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.

FILED
December 12, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, C.J., concurring:

I write separately to challenge the allegations made by my dissenting colleagues in their separate opinion.

To begin, my dissenting colleagues incorrectly assert that the "dispositive issue raised in this case by Gary Dailey was that he was fired because of union activities." They go on to accuse the majority of being "disingenuous[]," transforming a "meritless *fallback* argument into the dispositive issue in the case" and "summarily dispos[ing] of the true basis for the appeal" in a footnote. *See* ___ W.Va. at ___, n.1, ___ S.E.2d at ___ n.1 (Slip Op. at 1 n.1) (Davis, J., dissenting).

A quick view of Mr. Dailey's appeal brief reveals that my dissenting colleagues apparently failed to read Mr. Dailey's appeal brief before making their assertions. The appellant's sole assignment of error is that the record "is void of any misconduct, gross or otherwise, which would disqualify [Mr. Dailey] for unemployment benefits." The argument that follows this assignment of error focuses entirely on the question of the definition of misconduct, and the degree of misconduct that is required to deny a claimant unemployment benefits. Only in the opening statement of facts does Mr. Dailey discuss union activity, and

only in the statement of facts does he allude that this was his employer's true motivation for his firing; the remainder of the brief discusses his lack of misconduct, and his contention that the Board of Review erred as a matter of law in denying him benefits on the basis of misconduct.

My dissenting colleagues apparently also failed to examine the facts of the Court's earlier case in this area, *UB Services, Inc. v. Gatson*, 207 W.Va. 365, 532 S.E.2d 365 (2000). As the author of that opinion, I can in retrospect absolutely state that the case is a classic example of bad facts making bad law – an error that the majority opinion corrects. In *UB Services*, the Court was faced with an employee who, after hours and off the company's premises (in his own home), confronted a co-worker with whom he had had a long-term romantic relationship. The employee savagely beat the co-worker, breaking her pelvis and hip, hospitalizing her for five days and causing her to miss work for six months.

In these circumstances, no employer in their right mind would allow the employee to return to the workplace – hence he was fired. The question existed as to whether the employee's conduct – after hours and off the premises – could be considered "gross misconduct" in the course of employment so as to completely deny the employee unemployment benefits. This Court examined the law in light of these horrific facts, and unanimously stretched the definition of "or any other gross misconduct" to include that of the off-duty, off-premises fired employee, thereby denying unemployment benefits. Extreme facts resulted in an extreme rule of law.

The majority opinion in the instant case corrects the extreme nature of the Court's opinion in *UB Services*, and for the first time gives the Board of Review and courts detailed guidance as to the meaning of "misconduct" and "gross misconduct." As the author of *UB Services*, I am therefore offended by my dissenting colleagues' position that the decision to overrule the case is "reprehensible." The majority opinion, in superb detail, sets forth the definitions of the two terms used by other states, and uses the law of those other states to craft definitions for use in West Virginia. Because of the expansive nature of the definition of "gross misconduct" in *UB Services*, overruling the case was the only way to properly refine and discuss our law in this area.

I concur with the majority's well-researched, well-reasoned opinion, and am disappointed by the wholly-unnecessary vitriol of my dissenting colleagues in attacking that research and reasoning. My dissenting colleagues are clearly disappointed with the *result* of the case, but "sound-bites" chastising the majority for not adopting arguments that weren't even asserted by the parties, or accusing a party of engaging in criminal conduct, are simply inappropriate.