

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2017 Term

No. 17-0039

HELIO MARTINEZ,
Petitioner

v.

ASPLUNDH TREE EXPERT CO.,
Respondent

FILED

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Certified Questions from the United States District Court
for the Northern District of West Virginia

CERTIFIED QUESTIONS ANSWERED

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JUSTICE WALKER delivered the Opinion of the Court.

CHIEF JUSTICE LOUGHRY concurs and reserves the right to file a concurring opinion.

JUSTICE KETCHUM concurs and reserves the right to file a concurring opinion.

JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.” Syllabus Point 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 SE.2d 64 (1998).

2. “The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect. Syl. pt. 4, *Taylor v. State Comp. Comm’r*, 140 W.Va. 572, 86 S.E.2d 114 (1955).” Syllabus Point 2, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014).

3. “Statutory changes that are purely procedural in nature will be applied retroactively.” Syllabus Point 4, *Miller v. Smith*, 229 W.Va. 478, 729 S.E.2d 807 (2002).

4. “A statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application.” Syllabus Point 2, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

5. “A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application. Syl. pt. 3, *Sizemore v. State Workmen’s Comp. Comm’r*, 159 W.Va. 100, 219 S.E.2d 912 (1975).” Syllabus Point 3, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014).

6. West Virginia Code § 55-7E-3, abrogating Syllabus Point 2 of *Mason County Board of Education v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982) and its progeny, is a remedial statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed, thereby imposing an affirmative duty on the part of the plaintiff to mitigate any claim for past and/or future wages and requiring an award, if any, of back pay and front pay to be reduced by the amount of interim earnings or the amount that may be earned with reasonable diligence by the plaintiff.

7. West Virginia Code § 55-7-9 is a remedial statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed.

WALKER, Justice:

This case is before us on two certified questions from the United States District Court for the Northern District of West Virginia. We consider whether two recently enacted statutes relating to damages – West Virginia Code §§ 55-7-29 and 55-7E-3 – apply in a trial conducted after the effective date of the statutes when the underlying facts in the case occurred prior to that effective date. Finding the two statutes at issue to be remedial, we answer the certified questions in the affirmative.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Helio Martinez was employed by Respondent Asplundh Tree Expert Co. (“Asplundh”) to perform tree cutting services from 2011 until he was discharged on September 13, 2013. Mr. Martinez is an American citizen originally from Puerto Rico. He worked on a four-person work crew first assigned to work in Pennsylvania but then transferred to work in West Virginia by Asplundh. Mr. Martinez’s work crew was comprised entirely of Hispanic individuals and, according to Mr. Martinez, they were treated less favorably than other work crews as they were provided inferior equipment. Moreover, he alleges that at least one member of Asplundh management referred to them as the “Mexican crew” even though none of the crew members were of Mexican descent.

On September 13, 2013, Asplundh summarily terminated Mr. Martinez's employment on the grounds of theft. Although Mr. Martinez denied any wrongdoing, he was not provided any opportunity to respond to the accusation of wrongdoing. The separation notice documenting the termination was prepared by Mr. Martinez's direct supervisor, Terry McFarlan, and states: "Took our truck to shop, was caught stealing from a Jaflo truck on camera." Mr. Martinez's entire work crew was terminated as a result of the alleged theft of a cell phone charger from the truck of a competitor (Jaflo) parked at a truck repair facility (United Auto).

Mr. McFarlan and his supervisor, Tim Blankenship, admitted in their depositions that that the video surveillance upon which the decision to fire Mr. Martinez was based did not show him stealing the cell phone charger. Rather, Asplundh now claims that the video surveillance revealed Mr. Martinez was in a position to observe two other crew members steal the cell phone charger. Although counsel for Mr. Martinez requested a copy of the video surveillance within days of the discharge, it disappeared without explanation. Mr. McFarlan suggested in his deposition that the video "erased itself."

Following his discharge, Mr. Martinez filed a complaint against Asplundh with the West Virginia Human Rights Commission ("Commission"). The Commission subsequently issued a Notice of Right to Sue on December 30, 2014. On January 25, 2015, Mr. Martinez filed a civil action against Asplundh in the Circuit Court of Harrison

County alleging that he was wrongfully discharged from employment in violation of the West Virginia Human Rights Act, §§ 5-11-1 through -20 (2013) (the “Human Rights Act”). Mr. Martinez claims that he was unlawfully discriminated against on the basis of race, national origin and/or ancestry.

On February 25, 2015, Asplundh removed the case to the United States District Court for the Northern District of West Virginia on the basis of diversity pursuant to 28 U.S.C. § 1332 (2012). Prior to trial, the parties jointly moved the district court to stay the case and certify the questions we now consider.

