

Docket No. 11-0191 ✓

JUN 16 2011

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WILLIAM WATSON,**

Petitioner,  
Respondent below,

v.

**WEST VIRGINIA DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES/BUREAU FOR  
BEHAVIORAL HEALTH AND HEALTH  
FACILITIES/MILDRED MITCHELL-  
BATEMAN HOSPITAL,**

Respondent  
Petitioner below.

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FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
CIVIL ACTION NO. 10-AA-34

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**RESPONDENT'S BRIEF**

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DARRELL V. MCGRAW JR.  
ATTORNEY GENERAL

JENNIFER K. AKERS  
ASSISTANT ATTORNEY GENERAL  
W. VA. ID # 8771  
West Virginia Department of Health  
and Human Resources  
812 Quarrier Street, 2<sup>nd</sup> Floor  
Charleston, West Virginia 25301  
(304) 558-2131  
[Jennifer.Akers@wvago.gov](mailto:Jennifer.Akers@wvago.gov)

Counsel for Respondent

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## ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT CORRECTLY HELD THAT BATEMAN'S DIRECTIVE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION OR HIS RIGHT TO PRIVACY.
- II. THE CIRCUIT COURT CORRECTLY HELD THAT PETITIONER'S ACTIONS WERE INSUBORDINATE.
- III. THE CIRCUIT COURT CORRECTLY HELD THAT BATEMAN'S DISCIPLINARY ACTION WAS PROPORTIONATE AND APPROPRIATE GIVEN PETITIONER'S ACTIONS.

## STATEMENT OF THE CASE

Petitioner was employed by Mildred Mitchell Bateman-Hospital (hereinafter "Bateman") as a Security Guard. He was assigned to the midnight shift. In September 2008, a fellow employee, Karen Bledsoe, reported to management that Petitioner had informed her that he had been involved in a copper theft that occurred on hospital property. See Appendix, page 44.

As a result of Ms. Bledsoe's reporting, on September 16, 2008 Petitioner was suspended pending the outcome of an investigation of the allegations. In the letter notifying him of the suspension, Petitioner was informed that he was restricted from all areas of the hospital except the Human Resources office. He was also informed, verbally and in writing that he was not to contact any staff member other than the Director of Human Resources, his union representative or the Chief Executive Officer only until the investigation was complete. This was a standard procedure taken by Bateman to preserve the integrity of such investigations. See Appendix, page 56. See also, Appendix, page 100.

However, Petitioner did not follow this directive. Despite the directive otherwise, Petitioner contacted several employees, including his co-worker, Karen Bledsoe. Ms. Bledsoe is a security guard at Bateman, and the employee who had reported to management that Petitioner was involved in the copper theft. Petitioner contacted Ms. Bledsoe on September 16, 2008 at approximately 5:45 p.m. to inform her that he was not involved in the copper theft. He further informed her angrily that he had lied to her previously when telling her he had been involved. See Appendix, page 44. Ms. Bledsoe subsequently notified hospital management of Petitioner's phone call in writing on September 17, 2008. See Appendix, page 99.

Subsequently, Bateman's investigation failed to reveal any evidence of Petitioner's involvement in the copper theft. During a meeting with Daniel Persinger, Petitioner's supervisor and Kieth Anne Worden, Director of Human Resources on October 7, 2008, Petitioner admitted that he did sleep while on the job, and he had contacted employees during the investigation of his involvement in the copper theft. He also claimed that he had previously told Mr. Persinger and Ms. Worden that he had a hard time staying awake on his midnight shift. Although this was true, he had never told anyone that he actually slept during his shifts. See Appendix, page 56, 62.

As a guard on midnight shift, Petitioner was responsible for ensuring the safety and security of all hospital grounds, including patients and staff. Bateman has no gate to control outside entry to the facility. The hospital is located in a high crime area of Huntington. See Appendix, page 57.

