

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JUSTIN D. BAILEY,

Appellant,

v.

MAYFLOWER VEHICLE SYSTEMS, INC.,  
a corporation, d/b/a South Charleston  
Stamping and Manufacturing,

Appellee,

BRIEF ON BEHALF OF

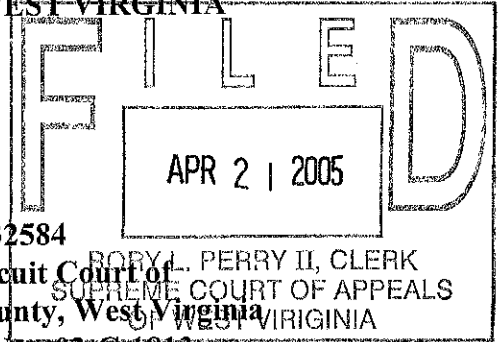
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Appeal No.: 32584

From the Circuit Court of  
Kanawha County, West Virginia

Civil Action No.: 02-C-1813

## **I. KIND OF PROCEEDING AND LOWER COURT RULING**

The appellant, Justin D. Bailey, filed a civil action in the Circuit Court of Kanawha County, West Virginia, on July 10, 2002, against the appellee, Mayflower Vehicles Systems, Inc., a corporation, d/b/a South Charleston Stamping and Manufacturing. The causes of action stated in the complaint arise from the appellee's termination of the appellant's employment and the appellee's refusal to reinstate the appellant to his employment. The unlawfulness of the appellant's termination and the failure to reinstate the appellant was based upon discriminatory practices prohibited by Sections 23-5A-1 and 23-5A-3 of the West Virginia Workers' Compensation Statute.

A jury trial was held before the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, on November 3, 2003 and November 4, 2003. At the conclusion of the plaintiff/appellant's case, the defendant/appellee filed motions under Rule 50 of the West Virginia Rules of Civil Procedure for judgment as a matter of law. Following oral argument, the Court granted the defendant/appellee's motions for judgment as a matter of law. The final order was entered by the Court on June 24, 2004. This matter is brought before this Honorable Court upon the petition for appeal filed by the plaintiff below, Justin D. Bailey.

## **II. STATEMENT OF FACTS**

The appellant, Justin D. Bailey, was employed by South Charleston Stamping and Manufacturing as a manufacturing associate and team leader beginning in August of 1991. (Tr., Vol.1, pp. 69-72) The appellant first injured his neck, right shoulder and arm while working at South Charleston Stamping and Manufacturing in June of 1994. (Tr. Vol. 1, p. 76) As a result of this

injury, the appellant filed a workers' compensation claim for payment of his medical bills. (Tr. Vol. 1, p. 79) Due to this injury, the appellant was initially taken off work for four days by the emergency room doctor and then returned back to work. (Tr. Vol. 1, p. 80)

On June 6, 1995, the appellant re-injured his neck, right shoulder and arm while working for the appellee. (Tr. Vol. 1, pp. 81-86) As a result of this injury, the appellant filed a second claim with Workers' Compensation. (Plaintiff's Exhibit No. 2) Due to this injury, the appellant was initially off work approximately nine days. (Tr. Vol. 1, p. 87)

In February of 1996, the appellant returned to his treating physician, Dr. Thomas Dannals, due to stiffness in his neck and numbness in his arm. Dr. Dannals took the appellant off work at that time and prescribed muscle relaxers, pain medication and physical therapy. (Tr. Vol. 1, pp. 93-94)

On March 29, 1996, the appellant completed a claim reopening application requesting that his workers' compensation claim be reopened for the periods of June 6, 1995 to June 14, 1995 and from February 27, 1996 to the present. The attending physician's section of the claim reopening application was completed by Dr. Thomas Dannals on April 1, 1996. Dr. Dannals listed present diagnoses of cervical strain with right arm pain and right CTS. Dr. Dannals reported the appellant's present complaints of right shoulder and right upper extremity pain, stiffness and right hand numbness radiating up to elbow. (Plaintiff's Exhibit No.3) After filing the reopening application with Workers' Compensation, the appellant began receiving benefits every two weeks beginning in May of 1996. (Tr. Vol. 1, pp. 98-100)

