

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

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**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Starcher, J., concurring:

I write separately to emphasize what the majority's opinion really says, and what it does not say.

This case is all about the power of a contract. The defendant-employer, AJR, Inc., entered into a written contract in 1997 with plaintiff-employee Danny L. Benson that guaranteed Mr. Benson employment until August 2005. Nobody disputes the clarity of this part of the agreement.

However, nowhere does the contract say that Mr. Benson cannot be fired. The contract did allow the defendant-employer to show Mr. Benson the door with pink slip in hand any time it chose to do so. But the contract also contained a clear, black-and-white penalty clause which said that if the defendant-employer let Mr. Benson go, then the defendant-employer would still be required to pay Mr. Benson his remaining wages through August 2005. Again, none of the parties disputes the clarity of this penalty clause built into the agreement.

The fuzzy area in this case is a loophole for the defendant-employer that was built into the contract which allowed the defendant-employer to escape the penalty clause if Mr. Benson was fired because of "dishonesty." The contract does not define "dishonesty." So, when Mr. Benson's drug use was discovered, and the defendant-employer fired him, the

question was raised whether Mr. Benson's firing was motivated by Mr. Benson's dishonesty, or for some other reason.

The defendant-employer vigorously asserts that it fired Mr. Benson because the owner of the company conducted meetings with company employees that included Mr. Benson, at which time the owner asked if anyone was aware of an employee who was using illegal drugs or was arriving for work with illegal drugs in his or her system; Mr. Benson said nothing when asked the question. The defendant-employer now asserts that Mr. Benson was fired when the cocaine test results were returned because his dishonesty – in the form of not responding to the question – was revealed. The defendant-employer therefore asserts that it does not have to pay Mr. Benson his remaining wages in compliance with the penalty clause.

The problem with the employer's argument is the written documentation surrounding Mr. Benson's firing. When Mr. Benson was fired, the employer completed a form indicating he was fired in accordance with the employees' manual (which mandated automatic termination for drug usage) for "controlled substance testing" and "tested positive for cocaine." This position was reiterated in writing several times by the company's owner and the company's counsel. The contractual "dishonesty" loophole was not raised by the employer until sometime later, when Mr. Benson asserted his contractual right to his remaining years of wages.

The competing positions taken by the employer raise, beyond a doubt, a question of fact for jury resolution as to the true motivating factor behind Mr. Benson's

termination. The circuit court was wrong to substitute its judgment on this factual question for that of the jury. A jury should hear the witnesses to Mr. Benson's firing testify, should review the documentation surrounding that firing, and should decide for themselves if Mr. Benson's firing was motivated by (a) dishonesty or (b) drug use. If the jury's answer is the former, Mr. Benson gets nothing; if the jury's answer is the latter, the defendant-employer must comply with the written employment contract and pay Mr. Benson his wages under the contract's penalty clause.

That said, let's get straight what this case is *not* about. This case is not – as my dissenting colleague suggests – a case that says a small employer cannot fire an employee who uses drugs. The employer in this case was fully within its rights to fire Mr. Benson – but it had to be willing to pay the price if that firing breached the employment contract. A contract is a promise, and a breach of that promise carries consequences. I disagree with my dissenting colleague's implicit suggestion that because of bad facts, this Court should make bad law, throw hundreds of years of contract law to the wind, and find that because Mr. Benson's actions are less-than-palatable, the contract should be ignored.

If anything, this case says that small employers should not give their employees open-ended contracts guaranteeing them employment. The defendant-employer in this case could have easily put in the contract a clause allowing Mr. Benson to be fired, without penalty to the defendant-employer, for using illicit substances on the job. Luckily, the majority opinion makes clear that the defendant-employer might still be able to hang its hat

on the vague term “dishonesty,” and prevail before a jury by showing that a lack of veracity on Mr. Benson’s part was the motivating factor behind his termination.

I therefore respectfully concur with the majority opinion.