RONNIE W. MATTHEWS
PUTNAM CO. CIRCUIT COURT
2017 OCT -4 PM 3: 24

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

DONALD WOODS,

Plaintiff,

v. Civil Action No.: 15-C-34

JEFFERDS CORPORATION,
A West Virginia Corporation,

Defendant.

ORDER GRANTING DEFENDANT JEFFERDS CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Upon consideration of the parties' written and oral arguments, the Court GRANTS Defendant Jefferds Corporation's Motion for Summary Judgment and DISMISSES this case from its docket. Specifically, the Court rules as follows:

A. FINDINGS OF FACT

The Court finds that the following facts are undisputed.

1. Jefferds Corporation ("Jefferds") maintains a permanent presence as a servicing company within the Toyota manufacturing plant in Buffalo, West Virginia. Jefferds keeps an office in the Buffalo plant and is responsible for maintaining and repairing a wide variety of equipment, including specialized cranes, vehicles such as forklifts and assembly line equipment. (Deposition of Ken Bradford,[1] at 7, 9).

[1] Mr. Bradford is employed with Toyota Motor Manufacturing in the Buffalo WV plant as the Manager of the Skilled Maintenance Facilities. (Bradford depo. at 7).

2. Nearly every employee that Jefferds stations at the Toyota facility occupies the same position, Engineering Equipment Mechanic, with the only distinction being which shift the employee is assigned to work—four during day shift and two on the night shift. (Deposition of Randy Harrison,[2] at 9).

3. Engineering Equipment Mechanics in Jefferds' Toyota location must be capable of certain physical requirements that are essential functions of the job. As identified in the job assessment and job posting, the job requires crouching, climbing ladders, lifting and carrying up to 75 pounds, crawling, lifting from floor to waist and assuming "many precarious positions."

4. The business reason for the physical requirements is that the repairs are often needed in difficult to reach places. For instance, some equipment that Jefferds repairs and maintains is located in "containment pits." (Bradford depo. at 20).

5. Other equipment is located on top of lifts that can only be accessed by climbing vertical ladders. (Bradford depo. at 22 and job assessment).

6. If a piece of equipment needs repairs in the Toyota facility, time is of the essence to make that repair. (Bradford depo. at 18). The Buffalo plant manufactures engines and transmissions. Costs of these products range from $2,500 to $5,000, and a product comes off of the assembly line approximately every 25 seconds. (Bradford depo. at 18-19). Accordingly, Toyota measures assembly downtime in minute increments and demands repairs on the fastest schedule possible. (Bradford depo. at 19).

[2] Mr. Harrison is employed with Jefferds Corporation as the Site Supervisor for the Toyota plant in Buffalo WV. (Harrison depo. at 5).

7. In late 2013, Jefferds began advertising for an open Engineering Equipment Mechanic position for placement in the Toyota facility. The opening was for the night shift when only two mechanics staff the Buffalo plant. (Harrison depo. at 9).

8. In January 2014, Mr. Woods and Jefferds exchanged correspondence, both expressing interest in the other for the available position.[3] (Deposition of Donald Woods at 60). Some of the physical requirements for the open position were listed in the job posting. (Job posting). Mr. Woods emailed his resume to Jefferds, and Jefferds in turn requested that he come in for an interview. (Woods depo. at 60).

9. In his initial correspondence with Jefferds, Mr. Woods voluntarily disclosed that he had a prosthetic left leg due to an above-the-knee leg amputation that resulted from a motorcycle accident. (Woods depo. at 80). Mr. Woods notified Jefferds, voluntarily, that he would be unable to satisfy the requirement that he lift up to 75 pounds due to his condition. (Woods depo. at 81).

10. Aware of Mr. Woods' condition due to his voluntary disclosure, Jefferds continued with the interview process and remained interested in hiring Mr. Woods. Indeed, as Mr. Woods stated in his deposition, Jefferds was "very, very adamant in trying to get me on." (Woods depo. at 73). During this pre-interview period, Jefferds also sent Mr. Woods a more detailed job description. (Woods depo. at 64–65).

11. At this point, Mr. Woods himself dropped out of contact when, as he puts it, "I had misplaced my phone for over a month, battery died, could not locate it, falls between the

[3] Communications stopped briefly because Mr. Woods' main contact with Jefferds left on medical leave. Mr. Woods filed a claim with the West Virginia Human Rights Commission, unrelated to the present dispute. That claim was subsequently resolved and communication resumed.

couch." (Woods depo. at 77). However, Jefferds and Mr. Woods eventually scheduled an interview for the open Engineering Equipment Mechanic position. (Woods depo. at 71).

