

13-1080

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
MAY 23 2013
KANAWHA COUNTY
COURT CLERK
11:05

TERRY W. MCCARTHY,

PETITIONER,

vs.

Case No. 13-AA-73
Judge Tod J. Kaufman

**WORKFORCE WEST VIRGINIA
BOARD OF REVIEW; RUSSELL FRY,
COMMISSIONER, WORKFORCE WEST
VIRGINIA; and CONSTELLIUM ROLLED
PRODUCTS RAVENSWOOD, LLC,**

RESPONDENTS.

Appeal of Board of Review Decision of
May 23, 2013, in Unemployment Case
Number R-2012-5013 (R-1-C)

FINAL ORDER

The Court, after reviewing the entire record from the Board of Review, and the memoranda of law submitted by the parties, is of the opinion that the Findings of Fact of the Board of Review and the Administrative Law Judge are clearly wrong in view of the evidence on the whole record and are hereby reversed. The Court does hereby make its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The alleged act was about one (1) mile from the employer's entrance, and did not take place on property owned or controlled by the employer. .
2. There was no damage to any property of the employer.
3. The driver of the first car, Rocky Elkins, Production Supervisor for Constellium Rolled Products Ravenswood, LLC ("Constellium") (Tr. 34), stated on direct

examination he saw Mr. McCarthy make “a motion like he was tossing something, but I didn’t see anything or hear anything... (Tr. 35.) ...I didn’t see anything come out of his hand.” (Tr. 37.) “I think he was messing with me acted like he was throwing something at me... and like I said, I seen him make a motion but I didn’t see anything come out of his hand.” (Tr. 41-52.) Four times on direct, and re-direct examination by the company’s attorney, Mr. Elkins stated he “did not see Mr. McCarthy throw anything.”

4. Mr. Elkins further testified that Mr. McCarthy was on the other side of the road from his car, but not on the road, and was standing in the triangle piece of land of the intersection, and when he saw the motion of Mr. McCarthy, he was closest to the left front quarter panel with the motion being made before the vehicle got to him. (Tr. 45-48.)

5. The company did not call Jeffrey Wamsley, the driver of the car following Elkins, but rather called David Johnson, a supervisor who was in the passenger seat of the Wamsley vehicle. (Tr. 58.) Johnson’s testimony was that Wamsley’s car was four to five feet from the Elkins car going through the intersection. (Tr. 59.) This puts the Elkins car blocking Johnson’s view of where Mr. Elkins places Mr. McCarthy at the time of the alleged tossing motion. Johnson says he saw a jack rock on the road between the Elkins car and the Wamsley vehicle (Tr. 60), and that the motion by Mr. McCarthy was after Elkins passed McCarthy (Tr. 65), and that the jack rock was thrown between the Elkins and Wamsley car. (Tr. 67.) Johnson’s testimony is totally inconsistent with Mr. Elkins’ testimony, and is totally opposite from the statement Johnson signed stating “I witnessed Terry McCarthy toss a jack rock at Rocky’s vehicle.” (See Employer Exhibit 2, Page 8.) Additionally, Johnson said he did not see McCarthy until the Elkins car had passed him (Tr. 70), and that’s when he saw Mr. McCarthy

make the motion. (Tr. 72.) The testimony of Johnson is in total conflict with that of Mr. Elkins who was in a much better position to observe Mr. McCarthy.

6. Terry McCarthy, an 18-year employee of the plant with no write-ups (Tr. 86.), testified that at the time of the alleged incident there were between twenty to twenty-five people at the picket line (Tr. 87), a tent, and many people carrying signs. (Tr. 80.) The only motion he ever made while on the line was giving the finger (Tr. 91), and he never threw a jack rock. (Tr. 92.) Ed Nunn, who was on the picket line with Mr. McCarthy, testified he was sitting in a chair side-by-side with him and he never saw him throw a jack rock or make any motions. (Tr. 104.) Luke Staskal, Human Resource Business Partner for Constellium, was not called by the company, but was by the claimant. Mr. Staskal testified that there was video in the possession of Tom Slone taken by AMAC (sic – the correct name is IMAC), the security company employed by the company. If these videos had shown Mr. McCarthy making any motion or throwing jack rocks, the company would have produced them. This omission, along with the failure to call Jeffrey Wamsley, a supervisor, gives rise to the legal principal that if called, the testimony of Wamsley would have been adverse to Constellium since they had power to produce him. This failure to produce the witness is prejudicial to Constellium's case. Syl. pt. 1, Workman v. Clear Fork Lumber, 111 W.Va. 496 (1932).

7. No jack rocks were collected or found around the front wheel of the driver's side of car where Johnson said Mr. McCarthy was allegedly making a motion, and none were produced at the hearing.

8. No arrests were made as a result of the alleged acts of Mr. McCarthy or any other persons.

9. If Mr. McCarthy was guilty of any act, it would be littering of a public road which is not an act of gross misconduct.

10. The alleged act did not take place during the course of Mr. McCarthy's work hours nor on company property.

CONCLUSIONS OF LAW

West Virginia Code § 21A-6-3 sets forth specific reasons for disqualification for gross misconduct as follows:

“If he or she were discharged from his or her most recent work for one of the following reasons, or if he or she were discharged from his or her last thirty days employing unit for one of the following reasons: Gross misconduct consisting of willful destruction of his or her employer's property; assault upon the person of his or her employer or any employee of his or her employer; if the assault is committed at the 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, as defined in chapter sixty-a of this code without a valid prescription, or being under the influence of any controlled substance, as defined in said chapter without a valid prescription, while at work; adulterating or otherwise manipulating a sample or specimen in order to thwart a drug or alcohol test lawfully required of an employee; refusal to submit to random testing for alcohol or illegal controlled substances for employees in safety sensitive positions as defined in section two, article one-d, chapter twenty-one of this code; arson, theft, larceny, fraud or embezzlement in connection with his or her work; or any other gross misconduct, he or she is disqualified for benefits until he or she has thereafter worked for at least thirty days in covered employment: *Provided*, That for the purpose of this subdivision, the words ‘any other gross misconduct’ includes, but is not limited to, any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from the act or acts.” [Emphasis added.]