In September of 1996, the appellant attempted to get a prescription for Zantac filled at which time the pharmacy told him that his prescription card was inactive. (Tr. Vol. 1, p. 102) The next day he received a letter from the Assistant Human Resource Manager for the appellee stating that his

employment with the appellee was being terminated effective September 5, 1996 because his absence had exceeded the maximum allowable by plant policy. (Plaintiff's Exhibit No. 4) After receiving the letter, the appellant called the plant and talked to Bob Vickers to whom he explained that he had given them information that he was off on comp due to his neck, shoulder and arm. At that time, Mr. Vickers made a comment that a "tummy ache" is not a plant related illness. (Tr. Vol. 1, p. 103) On September 23, 1996, a letter was mailed by the appellee's Personnel Coordinator to the appellant notifying him that his employment had been reinstated as of September 5, 1996. (Plaintiff's Exhibit No. 5)

In December of 1996, the appellant was seen by Dr. Kroening for an evaluation pursuant to the request of the appellant's workers' compensation claims representative. (Tr. Vol. 1, p. 106) After the examination by Dr. Kroening, the appellant received a letter from his claims representative dated January 17, 1997 indicating that his claim had been reviewed and that it was felt he needed further services which would help him return to employment. The appellant was further advised that he had been referred to D. R. S. and that a rehabilitation counselor would contact him to schedule an appointment. (Plaintiff's Exhibit No. 6) After seeing Dr. Kroening, the appellant also received a letter from Workers' Compensation granting him a permanent partial disability award. The appellant continued to receive benefits from Workers' Compensation up to April of 1997. (Tr. Vol. 1, p. 107)

On February 19, 1997, a letter was sent to the appellant by the appellee's Assistant Human Resource Manager indicating that they had received information from Workers' Compensation from Dr. Kroening dated 12-11-96 which indicated that he had reached maximum medical improvement from his injury and that his TTD has been suspended. The letter further requested the appellant to report to the plant by March 5, 1997, with a list of restrictions, if any, and a return to work date.

(Plaintiff's Exhibit No. 7) After receiving the letter, the appellant called the plant and spoke with the Assistant Human Resource Manager at which time he told her that he didn't have a return date from his doctor and that he didn't have any list of restrictions because the doctor hadn't yet released him to come back to work. (Tr. Vol. 1, p. 109)

After receiving the letter from the appellee in February of 1997, the appellant continued to receive treatment from Dr. Dannals. In addition, the appellant was referred to Dr. Ignatiadis regarding the possibility of surgery. Dr. Ignatiadis wanted a further MRI to see what might be the matter with the appellant's shoulder. At that time, Dr. Ignatiadis also talked about work hardening as an option before surgery. (Tr. Vol. 1, pp. 109-110)

On June 10, 1997, the appellant completed another workers' compensation claim reopening application requesting additional temporary total disability benefits for the periods of December 16, 1996 to March 23, 1997 and March 24, 1997 to September 10, 1997. The physician's portion of the form was again completed by Dr. Thomas Dannals on June 10, 1997. Dr. Dannals listed present diagnoses of impingement syndrome of the right shoulder, C6/7 radiculopathy, and carpal tunnel syndrome. Dr. Dannals noted that the appellant was significantly restricted in his functional abilities and that the period of temporary total disability for the appellant was February 28, 1996 to September 10, 1997. (Plaintiff's Exhibit No. 8)

In November of 1997, the appellant began work hardening at Associated Physical Therapy. He attended work hardening for a period of three or four days but then stopped because Workers' Compensation denied payment for the work hardening program, and the appellant could not afford to pay for it on his own. Thereafter, the physical therapist gave the appellant a pump traction

machine, a therapy ball, and a styrofoam roll with instructions for exercises that the appellant could do at home. (Tr. Vol. 1, pp. 115-117)

On May 26, 1998, the appellant received a certified letter dated May 22, 1998 from Tonya Rae Trembly, Benefits Coordinator for the appellee. The letter noted that the appellant's claim was closed on a temporary total disability basis on February 10, 1997 based upon the December 11, 1996 evaluation of Dr. John Kroening. Ms. Trembly requested the appellant to contact her to discuss his employment with South Charleston Stamping and Manufacturing and further stated "if we do not hear from you within the next ten days, we will have no alternative but to assume you have voluntarily resigned your employment." (Plaintiff's Exhibit No. 10) After receiving the letter, the appellant counted ten days beginning with the date he received the letter on May 26, 1998. The appellant then attempted to contact his attorney but was unable to do so because the attorney was on vacation that week. On the morning of June 3, 1998, the appellant talked to his attorney and then called the appellee's plant. At that time, the appellant left voice mail messages for Janna Dawson and Julian O'Dell. (Tr. Vol. 1, pp. 128-130)

