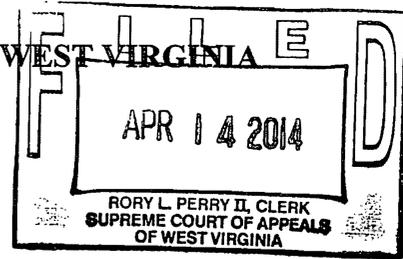


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA EX REL)
CITY OF WEIRTON)
)
Petitioner)
)
v)
)
DAVID J. SIMS, JUDGE OF THE)
CIRCUIT COURT OF BROOK COUNTY)
)
Respondent)

Case No.: 14-0279

RESPONSE TO WRIT OF PROHIBITION

Plaintiff’s case below, *Terry DiBacco vs. City of Weirton, West Virginia, and the Board of Trustees of the Policemen’s Pension or Relief Fund of the City of Weirton, Inc.*, Civil Action No.: 11-C-50, involves a claim by Mr. DiBacco, a former police officer of the City of Weirton, West Virginia; who after being employed by the City of Weirton for over a decade, was perceived to have a “mental” disability by the City of Weirton, put off on administrative leave and required to be evaluated by a forensic psychologist chosen by the City, and then advised by the City that he either had to apply for a “disability” pension, or be terminated.

Plaintiffs assert below a claim of disability discrimination under the West Virginia Human Rights Act.

During the time Plaintiff was on administrative leave, Plaintiff sought the help of a friend and attorney in Weirton, West Virginia, Dean Makricostas. Plaintiff and his wife were present when Mr. Makricostas discussed the issue of Plaintiffs return to work with the Weirton City Attorney, Vince Gurrera, who advised Makricostas that all he needed to return to work was a general “release” from his physician (as opposed to a “mental health” release). (Exhibit A, ¶8,

10, 11, Findings of Fact). Accordingly, Plaintiff obtained a general release from his physician, which the City then ignored. (Exhibit B).

At the time, there was neither a lawsuit pending against the City by Plaintiff, nor even any claim made by him against the City of Weirton. He was just trying to see how he could get back to active duty from administrative leave.

The City defends the present action claiming that Plaintiff's failure to provide a "release" from a mental health provider was why it required him to either be "terminated," or file for disability pension. Thus the nature of the required release goes to the heart of the Defendant City's defense. (Exhibit A, ¶5, Findings of Fact).

When Plaintiff sought to take the deposition of Dean Makricostas to verify what City Attorney Vince Gurrera had told him about the nature of release needed for Plaintiff to return to work, the City first objected claiming it involved "attorney-client" discussions between Makricostas and DiBacco; and later, filed a Motion for Protective Order, claiming additionally that the conversation was part of "compromise" settlement negotiations under W.V. Rule of Evidence 408, and thus inadmissible.

The City's Writ of Prohibition is premised on the Court's denying its Motion for a Protective Order. The Honorable Judge Simms correctly found, *inter alia*, that it was making no findings or conclusions at this time as to whether the alleged statements made by Mr. Gurrera are admissible (Exhibit A, ¶2, Conclusions of Law), but concluded that it needed "some context in which the statements regarding a release were made," before it could even rule on the admissibility of the statements (Exhibit A, ¶6, Conclusions of Law), and acknowledged that the case involves a "factual dispute as to what type of release the City was requiring the Plaintiff to produce." The Court reasonably concluded that "Based upon that factual dispute...Plaintiff has

articulated a specific reason that there exists the likelihood that admissible evidence will be generated by the deposition (Exhibit A, ¶8, Conclusions of Law), reserving the right to rule on admissibility prior to the trial of the above matter. (Exhibit A, ¶11, Conclusions of Law).

The City admitted Makricostas never even officially represented DiBacco, and even advised Makricostas that he could not represent DiBacco due to a conflict of interest, objecting to his representation of DiBacco “in any capacity.” (Exhibits C and D).

Although the City advanced, then abandoned its attorney-client argument and moved on to an argument that the City telling a lawyer what its former employee needed to return to work was covered by offers of compromise, then in its Petition for a Writ, the City again trots out attorney-client privilege as a basis, P. 9, n 6, which is not even a privilege the City could assert in any event.