12. Mr. Woods interviewed with Randy Harrison, Jefferds' site supervisor at the Toyota plant, and Mark Johnson, Jefferds' Operations Manager. (Woods depo. at 79).[4] At the outset of the interview, Mr. Woods again voluntarily disclosed that he had a prosthetic leg.

13. The group reviewed the job position and requirements together, and Mr. Woods affirmatively requested an accommodation for lifting 75 pound objects. (Woods depo at 80-81). Jefferds readily agreed to provide Mr. Woods a dolly to assist him with lifting and moving objects, and Mr. Woods indicated that such an accommodation would allow him to perform the job. (Woods depo at 80-81).

14. At no time during the interview did Mr. Woods ask for an accommodation for climbing ladders or squatting. Indeed, Mr. Woods believes he has no problem climbing ladders. (Woods depo. at 101-102).

15. In February 2014, Jefferds invited Mr. Woods back for a second-round interview. (Woods depo. at 85-86). Mr. Woods stated that in that interview, which again included Mr. Harrison and Mr. Johnson, that Jefferds told him "that I was perhaps, maybe, the best candidate that they had gotten so far." (Woods depo. at 86).

16. After the second interview concluded, Jefferds called Mr. Woods and left him a voicemail conditionally offering him the position. (Woods depo. at 90). The offer was conditional upon Mr. Woods' successful completion of a drug screen, background check, and pre-employment physical. (Woods depo at 90).

[4] The parties have different recollections about whether Anne Schoolcraft, Jefferds' Human Resources Manager (who has since retired), was present for the first interview, but her presence or absence is immaterial for purposes of this Motion.

17. Mr. Woods did not immediately receive the message though, because he had lost his phone again. He testified, "The phone died and I couldn't find it. It was stuffed up underneath my car seat and I had to take my seat out to get it." (Woods depo. at 90).

18. Once the parties were able to communicate, Randy Harrison again conditionally offered the position to Mr. Woods in a phone conversation. (Woods depo. at 91). Jefferds then set up the pre-employment physical and directed Mr. Woods to see the physician. (Woods depo. at 92).

19. The physician performed a full pre-employment physical examination of Mr. Woods and determined that Mr. Woods was unable to safely climb ladders or squat. (Pre-employment physical report at JC00004).

20. Mr. Woods adamantly disagrees with the doctor's conclusion and has frequently insisted that he can squat at least partially for a short period of time and that he needs no accommodation for climbing ladders. (*See, e.g.*, Woods depo. at 101–102).

21. Upon receiving the report from the physician, Jefferds called in Mr. Woods for a third meeting with Anne Schoolcraft, Mr. Harrison and Mr. Johnson. (Woods depo. at 105–106). Jefferds informed Mr. Woods that the physician concluded that he was unable to adequately squat or climb ladders and, as these were essential functions of the job, Jefferds would be unable to hire him. (Woods depo. at 106).

22. Mr. Woods never requested an accommodation, but instead insisted that the doctor was wrong. (Woods depo. at 106). In his deposition, Mr. Woods stated that he believes Jefferds erred when it did not give him the opportunity to prove that the physician who conducted the pre-employment physical was wrong about his abilities. (Woods depo. at 133).

23. However, Mr. Woods never, at any time, requested an accommodation for climbing ladders, nor did he request an accommodation for the doctor's conclusion that he could not fully squat. Rather, he asked Jefferds to simply disregard the doctor's conclusions. (Woods depo. at 115).

24. After being told that Jefferds would be unable to hire him, Mr. Woods filed the present suit.

25. During the course of litigation, it was revealed that Mr. Woods hid facts from Jefferds during the application process and subsequently lied during his deposition, while under oath. The lie concealed the fact that, while Mr. Woods was in the process of interviewing with Jefferds—indeed, just as Jefferds was extending Mr. Woods a conditional offer of employment—he was arrested for illegally selling narcotics and confessed to the crime.

26. A copy of the Criminal Complaint filed against Mr. Woods shows that on February 1, 2014, near midnight, Mr. Woods illegally sold another individual Hydrocodone pills (a Schedule III controlled substance) in a church parking lot in Nitro, West Virginia. When the police interviewed Mr. Woods regarding the illegal transaction, Mr. Woods "confessed to having sold the pills" for $60 and that he had done so on multiple prior occasions. The investigating officer confiscated Mr. Woods' cell phone as part of the search.

27. A few days after the police confiscated Mr. Woods' cell phone, Jefferds—unaware of the arrest—attempted to call Mr. Woods to offer him employment, subject to his successful completion of a background check and fitness-for-duty examination. Mr. Woods was obviously unable to take this call, but Jefferds persisted in its effort to hire Mr. Woods.

28. Once Plaintiff regained possession of his phone, Jefferds was able to contact him and extend the conditional offer of employment. In his deposition in this case, Mr. Woods falsely claimed that he had lost his cell phone under his car seat:

> A. Because they offered me the job. They actually left a voicemail on a phone that I couldn't find, but then they emailed me and I got back to them. And they said, "Hey, man, come on in here. We'd like to offer you this job, so when you get a chance, come on in here and we would like to have you go through the drug screen, have you do the physical, and then have you also do the criminal background check." I said okay.
>
> Q. So, again, they left a message on a phone, but you didn't – you were unable to access the message because, what, the phone was lost?
>
> A. The phone died and I couldn't find it.
>
> Q. Okay.
>
> A. It was stuffed underneath my car seat and I had to take my seat out to get it.
>
> Q. Okay. So, much like the first time, they tried to phone, then they sent an e-mail?
>
> A. Oh, no, I finally got my phone working.

(Woods Depo. Tr. p. 90 lns. 4–21). This testimony was a fabrication in its entirety—by his own admission, Mr. Woods' phone was in police custody.

29. During the hiring process, on February 7, 2014, Jefferds ran a background check on Mr. Woods, but it did not reveal the February 1, 2014 Criminal Complaint. Jefferds did not become aware of Mr. Woods' arrest until after it declined to hire him due to his inability to pass the fitness-for-duty examination.

30. In fact, Jefferds first learned that Mr. Woods concealed his illegal activities and lied under oath in this matter when he provided Jefferds' counsel with a sworn statement on September 19, 2016, admitting to the deception. In Mr. Woods' own words, "I Donald L. Woods, hereby acknowledge" that the deposition testimony regarding his "lost" cell phone was "not true,"

and that "[i]n fact, my cell phone was in the possession of the police pursuant to my arrest on a drug charge." Mr. Woods conceded "the statements in my deposition are in conflict and that conflict may affect the outcome of my claim in this case." *Id.*

31. Had Jefferds been aware of the Criminal Complaint against Mr. Woods and his confession to illegally selling narcotic pain medication, it would not have extended him a conditional offer of employment. (Sinclair Affidavit). And, Mr. Woods has not produced any evidence to the contrary.

32. Further, there will be no dispute that, had Jefferds become aware that Mr. Woods lied during a court proceeding in an attempt to conceal a Criminal Complaint for distributing narcotics, it would never have offered him employment either.

B. CONCLUSIONS OF LAW

33. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is appropriate where the record reveals no genuine issues of material fact and the movant demonstrates its right to judgment as a matter of law. W.Va.R.Civ.P. 56(c). "By its very terms, the standard provides that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, 477 U.S. 242, 247–48 (1986). The party opposing summary judgment may not rest on the allegations of his or her unsworn pleadings, but must come forward with actual evidence of a genuine dispute of material fact. Poweridge Unit Owners Ass'n. v. Highland Prop.. Ltd., 196 W.Va. 692, 697–98, n. 10 (1996). Although "the issue of discriminatory animus is generally a question of fact for the trier of fact," the Supreme Court of Appeals has adamantly stated that "we refuse to hold that simply because motive is involved that summary judgment is unavailable." Hosaflook v. Consolidation Coal Co., 201 W. Va. 325, 329

(1997). In this case, summary judgment is appropriate because there is no genuine dispute of any material fact, and the plaintiff's claims fail as a matter of law.

34. Count I of the plaintiff's Amended Complaint contends that Jefferds discriminated against Mr. Woods because of his disability by failing to hire him and/or failing to provide him with a reasonable accommodation. In order to make a prima facie case of disability discrimination under the West Virginia Human Rights Act (the "Act"), a plaintiff must prove that:

a. He has an actual or perceived disability;

b. He is a qualified individual with a disability; and

c. He was subject to an adverse employment decision based on his disability.

Morris Mem'l Convalescent Nursing Home, Inc. v. W.Va. Human Rights Comm'n, 189 W.Va. 314, Syl. Pt. 2 (1993).

35. Even if the plaintiff can make this showing, the defendants can rebut any inference of discrimination by articulating a legitimate, nondiscriminatory reason for their decision not to hire the plaintiff. In turn, the plaintiff can prevail only if he proves that the proffered reason is merely a pretext for discrimination. Id.

36. In order to establish disability discrimination, a plaintiff must prove that the employer acted with discriminatory intent. Id. at 317. "The crux of disparate treatment is ... discriminatory motive; the doctrine aims squarely at intentional acts." Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 56-57 (1996). Accordingly, liability in a disparate treatment case "depends on whether the protected trait ... actually motivated the employer's decision." Raytheon Co. v. Hernandez, 540 U.S. 44, 53, (2003) (citing *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S. Ct. 1701, 1701 (1993)).

