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

Albright, Justice, concurring:

In a separate opinion concurring with the result in this case, my colleague, the distinguished Chief Justice Elliott E. Maynard, suggests that this Court should supplement the legislative definition of *gross misconduct* which disqualifies one from receiving unemployment benefits indefinitely. I write separately to express strong opposition to that proposal.

This Court explained in *Dailey v. Board of Review*, 214 W. Va. 419, 589 S.E.2d 797 (2003), that our Legislature has created two levels of disqualification for receipt of unemployment benefits because of misconduct, unlike many other states which have only one category of disqualification. In West Virginia employee misconduct warrants a disqualification for benefits for six weeks unless the misconduct involves specific serious, statutorily defined conduct, referred to generally as *gross misconduct.*[1] An employee

[1]West Virginia Code § 21A-6-3(2) (1990) (Repl. Vol. 2002), in pertinent part, statutorily defines the more serious misconduct as follows:

> Misconduct consisting of willful destruction of his employer's

(continued...)

discharged for any of these specific acts is disqualified from receiving unemployment benefits not only for six weeks but indefinitely until the employee has returned to covered employment for at least thirty days.[2]

My concurring colleague, Chief Justice Maynard, would have this Court add to the statute by judicial fiat. He would have this Court create through a syllabus point an

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[1](...continued)
property; assault upon the person of his employer or any employee of his employer; if such assault is committed at such individual's place of employment or in the course of employment; reporting to work in an intoxicated condition, or being intoxicated while at work; reporting to work under the influence of any controlled substance, or being under the influence of any controlled substance while at work; arson, theft, larceny, fraud or embezzlement in connection with his work; or any other gross misconduct; he shall be and remain disqualified for benefits until he has thereafter worked for at least thirty days in covered employment. . . .

[2]An illuminating explanation of the statutory language regarding disqualification is contained in *Summers v. Gatson*, 205 W. Va. 198, 517 S.E.2d 295 (1999). The *Summers* Court observed as follows:

> The statutory language at issue in the case before us is byzantine in its complexity, but from the morass of dependent clauses one may distill the following: If one is discharged for misconduct, in general, one loses one's rights to unemployment compensation for six weeks, unless one is discharged (among other things) for theft or larceny in connection with one's work, in which case one is disqualified from receiving any unemployment compensation benefits until one has found a new job and worked for thirty days in covered employment.

205 W. Va. at 202, 517 S.E.2d at 299 (footnote and citation omitted).

indefinite disqualification for any employees "who commit or threaten criminal acts in the workplace." My colleague would have us create law stating that "if you commit a criminal act and are subsequently fired for that act, you cannot receive unemployment benefits - period!" I disagree for several reasons. Such broad sweeping rules are legally unjustified, legally improper, and would generate a myriad of difficulties in operation.

First and foremost, the actions warranting disqualification have already been specified by the legislature. The statute simply does not include the reason for indefinite disqualification for benefits my colleague seeks. "We must view the law as it is, and not as we might wish it to be." *Department of Econ. and Empl. Dev. v. Taylor*, 671 A.2d 523, 537 (Md. App. 1996). It is not the function of this Court to engage in judicial expansion of the grounds for indefinite disqualification. "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advoc. Div. v. Public Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

Secondly, it is patently unfair to hold that violation of every criminal statute, no matter how minor, is automatic grounds for disqualification for benefits. At one point in my colleague's concurring opinion, it appears that a disqualifying criminal act would only be one which occurred "in the workplace." However, at another point it appears that the author of that opinion would apply his disqualification rule to any criminal act for which an employee is fired. To "parade the horribles" under the latter scenario, an employee

terminated from employment after committing a criminal act totally unrelated to the workplace, such as wearing a hat in a theater,[3] camping on county courthouse grounds without permission,[4] or engaging in the unauthorized use of a trash dumpster,[5] would be disqualified indefinitely under the rule proposed by the concurring opinion. Certainly my colleague would not consider such a result fair. Certainly a reasonable nexus between the alleged criminal act and the workplace should be required.

Thirdly, under the rule suggested by my colleague's concurring opinion, what burden of proof would be utilized in demonstrating that the alleged criminal act had actually been threatened or committed by the employee? While our jurisprudence clearly establishes that proof beyond a reasonable doubt is necessary in a criminal prosecution, this Court has previously stated that the standard to be employed in the administrative context of unemployment benefits is preponderance of the evidence.[6] Specifically, we recently allowed alleged criminal conduct to be proven by a mere preponderance of circumstantial evidence

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[3]*See* W. Va. Code § 61-6-16 (1923) (Repl. Vol. 2000).

[4]*See* W. Va. Code § 61-6-18 (1969) (Repl. Vol. 2000).

[5]*See* W. Va. Code § 61-3-53 (1998) (Repl. Vol. 2000).

[6]*See Summers*, 205 W. Va. at 202, 517 S.E.2d at 299 (holding that burden is upon employer to demonstrate, by preponderance of evidence, that claimant committed act in question). However, in the context of proving fraud, for example, the "elements must be proved by clear and convincing evidence." *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992); *see also Gerver v. Benavides*, 207 W. Va. 228, 232, 530 S.E.2d 701, 705 (1999) (explaining that fraud is never presumed and must be proven by clear and distinct proof).

in a case involving the discharge of a member of the Department of Public Safety.[7] Thus, where no criminal conviction has been obtained against an employee, the new syllabus point suggested by my colleague's concurring opinion invites the indefinite denial of unemployment benefits on a showing by a mere preponderance of the evidence that an employee threatened to or did commit a criminal act. My colleague would say to that employee, "you cannot receive unemployment benefits - period." What a prescription for rampant unfairness![8]

Ultimately, the determination of what actions warrant disqualification rests with the legislature. We are not here to express in case law what we wish the legislature had done.

Because I believe the case before us correctly applied the law to the facts of the case, I respectfully concur with the majority opinion, stating however my total disagreement with my colleague's concurring opinion seeking to write new law not found in the governing legislative enactment.

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[7]*See Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004).

[8]*See Wardell v. Director of Div. of Employ. Sec.*, 491 N.E.2d 1057, 1059 (Mass. 1986) ("An admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial evidence from which a finder of fact in a collateral civil proceeding can determine that the alleged misconduct has indeed occurred.").