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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMEY LITTLE,

Plaintiff,

v.

WEST VIRGINIA ADJUTANT GENERAL,

Defendant.

Civil Action No. 05-C-2738
Judge Tod Kaufman

2008 APR -7 PM 1:39
CATHY J. B. SOLOMON
KANAWHA COUNTY CIRCUIT COURT

FILED

**AMENDED ORDER DENYING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
CERTIFYING QUESTIONS TO THE WEST VIRGINIA SUPREME COURT**

This amended order replaces the order entered by this Court on February 29, 2008. This matter is presently before the Court on the Defendant West Virginia Adjutant General's "Motion for Summary Judgment," filed April 20, 2007. Plaintiff Jamey Little filed a "Brief in Opposition to Defendant's Motion for Summary Judgment" on May 23, 2007. Defendant subsequently filed a "Reply Memorandum in Support of Defendant's Motion for Summary Judgment," on February 4, 2008. The Court held a hearing on this matter on February 6, 2008.

After reviewing the motion, response, reply, arguments of counsel, and the pertinent legal authorities, this Court DENIES the Defendant's Motion for Summary Judgment.

Pursuant to West Virginia Code § 58-5-2, counsel for both the Plaintiff Jamey Little and the Defendant West Virginia Adjutant General have moved this Court to present certified questions to the West Virginia Supreme Court. The parties have presented to this Court certain questions of law, which are issues of first impression in West Virginia, and which substantially control the outcome of the case. Therefore, this Court finds that these issues are appropriate for certification to the West Virginia Supreme Court.

For purposes of the certified questions, the parties have agreed and stipulated to the following facts:

1. Pursuant to W.Va. Code §15-1A-1, the West Virginia Adjutant General's department is part of the executive branch of State government and is "charged with the organization, administration, operation and training, supply and discipline of the military forces of the State."

2. Also as part of the Adjutant General's duties, firefighters and security guards are hired not only to serve the 130th Airlift Wing of the West Virginia National Guard, but also to deal with various emergencies at Yeager Airport and elsewhere.

3. In 1989, the civilian firefighter positions at Yeager Airport were dissolved, and the positions were reopened as state employment positions, under the control and supervision of the Adjutant General. On the 20th of July, 1989, the Adjutant General established a job description for the firefighters at the 130th Airlift Wing at the Yeager Airport in Charleston, West Virginia, which included a requirement that a candidate be a member of the West Virginia Air National Guard. Specifically, the job description stated:

TITLE: FIREFIGHTER

VI. QUALIFICATIONS:

a. MANDATORY:

* * *

5) Qualified Personnel are hired in accordance with department needs, State and Federal policy, and Affirmative Action Plan.

* * *

12) Be a member or eligible and willing to be a member of the WVANG with assignment to the Fire Protection Branch.

4. The Operations and Maintenance Agreement Position Vacancy Announcement, in effect at that time for the position of firefighter, stated:

MILITARY MEMBERSHIP: Position will be filled by a member of the West Virginia Air National Guard, unless the Adjutant General grants a waiver for special qualifications or other reasons justified by the selecting supervisor.

5. After serving approximately 4 ½ years in active duty with the United State Air

Force as a firefighter, Plaintiff applied for a firefighter position with the Adjutant General's office, in October of 1996.

6. At the time he applied, Plaintiff was a member of the National Guard.

7. Effective on June 2, 2004, the Legislature enacted W.Va. Code §15-1B-26, which provides:

Only firefighters and security guards who are members of the West Virginia national guard may be employed by the adjutant general as firefighters and security guards: Provided, That any person employed as a firefighter on the effective date of this section who is not a member of the West Virginia air national guard may continue to be employed as a firefighter: Provided, however, That no person who is not employed on the effective date of this section as a firefighter and who is not a member of the West Virginia air national guard may be employed as a firefighter for the West Virginia air national guard.

8. In 2002, Plaintiff began receiving periodic counseling and prescribed medications to address anxiety and depression.

9. Plaintiff has testified that he did not always take the medication as prescribed. Plaintiff's treating physician, Dr. Scott Moore, testified that he was not aware that Plaintiff was not taking his prescribed medication. He further testified that Plaintiff continued to show up for his appointments and to discuss medication changes with Dr. Moore until Plaintiff stopped treating with Dr. Moore some time in 2004.

10. On July 20, 2004, Plaintiff attempted to commit suicide by consuming an overdose of prescription medications in a hotel room, in front of fellow firefighters and members of the National Guard, and was required to be hospitalized.

11. As a result of this incident, the National Guard placed Plaintiff on 4T profile,

which restricts an individual from being militarily deployable based upon a medical condition.

