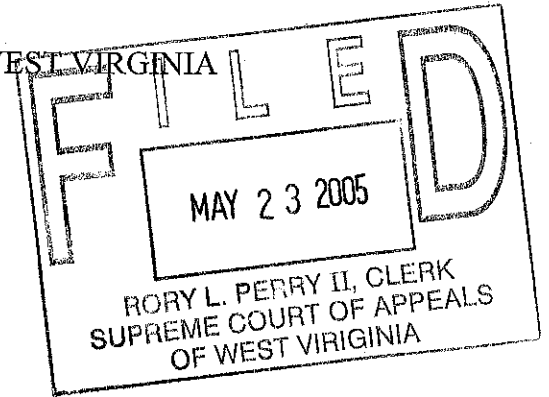


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JUSTIN D. BAILEY,

Appellant,

v.

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

Appellee.

RESPONSE BRIEF OF

MAYFLOWER VEHICLE SYSTEMS, INC.

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I.
INTRODUCTION

This case involves an employee, Mr. Bailey, who was allegedly injured while working for South Charleston Stamping and Manufacturing ("SCSM") in June of 1994 (SCSM is the predecessor of Mayflower Vehicle Systems, Inc.). He subsequently filed a claim with the West Virginia Workers' Compensation Division. On December 11, 1996, Mr. Bailey was found to have reached his maximum degree of medical improvement by the physician retained by the Worker's Compensation Division. After this, despite numerous inquiries by his employer, Mr. Bailey was never able to provide a time that he would be able to return to his former position. By Mr. Bailey's own admission, he was unsure when, if ever, he would be able to return to work. In June of 1998, a full one and-a-half years after having reached his maximum degree of medical improvement, he still was unable to return to work, or provide a time when he could. Thereafter, his employment was terminated because it became obvious to his employer that his period of disability was not determinable.

Mr. Bailey subsequently filed this suit alleging that the Appellee was discriminatory in its treatment of him. Mr. Bailey alleged that he was terminated because he filed a worker's compensation claim, that he was eligible to receive worker's compensation benefits at the time of his termination, and that the Appellee failed to reinstate his employment, all in violation of the worker's compensation anti-discrimination statutes.

Nevertheless, at the trial of this matter, after hearing the plaintiff's case-in-chief, the Court granted the Appellee's motions under Rule 50 of the West Virginia Rules of Civil Procedure for judgment as a matter of law as to each of the Appellant's claims. It is

from this Order that the Appellant appeals. However, The Court was clearly correct in its findings of fact and conclusions of law in dismissing each of the Appellant's claims, and thus the Court's Order granting judgment as a matter of law to the Appellee must stand.

II. STATEMENT OF FACTS

In his complaint Mr. Bailey alleged that his termination was the result of malicious and willful discrimination against him in retaliation for his claim for and receipt of benefits from the West Virginia Workers' Compensation Division (WVWCD), in violation of W.Va. Code § 23-5A-1. Mr. Bailey also alleged that his employment was terminated during a period of time when he was eligible to receive workers compensation benefits in violation of W. Va. Code § 23-5A-3(a). Finally, Mr. Bailey alleged that SCSM failed to reinstate him to his former position in violation of W.Va. Code § 23-5(A)-3(b). However, the undisputed facts of the case clearly demonstrate that SCSM went to great lengths to keep Mr. Bailey employed with the company.

In June of 1994, Mr. Bailey, a manufacturing team leader, allegedly experienced a soft tissue injury at work. (Tr. Vol. 1, p. 76). He did not report the injury until the next day. (Tr. Vol. 1, p. 80). Mr. Bailey applied for and received temporary total disability benefits from the West Virginia Workers' Compensation Division (WVWCD) for this injury. (Tr. Vol. 1, p. 79). He missed four days of work and returned to his former position with no harassment or ridicule from anyone at SCSM concerning his injury. (Tr. Vol. 1, pp. 76, 81).

Approximately one year later, Bailey allegedly re-injured his neck, right shoulder, and right arm, again at work, causing him to miss a total of nine days of work. (Tr. Vol. 1, pp. 81, 87). This time, as before, Bailey returned to his former position with no

harassment or ridicule from anyone at SCSM concerning his injury or worker's compensation claim. (Tr. Vol. 1, pp. 87-88).

