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Issue 5 *Issue 5, A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals*

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Civil Rights

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> reporter who had been hired by a private medical physician to transcribe an informal administrative meeting for use by the physician in connection with a disciplinary action is governed by contract law, and absent a specifically enforceable contract, the reporter is not obligated to perform the work involved in preparing the transcript.[310]

XIII. CIVIL RIGHTS

A. Litigating Discrimination Outside Human Rights Act

In the case of *Vest v. Board of Education of County of Nicholas*,[311] Justice Cleckley opened the door for unlawful discrimination to be remedied by the education and state employees grievance board:

> The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. Va. Code, Sec. 5-11-1, et seq.; nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," "favoritism," and "harassment," as those terms are defined in W. Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.[312]

Justice Cleckley held that "[a] civil action filed under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq., is not precluded by a prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances."[313]

B. Prima Facie Case of Discrimination

In *Hanlon v. Chambers*[314] Justice Cleckley clarified the standard for making

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310 *Id.* at Syl. Pt. 2.

311 455 S.E.2d 781 (W. Va. 1995).

312 *Id.* at Syl. Pt. 1.

313 *Id.* at Syl. Pt. 3.

314 464 S.E.2d 741 (W. Va. 1995).

out a *prima facie* case of discrimination:

> Although the plaintiff has the ultimate burden of proving elements of the claim of discrimination by a preponderance of the evidence, the showing the plaintiff must make as to the elements of the prima facie case in order to defeat a motion for summary judgment is de minimis. In determining whether the plaintiff has met the de minimis initial burden of showing circumstances giving rise to an inference of discrimination, the function of the circuit court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive. It is not the province of the circuit court itself to decide what inferences should be drawn.[315]

The opinion in *Hanlon* set out the effect of a *prima facie* case of discrimination on a motion for summary judgment by a defendant:

> In most discrimination cases, once a plaintiff's allegations and evidence create a prima facie case (showing circumstances that permit an inference of discrimination on an impermissible bias), unless the employer comes forward with evidence of a dispositive nondiscriminatory reason as to which there is no genuine issue and which no rational trier of fact could reject, the conflict between the plaintiff's evidence establishing a prima facie case and the employer's evidence of a nondiscriminatory reason reflects a question of fact to be resolved by the factfinder after trial.[316]

C. *Proving Employment Disparate Treatment*

It was held in *Barefoot v. Sundale Nursing Home*[317] that "[u]nless a comparison employee and a plaintiff share the same disputed characteristics, the comparison employee cannot be classified as a member of a plaintiff's class for

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315 *Id.* at Syl. Pt. 4.

316 *Id.* at Syl. Pt. 3.

317 457 S.E.2d 152 (W. Va. 1995).

purposes of rebutting prima facie evidence of disparate treatment."[318] In *Barefoot*, Justice Cleckley relaxed the burden on a plaintiff to prove that an employer's proffered nondiscriminatory reason for its actions was pretextual:

> After the employer has articulated a nondiscriminatory justification for its employment decision, to defeat a motion for a directed verdict, a plaintiff need not show more than the articulated reasons were implausible and, thus, pretextual. A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and, thus, permits the ultimate inference of discrimination.[319]

The opinion in *Skaggs v. Elk Run Coal Co., Inc.*[320] set out several disparate treatment principles:

> In disparate treatment cases under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination. Therefore, if the plaintiff raised an inference of discrimination through his or her prima facie case and the fact-finder disbelieves the defendant's explanation for the adverse action taken against the plaintiff, the factfinder justifiably may conclude that the logical explanation for the action was the unlawful discrimination.[321]

Skaggs then held that

> [i]n disparate treatment discrimination cases under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), a plaintiff proves a claim for unlawful discrimination if he or she proves by a preponderance of the evidence that a forbidden intent was a motivating factor in an adverse employment action. Liability will then be imposed on a defendant unless it proves by a

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318 *Id.* at Syl. Pt. 4.

319 *Id.* at Syl. Pt. 5.

320 479 S.E.2d 561 (W. Va. 1996).

321 *Id.* at Syl. Pt. 5.

> preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.[322]

The opinion in *Skaggs* concluded,

> [i]n disparate treatment discrimination cases under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), a plaintiff can create a triable issue of discrimination animus through direct or circumstantial evidence. Thus, a plaintiff who can offer sufficient circumstantial evidence on intentional discrimination may prevail, just as in any other civil case where the plaintiff meets his or her burden of proof. The question should not be whether the evidence was circumstantial or direct, but whether the evidence in its entirety was strong enough to meet the plaintiff's burden of proof.[323]

Justice Cleckley noted in *Conrad v. ARA Szabo*[324] that "W. Va. Code § 5-11-9(1) (1992) prohibits any person who is an employer from discriminating against any 'individual' regarding his or her employment opportunities irrespective of whether the individual is an employee of or seeks work with that employer."[325] *Conrad* also noted that "[t]he term 'person,' as defined and utilized within the context of the West Virginia Human Rights Act, includes both employees and employers."[326]

D. Sexual Harassment

The law on sexual harassment was refined in *Hanlon v. Chambers.*[327] The opinion started out by holding that "[t]he West Virginia Human Rights Act, W.Va. Code 5-11-9(1) (1992), imposes a duty on employers to ensure that workplaces are

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322 *Id.* at Syl. Pt. 6.

323 *Id.* at Syl. Pt. 7.

324 480 S.E.2d 801 (W. Va. 1996).

325 *Id.* at Syl. Pt. 8.

326 *Id.* at Syl. Pt. 9.

327 464 S.E.2d 741 (W. Va. 1995).

free of sexual harassment from whatever source."[328] Justice Cleckley then ruled that

> [t]o establish a claim for sexual harassment under the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq., based upon a hostile or abusive work environment, a plaintiff-employee must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputable on some factual basis to the employer.[329]

Hanlon concluded by holding that

> [a]n employee may state a claim for hostile environment sexual harassment if unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature have the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.[330]

Sexual harassment was also addressed by Justice Cleckley in *Conrad v. ARA Szabo*:[331]

> An employer's liability in a case where the source of the sexual harassment does not include management personnel depends on its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response. An employer with effective guidelines for prohibiting and dealing with sexual harassment is not liable unless the employer had knowledge of the misconduct or reason to know of the misconduct.[332]

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328 *Id.* at Syl. Pt. 8.

329 *Id.* at Syl. Pt. 5.

330 *Id.* at Syl. Pt. 7.

331 480 S.E.2d 801 (W. Va. 1996).

332 *Id.* at Syl. Pt. 4.

Justice Cleckley outlined the manner of proving an employer's knowledge of unlawful conduct. Cleckley stated, "[k]nowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with the West Virginia Human Rights Act, would be aware of the conduct."[333]

E. Employee Defined to Include a Supervisor

The opinion in *Hanlon v. Chambers*[334] clarified the meaning of employee under the state's human rights laws. Justice Cleckley ruled that "[a] supervisor is an employee under the West Virginia Human Rights Act, W. Va. Code 5-11-3(e) (1992), at least where the individual is not a partner, owner, or part-owner."[335] The opinion further held that

> [a] supervisory employee can state a claim for relief against an employer on the basis of a hostile work environment created by one or more subordinate employees if the employer knew or should have known about the offending conduct, yet failed to take swift and effective measures reasonably calculated to end the harassment.[336]

F. Instructing the Jury

The decision in *Skaggs v. Elk Run Coal Co., Inc.*[337] provides guidelines for trial courts when giving jury instructions in civil rights cases:

> In instructing the jury in civil rights cases, a trial court should bear in mind that the jury's role is the recreation of what happened and should strive to charge it in ways that are meaningful and lucid. In disparate treatment cases under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), the charge should inform the

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333 *Id.* at Syl. Pt. 5.

334 464 S.E.2d 741 (W. Va. 1995).

335 *Id.* at Syl. Pt. 6.

336 *Id.* at Syl. Pt. 9.

337 479 S.E.2d 561 (W. Va. 1996).

