

Childress v. Muzzle, No. 33440

Decided: March 19, 2008

What the Court was asked to decide:

Whether employees who leave their employment to accept a voluntary retirement incentive package when their jobs are not threatened is eligible for unemployment compensation?

What the Court decided:

The Court decided that individuals who accept voluntary retirement incentive packages are disqualified for unemployment compensation unless they establish a well-grounded fear of imminent layoff and establish that they would suffer substantial loss by not accepting the early retirement incentive package.

FACTS:

Clearon Corp. determined that it needed to reduce costs. To do so, it decided to offer a voluntary retirement package to employees who were at least fifty-five years old and had at least ten years of service with Clearon, or in combination with Clearon and its predecessor corporations. 29 of the 57 eligible employees accepted the offer. As a result of his acceptance of the offer, Childress terminated his employment. Childress then applied to the West Virginia Bureau of Employment Programs (BEP) for unemployment compensation benefits.

A deputy with the BEP determined that Childress was eligible for unemployment compensation benefits. This decision was appealed by Clearon, and as a result, an evidentiary hearing was conducted. The administrative law judge reversed the deputy's decision and determined that Childress was not entitled to unemployment compensation benefits. Childress appealed the decision to the Board of Review to the West Virginia Bureau of Employment Programs (BOR). The BOR affirmed the decision to deny Childress unemployment benefits.

STANDARD OF REVIEW:

The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is purely one of law, no deference is given and the standard of judicial review by the court is *de novo*.

DISCUSSION:

While this Court has held that unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof, the Court believes that it is also important for the Court to protect the unemployment compensation fund against claims by those not entitled to the benefits of the Unemployment Compensation Law.

- The Law is not intended to apply to those who “willfully contributed to the cause of their own unemployment.” It is the duty of employees to do whatever it takes to remain employed.

- One of the primary purposes of the West Virginia Unemployment Compensation Act is to compensate individuals who are involuntarily employed.
- The Court looks to a New Jersey case to determine whether or not a claimant can satisfy the good cause requirement under the statute. Pursuant to this case, when a claimant accepts a retirement incentive package, the claimant is disqualified for unemployment benefits unless the claimant can establish by definitive objective facts (1) a well-grounded fear of imminent layoff or (2) that he or she would suffer a substantial loss by not accepting early retirement. (Brady v. Bd. of Review, 152 N.J. 197 (1997)).
 - The Court found this definition compatible with the West Virginia Unemployment Compensation Law.
 - Those who accept early retirement packages with the knowledge that their jobs are not in jeopardy are not entitled to unemployment benefits because they left their jobs voluntarily without good cause involving fault on the part of the employer.

Impact on business:

This would be a pro business decision. An employee who willingly accepts a voluntary retirement package will not be entitled to unemployment benefits. The real meat to the decision is in the exceptions. Employers will have to be careful on how the retirement package is presented.

Croft v. TBR, Inc., No. 33504

Decided: March 18, 2008

What the Court was asked to decide:

Whether an offer of judgment precludes attorney fees and costs when the offer of judgment does not spell out their inclusion?

What the Court decided:

The Court held that when an offer of judgment does not explicitly indicate that they are inclusive of attorney fees and costs, a circuit court must award reasonable attorney fees and costs in addition to the offer of judgment when a statute defines costs as including attorney fees.

FACTS:

Appellants brought three separate sexual harassment related actions under the Human Rights Act, W.Va. Code § 5-11-1, against the defendants, TJ's Sports Garden and Restaurant, Mr. Radevski, and Mr. Kulpa. These defendants were insured by Erie Insurance Property and Casualty Company. Erie Insurance moved the circuit court to grant it intervenor status as a party defendant in order to seek declaratory judgments regarding its duty to provide indemnifications and defenses.

The defendants rejected the appellants' settlement demands; accordingly, the defendants made offers of judgment to each appellant pursuant to Rule 68 of the WV Rules of Civil Procedure. The offers of judgment for \$13,000.00 were accepted by the appellants. After accepting the offers of judgment, the appellants filed a motion with the circuit court for attorney fees and costs. This motion was denied because acceptance of the offer of judgment prevents all claims that could have been asserted, including attorney's fees and costs. An appeal ensued.

STANDARD OF REVIEW:

Courts apply ordinary contract principles in determining what was intended in an offer of judgment, and that interpretation of contract language is a question of law.