37. Further, to the extent that Mr. Woods' claims can be construed as alleging a breach of the duty of reasonable accommodation, he must establish the following elements:

a. The plaintiff is a qualified person with a disability;

b. the employer was aware of the plaintiff's disability;

c. the plaintiff required an accommodation in order to perform the essential functions of a job;

d. a reasonable accommodation existed that met the plaintiff's needs;

e. the employer knew or should have known of the plaintiff's need and of the accommodation; and

f. the employer failed to provide the accommodation.

Stone v. St. Joseph's Hosp., 208 W.Va. 91, 100 (2000).

38. "An employer may defend against a claim of reasonable accommodation by disputing any of the above elements or by proving that making such accommodation would impose an undue hardship on the employer." *Skaggs,* 198 W.Va. at 66. "To be sure, our discrimination laws are not a form of job assurance for handicap individuals or any other protected class members." Id. at 79.

39. Mr. Woods' own words foreclose his disability claim under West Virginia law.

40. For the purposes of this Motion, the Court presumes that Mr. Woods has an actual disability. He is not, however, a "qualified individual" under the Act, he was not subject to an adverse employment decision on the basis of his disability, and his refusal to accept the physician's conclusions that he cannot squat or climb ladders forecloses his appeal to the reasonable accommodation analysis.

41. "In applying the provisions of W.Va. Code § 5-11-9, a 'Qualified Individual with a Disability' has been defined by regulation as 'an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job[.]'" Hosaflook v. Consolidation Coal Co., 201 W. Va. 325, 341 (1997) (quoting 6B WV CSR § 77-1-4.2; W.Va. Code § 5-11-9 (1992)). A job function is deemed essential where it "bear[s] more than a marginal relationship to the job at issue." Rohan v. Network Presentations LLC, 375 F.3d 266, 273 n.9 (4th Cir. 2004).

42. There is no dispute in this case that climbing ladders and squatting are essential functions of the Engineering Equipment Mechanic position at issue. Mr. Woods has presented no evidence to the contrary.

43. Despite Mr. Woods' protestations, his medical examination established that he is unable to climb ladders and squat adequately. Jefferds is fully entitled to rely on the conclusions of the physician who examined Mr. Woods and it has no obligation to defer to Mr. Woods' non-medical opinions.

44. Federal law is a "usual reference" in determining how to apply the West Virginia Human Rights Act. Skaggs, 198 W.Va. at 69. Indeed, in disability discrimination suits, federal law holds that employers are "perfectly justified" in relying on a doctor's recommendation even when the employee contradicts it, and an employee's "self-serving opinion[s]" about their health without "objective corroboration" are legally insufficient. Wulff v. Sentara Healthcare, Inc., 513 F. App'x 267, 269 n.2 (4th Cir. 2013) (further quotations omitted); *see also*, *Beckner v. Tread Corp.*, 2014 U.S. Dist. LEXIS 169349, at *21 (W.D. Va. Dec. 8, 2014) ("Aside from Beckner's own testimony that he could perform work as a welder at Tread, he presents no medical evidence to support his contention that he could in fact perform the essential functions of the job").

45. Mr. Woods presented no evidence to Jefferds that he could perform the essential functions of the job; therefore he was not a "qualified individual" under the Act when Jefferds informed Mr. Woods that it could not employ him.

46. Mr. Woods references a self-serving medical review he obtained nearly two months after Jefferds made the determination not to hire him in support of his claim that he can climb ladders and partially squat. (Woods depo. at 136). This medical report is irrelevant because it was not available to Jefferds at the time it had to make a decision about Mr. Woods.

47. The West Virginia Human Rights Act does not impose an obligation on employers to hold a position open for months in order to allow a party to seek medical evaluations until he finds one with which he agrees. The corresponding federal guidance under the Americans with Disabilities Act on this point is clear: "The ADA recognizes that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires *only* that such examinations be conducted as a separate, *second step* of the examination process, after an individual has met all other job prerequisites." EEOC Technical Assistance Manual, § 6.4 (emphasis added).

48. Further, Mr. Woods' refusal to accept the limitations of his disability renders a discussion of reasonable accommodations moot. Jefferds cannot accommodate a person who refuses to be accommodated. As Mr. Woods testified:

Q. Okay. What would be a reasonable accommodation –

A. For?

Q. –for climbing a ladder for you?

A. I wouldn't need one.

Q. Okay

> A. I never said I needed to – an accommodation to climb a ladder. I said I needed an accommodation to push zero to 75 pounds and walk with it. I also requested accommodation to wear a tennis shoe instead of a steel toe boot. Those are the accommodations that I requested.

