

No. 30730 - Gary Dailey v. Board of Review, West Virginia Bureau of Employment Programs; William F. Vieweg, Commissioner, Bureau of Employment Programs; and Executive Air Terminal, Inc.

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OF WEST VIRGINIA

Davis, J., dissenting:

Under the decision reached by the majority opinion in this case, every employer in the State of West Virginia must provide unemployment compensation benefits to employees who are terminated for obtaining employment through fraudulent misrepresentation and engaging in on-the-job criminal conduct prior to being terminated. I find the majority opinion to be offensive to every employer and citizen of West Virginia. Therefore, for the reasons provided below, I dissent.¹

¹The dispositive issue raised in this case by Gary Dailey was that he was fired because of union activities. Therefore, he should not have been denied unemployment compensation benefits. As an unsupportable and vaguely briefed argument, Mr. Dailey contended that even if he was validly fired, the conduct causing him to be fired was not gross misconduct. In order to achieve its result, the majority opinion inverted the arguments raised by Mr. Dailey. That is, the majority opinion was written in a manner that disingenuously gives the impression that the primary issue raised by Mr. Dailey was that the conduct causing him to be fired was not gross misconduct. The majority opinion summarily disposed of the true basis for the appeal in footnote 2 of the opinion. The majority then goes on to transform Mr. Dailey's meritless *fallback* argument into the dispositive issue in the case. While I agree with the majority that Mr. Dailey's union activity argument was unsupportable, I disagree with the majority's resolution of Mr. Dailey's meritless contention that the conduct causing him to be fired was not gross misconduct.

I.

Mr. Dailey Obtained Employment Through Fraudulent Misrepresentation

The majority opinion recognized that under W. Va. Code § 21A-6-3(2) a person discharged from employment for gross misconduct is not entitled to unemployment compensation. The majority opinion also acknowledged that under W. Va. Code § 21A-6-3(2) fraud constitutes gross misconduct. One of the major legal flaws in the majority opinion is its inexplicable failure to analyze the issue of fraudulent misrepresentation that existed in this case.

It has been recognized that the concept of fraud is quite broad:

Fraud is sometimes defined as ‘[a] generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning dissembling, and any unfair way by which another is cheated.’

State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, No. 30840, Slip op. at 7, ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (April 30, 2003) (Davis, J., concurring) (quoting *Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex.Ct.App. 1993)). This Court has held that “[a]ctual fraud is intentional, and consists of an intentional deception or misrepresentation to ‘induce another to part with property or to surrender some legal right, and which accomplishes the end designed.’” *Gerver v. Benavides*, 207 W. Va. 228, 232, 530 S.E.2d 701, 705 (1999) (quoting *Stanley v. Sewell Coal Co.*, 169 W. Va. 72, 76, 285 S.E.2d

679, 683 (1981)). See also *Hager v. Hager*, No. 29688, Slip op. at 6, ___ W. Va. ___, ___, S.E.2d ___, ___ (November 29, 2001) (holding that appellee “in failing to testify fully and completely and honestly before the family law master, in effect, acted falsely and committed fraud.”); *Kessel v. Leavitt*, 204 W. Va. 95, 127, 511 S.E.2d 720, 752 (1998) (“A . . . party’s willful nondisclosure of a material fact that he knows is unknown to the other party may evince an intent to practice actual fraud.” (quoting *Van Deusen v. Snead*, 247 Va. 324, 328, 441 S.E.2d 207, 209 (1994))); *Arnoldt v. Ashland Oil, Inc.*, 186 W. Va. 394, 404, 412 S.E.2d 795, 805 (1991) (“Fraud means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.” (quoting Ky. Rev. Stat. Ann. § 411.184(1)(b))); *Miller v. Huntington & Ohio Bridge Co.*, 123 W. Va. 320, 335, 15 S.E.2d 687, 695 (1941) (“[F]raud includes cases of the intentional and successful employment of any cunning, deception, or artifice to circumvent, cheat or deceive another.” (quoting 23 Am. Jur., *Fraud & Deceit* § 4, at 756 (1939))); *Holt v. King*, 54 W. Va. 441, 447, 47 S.E. 362, 365 (1903) (“The suppression of the truth is equivalent to the utterance of a falsehood, and both are frauds.”); *Currence v. Ward*, 43 W. Va. 367, 377, 27 S.E. 329, 333 (1897) (Dent, J., concurring) (“Fraud . . . includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, or are injurious to another, or by which an undue advantage is taken of another.” (quoting Story, Eq. Jur. § 187)). Moreover, as Justice Albright recently observed in *Cordial v. Ernst & Young*, “[w]here one person induces another to enter into a contract by false representations, which he is in a situation to know, and . . . does know the

statements to be untrue, and, consequently, they are held to be fraudulent[.]” 199 W. Va. 119, 130, 483 S.E.2d 248, 259 (1996) (quoting Syl. pt. 1, *Horton v. Tyree*, 104 W. Va. 238, 139 S.E. 737 (1927)).

