No. 22117 - Board of Education of the County of Mercer v. Charles Wirt

Workman, Justice, dissenting:

> I nominate the majority opinion as the most outlandish decision of 1994. It demonstrates a lack of basic common sense in the determination of school personnel cases, and it creates an open season on children. Even the Administrative Law Judge (ALJ), whose findings are accorded great deference, found that the child and her witnesses were truthful and that the grievant custodian, Mr. Wirt, touched this child on her breasts and buttocks.[1] However, the ALJ found the Board had not met its burden of proving the nature of the contact.

The ALJ's analysis of the evidence in reaching this conclusion (and the majority's adoption of it) are almost laughable. The ALJ

[1] His actual finding was that he had made "physical contact." That term somehow sanitizes what actually happened.

and majority rely on these so-called "inconsistencies" in the evidence:

- Whether Mr. Wirt touched the child's breast from the top or the side;
- Whether the second incident happened by the stage or in the cafeteria line; (By the way, the stage and the cafeteria are in the same room!)
- Whether the grievant "patted" the child's buttocks or merely rested his hand there;
- Whether Mr. Wirt used his left or right arm.

Ye gad! Who cares?! If a school custodian touches a child's body in intimate areas, he should be fired! Even the majority concludes that many of the "inconsistencies" the ALJ relied on really don't exist.

It is utterly absurd that the ALJ found that a school custodian touched this child's buttocks and breast at an elementary school, yet ordered him reinstated with back pay because the Board didn't prove the nature of the contact! Just how might the majority suggest

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Oh yes, he not only gets more than two years of back pay, the majority refuses to offset the amount by the unemployment benefits and other income he received during this period. So Mr. Wirt is in actuality being rewarded for his actions.

The majority says the Employment Security Commissioner can seek to retrieve the benefits paid to Mr. Wirt under West Virginia Code

that the nature of the contact be proven when adults fondle children on intimate parts of their body? Here we have a child with two eyewitnesses (one another child and one Mr. Hurt, another school custodian) who witnessed Mr. Wirt touching this child on private parts of her body, with no evidence as to any discernible motive on the part of either of them, or Amanda, to lie about such a serious allegation. The nature of the physical contact and the impropriety of it was certainly clear to Mr. Hurt, the other school custodian, who actually went to Mr. Wirt and told him such conduct was improper.

The Board argues that this reasoning essentially placed a burden of proof upon them that is more commensurate with that required in a criminal case. Under the criminal provisions of West Virginia Code § 61-8(b)-1(6) (1989) sexual contact means an "intentional touching. . . ." That is the only real legal issue in this case--whether the Board actually has to prove the intent or the act in a school disciplinary context. But the majority goes on for

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§ 21A-10-21 (1989). That section, however, only allows retrieval of benefits only when "paid through error." These benefits were not paid erroneously under unemployment law. Thus, not only does it appear the benefits will not be recoverable thereunder, but the State will have to go to the additional expense of seeking them legally.

Why create all these hoops to jump through when there is a clear, simple, fair way to make the deduction?

twenty-five pages about non-issues they were more in the mood to discuss.

The majority's reasoning is especially untenable in light of Adkins v. Gaston, ___ W. Va. ___, ___ S.E.2d ___ (1994) (No. 22308, 12/21/94), wherein we held just this week in syllabus point three:

> The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is de novo.

276 S.E.2d 821, 330 S.E.2d 837.

In the instant case, the administrative trier of fact found as a fact that the grievant made physical contact with this child. I do not disagree with this finding and agree we should give it deference. However, the legal issue before us is whether the Board was required to prove the nature of the touching or Mr. Wirt's intent

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Mr. Hurt also testified that Amanda wasn't the only child he had witnessed Mr. Wirt fondle.

The majority's discusses the pre-deprivation hearing issue for nine pages before concluding it is moot. In that regard, they contend that placing the custodian at the school in the evening hours protected the children. How incredibly naive. Have they forgotten where children go to play after school? The school playground!

at the time he did the touching. Thus, the question is one of law, and no deference need be accorded the ALJ's legal conclusion for the standard of review is de novo. See id.

The majority goes on ad nauseam about the rights of Mr. Wirt--but what about the rights of children like Amanda? Not a word. Children ought to be entitled to a safe environment in our public schools. Parents ought to have the right to send their children to school with piece of mind that they will not be harmed. We have plenty of decent, hard-working people in this State who would happily work as a school custodian, but the majority's opinion places significant restraints on the ability of boards of educations of this State to get rid of the bad apples and fill their positions with decent, hard-working people.

The majority opinion is a good example of why more and more people in this country are fed up with the judicial system. When we treat cases that require a little common horse sense like some kind of esoteric exercise in legal gymnastics, we short-change those who look to us for justice. Each member of the majority should ask himself--is there any doubt in your mind why Mr. Wirt fondled this

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Mr. Wirt was probably more dangerous with that set-up, because there was no one else around to observe his behavior.

child? The rights of children to be safe in the public schools have been treated in a cavalier manner by the majority of this Court, and the parents of Ramsey Elementary School should caution their children to beware of Mr. Wirt, who will remain in their midst.