IN THE

Supreme Court of Virginia

RECORD NO. 130681

RICHARD ANTHONY, et al.,

Appellants,

v.

VERIZON VIRGINIA, INC., and
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO DISTRICT 2,

Appellees.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

THE CRUX OF THIS CASE IS THAT THE APPELLANTS' CLAIMS DO NOT REQUIRE THE COURT TO "INTERPRET" THE COLLECTIVE BARGAINING AGREEMENT ("CBA") WITHIN ANY REASONABLE DEFINITION OF THIS TERM.

As discussed at length in the opening brief of the Appellants (hereinafter "Plaintiffs"), the sole basis of the Appellants' claims is the alleged misrepresentation made by the Appellees (hereinafter "Defendants") that the Plaintiffs' jobs were "in serious jeopardy" in order to force the Plaintiffs to make an immediate decision on whether to resign and to accept the Enhanced Income Security Plan ("EISP"), or to be terminated by Verizon shortly thereafter with fewer benefits. (Joint Appendix [hereinafter "J.A."] 2.) The Plaintiffs have not alleged that the pretext for the Defendants' misrepresentation that the Plaintiffs' jobs were in serious jeopardy was that the Plaintiffs were "surplus employees". (J.A. 2.) The Defendants have alleged this. The Plaintiffs have alleged only that, irrespective of the reason, the Defendants misrepresented to the Plaintiffs that they would be terminated and lose substantial benefits if they did not accept the EISP and agree to resign shortly after the EISP was presented to them. (J.A. 2.) The Plaintiffs have alleged that the purpose of the alleged misrepresentation was to allow Verizon to rid itself of workers with more seniority, higher salaries, and more

fringe benefits. (J.A. 3-4.) Based upon such alleged misrepresentation, the Plaintiffs have brought state law claims against the Defendants for fraud and negligent misrepresentation. (J.A. 4.)

In order to support their argument that the Plaintiffs' Virginia law tort claims are preempted by the Labor Management Relations Act ("LMRA"), the Defendants go to great lengths in an effort to tie the Plaintiffs' claims to the CBA, the EISP, and the Memorandum of Agreement ("MOA"), and argue that such claims cannot be determined without interpreting these documents. The Defendants' argument does not bear scrutiny. For example, CWA argues that "[t]he dispute hinges on the Plaintiffs' belief that Verizon had no right to declare a surplus if it did not actually have a surplus of employees." (Brief of CWA at 1.) This is patently incorrect. The Plaintiffs' claims have nothing to do with whether Verizon had a right to declare a surplus, or even whether Verizon actually declared a surplus. Even if the CBA had said nothing about a "surplus" or the right to declare a "surplus", the Plaintiffs' causes of action would exist because they are based on the Defendants' statement that the Plaintiffs' jobs were "in serious jeopardy", irrespective of the Defendants' reason for making that statement. CWA itself acknowledges this fact when it states that "[w]hether or not Verizon was actually experiencing a decline in workload is a separate question" from the one involving the Plaintiffs'

"weighing of risks and benefits" in deciding whether to accept the EISP and to resign. (Brief of CWA at 8.) The Plaintiffs' "weighing of risks and benefits" was the consequence of the Defendants' alleged misrepresentation that the Plaintiffs' jobs were "in serious jeopardy", irrespective of the separate question of whether Verizon actually had a "surplus" of employees. CWA further acknowledges that the Defendants' statement did not necessarily arise from the labor agreements in noting that, even considering the agreements, "the alleged statements regarding risk of layoff were more in the way of logical speculation than misrepresentation." (Brief of CWA at 6.) Misrepresentations based on the Defendants' speculation, rather than on the terms of the labor agreements, do not require the interpretation of such agreements.