ISSUE:

Whether the offers of judgment were inclusive of attorney fees and costs or whether it is incumbent on the circuit court to include in its judgment an additional amount

DISCUSSION:

Offers of judgment are not inclusive of attorney fees and costs

- Unless a defendant's offer of judgment under Rule 68(a) explicitly provides that the amount of the offer is inclusive of costs and attorney fees, the circuit court should determine costs and fees in addition to the amount stated in the offer of judgment. (citing Shafer v. Kings Tire Service, Inc., 215 W.Va. 169 (2004)).
- In this case, the \$13,000.00 offers of judgment to each of the appellants do not clearly and unequivocally express that they are inclusive of attorney fees and costs. Thus, the

- circuit court erred in ruling that the offers are inclusive of fees and costs.

Impact on Business:

While at first blush this would appear to be an pro- plaintiff decision, the decision probably came as no surprise to those who practice employment law.. The case does give clear guidance on how to phrase an offer of judgment in fee shifting cases like employment ones.

Harrison County Commission v. Harrison County Assessor, No. 33381

Decided: January 25, 2008

What the Court was asked to decide:

Whether a county assessor is required to obtain the advice and counsel of the county commission prior to hiring employees to perform assessment and appraisal duties to be paid out of a revolving valuation fund?

What the Court decided:

An assessor hiring employees to perform appraisal and assessment duties is not required to seek the advice and counsel of the County Commission.

FACTS:

The County Assessor moved one of her existing employees from a position for which compensation had been paid from general county funds into a position involving assessing and/or appraising duties for which compensation was paid from a fund designated as the assessor's "valuation fund." The Assessor obtained approval of this change of position from the Valuation Commission as required by W.Va. Code § 11-1C-8(a), but she did not seek approval from the Harrison County Commission.

PROCEDURAL HISTORY:

The County Commission filed a petition for a writ of mandamus in the Circuit Court of Harrison County seeking to require the Assessor to obtain the advice and consent of the County Commission, pursuant to W.Va. Code § 7-7-7. The Assessor filed a counter-petition for writ of mandamus seeking to compel the County Commission to stop its alleged interference with her employ of persons hired pursuant to W.Va. Code § 11-1C-8(a). Her counter-petition was granted.

STANDARD OF REVIEW:

To invoke mandamus the relator must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another adequate remedy. (citing Myers v. Barte, 167 W.Va. 194, syl. pt. 2 (1981)).

DISCUSSION:

The Court is presented with two distinct statutes that each require a county assessor to obtain the approval of a separate body with respect to his or her hiring decisions.

- The Court made the following conclusions:
 - When a county assessor seeks to hire an employee to perform duties other than assessing and appraising duties, the assessor is required to first obtain the advice and consent of the county commission pursuant to W.Va. Code § 7-7-7.
 - When a county assessor seeks to hire an employee to perform assessing and appraising duties, which employee will be paid from the revolving valuation fund established in W.Va. Code § 11-1C-8, the assessor is not required to obtain the advice and consent of the county commission. Instead, the assessor must obtain

approval from the Property Valuation Training and Procedures Commission, as required by W.Va. Code § 11-1C-8(a).

Impact on Business:

This is a business neutral decision, but an important one for elected county officials. There has been a debate that remains ongoing as to when assessors, sheriffs and other elected county officials must seek the approval of the local county commission when hiring new staff or discharging them.

May v. Chair and Members, WV Bureau of Employment Programs, et al., No. 33703

Decided: June 17, 2008

What the Court was asked to decide:

Whether substantial unilateral changes in the terms of employment instigated by an employer necessitate an employee's resignation voluntarily without good cause shown thereby disqualifying the employee for unemployment compensation?

What the Court decided:

The Court decided that the qualitative changes were substantial enough in the employment situation to constitute good cause involving the fault of the employer to justify fault on the part of the employer and the employee should not have been disqualified from receiving unemployment compensation.

FACTS:

At the time of her hire at Mate Creek Security, employee's duties included housekeeping and other household tasks for her employer, who occupied the home. After 20 months, her employer made changes to her assigned duties. When the changes were made, employee took on the additional duties of cleaning a two-cabin business complex. As a result of the additional duties, employee requested a wage increase, but this request was denied. Two years later, employer gave more additional duties to employee, including cleaning a coach bus and stocking such bus with snacks and beverages and cleaning yet another home. Despite the significant changes in her responsibilities, employee received neither help nor a wage increase. Employee was working 33 hours of overtime in a given week, which led to stress and an eventual heart attack. Employee resigned after being informed that she would have to care for a German police dog brought into the house.

