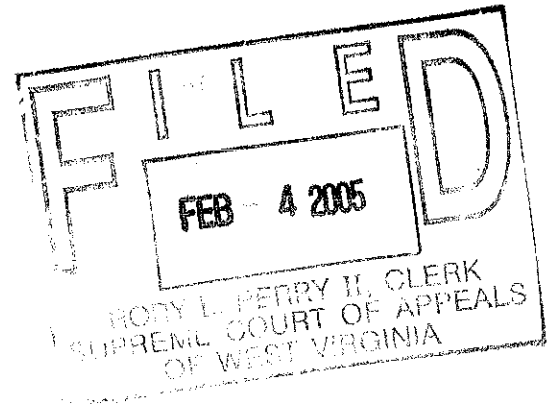


No. 32285
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

IN RE: Elsie Smith
Administrative Appeal Pursuant to Section
6.2 of the West Virginia Judicial
Personnel System Manual



BRIEF ON BEHALF OF EMPLOYER

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A. Nature of Proceedings Below

On July 30, 2004, Elsie Smith was terminated from her position as the Wood County Magistrate Clerk. This was a will-and-pleasure discharge carried out by Wood County Circuit Court Chief Judge Robert A. Waters under his authority as supervising employer of Mrs. Smith. Following her employment termination, Mrs. Smith requested a post-dismissal hearing pursuant to the applicable provisions of Section 6.2 of the *West Virginia Judicial Personnel System Manual* (hereinafter "*Judicial Personnel Manual*").

The post-dismissal hearing was held in Wood County on September 13, 2004, before the appointed hearing examiner, Senior Judge L. D. Egnor. On October 27, 2004, Judge Egnor issued his Findings of Fact, Conclusions of Law, and Recommended Decision to the Administrative Director's designee, Alison R. Chambers.¹ On November 1, 2004, having reviewed the matter, Deputy Director Chambers affirmed Judge Egnor's findings and the conclusion that the discharge of Elsie Smith as a will-and-pleasure employee did not violate federal or state law. Thereupon, Mrs. Smith submitted her appeal to this Court requesting administrative review. By order dated December 2, 2004, this Court granted (3-2) Mrs. Smith's petition for administrative review and scheduled the matter for briefing.

¹Due to prior communications in the matter, pursuant to Section 6.2(G) of the *Judicial Personnel Manual*, Acting Administrative Director Linda R. Artimez designated Deputy Director Chambers to decide the administrative appeal.

B. Standard of Review

This matter is before the Court as the culmination of the path for administrative review of a judicial employee's discharge. Under Section 6.2(G) of the *Judicial Personnel Manual*, if an employee's discharge is upheld following the administrative hearing, the dismissed employee may submit "a request for administrative review, on the record, by the Supreme Court." This provision further states that: "The Court may either grant or deny the review and may either uphold the dismissal or order reinstatement. Such Supreme Court administrative action will be final."

The appropriate standard for judicial review of a hearing examiner's decision under Section 6.2(G) pertaining to dismissal of a judicial employee would appear to be the analogous standard of review for administrative decisions under the Educational Employees Grievance Board (W. Va. Code § 18-29-1, *et seq.*). As this Court held in Syllabus Point 1 of Cahill v. Mercer County Bd. of Educ., 208 W. Va. 177, 539 S.E.2d 437 (2000):

Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*.

See also Syl. Pt. 1, Randolph County Bd. of Educ., 182 W. Va. 289, 387 S.E.2d 524 (1989)

(final order of hearing examiner based on findings of fact should not be reversed unless clearly wrong).

C. Statement of Facts

Elsie Smith was employed as the Clerk of the Wood County Magistrate Court beginning in 1992. Mrs. Smith, like all other staff in the State Judicial System, occupied her position as an at-will employee. The position of magistrate court clerk is under the direct supervision and control of the Chief Judge of the Circuit Court. In the Fourth Judicial Circuit, comprised of Wood and Wirt Counties, Circuit Judge Robert A. Waters has served as Chief Judge since 1997.