After calling the plant, the appellant received a letter in his mail from Julian O'Dell, the Human Resource Manager for the appellee dated June 2, 1998 stating that by his failure to contact Tonya Trembly by June 1, 1998 that the appellant had voluntarily quit his job and was terminated as of June 1, 1998. (Plaintiff's Exhibit No.12)

After receiving the letter, the appellant called the plant again at which time he spoke with Janna Dawson and Julian O'Dell. At that time, he explained that it had not been ten days since he received the May 22, 1998 letter and that he was calling them to update them. The appellant then

asked whether he had been fired and Julian O'Dell said that yes he had been terminated. (Tr. Vol. 1, pp. 131-133)

At the time the appellant received the letter from the appellee on May 26, 1998, he was still being treated by Dr. Dannals and had not been released to return back to work. At that time, the appellant was also continuing to do work conditioning at home. Although the appellant was able to do more things, he was still hurting and having pain. (Tr. Vol. 1, pp. 133-134)

On October 6, 1998, the appellant was released by Dr. Dannals to return back to work. On that day, the appellant called the appellee's Human Resource Manager, Julian O'Dell, and asked him about returning to work. Mr. O'Dell said that he wasn't familiar with what the appellant was talking to him about, and the appellant told him that he had been off work injured and was trying to see if he could come back to work. Mr. O'Dell asked the appellant if the injury had been comp related and when the appellant told him yes, Mr. O'Dell said that he would have to refer it to the person who takes care of comp and get back with the appellant. (Tr. Vol. 1, pp. 135-138)

The appellant attempted to contact Mr. O'Dell again on October 7, October 8, October 12, and October 13, 1998 and left messages on Mr. O'Dell's voice mail. On October 16, 1998, the appellant called Mr. O'Dell again and was finally able to talk to him. At that time, Mr. O'Dell said that he still did not have a decision for the appellant but that he had talked to his people and they were supposed to get in touch with them at Workers' Compensation to find out about his workers' compensation claim. (Tr. Vol. 1, pp. 138-142)

The appellant did not hear anything back from Mr. O'Dell between October 16 and October 26, 1998 so he called on October 26 and left a message on his voice mail. On October 27, 1998, the

appellant called and talked to Tonya Trembly. At that time, Ms. Trembly told the appellant that they had a form that they needed the doctor to fill out about his release. (Tr. Vol. 1, pp. 142-143)

On October 29, 1998, Ms. Trembly mailed a physician's report form to the appellant and requested the appellant to have his treating physician to complete the form and return it to her. (Plaintiff's Exhibit No. 13) After receiving the letter, the appellant took the physician's report form to his doctor's office to be filled out. After receiving the report back which was signed by Dr. Dannals on November 8, 1998, the appellant mailed the form to the appellee's plant. (Plaintiff's Exhibit No. 15)

The appellant called the plant again on November 27, 1998 at which time there wasn't anybody working. The appellant then called again on November 30, 1998 and left messages for Tonya Trembly and Julian O'Dell. When the appellant talked to Tonya Trembly, she told him that the form was incomplete and that there were some questions that the doctor had not answered. At that time, the appellant asked if he could have the doctor to fax answers to the questions that were not answered on the form. After the appellant contacted his doctor's office, a handwritten note dated November 30, 1998 was faxed to the plant. This note stated that the appellant could work without restrictions, has had physical therapy and rest for carpal tunnel syndrome and C6-C7 root dysfunction related to accident 6/6/95. (Plaintiff's Exhibit No. 16)

On December 4, 1998 the appellant received a telephone call from Mr. O'Dell at which time Mr. O'Dell told him that they had a position to offer him but that it wasn't the team leader position he was doing when he was hurt. At that time, Mr. O'Dell told the appellant that he wanted him to take a functional capacity test and that he wanted him to get in touch with Jamie at Benefit Assistance to try to straighten out some bills that were charged to insurance and they believed should

have been paid by Workers' Comp. At no time between October 6, 1998 and December 4, 1998 did Mr. O'Dell or Ms. Trembly mention to the appellant that he would have to have a functional capacity evaluation in order to be able to return to work. The appellant then called Mr. O'Dell back on December 4, 1998 and told him that he would accept the position at the plant that they were offering, that he would do the functional capacity test, and that he would try again to deal with the bills that they believed were workers' comp. (Tr. Vol. 1, pp. 151-155)

