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Recent Cases

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RECENT CASES

Bruen v. Columbia Gas Transmission Corp., 426 S.E.2d 522 (W. Va. 1992).

It is reversible error for a trial judge to instruct a jury that the word "produced" means "produced in paying quantities" in a flat-rate oil and gas lease.

A lease entered into in 1907 provided a 1/8 royalty on all gas produced and an annual rent of $200 for each well "from the time and while the gas is marketed." The lease also provided for a minimum rent of $1,200 per year with all rental and royalty payments to be deducted from this amount. Finally, the lease provided that it would be "for the term of ten years (and so long thereafter as oil or gas is *produced* from the land leased and royalty and rentals paid by lessee therefor)." (emphasis supplied by court).

The lessors became dissatisfied with this arrangement as early as 1916 despite the fulfillment of obligations by the lessee. The lessee had paid at least the minimum $1,200 from the time of inception until the trial date. The only time the well produced royalties above the minimum was from 1937 to 1944. At all other times the lessor only received the $1,200 minimum rent.

In 1990 the lessor filed suit claiming that the lease terminated sometime between 1928 and 1971 due to lessee's failure to produce oil or gas in paying quantities. At the end of a jury trial the trial court instructed a jury to return a verdict in favor of the lessor if the lease was terminated for failure to produce in paying quantities. The jury awarded the lessors $29.5 million.

The West Virginia Supreme Court of Appeals reversed the trial judgment holding that it was error to instruct the jury that "produced" meant "produced in paying quantity." This ruling was predicated on

the fact that this was a flat-rate lease rather than a production lease. In prior cases the court has held that under a production lease (where lessor receives a royalty only, not a fixed rent) that the word produced means produced in paying quantities. This definition, however, does not apply to leases which contain a flat rate rental fee. The court held that in a flat-rate lease "produced" does not mean "produced in paying quantities." Therefore, the trial court's instruction that the lease required production in paying quantities was erroneous. As the rental payments were made on time and at least one well produced gas, the lease had not terminated.

Curnutte v. Callaghan, 425 S.E.2d 170 (W. Va. 1992).

Under the "valid existing right" exception, a mining permit applicant may establish valid preexisting rights for a coal haul road if the applicant can demonstrate that the road was in existence prior to August 3, 1977.

Lynn Branch Coal Company wished to use a private road to gain access to a surface mine. Plaintiff Curnutte had sought to prevent the company from receiving a surface mining permit. Curnutte maintained that under the West Virginia Surface Coal Mining and Reclamation Act, W. Va. Code § 22A-3-1 to -40 (1985 & Supp. 1992), the respondent was prohibited from using a private road that was within 300 feet of an occupied dwelling, school, or church to gain access to a mine, unless it could establish that the road was used to transport coal prior to August 3, 1977. As the road was within 300 feet of occupied dwellings, the West Virginia Supreme Court of Appeals granted a temporary injunction preventing the West Virginia Department of Environmental Protection from issuing a permit during the pendency of appellate action.

Section 22A-3-22(d)(4) of the West Virginia Code provides that after August 3, 1977, "and subject to valid existing rights, no surface-

mining operations, except those which existed on that date, shall be permitted . . . within three hundred feet from any occupied dwelling." The court held that valid existing rights can be established by an applicant if the applicant demonstrates that the proposed road existed prior to August 3, 1977. Since it was uncontroverted that the road in question existed prior to August 3, 1977, the court affirmed the circuit court's dismissal of the case and dissolved the temporary injunction.

Dobson v. Eastern Associated Coal Corp., 422 S.E.2d 494 (W. Va. 1992).

A plaintiff may employ statistical evidence to show age discrimination as long as the defendant has the opportunity to rebut that evidence. Also, where a plaintiff has filed suit in circuit court, rather that with the Human Rights Commission, he or she may recover damages sounding in tort under the West Virginia Human Rights Act.

Dobson, the plaintiff, was employed by Eastern Associated Coal Corporation as a front line production foreman. The plaintiff was laid off in December 1987 as part of a reduction in supervisory personnel. The decision was made to layoff the lowest evaluated 12 percent of foremen at each of six mines. The evaluations had been performed in May 1987. Along with the plaintiff, twenty-two others were laid off in January 1988.

The plaintiff filed an age discrimination suit against the defendant for the 1988 layoff and failure to rehire. Following a jury trial, the plaintiff was awarded $325,000 in damages and $94,887 in attorney's fees. On appeal, the defendant contended that the plaintiff failed to make a prima facie case of age discrimination.