**THE CITY DOES NOT MEET THE REQUIRED STANDARD FOR A
WRIT OF PROHIBITION**

The City admits that it does not meet the fourth required element, that the order is an “often repeated error or manifests persistent disregard for either procedural or substantive law. (Petition, P. 7 (citations ignored))

Plaintiff below agrees, adding that it denies that the City meets any of the other standards as well. For example, the Court’s Order is not clearly erroneous, and this is a factor awarded substantial weight. Nor is this a matter of first impression, as seen *infra* at PP. 3-5. Numerous cases, before and after the promulgation of the rules of evidence, indicate that the Respondent Court is correct.

The City must first show that the statement occurred in settlement discussions. The City erroneously states that “[t]here is no dispute in this case that the two parties through their counsel met and attempted to reach a settlement agreement prior to suit.” (Petition, p. 11). Not only is

there a dispute: there is **absolutely no evidence** that this statement was part of any compromise, nor did the City even attempt to adduce any at the hearing before the Respondent Court.

“Return to work slips” are highly relevant in disability discrimination cases. e.g. *McKenzie v. Carroll Intern. Corp.*, 216 W.Va. 686, 689 610 S.E.2d 341, 344 (2004). See generally *McElroy Coal Co. v. Myers*, 2014 WL 928432 (W.Va.) (Mem. Op.), relying heavily upon the contents of a return to work slip in affirming a decision of the workers compensation office of judges.

Pre-claim communications among employers and employees are routinely allowed into evidence in employment cases. For example, employers often make “unconditional offers to employees to return to work,” even after they have been terminated to cut-off future damages. Such an offer is fully admissible in the employment claim context, any not subject to preclusion on a ground that such an offer constituted an “offer of compromise” as to future damages. It is rather part of the *res gestae* of the employer’s actions that may determine a material issue in the case—in that example, on the issue of damages. To say that any such communication to a Plaintiff is tantamount to an attempt to “compromise” a claim that hasn’t even been made just because it was communicated to an attorney (Mr. Makricostas) would allow the City to insulate itself from its ongoing wrongful conduct by its self-serving suggestions that everything discussed with an attorney is an “offer of compromise.”

The City also fails to address the exceptions to the rule of exclusion. While Relator here cited the rule generally Plaintiff cited the rule AND ITS EXCEPTIONS, see Exhibit A, ¶13, Findings of Fact.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not

admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. **This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.**

The City does not address any of the highlighted language. This evidence would be offered for another purpose: it was an admission by the City under *WVRE 801(d)*.

Thus statements in a letter which expressed only opinions of the Defendant with respect to future settlement of a claim and which did not indicate that any of them were made for the purpose of seeking a compromise constituted direct, express and unconditional “admissions” and disclosed an intention to admit liability for at least a part of Plaintiff’s claim. As here, they could not constitute a “compromise offer” and were admissible as admissions against interest. *Shaeffer v. Burton*, 151 W.Va. 761, 771, 155 S.E.2d 884, 891 (1967), citing *inter alia* *Averill*, *infra*.

While an offer of compromise is inadmissible, an independent admission of fact in an offer or proposed contract of compromise is admissible. *Keatley v. Hanna Chevrolet Co.*, 6 S.E.2d 1, 121 W.Va. 669 (1939), citing *Parkersburg and Lovett*. There an admission against interest made in the preamble of a proposed contract of compromise was admissible, where the admission did not disclose the purpose of compromise. *Id* at 4. See *Ballard v. Tri-County Metropolitan Transp. Dist. of Oregon* 2011 WL 1337090, 27 -28 (D. Or.).

Pre-rule cases reflect this situation, in that there was no compromise. The City simply said to an attorney that this is what the City demanded (though it now says it demanded something broader). Although testimony tending to show unaccepted offer of compromise is

incompetent, where such statements were made without attempt to make compromise, they are admissible as declarations against interest. *Averill v. Hart & O'Farrell*, 132 S.E. 870, 101 W.Va. 411 (1926), Accord; *Parkersburg & Marietta Sand Co. v. Smith*, 1915, 85 S.E. 516, 520, 76 W.Va. 246 (1915)(an admission was, held admissible, where it did not amount to a proposition of compromise) and *Lovett v. West Virginia Central Gas Co.*, 73 W.Va. 40, 79 S.E. 1007, 1008-9, (1913)(a concession, made in an offer of compromise, and not stated merely hypothetically to buy peace, is admissible in evidence as an admission, citing *Wigmore*).

