunderstanding. Regardless, Mr. Wyckoff does not contend that every employee who ever has suffered a compensable injury automatically should be entitled to a jury trial if/when the employment relationship terminates. In fact, Mr. Wyckoff agrees with Justice Maynard's dissenting opinion in Nestor; proximity in time between the filing of the claim and the termination is and should be merely a factor to be considered in cases of this nature.

In this same vein, mere passage of time should not automatically foreclose a finding that the termination decision was motivated by the filing of a workers' compensation claim. All relevant factors and circumstances should be fairly considered, in every case, in an effort to determine whether the decision was influenced by illegal factors.

Here, consideration of all relevant facts and circumstances should result in a finding that summary judgment was improvidently granted. It is undisputed that Mr. Wyckoff was one of two full-time welders employed by Soles, and that Soles did not have a business reason to reduce its welding capacity from two full-time employees to one until three years after Mr. Wyckoff missed

several weeks of work and incurred significant expense in connection with the surgical repair of a work-related hernia. It is also undisputed that Soles uses no objective procedure for determining, when there is a perceived surplus of employees at a given position, who should stay and who should go. Instead, Mr. Dallas Tucker makes an executive decision as to who will be laid off, leaving no paper trail or other basis to ascertain in hindsight the factors that he utilized in reaching his decision to send a worker into the ranks of the unemployed.

Keeping in mind that all facts and inferences should be construed in the light most favorable to the non-moving party, e.g., Casto v. Dupuy, 204 W. Va. 619, 624, 515 S.E.2d 364, 369 (1999),<sup>1</sup> these facts permit an inference that Soles kept Mr. Wyckoff for three years after his workers' compensation claim because it needed two full-time welders and that, as soon as Soles needed to reduce to one full-time welder, Mr. Wyckoff's prior injury was a motivating factor in the decision: (1) to select Mr. Wyckoff for layoff; (2) to fail to consider him for any other position; (2) to fail to offer him a recall for other positions even though he has the qualifications and experience for positions that were filled after his layoff; and (4) to continue to hide behind the notion that the layoff of Mr. Wyckoff resulted from a poor business climate, citing "the same cyclical highs and lows in [Soles'] business conditions as have been experienced in the coal industry," (Soles' Brief at 1), even as the coal industry in West Virginia experiences one of the largest booms in its history.

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<sup>1</sup> This principle takes on even greater importance in employment discrimination cases, where getting at the truth often requires an advanced degree in mind-reading. As this Court has explained, "[C]ourts should be cautious in granting summary judgment in employment discrimination cases," Strawderman v. Creative Label Co., Inc., 203 W. Va. 428, 430, 508 S.E.2d 365, 367 (1998), since such actions involve resolution of motive and intent, Hanlon v. Chambers, 195 W. Va. 99, 105, 464 S.E.2d 741, 747 (1995).

As explained in the appellants' initial brief, a rule of law preventing the pursuit of a claim for workers' compensation discrimination based solely on the amount of time that has elapsed between the injury and the adverse employment action would endorse, if not encourage, the layoff and/or termination of employees on some date certain in the future following a work-related injury. The real question in cases of this nature should be whether an illegal factor was considered, regardless of timing. Because discrimination is an element of the mind, little direct evidence of discriminatory motives ever will be available. E.g., Waddell v. John Q. Hammons Hotel, Inc., 212 W. Va. 402, 405, 572 S.E.2d 925, 928 (2002). As this Court has recognized, no modern employer ever will admit to being motivated by illegal considerations. Stone v. St. Joseph's Hosp. of Parkersburg, 208 W. Va. 91, 108 n.24, 538 S.E.2d 389, 406 n.24 (2000) ("Gone are the days (if, indeed, they ever existed) when an employer would admit to firing an employee because she is a woman, over forty years of age, disabled or a member of a certain race or religion.") (quoting Skaggs v. Elk Run Coal Co., 198 W. Va. 71, 79 n.21, 479 S.E.2d 561, 589 n.21 (1996)).

In Mr. Wyckoff's case, the facts support an inference that Soles kept him employed until it no longer had a need for two full-time welders and that, once the need evaporated, Soles selected him for layoff (and opted for more than four years not to call him back) because of his workers' compensation claim. The question of whether Soles' need for two full-time welders disappeared three days, three months, or three years after the filing of the workers' compensation claim should not matter, in light of the other facts and circumstances that cast serious doubt on the credibility of Soles' apparent decision that Mr. Wyckoff was not fit to remain as a welder – or to be recalled for any other position as Soles' business, along with the coal industry, improved.

