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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: ADMINISTRATIVE APPEAL OF ELSIE SMITH
FROM TERMINATION OF EMPLOYMENT

No. 32285

EMPLOYEE'S BRIEF

KIND OF PROCEEDING

Elsie Smith, Clerk of Wood County Magistrate Court, was dismissed as a will and pleasure employee without cause on July 30, 2004, by Chief Judge Robert A. Waters. L.D. Egnor upheld the dismissal.

FACTS

Appellant had worked in the Judicial System in Wood County for over thirty-seven years. From 1967 through 1992, she was a Judge's secretary and from 1992 until her termination she was Magistrate Clerk. Until her termination, she had never been disciplined. Likewise, she had never been the subject of any performance review or improvement period. She claimed that she was discharged as a whistleblower for objecting to the Wood County Prosecutor's misuse of space, equipment and staff time in Wood County Magistrate Court. In fact, she was fired within two weeks after the Supreme Court, responding to her letter, directed removal of the Prosecutor's office from the Magistrate Court building. Judge Waters maintained that her discharge was due to interpersonal problems between Magistrate Court staff. L.D. Egnor found her dismissal to be justified and this appeal followed his decision.

ASSIGNMENT OF ERROR

Appellant's dismissal which followed within two weeks of a Supreme Court directive issued after Appellant wrote to the Supreme Court objecting to misuse of Magistrate Court resources was a violation of WV Code 6C-1-1.

ARGUMENT

W.Va. Code 6C-1-1 (whistleblower law) protects an employee from discharge for filing a report of wrongdoing or waste. In June of 2004, Mrs. Smith sent a letter to Justice Starcher detailing misuse of Magistrate Court resources by the Wood County Prosecutor's office. This letter resulted in a Supreme Court directive mandating removal of the Prosecutor's office from Magistrate Court office space. Approximately two weeks later, Mrs. Smith, who had never been disciplined, reprimanded or even directed to improve her performance, was discharged.

Clearly, County officials were unhappy with the directive to remove the Prosecutor's office from Magistrate Court. In fact, reconsideration by the Supreme Court was requested and to date, no effort has been made to comply with the directive to remove the office. Significantly, despite prior complaints by her, this was the first and only time the Supreme Court had acted to remedy the problem. Certainly, the short time period between the Supreme Court letter and Mrs. Smith's discharge raises a circumstantial inference that her discharge was improperly motivated.

Proof by a preponderance of evidence that an impermissible

reason was a motivating factor which led to the discharge of an employee requires finding for the Appellant unless Judge Waters proves by a preponderance of the evidence that he would have taken the same action in the absence of the impermissible motive. See Skaggs v. Elk Run Coal Company, Inc., 198 W.Va. 51, 479 S.E.2d 561 (1996). In that regard, Elsie Smith had never been subject to a performance review which is strongly recommended by the Judicial Personnel System Manual (J.P.S.M.), Section 2.4(F). She had never been disciplined or reprimanded during her long employment. She had never been requested to attend a meeting at Judge Water's Office prior to the letter being sent. After the letter was sent, Judge Waters told one Magistrate staff member that changes were going to be made at magistrate court.

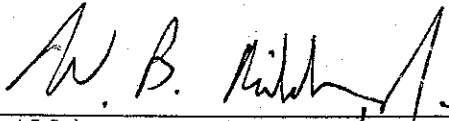
In this case, neither procedure for notifying the Supreme Court of a dismissal was followed. See J.P.S.M. Section 6.2. Moreover, Elsie Smith has had a long and unblemished employment record in the judicial system which has been found to be a factor in evaluating the level of discipline. See Buskirk v. Civil Service Commission of West Virginia, 175 W.Va. 279, 332 S.E.2d 579, (1985). In a closely analogous case, the discharge of a long-time public employed was overturned. Sloan v. Dept. of Health, 600 S.E.2d 554 (per curiam, 2004). In that case, an employee was discharged for allegedly mishandling evidence in a crime lab. However, the discharge occurred ten days after the employee had filed a grievance. The Court found the alleged reason to be a pretext and ordered reinstatement. The same result should follow in this case.

CONCLUSION

Appellant's termination should be reversed and she should be reinstated to her former position.

ELSIE SMITH, Appellant

By Counsel:



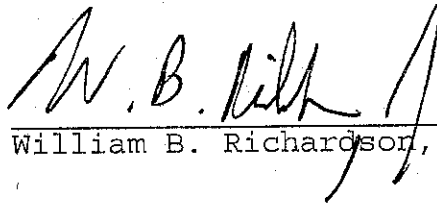
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing and hereto annexed Employee's Brief upon John Hedges and Allison Chambers, by mailing a true and exact copy thereof, via United States Mail, postage prepaid, to each, on this 3rd day of January, 2005.

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