IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1992 Term

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No. 20273

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DELORES ANN ADKINS, WANNA BUZZARD,
CARMEL ROSE DOOLEY, CHARLES JOHN GIBSON,
BONITA JARRELL, GARY R. KINDER,
CHRISTINE L. PAULEY, TAMALA G. PAULEY,
PATRICIA SANDERS, DEEN ANN SMITH,
CONYA G. WELLS, AND REBECCA L. WORKMAN,
Plaintiffs Below, Appellants

v.

JENNINGS P. MILLER, INDIVIDUALLY
AND AS SHERIFF OF BOONE COUNTY, WEST VIRGINIA,
Defendant Below, Appellee

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Appeal from the Circuit Court of Boone County
Honorable E. Lee Schlaegel, Jr., Judge
Civil Action No. 89-C-229

REVERSED AND REMANDED

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Submitted: January 28, 1992
Filed: July 23, 1992

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CHIEF JUSTICE McHUGH delivered the opinion of the Court.

Justice Neely dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "'Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.' Syllabus Point 3, Slack v. Jacob, 8 W. Va. 612 (1875)." Syl. pt. 1, Perilli v. Board of Education, 182 W. Va. 261, 387 S.E.2d 315 (1989).

2. The first amendment to the United States Constitution and article III, section 7 of the West Virginia Constitution do not confer any right upon a governmental employee to continued employment. Under certain circumstances, those provisions do, however, extend a protection to governmental employees to be free from employment decisions made solely for political reasons. Therefore, W. Va. Code, 7-7-7 [1982] may not be interpreted as permitting a governmental employer to make employment decisions based solely upon political reasons, unless the employees hold certain types of positions.

McHugh, Chief Justice:

This appeal by twelve former employees (appellants) of the Sheriff of Boone County is from the final order of the Circuit Court of Boone County dismissing their complaint. Apparently, the trial court sustained the motion to dismiss made by the appellee, Jennings P. Miller, Sheriff of Boone County, under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon which relief could be granted.[1] The trial court dismissed the complaint with prejudice. Appellants sought reinstatement to their former positions of employment, back pay and damages. Upon review of the record, we conclude that the trial court erred in dismissing the complaint.

The appellants were employed in the Sheriff's Tax Office of Boone County by Sheriff Vernon F. Harless during his term of office. Sheriff Harless' term of office expired on December 31, 1988, due to the election of the appellee as sheriff. The appellee succeeded Sheriff Harless as Sheriff of Boone County on January 1, 1989.

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[1]Neither the appellee, in his written motion to dismiss, nor the trial court, in its final order, cite any procedural rule as grounds for the dismissal. The order of the trial court states simply: "That, inasmuch as the [appellants'] claim that they were discharged is incorrect, their claim that they were improperly discharged is also refuted by the applicable statutes."

Because the trial court determined that appellants' claims were "incorrect," we will treat the motion to dismiss and dismissal order as coming under the scope of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Rule 12(b)(6) states, in pertinent part, "[T]he following defenses may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted[.]"

The appellants' complaint alleges that they reported to work on the first work day of 1989, but were told by the appellee that he had "hired his own people." Although the appellee did not technically "fire" the appellants, he did tell them to leave. Appellants contend that the appellee informed them that they were employees of Sheriff Harless and that he (appellee) wanted employees that would be loyal to him and that supported him. The complaint further alleges that: "The [appellee] intentionally, willfully and wantonly dismissed the [appellants] because the [appellants] had, or were believed or presumed to have had, affiliations, political or otherwise, with either the republican party or with other political personages or groups whose interests were opposed to those of the [appellee]."

Appellants base their complaint upon three separate causes of action, all of which are premised upon the idea that the appellee acted to terminate the employment of appellants in violation of their constitutionally protected rights.

The trial court's order granting the appellee's motion to dismiss was based upon its interpretation of W. Va. Code, 7-7-7 [1982].

W. Va. Code, 7-7-7 [1982] states, in pertinent part:

> The county clerk, circuit clerk, joint clerk of the county commission and circuit court, if any, sheriff, county assessor and prosecuting attorney, by and with the advice and consent of the county commission, may appoint and employ, to assist them in the discharge of their official duties for and during their respective terms of office, assistants, deputies and employees.

The trial court held, "That West Virginia Code §7-7-7 [1982] provides that a Sheriff may employ persons to assist him in the performance of his duties only for and during his term of office." (emphasis added). Therefore, the trial court granted the appellee's motion to dismiss because it found that the appellants had been discharged by operation of the law (W. Va. Code, 7-7-7 [1982]) rather than by any action of the appellee. For the reasons that follow, we find the trial court's dismissal of the complaint for the reason stated to be error, and we therefore remand this case for further proceedings.