PROCEDURAL HISTORY:

Upon termination of her employment, employee filed for unemployment benefits with the W.V. Bureau of Unemployment Programs. The Deputy held that the employee was disqualified from receiving the benefits because she left work voluntarily without good cause involving fault on the part of the employer. The employee appealed this decision and was granted an evidentiary hearing. The Board of Review affirmed the Deputy's decision because the Chief Administrative Law Judge found no fault on the part of the employer. The employee again appealed this decision to the Board of Review, which again affirmed the ruling of the Administrative Law Judge. The employee appealed to the Circuit Court of Kanawha County, which affirmed the Board's denial of unemployment benefits. The employee appealed again to the Supreme Court.

STANDARD OF REVIEW:

The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong.

ISSUE:

Whether the employee is disqualified from receiving unemployment compensation benefits for voluntarily leaving her job “without good cause involving fault on the part of the employer,” under West Virginia Code § 21A-6-3(1).

DISCUSSION:

- “Substantial unilateral changes in the terms of employment furnish ‘good cause involving fault on the part of the employer’ which justify employee termination of employment and preclude disqualification from the receipt of unemployment compensation benefits.” (citing Murray v. Rutledge, 174 W.Va. 423 (1985))
 - In Murray, the Court recognized that substantial changes in working hours or substantial quantitative increases in responsibilities may justify employee resignation
- Because the Board of Review ignored factual evidence regarding the substantial unilateral quantitative changes in the employee’s employment and failed to analyze whether the changes were substantial and whether they amounted to “good cause,” the Board of Review’s factual findings and legal conclusions were erroneous.
- “Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof.” (citing Davis v. Hix, 140 W.Va. 398 (1954)).
 - Thus, the Court concludes that as a matter of law that the quantitative changes in employee’s employment were substantial enough to constitute good cause involving fault on the part of the employer to justify the employee’s termination of employment, and the employee should not have been disqualified from receiving unemployment compensation benefits.

Impact on Business:

This case is a pro- employee case. The underlying rationale for the decision is that if the terms and conditions of the employment are substantially changed, it will be deemed a non-voluntary discharge without cause. Interestingly, the lower judicial tribunals all sided with the employer. Note, if the duties of the employee do increase, one may consider additional compensation or some form of bonus to compensate for the additional activities.

Messer v. Hannah, Sheriff of Mingo County, No. 33655

Decided: June 26, 2008

What was the Court asked to decide:

Whether a deputy sheriff on indefinite suspension can be reinstated with back pay to his former rank and position in the Sheriff's Office?

What the Court decided:

The Court decided that a deputy sheriff on indefinite suspension for alleged wrongdoing can not be reinstated to his former rank and position with back pay because there was a finding of wrongdoing by the Mingo County Civil Service Commission for Deputy Sheriffs that the deputy had overstated his travel time but the transgression was "trivial, inconsequential and without wrongful intent" and the decision did not mention the involvement of a prosecuting attorney's investigation into allegations of obtaining money under false pretenses.

FACTS:

Sergeant Messer was indefinitely suspended in May 2006 after submitting false requests for overtime pay concerning his participation in training at the Police Academy. Four hours of his requested sixteen hours of overtime were placed into question because of evidence indicating that Sgt. Messer had rented a motel room instead of driving home most nights. The Prosecuting Attorney concluded that the evidence was sufficient to charge Sgt. Messer with attempting to obtain money by false pretenses. The Civil Service Commission and the Circuit Court concluded that Sgt. Messer's transgression was trivial, inconsequential and without wrongful intention. The Commission failed to mention the involvement and conclusion of the Prosecuting Attorney. On appeal, the Court finds that while Sgt. Messer was reinstated and awarded back pay by the Commission, Sgt. Messer was suspended several months from his duties before the Commission entered its Order, lost overtime opportunities, and suffered obvious significant embarrassment, along with the threat of criminal prosecution.

STANDARD OF REVIEW:

Pursuant to W.Va. Code § 7-14-17(a), no deputy sheriff may be removed, discharged, or suspended from his or her employment except for just cause. Dismissal for just cause means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention. (citing Magnum v. Lambert, 183 W.Va. 184 (1990)). Accordingly, if an administrative agency's factual finding is supported by substantial evidence, it is conclusive. An appellate court may reverse a decision of the Correctional Officers' Civil Service Commission as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise.

