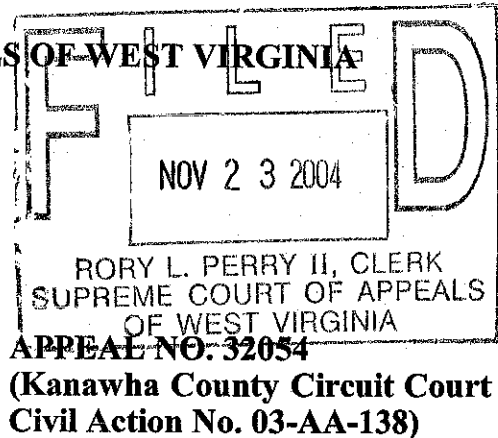


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**HERBERT J. THOMAS MEMORIAL
HOSPITAL,**

Appellant,



v.

**BOARD OF REVIEW OF THE WEST VIRGINIA
BUREAU OF EMPLOYMENT PROGRAMS, JAMES G.
DILLON, as Chairman thereof, JAMES SAGO and CAROLE
A.L. BLOOM, as members thereof, GREG BURTON,
COMMISSIONER OF THE BUREAU OF EMPLOYMENT
PROGRAMS, JAMES M. KIRK**

Appellees.

APPELLANT'S BRIEF

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November 23, 2004

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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal of an unemployment compensation benefits decision. The claimant, James M. Kirk ("the claimant" or "Mr. Kirk"), was employed as a maintenance person for the appellant, Herbert J. Thomas Memorial Hospital ("Appellant" or "Thomas"). During his employment with Thomas, Mr. Kirk removed many food items from the hospital cafeteria without paying for them. When Thomas learned of these thefts, it terminated Mr. Kirk's employment effective April 27, 2003. Mr. Kirk subsequently filed for unemployment compensation benefits. On May 13, 2003, the Deputy Commissioner ruled that the claimant was not entitled to receive unemployment benefits because he had committed theft, which is expressly listed as a form of gross misconduct under West Virginia Code § 21A-6-3(2) (2002).

Mr. Kirk appealed the Deputy's decision and, on June 4, 2003, a hearing was held before Administrative Law Judge Truman L. Sayre, Jr., at which time all parties were present and afforded the opportunity to present evidence. In his subsequent decision, Judge Sayre affirmed the Deputy's decision, similarly ruling that the claimant's theft was an act of gross misconduct under West Virginia Code § 21A-6-3(2).

The claimant then appealed the ALJ's decision to the Board of Review of the West Virginia Bureau of Employment Programs ("the Board"), which heard arguments on July 29, 2003. Upon the evidence of record, as well as the consideration of the arguments before them, the Board rendered an opinion on August 11, 2003, reversing the decision of ALJ Sayre. Thomas appealed to the Circuit Court of Kanawha County, asserting that the Board's decision was erroneous because it ignored the well-settled West Virginia law that theft automatically equals gross misconduct. Notwithstanding this argument, the Circuit Court affirmed the

Board's decision and Thomas now asks this Honorable Court to reverse the lower court's decision. This brief will demonstrate that Mr. Kirk committed theft, as defined by West Virginia law; that theft is automatically "gross misconduct" under West Virginia Code § 21A-6-3(2); and that the Board of Review and Circuit Court of Kanawha County incorrectly concluded that the theft in this case did not constitute gross misconduct.

II. STATEMENT OF THE RELEVANT FACTS

Mr. Kirk worked as a maintenance person for Thomas from January 5, 1995 to April 24, 2003. (Board of Review Decision, p. 1.) He worked primarily midnight shift. (Transcript of Administrative Law Judge Hearing, p. 12.) During his employment at Thomas, Mr. Kirk regularly stole food from the hospital's cafeteria. Sometimes, he would enter the locked cafeteria at night and remove food. (Tr. at 32.) On other occasions, he would take meals from the cafeteria without paying the cashier. (Tr. at 32.) In fact, according to Mr. Kirk's own witness, Dennis Wright, Mr. Kirk only paid for his cafeteria meals about five times in five years. (Tr. at 31.) Mr. Kirk admits that he committed theft. "Yes, I mean, stealing is stealing. I'll agree with that." (Tr. at 28.) And, importantly, there is no evidence of record that any supervisory personnel knew of the theft until April of 2003.

