No. 32584 – *Justin D. Bailey v. Mayflower Vehicles Systems, Inc., a corporation, d/b/a South Charleston Stamping and Manufacturing*

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OF WEST VIRGINIA

Starcher, J., dissenting:

I dissent to the circuit court's granting of judgment as a matter of law in this case. I would have reversed the circuit court's decision, and remanded the case to let a jury hear and assess the plaintiff's claims.

The plaintiff, Justin Bailey, laid out a clear case that he had been injured on the job, and kept aggravating his injury. Ultimately, he stopped working and filed for workers' compensation benefits on April 1, 1996, and began receiving benefits in May. But in September 1996, he discovered that his employer, defendant Mayflower Vehicle Systems, had fired him for "excessive absences." After talking with the personnel director, the employer reinstated him to his job.

The plaintiff was routinely seeing his own doctor while he was recuperating. But in December 1996 he was seen, at the request of his employer, by a doctor chosen by the folks at the Workers' Compensation Division. The doctor chosen by the Division stated that the plaintiff had reached his maximum degree of medical improvement. In January 1997, the plaintiff's temporary benefits were cancelled, and he received a permanent partial disability award and a referral to a rehabilitation counselor.

The plaintiff's personal physician, however, did not believe the plaintiff's injury was healed and refused to allow the plaintiff to return to work. The plaintiff even began paying for his own physical therapy and "work hardening," but stopped because of the cost and because the Workers' Compensation Division refused to assist in paying for these treatments. The defendant employer gave the plaintiff additional time – his own time, without a salary and without any workers' compensation benefits – to recover.

But the defendant employer finally demanded that the plaintiff return to work anyway. When he didn't, the employer declared that the plaintiff had "voluntarily quit his job." The employer later offered the plaintiff a "consolation prize" in the form of a job with less responsibility and lower pay, but premised the job on a functional capacity evaluation. The plaintiff passed the evaluation, but the employer claimed it never received the evaluation results, and later "gave up" on offering the plaintiff a job.

This Court has long held that "[u]pon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence." Syllabus, *Nichols v. Raleigh-Wyoming Coal Co.*, 112 W.Va. 85, 163 S.E. 767 (1932).

The circuit court in this case failed to consider every reasonable and legitimate inference fairly rising from the testimony in favor of the plaintiff. Instead, the circuit court and the majority opinion viewed the facts in a light most favorable to the defendant, and interposed their own interpretation of the plaintiff's evidence so as to find that the plaintiff

had failed to meet his burden of proof. A jury could have inferred from the defendant's actions that the defendant intended to get rid of the plaintiff because he had filed a workers' compensation claim, and because he missed work as a result of his work-related injury. The circuit court simply decided a fact issue which the plaintiff was entitled to have a jury decide. I therefore believe that the circuit court erred in granting judgment as a matter of law to the defendant on each of the plaintiff's claims.

I respectfully dissent, and I am authorized to state that Chief Justice Albright joins in this dissent.