By order entered on January 1, 2017, the district court certified the following questions to this Court:

1. Does W.Va. Code § 55-7E-3, which abrogates *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 170 W.Va. 632, 295 S.E.2 719 (1982), apply to a wrongful discharge case under the West Virginia Human Rights Act, W.Va. Code § 5-11-9(1), where the plaintiff employee was discharged on September 3, 2013, the effective date of the statute is June 8, 2015, and this case is set for trial after June 8, 2015?
2. Does W.Va. Code § 55-7-29, which limits punitive damage awards, apply to a wrongful discharge case under the West Virginia Human Rights Act, W.Va. Code § 5-11-9(1), where the plaintiff employee was discharged on September 3, 2013, the effective date of the statute is June 8, 2015, and this case is set for trial after June 8, 2015?

We proceed to consider the issues raised by the certified questions.

II. STANDARD OF REVIEW

As we have established, “[a] de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.” Syl. pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998). We consider the certified questions presented by the district court according to this standard.

III. DISCUSSION

To begin, we summarize the arguments advanced by the parties, which are virtually the same for both certified questions. Petitioner argues that responding to the certified questions in the affirmative would impose an impermissible retroactive application of West Virginia Code §§ 55-7-29 and 55-7E-3. Asserting that the law of damages is substantive, Petitioner contends that application of the statutes at issue would impair substantive rights contrary to this Court’s prior holding that “[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application.” Syl. Pt. 2, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). To hold otherwise, Petitioner states, would be contrary to our observation that “[i]t has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of actions, *suits*, or vested property rights.” *Mildred L.M. v. John O.F.*, 192 W.Va. 345, 351 n.10, 452 S.E.2d 436, 442 n.10 (1994) (citing *Landgraf v.*

USI Film Prod., 511 U.S. 244 (1994)). Petitioner further argues that the statutes at issue are neither procedural nor remedial, and absent contrary language in the legislation, may not be applied retroactively to a case based on a discharge from employment that preceded the statute's effective date of June 8, 2015.

Conversely, Respondent asserts that a plaintiff does not have a right to damages until they are proven at trial and thus Mr. Martinez had no vested right to unmitigated front pay or punitive damages prior to trial. Respondent relies upon the language of each statute referring to an "award" for its argument that applicability is not triggered until damages are awarded. Consequently, Respondent posits that it is not seeking to apply the subject statutes retroactively. Respondent urges this Court to rely upon our prior holding that "[a] law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application." Syl. Pt. 3, *Sizemore v. State Workmen's Compensation Comm'r.*, 159 W.Va. 100, 219 S.E.2d 912 (1975). Respondent requests that "the law in effect on the date of trial be applied in this case" and urges this Court to disregard what it characterizes as a "cloud of confusion" created by Petitioner's retroactivity argument.

We now address each certified question in turn.

A. *West Virginia Code § 55-7E-3*

The first certified question is based upon West Virginia Code § 55-7E-3, which addresses the recovery of front pay¹ and back pay² in employment cases and states:

(a) In any employment law cause of action against a current or former employer, regardless of whether the cause of action arises from a statutory right created by the Legislature or a cause of action arising under the common law of West Virginia, the plaintiff has an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and front pay awards are not an available remedy. Any award of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable diligence.

(b) In any employment law claim or cause of action, the trial court shall make a preliminary ruling on the appropriateness of the remedy of reinstatement versus front pay if such remedies are sought by the plaintiff. If front pay is determined to be the appropriate remedy, the amount of front pay, if any, to be awarded shall be an issue for the trial judge to decide.

W.Va. Code § 55-7E-3 (2016). The effective date of this statute was June 8, 2015.³

¹ “Back pay” is defined as “the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of the adverse employment action through the time of trial.” W.Va. Code § 55-7E-1(a).

² “Front pay” is defined as “the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of trial through a future date.” W.Va. Code § 55-7E-1(b).

³ 2015 W.Va. Act ch. 5.

This new article of Chapter 55 also includes articulated findings and a declaration of purpose. According to West Virginia Code § 55-7E-2(a)(3), “the goal of compensation remedies in employment law cases is to make the victim of unlawful workplace actions whole” W.Va. Code § 55-7E-2(a)(3). Moreover, “[i]n West Virginia, the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states. This lack of uniformity in the law puts our state and its businesses at a competitive disadvantage.” W.Va. Code § 55-7E-2(a)(4). Finally, “[t]he purpose of this article is to provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment action, but to ensure that compensation does not far exceed the goal of making a wronged employee whole.” W.Va. Code § 55-7E-2(b).