On December 17, 1998, a letter was mailed to the appellant from Mr. O'Dell. The letter stated that they did not have a team leader position available but that they may, pending the resolution of identified issues, be able to return the appellant to a Manufacturing Associate position. The letter further stated that they had scheduled a functional capacity evaluation at The Workability Center in Ashland, Kentucky on December 22, 1998. (Plaintiff's Exhibit No. 17)

On December 30, 1998, the appellant underwent a functional capacity evaluation at The Workability Center. (Plaintiff's Exhibit No. 18) Based upon the evaluation, the examiner stated that the appellant qualifies for the very heavy work category within the restricted work plane and the heavy work category within the unrestricted work planes. After undergoing the functional capacity evaluation, the appellant called Tonya Trembly on January 11, 1999 at which time she said that they had not received anything back on the functional capacity test. The appellant called Ms. Trembly again on January 22, 1999 and left a message on Ms. Trembly's voice mail. The appellant then called again on February 3, 1999 at which time he spoke to Ms. Trembly and she told him that they still hadn't received the report from the functional capacity exam. At that time, the appellant asked Ms. Trembly if they were going to need something else after they received the results of the functional capacity evaluation. Ms. Trembly told him that he would have to talk to Mr. O'Dell to

answer his question if he was going to get the job they offered him if the evaluation comes back satisfactory. The appellant then talked to Mr. O'Dell who told him that they'd have to wait until they got the report. (Tr. Vol. 1, pp. 161-163)

After talking to Ms. Trembly and Mr. O'Dell on February 3, 1999, the appellant called The Workability Center and was told that they had sent the plant a copy of the functional capacity evaluation. The appellant asked them if he could come down there and pick up a copy of the evaluation and take it to them and they responded that he could. The appellant then went to The Workability Center and got a copy of the report. He then called Ms. Trembly and asked her if she needed him to bring the report to her, and she said that it wouldn't do any good because Diane McCoy was the person who was going to look at the evaluation and evaluate the form. The appellant then called Ms. McCoy who advised him that she had received their copy of the evaluation. (Tr. Vol. 1, pp 159-160, 163-164)

The appellant called the plant again on February 9, 1999 and left a message for Ms. Trembly. He did not receive a call back from her and called again on February 22, 1999. At that time he spoke with Ms. Trembly who told him that they had received the report but that she had not had a chance to talk to Mr. O'Dell yet. The appellant asked to speak to Mr. O'Dell and was transferred to his voice mail at which time the appellant left a message for Mr. O'Dell to call him. The appellant then called the plant again on March 9, 1999 at which time Mr. O'Dell told the appellant that Ms. Trembly wasn't there and that he needed to talk to her to find out where they were on whatever decision they were going to make. Mr. O'Dell told the appellant that he needed to find out if he had a release from comp and the appellant told him that he had had a release since October 6. The appellant then called back for Ms. Trembly on March 10, 1999 at which time he left a message on

her voice mail and requested that she be paged. Later that day, Ms. Trembly called the appellant back and said that she didn't have any more information from Mr. O'Dell who wasn't there and that she needed to get some information from the attorneys. The appellant called Ms. Trembly again on March 11, 1999 at which time Ms. Trembly said she still didn't have the information from the attorneys and that she would have Mr. O'Dell contact him when they had gotten whatever they needed to do out of the way. (Tr. Vol. 1, pp 164-168)

On May 10, 1999, a letter was sent from Julian O'Dell, HR Manager of the appellee to the appellant. In this letter, Mr. O'Dell indicated that the appellant had completed a FCE at The Workability Center in December of 1998 and that the results of the FCE had been reviewed to determine if the appellant was capable of doing the job of a Manufacturing Associate. The letter also noted that the appellant had been asked to contact Jamie Morrison of Benefit Assistance regarding medical bills paid by Benefit Assistance that should have been billed to and paid by West Virginia Workers' Compensation. The letter requested the appellant to contact Mr. O'Dell to schedule an appointment to discuss the issues. The letter further stated "at this point in time, you are not employed by SCSM nor are we promising that we will return you to work here." (Plaintiff's Exhibit No. 19)