Plaintiff also argued that the Court, to determine whether this was admissible would benefit from having a transcript of the deposition. Respondent agreed. (Exhibit A, ¶6, Conclusions of Law).

In a similar context, the federal district court in *Oregon* ruled in favor of admissibility of documents that that public employer claimed were protected by the comparable provision restricting admission of settlement discussions for some purposes. As the court here indicated, that provides a higher standard for the proponent of the evidence than discoverability.

That former employee, Ballard, brought claims for workers' compensation discrimination, intentional infliction of emotional distress, and racial discrimination. There too arose the issue of whether documentation had been provided of written support regarding the employee's return to work. 2011 WL 1337090 at 2. The employer sought to exclude this declaration of plaintiff's attorney. Their method was exactly the same as here, first on the grounds of attorney-client, which the court rejected, and which rejection it refused to reconsider, then on grounds that it contained discussion of settlement. The district court exactly followed plaintiff's oral argument here, that the rule does not exclude evidence from settlement discussions, provided they had an independent relevance.

“While the email would be inadmissible under Federal Rule of Evidence 408(a) to establish Tri Met's liability in a proceeding concerning Ballard's underlying workers' compensation claim, it is likely admissible here when offered to demonstrate John Free's hostility towards Ballard on her workers' compensation discrimination claim.

Ballard v. Tri-County Metropolitan Transp. Dist. of Oregon 2011 WL 1337090, at 27-28 (D. Or.).

For all the foregoing reasons, The City of Weirton's Writ of Prohibition should be summarily denied.

Respectfully submitted,

TERRY DIBACCO, Plaintiff:

By: 

Of Counsel

Patrick S. Cassidy, Esquire
(WV I.D. #671)
Timothy F. Cogan, Esquire
(WV I.D. #764)
CASSIDY, COGAN,
SHAPELL & VOEGELIN, L.C.
The First State Capitol
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Wheeling, WV 26003
Telephone: (304) 232-8100
Fax: (304) 232-8200

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL)
CITY OF WEIRTON)
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Case No.: 14-0279

CERTIFICATE OF SERVICE

Service of the foregoing **RESPONSE TO WRIT OF PROHIBITION** was had upon counsel of record herein by mailing a true and complete copy thereof, by United States mail, postage prepaid, this 14th day of April 2014, to the following:

Thomas E. Buck, Esq.
Bailey & Wyant PLLC
1219 Chapline Street
Wheeling, WV 26003

James C Wright, Esq.
William D. Wilmoth, Esq.
Steptoe & Johnson PLLC
1233 Main Street, Suite 3000
Wheeling, WV 26003

By: 
Of Counsel

Patrick S. Cassidy, Esquire (WV I.D. #671)
Timothy F. Cogan, Esquire (WV I.D. #764)
CASSIDY, COGAN,
SHAPELL & VOEGELIN, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
Telephone: (304) 232-8100
Fax: (304) 232-8352

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA,

TERRY DIBACCO,
Plaintiff,

v.

CIVIL ACTION NO. 11-C-50
Judge David J. Sims

CITY OF WEIRTON, WEST VIRGINIA, and
THE BOARD OF TRUSTEES OF THE POLICEMEN'S
PENSION OR RELIEF FUND OF
THE CITY OF WEIRTON, INC.
Defendants.

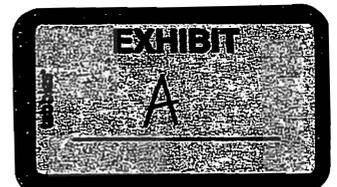
ORDER

On the 30th day of January 2014, the above styled matter came before the Court on Defendant, City of Weirton's, Motion for Protective Order and Motion to Quash Subpoena. Plaintiff appeared by counsel, Timothy Cogan, Esq., Defendant, City of Weirton (hereinafter "the City"), appeared by counsel, Thomas E. Buck, Esq., and Defendant, the Board of Trustees of the Policemen's Pension or Relief Fund of the City of Weirton (hereinafter "the Board"), by counsel, James Wright, Esq.