Chief Judge Waters discharged Elsie Smith from her employment as Wood County Magistrate Court Clerk on July 30, 2004. This employment termination was made at the conclusion of a meeting on that date between Chief Judge Waters and Mrs. Smith which took place in the Judge's office. Chief Judge Waters informed Mrs. Smith that she was being discharged based upon her will-and-pleasure status. Accordingly, no reason or cause was stated for her termination from employment.

Mrs. Smith thereafter made her request for her post-dismissal hearing under Section 6.2 of the *Judicial Personnel Manual*. Since Mrs. Smith's discharge was made on a will-and-pleasure basis (without cause), under Section 6.2(E), the hearing was for the limited purpose of attempting to show that the dismissal was contrary to federal or state law. Mrs.

Smith's allegation was that her dismissal was in violation of the State statutory provisions of the "Whistle-blower Law," codified at West Virginia Code § 6C-1-1 *et seq.* She contended that she was fired because she complained to the Supreme Court about the use of office space by the Wood County Prosecuting Attorney's Office in the Magistrate Court building.

Mrs. Smith was the sole witness testifying in her case-in-chief attempting to prove her claim of an unlawful discharge under the Whistle-blower statute. She testified that for several years she had complained to Chief Judge Waters; and that beginning as early as 2001 she also began complaining to the Supreme Court Administrative Office and to Justice Starcher about the problems she said arose out of prosecuting attorney staff handling magistrate court cases using an empty office in the magistrate court building.²

Mrs. Smith presented two exhibits in support of her whistle-blower claim. The first was a letter she wrote to Justice Starcher dated June 7, 2004, summarizing her ongoing complaints about the prosecutor's use of the office space in the magistrate court building. The second exhibit was a letter from Acting Administrative Director Linda R. Artimez to Chief Judge Waters dated July 13, 2004. This second letter confirmed a recent telephone call from Linda Artimez to Chief Judge Waters informing him that the Supreme Court, in

²In 2000, after one magistrate position was eliminated in Wood County under the statutory formula governing the number of magistrates serving in each county, the two-room office formerly occupied by that magistrate was freed up. The Wood County Prosecuting Attorney's Office obtained the consent of the building owner, the Wood County Commission, to use this office space in conjunction with prosecuting cases in magistrate court.

administrative conference, had decided that the prosecutor's office should not have dedicated space in the magistrate facility; but rather, that the two rooms of the unoccupied magistrate office should be utilized as conference rooms available for use both by prosecutors and other attorneys handling cases in the magistrate court.

Mrs. Smith did not present, through her own testimony or otherwise, any evidence that Judge Waters had ever chastised her, or voiced any criticism to anyone, about her complaints to him or to the Supreme Court regarding the prosecutor's presence in the magistrate building. During cross-examination, Mrs. Smith even acknowledged that when she presented specific problems relating to the prosecutor's presence in the magistrate building to Judge Waters, those problems were addressed.

In response to Mrs. Smith's claim of a retaliatory discharge for "whistle-blowing," Judge Waters defended his actions on two levels. First, through his own testimony and the testimony of five other witnesses, he refuted the allegation that Mrs. Smith's discharge was related to the issue of prosecutor space in the magistrate court building. Secondly, also to disprove the "retaliation" charge, through his testimony and that of several of the other witnesses, he provided detailed proof regarding when and why he arrived at the decision to exercise his authority to terminate Mrs. Smith's will-and-pleasure appointment.

Judge Waters testified that for the past several years, Mrs. Smith had indeed complained to him about problems she perceived arising from the prosecutor's use of office space in the magistrate court building. The Judge explained that whenever she raised a

specific problem, he would take action to address her concerns. For example, when Mrs. Smith complained about prosecutor staff using the magistrate court copy machine, at the Judge's request, the County Commission purchased another copy machine that was placed in the magistrate building for prosecutor use. Similarly, when Mrs. Smith complained about problems with the telephone system relating to use by prosecutor staff, a new telephone system was installed in the magistrate court building.

