No. 30848 - Patricia Wines v. Jefferson County Board of Education

FILED
April 30, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring, in part, and dissenting, in part:

In this proceeding, the majority opinion concluded that the circuit court committed error in awarding the appellant, Patricia Wines (hereinafter referred to as "Ms. Wines"), only one dollar as nominal damages. Consequently, the majority opinion has reversed and remanded this issue, concluding that an award of backpay is a more appropriate measure of Ms. Wines' damages. As to this issue, I wholeheartedly concur in the majority decision. Further, the majority opinion has directed the circuit court to award Ms. Wines attorney's fees in the amount of $2,000.00. Insofar far as that portion of an award for attorney's fees is attributed to the appeal before this Court, I concur. However, to the extent that part of the attorney's fee award is attributed to work performed at the administrative level and in the circuit court, I dissent.

The Circuit Court Has Exclusive Jurisdiction to Make an Initial Determination of Attorney's Fees for Work Performed Prior to Appeal

Ms. Wines has requested attorney's fees in her prayer for relief. The majority opinion granted that request and instructed the circuit court to enter an award of $2,000.00 for attorney's fees. The source of authority relied upon by the majority opinion for making an award of attorney's fees is W. Va. Code § 18A-2-11 (1985) (Repl. Vol.

2001). Pursuant to that statute, Ms. Wines was entitled to receive attorney's fees for work performed in the administrative proceeding and Circuit court in an amount that did not exceed $1,000.00. Additionally, the statute allowed Ms. Wines to obtain attorney's fees for work performed before this Court in an amount that did not exceed $1,000.00.[1] The majority opinion combined the maximum fees allowed under W. Va. Code § 18A-2-11 and instructed the circuit court to award such amount.

Although I question the majority's decision to award Ms. Wines $1,000.00 for work performed in the appeal to this Court, without any showing of hours actually spent prosecuting the appeal, I will not dissent from the discretionary determination by this Court. However, I strongly disagree with the majority's decision to compel the circuit

---

[1]W.Va. Code § 18A-2-11 (1985) (Repl. Vol. 2001) states in full:

> If an employee shall appeal to a circuit court an adverse decision of either a county board of education or of a hearing examiner rendered in a grievance or other proceeding pursuant to provisions of chapters eighteen and eighteen-a [§§ 18-1-1 *et seq*. and 18A-1-1 *et seq*.]of this code and such person shall substantially prevail, the adverse party or parties shall be liable to such employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such employee in all administrative hearings and before the circuit court and the supreme court of appeals, and shall be further liable to such employee for any court reporter's costs incurred during any such administrative hearings or court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this section shall not be construed to limit the school employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section eight [§ 18A-4-8] article four, chapter eighteen-a of this code.

court to award Ms. Wines $1,000.00 for work performed at the administrative level and in front of the circuit court.

Our cases have clearly demonstrated that an award of attorney's fees for work performed at the administrative level and before the circuit court, must initially be determined by the circuit court. Indeed, this Court held in *Weimer-Godwin v. Board of Education of Upshur County*, 179 W. Va. 423, 429, 369 S.E.2d 726, 732 (1988), that "before the circuit court can set the amount of reasonable attorney's fees to be recovered . . ., [the employee's] attorneys must submit to the circuit court an itemized attorney-fee bill and develop at a hearing the reasonableness of the same under the factors set forth in syllabus point 4 of *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986)." (Additional citation omitted). *Accord State ex rel. Shaw v. Board of Educ. of Braxton County*, 178 W. Va. 247, 248-49, 358 S.E.2d 808, 809-10 (1987) ("Because there is no record of the time spent and other factors stated in *Pitrolo*, we believe the circuit court erred in awarding the fees as it did and that a further hearing is necessary to develop these factors in order to determine what are reasonable fees.").

In the case *sub judice* there has been no *Pitrolo* hearing in the circuit court. Without such a hearing, this Court does not have jurisdiction to *sua sponte* award Ms. Wines $1,000.00 for work performed in the lower tribunals. "For the majority to *sua sponte* order the trial court to award attorney fees, when neither notice nor opportunity to

be heard was afforded to [the Jefferson County Board of Education] on the issue, is a fundamental violation of state and federal due process guarantees." *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia University*, 206 W. Va. 691, 697, 527 S.E.2d 802, 808 (1999) (Davis, J., concurring and dissenting) (citations omitted). As I stated in my separate opinion in *Maikotter*:

> Due process is not a new principle. Due process is an old and faithful doctrine embedded in the constitution of this state. Additionally, its aged protection reaches back to the ratification of the nation's constitution. Due process is one of the cornerstone legal principles that separates Anglo-American jurisprudence from many foreign third world legal systems that pay lip service to the idea of notice and an opportunity to be heard. Unfortunately, in this opinion the majority has chosen to disregard an aged and deeply rooted principle in our legal system.

Id., *Maikotter*, 206 W. Va. at 698, 527 S.E.2d at 809 (internal citations omitted).

For the reasons so stated, I respectfully concur, in part, and dissent, in part. I am authorized to state that Justice Maynard joins me in this concurring, in part, and dissenting, in part, opinion.