

No. 31731 – James F. Humphreys & Associates, L.C. v. Board of Review, West Virginia Bureau of Employment Programs/ Robert J. Smith, Commissioner, West Virginia Bureau of Employment Programs; and Elizabeth I. Cannafax

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OF WEST VIRGINIA

Maynard, Chief Justice, concurring:

This case required the Court to determine whether Ms. Cannafax should have been awarded unemployment benefits. Initially, I applaud the majority opinion for correctly concluding that Ms. Cannafax should not receive such benefits. However, while I agree with the majority opinion's result, I do not believe that it went far enough to send a clear and strong message that such irresponsible, dangerous, and reckless behavior will not be tolerated and certainly will not be rewarded with government benefits. It is my firm belief that we should have created a new syllabus point based on the statutes governing this case and making it abundantly clear that if you commit a criminal act and are subsequently fired for that act, you cannot receive unemployment benefits—period! Nonetheless, for some mysterious reason, the majority of this Court would not agree to such a clear statement of the law.

Likewise, the majority opinion curiously did not discuss the four new syllabus points in *Daily v. Board of Review*, 214 W.Va. 419, 589 S.E.2d 797 (2003), where this Court, in my view, incorrectly reversed the findings of the Board of Review and provided

unemployment benefits to an individual. In that case, the appellant was hired by Executive Air Terminal Inc. to drive gasoline trucks and was required to drive off the airport property to obtain bulk gasoline and deliver passengers on public roads. As a part of his employment, the appellant indicated that he maintained a valid driver's license. When his employer realized that the appellant's license had been suspended in 1996 and that he was subjecting Executive Air to potential liability, Executive Air discharged him. The Board of Review then concluded that the appellant had been terminated for gross misconduct and denied the appellant unemployment compensation benefits. This Court reversed the decision below and allowed the appellant to receive unemployment compensation benefits because he had only "engaged in simple misconduct by failing to indicate that his driver's license had been suspended and by permitting his employer to continue to believe that he maintained a valid driver's license. . . ." I joined in Justice Davis' dissent in that case where she stated:

Under the decision reached by the majority opinion in this case, every employer in the State of West Virginia must provide unemployment compensation benefits to employees who are terminated for obtaining employment through fraudulent misrepresentation and engaging in on-the-job criminal conduct prior to being terminated. I find the majority opinion to be offensive to every employer and citizen of West Virginia. Therefore, for the reasons provided below, I dissent.

214 W.Va. at 428, 429, 589 S.E.2d at 806, 807. After reviewing and comparing the circumstances in *Daily*, where the appellant's fraudulent misrepresentation was not sufficient to deny him unemployment compensation benefits, with the facts in this case, where Ms. Cannafax's behavior was sufficient to deny her benefits, I believe that this Court should

revisit this issue and clarify obvious inconsistencies between the two cases. The first step would have been to create a new syllabus point in today's case that would set forth clear and concise language denying unemployment benefits to criminals.

The facts of this case clearly indicate that Ms. Cannafax brandished a deadly weapon in the workplace and then incredibly had the audacity to apply for unemployment benefits after her employment was terminated for such behavior. I believe that a simple review of the facts (many of which are not included in the majority opinion) is necessary to illustrate all the surrounding circumstances of Ms. Cannafax's termination for committing an act of gross misconduct. The record indicates that on Friday, August 23, 2002, the day began with Ms. McLane, the office manager and Ms. Cannafax's immediate supervisor, informing Ms. Cannafax that she should only be taking two breaks per day instead of four. Thereafter, Ms. Cannafax abruptly informed Ms. McLane that she had a doctor's appointment on the following Monday, August 26, 2002, and further stated that she would probably be "locked up" after seeing the doctor because she felt suicidal. Ms. McLane advised Ms. Cannafax to calm down and to continue doing her job explaining that she was not in trouble for taking too many breaks. Later that day, Ms. Cannafax entered the office lunchroom and glared at Ms. McLane several times in an angry and threatening manner in front of other employees. Soon afterward, both Ms. Cannafax and Ms. McLane went to Ms. McLane's office to discuss the situation. Ms. Cannafax indicated that she was tired of people in the office who were out to get her. After Ms. McLane told Ms. Cannafax that people in

the office were not out to get her, Ms. Cannafax calmed down and then returned to work. At approximately 3:00 p.m. the same day, Ms. Cannafax, while standing at the receptionist's desk with a knife in her hand, stated to the receptionist, who was pregnant, that "the next person that comes after me is going to get it." Ms. Cannafax, with her knife still clutched in her hand, said, "I'm not kidding they're going to get it." Next, Ms. Cannafax proceeded to the third floor where Ms. McLane asked her what was wrong. According to Ms. McLane, Ms. Cannafax "went off on her" and then pointed a knife wrapped in a napkin in the air stating that she was going to use it on the office snitch. Ms. McLane then walked Ms. Cannafax out of the building and on Monday, August 26, 2002, her employment was terminated.

The facts of this case establish that this was not an isolated incident as Ms. Cannafax demonstrated unstable behavior throughout the entire day. Ms. Cannafax, who had previously taken medications for post traumatic stress, panic disorder, and major depression, was unquestionably exhibiting dangerous and unpredictable conduct that could have resulted in the stabbing of several employees—one of whom was pregnant! Even though this Court was entirely correct in reinstating the original September 19, 2002, decision of the Deputy Commissioner of the West Virginia Bureau of Employment Programs, we should have made it abundantly clear through a new syllabus point that such conduct will *never* be tolerated. The importance and necessity of such a syllabus point is plainly demonstrated by the fact that the administrative law judge, the Board of Review, and the circuit court all got it wrong and

unbelievably found in favor of unemployment benefits for Ms. Cannafax. Perhaps a clear and simple syllabus point stating that people who commit or threaten criminal acts in the workplace cannot receive unemployment benefits would have prompted all three reviewing agencies to get it right.

Therefore, for the reasons set forth above, I respectfully concur with the majority opinion.