No. 30091 – Angela Frye v. Future Inns of America-Huntington, Inc., and Richard Huff, in his individual capacity

FILED
July 3, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 5, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, dissenting:

This Court once referred to the Human Rights Act as "strong medicine to cure the social maladies of intentional and unnecessary" discrimination. *Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 64, 479 S.E.2d 561, 574 (1996). In light of the majority's opinion, I believe this phrase no longer rings true.

I dissent because I believe that the majority opinion's interpretation of the Act has undercut the ability of the Human Rights Commission to effectively address discrimination. More directly, I believe that the majority opinion's interpretation has seriously undermined the Commission's ability to sanction and punish individuals who have engaged in intentional discrimination, and its ability to make victims of discrimination whole.

The Act is a remedial statute, and is supposed to be "liberally construed to accomplish its objectives and purposes." *West Virginia Human Rights Comm'n v. Moore*, 186 W.Va. 183, 187, 411 S.E.2d 702, 706 (1991). By mandate of the Legislature, "[t]he West Virginia Human Rights Act 'shall be liberally construed to accomplish its objective and purpose.' W.Va.Code, 5-11-15 (1967). This construction applies to both its substantive and procedural provisions, and is consonant with this Court's view that administrative proceedings

should not be constrained by undue technicalities." Syllabus Point 1, *Paxton v. Crabtree*, 184 W.Va. 237, 400 S.E.2d 245 (1990).

There is no better way to get the attention of a malfeasant employer than through its bank account, and no other way to compensate a victim of discrimination for heartache and anguish. The majority opinion, however, takes a narrow view of the Act and imposes undue technicalities on the Commission's ability to cure the social maladies of intentional discrimination. The Commission can no longer fully compensate a victim, nor sufficiently sanction those who engage in discrimination.

This Court was faced with a similar question under the Consumer Credit and Protection Act in *State by and through McGraw v. Imperial Marketing*, 203 W.Va. 203, 506 S.E.2d 799 (1998). We considered whether a circuit court could impose a $500,000.00 (suspended) civil penalty, when the Consumer Protection and Credit Act authorized a civil penalty of "no more than" $5,000.00 if a "defendant has engaged in a course of repeated and willful violations of this chapter." *See W.Va. Code*, 46A-7-111(2) [1974]. In *Imperial Marketing*, an unscrupulous marketer had mailed over 17,563 misleading solicitations to consumers over the space of a year and thereby "bilked West Virginia consumers out of $975,389.02 through repeated, willful conduct[.]" 203 W.Va. at 219, 506 S.E.2d at 815. The marketer asserted that, under the Act, it should only be required to pay one $5,000.00 civil penalty for its "repeated and willful" misconduct, and not face the $500,000.00 penalty imposed by the circuit court.

This Court affirmed the circuit court's $500,000.00 penalty, and indicated that the law "clearly assumes that a civil penalty may be imposed for each, individual violation of the Consumer Credit and Protection Act." 203 W.Va. at 219-220 n.6, 506 S.E.2d at 815-16 n.6. (Starcher, J., concurring). We pointed out that other jurisdictions considering this question had consistently held that a civil penalty may be imposed for each individual violation of a consumer protection statute.[1]

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[1]*See*, *e.g.*, *State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717 (Mo.App. 1994) (consumer protection statute authorized civil penalty up to $1,000.00 per violation; court upheld $273,600.00 penalty for unlawful pyramid scheme involving 1,368 victims, holding penalties amounted to $200.00 per person); *State ex rel. Stenberg v. American Midlands, Inc.*, 509 N.W.2d 633 (Neb. 1994) (statute authorized $2,000.00 civil penalty per violation; court upheld penalty of $788,000.00 where 788 persons paid money to an advance fee loan scam); *People v. Dollar Rent-A-Car Systems, Inc.*, 211 Cal.App.3d 119 (1989) (each of the more than 500,000 misleading or deceptive car rental contracts could justify a separate penalty; therefore, the $100,000.00 penalty was "abundantly justified"); *State ex rel. Corbin v. United Energy Corp. of America*, 725 P.2d 752 (Ariz. 1986) (the state Consumer Fraud Act allowed court to impose a civil penalty of $55,000.00, or the statutory maximum of $5,000.00 for each of 11 consumers who were victims of fraud); *People v. Toomey*, 157 Cal.App.3d 1 (1984) (civil penalties for fraudulent telephone solicitations should be imposed "per victim;" because the defendant committed at least 150,000 violations of two statutes, court was justified in imposing $150,000.00 in civil penalties); *United States v. Readers' Digest Association, Inc.*, 662 F.2d 955 (3d Cir. 1981) (each individual mailing of a simulated check violated the Federal Trade Commission Act; while a civil penalty could be assessed of "not more than $10,000.00 for each violation," court upheld the imposition of $1,750,000.00 penalty for one bulk mailing of simulated checks to millions of consumers); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 553 P.2d 423, 436 (Wash. 1976) (court held that under Washington Consumer Protection Act, a civil penalty could be assessed for every violation of the Act, and that there could be multiple violations for each victim. The court stated that "[e]ach cause of action required respondent to prove divergent facts to establish a violation. Therefore, we hold that each cause of action is a separate violation of the consumer protection act."); *People v. Bestline Products, Inc.*, 61 Cal.App.3d 879 (1976) (court upheld a $1,000,000.00 civil penalty, or approximately $330.00 per violation in a pyramid promotional scheme where 3,000 consumers lost $9,000,000.00,

