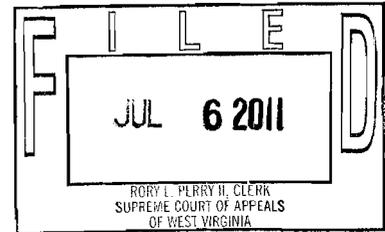


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0191



William Watson, Jr., Respondent Below,
Petitioner,

vs.) No. 11-0191

Appeal from a final order of
the Circuit Court of Kanawha
County (10-AA-34)

West Virginia Department of Health and
Human Resources/ Bureau for Behavioral
Health and Health Facilities/ Mildred
Mitchell-Bateman Hospital, Petitioners Below,
Respondents.

PETITIONER'S REPLY IN OPPOSITION TO RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED BY MISINTERPRETING THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS BY HOLDING THAT THE DIRECTIVE FROM THE EMPLOYER THAT THE PETITIONER HAVE NO CONTACT WITH ANY OF HIS COWORKERS DID NOT VIOLATE HIS FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION OR HIS RIGHT TO PRIVACY
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REPLY ARGUMENT

- I. **THE CIRCUIT COURT ERRED BY MISINTERPRETING THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS BY HOLDING THAT THE DIRECTIVE FROM THE EMPLOYER THAT THE PETITIONER HAVE NO CONTACT WITH ANY OF HIS COWORKERS DID NOT VIOLATE HIS FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION OR HIS RIGHT TO PRIVACY**

Respondent argues that friendship is not a protected freedom of intimate association and, therefore, the Petitioner had not constitutional right to contact any of his coworkers after the State ordered him to have no such contact. The order is contained in the September 16, 2008 letter to the Petitioner from the CEO of the Hospital, which stated, "You are not to contact any staff member other than the Director of Human Resources, your union representative (if he or she is an employee), or myself." (A.R. 100 (emphasis in original).)

The United States Supreme Court state that "because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly

personal relationships a substantial measure of sanctuary from unjustified interference by the State.” Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (citing various Supreme Court opinions). Relationships with “such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship[.]” such as family relationships and other similar relationships contain freedom of association as an element of personal liberty. Id. at 620; see also Bd. of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987). “Therefore, . . . courts have recognized both personal friendships and non-marital romantic relationships as the types of ‘highly personal relationships’ within the ambit of intimate associations contemplated by Roberts.” Anderson v. City of LaVergne, 371 F.3d 879, 882 (6th Cir. 2004) (citing Akers v. McGinnis, 352 F.3d 1030, 1039-40 (6th Cir. 2003)).

In response to this argument, the Respondent cited Silverstein v. Lawrence Union Free School District Number 15, 2011 WL 1261122 (E.D.N.Y. Feb. 15, 2011), which addressed a claim of freedom of intimate association at the motion to dismiss stage. In Silverstein, the issue of intimate association is not discussed in detail and based on the Court’s statement that “the intimate relationship alleged by the plaintiff is *presumably* his friendship with Levey,” the issue was apparently not briefed adequately. Id. at *6 (emphasis added). The Silverstein decision cited to a line of Second Circuit cases rejecting sexual relationships and non-familial relationships as protected and stated that “[t]he plaintiff has pointed to no precedent, however, that would extend the right to a platonic friendship, even a long standing one of great intimacy.” Id. at *7. Clearly, the line of Sixth Circuit cases cited in the Petitioner’s Brief and reiterated in the previous paragraph is precedent that would extend the right in such a way.

Of course, neither the Second Circuit nor the Sixth Circuit are binding on this Court. Rather, this Court has to decide this issue of first impression by considering such persuasive authority and analyzing the Constitution and the United States Supreme Court decisions interpreting it. As the Court stated in Roberts, “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State[.]” 468 U.S. at 617-18. Such a “fundamental element of personal liberty” clearly exists as to relationships “that attend the creation and sustenance of a family” and clearly do not exist with regard to “a large business enterprise[.]” Id. at 619-20. “Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State.” Id. at 620. “Determining the limits of state authority over an individual’s freedom to enter into a particular association therefor unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” Id.