> jury that the plaintiff bears the burden of proving by a preponderance of the evidence that the alleged forbidden bias was a motivating factor in the defendant's decision to take an adverse employment action against the plaintiff. If the plaintiff carries that burden, then the jury should find for the plaintiff unless the defendant can prove by a preponderance of the evidence that it would have taken the same action in the absence of the impermissible motive. In making its determination on both intent and causation, the jury should take into account any inferences created by the plaintiff's membership in the protected class, his or her qualifications, the defendant's explanation, the believability of that explanation, and all other relevant evidence bearing on the issues.[338]

In *Barlow v. Hester Industries, Inc.*,[339] Justice Cleckley cautioned trial courts to provide a limiting jury instruction when admitting certain evidence in employment discrimination cases:

> In an employment discrimination case when an employer discovers, after terminating an employee, evidence of the employee's wrongdoing that he or she committed before his or her discharge, a trial court may, with the exercise of reasonable discretion, admit such evidence for the limited purpose of determining which remedies are properly available to the plaintiff employee. Consistent with Rule 105 of the West Virginia Rules of Evidence, the trial court, upon admitting after-acquired evidence of an employee's wrongdoing, should instruct the jury as to the limited purpose of the evidence.[340]

Barlow also provided guidance for trial courts in the giving of final charge jury instructions in employment discrimination cases:

> Jury instructions in an employment discrimination case should be written to convey clearly for the lay person the operation of discrimination and should avoid obscuring the forest of

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338 *Id.* at Syl. Pt. 8.

339 479 S.E.2d 628 (W. Va. 1996).

340 *Id.* at Syl. Pt. 4.

> discrimination with the trees of the three-step analysis from *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 668 (1973), and *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E.2d 152 (1995). Accordingly, the trial court should either (1) instruct the jury that the plaintiff must prove, by a preponderance of the evidence, that the alleged discriminatory animus motivated the defendant's employment decision and that the defendant would not have made the same decision in the absence of the discriminatory animus, or (2) frame the evidence in the context of the *McDonnell Douglas/ Barefoot* framework in order to focus the attention of the jury on the critical evidentiary issues of the case and to assist it in determining whether the plaintiff has proved that the defendant's proffered explanation for its employment decision was pretextual and motivated by illegal bias and that the defendant would not have made the same decision in the absence of the illegal bias.[341]

G. Retaliatory Conduct

In *Hanlon v. Chambers*,[342] the court ruled that "W. Va. Code 5-11-9(7)(C) (1992), prohibits an employer or other person from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Act."[343]

H. Wage Discrimination

In *Martin v. Randolph County Board of Education*,[344] the West Virginia Supreme Court of Appeals recognized a claim of wage disparity based upon unlawful discrimination:

> A plaintiff can establish a prima facie case of intentional salary discrimination if she proves that she is a member of a protected class and that she receives a lower salary than an individual who

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341 *Id.* at Syl. Pt. 5.

342 464 S.E.2d 741 (W. Va. 1995).

343 *Id.* at Syl. Pt. 11.

344 465 S.E.2d 399 (W. Va. 1995).

> is not a member of the plaintiff's class and who is similarly situated to the plaintiff in terms of experience and the comparability of job content. The employer may rebut the inference by coming forward with some legitimate explanation for the salary discrepancy.[345]

The opinion also noted that "[a] nonsensical and arbitrary justification for disparate treatment seriously undercuts an employer's claim that it did not rely on a forbidden motive and tends to show that the purported justification was pretextual. Still, it is possible for an employer to act arbitrarily, but not necessarily on the basis of an illicit motive."[346]

The final issue *Martin* addressed was the issue of the timely filing of a complaint alleging wage disparity based upon unlawful discrimination:

> Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a 'continuing violation,' so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if it is filed within the statutory limitation period after such compensation disparity last occurred.[347]

I. Handicap Employment Discrimination

The case of *Skaggs v. Elk Run Coal Co., Inc.*[348] allowed Justice Cleckley to address the rights of employees with disabilities. The opinion specifically focused upon reasonable accommodation for disabled employees:

> Under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), once an employee requests reasonable accommodation, an

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345 *Id.* at Syl. Pt. 3.

346 *Id.* at Syl. Pt. 4.

347 *Id.* at Syl. Pt. 2.