The alleged act of misconduct occurred on August 8, 2012, which was three days after the labor dispute began and did not occur during the course of Mr. McCarthy's work hours

or on Constellium's property, nor did it result in damage or destruction of company property. In Dailey v. Board of Review, 214 W.Va. 419 (2003), the Supreme Court of Appeals overruled its decision in UB Services Inc. v. Gatson, 207 W.Va. 365 (2000), where the claimant in UB Services had savagely beat a co-worker at the claimant's residence, holding there was a substantial nexus between the gross misconduct and the work environment, that the effects of the gross misconduct extend substantially into the work area. In overruling UB Services, the Supreme Court of Appeals held:

“...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. See W. Va. Code § 21A-6-3. To the extent that UB Services implemented a definition for gross misconduct inconsistent with the foregoing, it is expressly overruled.” [Footnote omitted.] Dailey at 427. [Emphasis added.]

The alleged act of throwing a jack rock onto a public highway while not on company time does not fall within the definition of gross misconduct as defined by the Legislature in West Virginia Code § 21A-6-3, and within the holding of Dailey.

Justice Starcher, who wrote the opinion in UB Services, wrote a concurring opinion in Dailey stating that:

“Because of the expansive nature of the definition of ‘gross misconduct’ in UB Services, overruling the case was the only way to properly refine and discuss our law in this area.” Dailey at 433. [Emphasis added.]

The overruling of “expansive nature” which Justice Starcher refers is including “that of the off-duty, off-premises fired employee, thereby denying unemployment benefits.

Extreme facts resulted in an extreme rule of law.” Dailey at 433. The Supreme Court in Dailey is specifically holding that acts which occur off company premises and not on company time are not disqualifying acts under West Virginia Code § 21A-6-3.

Additionally, the evidence of the employer at best is contradictory and confusing and does not rise even to the level of meeting the employer’s burden of preponderance of the evidence test, and falls far short of clear and convincing evidence.

Justice Franklin Cleckley,¹ writing for a unanimous court in Brown v. Gobble, 195 W.Va. 559, 564 (1996), opined:

“[9, 10] While the preponderance standard applies across the board in civil cases, a higher standard is needed where fairness and equity require more persuasive proof. See 2 McCormick on Evidence § 340 (Strong ed. 1992) (cases collected); Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 3.4, pp. 135 (1995) (cases collected). Although the standard clear and convincing is less commonly used, it nonetheless is no stranger to West Virginia civil cases. In Wheeling Dollar Sav. & Trust Co. v. Singer, 162 W.Va. 502, 510, 250 S.E.2d 369, 374 (1978), this Court stated that ‘clear and convincing’ is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established. It should be the highest possible standard of civil proof. Cramer v. Dep’t of Hwys., 180 W.Va. 97, 99 n. 1, 375 S.E.2d 568, 570 n. 1 (1988). The interest at stake in an adverse possession claim is not the mere loss of money as is the case in the normal civil proceedings. Rather, it often involves the loss of a homestead, a family farm or other property associated with traditional family and societal values. To this extent, most courts have used the clear and convincing standard to protect these important property interests. See Stevenson v. Stein, 412 Pa. 478, 482, 195 A.2d 268, 270 (1963) (to prove adverse possession ‘credible, clear and definitive proof’ is needed). Adopting the clear and convincing standard of proof is more than a mere academic exercise. At a minimum, it reflects the value society places on the rights and interests being asserted.”

West Virginia has long recognized the property rights that a person has in his right to earn a living. In State v. Goodwill, 33 W.Va. 179, our Supreme Court held:

¹ Justice Cleckley is a recognized authority on the law of evidence and the author of Handbook on Evidence for West Virginia Lawyers.

“The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property.” Cited with approval in Lawrence v. Barlow, 77 W.Va. 289, 292 (1915). [Emphasis added.]

Here, the important property right is that of working at a job without the fear of infliction of economic capital punishment where the worker has the right to strike, yet is discharged on weak, inconsistent and uncorroborated testimony.

The Findings of Fact of the Board of Review and Administrative Law Judge are clearly wrong, and are hereby reversed.

Therefore, this Court, based on the entire record and the Findings of Fact and Conclusions of Law, does hereby find that the that the Findings of Fact of the Board of Review are clearly wrong in view of the whole record, and are hereby REVERSED, and petitioner is entitled to benefits, to all of which the respondent objects and accepts.

It is ORDERED that a certified copy of this Final Order be sent to the following counsel of record:

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1900 Kanawha Boulevard, East
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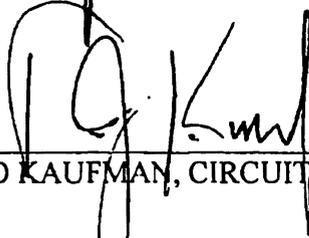
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ENTER this 10th day of September, 2013.



TOD KAUFMAN, CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF MORGAN, SS
I, CATHY S. GATOR, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10
DAY OF September 2013
Cathy S. Gator CLERK
CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA