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Vi. Government Benefits

Fourth Circuit affirmed the district court's grant of summary judgment in favor of Brown on Keziah's intentional infliction of emotional distress claim.

Addressing Keziah's final claim that Brown negligently supervised its employees, the Fourth Circuit noted that to establish liability the plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that, prior to the act, the employer knew or had reason to know of the incompetency. Keziah sought to prove the emotional distress claim as the underlying tortious conduct for the negligent supervision claim. Because the Fourth Circuit affirmed summary judgment against Keziah on the emotional distress claim, the Fourth Circuit also affirmed the district court's granting of summary judgment against Keziah on the negligent supervision claim.

GOVERNMENT BENEFITS

The Railroad Retirement Act of 1974 (RRA), 45 U.S.C. sections 231a-v (1982 & Supp. 1987), governs the retirement benefits for all employees of United States railroads. The RRA requires employers to withhold employer and payroll taxes, which fund railroad retirement benefit plans. In 1940, Congress amended the RRA, adding the Foreign Service Exclusion which provides that foreign nationals working for United States railroads outside the United States cannot receive retirement credit in the United States if the employees' country requires the employer to prefer its own citizens for employment.

In 1978, the Canadian government enacted regulations changing the Canadian Immigration Act, including the requirement that railroads operating in Canada prefer Canadian citizens for employment. The Internal Revenue Service interpreted these regulations as triggering the Foreign Service Exclusion of the RRA.[154] The Railroad Retirement Board, which administers the railroad retirement system, also concluded that the new Canadian regulations fell within the Foreign Service Exclusion.[155] The United States Court of Appeals for the District of Columbia affirmed the Railroad Retirement Board's view.[156] As a result, Canadian employees of United States railroads in Canada no longer received credit toward the RRA's vesting requirements, and railroad employers no longer owed retirement taxes otherwise due on Canadian employees' services.

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154. *See* Rev. Rul. 83-184, 1983-2 C.B. 173 (interpreting Canadian Immigration Act as triggering Foreign Service Exclusion).

155. *See* General Counsel of Railroad Retirement Board Legal Opinion L-83-79 (March 25, 1983) (stating that Canadian regulations triggered Foreign Service Exclusion); General Counsel Opinion L-83-79.1 (May 11, 1983) (same).

156. *See* Railway Labor Executives Ass'n v. United States R.R. Retirement Bd., 842 F.2d 466 (D.C. Cir. 1988) (affirming Railroad Retirement Board's conclusion that Canadian regulations triggered Foreign Service Exclusion); Railway Labor Executives Ass'n v. United States R.R. Retirement Bd., 749 F.2d 856 (D.C. Cir. 1984) (same).

In *Vollmar v. CSX Transportation, Inc.*, 898 F.2d 413 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit considered whether the Foreign Service Exclusion precluded receipt of retirement benefits that a Memorandum of Understanding between railroad management and labor otherwise granted to Canadian railroad employees. The plaintiffs in *Vollmar* brought a class action against CSX Transportation, Inc. (CSXT), a Virginia railroad company with operations in Canada. The plaintiffs claimed that the 1973 Memorandum of Understanding (Memorandum) provided contractual rights to retirement benefits that CSXT contributed to employee benefit plans. The Memorandum was the result of a collective bargaining agreement designed to achieve a consensus on railroad retirement legislation. The Memorandum shifted a portion of the retirement tax burden from the employees to the employers, resulting in an increase in employee take-home pay. In exchange, railroad employees agreed to take a wage increase of only four percent.

The plaintiffs argued that because the contract agreement in the Memorandum was rendered impossible to perform, the plaintiffs were entitled to restitution or, alternatively, to recovery in quasi-contract. Additionally, the plaintiffs argued that the refund of railroad retirement taxes that CSXT had contributed to employee benefit plans unjustly enriched CSXT. Defendant CSXT argued that retirement benefits for railroad employees are statutory only. Therefore, the Memorandum did not create contractual rights in the plaintiffs to receive benefits.

The United States District Court for the Eastern District of Virginia, 705 F. Supp. 1154 (E.D. Va. 1989), agreed with the plaintiffs that the Memorandum created enforceable contract rights in the plaintiffs. However, the district court found that the parties reasonably could have foreseen the applicability of the Foreign Service Exclusion, which made the contract impossible to perform. The district court, therefore, denied recovery for the plaintiffs, holding that the plaintiffs should have anticipated changes in Canadian law which would trigger the Foreign Service Exclusion. The lower court also rejected plaintiffs' unjust enrichment theory because it found that express contract rights existed.

The plaintiffs appealed the district court decision, arguing that the Memorandum entitled them to receive, in cash, the amount of retirement taxes originally contributed by CSXT and later refunded to CSXT, in addition to the taxes that CSXT would have paid absent the Foreign Service Exclusion. The Fourth Circuit relied on *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), to hold that railroad retirement benefits, unlike most private pension plans, are entirely statutory rather than contractual. The court concluded that because the railroad retirement plan is a federally funded and administered social welfare program, railroad retirement benefits are not alterable by contract.

The Fourth Circuit explained that the Memorandum merely was a political compromise and an agreement to make joint legislative recommendations. The Memorandum, according to the *Vollmar* court, represented

the willingness of labor management to shift the tax burden for benefits from the employee to the employer. The court pointed out that at no time, however, was the Memorandum free from statutory regulation. In 1981, Congress enacted certain Railroad Retirement Amendments that again shifted a greater portion of the tax burden to the employees, notwithstanding the Memorandum. The parties to the Memorandum supported the enactment of these amendments and continued making the statutorily required contributions. The Fourth Circuit in the *Vollmar* case stressed that even when Congress incorporates the terms of a bargaining agreement, such as the Memorandum in question, in its legislation, the agreement does not become a contract. The agreement remains a statutory entitlement, subject to change by Congress at any time.

The *Vollmar* court further explained that the purpose behind the Foreign Service Exclusion was to protect the interests of American railroad employees who work outside the United States. When another country statutorily requires a hiring preference in favor of its own citizens, American workers lose their "equal footing" with these foreign nationals. According to the Fourth Circuit, acceptance of the plaintiffs' position in this case would result in this inequality.

Finally, the Fourth Circuit addressed the plaintiffs' claim for recovery in quasi-contract. The plaintiffs argued that CSXT would receive an unjust enrichment if the court allowed CSXT to retain the refund of the retirement taxes it previously contributed for the plaintiffs' services. Additionally, the plaintiffs argued that the court should not allow CSXT to receive tax benefits resulting from the application of the Foreign Service Exclusion. The plaintiffs' argument contended that they conferred a benefit upon CSXT by forfeiting a greater than four percent wage increase. The plaintiffs agreed to this forfeiture with the understanding that CSXT would contribute to the plaintiffs' retirement benefits.

Rejecting the plaintiffs' argument, the Fourth Circuit found that the Memorandum between the parties only incorporated the parties' agreement to support legislation regarding retirement benefits. Because the plaintiffs' right to retirement benefits was at all times statutory, and because the Memorandum did not change the plaintiffs' rights, the plaintiffs were justified in expecting CSXT to contribute to their benefits only as long as the statutes so required. The Fourth Circuit explained that the plaintiffs' arguments would allow private parties to avoid congressional action. Therefore, the court refused to accept the plaintiffs' position.

The *Vollmar* court concluded that the Memorandum upon which the plaintiffs relied for their contractual claim created no contractual right to the retirement benefits that the defendant contributed. The court stated that railroad retirement benefits are statutory only and cannot be altered by contract. Further, the Fourth Circuit found that the Foreign Service Exclusion precluded any statutory relief for the plaintiffs. To date, the Fourth Circuit is the only circuit that has addressed the issue of the Foreign Service Exclusion in relation to a collective bargaining agreement allegedly granting contractual entitlement to retirement benefits. However, the United States

Supreme Court has held that railroad retirement benefits are statutory and not contractual,[157] which supports the conclusion of the *Vollmar* court.

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In *Meyers v. Califano*, 611 F.2d 980, 983 (4th Cir. 1980), the Fourth Circuit held that an Administrative Law Judge (ALJ) should evaluate the impact of pain on Social Security disability claimants even if the claimant only can prove the intensity of the pain by subjective evidence.[158] The Secretary of the Social Security Administration (Secretary), however, issued a ruling requiring claimants to present objective proof of the intensity of their pain before the agency would grant an award of social security disability benefits.[159] In *PPG Industries, Inc. v. NLRB*, 671 F.2d 817, 823 n.9 (4th Cir 1982), the Fourth Circuit held that the court would not defer to an agency's legal analysis when that analysis conflicted with the decisional law of the circuit, thus rejecting rulings similar to the Secretary's objective evidence requirement.[160]

This conflict between the Secretary's ruling and Fourth Circuit case law sparked a class action suit in which the parties have appeared before the Fourth Circuit three times. In the most recent of those appearances, *Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990), the Fourth Circuit considered whether the district court correctly determined that the Secretary's new pain directives were not a change from the agency's earlier, discredited position; whether the court properly expanded the class of claimants to include those persons whose claims were rejected up until the date of the agency's implementation of the new regulation; and whether the court usurped the agency's power by drafting a new regulation and mandating its application.

The complicated history of the present case began when claimants brought a class action suit against the Secretary alleging that the Secretary's ruling on pain cases, SSR 82-58, did not follow the precedent of the Fourth Circuit in adjudicating cases within the Fourth Circuit. The district court held for the plaintiffs and enjoined the Secretary from nonacquiescence of Fourth Circuit law. During pendency of the Secretary's appeal, section two of the newly-enacted Social Security Disability Benefits Reform Act (DIBRA), 42 U.S.C. section 423 (1982), set out standards that included both mental and physical impairments for consideration. Because of the enactment of DIBRA, the Fourth Circuit vacated the district court's finding of nonacquiescence so that the Secretary could review the policy. The Fourth

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157. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (holding that railroad retirement benefits are statutory in nature); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (same).

158. *See* Walker v. Bowen, 889 F.2d 47 (4th Cir. 1989) (affirming Fourth Circuit's disallowance of requirements of objective pain evidence); Foster v. Heckler, 780 F.2d 1125 (4th Cir. 1986) (same).

159. *See* Social Security Administration Ruling 82-58 (1982) (requiring objective evidence of intensity of claimant's pain).

160. *See* Ithaca College v. NLRB, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980) (requiring agencies to follow decisional law of circuit); Allegheny General Hospital v. NLRB, 608 F.2d 963 (3d Cir. 1979) (same).

Circuit also held that the district court's certification of the class was too broad because it included claimants who had yet to exhaust their administrative remedies. On appeal, the United States Supreme Court vacated the Fourth Circuit's decision under *Bowen v. City of New York*, 476 U.S. 467 (1986), which held that exhaustion of a claimant's remedies is unnecessary in extreme situations. On remand, the Fourth Circuit held that the district court correctly waived the exhaustion requirement. Additionally, the Fourth Circuit held that the district court correctly had determined that the Secretary had failed to acquiesce in Fourth Circuit law. The Fourth Circuit, however, refused to affirm the district court's grant of injunctive relief, reasoning that such relief was beyond the scope of the remand order. The court noted only that the plaintiffs had succeeded in getting their claims considered apart from the Secretary's nonacquiescence.