In a series of three cases, the United States Supreme Court has repeatedly held that dismissals of non-civil service protected employees are improper and violative of first amendment rights when made for political patronage reasons. There are exceptions to this general rule; specifically, governmental employees who maintain a confidential and/or policy-making position in regard to an elected official may be terminated for political reasons. The Sixth Circuit Court of Appeals in Faughender v. City of North Olmsted, Ohio, 927 F.2d 909 (6th Cir. 1991) has offered a concise but inclusive synopsis of the three Supreme Court decisions which have held "that a governmental unit violates the first amendment if it makes certain personnel actions for political reasons."[2] Id. at 912. That court stated:

[2]In Faughender a mayor's secretary was not rehired upon the election of a new mayor. She alleged that she had been denied her former position for political reasons in violation of her first amendment rights. The court concluded she was properly discharged because she was a confidential employee.

> The [Supreme] Court first considered this question in Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). The court in Elrod held that a governmental unit violated the first amendment by installing a traditional patronage system of government employment, wherein every government employee not covered by civil service could be fired for strictly political reasons. There was no majority opinion, but the opinion for the plurality stated that politically-motivated firings violate the first amendment by restraining the freedom of the fired employee to hold whatever political beliefs he desires, and to associate with others to advance those beliefs. Elrod, 427 U.S. at 355-60, 96 S. Ct. at 2680-83. It stated that a government could constitutionally fire an employee for political reasons, however, if the government could demonstrate that a 'vital government end' would be achieved by means '"closely drawn to avoid unnecessary abridgement. . . ."' Elrod, 427 U.S. at 363, 96 S. Ct. at 2684-85 (citation omitted). It also stated that governments have a vital interest in ensuring that 'representative government not be undercut by tactics obstructing the implementation of policies of the new administration,' Elrod, 427 U.S. at 367, 96 S. Ct. at 2687, but that this interest extended only to 'confidential' employees in 'policymaking positions' because such a limitation was the least restrictive means of achieving the government's legitimate interest in patronage dismissals. Elrod, 427 U.S. at 372, 96 S. Ct. at 2689.
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> The Court affirmed and clarified its holding in Elrod in Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980). The Court majority in Branti reaffirmed the holdings of the Elrod plurality that patronage dismissal violated the first amendment, and that permitting politically-motivated dismissals of persons in certain politically sensitive positions is necessary to uphold a vital governmental interest. Branti, 445 U.S. at 513-16, 100 S. Ct. at 1292-94. The Court in Branti, however, reformulated the scope of permissible patronage. The Branti Court held that 'the question is whether the hiring authority can demonstrate that party affiliation

> is an appropriate requirement for the effective performance of the public office involved.' Branti, 445 U.S. at 518, 100 S. Ct. at 1295.
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> In its last term, the Court eliminated any thought that the dictates of Elrod and Branti would be limited to firings. In Rutan v. Republican Party of Illinois, [497] U.S. [62], 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990), the Court upheld the rationale of both Elrod and Branti, and extended their reach to other common varieties of patronage preferment: hirings, transfers, promotions, and recalls from layoffs.

Id. at 912.

In Rutan the then-Governor of Illinois had issued an executive order proclaiming a hiring freeze pertaining to approximately 60,000 state jobs. No exceptions were permitted without the "express permission" of the governor. The governor screened all requests for his "express permission" through an office of personnel. Approval of the office of personnel was required for all hiring, promotional, transfer and recall after layoff decisions. The office of personnel made its decisions based upon political considerations.

The Rutan Court noted that the First Amendment to the United States Constitution prohibits the use of political considerations when making job decisions: "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." 497 U.S. at ___, 110 S. Ct. at 2738, 111 L. Ed. 2d at ___. The Supreme Court also

reiterated the precedent established in Elrod and Branti. It noted that those cases recognized that:

> [T]he government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests. See Elrod, supra, 427 U.S., at 372-373, 96 S. Ct., at 2689 (plurality opinion) and 375, 96 S. Ct., at 2690 (Stewart, J., concurring in judgment).

497 U.S. at ___, 110 S. Ct. at 2734, 111 L. Ed. 2d at ___. The Supreme Court further stated that:

> [C]onditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of 'the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job.' [Branti,] 445 U.S., at 516, 100 S. Ct., at 1294.