To answer the certified question presented by the district court, we first examine our precedent relating to the applicability of statutory enactments. We begin with the statutory proposition that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” W.Va. Code § 2-2-10(bb) (2013). “The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect. Syl. pt. 4, *Taylor v. State Compensation Comm’r*, 140 W.Va. 572, 86 S.E.2d 114 (1955).” Syl. Pt. 2, *In re*

Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc., 234 W.Va. 485, 766 S.E.2d 432 (2014).

How statutory amendments apply may be determined by the subject matter of the statute. For example, “[s]tatutory changes that are purely procedural in nature will be applied retroactively.” Syl. Pt. 4, *Miller v. Smith*, 229 W.Va. 478, 729 S.E.2d 807 (2002). On the other hand, we have held that “[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application.” *Public Citizen* at Syl. Pt. 2.

Addressing whether a statute applies retrospectively, we have held, “[t]he law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application. Syl. pt. 3, *Sizemore v. State Workmen’s Comp. Comm’r*, 159 W.Va. 100, 219 S.E.2d 912 (1975).” *Cassella* at Syl. Pt. 3.

Turning to the first certified question, we note that the Legislature’s findings and declaration of purpose set forth explicitly in West Virginia Code § 55-7E-2

state that “the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states.” *Id.* This inconsistency originated with this Court’s holding more than 30 years ago regarding an employee’s duty to mitigate damages:

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Syl. Pt. 2, *Mason County Board of Educ. v. State Superintendent of Sch.*, 170 W.Va. 632, 295 S.E.2d 719 (1982). Eventually, this Court extended this so-called “malice exception” beyond a plaintiff’s duty to mitigate back pay damages and applied the exception to front pay damages. *See Burke-Parsons-Bowlby Corp. v. Rice*, 230 W.Va. 105, 115 736 S.E.2d 338, 348 (2012); *Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 184, 680 S.E.2d 791, 815 (2009); *West Virginia Am. Water Co. v. Nagy*, No. 10-1229, 2011 WL 8583425 at *3 (W.Va. June 15, 2011) (memorandum decision). As a result, this State adopted a concept of unmitigated front and back pay unrecognized by any other state.⁴

West Virginia Code § 55-7E-3 abrogates *Mason County* and its progeny, providing that “in any employment law cause of action,” “[u]nmitigated or flat back pay

⁴ Amber Marie Moore, Student Work, *Can Damages Be Too Damaging? Examining Mason County and its Progeny*, 155 W. Va. L. Rev. 807, 837 (2012).

and front pay awards are not an available remedy. Any amount of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earning or the amount earnable with reasonable diligence by the plaintiff.” W.Va. Code § 55-7E-3(a)-(b). Moreover, the statute provides that “[t]he amount of front pay, if any, to be awarded shall be an issue for the trial judge to decide.” W.Va. Code § 55-7E-3(b).

We now consider whether this statute applies to an employment case that is based upon a claim for unlawful discriminatory discharge that occurred prior to June 8, 2015, and is set for trial after the effective date of West Virginia Code § 55-7E-3. As we have stated, “[s]tatutes which do not create new rights or take away vested ones are deemed to be remedial and are not within the strict application of the rule of presumption against retroactivity.” *Mildred L.M.*, 192 W.Va. at 351 n.10, 452 S.E.2d 445 n.10 (citing *Joy v. Chessie Emp. Fed. Credit Union*, 186 W.Va. 118, 411 S.E.2d 261 (1991)). Generally, a remedial statute has been defined as “a statute that relates to practice, procedure, remedies and does not affect substantive or vested rights.” 73 Am. Jur. 2d *Statutes* § 7 (2017). Accordingly, we consider whether the statute at issue is remedial.

A remedial statute improves or facilitates remedies already existing for the enforcement or rights of redress of wrongs, as opposed to an enactment extinguishing a cause of action or barring a party from prosecuting a cause of action that affects substantive rights and, therefore, is not remedial. 73 Am. Jur. 2d *Statutes* § 7; *see also Langston v. Riffe*, 754 A.2d 389, 395-96 (Md. 2000). West Virginia Code § 55-7E-1