DISCUSSION:

Seriously wrongful conduct by a civil service employee can lead to dismissal even if it is not a technical violation of any statute. The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public. (citing Magnum).

- The Court reversed the decision of the Circuit Court and remanded the case to the Circuit Court for the entry of an order reinstating the indefinite suspension imposed upon Sgt. Messer by Sheriff Hannah.
 - The judgment was reversed due to the fact that the Circuit Court failed to make a factual finding as to whether Sgt. Messer actually overstated his overtime hours.

Impact on Business:

This is a pro- employer decision. The conduct of the employer, falsifying an overtime voucher, is ground for suspension in the public sector.

Smith v. State of W.Va. Consolidated Public Retirement Bd., No. 33502

Decided: May 30, 2008

What was the Court asked to decide:

Does the reelection of an incumbent, to a consecutive term of office, constitute reemployment, thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest?

What the Court decided:

The Court decided that the reelection of an incumbent does not make the incumbent eligible to reinstate forfeited PERS credit upon the repayment of the amount withdrawn plus interest.

FACTS:

Smith was employed as deputy sheriff in Berkeley County for a period of 12 years. During this time, he accumulated five months of credited service in the Public Employees Retirement System (PERS) and accumulated contributions of \$11,075.77. Smith withdrew his PERS contributions when his employment terminated.

When Smith was elected as Sheriff of Berkeley County eleven years later, the Consolidated Public Retirement Board notified Smith that he had a right to reinstate previously forfeited credited service by repaying the amount withdrawn plus interest for a total of \$21,868.78. Smith took no action to reinstate his previously forfeited credited service because it was his understanding that he had five years from the date of re-employment to return to the retirement fund the amount of contributions he had withdrawn in order to reinstate his credited service.

Smith was reelected sheriff of Berkeley County in 2004. He attempted to make partial payment of \$5,000 to the Board to reinstate his 12 years and five months of credited service, but the Board returned his payment as untimely. The Board denied Smith's request to reinstate his credited service. Smith appealed this decision, but the hearing examiner denied reinstatement. The hearing examiner also concluded that Smith's employment had been continuous and no new opportunity to reinstate had arisen. The Consolidated Public Retirement Board adopted the hearing officer's recommended decision.

ISSUE:

Does the reelection of an incumbent, to a consecutive term in office, constitute re-employment under W.Va. Code § 5-10-18(a), thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest?

DISCUSSION:

"Re-employed" under W.Va. Code § 5-10-18(a)= a return to the employ of a participating public employer after having left the employ of a participating public employer

- It is clear that an incumbent who is reelected to a consecutive term of office does not leave his or her employment at the end of his or her original term and return to employment at the beginning of the second term. The term of every officer will continue until his successor is elected or appointed.

- An incumbent who is reelected to a consecutive term of office does not cease to be a member of PERS and does not forfeit credited service upon completion of his or her first term in office
 - Thus, reemployment under the statute is not the same as reelection to a consecutive term
- The return to employment that triggers reinstatement in PERS is the same return to employment that commences the two year period in which to restore one's previously forfeited credited service. Thus the sheriff was not entitled to repay PERS for the retirement previously withdrawn.

Impact on Business:

This is probably a business neutral decision because it deals with an elected public official. PERS perceives this as a significant decision in its favor. The interesting part of this decision is that the court was unwilling to provide more time to an elected official than what is provided to a non-elected employee.

State ex rel. Tucker Co. Solid Waste Authority v. W.Va. Division of Labor, No. 33809

Decided: June 26, 2008

What the court was asked to decide:

The Court was asked to issue a writ of prohibition to prevent the Division of Labor from continuing administrative proceedings against the Tucker County Solid Waste Authority.

What the court decided:

The Court issued a writ of prohibition to prohibit the Division of Labor from enforcing a hearing examiners decision and from conducting further proceedings in the matter.

FACTS

In 2003, TCSWA hired ten additional workers for its new landfill project (from May until August of 2003). Most of the workers were hired on a temporary basis, but some remained as permanent employees. The work was not completed by contract, and the workers hired to complete it were not paid the prevailing wage because the TCSWA considered the workers to be temporary employees.

