STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

WILLIAM WATSON, JR.,
Respondent Below, Petitioner

vs.) No. 11-0191 (Kanawha County No. 10-AA-34)

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR BEHAVIORAL HEALTH AND HEALTH FACILITIES, AND MILDRED MITCHELL-BATEMAN HOSPITAL,
Petitioners Below, Respondents

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner herein and respondent below, William Watson, Jr. ("Mr. Watson"), appeals from an order entered December 30, 2010, by the Circuit Court of Kanawha County. By that order, the circuit court reversed a final order of the West Virginia Public Employees Grievance Board; denied Mr. Watson's grievance; and reinstated the discipline imposed upon Mr. Watson by his employer, Mildred Mitchell-Bateman Hospital, respondent herein and petitioner below ("Mitchell-Bateman"). Mitchell-Bateman disciplined Mr. Watson for insubordination and sleeping on the job by suspending Mr. Watson for five days and transferring him from the position of night-shift security guard to the position of day-shift food service worker. On appeal to this Court, Mr. Watson asserts that the circuit court erred by (1) ruling that Mitchell-Bateman's directive prohibiting him from speaking with his coworkers during the pendency of its investigation into his alleged theft of copper did not violate his constitutional rights to intimate association or privacy; (2) finding that his actions amounted to insubordination warranting discipline; and (3) concluding that the discipline imposed by Mitchell-Bateman was proportionate to his misconduct.

Upon our review of the briefs, oral arguments of the parties, and appendix record, we affirm the December 30, 2010, order of the Kanawha County Circuit Court. In summary, we conclude that Mitchell-Bateman did not violate Mr. Watson's constitutional rights; that Mr. Watson was insubordinate; and that Mitchell-Bateman imposed proportionate discipline. We further find this matter to be proper for disposition pursuant to Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

The facts giving rise to the instant controversy are not disputed by the parties. In the fall of 2008, copper was stolen from Mitchell-Bateman's facility, a state-supported psychiatric hospital located in Huntington, West Virginia. At that time, Mr. Watson had been employed by Mitchell-Bateman for approximately nine years and was working as a night-shift security guard. Following the copper theft, Mr. Watson disclosed to a fellow Mitchell-Bateman security guard that he knew who had stolen the copper and that he had participated in the crime. The fellow security guard alerted Mitchell-Bateman officials, and an investigation ensued. Because Mitchell-Bateman believed that Mr. Watson had been involved in the copper theft, it suspended him from work while it conducted its investigation. Mitchell-Bateman notified Mr. Watson of his suspension orally and by letter dated September 16, 2008, further directing Mr. Watson to temporarily refrain from speaking with his coworkers: "During the period of your suspension . . . . [y]ou are not to contact *any* staff member other than the Director of Human Resources, your union representative (if he or she is an employee), or [the Chief Executive Officer]." (Emphasis in original).

After he had learned of his suspension and Mitchell-Bateman's directive limiting his communications with coworkers during the investigation, Mr. Watson nevertheless contacted three different Mitchell-Bateman employees. Mr. Watson first spoke with the fellow security guard with whom he previously had discussed the copper theft. During this post-suspension conversation, Mr. Watson claimed that he really had not been involved in the copper theft and asked what, if anything, she had said to Mitchell-Bateman investigators.

Mr. Watson also spoke with a coworker from whom he had purchased an automobile. This conversation entailed Mr. Watson's explanation that, because of his suspension from work without pay, he would not be able to make timely payments for the automobile.

Finally, Mr. Watson spoke with a coworker who lives in his neighborhood. During this exchange, Mr. Watson asked him if he had been contacted with regard to the copper theft investigation.

On October 8, 2008, Mitchell-Bateman informed Mr. Watson that it had determined that he was not involved in the theft of copper from its facility. However, during the investigation, Mitchell-Bateman learned that Mr. Watson had spoken with numerous coworkers contrary to its directive that he refrain from doing so and that Mr. Watson had fallen asleep while working his night-shift security guard position. Consequently, Mitchell-Bateman concluded that Mr. Watson's insubordination and misconduct warranted discipline, which included a five-day suspension without pay and a job transfer from night-shift security guard to day-shift food service worker. Despite the change in his job title and position, Mr. Watson's job classification and pay grade remained the same so his salary did not change.

Mr. Watson accepted the transfer to day-shift food service worker but filed a grievance to contest the disciplinary actions. He did not prevail at either the Level I or Level II grievance proceedings. After the Level III grievance hearing, the ALJ ruled in favor of Mr. Watson by final decision issued December 31, 2009. In summary, the ALJ concluded that the restrictions that Mitchell-Bateman had placed upon Mr. Watson's ability to communicate with his coworkers improperly violated his constitutional rights to intimate association and privacy. Accordingly, the ALJ found further that Mr. Watson had not been insubordinate and that Mitchell-Bateman should not have disciplined him for his conduct. Therefore, the ALJ reinstated Mr. Watson to his former position of night-shift security guard.