In *Conway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423 (W. Va. 1986), the court held that the plaintiff need not show direct evidence of discrimination, but may offer alternative evidence. This evi-

dence need only give rise to an inference that the employment decision was based on an illegal discriminatory criterion. Accordingly, the court held that statistical evidence may be employed by a plaintiff to show age discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 to -19 (1990 & Supp. 1992). However, under Rule 702 of the West Virginia Rules of Evidence, the defendant must have the opportunity to rebut such statistical evidence.

Finally, when discussing damages under section 5-11-13(c) of the West Virginia Code, the court held that plaintiff can recover loss of future earning power. The statute does not specifically provide for loss of future earning power, but does state that a plaintiff may recover "any other legal or equitable relief as the court deems appropriate." The court held that "other relief" includes loss of future earning power.

Joy Technologies, Inc. v. Liberty Mutual Insurance Co., 421 S.E.2d 493 (W. Va. 1992)

A "pollution exclusion" clause in a commercial general liability policy precludes insurer liability only when pollution damage was expected or intended by insured, even if the pollution occurred gradually over time and was not "sudden and accidental."

A Pennsylvania corporation, Joy Technologies, sought indemnification from its insurer, Liberty Mutual Insurance Company, for certain pollution claims that had been paid by Joy. Joy had operated a mining equipment cleaning and refurbishing plant in Bluefield, West Virginia since 1968. This plant used oil containing polychlorinated biphenyls (PCBs). This oil was both intentionally dumped and accidentally spilled at the plant for several years. In the early 1970s, the EPA warned Joy of the hazards of PCBs. Joy then adopted measures to prevent PCB pollution. In spite of their efforts there was PCB contam-

ination at the Bluefield site and on surrounding property. Joy eliminated the pollution at a cost of $6 million.

Liberty Mutual had issued commercial general liability policies to Joy since 1944. Liberty Mutual was to indemnify Joy for all liability claims based on personal injury or property damage arising out of an "occurrence." An "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Starting in 1972, the insurance policy contained an "exclusion clause" providing that the coverage did not extend to pollution damage unless the discharge was sudden and accidental.

At trial, Liberty successfully argued that Pennsylvania law applied as Joy Technologies was a Pennsylvania corporation. Under Pennsylvania case law, the exclusion clause would prevent Joy from recovering under the insurance contract. The West Virginia Supreme Court of Appeals reversed on the choice of law issue and held that West Virginia had a more significant relationship to the insurance contract and therefore applied West Virginia law to the contract dispute.

In determining the effect of the pollution exclusion clause under West Virginia law, the court looked to the hearings before the West Virginia Insurance Commissioner. At these hearings, Liberty's representative stated that the exclusion clause merely clarified, rather than changed, existing coverage. This clarification was to emphasize that coverage did not extend to intentional pollution. Based on this, the court held that Liberty Mutual was required to indemnify Joy as the pollution, although not sudden and accidental, was not intentional.

Mace v. Charleston Area Medical Center Foundation, Inc., 422 S.E.2d 624 (W. Va. 1992).

An employee handbook which contains a clear and conspicuous disclaimer of job security will preserve the at-will status of the employment relationship.

Plaintiff Mace was awarded $230,700 at trial in damages after suing Charleston Area Medical Center (CAMC) for breach of contract and retaliatory discharge. The plaintiff was employed as a pharmacy technician beginning in 1981. In July 1985, he joined the National Guard and began 13 weeks of military training. Upon completion of the training, the plaintiff returned to find his position eliminated at CAMC and alleged a violation of the Veteran's Reemployment Rights Act. After the United States Department of Labor interceded on his behalf the plaintiff was reinstated in December 1985. However, it took nearly a year and a half to recover his back pay for the period when he was available to work but CAMC refused to reemploy him.

In July 1986, Mace suffered a back injury while on active duty. As a result of the injury he was required to take medication. Once, after taking his medication on an empty stomach, he became sleepy, dizzy, and unable to concentrate. The attending physician at CAMC's Employee Heath Department felt the plaintiff had taken an excess of drugs. The plaintiff was instructed to report to the Personnel Department for a drug screening to test for overmedication. The plaintiff informed CAMC doctors that he was taking thirteen different drugs but refused the drug screening because he felt he was being treated unfairly in retaliation for his on-going action to recover back pay from CAMC. The plaintiff was informed that he would be fired if he refused to submit to the drug screening.

Mace resigned his position in lieu of being fired. However, he changed his mind within a few days and contested his resignation to the hospital grievance committee. The committee recommended he be reinstated after a two week suspension and that he be referred to employee assistance. CAMC declined to follow the grievance committee's

recommendation. Mace then filed suit in circuit court for breach of an employment contract and retaliatory discharge. The jury found for the plaintiff on both theories and awarded him $230,000: $55,700 in lost wages, $50,000 for emotional distress, and $125,000 in punitive damages.