Judge Waters also testified that he was aware that Mrs. Smith was also directing her complaints on the matter to the Supreme Court. He never once chastised Mrs. Smith for raising her concerns with others at the Supreme Court. More to the point, by his own testimony and through the testimony of the Wood County Prosecuting Attorney Virginia Conley and County Commission President Richard Modesitt, it was clearly shown that Judge Waters was neither an advocate for or against the prosecutor's use of space in the magistrate court building. Judge Waters' conduct and actions at all times demonstrated that he acted in a neutral fashion to address any concerns among those using the magistrate court facilities that arose regarding this issue; and that he promptly brought those parties together to carry out the administrative directive from the Supreme Court once he was informed of it. Nothing Judge Waters did or said during this time period supports even an inference that he was angry or displeased with Mrs. Smith for reporting her concerns to the Supreme Court.

To further refute Mrs. Smith's allegations of an illegal motive for her discharge, Judge Waters presented substantial testimony showing why he decided to terminate her employment on July 30, 2004.

Three deputy clerks worked under Elsie Smith in the magistrate court clerk's office. All three deputy clerks testified in the hearing and described a highly stressful workplace, not arising mainly from their duties, but due to Mrs. Smith's erratic behavior and groundless accusations that one or another of the deputy clerks (whomever was the target of her disfavor at the time) had committed illegal acts in carrying out their duties. Judge Egnor's findings detail some of those incidents. Judge Waters, in his supervisory role as Chief Judge, had been aware of some of the problems created by Mrs. Smith with her deputy clerks. He also testified that at least one former deputy clerk left that office for another courthouse job due to wrongful accusations by Mrs. Smith and other stressful circumstances created by her.

Judge Waters addressed any problems arising from Mrs. Smith's behaviors when such matters were brought to his attention and his intercession was needed to resolve a particular issue in the clerk's office. However, it was not until the week of July 26-30, 2004 that he was made keenly aware that Mrs. Smith's erratic and accusatory behaviors had increased in the recent months to the point that a change was necessary in order to keep the magistrate clerk's office properly staffed and functioning. Judge Waters was on vacation that week but remained in the area. He received a telephone call one night from Magistrate Emily Bradley, who informed him of major problems in the clerk's office, and that at least the two most

experienced deputy clerks were prepared to quit due to Mrs. Smith's conduct creating a very hostile work environment. Magistrate Bradley asked Judge Waters to do something to resolve the matter right away.

The next evening, Judge Waters telephoned each of the three deputy clerks. One deputy stated things were so bad because of Mrs. Smith, she would cry on her way to work and again on her way home. The two other deputies who were planning to leave described the office situation as increasingly unbearable due to the climate of extreme stress brought about by Mrs. Smith's conduct.

On July 30, 2004, while still on vacation, Chief Judge Waters went to his office in order to call over Mrs. Smith to learn her view of the situation and make a decision about what should be done. When they met, Mrs. Smith provided her version of the circumstances and further said she wanted to fire one of the deputies. Upon hearing everything, Judge Waters came to a final decision and informed Mrs. Smith of her discharge from her will-and-pleasure employment.

The detailed testimony from Judge Waters and other witnesses, as determined by Judge Egnor sitting as hearing examiner, clearly refuted Mrs. Smith's unsupported accusation that the discharge was in "retaliation" for Mrs. Smith's complaints regarding the prosecutor's use of space in the magistrate court building. The history of that issue revealed that Judge Waters acted only in a neutral supervisory role when the prosecutor space issue

was brought up, and that he promptly acted upon the Supreme Court's administrative decision on the matter.