After receiving this letter, the appellant called Mr. O'Dell on May 14, 1999. At that time the appellant left a message on Mr. O'Dell's voice mail asking him to call him back regarding the letter. The appellant called three times again on May 17, 1999 and left messages with Mr. O'Dell. On May 18, 1999, the appellant called Mr. O'Dell two times and left voice mail messages. The appellant then called on May 19, 1999 and again left Mr. O'Dell a message on the voice mail. (Tr. Vol. 1, pp. 171-174)

On June 1, 1999, the appellant mailed a certified letter to Mr. O'Dell responding to Mr. O'Dell's letter of May 14, 1999. In this letter, the appellant stated the number of times that he had called and left messages including his telephone number on Mr. O'Dell's voice mail. The appellant indicated in his letter that he had passed the FCE at The Workability Center and had done everything that Mr. O'Dell and Ms. Trembly had asked him to do. The appellant indicated that he could not afford these long distance calls and requested Mr. O'Dell to contact him to schedule the appointment for him to meet with Mr. O'Dell at SCSM. (Plaintiff's Exhibit No. 20)

### **III. ASSIGNMENTS OF ERROR**

A. The Circuit Court erred in granting the defendant's Motion for Judgment as a matter of law regarding plaintiff's claim under West Virginia Code Section 23-5A-1.

B. The Circuit Court erred in granting the defendant's Motion for Judgment as a matter of law regarding plaintiff's claim under West Virginia Code Section 23-5A-3(a).

C. The Circuit Court erred in granting the defendant's Motion for Judgment as a matter of law regarding plaintiff's claim under West Virginia Code Section 23-5A-3(b).

### **IV. POINTS AND AUTHORITIES RELIED UPON**

#### **Statutes**

West Virginia Code Section 23-5A-1.

West Virginia Code Section 23-5A-3(a).

West Virginia Code Section 23-5A-3(b).

## Cases

Blake v. John Skidmore Truck Stop, Inc., 201 W.Va. 126, 493 S.E.2d 887 (1997).

Gardner v. CSX Transp., Inc., 201 W.Va. 490, 498 S.E.2d 473 (1997)

Jones v. Patterson Contracting, Inc. 206 W.Va. 399, 524 S.E.2d 915 (1999).

Kessel v. Leavitt, 204 W.Va. 95, 511 S.E.2d 720, (1998) certiorari denied 119 S.Ct. 1035, 525 U.S. 1142, 143 L.Ed.2d 43.

Kiser v Caudill, 210 W.Va. 191, 557 S.E.2d 245 (2001).

Louk v. Isuzu Motors, Inc., 198 W.Va. 250, 479 S.E.2d 911 (1996).

McCloud v. Salt Rock Water Public Services Dist., 207 W.Va. 453, 553 S.E.2d 679 (2000).

Powell v. Wyoming Cabelvision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991).

Radec, Inc. v. Mountaineer Coal Development Co., 210 W.Va. 1, 552 S.E.2d 377 (2000), certiorari denied 121 S.Ct. 2550, 533 U.S. 929, 150 L.Ed.2d 717.

Sayre v. Roop, 205 W.Va. 193, 517 S.E.2d 290 (1999).

Stewart v. Johnson, 209 W.Va. 476, 549 S.E.2d 670 (2001).

Wooton v. Roberts, 205 W.Va. 404, 518 S.E.2d 645, (1999), certiorari denied 120 S.Ct. 937, 528 U.S. 1117, 145 L.Ed.2d 815.

## V. DISCUSSION OF LAW

Upon a motion for judgment as a matter of law for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff, and the court must assume as true those facts which the jury may properly find under the evidence. Stewart v. Johnson, 209 W.Va. 476, 549 S.E.2d 670 (2001);

Radec, Inc. v. Mountaineer Coal Development Co., 210 W.Va. 1, 552 S.E.2d 377 (2000), certiorari denied 121 S.Ct.2550, 533 U.S. 929, 150 L.Ed.2d 717; McCloud v. Salt Rock Water Public Services Dist., 207 W.Va. 453, 553 S.E.2d 679 (2000); Jones v. Patterson Contracting, Inc. 206 W.Va. 399, 524 S.E.2d 915 (1999); Wooton v. Roberts, 205 W.Va. 404, 518 S.E.2d 645 (1999) certiorari denied 120 S.Ct. 937, 528 U.S. 1117, 145 L.Ed.2d 815; Kessel v. Leavitt, 204 W.Va. 95, 511 S.E.2d 720 (1998), certiorari denied 119 S.Ct.1035, 525 U.S. 1142, 143 L.Ed.2d 43; Gardner v. CSX Transp., Inc., 201 W.Va. 490, 498 S.E.2d 473 (1997); Blake v. John Skidmore Truck Stop, Inc., 201 W.Va. 126, 493 S.E.2d 887 (1997); Louk v. Isuzu Motors, Inc., 198 W.Va. 250, 479 S.E.2d 911 (1996).