At that time, Marybeth Smith, Thomas' Director of Human Resources, learned for the first time that Mr. Kirk had been taking food from the cafeteria without paying for it. (Tr. at 12.) During this same time period, Mr. Kirk had been having performance-related problems. (Tr. at 13.) Ms. Smith, along with Frank Chambers, Assistant Director of Plant Operations and Security, called a meeting with Mr. Kirk in order to discuss these performance issues. (Tr. at 13.) Ms. Smith also intended to talk to the claimant about entering the cafeteria and removing food items. (Tr. at 13.) During the course of this meeting, however, the

claimant actually admitted that he had been taking food from the cafeteria. (Tr. at 13.) Ms. Smith, shocked by this admission, informed Mr. Kirk that she would need to talk to the cafeteria cashier, Donna Breece, before making a final determination regarding discipline. (Tr. at 14.) Ms. Smith learned from Ms. Breece that Mr. Kirk had already met with Ms. Breece and asked her to lie for him. (Board Decision at 1; Tr. at 14, 48.) According to Ms. Breece:

I was cutting desserts and he came in the cafeteria where I was and asked me to . . . he said he was getting fired and I had to tell them that he paid for stuff that he took out of the cafeteria. I told him I couldn't do it. He said I had to. He has kids and he can't lose his job and I needed to tell them that he paid for everything. I just had to and he begged me, and he said, 'What if it was your daughter?' He said, 'I need my job. I've got kids.' And I told him I couldn't do it.

(Tr. at 48.) Thus, Ms. Breece refused to lie for the claimant. (Tr. at 48.) After speaking with Ms. Breece, hospital management decided to terminate Mr. Kirk. According to Ms. Smith, "we really didn't have a choice but to terminate [him]." (Tr. at 15.) The official cause of Mr. Kirk's termination was theft. Although he had been disciplined in the past for performance issues, these issues did not play a role in the decision to terminate him.

III. ASSIGNMENT OF ERROR

The Circuit Court erred by ruling that Mr. Kirk's theft of food from the hospital cafeteria did not constitute gross misconduct because West Virginia Code § 21A-6-3(2) expressly states that theft is gross misconduct.

IV. POINTS AND AUTHORITIES

Theft constitutes gross misconduct and disqualifies a claimant from receiving unemployment compensation benefits under West Virginia law. West Virginia Code § 21A-6-3(2); *Shively v. Gatson*, 408 S.E.2d 610 (W.Va. 1991).

V. DISCUSSION OF LAW

This Court is subject to the same standard of review as the Circuit Court. “Findings of fact by the Board of Review of the West Virginia [Bureau of Employment Programs], in an unemployment compensation case, should not be set aside unless such findings are plainly wrong. . . .” Syllabus point 2, in part, *Kisamore v. Rutledge*, 276 S.E.2d 821 (W.Va. 1981). This doctrine does not apply to the Board’s conclusions of law. Syllabus Point 1, *Butler v. Rutledge*, 329 S.E.2d 118 (W.Va. 1985). Thomas does not dispute the Board’s most significant finding of fact -- that the claimant removed food from the hospital cafeteria without paying for it. However, in light of this finding, Thomas does challenge the Board’s and Circuit Court’s *legal* determination that the claimant’s actions did not constitute gross misconduct under West Virginia law.

The purpose of the West Virginia Unemployment Compensation Act is to reduce the hazards of unemployment. W.Va. Code § 21A-1-1. The purposes of the Act are only served when compensation is awarded to an available and willing worker who, against his will and contrary to his choice, is compelled to leave his employment. *Lee-Norse Co. v. Rutledge*, 291 S.E.2d 477 (W.Va. 1982). The protections of the Act are partially or totally lost where an employee causes his own termination through acts of misconduct or gross misconduct. Under West Virginia Code § 21A-6-3, an employee guilty of misconduct is barred from receiving benefits for a period of six weeks. The Supreme Court of Appeals of West Virginia has defined misconduct as:

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.

Federoff v. Rutledge, 332 S.E.2d 855, 858 (W.Va. 1985); *Kirk v. Cole*, 288 S.E.2d 547, 549 (W.Va. 1982).

An employee guilty of gross misconduct is barred from receiving unemployment benefits until such time as he has worked at a new job for 30 days. W.Va. Code § 21A-6-3(2).

The statute states that gross misconduct includes any of the following:

Misconduct consisting of willful destruction of his employer's property; assault upon the person of his employer or any employee of his employer; if such assault is committed at such 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, or being under the influence of any controlled substance while at work; arson, theft, larceny, fraud or embezzlement in connection with his work; or any other gross misconduct . . . [which] shall include, but not be limited to any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from such act or acts.

W.Va. Code § 21A-6-3(2) (emphasis supplied).