During the week leading up to Mrs. Smith's discharge, Judge Waters' only concern was to find an answer to an entirely separate question – keeping the magistrate clerk's office functioning. In the hearing, Judge Waters described the background of how Mrs. Smith's behaviors had gone beyond the regular clashing with magistrates and magistrate assistants, to a very pronounced set of problems with her own deputy clerks. Summarizing the reason for Elsie Smith's discharge, Judge Waters testified that: "In the past, things had been directed outside her office. But when it turned internal and all three of the Deputy Clerks were saying that the environment was intolerable and could not continue, I saw no choice but to make a change there."

D. Argument of Law

In her position as Wood County Magistrate Clerk, Elsie Smith served as an at-will employee under the supervision of Chief Judge Waters. As expressed in West Virginia Code § 50-1-8, the magistrate clerk is appointed by the chief circuit judge, and serves at the will and pleasure of the judge. In Section 1.3 of the *Judicial Personnel Manual*, will-and-pleasure employment is defined as: "A job status in which an employee is subject to dismissal at any time, without cause, by the employing authority."

It is well established that "the doctrine of employment at-will allows an employer to discharge an employee for good reason, no reason or bad reason without incurring liability

unless the firing is otherwise illegal under state or federal law.” Williams v. Precision Coil, Inc., 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995). This principle of law applies to non-civil service public employees who, like the at-will employees of a private-sector employer, serve at the will and pleasure of an appointing public official. See McClung v. Marion County Commission, 178 W. Va. 444, 367 S.E.2d 221 (1978). All judicial employees, whether employed in a statutory or non-statutory position, are will-and-pleasure employees. Section 6.2(A), *Judicial Personnel Manual*; W. Va. Code § 29-6-4(c)(1).

As her supervising employer, Chief Judge Waters could, therefore, dismiss Mrs. Smith for no cause, good cause or bad cause, so long as her dismissal did not violate federal or state law. Since she was dismissed on a no-cause basis, Mrs. Smith was not entitled to reinstatement or backpay unless she proved that her dismissal was actually for reasons impermissible under federal or state law. Section 6.2(E), *Judicial Personnel Manual*. With regard to Mrs. Smith’s contention that she was discharged in violation of the Whistle-blower Law, West Virginia Code § 6C-1-4(b) requires that: “An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction of the employee, had reported, or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.”

Mrs. Smith was the sole witness to testify in support of her whistle-blower claim alleging that her discharge was in reprisal for reporting “an instance of wrongdoing or

waste.” In her own testimony, she admitted that she had been complaining about the prosecutor space issue to the Supreme Court since as early as 2001. She had also presented similar complaints to Judge Waters. She further acknowledged in cross-examination that he took action on some of her concerns about the matter, such as having the County Commission provide a separate copy machine and a new telephone system.

More significantly, Mrs. Smith provided absolutely no proof, through her own testimony or otherwise, that Judge Waters chastised her or was in any way displeased with her for taking her complaints to the Supreme Court. There was never even an instance where Judge Waters voiced any criticism to anyone at the Supreme Court or anyone at the local level about Mrs. Smith’s complaints regarding the prosecutor’s use of space in the magistrate court building. Throughout the several years Mrs. Smith has complained about this situation, Judge Waters has endeavored to resolve her legitimate concerns impartially.

Mrs. Smith’s only evidence that even raises a suggestion that her complaints about the prosecutor space issue was the motivation for her discharge was the proximity in time between the Supreme Court’s administrative decision on the office space issue and her termination. This raised, at most, only a circumstantial inference of a relation between the two events. As Judge Egnor found and determined, however, this lone circumstantial inference did not meet Mrs. Smith’s statutory burden of proving by a preponderance of the evidence that Judge Waters fired her in retaliation for reporting her complaints about the matter to the Supreme Court.