The Petitioner’s friendships with persons who happened to be his co-workers were much closer to the most intimate relationship than the most attenuated on the spectrum described by the United States Supreme Court. Aside from the line of cases in the Sixth Circuit, no court has thoroughly addressed where personal friendship falls on the spectrum of intimate relationships. This Court should follow the Sixth Circuit and hold that a personal friendship is granted constitutional freedom of intimate association protection because the objective characteristics of friendship include many of the same characteristics of marriage and other widely recognized intimate relationships, with the exception of sexual contact. Friendship is an intimate association that falls much closer to marriage on the Supreme Court’s spectrum and, accordingly, this Court

should hold that it is protected and that the State cannot infringe upon except under certain circumstances. Notably, the Respondent does not make any arguments or assertions as to where personal friendship falls on the spectrum, but instead simply concluded that it is not protected.

After the Respondent concluded that personal friendship is not a protected intimate relationship, it did not address the standard to be applied if, in fact, personal friendship is protected, as the Petitioner argues. The Petitioner hereby reiterates his arguments that the interference at issue in this case should receive strict scrutiny analysis under the Akers Court standard that a “direct and substantial interference” with intimate associations is subject to strict scrutiny. 352 F.3d at 1040. In this case, the order states that the Petitioner was to have no contact with any employee of the Hospital. (A.R. 100.) Such an order is clearly a direct and substantial interference, as it did not address either particular employees that the Petitioner could not contact or particular topics that the Petitioner could not discuss. Such a broad directive must meet strict scrutiny and the Respondent has failed to provide any evidence that such a broad directive was necessary in this case, as is explained in more detail throughout the Petitioner’s Brief. In order to discipline an employee for insubordination, the Respondent must prove “(a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” Butts, 212 W. Va. at 212. For the reasons discussed above, the Respondent cannot prove element (c) as articulated in Butts and, therefore, any punishment received by the Petitioner for insubordination must be vacated.

Finally, the Respondent does not address the Petitioner’s argument that the Circuit Court simply substituted its reasoning for that of the ALJ. With respect to this argument, the ALJ held that the order itself was overly broad and violated the West Virginia and United States

Constitutions, and, therefore, the ALJ declared the order void and unenforceable. (A.R. 17; 19.) Accordingly, the ALJ held that the Respondent did not meet its burden of proof with respect to the allegation of insubordination. In reversing this portion of the ALJ's decision, the Circuit Court held that the topics discussed by the Petitioner did not rise to the level of public concern and that the case was not about "association" and, therefore, no freedom of association was at issue. (A.R. 3.) In doing so, the Circuit Court ignored that reasoning of the ALJ and the conclusions drawn by the ALJ. The Circuit Court simply determined that it disagreed with the ALJ and substituted its reasoning for that of the ALJ.

II. THE CIRCUIT COURT PLAINLY ERRED IN CONCLUDING THAT THE RESPONDENT MET ITS BURDEN OF PROOF TO SHOW THAT THE PETITIONER WAS INSUBORDINATE TO THE DIRECTION THAT HE NOT CONTACT ANY OF HIS COWORKERS

If the Court determines that the order prohibiting the Petitioner from communicating with any of his coworkers about any matter is constitutional, reasonable, and valid, the Court can still rule in favor of the Petitioner on the question of insubordination if it finds that the Petitioner's violation of that order was not willful. See Butts, 212 W. Va. at 212. Although this question of fact was not addressed specifically by the ALJ, the findings of fact and the opinion generally show that the ALJ did not think that the Petitioner violated the order out of any sort of defiance or contempt for authority. In fact, the ALJ stated that "[w]hen speaking with Ms. Bledsoe, Ms. Parker and Mr. Albright, [the Petitioner] did not attempt to coerce or threaten any coworker for participating in the investigation. Nor did he attempt to alter their statements or testimony." (A.R. 11.)

As this Court stated, precedent "suggest[s] that for a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for

authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.” Butts, 212 W. Va. at 213 (citing Annotation, Dismissal of Teacher-“Insubordination”, 73 A.L.R.3d § 3 (1977)). The undisputed facts in this case do not show anything more than a disagreement or misunderstanding over the reach of an order. The Petitioner contacted three of his friends, who happened to be three of his coworkers. In doing so, the Petitioner spoke about money owed to one friend, general topics that included whether or not another friend had been interviewed in the investigation but did not discuss details of the investigation, and what was “going on” in relation to the investigation with another friend. (A.R. 16-17.) Nothing in the record shows that the Petitioner acted with defiance or contempt. Accordingly, this Court should conclude that the undisputed facts show that the Petitioner did not violate the order willfully and, therefore, cannot be punished for insubordination. If the Court determines that the facts are in dispute, the Petitioner respectfully requests that the matter be remanded to the ALJ for further fact finding and argument as to the question of willfulness.