Bateman rescinded Petitioner's suspension regarding the copper theft. All information regarding that incident was removed from his personnel file. However,

Petitioner was issued a five-day suspension for his admitted insubordination in contacting employees in violation of the directive, and his failure to adhere to the Employee Conduct Policy by sleeping while on his work shift as a night security guard.

Additionally, Petitioner was transferred from the position of Guard to a Food Service Worker position. Petitioner's new position was in the same pay grade, at the same rate of pay on day shift. Petitioner suffered no loss of salary. See Appendix, page 59. At that time, there was a need for employees in the dietary department. It was also the only vacant day shift position for which Petitioner met the minimum qualifications that did not require a reduction in pay. See Appendix, page 59. See also, Appendix, pages 102-104.

When making the decision to transfer Petitioner, Bateman considered Petitioner's tenure and work history. See Appendix, page 59. At least two other security guards have been dismissed for sleeping during their midnight work shift. See Appendix, page 61. Several other employees in different job positions had received suspensions and transfers when caught sleeping on the job. See Appendix, page 97.

### **SUMMARY OF ARGUMENT**

Bateman's order that Petitioner refrain from speaking to co-workers during an investigation of copper theft did not violate Petitioner's constitutional right to freedom of intimate association. Petitioner's relationships with co-workers are not the type of relationship contemplated by the Constitution.

The directive that Petitioner not discuss the investigation with co-workers was merely intended to preserve the integrity of the investigation in copper theft at the Hospital. Petitioner willfully defied this order by immediately contacting several co-

workers, including the co-worker who had reported that he was involved in the copper theft.

Petitioner did not establish by a preponderance of the evidence that his suspension and demotion were disproportionate to his acts of insubordination and falling asleep while working as a night shift security guard.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Because the issue regarding Petitioner's claim of freedom of intimate association with co-workers is a case of first impression, oral argument is appropriate under Rev. R.A.P. 20. However, if the Court determines that the facts and arguments are adequately presented by the briefs and record on appeal, the Court may, in its discretion, determine that oral argument is not necessary

### **ARGUMENT**

- I. **THE CIRCUIT COURT CORRECTLY HELD THAT BATEMAN'S DIRECTIVE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL FUNDAMENTAL RIGHT TO FREEDOM OF ASSOCIATION OR HIS RIGHT TO PRIVACY.**

Petitioner argues that his freedom of intimate association was violated by Bateman's directive not to speak to any co-workers during its investigation. However, the Circuit Court correctly held that Petitioner's right to freedom of association or his right to privacy were not violated because the relationship that Petitioner had with his coworkers is not the kind of association that is protected under the Constitution

In *Roberts v. United States Jaycees*, 468 U.S.609, 104 S.Ct. 3244, 82 L.E.2d 462 (1984), the Supreme Court identified two forms of constitutionally protected associational rights. These rights are the "freedom of intimate association" and the "freedom of expressive association." Intimate association consists of the choice to enter

into and maintain [an] intimate human relationship.” Expressive association has been identified as the right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances and the exercise of religion.” *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 146 (4<sup>th</sup> Cir. 2009) (quoting *Roberts*, 468 U.S. at 617-618).

Constitutionally protected intimate associations include those “personal bonds that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs. . . .” *Roberts* at 618-19, 104 S.Ct.

In *Silverstein v. Lawrence Union Free School District Number 15*, 2011 WL 1261122 (E.D.N.Y.), the Court held that “to state an intimate association claim, the plaintiff must show that “the particular relationships at issue . . . are generally protected . . . under the circumstances alleged.” In *Silverstein*, the court held that a friendship does not rise to the level of intimacy contemplated in this right. “This right protects relationships that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children and cohabitation with one’s relatives.” *Roberts* at 620. The Constitution does not recognize a generalized right of social association. *Silverstein* at 6.

In *Phillips v. Joy*, 2009 WL 5214324 (D.S.C.), the court held that the relationship between co-workers is not of an intimate nature, nor is it protected as expressive association. Intimate association refers only to highly personal relationships, such as marriage and family relationships. *Willson v. Yerke*, 2011 WL 332487 (M.D.Pa.)