The Secretary subsequently issued a new ruling, SSR 88-13, and a series of new directives to adjudicators detailing the new policy regarding the evidence required to prove debilitating pain. On remand, the district court determined that the Secretary's new pain directives did not represent any real change from the old policy and, therefore, the district court ordered the Secretary to reconsider the claims under Fourth Circuit law. After the Secretary refused to comply, the plaintiffs moved to enforce the judgment. The district court determined that the Secretary had continued to disregard Fourth Circuit law because the Secretary required claimants to present objective evidence of their level of pain. The district court not only ordered the Secretary to rescind the new directives, but also drafted a new regulation regarding pain, and ordered the Secretary to distribute the new regulation to the agency's decision makers in North Carolina. The court also extended the closing date of the class to the date whenever the Secretary complied and issued the new regulation drafted by the court. The Secretary appealed the court's orders, arguing that the prior regulation on pain correctly reflected the law and that the district court should not have extended the class because the Secretary's new directives were correct under the Fourth Circuit law. The Secretary also contended that the district court was *ultra vires* when drafting a new regulation and mandating its application.

On the issue whether the Secretary's old ruling, SSR 82-58, was a correct statement of the law, the Fourth Circuit first disregarded the Secretary's argument that DIBRA codified SSR 82-58 and, therefore, that SSR 82-58 superseded the case law of the Fourth Circuit. The court noted that DIBRA did not codify SSR 82-58 because, while DIBRA requires objective evidence of an *underlying condition* that may be causing claimant's pain, SSR 82-58 exceeds DIBRA's requirements and mandates that claimants provide additional objective evidence on the intensity and persistence of the pain. Because SSR 82-58 was contrary to the case law of the Fourth Circuit, the court, therefore, rejected SSR 82-58.

The Fourth Circuit then addressed whether the district court correctly found that the Secretary's new pain directives were contrary to the decisional law of the circuit. The Fourth Circuit first examined the stated purpose of the new directives. Concluding that the stated purpose was to retain the

Secretary's old policy on pain, the Fourth Circuit found that the Secretary had not departed from its nonacquiescence of Fourth Circuit law. The court then examined the wording of the new directives, noting that large sections of the text were identical to the text of the rejected SSR 82-58. Because these sections of text required objective evidence of the intensity of the claimant's pain, and that the Secretary refused explicitly to state the circuit's rule on pain to the ALJs while expressly adhering to SSR 82-58's rule on pain, the court determined that the Secretary's nonacquiescence had not changed. The Fourth Circuit, therefore, held that the district court properly determined that the Secretary's directives showed no acquiescence to Fourth Circuit law.

Addressing the Secretary's contention that the district court incorrectly expanded the class to include claimants rejected up until the date when the Secretary complied with the district court order, the Fourth Circuit noted that the Secretary had not discontinued its "systematic, unpublished policy that denied benefits in disregard of the law". The Fourth Circuit, relying on *Bowen v. City of New York*, 476 U.S. 467 (1986), held that the district court properly extended the class. Consequently, the Fourth Circuit affirmed the district court's order of March 31, 1989 regarding extension of the class, but modified the cutoff date for reconsideration of claims to whenever the Secretary complies with the court's current opinion.

When reviewing further clauses of the district court order, the Fourth Circuit affirmed the rescission of two of the Secretary's newer pain directives, but remanded a third for determination of whether it was in violation of Fourth Circuit law. The Fourth Circuit then upheld a fourth pain ruling, SSR 88-13, on the condition that the Secretary amend the ruling by clearly expressing that it is not a mere rehashing of the old policy. The district court's order also had required the Secretary to keep plaintiffs' counsel updated concerning any and all new pain regulations promulgated by the agency. The Fourth Circuit vacated this provision of the court order on separation of powers grounds, stating that the provision encroached too far into the realm of the executive branch. Finally, when considering whether the district court improperly drafted a new regulation that the Secretary must implement, the Fourth Circuit noted that agencies should first be given an opportunity to draft a proper regulation and that courts should draft regulations only in extreme cases. The Fourth Circuit determined that the case at hand was not an extreme case and, therefore, amended the district court order.

