IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED
November 10, 2026
ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

CHRISTOPHER WELLS,
Claimant Below, Petitioner

v.) No. 26-ICA-130 (WorkForce W. Va. Bd. of Rev. Case No. R-2025-1793)

SCOTT A. ADKINS, in his Official Capacity as Acting Commissioner of WorkForce West Virginia,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Christopher Wells appeals the March 27, 2026, order from the WorkForce West Virginia Board of Review ("Board") which reversed the decision of the administrative law judge ("ALJ") and found Mr. Wells was disqualified from receiving unemployment compensation benefits due to gross misconduct. Respondent Scott A. Adkins, in his Official Capacity as Acting Commissioner of WorkForce West Virginia ("WorkForce") filed a response in support of the Board's decision.[1] Mr. Wells filed a reply. WorkForce was also Mr. Wells' employer.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2026). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds that there is error in the Board's decision but no substantial question of law. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure for resolution through a memorandum decision. For the reasons set forth below, the Board's decision is reversed.

Mr. Wells was employed by WorkForce as a Disabled Veterans' Outreach Specialist and Local Employment Veterans' Representative from February 28, 2022, until August 11, 2025. Mr. Wells' dual-role position required him to work with veterans facing barriers to employment to develop opportunities for employment, and also to travel to meet with employers to explain the program and obtain employment opportunities for veterans.

Mr. Wells was discharged for alleged "time theft" that his employer classified as "gross misconduct" in its letter of termination. Mr. Wells was employed to work 8:00 a.m. until 4:00 p.m., five days a week, for a total of 37.5 hours per week. According to

[1] Mr. Wells is self-represented. WorkForce is represented by Kimberly A. Levy, Esq.

WorkForce's policies, Mr. Wells' workday included a thirty-minute unpaid lunch and two fifteen-minute paid breaks to be taken one in the morning and one in the afternoon. WorkForce's policy also specified that paid breaks could not be used to extend the lunch break and that the unpaid lunch break was not to occur earlier than three hours and no later than six hours from the start of an employee's scheduled shift.

On July 23, 2025, the spouse of a WorkForce employee reported that Mr. Wells was at Planet Fitness working out in the morning, during what would normally be Mr. Wells' working hours. The WorkForce employee reported this information to a supervisor. The following week, on July 30, 2025, a WorkForce supervisor was directed to follow Mr. Wells when Mr. Wells left the office for scheduled employer outreach. The supervisor arrived at Planet Fitness at around 9:30 a.m. and observed what he believed was Mr. Wells' vehicle in the parking lot. The supervisor then took a photograph of the license plate to later confirm and saw Mr. Wells leave Planet Fitness at 10:18 a.m. wearing his work clothing and carrying a gym bag over his shoulder. Mr. Wells submitted a Travel Expense Account Settlement stating that he left the office at 9:00 a.m. and arrived at Woodridge Golf Club at 9:35 a.m. Mr. Wells did not list any Planet Fitness stops on his weekly Employer Outreach Activities reports on either date he was seen at Planet Fitness.

WorkForce discharged Mr. Wells for what it characterized as intentional misrepresentation of his work hours and violation of its work hours and conduct directives. Mr. Wells admitted going to Planet Fitness before traveling to employers but testified that he combined his lunch and break periods for that purpose, which he stated he believed was permitted. Mr. Wells denied knowledge of the policy prohibiting combined breaks and maintained that he performed his job duties throughout the remainder of the day and worked the required seven hours each day.

Mr. Wells filed a claim for unemployment compensation on August 11, 2025. A WorkForce West Virginia Deputy issued a decision dated and mailed August 21, 2025, finding Mr. Wells indefinitely disqualified from benefits on the ground of gross misconduct under West Virginia Code § 21A-6-3(2), and that Mr. Wells was disqualified until he returned to covered employment and worked at least thirty days. Mr. Wells appealed to the Board of Review, which received his request on August 28, 2025.

A telephonic hearing was held on September 11, 2025, in front of an ALJ. Three witnesses testified: Mr. Wells; a representative of WorkForce, as Mr. Wells' former employer; and the supervisor who had followed Mr. Wells to Planet Fitness. The ALJ issued a decision dated and mailed September 24, 2025, reversing the Deputy. The ALJ held that Mr. Wells was discharged for simple misconduct and was disqualified from receiving benefits only for the week of the discharge and the next six weeks.

WorkForce appealed to the Board on October 1, 2025. The Board remanded the matter to the ALJ for an amended decision, directing additional findings on: (1) what act(s)

resulted in the discharge and when they occurred, (2) whether Mr. Wells knowingly falsified time sheets or expense-reimbursement requests, (3) whether Mr. Wells worked at least seven hours each day excluding lunch and breaks, and (4) whether Mr. Wells committed simple, gross, other gross, or no misconduct. The ALJ held another telephonic hearing on December 17, 2025. On February 9, 2026, the ALJ issued a decision affirming the prior conclusion that Mr. Wells was discharged for simple misconduct. The ALJ found that Mr. Wells had not falsified travel/expense forms.

WorkForce appealed the ALJ's February 9, 2026, decision to the Board. The Board scheduled its review of the matter for March 5, 2026. By decision dated and mailed March 27, 2026, the Board reversed the ALJ in a 2-1 decision. The Board agreed with the ALJ that Mr. Wells had not falsified travel/expense forms, but the majority concluded the ALJ was clearly wrong in finding only simple misconduct. The Board drew "a reasonable inference" that Mr. Wells did not work his mandatory work hours on the two days in question. The Board held that his conduct rose to the level of other gross misconduct under West Virginia Code § 21A-6-3(2), disqualifying Mr. Wells from receiving benefits until he returned to covered employment and worked at least thirty days. One Board member dissented and opined that they would have affirmed the ALJ, concluding that the employer failed to meet its burden of proving misconduct. The dissenting member found no proof that Mr. Wells received or was aware of the policies he was terminated for violating, viewed the employer's testimony as uncertain and contradictory, and believed that the law requires proof of misconduct rather than a "reasonable inference."