The Court, having previously reviewed the parties' filings, did entertain argument of counsel. The Court makes the following findings of facts and conclusions of law.

FINDINGS OF FACT

- 1) Plaintiff's claims in this matter are employment and disability related.
- 2) The trial date in this matter is set for July 7, 2014, with discovery to be completed by May 7, 2014.
- 3) Plaintiff was hired as a police officer for the City in July of 1993.
- 4) Plaintiff alleges that he was placed on administrative leave in April 2009.



5) One of the main issues in this matter is what type of release, “medical” or “mental”, was required to be provided by Plaintiff before he would be permitted to return to work as a police officer by the City.

6) The City’s asserts that Plaintiff never submitted a “mental” release to return to work after being put on administrative leave.

7) The City contends that since an independent medical examination (“IME”) identified that Plaintiff had mental health issues that Plaintiff should have secured a “mental” release from a mental health professional before returning to work.

8) Plaintiff testified in his deposition that during a conversation with Vince Gurrera, Esq., the City’s attorney, and Dean Makricostas, Esq., then Plaintiff’s attorney, both Plaintiff and his wife, heard Mr. Gurrera indicate that all the City needed for him to be able to return to work was a “medical” release.

9) Plaintiff disputes that he was ever required by the City to provide a “mental” release to return from administrative leave and contends that he did provide a general “medical” release from his attending physician.

10) Plaintiff noticed the deposition of Mr. Makricostas for February 1, 2014, which was subsequently re-scheduled for March 3, 2014.

11) Plaintiff seeks to discover by deposition of Mr. Makricostas, confirmation of an statements made by Mr. Gurrera, as the City’s attorney, of what Plaintiff would need to return to work as a police officer.

12) The City contends that Mr. Makricostas’ testimony involves settlement negotiations and is irrelevant and inadmissible pursuant to West Virginia Rule of Evidence 408.

13) Plaintiff denies that a deposition of Mr. Makricostas would solely involve irrelevant and inadmissible evidence.

CONCLUSIONS OF LAW

1) The issue is whether the alleged statements made by Mr. Gurrera, the City's attorney, are discoverable.

2) The Court makes no findings or conclusions at this time as to whether the alleged statements made by Mr. Gurrera are admissible under the Rule of Evidence.

3) Rule 26(b) of the West Virginia Rules of Civil Procedure (2010) states, in pertinent part that

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

4) Compromise and offers of compromise under Rule 408 of the Rules of Evidence are generally not admissible.

5) However, Rule 408 does not address the discoverability of compromise or offers of compromise, nor does it define compromise and offers of compromise as privileged communications.

6) The Court concludes that without some context in which the statements regarding a release were made, the Court is unable to rule on the admissibility of the statements.

7) There exists in this matter a factual dispute as to what type of release the City was requiring the Plaintiff to produce

8) Based upon that factual dispute, the Court concludes that Plaintiff has articulated a specific reason that there exists the likelihood that admissible evidence will be generated by the deposition.

9) The Court concludes that Mr. Makricostas' deposition may to be taken as part of discovery to determine the ultimate issue of whether any of the evidence is admissible under the Rules of Evidence.

10) The Court concludes that the Rules of Evidence do not preclude the taking of the deposition of Mr. Makricostas.

11) However, the Court may, upon completion of discovery, preclude the admission of the evidence should this matter proceed to trial. It is accordingly

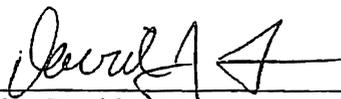
ORDERED that the City of Weirton's Motion for Protective Order and Motion to Quash Subpoena shall be and are hereby **DENIED**. It is further

ORDERED that the deposition of Dean Makricostas is stayed for thirty (30) days from the date of this Order for Defendants to seek a Writ of Prohibition from the Supreme Court of Appeals, or at least a stay of this Order. It is further

ORDERED that the Circuit Clerk of Brooke County shall provide an attested copy of this Order to counsel for the parties.

To which rulings the respective objections of the parties hereto are hereby noted.