At the time of the enactment of DIBRA, every Federal Circuit Court of Appeals, except the United States Court of Appeals for the District of Columbia, followed the Fourth Circuit's rejection of the Secretary's original position on pain embodied in SSR 82-58.[161] Moreover, the court's rejection

161. *See* H.R. REP. No. 98-618, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3062 (noting that every circuit except D.C. Circuit has held that Social Security Administration must consider subjective evidence of pain).

of the objective evidence requirement in the Secretary's newer directives has been followed by every circuit in the country.[162]

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In *Tice v. Botetourt County School Board*, 908 F.2d 1200 (4th Cir. 1990), the Fourth Circuit addressed the issue of whether Matthew L. Tice (Matthew), an emotionally disturbed first grader, was entitled, under the Education of All Handicapped Children Act of 1975 (the Act), 20 U.S.C. sections 1400-1485, to reimbursement by the Botetourt County School Board (the School Board) of educational expenses. Matthew's parents (the Tices) represented him in this action.

The Act provides federal funds to assist state and local education authorities in the education of handicapped children. This funding is conditioned on a state's compliance with extensive procedural requirements and on the existence of a state policy that assures all handicapped children the right to a free appropriate public education (FAPE). A FAPE is provided to a child through an individualized education program (IEP), specially designed for the child through school board consultation with the child's parents or guardians. This special instruction is designed to meet the unique needs of handicapped children at no cost to the parent. Special education under the Act includes instruction the child receives in hospitals and institutions.

The Act strictly defines procedures that a school board must follow when developing a FAPE. These procedures include a series of deadlines which the school board must meet to assure that the handicapped child's due process rights have not been violated. In *Tice* the Botetourt County School Board failed to meet most of the deadlines required under the Act. The School Board's most egregious error was its significant delay in the formal assessment of Matthew's needs. According to Virginia state regulations, an eligibility committee appointed by the School Board should have completed the evaluation process within sixty-five working days of the initial referral.[163] However, the eligibility committee did not meet to evaluate Matthew's placement needs until over 200 days after the referral. Although the Tices brought the referral during Matthew's first grade year, the eligi-

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162. *See* Prince v. Bowen, 894 F.2d 283 (8th Cir. 1990) (holding that adjudicator must recognize pain even when claimant presents no objective evidence of pain's intensity); Copeland v. Bowen, 861 F.2d 536 (9th Cir. 1988) (holding that adjudicator cannot disallow pain testimony merely because claimant presents no objective evidence of pain intensity); Listenbee v. Secretary of Health and Human Services, 846 F.2d 345 (6th Cir. 1988) (holding subjective evidence of pain intensity admissible if accompanied by objective evidence of underlying condition); Williams v. Bowen, 859 F.2d 774 (2d Cir. 1988) (same); Woody v. Secretary of Health and Human Services, 859 F.2d 1156 (3d Cir. 1988) (same); Veal v. Bowen, 833 F.2d 693 (7th Cir 1987) (same); Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) (same); Brown v. Bowen, 794 F.2d 703 (D.C. Cir. 1986) (holding ALJ properly weighed evidence of pain when ALJ considered pain despite lack of objective evidence); Parfait v. Bowen, 803 F.2d 810 (5th Cir. 1986) (same); DaRosa v. Secretary of Health and Human Services, 803 F.2d 24 (1st Cir. 1986) (same); Freeman v. Heckler, 738 F.2d 1169 (11th Cir. 1984) (same).

163. Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia § II(A)(6)(e) (1984).

bility committee did not conduct the evaluation until well into what should have been Matthew's second grade year. When the eligibility committee finally met, the committee determined that Matthew was not handicapped and, therefore, was ineligible for special education services. However, the committee did recommend that Matthew receive counseling at his parents' expense.

Matthew's parents took Matthew to a child psychiatrist, who examined him and recommended immediate placement in special education services. The school board received a copy of the psychiatrist's report on December 1, 1986. On December 4, 1986, Matthew became hysterical at school. On the advice of his doctor, Matthew's parents admitted him to Roanoke Valley Psychiatric Center. Matthew was suffering from what the psychiatrist termed to be a nervous breakdown. While in the hospital, Matthew received medical attention for his physical and emotional needs. Additionally, Matthew received daily educational services at the Blue Ridge Center, the hospital's certified school program.