It is from this decision that Mr. Wells now appeals.

In this appeal, our standard of review is as follows:

> The findings of fact of the Board of Review of [WorkForce West Virginia] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.

Syl. Pt. 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994).

On appeal, Mr. Wells asserts four assignments of error. Because his assignments of error are similar, we will consolidate and restate them into one assignment of error for clarity and efficiency. Mr. Wells argues that the Board erred by reversing the ALJ's finding that he was discharged due to simple misconduct and instead finding that Mr. Wells engaged in gross misconduct which led to his termination. We agree.

Under West Virginia Code § 21A-6-3(2), an employer may challenge a discharged employee's claim for unemployment benefits by showing the employee was discharged for

committing either gross misconduct or simple misconduct. The Supreme Court of Appeals of West Virginia ("SCAWV") defined "gross misconduct" as follows:

> For purposes of determining the level of disqualification for unemployment compensation benefits under West Virginia Code § 21A-6-3, an act of misconduct shall be considered gross misconduct where the underlying misconduct consists of (1) willful destruction of the employer's property; (2) assault upon the employer or another employee in certain circumstances; (3) certain instances of use of alcohol or controlled substances as delineated in West Virginia Code § 21A-6-3; (4) arson, theft, larceny, fraud, or embezzlement in connection with employment; or (5) any other gross misconduct which shall include but not be limited to instances where the employee has received prior written notice that his continued acts of misconduct may result in termination of employment.

Syl. Pt. 4, *Dailey v. Bd. of Rev., W. Va. Bureau of Emp. Programs*, 214 W. Va. 419, 589 S.E.2d 797 (2003). Alternatively, the SCAWV defined "simple misconduct" as:

> simple misconduct is conduct evincing such willful and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Id. at 421, 589 S.E.2d at 799, Syl. Pt. 7, in part. In addition, it is well established in West Virginia law that "the burden of persuasion is upon the former employer to demonstrate by the preponderance of the evidence that the claimant's conduct falls within a disqualifying provision of the unemployment compensation statute." *Taylor v. Workforce W. Va.*, 249 W. Va. 381, 389, 895 S.E.2d 236, 244 (Ct. App. 2023) (quoting *Peery v. Rutledge*, 177 W. Va. 548, 552, 355 S.E.2d 41, 45 (1987)).

When an employer relies upon the "other gross misconduct" provision in West Virginia Code § 21A-6-3(2) and there is no prior written warning, "the employer is required to furnish evidence that the act in question rises to a level of seriousness equal to or exceeding that of the other specifically enumerated items." *Dailey*, at 421, 589 S.E.2d at 799, Syl. Pt. 6. The "placement of a particular act in the category of gross misconduct should be carefully reviewed and should not be undertaken unless it is clear that such acts constitute gross misconduct as defined by the legislature." *Id*. at 427, 589 S.E.2d at 805. "Except where an employee has received a prior written warning, the phrase, 'other gross misconduct,' in West Virginia Code § 21A-6-3(2) evidences the legislature's intent to

provide some element of discretion in the Board and reviewing courts, based upon the peculiar facts of each case." *Id*. at 421, 589 S.E.2d at 799, Syl. Pt. 5.

In this case, Mr. Wells violated WorkForce's employee policy relating to break times on two separate occasions. The policy specified that an employee's paid breaks could not be used to extend their unpaid lunch break and that the unpaid lunch break was not to occur earlier than three hours and no later than six hours from the start of an employee's scheduled shift. Mr. Wells' violation of WorkForce's internal lunch break policy does not "rise[] to the level of seriousness equal to or exceeding that of the other specifically enumerated items" as required when an employer relies upon the "other gross misconduct" provision of West Virginia Code § 21A-6-3(2). Moreover, Mr. Wells did not "receive[] prior written notice that his continued acts of misconduct may result in termination of employment" prior to his termination. For these reasons, we conclude that Mr. Wells' policy violation does not reach the level of "other gross misconduct" as determined by the Board.

Furthermore, WorkForce failed to present any evidence that Mr. Wells did not work the mandatory seven hours per day as required by his employment, accounting for his thirty-minute unpaid lunch break and two paid fifteen-minute breaks, on the two days in question. The Board only inferred that Mr. Wells did not work his required hours. Because WorkForce bore the burden of persuasion, that inference cannot substitute for evidence of "time theft." As stated earlier, WorkForce had the burden of persuasion to demonstrate that Mr. Wells' conduct fell within a disqualifying provision of the statute. *See Taylor*, at 389, 895 S.E.2d at 244. Based on this Court's review of the record, the Board was clearly wrong in its reversal of the ALJ's decision and finding that Mr. Wells was terminated due to gross misconduct. We conclude that WorkForce's evidence demonstrated that Mr. Wells violated WorkForce's internal policy regarding combining break times and taking breaks outside of the allowed timeframe. However, the evidence does not establish that Mr. Wells' conduct rose to the level of gross misconduct within the meaning of West Virginia Code § 21A-6-3(2).

Accordingly, we reverse the Board's March 27, 2026, order.

Reversed.

ISSUED: November 10, 2026

CONCURRED IN BY:

Chief Judge Daniel W. Greear
Judge Charles O. Lorensen
Judge S. Ryan White