Verizon's argument is similarly fraught with inaccuracies. The Plaintiffs do not allege that the Defendants "misrepresented their risk of layoff based on their seniority." (Brief of Verizon at 3.) The Plaintiffs clearly do not base their claims of fraud and negligent misrepresentation on the Defendants' earlier statement that their jobs were not in jeopardy based on their seniority (a statement on which the Plaintiffs did not rely), but on the Defendants' later statement that their jobs were "in serious jeopardy" (a statement on which the Plaintiffs did rely in accepting the EISP and resigning). (J.A. 2.) As discussed above, the Plaintiffs' claims do not depend on whether Verizon even actually

declared a surplus. Therefore, Verizon's verbiage attempting to link the Plaintiffs' claims to the mechanism established by the CBA for declaring and executing a surplus is meaningless. (Brief of Verizon at 3.) As to the EISP as the consideration for the Plaintiffs' decision to resign, the fact that the EISP was created by the CBA and the MOA is irrelevant. The EISP was merely the consideration for the Plaintiffs' decision to resign in reliance on the Defendants' misrepresentation. The EISP had a monetary value. It does not require interpretation of the CBA or the MOA to determine that the Defendants induced the Plaintiffs to act upon their misrepresentation by offering them a thing of value to do so.

Verizon argues that the only way to determine whether the Plaintiffs' jobs were in jeopardy is to examine the CBA and MOA provisions on force reduction, seniority, and layoff procedures. (Brief of Verizon at 26.) This is incorrect. It is possible that the Plaintiffs' jobs were not in serious jeopardy, contrary to the Defendants' representation that they were, even if conditions existed upon which a surplus could be declared under the CBA. Such a possibility is supported by the fact that, shortly after the Plaintiffs' termination, Verizon represented to the Virginia Employment Commission that the Plaintiffs' jobs had not been in jeopardy and that their termination was voluntary. (J.A. 3.) Moreover, shortly after the Plaintiffs' termination, Verizon

recalled 84 technicians who had been removed and also brought in technicians from outside the area to meet the company's requirements. (J.A. 3, 164.) Verizon may have decided, as the Plaintiffs have alleged, that it wished to rid itself of the Plaintiffs because they had more seniority, higher salaries, and more fringe benefits, and cost Verizon more to employ than other workers, irrespective of whether the Plaintiffs' jobs were in serious jeopardy within the meaning of the CBA. Under such circumstances, it is not necessary to interpret the CBA in order to determine whether the Plaintiffs' jobs were actually in jeopardy for purposes of establishing the falsity element of fraud and negligent misrepresentation.

As to reliance, it is not necessary to interpret the CBA and the related agreements in order to determine whether the Plaintiffs reasonably relied upon the Defendants' representation that their jobs were in serious jeopardy. Contrary to the Defendants' argument, the Plaintiffs may establish reasonable reliance irrespective of whether the CBA indicated that they would not have been terminated under the surplus. The Plaintiffs have alleged that the Defendants told them that their employment "was in serious jeopardy", not that their employment "was in serious jeopardy under the surplus employee provisions of the CBA." (J.A. 2.) Their claims thus do not involve a term of the CBA. Indeed, the Plaintiffs could have believed that their jobs were in

serious jeopardy for reasons entirely separate from the provisions of the CBA, such as a perceived possibility that Verizon intended to rid itself of higher compensated employees. Accordingly, it is not necessary to interpret the CBA in order to determine whether the Plaintiffs reasonably relied on the Defendants' alleged misrepresentation.

In their opening brief, the Plaintiffs have dealt with most of the authority cited by the Defendants, explaining how such authority is clearly distinguishable from the present case, and how the relevant authority demonstrates that the Plaintiffs' claims are not preempted by the LMRA. The additional authority cited by the Defendants is likewise inapt, and does nothing to undermine the clear conclusion that the Plaintiffs' state tort claims are not preempted. *See Perez v. Roadway Express, Inc.*, 281 F. Supp. 2d 936 (N.D. Ohio 2003) (state fraud claims were preempted when plaintiffs' claims were for rights granted by the CBA; the Plaintiffs in the case at bar make no such claims); *Moon v. Goodyear Tire & Rubber Co.*, 519 F. App'x 620 (11th Cir. 2013) (state fraud claim was preempted when plaintiff alleged a misrepresentation in a buyout application form which specifically incorporated the terms of CBA; in the present case, the Plaintiffs are not alleging a misrepresentation contained in a form specifically controlled by the CBA, or for which the CBA served as the terms); *Dougherty v. AT&T*, 902