The eligibility committee reconvened and rescinded its previous decision concerning Matthew. The committee found Matthew to be eligible for special services as a handicapped child belonging to both the emotionally disturbed and learning disabled categories. However, the committee decided to wait to determine Matthew's specific IEP needs until Matthew was released from the hospital. On January 6, 1987, Matthew's mother met with Botetourt County officials to discuss Matthew's IEP for the rest of the 1986-87 school year. The School Board, after consultation with Matthew's mother, designed an IEP that did not provide for individualized psychological counseling. The Tices did not request a program providing for psychological counseling. Mrs. Tice agreed to and signed the IEP. Matthew and his parents continued to seek counseling through June 1987 at the Tices' expense. Matthew's condition improved greatly, and he successfully completed first grade.

In July 1987, the Tices demanded that the school board fully reimburse them for expenses incurred during Matthew's hospitalization as well as for counseling after Matthew received his IEP. They claimed that because of the undue delay in Matthew's evaluation, he was denied the FAPE to which he was entitled under the Act. They argued that this denial necessitated Matthew's hospitalization and subsequent need for psychiatric help which, they argued, were services necessarily related to Matthew's education. The School Board rejected the Tice's claim. The Tices then requested and were granted a formal hearing pursuant to Virginia state regulations.[164]

The hearing officer found in favor of Botetourt County. Although the hearing officer found that the School Board had violated the evaluation time limits established by state regulation, the hearing officer held that the Tices could not recover expenses. The hearing officer found the Tices ineligible for expense recovery because the Tices had failed to prove that the School Board's delay caused or significantly contributed to Matthew's

164. *Id* at § II(C)(1)(b)(1).

hospitalization. The hearing officer further held that the counseling services rendered to Matthew, during and after Matthew's hospitalization, were purely medical and not educational. Therefore, the hearing officer found that Matthew's counseling expenses were not compensable under the Act. The hearing officer also held that the Act did not cover Matthew's schooling at the Blue Ridge Center because Matthew's medical and emotional needs necessitated this schooling.

The Tices appealed the decision to a state review officer, who used similar reasoning to affirm the hearing officer's decision. Pursuant to 20 U.S.C. section 1415(e), the Tices then filed suit in the United States District Court for the Western District of Virginia, challenging the review officer's decision. The district court upheld the state review officer's ruling in all respects. The Fourth Circuit addressed Tices' arguments in *Tice v. Botetourt County School Board*, 908 F.2d 1200 (4th Cir. 1990).

In *Tice* the Fourth Circuit found that the hearing officer, the review officer and the district court had incorrectly inquired into whether the School Board's delay caused Matthew's hospitalization when they determined whether the Tices were eligible for reimbursement. The Fourth Circuit cited *School Commission of Town of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985), for the principle that reimbursement of special education expenses under the Act is appropriate if two factors are present. First, the decision-maker must find that the public school system was not providing the child with a FAPE. Second, the decision-maker must find that the parents' alternative placement was proper under the Act.[165]

The Fourth Circuit used a twofold inquiry to determine whether Matthew was receiving a FAPE. First, the court inquired into whether the state had complied with the procedures set forth in the Act. Second, the court considered whether the IEP was reasonably calculated to enable the child to receive educational benefits. The Fourth Circuit addressed these issues with regard to each of the Tices' claims.

First, the Fourth Circuit addressed the issue of whether Matthew was receiving a FAPE during his hospitalization, before the School Board implemented Matthew's IEP. Because Matthew was handicapped as defined by the Act and because Botetourt County failed to complete Matthew's evaluation on time, the court found that Matthew was not receiving a FAPE during this time.

Second, the Fourth Circuit addressed the issue of whether Matthew was receiving a FAPE after the IEP was implemented, even though the IEP did not provide for psychotherapy. To prove that Matthew did not receive a FAPE after the IEP, the Tices were required to prove that Matthew's IEP, absent psychiatric counseling, was not reasonably calculated to enable him to receive educational benefits. Finding that the Tices failed in their burden

165. School Comm. of Town of Burlington v. Massachusetts Dep't of Educ., 471 U.S. 359, 369-70 (1985).