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I believe that similar reasoning applies to the instant case. The Legislature has authorized the Human Rights Commission to take "such affirmative action . . . as in the judgment of the commission, will effectuate the purposes" of the Human Rights Act. *W.Va. Code*, 5-11-10 [1994]. We held, in *State Human Rights Comm'n v. Pauley*, 158 W.Va. 495, 212 S.E.2d 77 (1975) and *State Human Rights Comm'n v. Pearlman Realty Agency*, 161 W.Va. 1, 239 S.E.2d 145 (1977) that the Act allows the Commission to award "incidental" damages to make a victim of discrimination whole. However, in *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (1989), we held that because of a defendant/respondent's constitutional right to trial by jury, the Commission could only award a victim $1,000.00 in incidental damages. That "constitutionally acceptable" amount, adjusted for inflation, has grown to $3,277.45.

I believe that the statutory authority exists for the Commission to award a victim of discrimination $3,277.45 in incidental damages against each defendant responsible for the discrimination, until the victim has been made whole. Our holding in *Bishop Coal* was intended to protect each defendant's right to trial by jury; it was not intended to impose a limit on the victim's right to recover their losses. Accordingly, I believe the majority opinion could, and should, have given the Act a liberal interpretation so as to achieve its beneficent purposes.

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[1](...continued)
stating that the number of violations of the statute was to be determined by the number of persons to whom misrepresentations were made).

Unfortunately, because the majority opinion interprets the Act as not containing the necessary statutory authority, the Legislature should amend the Act to allow the Commission to require each defendant to pay incidental damages to a victim of discrimination.[2] A victim of discrimination must, of course, only be permitted to recover the

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[2]The majority opinion, at Syllabus Point 3, indicates that the limit on awards of incidental damages "applies *per case* rather than per respondent." Applying this language, the Commission may have an alternate route for pursuing cases of discrimination under the Act, a route not fully considered by the respondents in the instant case. In instances where multiple respondents discriminate against a complainant, the Commission should consider filing individual complaints against each individual respondent. In this way, the Commission could recover incidental damages "per case rather than per respondent."

This outcome was suggested in *State by and through McGraw v. Imperial Marketing*, 203 W.Va. at 219-220 n.6, 506 S.E.2d at 815-16 n.6 (Starcher, J. concurring), where an unscrupulous marketer argued that the Attorney General could only collect one $5,000.00 civil penalty per case, rather than per violation. In that case, 17,563 violations of the statute had occurred, and the Attorney General had originally sought a civil penalty for each solicitation. A concurring opinion characterized the marketer's argument as follows:

> I do not believe that [the marketer] has thought its argument through to its logical conclusion. Assuming [the marketer's] argument was correct, to avoid the argument in this case the Attorney General would have had to file 17,563 separate lawsuits to maintain an action for civil penalties for each violation. Since this one lawsuit has generated enough paperwork to fill two bankers boxes, 17,563 lawsuits would likely have a similar result – thereby filling the courthouse with over 35,000 boxes of paper. Additionally, the Attorney General would, as in this one single case, be entitled to collect the attorneys' fees and costs incurred from the extra work necessary to the filing and prosecution of these extra lawsuits. This is to say nothing for the extra litigation costs that [the marketer] would have incurred, and would have added a considerable sum to the $87,815,000.00 fine that the circuit court could have imposed in the 17,563 lawsuits. I do not believe that the Legislature intended such a complicated or expensive result.

In the instant case, by holding that the Commission can impose incidental damages "per case

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damages which can be proven, and the defendant's share of the damages must be imposed within constitutional limitations. With such a change, the Act might once again become "strong medicine."

I therefore respectfully dissent.

[2](...continued)
rather than per respondent," it appears that the majority opinion did intend such a complicated and expensive result.