F.2d 201 (2d Cir. 1990) (state fraud and negligent misrepresentation claims by employees who transferred in reliance on defendant's statements as to force reduction were preempted, when CBA defined employment rights of transferred employees; in the present case the Plaintiffs are not asserting misrepresentation as to employment rights which could be enforced through the CBA); *Gibson v. AT&T Technologies, Inc.*, 782 F.2d 686 (7th Cir. 1986) (state fraud claim based upon employer's withholding of information as to plant closing plans was preempted, when the plaintiffs complained about their failure to obtain layoff benefits created by the CBA; in the present case, the Plaintiffs do not seek a benefit created by the CBA, and do not allege that they lost benefits under the EISP or the CBA as a result of the Defendants' misrepresentation); *Smith v. Colgate-Palmolive Co.*, 752 F. Supp. 273 (S.D. Ind. 1990), *aff'd*, 943 F.2d 764 (7th Cir. 1991) (state fraud claim based upon employer's representations about the permanent nature of employment accepted by plaintiffs at another facility was preempted, when Plant Closure Agreement addressed and contradicted the plaintiffs' allegations; in the present case, the CBA did not contain any provision undermining the Defendants' representation that the Plaintiffs' employment was in serious jeopardy).

Finally, CWA has argued, in addition to preemption, that Virginia law does not provide any independent state tort action against that party. As the basis for this argument, CWA cites the proposition that negligent performance of contractual duties is not actionable in tort. (Brief of CWA at 16-17.)

Under Virginia law, however, to establish a cause of action in tort, the duty alleged to have been tortiously breached must be a common law duty, not a duty arising solely by virtue of a contract. *Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 509 S.E.2d 494 (1999). A party can, in certain circumstances, show both a breach of contract and a tortious breach of duty. *E.g.*, *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998); *Foreign Mission Board of Southern Baptist Convention v. Wade*, 242 Va. 234, 409 S.E.2d 144 (1991). In order to maintain an action for tort in the context of a breach of contract, the duty tortiously breached must be a common law duty that does not exist between the parties based solely on their contract. *Richmond Metropolitan Authority*, 256 Va. at 558, 507 S.E.2d at 347; *Foreign Mission Board of Southern Baptist Convention*, 242 Va. at 241, 409 S.E.2d at 148; *Dunn Construction Co. v. Cloney*, 278 Va. 260, 682 S.E.2d 943 (2009). Thus, an omission or nonperformance of a duty may sound in both contract and in tort, but only when the omission or nonperformance of the contractual duty also violates a

common law duty. *Station #2, LLC v. Lynch*, 280 Va. 166, 695 S.E.2d 537 (2010).

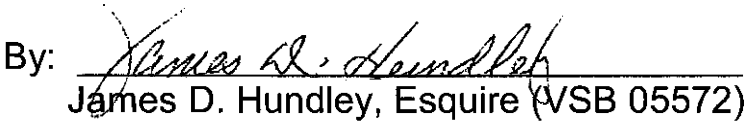
In the case at bar, the Plaintiffs have alleged a violation of common law duties against CWA, specifically the duties to refrain from making fraudulent and negligent misrepresentations which cause harm to others. (J.A. 2-4.) While it is undoubted that CWA had contractual duties to the Plaintiffs and the other employees it represented, CWA's duty to communicate accurately about severance benefits and layoffs did not exist *solely* because of the CBA and the related labor agreements. Rather, Virginia tort law also imposes the duty not to make misrepresentations upon which others rely to their detriment. In other words, CWA would still have had a duty to the Plaintiffs not to make misrepresentations to them, even if the CBA had not existed. Therefore, the Plaintiffs have valid tort claims against CWA, and their claims against CWA are not subject to dismissal.

CONCLUSION

For all the foregoing reasons, the Appellants, Richard Anthony, et al., respectfully renew their request that this Honorable Court reverse the judgment of the circuit court, reinstate the Plaintiffs' Complaints, and remand their cases to the circuit court for further proceedings consistent with such an order.

Respectfully submitted,

Richard Anthony, et al.

By: 

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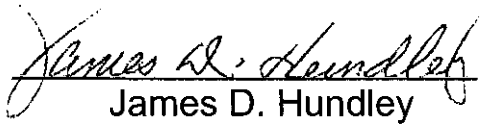

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