No. 20123 - Robert L. Mace, Plaintiff Below, Appellee, v. Charleston Area Medical Center Foundation, Inc., A West Virginia Corporation, Defendant Below, Appellant

Workman, Justice, dissenting:

The majority opinion gets my vote for the Court's most outrageous decision of the year.[1]

It is incredible that when the person in charge of filling drug carts with drugs to be administered to patients, filling employee prescriptions, copying doctor's written orders for patients, and preparing intravenous solutions for patients comes to work in such a drug-impaired condition that he cannot by his own admission perform his duties, the majority believes he cannot be fired.

It is also incredible that this Court as recently as July 1990 in the case of Twigg v. Hercules Corp., 185 W. Va. 155, 406 S.E.2d 52 (1990), enunciated the law governing this precise issue, yet the majority fails to even mention it. But most incredible of all is that the author of the majority opinion in the instant case wrote a ringing dissent in Twigg in which he said "I believe that an employer is entitled to know whether his employees are using drugs which may

[1]Of course, the year isn't over yet. We still have the September term.

affect their work performance and, in some cases, the safety of others at work." 185 W. Va. at 161, 406 S.E.2d at 58.

This Court in McClung v. Marion County Comm'n, 178 W. Va. 444, 450-51, 360 S.E.2d 221, 228 and Syl. Pt. 3 (1987), held that an employer may defeat a retaliatory discharge claim by showing that the employee would have been discharged even in the absence of the protected conduct. (The protected conduct at issue in this case was Mace's wage claim under the Veterans Reemployment Rights Act at least one year prior to the drug screen request.) The record is replete with evidence that the reason for Mace's discharge was his insubordination in refusing to submit to a drug screen. But even if it could be demonstrated that CAMC was ill-motivated in its actions, they were still entitled under Twigg to demand that this employee submit to drug screening and, in the event of his refusal to do so, to fire him. Clearly under McClung, the employee could have been discharged even absent the protected conduct.

In Twigg, this Court made it abundantly clear that drug testing by an employer is permissible "where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or where an employee's job responsibility involves public safety or the safety of others." 185 W. Va. at 158, 406 S.E.2d at 55. Both factors existed here.

Not only did employee Mace acknowledge ingesting fifteen prescription drugs, but his conduct in the workplace was bizarre. According to unrefuted testimony, his words were slurred, he was staggering, his eyelids were drooping, and he could barely sit up. He had also received written warning as a result of belligerent and discourteous behavior to fellow employees, and on the basis that he went about muttering obscenities and refused a direct order from his supervisor. Given Mace's duties, it is beyond dispute that his "job responsibility involved[d] public safety or the safety of others."

This certainly was not the case of an employee being unfairly singled out for a random drug-test. CAMC's reasonable suspicion of drug use[2] was confirmed by Mace himself. CAMC had an obligation to its patients to pursue the drug screen to verify both the quantity and the nature of the drugs ingested by Mace to determine whether he should participate in the hospital Employee Assistance Program, and to determine whether he was improperly removing drugs at his disposal from the hospital pharmacy. The sheer quantity of drugs revealed by Mace, together with his further admission that some of the drugs were actually drugs prescribed for his wife, gave CAMC a bona fide reason for insisting on the drug screen.

[2]It is immaterial that the employee here claimed that all fifteen drugs he was taking were prescribed medications, and thus may not have been illegally obtained. The purpose of employer drug screening where justified is not to ferret out unlawful criminal activity. It is to determine if one is drug-impaired.

Another critical fact regarding the drug screen is that Dr. Willard Pushkin of Employee Health, the person who first suggested the need for the drug screen, had no knowledge whatsoever of any problem between Robert Mace and the hospital administration, nor was he aware of the wage claim which Mace claims to have been the motivating force behind the drug screen demand. Moreover, Dr. Pushkin also testified that he had previously recommended other hospital employees be screened for drugs and that rehabilitation was provided to those individuals.

The lower court should have granted CAMC's motion for a directed verdict on the issue of retaliatory discharge as CAMC had a valid nondiscriminatory reason for discharging Mace and he could have been discharged even in the absence of his wage claim.

Ironically, if a drug-impaired employee were to cause injury or death to a patient, this Court would be most eager to uphold a multi-million dollar verdict against a hospital for its negligence in permitting the employee to be in a position to cause such harm. We should be fair enough to this hospital and to the general public to give them the opportunity to assure that drug-impaired employees are not put in a position to injure innocent people.