At about the same time he returned from his second injury, Bailey was diagnosed with diabetes. (Tr. Vol. 1, pp. 88, 91). As part of his diabetic treatment, his personal physician advised him to lose weight. (Tr. Vol. 1, p. 91). Bailey ate salads and raw vegetables and in the process aggravated his diverticulitis, which he had apparently been suffering from for some time. (Tr. Vol. 1, p. 91). After he returned to work from his second injury, Mr. Bailey missed a great many work days due to his diverticulitis, including fifteen straight days in late October, 1995. (Tr. Vol. 1, p. 92). By his own admission, neither his diabetes nor his diverticulitis were work-related conditions. (Tr. Vol. 2, p. 57).

When Mr. Bailey's diverticulitis was finally brought under control, he began to notice the pains in neck, right shoulder, and right arm again. (Tr. Vol. 1, pp. 92-93). He testified that one day in February of 1996 he woke to find his arm was completely numb. (Tr. Vol. 1, p. 93). He went to his own doctor who took him off work. (Tr. Vol. 1, p. 94). Mr. Bailey then filed a petition to reopen his claim with the West Virginia Workers' Compensation Division (WVWCD). (Tr. Vol. 1, p. 96).

On December 11 1996, Mr. Bailey was examined by Dr. John Kroening, a physician retained by the Worker's Compensation Division. (Tr. Vol. 1, p. 106). Dr. Kroening found Mr. Bailey to have reached his maximum degree of medical improvement. (Tr. Vol. 1, pp. 107-108). On January 17, 1997 he was referred to the Department of Rehabilitation Services (Tr. Vol. 1, p. 106), and on January 20, 1997 he was awarded a 5% permanent partial disability by the WVWCD. (Tr. Vol. 1, p. 107).

On February 20, 1997 Mr. Bailey received a letter from SCSM stating that it was aware of the WVVCD's decision, and that he should report to the plant on March 5, 1997 with a list of restrictions and a return to work date. (Tr. Vol. 1, p. 108; Plaintiff's Exhibit #7). Mr. Bailey's response to this letter, when he called Angela Markham the next day, was that his personal physician had still not released him to work, and so he could not come back to work. (Tr. Vol. 1, p. 109). In light of this representation, Markham told Mr. Bailey not to report to the plant on March 5, but that he needed to keep SCSM informed of his condition. (2/28/01 Bailey Depo. at 172-174).

Throughout the remainder of 1997, Mr. Bailey protested and appealed the decisions of the WVVCD to no avail. (Tr. Vol. 1, p. 65).

On May 22, 1998, nearly eighteen months after the termination of his TTD benefits, and three months since Mr. Bailey had last called in to update his condition, SCSM sent a letter to Mr. Bailey stating that he should contact the plant within ten days to discuss his employment status. (Plaintiff's Exhibit #10). It also stated that failure to contact SCSM within the prescribed period would result in his termination. (Plaintiff's Exhibit #10). After no reply, a letter of termination was sent to Mr. Bailey on June 2, 1998, that was signed by Julian O'Dell, SCSM's new Human Resources Manager. (Plaintiff's Exhibit #12). Mr. Bailey spoke with Julian O'Dell the next day after conferring with his attorney. (Tr. Vol. 1, p. 130). Mr. O'Dell told Mr. Bailey that he had been terminated for failure to respond to the 5/22/97 letter within the allotted time. (Tr. Vol. 1, pp. 132-133). Mr. Bailey does not and cannot deny that he had ample time from his receipt of the letter in which to contact SCSM, but failed to do so. Mr. Bailey

claimed that he was waiting to speak with his attorney before he contacted the plant. (3/14/01 Bailey Depo. at 72).

On October 6, 1998, Mr. Bailey's treating physician released him for unrestricted work. (Tr. Vol. 1, p. 135). Mr. Bailey then began calling SCSM to see if he could get his job back. (Tr. Vol. 1, pp. 135-136). In a letter dated December 17, 1998, Mr. O'Dell told him that there was not a manufacturing team leader position available at that time, but that there was an associate position. (Plaintiff's Exhibit #17). The letter also stated that to be considered for the job, Mr. Bailey would have to undergo a Functional Capacity Evaluation and meet the physical requirements for the manufacturing associate position. (Plaintiff's Exhibit #17). In addition, he was required to speak with Jamie Morrison, a representative of Benefit Assistance, SCSM's insurance administrator, about whether his health insurance had paid any medical bills that should have been, or were paid by workers' compensation. (Plaintiff's Exhibit #17).