The appellate standard of review for the granting of a motion for judgment as a matter of law is de novo; on appeal, the Supreme Court of Appeals, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of judgment as a matter of law when only one reasonable conclusion as to the verdict can be reached, and if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting judgment as a matter of law will be reserved. Kiser v Caudill, 210 W.Va. 191, 557 S.E.2d 245 (2001).

**A. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING PLAINTIFF'S CLAIM UNDER WEST VIRGINIA CODE SECTION 23-5A-1.**

Article 5A of Chapter 23 of the West Virginia Code provides several provisions regarding discriminatory practices under the West Virginia Workers' Compensation Law. Section 23-5A-1, which was enacted in 1978, provides as follows:

“No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee’s receipt of or attempt to receive benefits under this chapter.”

As set forth above, Section 23-5A-1 is a very broad prohibition of discriminatory practices. Although most frequently considered in employment termination cases, the language is much broader prohibiting discrimination “in any manner” against not only present employees but also former employees.

It is submitted that the circuit court erroneously relied solely upon the case of Powell v. Wyoming Cabelvision, Inc., 184 W.Va. 700, 403 S.E.2d 717 (1991) in granting judgment as a matter of law in regard to the appellant’s claim of discrimination under Section 23-5A-1. The Powell case dealt with a retaliatory discharge case and primarily addressed the issue of sufficient evidence required to establish a nexus between the filing of the workers’ compensation claim and the discharge. In the case at hand, however, the appellant presented evidence that he was discriminated against by his former employer when he sought re-employment after he was released to return to work. In this regard, the appellant testified that when he called the appellee’s Human Resource Manager, Julian O’Dell, on October 6, 1998 after being released by his treating physician, Mr. O’Dell asked the appellant if he had been off due to a workers’ compensation injury and indicated that his request to come back to work would have to be referred to the person who took care of workers’ compensation. (Tr. Vol.1, pp. 137-138) In addition, Mr. O’Dell admitted asking the appellant if he had been off due to a work related injury when the appellant called on October 6, 1998 requesting reinstatement. (Tr. Vol.2, p. 149) During his testimony at trial, Mr. O’Dell further agreed with his previous testimony given at a deposition in March of 2001 at which time he stated

that it did make a difference whether or not an individual's injury was a workers' compensation injury or not in regard to handling a request to return to work. (Tr. Vol.2, pp. 152-153)

During his testimony at trial, Mr. O'Dell admitted further disparate and discriminatory treatment of the appellant's request for reinstatement due to the fact that he had been off as a result of a workers' compensation injury. In this regard, Mr. O'Dell testified that he decided to require the appellant to have a functional capacity evaluation prior to considering him for reinstatement even though he acknowledged that other employees are not required to have a functional capacity evaluation before being hired by the appellee. (Tr. Vol. 2, pp 160-161)

It is, therefore, submitted that there is significant evidence in the record from which the jury could have concluded that the appellee did discriminate against its former employee because of his prior workers' compensation claim at the time he sought reinstatement in October of 1998. Accordingly, the circuit court was clearly wrong in granting judgment as a matter of law and not allowing the jury to consider the evidence regarding the appellant's general claim of discrimination under 23-5A-1.

**B. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING PLAINTIFF'S CLAIM UNDER WEST VIRGINIA CODE SECTION 23-5A-3(a)**

Section 23-5A-3(a) of the West Virginia Code, which was enacted in 1990 provides as follows:

“It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggravation of absence due to the injury with any other absence from work.”