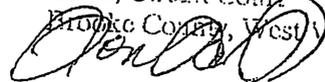
ENTER this 6th day of March 2014.



Judge David J. Sims

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: Glenda Brooks
Clerk, Circuit Court
Brooke County, West Virginia





RUPINDER K. ARORA, M.D.
INTERNAL MEDICINE
651 COLLIER'S WAY
SUITE 501
WEIRTON, WV 26062

WV Lic. # 21739

TEL: 304-723-6061
FAX: 304-723-6063

DEA # _____
NPI # _____

NAME Terry Di Rocco
ADDRESS _____ DATE 5-28-09

Dr. (Please Print) _____

would release to work
no restrictions,
physically

LABEL
REFILL _____ TIMES PRN NR

THIS PRESCRIPTION MAY BE FILLED WITH A GENERICALLY EQUIVALENT DRUG PRODUCT
UNLESS THE WORDS "BRAND MEDICALLY NECESSARY" ARE WRITTEN, IN THE PRACTITIONER'S
OWN HANDWRITING, ON THIS PRESCRIPTION FORM.

Sheila A. Seavolt

From: Dean Makricostas
Sent: Tuesday, April 13, 2010 9:54 PM
To: Sheila A. Seavolt
Subject: Fwd: Meeting for Terry DiBacco

Have Terry pick this up
Sent from my iPhone

Begin forwarded message:

From: v g <esq87@hotmail.com>
Date: April 13, 2010 9:32:12 PM EDT
To: <dmakricostas@taymaklaw.com>, Gary Dufour <citymanager@cityofweirton.com>, Police Chief <policechief@cityofweirton.com>
Subject: Meeting for Terry DiBacco

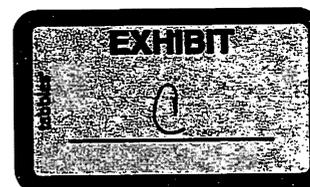
Dean, Gary and Bruce:

This will confirm that I spoke with Dean Makricostas tonight and confirmed a meeting with Dean, Terry, Gary, Bruce and me at 8:00 a.m. at the city building on Thursday, April 22, 2010. I understand that Dean is not technically representing Terry but is trying to facilitate the meeting in order to establish and maintain a peaceful relationship between the parties and to give Terry some guidance in how he is to proceed. I really appreciate Dean's efforts. I have informed Dean that Terry needs to turn in his ID, badge and unloaded revolver in the proper case either before or at the time of the meeting.

Thank you.

Vince Gurrera
GURRERA LAW OFFICES, PLLC
P.O. BOX 2308
WEIRTON, WV 26062
304-723-3861
FAX: 304-723-3871
E-mail: esq87@hotmail.com

4/14/2010



DITTMAR, TAYLOR & MAKRICOSTAS, PLLC

320 Penco Road

Reply to: Post Office Box 2827

Weirton, West Virginia 26062

Telephone: (304) 723-9670 Fax: (304) 723-9674

Toll Free: 1-800-888-4740

Dean G. Makricostas (WV, OH)

Email: dmakricostas@taymaklaw.com

April 20, 2010

Terry DiBacco
3725 Woodland Way
Weirton, WV 26062

RE: Employment Issue

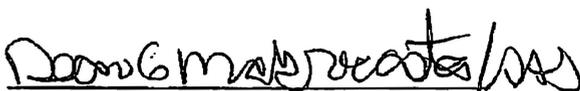
Dear Terry:

As always it was a pleasure meeting with you at my office. As you heard directly from Vincent Gurrera, the City of Weirton has raised a conflict of me representing you in any capacity due to the fact that I have represented other Police Officers and have access to confidential privileged information. Therefore, since there is an appearance of a conflict, I will not be able to partake in your representation and that's why I referred you to attorney Ron Kasserman and you spoke to him on the phone in my office.

Nevertheless, I am glad you have been consulting with attorney Steve Herndon regarding your employment issue. He is experienced in Civil Service and Employment issues. I wish you the best of luck. Make sure that Steve attends or reschedules the Thursday meeting so you can have counsel present.

Should you have any questions or would like to discuss this matter, please feel free to contact me immediately.

Very truly yours,



DEAN G. MAKRICOSTAS, ESQ.

DGM/sas