Judge Egnor's determination on this evidentiary point is supported by a case decided under Pennsylvania's very similar Whistle-blower Act. In Gray v. Hafer, 168 Pa. Cmwlth. 613, 615 A.2d 221 (1994), the Court rejected the discharged state employee's argument that his petition stated a *prima facie* case under the Whistle-blower Act based upon the closeness in timing (approximately 2 weeks) between when his employer's attention was directed to his report of wrongdoing and when he was presented a letter of termination. The Court in Gray rejected this timing argument under the following reasoning:

To make out a cause of action under the Whistleblower Law . . . that person must make more than a general statement that a report was filed and, within a given amount of time, the employee was fired as a result. An employee who has been terminated based on a filed report and wants to base his or her complaint on their employer's violation under the Whistleblower Law must specify how their employer is guilty of waste and/or wrongdoing. They must also show by concrete facts or surrounding circumstances that the report led to their dismissal, such as that there was specific direction or information they received not to file the report or there would be adverse consequences because the report was filed. 168 Pa. Cmwlth. at 620, 651 A.2d at 225 (emphasis added).

Another decision directly supporting the conclusion that Mrs. Smith failed to prove her claim is West v. General Motors Corp., 469 Mich. 177, 665 N.W.2d 468 (2003). In West, the plaintiff was subjected to disciplinary action (and later discharged) for alleged overtime violations shortly after he reported an assault by a co-worker to the local police department. The Michigan Supreme Court held that the plaintiff failed to establish a *prima*

facie case under the state's Whistleblower Act. This conclusion was based upon the following observations and reasoning:

The most that plaintiff demonstrates here is that he was disciplined, and eventually discharged, after he reported to the police that Reeves had assaulted him. To prevail, plaintiff had to show that his employer took adverse employment action *because of* plaintiff's protected activity, but plaintiff has merely shown that his employer disciplined him *after* the protected activity occurred. Plaintiff had to demonstrate that the adverse employment action was in some manner influenced by the protected activity, but has failed to make such a demonstration. (emphasis in original.)

...
Although the employment actions about which plaintiff complains occurred after his report to the police, such a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action. Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed. Nguyen v. City of Cleveland, 229 F.3d 559 (C.A.6, 2000) (retaliation for claim of discrimination based on national origin); Scroggins v. Univ. of Minnesota, 221 F.3d 1042 (C.A.8, 2000) (retaliation for race-discrimination claim); Cooper v. North Olmsted, 795 F.2d 1265 (C.A.6, 1986) (retaliation for race- and sex-discrimination claims); Taylor v. Modern Engineering, Inc., 252 Mich.App. 655, 662, 653 N.W.2d 625 (2002) (retaliation for alleged whistleblower activity). Plaintiff must show something more than merely a coincidence in time between protected activity and adverse employment action. 469 Mich. at 185-86, 665 N.W.2d at 472-74.

Clearly, as determined by Judge Egnor, Mrs. Smith's limited circumstantial evidence failed to meet the burden of proof necessary to support her whistle-blower claim. But even if she had made a sufficient showing in her case-in-chief, it is equally clear that Judge

Waters successfully rebutted the allegations by presenting substantial and reliable evidence of the actual reason behind his decision to discharge Mrs. Smith on July 30, 2004.

As provided under the Whistle-blower Act: "It shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." W. Va. Code § 6C-1-4(c). This statutory defense parallels the evidentiary principles applicable to common law claims for retaliatory discharge. As the Court held in Syllabus Point 8 of Page v. Columbia Natural Resources, Inc., 198 W. Va. 378, 480 S.E.2d 817 (1996):

Once the plaintiff in an action for wrongful discharge based upon the contravention of a substantial public policy has established the existence of such policy and established by a preponderance of the evidence that an employment discharge was motivated by an unlawful factor contravening that policy, liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.

Under the findings made by Judge Egnor, he properly concluded that Judge Waters presented in his defense substantial, credible evidence of a separate and legitimate basis that led to his decision to terminate Elsie Smith's employment. The conduct of Mrs. Smith showed a pattern of unsupported accusations and interactions with the deputy clerks that fostered a climate of stress and turmoil in the magistrate clerk's office. When Magistrate Bradley called Judge Waters at his home during the week of July 26, 2004, it was reported

to him that the problems between Mrs. Smith and the deputy clerks had increased to the point that at least two of the deputies were prepared to resign. In response to this call, Judge Waters conducted a proper investigation involving all three deputies and Mrs. Smith. Based upon the testimony of all of the witnesses, Judge Egnor correctly determined there was ample proof that the extremely stressful workplace environment created by Mrs. Smith was the actual reason behind Judge Waters' decision to discharge Mrs. Smith.