348 479 S.E.2d 561 (W. Va. 1996).

> employer must assess the extent of an employee's disability and how it can be accommodated. If the employee cannot be accommodated in his or her current position, however it is restructured, then the employer must inform the employee of potential job opportunities within the company and, if requested, consider transferring the employee to fill the open position. To the extent that *Coffman v. West Virginia Board of Regents*, 182 W.Va. 73, 386 S.E.2d 1 (1988), is inconsistent with the foregoing, it is expressly overruled.[349]

The opinion then tempered the meaning of reasonable accommodation for employees with disabilities:

> Under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), reasonable accommodation means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or to remain in the position for which he or she was hired. The Human Rights Act does not necessarily require an employer to offer the precise accommodation an employee requests, at least so long as the employer offers some other accommodation that permits the employee to fully perform the job's essential functions.[350]

Skaggs next outlined the elements of a cause of action when an employer failed to provide reasonable accommodation to a disabled employee:

> To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need and of the accommodation; and (6) the employer failed to provide the

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349 *Id.* at Syl. Pt. 4.

350 *Id.* at Syl. Pt. 1.

accommodation.[351]

Finally, *Skaggs* indicated the type of defense an employer may present in defending against a claim of failing to provide reasonable accommodations for a disabled employee:

> Under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), in a disparate treatment discrimination case involving an employee with a disability, an employer may defend against a claim of reasonable accommodation by disputing any of the essential elements of the employee's claim or by proving that making the accommodation imposes an undue hardship on the employer. Undue hardship is an affirmative defense, upon which the employer bears the burden of persuasion.[352]

J. *Cause of Action Under 42 U.S.C. § 1983*

In *Hutchison v. City of Huntington*,[353] Justice Cleckley addressed a cause of action under 42 U.S.C. § 1983 for the deprivation of rights under the color of law. The opinion held that "[t]he circuit courts of West Virginia, being courts of general jurisdiction, have original jurisdiction to hear and resolve claims under Title 42, U.S.C.A. § 1983 (1979)."[354] It was then held that:

> Because Title 42, U.S.C.A. § 1983 (1979) does not create substantive rights, but rather provides a remedy for pre-existing rights, all claims under this section must allege a specific violation of the constitution or "laws" of the United States. In order to recover damages under § 1983, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.[355]

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351 *Id.* at Syl. Pt. 2.

352 *Id.* at Syl. Pt. 3.

353 479 S.E.2d 649 (W. Va. 1996).

354 *Id.* at Syl. Pt. 3.

355 *Id.* at Syl. Pt. 4.

Justice Cleckley sought to extend the protections of 42 U.S.C. § 1983 by attaching similar protections on state constitutional grounds. The opinion did this by holding that

> [u]nless barred by one of the recognized statutory, constitutional or common law immunities, a private cause of action exists where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution.[356]

XIV. LABOR LAW

The case of *Williams v. Precision Coil, Inc.*[357] examined whether employers could provide employees with handbooks that had disclaimers. Justice Cleckley held that "[f]or a disclaimer to be valid, it must be sufficiently clear, conspicuous, and understandable so that employees will know that the handbook provides them with no protection and it only is intended to benefit one side of the employment relationship, i.e., the employer."[358]

XV. TORT LAW

A. Statute of Limitations

In *Donley v. Bracken*,[359] the cause of action limitation for incompetents found in W. Va. Code section 55-2-15 was construed. *Donley* held "[i]n order for a permanently incompetent person to maintain a viable and timely action under W. Va. Code, 55-2-15 (1923), the lawsuit must be brought within twenty years of the date of the wrongful act and the injury."[360] The opinion also determined that "[t]he twenty year cap in W. Va. Code, 55-2-15 (1923), is reasonably related to the legislative goal of preventing stale law suits and the failure to impose a similar cap on competent persons does not adversely discriminate against the mentally

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356 *Id.* at Syl. Pt. 2.

357 459 S.E.2d 329 (W. Va. 1995).

358 *Id.* at Syl. Pt. 6.

359 452 S.E.2d 699 (W. Va. 1994).

360 *Id.* at Syl. Pt. 1.