

No. 31542 – Danny L. Benson v. AJR, Inc., a West Virginia Corporation, and John M. Rhodes

FILED

Maynard, Chief Justice, concurring, in part, and dissenting, in part: **July 6, 2004**

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RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

What a terrible message this case sends to small West Virginia employers and businesses! This Court tells this company that it should not have fired an employee who:

- (1) admitted that he used cocaine;
- (2) reported to work with cocaine in his system;
- (3) failed a drug test in which he tested positive for cocaine;
- (4) misrepresented his drug use by failing to truthfully answer management's inquiries about drug use;
- (5) worked in a plant where steel fabrication involving constant welding occurs;
- (6) continually worked around large quantities of explosives and highly volatile gases and liquids including acetylene, oxygen tanks, thinner paint, and other explosive substances; and, here is the icing on the cake;

(7) was the SAFETY DIRECTOR of the
company!! Appalling!

This Court now says that AJR was wrong to fire a deceitful, coke-head safety director in a plant where tanks of acetylene, oxygen, and other explosives are everywhere! The irony is that if there had been some explosion or other accident which killed or seriously injured another employee, the victim of that accident could have successfully sued under our workers' compensation deliberate intent statute and obtained a large verdict. This Court doubtless would have upheld the large verdict based on the fact that the company allowed a cocaine user to be its safety director.

In distinguishing between dishonesty and drug use under the specific facts of this case, the majority opinion does one of the finest jobs of legalistic hairsplitting in the history of American jurisprudence. The undisputed facts show that if Appellant was terminated for dishonesty, AJR was not obligated to pay Appellant his salary for the balance of the employment agreement. Appellant was responsible for safety at AJR's facility including enforcing AJR's drug-free workplace policy. Appellant received a copy of AJR's employee manual which states, in part, that employees may be terminated for the sale, possession, or use of controlled substances while on the job, during work hours, or while on company business. After Appellant failed a drug test, he admitted that he used cocaine the Saturday immediately prior to the Monday drug test. Finally, he also admitted that he was dishonest with management when he failed to answer management's questions regarding

possible drug use in the workplace because he knew to an absolute certainty that he had used illegal drugs and had them in his system when asked the question.

Given these facts, I must disagree with the majority that a jury could determine that drug use rather than dishonesty was the basis for Appellant's dismissal. This is a distinction without a difference. Appellant's drug use, established by the positive drug test, demonstrates dishonesty. Specifically, Appellant, who was responsible for enforcing a drug-free workplace, knowingly violated his employer's drug-free workplace policy by coming to work with cocaine in his system. This is dishonest conduct. Actually testing positive for the drug use is evidence of this dishonest conduct. Therefore, it is irrelevant whether the official reason for Appellant's dismissal was dishonesty or drug use.

Finally, troubling also is the majority opinion's failure to address AJR's argument that Appellant's decision to appear for work under the influence of cocaine was tantamount to a willful quit; substantial public policy against rewarding a person for his or her dishonesty; and the impact of Appellant's admission of dishonesty. The plain fact is that any of these matters would have been sufficient for this Court to affirm the summary judgment on behalf of AJR.

In sum, I concur with affirming the circuit court's grant of summary judgment on the false light invasion of privacy claim, but I dissent to the majority's reversal of the

circuit court's grant of summary judgment on the breach of contract claim.