On appeal, CAMC contended that they were entitled to a directed verdict on the issue of breach of contract. CAMC asserted that the employment handbook relied upon by the plaintiff as an employment contract was not a contract. The West Virginia Supreme Court of Appeals agreed. The court noted that in West Virginia an employment contract is presumed to be terminable at will. However, as noted in *Cook v. Heck's Inc.*, 342 S.E.2d 453 (W. Va. 1986), "[a]n employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge employees except for specified reasons." Here, the employee handbook did not make a definite promise. In fact, it contained a clear and conspicuous disclaimer: "[T]his handbook is not part of a contract, and no employee of the medical center has any contractual right to the matters set forth in this handbook. In addition, your employment is subject to termination at any time either by you or the Medical Center." The court held that an employee handbook that contains a clear and conspicuous disclaimer of job security such as the one contained in the CAMC handbook preserves the at-will status of the employment relationship and reversed the trial court judgment on the breach of contract claim.

The court went on to find the retaliatory discharge claim a proper jury question and affirmed the finding for the plaintiff. The court affirmed the damage award for lost wages and emotional distress, but reversed the award for punitive damages. The court found that the punitive damage award was duplicative of the emotional distress award due to the bifurcated procedure used at trial. The court noted that paucity of evidence on the plaintiff's emotional distress damages and indicated that when the jury was making its determination on emotional damages, it was unaware that it would later be permitted to punish the defendant hospital. Thus, the emotional distress damages comprised the proper punishment against CAMC for its retaliatory discharge of the plaintiff.

Slack v. Kanawha County Housing & Redevelopment Authority, 423 S.E.2d 547 (W. Va. 1992).

In order to prove a constructive discharge, the plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.

The discovery rule tolling the statute of limitations until the plaintiff knows or reasonably shown have known of a cause of action applies to the tort of invasion of privacy.

Sara Slack (plaintiff) was a manager for the Kanawha County Housing and Redevelopment Authority (Authority). Frank Vinson (defendant) was the Executive Director of the Authority. Plaintiff became aware of a conflict of interest concerning the Authority and a private company in which defendant owned an interest. Plaintiff notified the proper authorities of the defendant's conflict of interest and a criminal investigation of the defendant was initiated. At this point, plaintiff became suspicious that conversations in her office were being monitored. She confided to several of the Authority's board members that she felt her office was bugged and asked for an electronic sweep. The request was denied and the plaintiff was told she was being "paranoid." As a result of information supplied by the plaintiff, the defendant was fired and indicted in federal court. The defendant's replacement, Mike Epps, transferred the plaintiff, over her objection, to another position. The plaintiff resigned in lieu of the transfer.

In the course of their criminal investigation, federal investigators discovered an operational listening device concealed in the ceiling of the plaintiff's former office at the authority. The defendant was eventually convicted of receiving unlawful payments of money for or on account of his official acts (four counts), committing perjury before a grand jury investigating the payments, and making and using an illegal eavesdropping device in the office of his subordinate employee, the

plaintiff. Thereafter, the plaintiff instituted this civil suit against Mr. Vinson and the Authority for invasion of privacy, civil conspiracy, and retaliatory discharge for her whistle-blower activities. The jury awarded the plaintiff $60,000 in damages against Mr. Vinson on the invasion of privacy claim and found for the defendants on the retaliatory discharge and civil conspiracy claims. The trial judge set aside the jury verdict and granted Mr. Vinson judgment notwithstanding the verdict on the invasion of privacy claim on the ground that the statute of limitations had lapsed and entered judgment on the jury verdict denying recovery on the retaliatory discharge and civil conspiracy claims.

The West Virginia Supreme Court of Appeals reversed and held that the discovery rule is applicable to the tort of invasion of privacy, therefore the one-year statute of limitations application to the tort of invasion had not yet run. Therefore, the court ordered that the jury verdict for the plaintiff on the invasion of privacy claim be reinstated.

The court next addressed the plaintiff's constructive discharge claim which was a part of her cause of action for retaliatory discharge. Plaintiff alleged that her job transfer was due to her cooperation in the federal investigation and that the transfer was designed to make her job more onerous and force her to quit. She based her appeal on this matter on an erroneous jury instruction that stated that she had to prove that the Authority's transfer action was taken with the specific intent of forcing her to resign. The plaintiff asserted that there is no requirement that she make such a subjective showing to prove constructive discharge. The court adopted the majority view: No finding of specific intent is required to prove constructive discharge. The plaintiff need merely prove that the "working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit" to establish the constructive discharge element of a retaliatory discharge claim. Since the instruction was clearly erroneous, the court reversed the trial court judgment on the retaliatory discharge claim as well and remanded the case to the lower court with instructions.