As noted by the Court in the Powell decision, West Virginia Code Section 23-5A-3 was enacted to clarify some of the issues raised under Section 23-5A-1. Powell v. Wyoming Cabelvision, Inc., supra, footnote 10. In this regard, Section 23-5A-3(a) declares termination of an injured employee to be a discriminatory practice under certain specific circumstances. The requirements under subsection (a) are that the injured employee is off work due to a compensable injury and that he or she is receiving or is eligible to receive temporary total disability benefits. The sole exception to a finding of a discriminatory practice under these circumstances is if the employee has committed a separate dischargeable offense other than absence from work. In regard to these requirements, the Circuit Court below specifically found that there was credible testimony that the appellant was an injured employee off work due to a compensable injury. (Tr. Vol. 2, p. 192)

As to the requirement that the injured employee “is receiving or eligible to receive temporary total disability benefits,” the Circuit Court found that the appellant was not receiving temporary total disability benefits at the time of his termination and that there was no evidence that he was eligible to receive temporary total disability benefits. (Tr. Vol. 2, p. 193) In this regard, it is submitted that the Circuit Court has interpreted the statute far too narrowly. As noted by this Court in the case of Sayre v. Roop, 205 W.Va. 193, 517 S.E.2d 290 (1999) (per curiam), the Workers’ Compensation Act generally prohibits the termination of an injured employee while off work for a compensable

injury. Furthermore, the appellant was under active medical treatment for his compensable injury and had not been released by his treating physician to return to work. In this regard, the appellant underwent a further neurosurgical evaluation and had been prescribed work hardening for further treatment. (Tr. Vol. 1, pp.109-110) More importantly, the appellant had been certified by his treating physician, Dr. Dannals, as being temporarily totally disabled due to his compensable injury. (Plaintiff's Exhibit No. 8) Therefore, it is submitted that there was sufficient evidence for the jury to make a factual determination that the appellant was eligible to receive temporary total disability benefits at the time of his discharge was a discriminatory practice.

**C. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S  
MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING PLAINTIFF'S  
CLAIM UNDER WEST VIRGINIA CODE SECTION 23-5A-3(b)**

Section 23-5A-3(b) of the West Virginia Code provides as follows:

“It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee

notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement: Provided, That the employee provides to the employer a current mailing address during this one year period.”

Like Section 23-5A-3(a) discussed above, Section 23-5A-3(b) was added to the West Virginia Workers' Compensation Statute in 1990 for the purpose of defining certain specific acts by employers which constitute discriminatory practices prohibited under the law. This section requires the reinstatement of an employee to his or her former position or to a comparable position. As set forth in the statute, the sole requirements for reinstatement are that the position or comparable position is available and that the employee “is not disabled from performing the duties of such position.”

In the case at hand, the uncontradicted testimony of the appellant established that the position of Manufacturing Associate which the appellant had previously performed was available. (Tr. Vol. 1, p.153) The testimony of the appellant was corroborated by the letter sent by the Human Resource Manager to the appellant on May 10, 1999 confirming that they did not have a team leader position available but that they had the appellant complete a FCE to determine if he was capable of doing the job of a Manufacturing Associate. (Plaintiff's Exhibit No. 19)

As noted above, the second requirement under Section 23-5A-3(b) is that the employee is not disabled from performing the duties of such position. In this regard, the appellant testified that he was released by Dr. Dannals, his treating physician to return to work on October 6, 1998. Pursuant to the further request of the appellee, the appellant also submitted to the appellee a Report of Attending Physician which was completed by Dr. Dannals on November 8, 1998. In that report, Dr. Dannals noted that the appellant was available for regular duty and that he was released to return to

work on October 6, 1998. (Plaintiff's Exhibit No. 15) Upon further request from the appellee, the appellant submitted a supplemental note from Dr. Dannals dated November 30, 1998 which specified that the appellant was released to return to work without restrictions and that the appellant had been treated with physical therapy and rest for carpal tunnel syndrome and C6-C7 root dysfunction related to accident on June 6, 1995. (Plaintiff's Exhibit No. 16)

As previously noted, after receiving the written statement from the appellant's physician which released the appellant to return to regular duty with no restrictions, the appellee also required the appellant to undergo a functional capacity evaluation. The appellee's Human Resource Manager, Mr. O'Dell, admitted that a functional capacity evaluation is not required of other employees. Nevertheless, the appellant went for the functional capacity evaluation at which time he was advised by the examiner that he had done the best of anybody that they had had in there. (Tr. Vol. 1, pp. 162-163) This fact was confirmed by the results of the functional capacity evaluation which indicated that the appellant was capable of performing heavy to very heavy work. (Plaintiff's Exhibit No. 18)