In the instant proceeding, both the circuit court and the administrative law judge found that Mr. Dailey “misrepresented that he had a valid [driver’s] license,” and that this “misrepresentation constitutes gross misconduct.” The majority opinion failed to perform an analysis to determine whether the “misrepresentation” rose to the level of fraud in order to support a finding of gross misconduct. It is obvious that the majority omitted such an analysis because to do so would defeat the majority’s desired result.

The essential elements of noncriminal fraud are: “(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.” Syl. pt. 1, in part, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981). The facts in this case support a finding of fraud.

First, the fraudulent act in this case was Mr. Dailey’s false representation of the status of his driver’s license. The circuit court summarized this point as follows:

[The employer] testified that when he interviewed [Mr. Dailey] in anticipation of [hiring him, he asked [Mr. Dailey] if there were any problems with [his] operator’s license. [Mr.

Dailey] told [the employer] there were none.

Second, the issue of the status of Mr. Dailey's driver's license was material because the employment position he was seeking "required him to drive gasoline trucks used to fill airplanes at the airport . . . [and] required him to drive off airport property to pick up bulk gasoline and to deliver[] or pickup passengers on public roads." The record is clear. Mr. Dailey lied when he stated during the job interview that he had a valid driver's license. The employer hired Mr. Dailey on the basis that he had a valid driver's license.² Subsequent to hiring Mr. Dailey, the employer requested on several occasions that Mr. Dailey produce his driver's license for photocopying, as required by the employer's insurer. Mr. Dailey repeatedly offered excuses as to why he did not produce his driver's license when requested. The employer eventually obtained an official record from the Department of Motor Vehicles which indicated that Mr. Dailey's driver's license had been suspended *before and after* he was hired.

Third, the employer was damaged in several ways because of Mr. Dailey's fraudulent misrepresentations. The employer was forced to incur expenses associated with hiring a new driver because it had to fill the vacancy left when Mr. Dailey was fired. The

²As a result of Mr. Dailey having previously been employed by the employer, the employer reasonably believed that he was stating the truth when he said that he had a valid driver's license.

employer also incurred legal expenses in having to defend against Mr. Dailey obtaining unemployment compensation for fraudulent conduct. Finally, Mr. Dailey's fraudulent conduct "was jeopardizing the employer, by potentially voiding the employer's insurance coverage in the case of an accident involving [him]."

It is clear to me that the misrepresentation found by the circuit court and the administrative law judge was not an inadvertent or inconsequential misrepresentation. The misrepresentation constituted fraud on the employer. As such, the misrepresentation was gross misconduct. In order for the majority opinion to conclude otherwise, it had to totally ignore the true posture of this issue and cast in a light that made it appear not to come under the fraud component of W. Va. Code § 21A-6-3(2). It is indeed a sad moment in West Virginia jurisprudence when our law blatantly permits wrongdoers to profit by their fraudulent conduct and penalizes the victims of fraud by making them pay the wrongdoers. *See UB Services, Inc. v. Gatson*, 207 W. Va. 365, 368, 532 S.E.2d 365, 368 (2000) ("[I]ndividuals should not benefit from their own misdeeds[.]",) *overruled by the majority opinion in this case.*

II.

The Majority Opinion Has Rewarded Mr. Dailey for Criminal Conduct

One of the most striking omissions in the majority opinion involves the lack

of discussion concerning the criminal conduct that flowed from Mr. Dailey's fraudulent misrepresentation in obtaining employment. The majority omitted such discussion because including it would have weakened and undermined the outcome sought by the majority. I will take the opportunity to highlight only two of the obvious criminal offenses committed by Mr. Dailey.

(1) Driving without a license. The record in this case is not in dispute. Mr. Dailey did not have a valid driver's license when he was hired by the employer. The record is equally clear in showing that during the brief period of his employment, Mr. Dailey operated the employer's motor vehicle without a valid driver's license. The majority opinion totally disregarded the evidence indicating Mr. Dailey operated a motor vehicle without a valid driver's license.

Pursuant to W. Va. Code § 17B-2-1(a) (2000) (Repl. Vol. 2000) "[n]o person . . . may drive any motor vehicle upon a street or highway in this state . . . unless the person has a valid driver's license[.]" Further, under W. Va. Code § 17B-2-1(f), it is a misdemeanor offense for a person to operate a motor vehicle without a driver's license. Although Mr. Dailey violated W. Va. Code § 17B-2-1(a) by knowingly driving his employer's vehicle without a license, the majority has rewarded this criminal conduct with unemployment compensation benefits.

(2) *Obtaining money by false pretense.* Under W. Va. Code § 61-3-24(a)(1) (1994) (Repl. Vol. 2000) it is a criminal offense for “a person [to] obtain[] from another by any false pretense . . . with intent to defraud, any money, goods or other property[.]” This offense is punishable as a felony or misdemeanor, depending upon the value of the property unlawfully obtained. The essential elements of the crime of false pretense are:

(1) the intent to defraud; (2) actual fraud; (3) the false pretense was used to accomplish the objective; and (4) the fraud was accomplished by means of the false pretense, *i.e.*, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property.