It is necessary to point out that Mrs. Smith's brief attempts to make up for the lack of proof on her claim by mischaracterizing witness testimony. In Mrs. Smith's brief filed with this Court, referring to her June 7, 2004 letter to Justice Starcher, it is represented that: "After the letter was sent, Judge Waters told one Magistrate staff member that changes were going to be made at magistrate court." (Employee's Brief, at p. 3.) This is a gross mischaracterization of timeframe. Deputy Clerk Elaine Sanders testified that in the telephone call investigating the problems reported by Magistrate Bradley made by Judge Waters to Mrs. Sanders at her home (which was a call made during the week ending with Mrs. Smith's termination on July 30, 2004), Judge Waters indicated to her that there would be changes made, but did not elaborate. (September 13, 2004 Hearing Transcript, at p. 169.) The attempt in Mrs. Smith's brief to link this statement to a letter almost two months earlier is, to say the least, misleading.

Finally, it is noted that the brief filed by Mrs. Smith relies upon two *per curiam* decisions of the Court to support her argument that there was insufficient cause for her

termination.³ These cases are inapplicable to the issue at hand since both decisions dealt with *civil service* employees subject to discharge only upon proof of good cause. Mrs. Smith was a will-and-pleasure employee and was discharged on that basis. The underlying reason that led to her at-will discharge came into evidence only to rebut her allegations of an illegal cause. Judge Waters did not have to prove good cause. He only needed to rebut her unlawful discharge claim with proof of the actual reason. He did that; and although this showing did not have to rise to the “good” cause level in this case, it is submitted that the evidence presented would meet this standard.

E. Conclusion

As reflected in the record of the administrative hearing in this matter, Mrs. Smith failed to meet her burden of proof on her claim that for her dismissal was a retaliatory discharge in violation of the State Whistle-blower Act. Judge Egnor, sitting as hearing examiner, heard the testimony and weighed the credibility and probative value of all the evidence. His findings are properly afforded great deference. The proof adduced in the hearing fell far short of supporting Mrs. Smith’s charge that Judge Waters dismissed her unlawfully. Moreover, there was substantial, reliable evidence upon which to conclude that when Judge Waters, in his supervisory role as Chief Judge, was confronted with the pronounced set of internal problems affecting the basic functioning of the magistrate clerk’s office, he made his decision to dismiss Elsie Smith was on that basis alone.

³Buskirk v. Civil Service Commission, 175 W. Va. 279, 332 S.E.2d 579 (1985); Sloan v. Dept. of Health, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Based upon the foregoing reasons, Chief Judge Waters respectfully requests that this Court affirm the findings and conclusions of the Hearing Examiner and Administrative Office, and uphold the dismissal of Elsie Smith.

CHIEF JUDGE ROBERT A. WATERS

By Counsel



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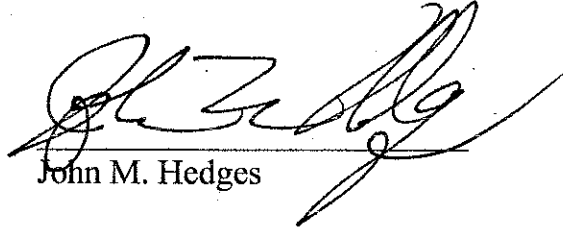
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CERTIFICATE OF SERVICE

I, John M. Hedges, do hereby certify that I served a true and correct copy of the foregoing *Brief on Behalf of Employer*, upon William B. Richardson, Jr., P.O. Box 266, Parkersburg, WV 26102, by U.S. Mail, this 3rd day of February, 2005.



John M. Hedges