addresses the procedure by which an award of back pay or front pay is considered at trial by eliminating the former “malice exception” to a plaintiff’s duty to mitigate wage damages. As the Iowa Supreme Court observed, “[i]t has been held that a plaintiff has no vested right in a particular measure of damages.” *Shepherd Components, Inc. v. Brice Petrides-Dobohoe & Assoc.*, 473 N.W.2d 612, 619 (Iowa 1990) (citations omitted). Several other courts have agreed with this approach. *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736 (8th Cir. 1985) (applying statute removing punitive damages as remedy to case filed prior to statute’s enactment); *Dardeen v. Heartland Manor, Inc.*, 710 N.E.2d 827, 831-32 (Ill. 1999) (“Because no vested right is affected, the application of the [amended statute abolishing treble damages] to plaintiff’s pending suit is proper, irrespective of when the cause of action accrued or the complaint was filed.”); *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 504 (Mont. 1989) (“There is no vested right to exemplary damages and the legislature may, at its will, restrict or deny the allowance of such damages”) (citation omitted); *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. 1986) (“[U]nder Missouri law, punitive damages are remedial and a plaintiff has no vested right to such damages prior to the entry of judgment.”). Although these cases specifically address punitive damages, which is the subject of the second certified question, we find this analysis equally applicable to front and back pay damages.

We find that West Virginia Code § 55-7E-3 is a remedial statute that does not impact a vested right. Because it neither diminishes substantive rights nor augments substantive liabilities, it is not subject to a retroactivity analysis under syllabus point 2 of

Public Citizen. We note that retroactivity ought to be judged with regard to the act or event that the statute is meant to regulate.⁵ On that point, West Virginia Code § 55-7E-3 clearly regulates the award of back pay and front pay at trial in an employment case. As we have stated, “[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive” *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 351, 752 S.E.2d 372, 382 (2013) (quoting *Landgraf*, 511 U.S. at 273-74). It is recognized that “[i]n general, statutes dealing with a remedy apply to actions tried after their passage even though the right or cause of action arose prior thereto.” 3 Sutherland Statutory Construction § 60:1 (7th ed. 2016). We therefore hold that West Virginia Code § 55-7E-3, abrogating Syllabus Point 2 of *Mason County Board of Education v. State Superintendent of Sch.*, 170 W.Va. 632, 295 S.E.2d 719 (1982) and its progeny is a remedial statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed, thereby imposing an affirmative duty on the part of the plaintiff to mitigate any claim for past and/or future wages and requiring an award, if any, of back pay and front pay to be reduced by the amount of interim earnings or the amount that may be earned with reasonable diligence by the plaintiff. Thus, we answer the first certified question in the affirmative.

⁵ A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 41, p. 263 (2012).

B. West Virginia Code § 55-7-29

We now turn to the second certified question, which is whether West Virginia Code § 55-7-29 applies to a case that is based upon a claim for unlawful discriminatory discharge that occurred prior to June 8, 2015, and is set for trial after that effective date of West Virginia Code § 55-7E-3. West Virginia Code § 55-7-29 pertains to punitive damages and states in relevant part as follows:

(a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

(b) Any civil action tried before a jury involving punitive damages may, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:

(1) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages, if any.

(2) If the jury finds during the first stage of a bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages.

(3) If the court finds that sufficient evidence exists to proceed with a consideration of punitive damages, the same jury shall determine if a defendant is liable for punitive damages in the second stage of a bifurcated trial and may award such damages.

(4) If the jury returns an award for punitive damages that exceeds the amounts allowed under subsection (c) of this section, the court shall reduce any such award to comply with the limitations set forth therein.

(c) The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or \$500,000, whichever is greater.

W.Va. Code § 55-7-29 (2016). The effective date of this statute was also June 8, 2015.⁶

West Virginia Code § 55-7-29 is similar to West Virginia Code § 55-7E-3 in that both address the process for consideration of damages at trial. The latter statute articulates the evidentiary standard and procedure for an award of punitive damages at trial and imposes a cap on such awards. As explained above, “[s]tatutes which do not create new rights or take away vested ones are deemed to be remedial and are not within the strict application of the rule of presumption against retroactivity.” *Mildred L.M.*, 192 W.Va. at 351 n.10, 452 S.E.2d 445 n.10 (citation omitted).

In reliance on the same authorities cited in our discussion of the first certified question, we hold that West Virginia Code § 55-7-9 is a remedial statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed. As such, West Virginia Code § 55-7-29 is not subject to a retroactivity analysis under syllabus point 2 of *Public Citizen*. As the Supreme Court of the United States explained in *Landgraf*:

Even absent specific legislative authorization, application of new statutes passed after the events in suit is

⁶ 2015 W.Va. Acts ch. 6.

unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Landgraf, 511 U.S. at 273. A plaintiff has no right, much less a vested right, to an award of punitive damages prior to trial. Thus, we answer the second certified question in the affirmative.

IV. CONCLUSION

Having answered each of the two certified questions in the affirmative, this matter is dismissed from the docket of this Court.

Certified questions answered.