12. Based upon Plaintiff's 4T profile, the Adjutant General's office placed Plaintiff on a medical suspension from working as a firefighter, due to the requirement that firefighters be members of the military.

13. Plaintiff grieved the Adjutant General's decision to medically suspend him.

14. Plaintiff won his grievance by default, and the parties subsequently entered into a settlement agreement reinstating the sick and vacation leave used up by Plaintiff and also paying Plaintiff \$1,486.56 to cover the pay lost between January 24, 2005, and May 24, 2005.

15. Various psychiatrists and psychologists, who have provided counseling and treatment to Plaintiff, have determined that he suffers from post traumatic stress syndrome and depression.

16. Plaintiff's medical file was evaluated by an Air Force Medical Evaluation Board and, in January of 2005, the Air Force disqualified Plaintiff for world-wide duty based upon a diagnosis of "[300.00] Anxiety disorder with PTSD symptoms, and [E950] suicide and self-inflicted poisoning by solid or liquid substances." Plaintiff was subsequently discharged from the Air National Guard.

17. Based upon Plaintiff's military discharge, and pursuant to W.Va. Code §15-1B-26, Plaintiff was transferred, effective June 16, 2005, to the position of building maintenance specialist with the Civil Engineering branch of the Adjutant General's office, a position which does not require military membership for employment.

18. Based upon the testimony of Plaintiff's current treating physician, Dr. Lawrence Kelly, due to Plaintiff's post traumatic stress disorder, Plaintiff would have been unable to continue employment as a firefighter at least as of August 23, 2005, and would have been unable

to continue in any type of gainful employment as of September 27, 2006. Dr. Kelly testified that, following Plaintiff's office visit with Dr. Kelly on September 27, 2006, he advised Plaintiff to resign his position with the Adjutant General's office.

19. Plaintiff resigned his employment with the Adjutant General's office on October 17, 2006.

20. The Defendant has moved for summary judgment on the following grounds: (1) the Adjutant General had a legitimate, nondiscriminatory reason for the Plaintiff's dismissal pursuant to W.Va. Code §15-1B-26, therefore his actions are not in violation of the West Virginia Human Rights Act; and (2) the "grandfather clause" contained in W.Va. Code §15-1B-26 does not provide an exception to military membership which would benefit the Plaintiff in this case.

Conclusions of Law

1. The West Virginia Rules of Civil Procedure state that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." W.Va. R. Civ. P. 56(c). "The circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 451 S.E.2d 755, 758 (1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

2. "The essence of the inquiry the court must make is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 338

(1995) (quoting *Anderson*, 477 U.S. at 249).

3. W.Va. Code §5-11-1, *et seq.*, also known as the West Virginia Human Rights Act, prohibits certain discriminatory practices by employers against certain classes of employees.

4. In this case, the Plaintiff has alleged that he lost his job as a firefighter because he was diagnosed as suffering from post traumatic stress disorder. Thus, the Plaintiff contends that, although the reason for his discharge as a firefighter was stated to be the loss of his membership in the WV Air National Guard, he was actually discriminated against based upon his disability. The Plaintiff further contends that the Defendant's reliance on W.Va. Code § 15-1B-26 is a pretext for disability discrimination, and also asserts that this statute does not exempt the Defendant from being held liable for violations of the West Virginia Human Rights Act.

5. The Defendant asserts that the Adjutant General's reliance upon W.Va. Code §15-1B-26, as the reason for discharging the plaintiff as a firefighter, demonstrates a legitimate, nondiscriminatory reason for plaintiff's discharge, and acts as a complete defense to a discrimination claim filed under the West Virginia Human Rights Act because it shows the absence of any discriminatory motive.

6. W.Va. Code §15-1B-26 provides:

Only firefighters and security guards who are members of the West Virginia national guard may be employed by the adjutant general as firefighters and security guards: Provided, That any person employed as a firefighter on the effective date of this section who is not a member of the West Virginia air national guard may continue to be employed as a firefighter: Provided, however, That no person who is not employed on the effective date of this section as a firefighter and who is not a member of the West Virginia air national guard may be employed as a firefighter for the West Virginia air national guard.

7. Based upon the West Virginia Supreme Court's decisions in *Stone v. St. Joseph's Hospital of Parkersburg*, 208 W.Va. 91, 538 S.E.2d 389 (2000), and *Skaggs v. Elk Run Coal*

Company, Inc., 198 W.Va.51, 479 S.E.2d 561 (1996), the Court finds there are genuine issues of material fact requiring submission to a jury. Furthermore, as explained below, the Court finds the Plaintiff is protected by the grandfather clause included in W.Va. Code § 15-1B-26. Therefore, the Court DENIES the Defendant's Motion for Summary Judgment.