Mr. Bailey passed the Functional Capacity Evaluation (Tr. Vol. 2, p. 73), but failed to resolve the health insurance dispute. (Tr. Vol. 2, p. 76). On May 10, 1999, Julian O'Dell sent a letter to Mr. Bailey to set up an appointment to discuss his Functional Capacity Evaluation results and the status of the disputed health insurance claims. (Plaintiff's Exhibit #19). Mr. O'Dell specifically stated in the letter that Mr. Bailey was not considered an employee of SCSM; nor was the letter an offer of employment.

Finally, on July 12, 1999, Mr. Bailey received a letter from Jana Dawson at SCSM stating that the company had been unable to contact him, and requesting that he contact her to make an appointment with Julian O'Dell to discuss his employment with

SCSM. (3/14/01 Bailey Depo. Exhibit 50). By his own admission, Mr. Bailey made no further attempt to contact SCSM about securing a job with the plant. (Tr. Vol. 1, p. 178). Mr. Bailey subsequently filed the instant lawsuit.

III. ARGUMENT

The Appellant alleges that the Circuit Court erred in granting the Appellee's motions for judgment as a matter of law as to the Appellant's claims under W. Va. Code §§ 23-5A-1, 3(a), 3(b). However, a review of the facts and the law combine to prove that as to each of Plaintiff's claims only one reasonable conclusion could be reached, and that judgment as a matter of law in favor of the Appellee is proper. Accordingly, the Appellant's claims of error are meritless. The Appellant's arguments claiming error as to each of his claims dismissed by the Circuit Court will be addressed individually, hereafter.

A. Judgment as a Matter of Law in Favor of the Appellee Regarding Appellant's Claim Under W. Va. Code 23-5A-1 was Proper

West Virginia Code § 23-5A-1 provides:

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.

To prove a prima facie case of discrimination under §23-5(A)-1, the employee must prove three elements:

- i. That an on-the-job injury was sustained,
- ii. Proceedings were instituted under the worker's compensation act,
- iii. And the filing of the worker's compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.

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

The first two elements are undisputed in the present case. Mr. Bailey claims he suffered a work-related injury in June 1994, and then apparently re-aggravated the injury while at work in June 1995. Mr. Bailey also filed a workers' compensation claim, received temporary total disability benefits, and was eventually awarded 5% permanent partial disability by the Workers' Compensation Division. It is the third element, however, that Mr. Bailey did not prove at trial, as recognized in the Court's Order.

The plaintiff's termination came almost eighteen months after Mr. Bailey's temporary total disability benefits had ended and he had been granted a 5% permanent partial disability award. In spite of the fact that Mr. Bailey was no longer receiving temporary total disability benefits, SCSM accepted Mr. Bailey's explanation that his personal physician had not cleared him to work regardless of what the workers' compensation physician had decided. All that SCSM asked of Mr. Bailey was that he keep them informed on a regular basis of his health status. On June 2, 1998, Mr. Bailey's employment with SCSM was ended, after he failed to respond within the proper time frame (10 days) to a letter, representing SCSM's last attempt at inquiring as to his condition. Mr. Bailey admitted at trial that he had been told on numerous occasions that he was expected to keep the plant up to date on his condition. Further, he did not dispute that he had ample time in which to contact SCSM, but chose not to do so within the required ten days. The Court ruled that this was in effect a violation of a neutral company policy. Accordingly, the termination was proper, as employees who have suffered work related injuries are still subject to an employer's neutral policies. See *Powell*, 403 S.E.2d at 722-23; Court's Final Order at 2.

Further, Mr. Bailey admitted that at the time of his termination, eighteen months after he had reached his maximum degree of medical improvement, he was unsure when, if ever, he would be able to return to work. (Tr. Vol. 2, p. 72). For its part, SCSM inquired numerous times as to Mr. Bailey's condition and ability to return to work. However, it became obvious that the period of Mr. Bailey's disability was not determinable. Accordingly, SCSM terminated Mr. Bailey's employment.

Mr. Bailey's termination is consistent with the principle of law enunciated in *Powell* that "if an employee is disabled on the job and is no longer qualified to perform the duties of his or her job, an employer may terminate that employee when it becomes obvious that the period of disability is not determinable." 403 S.E.2d at 723 (quoting *Kern v. South Baltimore General Hospital*, 504 A.2d 1154 (Md.App. 1986)).