2. Passage Of Time Is The Key Factor On Which The Circuit Court Relied.

Soles also attempts to dilute the fact that the Circuit Court focused the entry of summary judgment on the passage of time between the filing of the workers' compensation claim and the layoff decision. (Soles' Brief at 8-9.) Contrary to Soles' representations, it is beyond dispute that the key factor in the Circuit Court's decision to grant summary judgment was the amount of time that passed between injury and layoff. (See Opinion Order at 8 (¶ 10).)

Indeed, the same circumstantial evidence that permitted Mr. Wyckoff's age discrimination claim to go to the jury is relevant to his claim for workers' compensation discrimination. For example, the evidence submitted by Soles in support of its motion for summary judgment indicated that the loss of the contracts that supposedly triggered the layoff of Mr. Wyckoff actually occurred after his departure. (Opinion Order at 3-4 (¶6); 7 (¶8).) The Circuit Court relied on this inconsistency in denying the motion for summary judgment as to the age discrimination claim; this inconsistency likewise was (or should have been) a factor considered as to the claim for workers' compensation discrimination.<sup>2</sup> The Circuit Court, however, concluded that too much time had passed to permit an inference that the decision was motivated in any way by the workers' compensation claim.

3. Mr. Wyckoff's Subjective Beliefs Are Irrelevant.

In an apparent effort to obscure the present analysis, Soles points to isolated quotes from Mr. Wyckoff's deposition in this matter regarding his own subjective beliefs regarding the basis

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<sup>2</sup> Moreover, if Soles disagreed with the manner in which the issue on this point was formulated, Soles could have – and should have – articulated its position in response to the petition for appeal. Soles opted instead to file no response at all to the petition.

for the decision to lay him off. (Soles' Brief at 9.) For three separate reasons, this argument should be disregarded.

First, the portions of the transcript of the deposition of Mr. Wyckoff are not part of the record. Although Soles attached pages from his deposition transcript to its brief, the excerpts were withdrawn after Soles learned that its brief plus attachments exceeded fifty pages.<sup>3</sup>

Second, the Circuit Court did not cite this testimony as a basis for its decision to grant summary judgment. In fact, the Order granting summary judgment does not mention this testimony in any way.

Third, Soles unfairly has taken the testimony of Mr. Wyckoff out of context, ignoring the following exchange between Mr. Wyckoff and his counsel:

Q. You're not lawyer; right?

A. No, I'm not.

Q. You don't have any training in the nuances of proving discrimination claims, do you?

A. No, I don't.

Q. Who are you relying upon to put together the evidence and present the evidence to the judge and the jury regarding your discrimination claims?

A. You, Michael Florio.

(Wyckoff Dep. at 67 (lines 10-18).)<sup>4</sup>

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<sup>3</sup> Although this appeal is being pursued without a full transcript of the trial testimony, Soles has not taken issue with any of the factual representations made by the appellants either in their petition for appeal, or in their initial brief.

<sup>4</sup> Copies of the relevant pages of Mr. Wyckoff's deposition transcript are attached as "Exhibit A."

4. Soles' Focus On Other Workers' Compensation Claims Is Misleading.

At page 9 of its brief, Soles points to the fact that nearly 40 percent of its employees have pursued some sort of workers' compensation claim. The distinguishing factor in this case, however, is not the fact that Mr. Wyckoff filed a workers' compensation claim – but that Mr. Wyckoff had an expensive claim.<sup>5</sup> The fact that his claim also was based on an injury (a hernia) that some managers might be inclined to brush off as non-work-related also could have been a factor in the superficially inexplicable decision to select Mr. Wyckoff for layoff from his welder position, to fail to consider him for other jobs, and to fail for more than four years to call him back to work.

B. The Jury Instructions Were Erroneously Given.

Mr. Fravel and Mr. Wyckoff believe, as explained in their initial brief, that the ultimate charge to the jury created an unfair advantage to Soles. Without rehashing the arguments previously raised, several points need to be made in response to Soles' written submission.

As an initial matter, the issues raised regarding the jury instructions in this case flow from this Court's admonition that "the jury's role is the recreation of what happened," and that the trial court "should strive to charge [the jury] in ways that are meaningful and lucid." Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 77, 479 S.E.2d 561, 587 (1996). Moreover, this Court has advised trial courts "to avoid repetitious statements of the law that could create an unintended advantage for one side or the other." Id. at 78, 479 S.E.2d at 588.