Certified Question

1. In this case, Plaintiff was a firefighter employed by the Adjutant General and was a member of the National Guard when he was first hired. The National Guard later discharged Plaintiff based upon a mental disability. The Adjutant General then discharged Plaintiff as a firefighter, based upon W.Va. Code §15-1B-26, because he was no longer a member of the National Guard. Under these facts, is the Adjutant General's reliance on W.Va. Code §15-1B-26 a complete defense to Plaintiff's claim that he was discriminated against by the Adjutant General in violation of the West Virginia Human Rights Act, unless the Plaintiff falls within the exception to the requirement of military membership in the "grandfather clause" contained in the statute?

The Court has ruled in the affirmative on this question, answering it, "yes." Based upon the fact that the West Virginia Legislature had enacted West Virginia Code § 15-1B-26 prior to the Plaintiff's discharge from the West Virginia National Guard, the Adjutant General was mandated to discharge the Plaintiff as a firefighter, unless he was "grandfathered" into his position.

The Plaintiff's dismissal as a firefighter was due to the failure of the Plaintiff to maintain his membership with the WVANG, regardless of the reason for the failure to maintain such membership. Under Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 479 S.E.2d 561 (1996), the Plaintiff would have to prove by a preponderance of the evidence

that a forbidden intent was a motivating factor in the adverse employment action. The Adjutant General would then be able to show that the same result would have occurred even in the absence of any unlawful motive or, in other words, to show a legitimate, nondiscriminatory reason for his actions. The Adjutant General's reliance upon W.Va. Code §15-1B-26, would clearly demonstrate a legitimate, nondiscriminatory reason for his actions. Thus, unless the plaintiff falls within the exception to the requirement of military membership in the "grandfather" clause contained in the statute, the Adjutant General's reliance upon W.Va. Code §15-1B-26 would be a complete defense to Plaintiff's claim that he was discriminated against by the Adjutant General in violation of the West Virginia Human Rights Act.

However, this Court further finds that any firefighter who was a member of the National Guard on the date this statute was enacted is protected by this grandfather clause. The assertion that a firefighter, who was a member of the National Guard at the time this statute was enacted, but who later is dismissed from the National Guard, somehow loses the benefit of this grandfather clause requires too narrow a reading of W.Va. Code §15-1B-26. Such an interpretation would permit Defendant to keep firefighters, who have never been members of the National Guard, while firefighters, who actually were members of the National Guard for many years could be discharged, leaving those originally in the National Guard with less rights than others. The only logical reading of this grandfather clause is that it protects all persons who were firefighters in 2004, when the statute was enacted. Otherwise, Equal Protection under the Due Process Clause of the Fourteenth Amendment is violated.

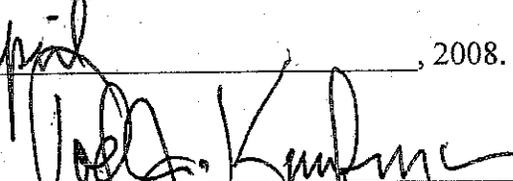
These questions arise upon a motion for judgment on the pleadings and present questions of law that the parties agree need to be answered by the West Virginia Supreme Court because the outcome will impact not only Plaintiff and Defendant, but may impact other employees of Defendant who may be discharged by the National Guard, based upon the employee's age, disability or whether or not they were "grandfathered" into their position.

The objections and exceptions of the Plaintiff and Defendant to the respective portions of this Order which adversely impact each party are hereby noted and preserved.

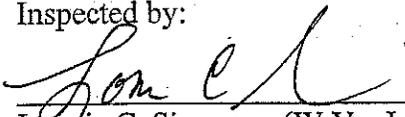
It is ORDERED that counsel for the Defendant is to file a Petition within sixty days of the date of entry of this Order, in accordance with the WV Rules of Appellate Procedure, Rule 13.

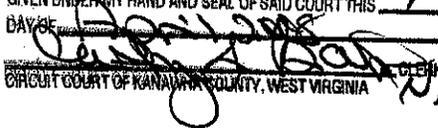
The Clerk is directed to send a certified copy of this Order to all counsel of record.

Entered this 7th day of April, 2008.


Honorable Tod Kaufman
Circuit Court of Kanawha County, West Virginia

Inspected by:


Lonnie C. Simmons (W.Va. I.D. No. 3406)
DiTRAPANO, BARRETT & DiPIERO, PLLC
604 Virginia Street, East
Charleston, West Virginia 25301
(304) 342-0133

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, GATHY B. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 7
DAY OF April, 2008.

GATHY B. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


Traci L. Wiley (W.Va. I.D. No. 8080)
PULLEN, FOWLER, FLANAGAN, BROWN & POE, PLLC
James Mark Building
901 Quarrier Street
Charleston, West Virginia 25301
(304) 344-0100