Adkins v. INCO Alloys International, Inc., 417 S.E.2d 910 (W. Va. 1992).

> *In order to establish an implied contract right by custom and usage of practice, it must be shown by clear and convincing evidence that the practice occurred a sufficient number of times to indicate a regular course of business and that the practice occurred under conditions that were substantially the same as the circumstances in issue. Such a showing is necessary to demonstrate the parties' implied knowledge of and reliance on the custom or practice, an essential element of such a contract.*

INCO appealed a verdict in favor of former employee inspectors for breach of implied contractual seniority rights. Prior to 1979, INCO used a seniority system for inspectors to determine movement, vacation, workshifts, and overtime in the inspector department. This system was not used outside the inspection department. In 1979, the inspector department was reorganized and the use of the seniority system was discontinued.

In 1987, INCO underwent a downsizing resulting in the termination of approximately 100 employees including the plaintiff inspectors. After their discharge, the plaintiffs filed suit claiming INCO had breached an implied contract by firing them and retaining less senior inspectors. The jury found in favor of the plaintiffs and awarded $2.6 million.

The plaintiffs never had a written contract. Rather, their claim was based on the assertion that INCO's prior conduct and dealings with them gave rise to an implied contract of employment requiring INCO to base all employment decisions on seniority.

The West Virginia Supreme Court of Appeals reversed the trial judgment and held that in order to establish an implied contract right by custom and usage of practice, it must be shown by clear and convincing evidence that the practice occurred a sufficient number of times to indicate a regular course of business and that the practice

occurred under conditions that were substantially the same as the circumstances in issue. Such a showing is necessary to demonstrate the parties' implied knowledge of and reliance on the custom or practice, an essential element of such a contract. After reviewing the evidence presented at trial, the court found that plaintiffs failed to establish their prima facie case by the heightened standard of clear and convincing evidence. Therefore, the trial court's denial of the defendant's motion for a directed verdict was error and the court reversed the trial judgment for the former employees.

Williamson v. Sharvest Management Co., 415 S.E.2d 271 (W. Va. 1992).

> *An* implied *lifetime employment contract may be enforceable where the employee furnishes sufficient consideration in addition to those services incident to the terms of his or her employment. However, if the intent of the parties is clear and unequivocal that a lifetime employment contract exists, there is no requirement for additional consideration.*

Williamson was employed as a manager of a convenience store operated by Sharvest Management Company. Williamson was hired after meeting with Jeff Hoops, co-owner of Sharvest. At this meeting, Hoops gave Williamson a handwritten note stating the manager's salary, details on a profit sharing plan, Christmas bonus, wages of other employees, and the hours of operation. The writing was not signed by Mr. Hoops, nor did it state the duration of the employment term.

The store opened in May 1988 with Williamson in charge of daily operations. Shortly after the store opened Mr. Hoops became aware of problems at the store. The inventory of common items was inadequate, on occasion the store was not open during scheduled hours, and there were problems with cleanliness. In July 1988, Williamson's salary was

cut and two employees were promoted to co-managers. The problems persisted, however, and Williamson was fired.

Williamson filed suit claiming breach of an employment contract for life. Williamson asserted that the unsigned writing given to him at the start of his employment formed the contract guaranteeing him employment for life. At the close of the evidence, the defendant made a motion for a directed verdict which was denied by the trial court. The jury returned a verdict for the plaintiff and awarded damages of $150,000.

The West Virginia Supreme Court of Appeals reversed, holding that while an implied contract for life may exist, there was no such contract in this case. The analysis began with a reiteration of its prior holding that employment of indefinite duration is rebuttably presumed to be at-will employment. A party advancing a contrary finding shoulders the burden of persuasion in such instances. Relevant factors in such an inquiry include the extraordinary nature of a lifetime employment contract and the substance of the consideration furnished by the employee in return for a promise of lifetime employment.

Finding the unsigned writing listing employment information worthless, the court found that there was no express lifetime employment contract. Likewise, the court held that there was no implied lifetime employment contract because the plaintiff furnished absolutely no additional consideration above that required to support a standard employment contract. Specifically, the court stated that "an *implied* lifetime employment contract may be enforceable were the employee furnishes sufficient consideration in addition to those services incident to the terms of his or her employment. However, if the intent of the parties is clear and unequivocal that a lifetime employment contract exists, there is no requirement for additional consideration."

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