In this case, the contact that Petitioner claims is protected was contact with co-workers. Friendships with co-workers clearly fall outside the protection of the freedom of

intimate association contemplated by the Constitution. Therefore, the Circuit Court correctly held that Bateman's directive did not violate Petitioner's constitutional fundamental right to freedom of intimate association.

**II. THE CIRCUIT COURT CORRECTLY HELD THAT PETITIONER'S ACTIONS WERE INSUBORDINATE.**

The Circuit Court correctly held that Petitioner's actions were insubordinate because he willfully refused to follow Bateman's legitimate directive not to speak to other employees during the investigation of the copper theft. Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

Petitioner contacted the Karen Bledsoe, very employee who reported that he had been involved in the copper theft. Ms. Bledsoe testified at the Level III hearing that Petitioner called specifically to discuss the fact that she had reported him. She stated

he was very angry and upset. Another employee testified that Petitioner called him to ask if he had been interviewed regarding the investigation.

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

In the case at hand, Petitioner willfully defied Bateman's request that he not contact his co-workers during the investigation. This request was issued to prevent the exact type of contact that Petitioner made. This action by Petitioner caused Ms. Bledsoe to be reluctant to testify at the Level III hearing. Bateman had a legitimate interest in protecting the integrity of investigations in order to determine the truth. Therefore, the Circuit Court correctly held that Petitioner's actions constituted insubordination.

### **III. THE CIRCUIT COURT CORRECTLY HELD THAT BATEMAN'S DISCIPLINARY ACTION WAS PROPORTIONATE AND APPROPRIATE GIVEN PETITIONER'S ACTIONS.**

The Circuit Court correctly held that Bateman's disciplinary action was appropriate given Petitioner's actions. The argument that discipline is excessive given the facts of the situation is an affirmative defense, and the employee bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8,

1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar.31, 1994). See *Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

In the case at hand, Petitioner failed to establish that his discipline was so disproportionate to his offense that Bateman abused its discretion by its issuance. Kieth

Anne Worden, Human Resource Director for Bateman, testified at the Level III hearing that several security officers had been terminated for sleeping on the job. Ms. Worden's cross examination revealed that another employee had been suspended for 10 days and also transferred for sleeping while on the job. Petitioner only received a 5-day suspension, and transfer. Petitioner failed to identify any specific individual in his classification who had received a lesser disciplinary action than the one he received for sleeping while on the job and being insubordinate.

Bateman considered Petitioner's work history and previous employment evaluations, and decided to issue Petitioner a five-day suspension and transfer him to a position within the same pay grade instead of terminating him.

### CONCLUSION

For the above-stated reasons, the final order of the Circuit Court should be affirmed.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,

RESPONDENT

By Counsel

DARRELL V. McGRAW JR.  
ATTORNEY GENERAL

  
JENNIFER K. AKERS

ASSISTANT ATTORNEY GENERAL  
W. VA. ID # 8771

West Virginia Department of Health  
and Human Resources  
812 Quarrier Street, 2<sup>nd</sup> Floor  
Charleston, West Virginia 25301  
(304) 558-2131

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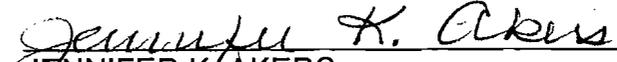
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FACILITIES/MILDRED MITCHELL-  
BATEMAN HOSPITAL,

Respondent  
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CERTIFICATE OF SERVICE

I, Jennifer K. Akers, Assistant Attorney General, certify that I have this 16<sup>th</sup> day of June, 2011, served a true copy of the foregoing **RESPONDENT'S BRIEF** upon the following individual(s) by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Kevin Baker  
Baker & Brown, PLLC  
707 Virginia Street East, Suite 230  
Charleston, WV 25301

  
JENNIFER AKERS  
ASSISTANT ATTORNEY GENERAL