IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01054

COOPER L. "PETE" MISSKELLEY — APPELLANT

VS.

CARROLL COUNTY, MISSISSIPPI and
CARROLL/MONTGOMERY REGIONAL
CORRECTIONAL FACILITY — DEFENDANT/APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF CARROLL COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT, COOPER L. "PETE" MISSKELLEY

ORAL ARGUMENT NOT REQUESTED

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APPELLANTS REPLY TO APPELLEES BRIEF

The Appellees make three arguments in their brief to support the lower courts ruling in granting them summary judgment.

I. MISSKELLEY'S ALLEGED RESIGNATION REMOVED HIS PROTECTION UNDER THE WRITTEN EMPLOYMENT CONTRACT WITH CARROLL COUNTY, AND, EVEN THOUGH HE CONTINUED TO WORK "UNDER THE SAME TERMS AND CONDITIONS," HE BECAME AN EMPLOYEE AT WILL.

This first argument fails on three important counts.

(A) A serious and material fact in issue exists as to whether or not Misskelley resigned. It is clear that he had a misunderstanding with his boss, the Sheriff, over a personnel matter. However, the misunderstanding was resolved, and Misskelley, at the request of the Sheriff returned to his position as Warden thereafter and worked under the same terms and conditions which existed prior to their misunderstanding until he became disabled. (T. 26). Additionally, the County took no action on Misskelley's alleged resignation. In fact, the Sheriff informed the County that Misskelley had returned and would continue as Warden. (T. Ex. F). No minute entry exists on the County's minutes accepting or rejecting the "so called" resignation. Under the terms of the written contract of employment, either party was required to notify the other of its termination in writing within sixty days of its expiration date. (R. 102).

The most glaring example of a factually disputed issue existing concerning Misskelley's alleged resignation is his sworn testimony at the hearing:

> Q. Mr. Misskelley, I'm going to hand you what has been marked Exhibit P-1 and ask you if you can identify that?
> A. I see – yes, sir. I see a letter to Mr. Stanley Mullins being signed by Sheriff Don Gray.
> Q. And it indicates that you had resigned; correct?

A. Yes, sir. It does.
Q. And did you resign to Sheriff Gray?
A. No , sir.
Q. Did you resign to Sugar Mullins?
A. No, sir.
Q. Did you resign to the board?
A. No.
Q. This is Sheriff Gray's writing?
A. Yes, sir.

(T. 23: 10 - 24)

(B) Even if a fact finder after hearing all the evidence should hold that Misskelley had resigned and that he became an employee at will, Misskelley would still have had the benefit of the County's personnel policy. "A personnel manual can create contractual obligations, even in the absence of a written agreement." Bobbett v. The Orchard, Ltd, 603 So. 2d 356 (Miss. 1992). (See also appellant's brief 8 - 10).

(C) The Court's grant of summary judgment was not founded on the issue of whether or not Misskelley was a contract employee or an "at will" employee. The appellees on inquiry by the lower court admitted that a finding on this issue by the Court was not necessary for a ruling on the Motion for Summary Judgment. (T. 35). Appellees now argue that this factual issue, which was not considered by the Court supports the Court's ruling on the Motion for Summary Judgment.

Appellant submits that a genuine outcome determinative issue of material fact exists on his contractual claims and that the lower court erred in awarding the defendants below summary judgment.

II. APPELLEES NEXT ARGUE THAT MISSKELLEY WAS UNEQUIVOCALLY TERMINATED ON DECEMBER 31, 2007, AND BECAUSE OF THAT TERMINATION, HE WAS NOT ENTITLED TO THE TOTAL NUMBER OF CATASTROPHIC LEAVE DAYS HE HAD EARNED UNDER THE PERSONNEL POLICY.

Appellant submits that under the terms of the County's personnel policy he had earned 275 days of catastrophic leave. This fact is uncontroverted. Appellant was only approved for catastrophic leave for 52 of those 275 days. This fact is uncontroverted. Appellant submits that the decision of the Board of Supervisors to terminate his leave after only 52 days had been paid was arbitrary and capricious. Although appellees argue that Misskelley could have been terminated at any time and for any reason, it would have been impossible for Misskelley to have been terminated for cause. He was in leave status drawing his regular pay and allowances and was not actually acting as Warden. While on leave status appellees argue he was terminated by the Board because a new Warden had been hired by a new Sheriff who had been elected, and that this decision was discretionary under the personnel policy.

Appellant submits that the Board did not terminate Misskelley's employment, but, simply terminated his leave status. Appellees then make the bold assertion that because of Misskelley's disability which entitled him to catastrophic leave, he was unable to perform his duties as Warden and that inability to perform was grounds for his termination.

The only two actions by the Board of Supervisors regarding Misskelley's catastrophic leave both include the language "pending termination date." (R. 115; 118). In that the Board only acts through its minutes, appellant submits that he has never been officially terminated as an employee and that the date of his catastrophic leave status has never been established. The appellees argue that Misskelley had made no claim for salary after December 31, 2007; however,

he has made an appearance before the Board, filed a claim against the County and has filed this lawsuit making his claim for compensation for his earned but unpaid catastrophic leave.

The Board of Supervisors in adopting the personnel policy was bound to follow that policy, and Misskelley as an employee covered by the policy had a right to and did rely on the catastrophic leave provisions. An "employer has an obligation to follow the provisions in its own employee manual". Southwest Medical Center v. Lawrence, 684 So. 2d 1257 (Miss. 1996).