Here, multiple problems with the jury instructions combined to create an unfair advantage for the employer.

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<sup>5</sup> The Policy Claim Loss report attached as "Exhibit A" to the appellants' initial brief demonstrates the relative expenditures associated with the claims of Mr. Wyckoff and Mr. Fravel, and other employees.

First, instructions offered by the appellants were rejected simply because the language did not come from a Syllabus Point of a decision of this Court, even though similar dicta tendered by Soles was included.<sup>6</sup>

Second, the specific formulation of the business judgment rule used by the Circuit Court must be weighed against the concept of pretext. By instructing the jury not to consider at all the question whether the decisions of Soles seem fair or wise, the Circuit Court risked confusing the jury regarding the inherently amorphous task of peering behind the given reason for a decision in search of whether it was cover for illegal motives. The quest for proof of pretext necessarily compels the jury to ask itself whether the decision seems fair or wise, since proof that the employer acted “incorrectly or foolishly” is “clearly . . . relevant” to the question of whether the employer’s stated reason for the adverse decision is a smokescreen for discrimination. Skaggs, 198 W. Va. 74, 479 S.E.2d 584.<sup>7</sup>

Third, the Circuit Court’s method of instructing the jury invites further confusion, especially in complex cases requiring the jury to ascertain the subconscious motivations of

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<sup>6</sup> At page 13 of its brief, Soles argues that refusal of language regarding the possible unconscious consideration of illegal factors was justified because there was no evidence that illegal factors were unconsciously considered by Soles management. However, the question of whether an adverse employment decision was motivated by a protected characteristic never is proven via tangible proof of unconscious thought. Instead, evidence regarding, for example, the disparate treatment of similarly-situated individuals, or implausible explanations offered by management, or decisions that seem imprudent or foolish help to shed light on whether the decision-maker allowed illegal factors to creep subconsciously into the relevant thought processes.

<sup>7</sup> Soles has not specifically addressed the argument that the business judgment rule as articulated in the instructions places a “double burden” on the plaintiff in employment cases by creating a threshold presumption that the employer acted properly.

managers.<sup>8</sup> Cases of this nature require more careful construction of the charge, especially where the instructions are read to the jury once, with nothing in writing to which the jurors may refer while deliberating.

Here, the jurors initially heard an instruction tendered by the plaintiff regarding the concept of pretext (without the benefit of the three specific passages omitted by the Circuit Court on the basis that the language did not come from a Syllabus Point of a past decision of this Court). Then, much later in the reading of the instructions, the jurors received an express direction that they shall not consider whether the decision of the employer was fair or wise. Not long thereafter, the reading of the instructions concluded, and the jurors at no time had the benefit of a comprehensive statement regarding the evidence that should be considered – and that should be ignored – when asking itself whether the employer’s stated reason for the layoff decisions should be accepted at face value, or deemed pretextual.

Under the instructions given in this case, and considering the manner in which the charge was constructed, it would have been very easy for the jury to conclude that the decisions made by Soles should not under any circumstances be second guessed. The very purpose of the pretext analysis, however, is to subject the stated reasons to such scrutiny in order to determine whether the employer’s reasoning is credible – or whether it is cover for illegal discrimination. The appellants therefore ask that this Court find that the Circuit Court abused its discretion in the

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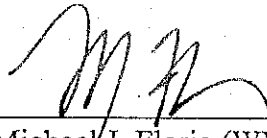
<sup>8</sup> Soles does not attempt to defend the practice of giving all of the instructions tendered by the plaintiff on liability, followed by all of the instructions tendered by the plaintiff on damages, followed by all of the instructions tendered by the defendant on liability, followed by all of the instructions tendered by the defendant on damages. Instead, Soles retreats to general principles regarding the trial court’s discretion in formulating the final charge. (Soles’ Brief at 15.)

selection of the content of the instructions, and through the specific arrangement in which the instructions were given.

**II.**  
**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 4<sup>th</sup> day of February, 2005.

  
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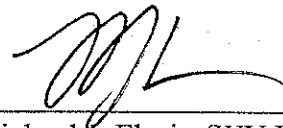
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CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> day of February, 2005, I served two copies of the foregoing "Appellants' Reply 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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