Mitchell-Bateman then appealed the ALJ's decision to the circuit court. By order entered December 30, 2010, the circuit court reversed the ALJ's order, denied Mr. Watson's grievance, and reinstated the discipline imposed by Mitchell-Bateman. In rendering its ruling, the circuit court determined that Mr. Watson's constitutional rights had not been violated because Mitchell-Bateman issued its directive only to ensure the integrity of its investigation. The circuit court additionally found that Mr. Watson's defiance of said directive amounted to insubordination and that the resulting discipline imposed by Mitchell-Bateman was proportionate to his misconduct.

In his appeal to this Court, Mr. Watson challenges the circuit court's decision to reverse the ruling rendered by the Grievance Board. We previously have held that,

> [o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). Furthermore, "[i]n cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl. pt. 2, *id.* To the extent the circuit court's decision considered Mr. Watson's constitutional challenges, our review is plenary. *See* Syl. pt. 1, *Phillip Leon M. v. Greenbrier Cnty. Bd. of Educ.*, 199 W. Va. 400, 484 S.E.2d 909 (1996) ("A circuit court's interpretation of the West Virginia Constitution is reviewed *de novo*.").

Mr. Watson first assigns error to the circuit court's ruling that Mitchell-Bateman did not violate his constitutional rights to intimate association or privacy when it directed him to not contact his coworkers during the copper theft investigation. The right to intimate

association is guaranteed by the First[1] and Fourteenth[2] Amendments to the United States Constitution and by article III, section 16[3] of the West Virginia Constitution. In recognizing a right to intimate association, the United States Supreme Court has explained that, "because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 3250, 82 L. Ed. 2d 462 (1984) (citations omitted). Although other types of relationships also may exhibit certain of these characteristics, in the main the Court contemplated that relationships of the marital and familial varieties are the types of intimate associations meriting constitutional protection:

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage; childbirth; the raising and education of children; and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special

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[1]The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; *or the right of the people peaceably to assemble*, and to petition the Government for a redress of grievances." (Emphasis added).

[2]In pertinent part, the Fourteenth Amendment to the United States Constitution guarantees that

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

[3]Article III, section 16 of the West Virginia Constitution secures the right to association: "[t]he right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate."

> community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Id., 468 U.S. at 619-20, 104 S. Ct. at 3250-51, 82 L. Ed. 2d 462 (citations omitted). Organizational memberships, friendships, and casual acquaintances with coworkers are not among the types of relationships that have been afforded constitutional protection. *See, e.g.*, *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 547, 107 S. Ct. 1940, 1946, 95 L. Ed. 2d 474 (1987) (refusing to find violation of constitutional right to intimate association based upon relationship among members of civic organization because the service-based fellowship at issue was not "the kind of private or personal relationship to which we have accorded protection under the First Amendment"); *Silverstein v. Lawrence Union Free Sch. Dist. No. 15*, No. CV 10-993(SJF)(WDW), 2011 WL 1261122, at *6 (E.D.N.Y. Feb. 15, 2011) ("[T]he Constitution does not recognize a generalized right of social association, and courts in the Second Circuit have not accepted intimate association claims based on friendships, however close." (internal citations omitted)); *Willson v. Yerke*, No. 3:10cv1376, 2011 WL 332487, at *7 (M.D. Pa. Jan. 31, 2011) (ruling that right to intimate association "attaches only to certain kinds of highly personal relationships such as marriage and family relationships, which are essential to the ability independently to define one's identity that is central to any concept of liberty" (citing *Roberts*, 468 U.S. at 618, 104 S. Ct. at 3250, 82 L. Ed. 2d 462) (additional quotations and citation omitted)); *Phillips v. Joy*, No. 3:08-cv-03820-CMC, 2009 WL 5214324, at *10 (D.S.C. Dec. 28, 2009) ("The relationship between co-workers . . . [is] not of an intimate nature . . . . [and] is not the kind of association protected under the First Amendment."). *But see Akers v. McGinnis*, 352 F.3d 1030, 1039-40 (6th Cir. 2003) ("Personal friendship is protected as an intimate association." (citation omitted)). Because friendships and casual acquaintances are not among the types of relationships that traditionally have received constitutional protection, we conclude that Mitchell-Bateman's directive limiting Mr. Watson's contact with his coworkers did not violate his constitutional right to intimate association.

Mr. Watson also contends that the circuit court erred by ruling that Mitchell-Bateman's directive did not violate his constitutional right to privacy.[4] Insofar as we have concluded that Mr. Watson did not have a protected right of intimate association to communicate with his coworkers during the pendency of the copper theft investigation, we likewise determine that Mr. Watson did not have a protected right of privacy to the contents of such communications. It goes without saying that there cannot be a right to keep private the contents of a conversation when the participants thereto do not have a protected right to associate in the first instance. We therefore conclude that neither did Mitchell-Bateman's directive violate Mr. Watson's constitutional right to privacy.