In fact, Mr. Bailey's absences from work totaled in excess of 800 days since the date he last worked for SCSM at the time of his termination. Such a period of time far outdistances the 249 days of absences before termination cited in the *Powell* case as an example of an amount of time too great to support a charge of discrimination. *Id.* (citing *Kern*, 504 A.2d 1154)). Further, it had been eighteen months (over 500 days) from the date the plaintiff had reached maximum degree of medical improvement and had stopped receiving temporary total disability benefits, to the date when he was terminated. The Court found that "eighteen months was a sufficient period of time for the employee to notify the employer when he would return to work and demonstrate that he could perform the duties of his employment." Final Order at 3.

Obviously, such a long period of time after an employee's injury to the date of his termination is incapable of supporting an inference of discrimination necessary to support

a prima facie case of workers' compensation discrimination. Further, the Appellant presented no evidence to suggest he was harassed or criticized for filing a workers' compensation claim or receiving benefits. Final Order at 2. The Appellant simply presented no evidence capable of providing the jury with the opportunity to infer discrimination. That is why the Circuit Court found "that no reasonable juror could find that the filing of a worker's compensation claim was a factor in the employer's decision to discharge [the] plaintiff in this case." Final Order at 3.

The Court's finding was clearly correct in light of the evidence and the law, as shown by the above argument. Accordingly, the Appellee's motion for judgment as a matter of law regarding the Appellant's claim under W. Va. Code § 23-5A-1 was properly granted. Therefore, the Circuit Court was guilty of no error, and the Appellant's Appeal should be denied.

Moreover, Plaintiff's claim that he was discriminated against as a former employee is unfounded as well. The instances where the Plaintiff relates that Mayflower's Human Resource Manager, Julian O'Dell, asked whether the Plaintiff's injury was work-related is something any employer would legitimately want to know. As evidenced by the provisions in W. Va. Code §§ 23-5A-1 to 23-5A-3, workers' compensation claimants must be treated differently by their employers. Finally, Mayflower's effort to make sure that Mr. Bailey was fully recovered from his injuries which led to his workers' compensation claim before considering him for employment may not be construed as evidence of discrimination. Accordingly, Appellant's claim under § 23-5A-1 based upon his status as a former employee was properly dismissed by

the Court below. Therefore, the Circuit Court was guilty of no error, and the Appellant's Appeal should be denied.

B. Judgment as a Matter of Law in Favor of the Appellee
Regarding Appellant's Claim Under W. Va. Code 23-5A-3(a) was Proper

The code provides:

§23-5A-3. Termination of injured employee prohibited; re-employment of injured employees.

(a) 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 aggregation of absence due to the injury with any other absence from work.

To be covered under this section, Mr. Bailey must have been receiving or eligible to receive temporary total disability benefits under the worker's compensation statute. In *Rollins*, the court found that the legislature only meant to protect employees who filed workers' compensation claims by providing health care coverage from the date of the injury until the date the worker's compensation benefits were received. 489 S.E.2d at 774 (interpreting W. Va. Code § 23-5A-2). There is no such protection against discrimination after the benefits have been denied or suspended. The same rationale is applicable to cases brought pursuant to W. Va. Code § 23-5A-3(a).

The record is clear that by June 2, 1998, the Appellant was no longer receiving or eligible to receive temporary total disability benefits. In fact, he had been found by the Worker's Compensation Division physician to have reached his maximum degree of medical improvement on December 11, 1996, eighteen months before he was terminated. In fact, at the time of his termination, there was no pending appeal of the determination that Mr. Bailey had reached his maximum degree of medical improvement pending. The following testimony on cross-examination of Mr. Bailey at trial illustrates the information available to SCSM at the time the decision was made to terminate Mr. Bailey:

Q: Okay. And there is another issue. You asked Workers' Comp., after they said that you had reached maximum medical improvement back in December of '96, you filed an appeal on that, didn't you?

A: I don't remember if I filed the appeal. I think what had happened was I didn't understand the Comp. system at the time.

Q: Well, you had an attorney at the time, didn't you?

A: I wasn't going to an attorney regularly. I asked advice from time to time on something that I didn't know, and apparently I would have probably been better off if I had had an attorney to do the whole thing, because I would have know to file the appeal at that time.