(Woods depo. at 101).

49. An individual who will not accept an accommodation is not a "qualified" individual under the Act: "if such individual rejects a reasonable accommodation . . . that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified." 29 CFR 1630.9(d).

50. In fact, affirming a bench trial verdict in favor of an employer who relied upon a treating physician's opinion to determine that it could not reinstate an employee, the Sixth Circuit explained:

> The question is thus not whether TVA's decision that plaintiff was not employable due to his psychiatric condition was correct measured by "objective" standards. What is relevant is that TVA, in fact, acted on its good faith belief about plaintiff's condition based on Dr. Paine's opinion, and, as the district court pointed out, there is no proof to the contrary. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir.1988) ("[T]he reasons tendered need not be well-advised, but merely truthful."); *Williams v. Southwestern Bell Tel. Co.,* 718 F.2d 715, 718 (5th Cir.1983) ("The trier of fact is to determine the defendant's intent, not adjudicate the merits of the facts or suspicions upon which it is predicated."); *Jones v. Orleans Parish School Bd.*, 679 F.2d 32, 38 (5th Cir.), modified on other grounds, 688 F.2d 342 (5th Cir.1982), *cert. denied*, 461 U.S. 951, 103 S.Ct. 2420, 77 L.Ed.2d 1310 (1983) ("Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge."); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir.1980) ("[W]hether HCCAA was wrong in its determination that Jefferies acted in violation of HCCAA guidelines ... is irrelevant.... [W]here an employer *wrongly* believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief."); *Fahie v. Thornburgh*, 746 F.Supp. 310, 315 (S.D.N.Y.1990) ("[T]he Bureau's honestly held, although *erroneous*, conviction that [plaintiff] was not a good employee is a legitimate ground for dismissal.") (emphasis added).

Pesterfield v. Tennessee Valley Authority, 941 F.2d 437, 443 (6th Cir. 1991).

Indeed, 20 years later, the same Court still found:

> "[A] plaintiff's uncorroborated belief in his physical prowess is not enough to counter affirmative evidence to the contrary." *Boback v. Gen. Mot. Corp.*, 107 F.3d 870, 1997 WL 3613 (6th Cir.1997) (citing *White v. York Int'l Corp.*, 45 F.3d 357, 362–63 (10th Cir.1995)). The doctors' restrictions must be taken at face value and the District was reasonable—indeed, correct—to assume that Johnson could not perform a task that her doctors indicated she was incapable of safely performing. *See Manigan v. Southwest Ohio Regional Transit Auth.*, 385 Fed.Appx. 472, 478 (6th Cir.2010) ("Manigan argues that he could perform his job with or without reasonable accommodation.... It is unclear whether Manigan asserts that he was able to drive more than 8 hours when required. Any such argument would fail, however, in light of his doctor's restrictions."); *Boback*, 107 F.3d 870 at *3 ("In response [to the physician's statement of his physical limitations], Boback offers only his personal observation that he could perform such work.").

Johnson v. Cleveland City Sch. Dist., 443 F. App'x 974, 986 (6th Cir. 2011).

51. Jefferds, as Mr. Woods admits, wanted to hire Mr. Woods. It conditionally offered him the job. Unfortunately, a physician determined that Mr. Woods could not perform the essential functions of the position.

52. And, even if there were an accommodation, Mr. Woods refused to accept it because he refused to accept the medical conclusions upon which Jefferds must rely. Just as Jefferds cannot force an accommodation on Mr. Woods, it cannot allow Mr. Woods to perform job functions in its workplace that a doctor has determined he cannot perform.

53. Liability in a disparate treatment case "depends on whether the protected trait ... actually motivated the employer's decision." Raytheon Co., 540 U.S. at 53. This case is devoid of any evidence or factual dispute about a discriminatory animus for Jefferds' decision not to hire Mr. Woods.

54. Consequently, the Court **FINDS** that Mr. Woods' claim of disability discrimination fails as a matter of law and **GRANTS** Jefferds' Motion for Summary Judgment on Count I of the Amended Complaint.

55. Count II of plaintiff's Amended Complaint is a threadbare assertion that the basic facts of plaintiff's no-hire were "outrageous" and intentionally done to inflict emotional distress, which plaintiff claims to have suffered only in conclusory fashion in a separate count. (*See* Am. Compl. Count I, ¶ 23 (… "Donald Woods:… (c) Has sustained emotional distress.")).