For his second assignment of error, Mr. Watson asserts that the circuit court erred by finding that his actions amounted to insubordination warranting discipline. We previously have considered "that[,] for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). Given this definition, Mr. Watson's refusal to comply with Mitchell-Bateman's no contact directive clearly amounts to insubordination. First, Mr. Watson refused to obey Mitchell-Bateman's directive that he not contact coworkers during his suspension and, instead, spoke with three different coworkers after he had been instructed not to do so. Second, Mr. Watson's disobedience was wilful, meaning that "the motivation

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[4]Although Mr. Watson does not specify which constitutional provisions guarantee his right to privacy, we surmise that he is relying upon those freedoms secured by the Ninth Amendment to the United States Constitution and article III, section 1 of the West Virginia Constitution. *See* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); W. Va. Const. art. III, § 1 ("All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety."). In support of his constitutional argument, Mr. Watson instead relies upon this Court's prior decisions concerning an individual's common law right to privacy. *See* Syl. pt. 1, in part, *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958) (defining "right of privacy" as "the right of an individual to be let alone and to keep secret his private communications, conversations and affairs"). *See also Golden v. Board of Educ. of Cnty. of Harrison*, 169 W. Va. 63, 69, 285 S.E.2d 665, 669 (1981) (recognizing that school teacher's "right of privacy, while not absolute, must be balanced against the legitimate interest of the school board").

for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). Not only did Mr. Watson speak with three different coworkers contrary to Mitchell-Bateman's directive, but all three of these conversations concerned the very reason why Mitchell-Bateman had restricted Mr. Watson's communications with his coworkers in the first place–the copper theft investigation! Moreover, during two of these conversations, Mr. Watson attempted to acquire information about the nature and progress of the investigation by inquiring about specific details or asking his coworkers the extent of their participation in the investigation. Third, as noted previously, Mitchell-Bateman's directive was valid because it did not violate Mr. Watson's constitutional rights. Accordingly, we conclude that Mr. Watson's conduct amounted to insubordination warranting discipline.

Mr. Watson's third assignment of error challenges the circuit court's ruling that the discipline imposed by Mitchell-Bateman was proportionate to his misconduct. Proportionality contemplates that the discipline imposed by the employer is commensurate or consistent with the misconduct giving rise to the disciplinary action. *See, e.g.*, Webster's Ninth New Collegiate Dictionary 944 (1983) (defining "proportional" as "corresponding in size, degree, or intensity"). In light of the facts of the case *sub judice*, the discipline imposed by Mitchell-Bateman, *i.e.*, suspending Mr. Watson for five days without pay and transferring him to a different position within the same job classification and pay grade, was proportionate to Mr. Watson's misconduct of insubordination and sleeping during his night shift as a security guard. First and foremost, it is apparent that the copper theft investigation was initiated due, in large part, to Mr. Watson's false report to his fellow security guard that he had been involved in the crime. To the extent that Mr. Watson's untruthfulness caused Mitchell-Bateman to incur the time and expense of an investigation that culminated in its discovery that Mr. Watson had not, in fact, participated in the copper theft, Mr. Watson's conduct clearly warranted disciplinary action. Additionally, Mr. Watson was insubordinate because he acted with wilful disregard for his employer's directives when, during his suspension from work, he asked his coworkers about the copper theft investigation when Mitchell-Bateman had directed him to refrain from such contact. Furthermore, Mr. Watson was employed as a security guard at a facility known to be located in a high-crime area; although it is unclear at what time of day the copper theft occurred, it is abundantly clear that Mitchell-Bateman employed security guards because it required their services to keep its facility and its patients safe. Mr. Watson's actions in this regard rendered him unable to fulfill the duties for which he had been hired and left both the facility and the facility's patients vulnerable as a result of his inattentiveness to his responsibilities. Finally, from the nature and severity of the discipline imposed, it is abundantly clear that Mitchell-Bateman considered Mr. Watson's nine-year record of good work performance given that it has terminated other employees for sleeping on the job. Therefore, we conclude that the

discipline imposed by Mitchell-Bateman was proportionate to the nature of Mr. Watson's misconduct.

For the foregoing reasons, we conclude that the circuit court did not err by finding that Mitchell-Bateman did not violate Mr. Watson's constitutional rights. Additionally, we further conclude that the circuit court did not err by ruling that Mr. Watson was insubordinate and that Mitchell-Bateman appropriately disciplined Mr. Watson for his misconduct. Accordingly, the December 30, 2010, order of the Circuit Court of Kanawha County is hereby affirmed.

Affirmed.

ISSUED: January 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISQUALIFIED:

Justice Margaret L. Workman