Q: Well, the records show that before you lost your job in June of '98 that you appealed it twice.

A: I appealed the reopening.

Q: And you lost it both of those times, right?

A: I believe, yes.

Q: Okay. So not only did Workers' Comp. make a decision in December of '96 that your case was closed, twice more on appeal they said, "That's right. It's closed. It's done." Right?

A: I believe, yes.

Q: So for Julian O'Dell here, who is trying to make a decision in the summer of '98, Workers' Comp. had closed your case, you had appealed it twice, they had said, "No, we're right. It was closed back in '96," and you didn't give him one written document, that is the only information in writing that he had, correct?

A: (No verbal response.)

Q: Are you aware of any other written information that he had?

A: I didn't give him a thing. I didn't know I was supposed to.

Q: You didn't give him a thing, did you?

A: No.

(Tr. Vol. 2, pp. 64-66).

Therefore, at the time of Mr. Bailey's termination, he was not receiving any workers' compensation benefits, he had reached his maximum degree of medical improvement eighteen months prior, his appeals had all been turned down, and SCSM had no information from Mr. Bailey to suggest that he was "eligible to receive temporary total disability benefits." Accordingly, the Court found that "there was no evidence presented indicating that the plaintiff was eligible for temporary total disability benefits at the time of his termination." Final Order at 4.

"The evidence actually presented indicated that the Workers' Compensation Division, a Workers' Compensation Division Administrative Law Judge, and the Workers' Compensation Appeals Board had determined the plaintiff was not eligible for temporary total disability benefits at the time of his termination." Final Order at 5. In fact, at the time of his termination the Appellant had withdrawn his appeal of the order closing his claim for temporary total disability benefits. Finally, a petition to reopen his claim for temporary total disability benefits was denied nearly a year before his termination.

Given the above evidence, it is clear, as the Court found, that "there is no evidence that would permit a reasonably prudent juror to find that at the time of his termination the plaintiff was eligible to receive temporary total disability benefits." Final Order at 5. Accordingly, the Appellee's motion for judgment as a matter of law regarding

the Appellant's claim under W. Va. Code § 23-5A-3(a) was properly granted. Therefore, the Circuit Court was guilty of no error, and the Appellant's Appeal should be denied.

C. Judgment as a Matter of Law in Favor of the Appellee
Regarding Appellant's Claim Under W. Va. Code 23-5A-3(b) was Proper

The code provides:

§23-5A-3. Termination of injured employee prohibited; re-employment of injured employees.

(b) 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 the employer a current mailing address during this one year period.

A review of the relevant facts of Mr. Bailey's case make clear that the Court came to the correct conclusion in granting judgment as a matter of law to the Appellee on this

claim. The Circuit Court found that according to the above-quoted provision, a plaintiff bears the burden of proving he is not disabled from performing the duties of his position upon a request for reinstatement. The statute states that “[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.” W. Va. Code § 23-5A-(3(b)). In the present case, Mr. Bailey had his physician write a note, at SCSM’s request, stating that the Appellant had been treated with physical therapy and rest for carpal tunnel syndrome and C6-C7 root dysfunction related to his accident, and could return to work without restriction. (Plaintiff’s Exhibit #16).

Nevertheless, the note says the carpal tunnel syndrome and root dysfunction were “related to accident 6/6/98.” There was no accident on 6/6/98. Furthermore, the Appellant never received workers’ compensation benefits for carpal tunnel syndrome, and Dr. Ignatiadis explicitly stated that the carpal tunnel syndrome was not related to the compensable injury. Dr. Koenig diagnosed the Appellant with degenerative arthritis of the cervical spine, a cervical strain, and nerve entrapment syndrome of his right extremity, which were the injuries for which the Workers’ Compensation Division compensated Mr. Bailey. However, Mr. Bailey’s return to work note from his physician did not mention the cervical strain or the nerve impingement syndrome.

Given the above deficiencies in the return to work notice, the Circuit Court found that the Appellant failed to provide adequate evidence that he was able to perform the duties of his employment entitling him to reinstatement, as was his burden.