56. Intentional infliction of emotional distress is also known as the "tort of outrage" in West Virginia courts. Travis v. Alcon Labs. Inc., 202 W.Va. 369, 374, 504 S.E.2d 419 (1998). West Virginia follows the Restatement (Second) of Torts for intentional infliction of emotional distress claims, "which requires that the conduct be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 283, 445 S.E.2d 219 (1994) (overruled on other grounds, 209 W.Va. 318, 547 S.E.2d 256) (quoting Restatement (Second) of Torts § 46 cmt. (d)).

57. In order to state a claim for intentional infliction of emotional distress, "[i]t must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could have expected to endure it." Travis, 202 W.Va. at 375.

58. The West Virginia Supreme Court of Appeals has carefully delineated between standard employment claims and outrage claims and cautioned that the two should not be conflated. Dzinglski, 191 W. Va. at 285. Specifically, the Court has held that emotional distress resulting from the adverse employment action itself—here, Jefferds' determination not to hire the plaintiff—cannot support an outrage claim.

Instead, the claim must be based on the conduct surrounding the adverse action:

> In essence, then, the prevailing rule in distinguishing a wrongful discharge claim from an outrage claim is this: when the employee's distress results from the fact of his discharge -- e.g., the embarrassment and financial loss stemming from the plaintiff's firing -- rather than from any improper conduct on the part of the employer in effecting the discharge, then no claim for intentional infliction of emotional distress can attach. When, however, the employee's distress results from the outrageous manner by which the employer effected the discharge, the employee may recover under the tort of outrage.

Id.

59. Thus, in failure to hire employment cases, West Virginia courts look to the manner in which the failure to hire was implemented rather than the matter of the decision itself.

60. Here, Jefferds brought Mr. Woods back for a face-to-face meeting to explain the findings of the pre-employment physical and their decision. There is nothing remotely outrageous about how Jefferds effected its decision not to hire Mr. Woods.

61. One case where the West Virginia Supreme Court of Appeals has found grounds to support an intentional infliction of emotional distress claim in the employment context illustrates just how deficient plaintiff's claims are in the instant matter. In Roth v. Defelicecare, Inc., 226 W.Va. 214, 700 S.E.2d 183 (2010), the plaintiff's boss told her to come to work over the weekend; when she arrived, she walked in on her boss and another co-worker "in a compromised position" and was told to forget what she observed and threatened with the loss of her job and her

professional license. Id. at 218. Soon thereafter, plaintiff's position was terminated for the stated reason that her boss "did not like how she dressed he did not like the style[/]color of her hair." Id. at 219. Under these facts, the West Virginia Supreme Court of Appeals reasoned that, "[g]iven the proximity between Mrs. Roth's observation and her termination, there are sufficient allegations to support her claim that her emotional distress resulted from the outrageous manner by which the employer effected the discharge." Id. at 226.

62. Conversely, in Harless v. First Nat'l Bank, 169 W.Va. 673, 289 S.E.2d 692 (1982), where the plaintiff claimed he was discharged for reporting that his employer, a bank, was illegally overcharging its customers, the West Virginia Supreme Court of Appeals found no grounds for an intentional infliction of emotional distress claim. Specifically, the plaintiff claimed that he became aware of the wrongful conduct, reported the illegal practices, and was subsequently demoted. Id. at 678. Nearly a year later, the bank discovered that the plaintiff's claims were at least partially true and the bank refunded money to some of its customers. Id. The plaintiff was then reinstated to his original position and directed to cooperate with a continued investigation into the past practices. Id. During the continued investigation, the plaintiff retained a number of files central to the investigation "which he had retrieved from Bank wastebaskets." Id. at 679. When he was directed to turn the files over to the investigators, plaintiff "only turned over a few each day over a period of one week." Id. Plaintiff was subsequently terminated for sequestering the files along with other performance-related issues. Id. Under these facts, the Court held that "we do not find the conduct of the Bank . . . to have reached the level of outrageous conduct that would support a claim for the tort of outrage." Id. at 697. Rather, the Court concluded, the plaintiff's outrage claim was "duplicative" of his claim for retaliatory discharge. Id.

63. Mr. Woods states no facts in his Amended Complaint, nor has he produced any evidence in discovery to support his claims for emotional distress. His claim appears to be that it was "outrageous" for Jefferds to require a post-conditional-offer, pre-hire medical exam to ensure that plaintiff could safely and effectively perform the essential functions of the job and then for Jefferds to comply with the results of that exam.

64. This conduct is not outrageous; it is the normal operating procedure for nearly every employer in the country with jobs that have physical demands and permitted by law.