PROCEDURAL HISTORY:

The WVDOL received a letter from Delegate Mary M. Poling that alleged that the TCSWA may have violated the law when it hired temporary employees on its landfill project. The WVDOL initiated an investigation and issued a subpoena duces tecum to TCSWA for the payroll records of all employees working on the project. The WVDOL concluded that nine of the TCSWA employees who worked on the project should have received the prevailing wage. The WVDOL determined that TCSWA owed the workers an additional \$95,820.82 plus all penalties provided for in the WV statute (totaling \$191,641.64).

An informal conference was conducted between the TCSWA and the WVDOL to allow TCSWA to depict why it had chosen not to apply the West Virginia Prevailing Wage Act to its temporary workers. No resolution was reached from this meeting. Nine months later, the WVDOL determined that an additional TCSWA employee should have been paid the prevailing wage for his work on the landfill project. This determination increased the amount owed to \$199,760.30.

The matter went before a hearing examiner who concluded that insofar as the landfill project was neither a temporary nor an emergency repair, the Act applied and the TCSWA temporary workers should have been paid the prevailing wage. TCSWA filed for a writ of prohibition, seeking to prohibit further evidentiary proceedings recommended by the hearing examiner.

DISCUSSION:

1) TCSWA contends that the hearing examiner improperly determined that the TCSWA's 10 employees should have been paid the prevailing wage when the Act does not require a public authority to pay its workers the prevailing wage. (W.Va. Code § 21-5A-1(7)).

- However, W.Va. Code § 21-5A-2 requires that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in this State in which

the construction is performed, shall be paid to all workmen employed by or on behalf of any public authority engaged in the construction of public improvements

- WVDOL contends that the Act specifically includes a public authority's workers in its requirement that public authorities pay their workers the prevailing wage
- TCSWA contends that it was not required to pay its workers because the Act specifically excludes the workers of a public authority from the definition of "employee"—The Act excludes such persons employed or hired by the public authority on a regular or temporary basis or engaged in making temporary or emergency repairs
 - The Court concluded that pursuant to 21-5A-1 (The West Virginia Prevailing Wage Act), the terms "employee" and "workman" do not include workers who are (1) employed or hired by a public authority on a regular basis, (2) employed or hired by a public authority on a temporary basis, (3) employed or hired by a public authority to perform temporary repairs, or (4) employed or hired by a public authority to perform emergency repairs.
 - The Court determined that in order to give meaning to the conflicting statutory provisions, the scope and application of the purpose of prevailing wage requirement would need to be limited. Any other construction would create an absurd result, which the court is bound to avoid.
 - Accordingly, 21-5A-2 does not require that the prevailing wage be paid to persons employed by a public authority
 - Thus, TCSWA was not required to pay the prevailing wage to the temporary workers it hired for the landfill project.
 - Writ of prohibition was granted.

2) TCSWA contends that the hearing examiner erred by requiring it to pay the prevailing wage to temporary employees who were performing work on a project not let to contract when the Act states that its application is limited to construction of public improvement projects that have been "let to contract." W.Va. Code 21-5A-1(2); W.Va. Code 21-5A-1(4).

- TCSWA argues that the Act does not require the prevailing wage to be paid with respect to construction work that was not let to contract
 - WVDOL argues, however, that although TCSWA did not let to contract the work, it was required to do so under the WV Fairness in Competitive Bidding Act; thus, TCSWA should not be allowed to escape its responsibilities under the Prevailing Wage Act, which would have applied but for TCSWA's violation of the Competitive Bidding Act.
 - The Court concluded that because it had already decided that TCSWA was not required to pay the prevailing wage it is not necessary to consider the let to contract issue

DISSENT (Justice Starcher):

Until changes are made by the legislature to contradictory provisions in a statute, courts are obliged to "do their best" to interpret and apply the statute the facts of the case. When interpreting a statute, a court's best tool is legislative intent. The legislative intent of the Prevailing Wage Act is clear that public authorities must pay prevailing wages when constructing public improvements, whether using private contractors' employees or persons directly employed by the public authority.

The majority's decision is in direct conflict with the legislative intent; the majority read the statute as categorically excluding those workers who are constructing public improvements, and who are employed to do so by a public authority. Justice Starcher concludes that workers constructing public improvements are entitled to prevailing wages, no matter who employs them.

Impact on Business:

This is the most significant decision of the term. Public bodies have been struggling with the issue of prevailing wage for some time. The courts ruling that temporary employees working on a public project are not entitled to prevailing wage. This will result in savings to counties and other public bodies.