III. APPELLEES FINAL ARGUMENT ASSERTS THAT THE BOARD OF SUPERVISORS STRICTLY FOLLOWED THE UNAMBIGUOUS TERMS OF PERSONNEL POLICY BY CERTIFYING MISSKELLEYS UNUSED CATASTROPHIC LEAVE TO PERS, AFTER MISSKELLEY'S TERMINATION ON DECEMBER 31, 2007.

First, it is important to note that the lower court stated on the record that the question of the Board of Supervisors certifying the unused leave to PERS was not an issue for him (the lower court) to decide. (T. 37). Appellants' attorney stated to the lower court that defendants below knew that Misskelley would receive no benefits from PERS for the unused leave. (T. 36). In addition, Misskelley in his Complaint, seeks damages from the appellees for the loss of retirement income from both the Social Security Administration and PERS as a result of the appellees failure to keep him on catastrophic leave for the entire 275 days earned under the personnel policy. (R. 97). Misskelley quantifies his loss in the Complaint of approximately $19,000.00 per year over the life of his retirement. (R. 97). Whether or not the Board of Supervisors certified the unused catastrophic leave and its effect on appellant's retirement are highly fact sensitive issues which have not been heard or decided by a fact finder. The lower court erred in awarding summary judgment.

Appellant submits that the only logical interpretation of that portion of the personnel policy which provides that "**any unused catastrophic leave shall be counted as creditable**

service for the purpose of the retirement system upon termination of employment" would only apply to those healthy employees who had not needed to use the accrued leave during their years of service. Certainly to interpret this portion of the policy to apply to an employee who had been placed in a leave status because of a disability, and to contend that the Board had complied with the policy in the case at bar is ludicrous.

Appellant submits that the only way to justify an interpretation of the personnel policy to deny Misskelley his entire 275 days of catastrophic leave is contained in the following sentence of that policy:

> Catastrophic leave can only be used by employees or appointed officials upon approval of the Sheriff of Carroll County and the Board of Supervisors of Carroll County.

At the hearing below counsel for Carroll County argued that this sentence in the personnel policy makes all decisions with reference to catastrophic leave discretionary with the Board of Supervisors. Counsel for Misskelley argued that the County had adopted the policy vesting a right to Misskelley and was bound to follow that policy. The lower court evidently accepted the County's position and awarded summary judgment based on that flawed reasoning. The following colloquy between the lower court and counsel clearly describes the reasoning of the County in denying Misskelley the entire 275 days catastrophic leave he had earned:

> **BY MR. McCHAREN:** Right, Your Honor, but my question is, and this is what I'm having a hard time understanding. How can he be on leave from a job for which he is no, that he no longer holds? In other words, he is - - I think he is arguing, and this gets back to what we have contended all along, that this is not a vesting or a right. It is a provision that is granted by the Board of Supervisors, and in this case it was granted, clearly defined. His employment was terminated. He is then left with getting his creditable serve with the- -
> **BY THE COURT:** - - Let's take any other case, just any case. You have got "X" amount of leave.

BY MR. McCHAREN: Right.
BY THE COURT: The supervisors have the right to determine how much that leave is going to be, regardless. So let's say that it's 365 days, and somebody comes in and says I need to take catastrophic leave. Then they could say, okay, we will do that, but we are not going to give you 365 days. Is that right? Is that what they can do?
BY MR. McCHAREN: That could be - -
BY MR. LANCASTER: - - The Board can approve catastrophic leave any - -
BY THE COURT: They determine the terms; right?
BY MR. LANCASTER: They determine number one, if it is going to be granted - -
BY THE COURT: - - Sure.
BY MR. LANCASTER: And number two, the term.
BY THE COURT: Right.
BY MR. LANCASTER: They could give him, they could have given him two days, or they could have given him 272 days.

(T. 47: 12-29; 48: 1-15)

If the Board of Supervisors could arbitrarily determine the number of leave days it would approve regardless of the amount of leave earned by an employee under the policy, then the policy is not a benefit to employees and becomes nothing but "window dressing."

It is respectfully submitted that the lower court erred in its interpretation of this important employee benefit earned by Misskelley and subsequently taken away by the Carroll County Board of Supervisors.

CONCLUSION

In this Court's de nova review of the order granting summary judgment to Carroll County Mississippi and Carroll/Montgomery Regional Correctional Facility, Misskelley respectfully submits that the record clearly demonstrates he earned 275 days of catastrophic leave and that he was arbitrarily denied 223 days of that earned leave. Sufficient evidence exists in this record to justify this Court in reversing the lower court and rendering a judgment here in favor of

Misskelley directing the appellees to pay Misskelley for 223 days earned catastrophic leave and remanding the case to the lower court on the issue of damages. Alternatively, Misskelley asks that this Court reverse the lower court's order granting summary judgment and remand the case for trial on the merits.

Respectfully submitted this the 20th day of January, 2010.

COOPER L. "PETE" MISSKELLEY, Appellant

By: _____

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CERTIFICATE OF SERVICE

I, Webb Franklin, attorney for Plaintiff/Appellant, Cooper L. "Pete" Misskelley, hereby certify that I have this day served a copy of the foregoing **Reply Brief of Appellant** on the following:

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Honorable Clarence E. Morgan, III
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SO CERTIFIED, this the 20th day of January, 2010.

WEBB FRANKLIN (MS[redacted]

CERTIFICATE OF FILING

I, Webb Franklin, of counsel for Plaintiff/Appellant, Cooper L. "Pete" Misskelley, certify that I have this day served the Office of the Clerk, Supreme Court of Mississippi and counsel of record, via U. S. Mail, postage pre-paid, a copy of the foregoing Reply Brief of Appellant.

THIS the 20th day of January, 2010.

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