The Court finds that the plaintiff bears the burden of proving that the compensable injury must be similar to the

plaintiff's medical condition when he asks for reinstatement. In other words, the plaintiff may not be off work for an injury, not return to work for an extended period of time, and then demand reinstatement based upon medical evidence which substantially differs from the medical evidence supporting the original compensable injury. In the case at bar, the plaintiff called no medical witnesses. There was no testimony proffered by the plaintiff linking his compensable injuries sustained at work with those listed on the proffered exhibits. As such, the jury would be left only to speculate whether the plaintiff's release to return to work deals with the compensable injury or a noncompensable injury.

(Final Order at 6).

The Appellant is not entitled to reinstatement where the only medical evidence he provides to the Appellee (after nearly two years since he reached maximum degree of medical improvement) does not adequately address whether he has recovered from his injuries related to his compensable at-work accident. To rule otherwise would open the door too wide to abuse of the system.

For instance, Mr. Bailey, when he reached his maximum degree of medical improvement, did not come back to work because he told his employer that he had not yet been released by his personal physician. (Tr. Vol 1, p. 109). SCSM relied on this statement and permitted Mr. Bailey to remain off work and did not terminate him until eighteen months later, when it became clear that his period of disability was not determinable. He then submitted the above-described note from his physician, and asked for reinstatement. Given the contents of the note, SCSM could not tell whether Mr. Bailey had been absent from work for two years because of his carpal tunnel syndrome (a non-compensable injury) or one of his compensable injuries. If Mr. Bailey had not been released by his doctor to return to work for two years due to a non-compensable injury

such as carpal tunnel syndrome, then he clearly would have no right to reinstatement upon recovering from that injury, as it was outside of the workers' compensation system. An employee cannot be permitted to flaunt the system in this way.

Furthermore, an employer is entitled to know whether an employee who seeks reinstatement is capable of performing the duties of his employment. The note provided by Mr. Bailey says nothing concerning some of Mr. Bailey's compensable injuries, injuries SCSM was led to believe were the cause of Mr. Bailey's inability to work. SCSM was entitled to know whether those permanent injuries had subsided to the extent that Mr. Bailey could perform his duties. Instead, SCSM was left with an inconclusive and confusing note which did nothing to help SCSM determine whether or not it had a duty under the law to reinstate Mr. Bailey.

Accordingly, the Court recognized that the jury could not find SCSM guilty of workers' compensation discrimination in violation of W. Va. Code § 23-5A-3(b) without evidence sufficient for the jury to conclude that Mr. Bailey had properly invoked a duty of the part of SCSM to reinstate him to his former employment. Given the above argument, the Court clearly made the correct decision in determining that "the jury would be left only to speculate whether the plaintiff's release to return to work deals with the compensable injury or a noncompensable injury." (Final Order at 6).

Notwithstanding the Circuit Court's ruling, judgment as a matter of law in favor of the Appellee on the Appellant's reinstatement discrimination claim is proper on alternative grounds as well. W. Va. Code § 23-5A-3(b) contemplates an application for reinstatement when an employee reaches his maximum degree of medical improvement. An employee may not delay the assertion of his rights under this section for nearly three

years after having reached his maximum degree of improvement, as Appellant did here, and then seek to be reinstated to his former employment.

Nevertheless, Mr. Bailey attempted that exact course of conduct. He was found by the Worker's Compensation Division physician to have reached his maximum degree of medical improvement on December 11, 1996. Yet at that time he did not ask SCSM to return him to his former position. It wasn't until October of 1998, when Mr. Bailey at last secured a release to work from his personal physician, that Mr. Bailey made such a request.

However, SCSM was under no duty to reinstate Mr. Bailey in October 1998 or at any time thereafter. Mr. Bailey was terminated because it became obvious to SCSM that his period of disability was not determinable. Under West Virginia law, "if an employee is disabled on the job and is no longer qualified to perform the duties of his or her job, an employer may terminate that employee when it becomes obvious that the period of disability is not determinable." *Powell v. Wyoming Cablevision*, 403 S.E.2d 717, 723 (W.Va. 1991) (quoting *Kern v. South Baltimore Gen. Hosp.*, 504 A.2d 1154, 1159 (Md. 1986)). In fact, by Mr. Bailey's own admission, he was unsure when, if ever, he would be able to return to work.