65. Thus, in the present case, Mr. Woods fails to assert facts or produce evidence regarding the conduct surrounding Jefferds' decision not to hire him that even hints at "outrageous," "extreme," "atrocious" behavior "beyond all possible bounds of decency" or that would be considered "utterly intolerable in a civilized community." Dzinglski, 191 W.Va. at 283.

66. Nor can plaintiff's allegation that Jefferds did not engage in the interactive process with him bootstrap an emotional distress claim to his Amended Complaint. If a simple allegation that an employer failed to follow the Act's requirements, without accompanying allegations of outrageous conduct, can support an emotional distress claim, then every claim under the Act would automatically carry with it an emotional distress claim.

67. This is, in fact, plaintiff's position: every breach of the Act, regardless of the surrounding conduct, is automatically intentional infliction of emotional distress. This argument is untenable and exactly what the West Virginia Supreme Court sought to avoid when it held that emotional damages stemming from the adverse employment action itself, instead of the surrounding conduct, cannot support an outrage claim.

68. In addition, to the extent Mr. Woods contends that sending him for a pre-employment physical was outrageous, this claim also fails because Jefferds actions were privileged.

69. West Virginia "recognizes that a privilege may bar the right to recover under the tort of outrage." Dzinglski, 191 W.Va. at 286 (citing Restatement (Second) of Torts § 46 cmt. (g)). "[A] defendant's conduct is subject to a qualified privilege when he acts to protect or advance his own legitimate interests, the legitimate interests of others or the legitimate interests of the public." Id.

70. In Dzinglski, the plaintiff-employee faced allegations of embezzlement from a co-worker and the company suspended the plaintiff and conducted a full investigation. Id. at 282-83, 445 S.E.2d at 223. Although some irregularities were discovered in the investigation, none of the co-worker's allegations were fully substantiated. Id. Nonetheless, the allegations of improprieties "raised concerns" about the plaintiff's ability to function in his role as a labor manager and he was subsequently discharged. Id. at 283, 445 S.E.2d at 224. The plaintiff sued under multiple theories, including a claim that the defendant's actions in conducting its investigation and the ultimate discharge constituted intentional infliction of emotional distress. Id. Under these facts, the West Virginia Supreme Court held that the investigation was privileged because it was "designed to protect the defendant's legitimate business interests" and, therefore "[a]s a matter of law . . . [defendant] could not have been guilty of outrageous conduct by its investigation ...." Id. at 287.

71. Such is the case here. Far from being outrageous, Mr. Woods' allegations portray Jefferds as an employer engaging in basic due diligence to ensure a safe and effective workplace.

72. A pre-employment medical examination is entirely consistent with the West Virginia Human Rights Act. *See Stone v. St. Joseph's Hosp.*, 208 W. Va. 91, 99, 538 S.E.2d 389, 397 (2000) ("[B]ased on the clear language from the regulations . . . the West Virginia Human Rights Act . . . requires that *after* the commencement of an employee's employment duties, an employer shall not require an employee to submit to any medical examination ... unless such examination or inquiry is job-related and consistent with a business necessity.") (emphasis added).

73. Here, as Mr. Woods alleges, the medical examination was post-offer, pre-hire and *also* job-related and consistent with a business necessity. Jefferds was taking reasonable, legal measures designed to protect its legitimate business interests. These facts cannot support an outrage claim and instead establish a qualified privilege which mandates dismissal of plaintiff's claim for intentional infliction of emotional distress.

74. Consequently, the Court **FINDS** that Mr. Woods' claim of intentional infliction of emotional distress fails as a matter of law and **GRANTS** Jefferds' Motion for Summary Judgment on Count II of the Amended Complaint.

75. The Court notes that during the September 8, 2017 hearing, Mr. Woods, through counsel, withdrew his claim in Count III for negligent infliction of emotional distress. Jefferds had no objection.

76. Finally, in its Supplemental Motion for Summary Judgment, Jefferds moves for dispositive relief on the issue of damages under the "after-acquired evidence doctrine." Jefferds contends that regardless of the pre-employment physical results, it would not have hired Mr. Woods had it known about his arrest for selling painkillers and his resulting deception and, therefore, Mr. Woods is not entitled to recover damages. The Court finds this argument has merit.

77. If an employer discovers, after taking an adverse employment action against an employee or applicant, "that the employee engaged in wrongdoing prior to" the adverse action, "such 'after-acquired evidence of the employee's wrongdoing bears on the specific remedy to be ordered.'" Barlow v. Hester Indus., 198 W. Va. 118, 132, 479 S.E.2d 628, 642 (1996) (quoting McKennon v. Nashville Banner Publ. Co., 513 U.S. 352, 360, 115 S. Ct. 879, 885 (1995)). "In determining appropriate remedial action, the employee's wrongdoing becomes relevant . . . to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing." McKennon, 513 U.S. at 361. For example, in a case where the remedy sought was reinstatement, the United States Supreme Court reasoned that "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, *and will terminate*, in any event and upon lawful grounds." Id. at 362 (emphasis added).