Based upon these facts, it is submitted that the uncontradicted evidence submitted by the appellant in this case establishes that the appellee committed a discriminatory practice when they refused to reinstate the appellant to his former position of Manufacturing Associate. In this regard, the requirements of availability of the position and verification that the appellant was not disabled from performing the duties of such position were clearly fulfilled. In granting the defendant's motion for judgment as a matter of law as to the appellant's claim under West Virginia Code Section 23-5A-3(b), the Circuit Court stated that there was no testimony proffered by the appellant with regards to a carpal tunnel syndrome injury being a compensable injury as a result of his employment with the defendant. The Court further stated that the jury is left to only speculate as to whether or

not the release to go back to work deals with a compensable injury or a noncompensable injury. (Tr. Vol.2, pp. 233-234) In the first place, this is totally contradictory to the specific finding that the Court made in regard to the appellant's claim under Section 23-5A-3(a) that there was credible testimony that the appellant "was an injured employee off work due to a compensable injury." (Tr. Vol. 2, p. 192) Secondly, carpal tunnel syndrome was listed by Dr. Dannals as one of the current conditions directly resulting from the injury covered by the workers' compensation claim on the reopening application which was the basis for the appellant being paid temporary total disability benefits under his workers' compensation claim. (Plaintiff's Exhibit No. 3) Therefore, the evidence clearly establishes that the appellant was off work due to his compensable injury and that he was released to return to work by Dr. Dannals following improvement for treatment of the compensable injury.

Finally, it is submitted that the Circuit Court has erroneously added additional requirements to Section 23-5A-3(b) which are clearly not contained within the language of the statute. As previously cited, the only requirements of this section are that a former position or comparable position are available and that the employee is not disabled from performing the duties of such position. Although the statute acknowledges that a written statement from a physician approving the injured employee's return to employment is prima facie evidence that he is able to perform such duties, there is clearly no mandatory language as imposed by the Circuit Court in this case. In this regard, it is submitted that the functional capacity evaluation completed by the appellant is perhaps the best evidence or proof that the appellant is not disabled from performing the duties of the Manufacturing Associate position at the appellee's plant.

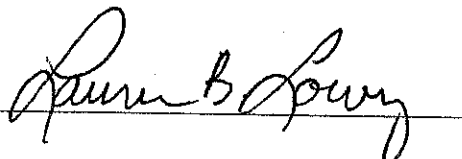
It is submitted that the evidence in this case clearly substantiates that the appellee's failure to reinstate the appellant after his release to return to work was clearly a discriminatory practice under the law. In this regard, it should be noted that there was substantial evidence that the appellee had no intention whatsoever in upholding it's duty to reinstate the appellant. As demonstrated by the appellant's testimony, after the appellee's Human Resource Director discovered that the appellant had been off work due to a workers' compensation injury, he added one roadblock after another to prevent the reinstatement of the appellant. Rather than being a normal process of rehiring which should take a few weeks, the appellee strung the appellant along for more than eight months. During this time, the appellant had to repeatedly make long distance phone calls to the appellee which were seldomly returned. In addition, after each request or requirement was fulfilled by the appellant, the appellee always added some other condition or requirement to the reinstatement. It is submitted that any reasonably prudent juror could obviously find that the appellee's pattern of conduct toward the appellant was clearly discriminatory. Therefore, it was plainly wrong for the court to dismiss the case on the appellee's motions for judgment as a matter of law rather than allowing the jury to reach a verdict in this case.

**VI. PRAYER FOR RELIEF**

For all the foregoing reasons and authorities, your appellant respectfully prays that this Honorable Court reverse the final order of the Circuit Court granting the appellee's motions for judgment as a matter of law and remand this case to the Circuit Court for a new trial.

Respectfully submitted,  
Justin D. Bailey, Appellant  
By Counsel

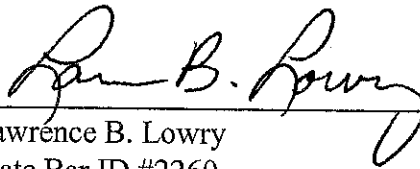
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Counsel for Appellant  
Justin D. Bailey

**CERTIFICATE OF SERVICE**

I, Lawrence B. Lowry, counsel for the Appellant, Justin D. Bailey, do hereby certify that I have served the foregoing Brief upon Mark A. Atkinson, Esq., counsel for the appellee, by depositing a true copy thereof in the United States Mail, postage prepaid, to said Mark A. Atkinson, Atkinson, Mohler & Polak, P.O. Box 549, Charleston, WV 25322, this 19<sup>th</sup> day of April, 2005.



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