State v. Moore, 166 W. Va. 97, 108, 273 S.E.2d 821, 829 (1980) (citation omitted).

In this case, Mr. Dailey sought to obtain a job, wages and employment benefits, all of which were the property of the employer, by fraudulently misrepresenting the status of his driver’s license. This misrepresentation directly caused the employer to give Mr. Dailey a job, wages and employment benefits. *See State v. Zain*, 207 W. Va. 54, 528 S.E.2d 748 (1999) (upholding an indictment under W. Va. Code § 61-3-24 that charged a defendant with obtaining wages and employment benefits while fraudulently performing his work).

III.

The Majority Opinion “Stood Stare Decisis on its Ear”³

³*A & M Props, Inc. v. Norfolk S. Corp.*, 203 W. Va. 189, 197, 506 S.E.2d 632, 640 (1998) (Starcher, J., dissenting).

To reach the result sought by the majority it was necessary to overrule the recent decision of *UB Services, Inc. v. Gatson*, 207 W. Va. 365, 532 S.E.2d 365 (2000). In syllabus point 2 of *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974), this Court held:

An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law.

As Justice Cleckley pointed out in *Banker v. Banker*, 196 W. Va. 535, 546 n.13, 474 S.E.2d 465, 476 n.13 (1996), “[s]tare decisis is the policy of the court to stand by precedent.” That is, “[a]s a general rule, the principle of stare decisis directs us to adhere . . . to the holdings of our prior cases[.]” *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S.Ct. 3086, 3141, 106 L. Ed. 2d 472 (1989) (Kennedy, J., concurring and dissenting). Moreover, “[s]tare decisis rests upon the important principle that the law by which people are governed should be ‘fixed, definite, and known,’ and not subject to frequent modification in the absence of compelling reasons.” *Bradshaw v. Soulsby*, 210 W. Va. 682, 690, 558 S.E.2d 681, 689 (2001) (Maynard, J., dissenting) (quoting *Booth v. Sims*, 193 W. Va. 323, 350 n.14, 456 S.E.2d 167, 194 n.14 (1995)). The majority decision to overrule *UB Services* is reprehensible. In fact, “[t]he author of the majority opinion has, in effect, ‘stood stare decisis on its ear.’” *A & M Props, Inc. v. Norfolk S. Corp.*, 203 W. Va. 189, 197, 506 S.E.2d 632, 640 (1998) (Starcher, J., dissenting).

Some background information is necessary to understand the reasoning behind the majority's decision to overrule *UB Services*. *UB Services* involved the award of unemployment compensation to an employee who was terminated after assaulting a co-worker while off-duty. The employer argued that the assault by the employee constituted gross misconduct and that he should be denied unemployment compensation. In order to address this issue, the Court in *UB Services* set out various principles of law defining gross misconduct. The opinion in *UB Services* cited to the examples of gross misconduct found in W. Va. Code § 21A-6-3(2). The conduct by the employee did not fit under any of the enumerated examples. Consequently, the opinion looked to the catch-all provision of the statute that provided "or any other gross misconduct."

In an effort to provide some structure and guidance to the phrase "any other gross misconduct," the opinion looked to a prior decision of this Court and stated the following:

We have previously defined gross misconduct as:

. . . conduct evincing such willful and wanton disregard of an employer's interests as is found in deliberate violations *or disregard of standards or behavior which the employer has the right to expect of his employee*, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or

good faith errors in judgment or discretion are not to be deemed “misconduct” within the meaning of the statute. *Kirk v. Cole*, 169 W. Va. 520, 524, 288 S.E.2d 547, 550 (1982) (emphasis added) (quoting, *Carter v. Michigan Employment Security Commission*, 364 Mich. 538, 111 N.W.2d 817 (1961)).

UB Services, 207 W. Va. at 367, 532 S.E.2d at 367 (emphasis in original).⁴ In view of this definition and other considerations, the decision in *UB Services* found that the off-duty conduct was gross misconduct that warranted a denial of unemployment compensation.

The definition for “any other gross misconduct” that was recognized in *UB Services* was overruled by the majority without explanation. It is easy to understand why the majority chose to overrule *UB Services*. All of the evidence in this case conclusively demonstrated that Mr. Dailey’s conduct in lying to obtain employment and operating his employer’s motor vehicle without a driver’s license, constituted “willful and wanton disregard of [the] employer’s interests as is found in deliberate violations . . . of standards . . . which the employer has the right to expect of his employee.” The majority could not have reached its desired result in the instant case had it allowed the *UB Services* opinion to stand.

⁴It is important to note that the definition of gross misconduct taken from *Kirk* by *UB Services* was actually given in the context of simple misconduct. That is, the decision in *Kirk* was concerned with a definition for misconduct generally, not gross misconduct. The definition quoted by *Kirk* was taken from a jurisdiction, Michigan, that did not make a distinction between misconduct and gross misconduct. The decision in *UB Services* realized that the language quoted in *Kirk* actually rose to the level of gross misconduct and therefore correctly characterized the definition as that of gross misconduct.

In view of the foregoing, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.