78. It is of no moment that, but for the litigation Mr. Woods initiated, his arrest and subsequent dishonesty about it may not have been discovered: "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit." Id. Jefferds cannot and should not be required to ignore its discovery during this suit that (1) Mr. Woods, while applying with Jefferds, was arrested for illegally distributing narcotic pain medication and confessed to that unlawful act; and (2) that Mr. Woods lied under oath in a court proceeding to try and continue concealing the arrest from Jefferds.

79. Mr. Woods' alleged damages are for (1) back pay; (2) front pay; and (3) emotional distress. (Am. Compl. pp. 3–4). Here, as in McKennon, it would be "both inequitable

and pointless" to award Plaintiff back pay, front pay or emotional damages if he never would have been hired in the first place on indisputably lawful grounds.

80. The Fourth Circuit Court of Appeals takes no issue with considering the after-acquired evidence doctrine at the summary judgment stage of proceedings and, in doing so, applies the typical 'genuine issues of material fact' analysis. Russell v. Microdyne Corp., 65 F.3d 1229, 1240 (4th Cir. 1995). Federal District Courts also have applied the after-acquired evidence doctrine against failure to hire claims on summary judgment. *See Colin v. Guilford Cty. Bd. of Educ.*, No. 1:09CV365, 2010 U.S. Dist. LEXIS 107473, at *24-25 (M.D.N.C. Oct. 5, 2010) (applying the after-acquired evidence doctrine to unprofessional letters the plaintiff wrote as prima facie evidence that plaintiff was not qualified for the position). "[T]his Court concludes and holds that Defendant's evidence bearing on Plaintiff's lack of qualification to be a high school teacher, although unknown to the principals who did not hire him, is relevant and may be relied upon in the determination of Plaintiff's prima facie case of age discrimination at the summary judgment stage of review." Id.; *see also Rich v. Westland Printers*, No. 92-2475, 1993 U.S. Dist. LEXIS 8526, at *14 (D. Md. June 9, 1993) (granting summary judgment for employer and reasoning "[t]he present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a 'doctor.' In our view, the masquerading doctor would be entitled to no relief") (citing *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988)).

81. The *Westland Printers* Court further observed that "[t]he majority of courts which have followed *Summers,* have done so in cases like this, where an employee brings a claim of discriminatory discharge and the employer discovers after the discharge that the employee had

made material misstatements or omissions on his or her job application, which, if known by the employer, would have caused the employer to not hire or to discharge the employee." Id.

82. This case is no different. After Mr. Woods was unable to satisfy the fitness-for-duty requirements and subsequent to the commencement of this suit, Jefferds became aware that Mr. Woods was arrested for and confessed to illegally selling narcotic pain medication in a church parking lot. Jefferds further learned that Mr. Woods lied about the circumstances surrounding that arrest in an effort to conceal it in a court proceeding under oath. It is undisputed that had Jefferds known about the arrest, confession and dishonesty, it would never have hired Mr. Woods.

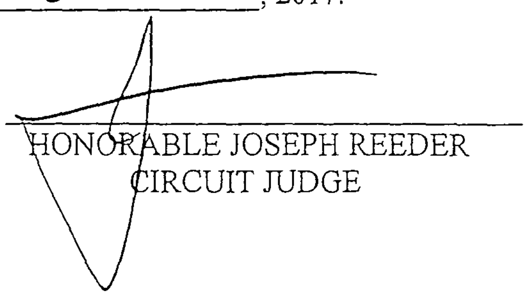
83. Accordingly, the damages that allegedly flow from Mr. Wood's failure-to-hire claim are nullified by this after-acquired evidence. Consequently, the Court **FINDS** that the after-acquired evidence doctrine is applicable to this case and **GRANTS** Jefferds' Supplemental Motion for Summary Judgment.

84. Therefore, for all these reasons, the Court **GRANTS** Jefferds' Motion for Summary Judgment and Supplemental Motion for Summary Judgment and **DISMISSES** the plaintiff's Amended Complaint and this proceeding.

85. The Court notes the plaintiff's objections and exceptions.

86. The Court directs the Court to send a copy of this Order to all counsel of record.

Entered this 4th day of Oct., 2017.



HONORABLE JOSEPH REEDER
CIRCUIT JUDGE

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