Though SCSM did consider rehiring Mr. Bailey, it never considered itself under a duty to do so. In a letter dated May 10, 1999 addressed to Mr. Bailey, Julian O'Dell informed him that he was not an employee of SCSM, and any efforts to find him a job within the company were not a promise of employment. (Plaintiff's Exhibit #19). At no time after June 1, 1999 did SCSM intimate to Mr. Bailey that he was still employed or

that he would be guaranteed a job. By Mr. Bailey's own admission, he did not consider himself an employee of SCSM after June 3, 1998. (3/14/01 Bailey Depo. p. 109).

It would be illogical that an employer could lawfully terminate an employee according to well-established law, and then be forced to rehire that same employee under section (b). See *Harris v. United States*, 215 F.2d 69 (4th Cir. 1954);¹ *Lilly v. United States*, 238 F.2d 584 (4th Cir. 1956). Nevertheless, the Circuit Court found that W. Va. Code § 23-5A-3(b) "requires the reinstatement of employees who have sustained compensable injuries and are able to provide unambiguous medical evidence that the injuries determined to be compensable by the Workers' Compensation Division no longer disable the employee from performing the duties of his former position." Final Order at 6. Evidently, the Circuit Court interprets this provision to extend the period of time that a former employee could demand reinstatement until that person's death. This cannot be the law.

An employer is clearly required to reinstate an employee at the time that he reaches maximum degree of medical improvement and his claim for temporary total disability benefits is closed, provided the employee seeks reinstatement. In the present case, Mr. Bailey did not. He did not seek reinstatement for the eighteen months between the time he reached maximum medical improvement and the date SCSM finally terminated his employment. He did not seek reinstatement until October, 1998, four months after his employment ended.

¹ *Harris* states:

"All laws should receive a sensible construction. General terms should not be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

One difficulty in interpreting W. Va. Code § 23-5A-3(b) in the context of the present case is that it appears that the statute does not contemplate an intervening lawful termination² between the time the employee has reached his maximum degree of medical improvement and the time he seeks reinstatement. It simply contemplates reinstatement to employment "upon demand for such reinstatement." The section speaks of reinstatement, not rehire. Such request for reinstatement would logically take place shortly after an employee has reached his maximum degree of medical improvement. Once an employee reaches his maximum degree of improvement, he may not wait as long as Mr. Bailey did (approximately two years) before requesting reinstatement, and seek the protection of the reinstatement section of the workers' compensation discrimination statutes after he has been lawfully terminated. Accordingly, judgment as a matter of law in favor of the Appellee on the Appellant's reinstatement discrimination claim was proper for this reason as well as for the Appellant's failure to provide proper evidence concerning his ability to perform the duties of his employment.

Considering the above lack of sufficient evidence proffered by the Appellant at trial regarding his ability to perform his duties when seeking reinstatement, combined with the Appellant's failure to seek reinstatement for approximately two years after he reached maximum degree of medical improvement, it is clear, as the Court found, that "the defendant had no obligation to reinstate the plaintiff." (Final Order at 6). Consequently, the Appellee's motion for judgment as a matter of law regarding the Appellant's claim under W. Va. Code § 23-5A-3(b) was properly granted. Therefore, the Circuit Court was guilty of no error, and the Appellant's Appeal should be denied.


² As shown in the preceding sections, Mr. Bailey was terminated properly according to the law.

IV.

CONCLUSION

For the above reasons, it is apparent that judgment as a matter of law was properly granted in favor of the Appellee as to each of the Appellant's claims. Therefore, the Circuit Court was guilty of no error, and the Appellant's Appeal should be denied.

MAYFLOWER VEHICLE SYSTEMS, INC.,
a corporation,
By Counsel



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CERTIFICATE OF SERVICE


I, Paul L. Frampton, Jr., counsel for the Appellee, do hereby certify that service of the "RESPONSE BRIEF OF MAYFLOWER VEHICLE SYSTEMS, INC." was made upon the parties listed below by faxing and by mailing a true and exact copy thereof to:

Lawrence B. Lowry, Esquire
BARRETT, CHAFIN, LOWRY, AMOS & MCHUGH
P.O. Box 402
Huntington, WV 25708
Fax No.: (304) 529-6179
Counsel for Plaintiff

in a properly stamped and addressed envelop, postage prepaid, and deposited in the United States mail, and by mailing the original and nine copes to:

Rory L. Perry, II
Clerk of Court
State Capitol Rm E-317
Charleston, WV 25305

this 20th day of May, 2005.



Paul L. Frampton, Jr.