497 U.S. at ___, 110 S. Ct. at 2735, 111 L. Ed. 2d at ___ (emphasis added).

The Supreme Court reaffirmed that political considerations could be used when dismissing employees from policy-making positions. 497 U.S. at ___, 110 S. Ct. at 2735, 111 L. Ed. 2d at ___, citing Branti. A government's primary interest in employment considerations involving employees in non-confidential/non-policy-making positions, however, lies in ensuring the effectiveness and efficiency of those employees. Political considerations are unnecessary and violative of first amendment rights when used to discharge non-policy-making employees:

> A government's interest in securing effective employees can be met by discharging, demoting or

> transferring staffmembers whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.

497 U.S. at ___, 110 S. Ct. at 2737, 111 L. Ed. 2d at ___ (citing Elrod and Branti).[3]

Importantly, the Supreme Court in Rutan also addressed the question of whether patronage hiring practices violate the First Amendment. The Court stated:

> What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. [citations omitted] Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. [citations omitted] We find no such government interest here, for the same reasons that we found the government lacks justification for patronage promotions, transfers or recalls.

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[3]The Supreme Court went on to explain the rationale behind the Elrod decision:

> [A]lthough the plurality recognized that preservation of the democratic process 'may in some instances justify limitations on First Amendment freedoms,' it concluded that the 'process functions as well without the practice, perhaps even better.' Patronage, it explained, 'can result in the entrenchment of one or a few parties to the exclusion of others' and 'is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.' Id., at 368-370, 96 S. Ct., at 2688.

497 U.S. at ___, 110 S. Ct. at 2734-35, 111 L. Ed. 2d at ___.

497 U.S. at ___, 110 S. Ct. at 2738-39, 111 L. Ed. 2d at ___ (emphasis added).

It is clear from the above-quoted language of Rutan that even if the West Virginia Legislature intended to codify patronage dismissals by enacting W. Va. Code, 7-7-7 [1982], such codification inherently violates the effected employees freedom to associate guaranteed by both the First Amendment to the United States Constitution and article III, section 7 of the West Virginia Constitution. Such a codification would force non-policy-making/ non-confidential employees to inhibit their true political beliefs in order to protect and retain their government jobs. Such a forced inhibition is clearly violative of said employees freedom of speech and association.

The Rutan decision is consistent with the Supreme Court's earlier holding in Branti. In Branti, the Court addressed an argument similar to that made by the appellee in this case. The government employer therein asserted that the employees' tenure automatically expired with the term of the hiring elected official. The Supreme Court stated in footnote 6:

> [R]elying on testimony that an assistant's term in office automatically expires when the public defender's term expires, petitioner argues that we should treat this case as involving a 'failure to reappoint' rather than a dismissal and, as a result, should apply a less stringent standard. Petitioner argues that because respondents knew the system was a patronage system when they were hired, they did not have a reasonable expectation of being rehired when control of the office shifted to the Democratic Party. A similar waiver argument was rejected in Elrod v. Burns,

> 427 U.S. 347, 360, n. 13, 96 S. Ct. 2673, 2683, 49 L. Ed. 2d 547; see also id., at 380, 96 S. Ct. at 2692 (POWELL, J., dissenting). After Elrod, it is clear that the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs.

Branti, 445 U.S. 507, 512 n. 6, 100 S. Ct. 1287, 1291 n. 6, 63 L. Ed. 2d 574, 580 n. 6 (emphasis added).

Other courts addressing this issue have been consistent in affirming this holding. In Christian v. Belcher, 888 F.2d 410 (6th Cir. 1989), the Sixth Circuit Court of Appeals addressed the precise situation at issue in the instant case. In that case the governmental employers failed to reappoint a county flood plain administrator and building inspector whose employment had terminated automatically under state law. The Sixth Circuit Court of Appeals stated:

> Although in the instant case, [the employee's] employment terminated automatically under state law, such an automatic termination from otherwise continuous government employment is properly viewed as a constructive discharge in this legal context. [citations omitted] Therefore, since the case at hand is properly regarded as a 'termination' case rather than a 'hiring' case, [the government employer] was constitutionally prohibited from dismissing [the employee] solely because of his political association and/or expression.

Id. at 416. That same court has also held that:

> [A] failure to rehire is treated no differently than a firing under Elrod and Branti. Branti, 445 U.S. at 512 n. 6, 100 S. Ct. at 1291; Christian v. Belcher, 888 F.2d 410, 415 (6th Cir. 1989). In addition, the Supreme Court has now ruled conclusively in Rutan that Elrod and Branti also apply to hiring decisions.

Faughender, 927 F.2d at 913.

Furthermore, the Eleventh Circuit Court of Appeals has addressed the issue of whether a governmental employer must retain employees who have supported a newly elected official's opponent. That court held:

> A wholesale refusal to retain employees who supported an opponent's election elevates political support to a job requirement. We see no practical difference between the lack of loyalty punished by [the] Sheriff . . . in this case and the lack of party affiliation punished by the defendants in Elrod and Branti.

Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989)[4] (emphasis added).

The Fourth Circuit Court of Appeals has addressed a similar issue to the one presented in the instant case. In Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990), the Court of Appeals was faced with patronage dismissals of North Carolina governmental employees specifically exempted from first amendment protection by an act of the North Carolina legislature. The Court of Appeals held that:

> While deference must be given to the decision to so designate those positions as exempt, or to reduce the number of exempt positions, that decision is not

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[4]In Terry an Alabama sheriff refused to rehire or reappoint any of his predecessor's employees. The Eleventh Circuit Court of Appeals remanded the case "to permit factual development of the methods used by the remaining plaintiffs to apply for reinstatement and whether their efforts were sufficient under the circumstances." Id. at 378.

In this case we note that the appellants allege that they attempted to continue working. Based upon that allegation, it is clear that they intended to continue working and therefore, if their employment was to automatically terminate, they were candidates to be rehired or reappointed.

> unreviewable. The matter is a question of law to be ultimately decided by the courts.

Id. at 142-43 (emphasis added). The Fourth Circuit Court of Appeals went on to state:

> We believe that in political patronage cases, the critical and dispositive question is whether a particular position is one that requires, as a qualification for its performance, political affiliation. If it does, then dismissal or demotion is within the bounds of the Constitution. Clearly, then, the inquiry mandated by patronage cases must go beyond the pattern or practice inquiry common to Title VII cases and must focus on individual claims with the purpose of determining (1) whether the position held was subject to patronage dismissal, and (2) if not, whether there was another constitutionally sufficient reason, such as poor job performance, constant absenteeism or insubordination, to justify the action taken. It is not until such inquiries are complete, and the answer to the posed questions is no, that a constitutional violation is implicated.

Id. at 143.

It is clear from the foregoing discussion of relevant case law that all courts addressing the issue of political firings have determined that codification of patronage dismissal is not dispositive of a first amendment claim by a terminated governmental employee. The dismissal is reviewable to determine whether the specific positions held by the terminated employees fall under the policy-maker/confidential employee exception articulated by the Supreme Court in Elrod, Branti and Rutan.[5]

[5]We note that the great majority of cases addressing the termination of employment of governmental employees for alleged patronage or political reasons, including those holding jobs in state

It has been a longstanding rule of statutory construction in this jurisdiction that whenever and "'[w]herever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.' Syllabus Point 3, Slack v. Jacob, 8 W. Va. 612 (1875)." Syl. pt. 1, Perilli v. Board of Education, 182 W. Va. 261, 387 S.E.2d 315 (1989).[6]

Therefore, we hold that the first amendment to the United States Constitution and article III, section 7 of the West Virginia Constitution do not confer any right upon a governmental employee to continued employment. Under certain circumstances, those provisions do, however, extend a protection to governmental employees to be free from employment decisions made solely for political reasons. Therefore, W. Va. Code, 7-7-7 [1982] may not be interpreted as permitting a governmental employer to make employment decisions based solely upon political reasons, unless the employees hold certain types of positions.

(..continued)
or local government, have been brought in the federal court system. Perhaps there is a reluctance to put faith in state court systems to protect the federal constitutional rights of those persons. We want to make clear that we recognize our duty and we will not abrogate from our responsibility to review and apply the United States Constitution when a provision of the West Virginia Code presents an inconsistency with the Constitution.

[6] The rule articulated in Slack and Perilli is equally applicable to acts of the legislature that conflict with either the United States Constitution or the West Virginia Constitution.

The mischief to be protected against in this case or similar cases is not the termination of an employee, by itself, but whether the termination was solely based upon political reasons. Nothing in this opinion should be construed as giving a governmental employee a right to any job. We merely acknowledge that the West Virginia Legislature, except for certain positions, may not permit, directly or indirectly, employment decisions based solely upon political reasons. As the Supreme Court stated in Rutan:

> The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

Rutan, 497 U.S. 62, ___, 110 S. Ct. 2729, 2738, 111 L. Ed. 2d 52, ___.

This case must therefore be remanded to consider the question of whether these appellants were terminated (constructively or explicitly) solely for political reasons. Only if that question is answered in the affirmative must an inquiry be made into the nature of the employment of the position held: whether the position falls within the policymaker/confidential exception. To withstand a motion to dismiss based upon their complaint, it is enough for the appellants to allege that they have been terminated from otherwise continuous government employment solely for political reasons.

For the reasons stated above, the order of the Circuit Court of Boone County is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.