III. THE CIRCUIT COURT ERRED IN REVERSING THE ADMINISTRATIVE LAW JUDGE’S CONCLUSION THAT THE DISCIPLINE OF THE PETITIONER WAS DISPROPORTIONATE TO THE PETITIONER’S OFFENSE, WHERE THE CIRCUIT COURT DID NOT GIVE PROPER DEFERENCE TO THE ADMINISTRATIVE LAW JUDGE’S FINDING OF FACTS

Regardless of whether the Court finds that the Petitioner can be reprimanded for insubordination, the Court can still find that the discipline handed down to the Petitioner was disproportionate to the Petitioner’s offense. Whether or not discipline is excessive given the facts of a situation is an affirmative defense. The ALJ concluded that the discipline handed down for the Petitioner’s offense was disproportionate and the Circuit Court substituted its decision for that reasoning of the ALJ. As explained more thoroughly in the Petitioner’s Brief, the ALJ

concluded that the totality of the evidence made mitigation appropriate and ordered the penalty of five days suspension and demotion to Food Service Worker mitigated to five days suspension. (A.R. 21; 23-24.)

In overturning this portion of the ALJ's decision, the Circuit Court stated that "[g]iven the totality of the evidence, [the Petitioner] did not establish by a preponderance of the evidence that his discipline was so disproportionate to his offense and that the Hospital abused its discretion by its issuance." (A.R. 4.) The Circuit Court's opinion improperly weighs the evidence and fails to establish that the ALJ was clearly wrong. The Circuit Court attempts to substitute its judgment for the ALJ's judgment, which this Court has strictly prohibited. See Cahill v. Mercer County Bd. of Educ., 208 W. Va. 177, Syl Pt. 1 (2000). Factual findings and credibility determinations made by an ALJ are entitled to deference by the Circuit Court and this Court. While the credibility conclusion of the ALJ can be displaced by a showing that reliable, probative and substantial evidence on the whole record shows that the ALJ was clearly wrong, it cannot be displaced merely because the Circuit Court disagrees with the ALJ. In this case, the record does not contain reliable, probative and substantial evidence that the Petitioner failed to establish by a preponderance of the evidence that his discipline was so disproportionate to his offense that the Hospital abused its discretion. Rather, the record supports the conclusion of the ALJ and the Circuit Court erred by substituting its interpretation of the evidence.

The Respondent relies on the same faulty testimony that the Circuit Court relied on in stating that "several security officers had been terminated for sleeping on the job." (Resp. Br. at 9.) The witness that the Respondent relies upon, Anne Worden, actually stated "[w]e've dismissed two security guards on two separate occasions [for sleeping on the job]." (A.R. 61.)

On cross examination, Ms. Worden stated she knew of no other employees who were reported dozing off or sleeping. (A.R. 62.) Furthermore, Ms. Worden was unable to recall specific instances of employees being disciplined for sleeping on the job when questioned by the Petitioner's representative. (A.R. 63-66.) In determining what credibility to give Ms. Worden's testimony, the ALJ clearly concluded that her testimony did not deserve substantial credibility when he held that "[i]n the past, other employees have only received a suspension (or less) for sleeping on the job." (A.R. 11 at ¶ 14 (citing Testimony of Kara Anderson).) By crediting the testimony of Ms. Anderson and not Ms. Worden, the ALJ made a credibility determination that should not be overturned by the Circuit Court simply because the Circuit Court disagrees with that determination. See Cahill, 208 W. Va. 177, Syl Pt. 1. The Respondent failed to address this argument in its brief. Accordingly, the Court should reverse the decision of the Circuit Court and reinstate the decision by the ALJ.

CONCLUSION

For the reasons stated above, the Circuit Court's Final Order should be reversed, and the Court should reinstate the decision of the Administrative Law Judge in full or remand this matter for further proceedings, as appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2011, true and accurate copies of the foregoing **PETITIONER'S REPLY IN OPPOSITION TO RESPONDENT'S BRIEF** in this case were delivered by U.S. mail, postage prepaid, to counsel for all other parties to this appeal as follows:

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