

No. 31343 - Forrest A. Younker v. Eastern Associated Coal Corporation, a corporation, West Virginia Division.

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

I fully join in the majority opinion. I believe the Court has struck the appropriate balance between the interest of business in adopting and enforcing Eastern’s Code of Business Conduct (hereinafter referred to as “the CBC”) and the reasonable expectations of the employees subject to it. I also observe that while CBCs are not new, this Court has not, until now, had the opportunity to explore them. Thus, I write to generally review the nature of CBCs and their potential value in advancing desirable goals for society at large, the businesses themselves and their employees.

A. What is a Code of Business Conduct?

As early as the 1970s, commentators recognized that “the demand for [code of business conduct] adoption by all public companies is likely to increase.” Charles E. Harris, *Structuring a Workable Business Code of Ethics*, 30 U. Fla. L. Rev. 310, 312 (1978). Since then, “corporate codes have become a common corporate document.” Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 Geo. L. J. 1559, 1602 (1990). Because many businesses have such codes, it would be useful to identify and discuss the definition of a CBC. The definition of a CBC can be found in recent Congressional legislation requiring public

corporations to either adopt a CBC for corporate financial officers or explain why such a code has not been adopted. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 406(a), 116 Stat. 745, 789 (codified at 15 U.S.C.A § 7264(a) (West. 2002 & Supp. 2003)).¹ The federal regulations implementing the Sarbanes-Oxley Act expand the statutory definition of code of conduct² to generally mean written standards reasonably designed to deter wrongdoing; to promote honest and ethical conduct and compliance with applicable governmental laws, rules and regulations; to govern prompt internal reporting to an appropriate person or persons, identified in the code, of code violations; and to ensure accountability of those subject to the code for adherence to it. *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, 68 Fed. Reg. 5110, 5118 (Jan. 31, 2003). Thus, federal law provides us with a benchmark for defining CBCs. I now turn to an examination of the potential utility of such codes.

B. Why CBCs are Important

The widespread adoption of CBCs reflects “an unstated belief by academics, regulators, and legislators that a written code of conduct is an important vehicle for promoting corporate self-governance and the development of ethical standards.” *Id.* at 1600.

¹Moreover, both the New York Stock Exchange and the National Association of Securities Dealers require that listed companies have codes applicable to directors, officers and employees. Securities and Exchange Commission Approval Order, Release No. 34-48745, 68 Fed. Reg. 64154, 64178 (Nov. 12, 2003).

²The Sarbanes-Oxley Act calls such codes “code[s] of business ethics.” The regulation implementing Sarbanes-Oxley also requires a code of business ethics to cover the chief executive officer.

CBCs have been recognized by commentators and regulators alike as a potentially desirable means to advance social policy. *See, e.g.,* Cristina Baez, et al., *Multinational Enterprises and Human Rights*, 8 U. Miami Int'l & Comp. L. Rev. 183, 324 (1999-2000) (“[T]hese codes seem to provide an ideal mechanism for creating awareness and respect for human rights within the structure of a corporation.”); Pitt & Groskaufmanis, *Corporate Codes of Conduct*, 78 Geo. L. Rev. at 1635-36 n.449 (noting that Johnson & Johnson’s corporate credo was “*the* contributing factor in the company’s exemplary behavior” when the company’s Tylenol drug was poisoned in the early 1980s (citation omitted)); U.S. Dep’t of Labor, *The Apparel Industry and Codes of Conduct: A Solution to the Int’l Child Labor Problem?* (1996) (noting that CBCs can be an effective tool for fighting child labor exploitation). Moreover, the potential benefits of a CBC also extend to a business’s bottom line. Research from the Institute for Business Ethics “suggests that companies with a published code of ethics are consistently more admired, have a better rating in terms of managing non-financial risks and show better financial performance than companies without ethical codes.” *Ethics Pays*, *Ethical Corp. Magazine* at 6 (May 2003). Given the important role that CBCs can play in advancing important social goals, I applaud the majority for striking an appropriate balance between the impact of CBCs and the expectations of those subject to them.

For the foregoing reasons, I concur. I am authorized to state that Justice Maynard joins in this concurring opinion.