Thus, the statute specifically lists theft as an act of gross misconduct. Accordingly, the only way the Board of Review could justify its decision was to rule that the claimant's actions did not constitute theft. The Board noted that other employees took food without paying for it and that the cafeteria cashier gave away food for free. "The Board does not find that the claimant committed theft when he simply joined with other hospital workers in accepting some free items from the cafeteria staff." (Board Decision at 2.) The Circuit Court upheld this finding, stating:

The Court finds that James Kirk's actions do not rise to the level of gross misconduct, especially considering the fact that it was a regular practice for hospital employees to occasionally remove food without paying and that the cafeteria cashier gave away free items to staff.

(Final Order, p. 2.) Thus, both the Board of Review and Circuit Court found that the claimant removed items from the cafeteria without paying for them; however, both tribunals found that the acts did not constitute theft because other employees engaged in the same behavior. While Thomas does not dispute the factual finding that the claimant removed items from the cafeteria without paying for them, Thomas asserts that both the Board of Review and Circuit Court committed reversible *legal* error in refusing to hold that the claimant's actions constituted theft under West Virginia law.

In West Virginia, to prove an act of theft, or larceny, "it must be shown that the defendant took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof." Syl. pt. 3, *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981). All of these elements are met in the present case. The claimant admits that he removed food from the cafeteria against the will of Thomas and with the intent to permanently deprive Thomas of the ownership thereof. According to his own testimony, "stealing is stealing." (Tr. at 28.) Thus, the record in this case supports the legal conclusion that Mr. Kirk's actions constituted theft, and therefore gross misconduct, under West Virginia law. As such, the decision of the Circuit Court should be reversed.

This Court has had the opportunity to consider a case similar to this one. In *Shively v. Gatson*, 408 S.E.2d 610 (W.Va. 1991), the claimant worked for Tri-State Greyhound Park. *Id.* at 611. The claimant stole a winning ticket valued at \$21.50. *Id.* As a result, the claimant was terminated. The ALJ in that case determined that the "facts in this case

lead to the inescapable conclusion that the claimant was guilty of theft as provided in the gross misconduct provision of [W.Va. Code § 21A-6-3(2)].” The Board of Review, the Circuit Court, and this Court all affirmed. This Court noted that “the appellant introduced no evidence to challenge the allegation of theft.” *Id.* at 613. Thus, this Court held that the theft of \$21.50 constituted gross misconduct under West Virginia law and the claimant’s disqualification from benefits was upheld.

In the present case, the claimant not only failed to present evidence to refute the hospital’s contention that he committed theft, he admitted the wrongdoing. And, like *Shively*, the present case involves items of relatively minimal value. As this Court correctly held in *Shively*, however, the value of the stolen property is irrelevant. Theft always equals gross misconduct. The Circuit Court did not even mention the *Shively* decision in its two page order. Instead, the Circuit Court, like the Board of Review, attempts to rationalize its decision by noting that other employees stole from the cafeteria. This logic fails as a matter of law for several reasons.

First, under the Circuit Court’s analysis, it is perfectly legal to join others in stealing or to accept stolen goods from another person. Thomas respectfully asserts that, regardless of what other employees did, the claimant plainly committed theft under West Virginia law. Thus, the Circuit Court cannot legally justify its holding simply by pointing out the fact that other employees had engaged in similar behavior. The logical extension of such a holding is that employees can commit any illegal act they wish against their employer so long as other employees are committing similar acts. While the Circuit Court may not have intended such a result, it is the only logical reading of the court’s ruling.

Second, the Circuit Court implies that the taking of food was somehow condoned by Thomas by stating that it was a "regular practice." In reality, Mr. Kirk introduced absolutely no evidence at the ALJ hearing that any supervisor at Thomas knew of the thefts until April 2003, which is when the claimant was terminated. Thus, although multiple employees may have stolen food, the tribunals below could not have found that the thefts were somehow condoned or ignored by Thomas. Thus, these other so-called thefts are irrelevant, as a matter of law, to the proper determination of this case.

Finally, the Circuit Court ignore the instances where the claimant went into the locked cafeteria and removed food without anyone's knowledge. (Tr. at 32.) Even if the claimant did not commit theft when he "joined other employees" in taking free meals from the cashier, he certainly committed theft when he entered a locked cafeteria at night and removed food items. The claimant admits as much. He admits what he did was "wrong" (Tr. at 57) and that "stealing is stealing" (Tr. at 28).

In summary, this Court need only answer a series of simple questions to make a determination in this case. 1.) Did the claimant take food from the cafeteria without paying for it? [Yes. He admits it and the Board of Review and Circuit Court both found this to be true.] 2.) Did any supervisory employee at Thomas authorize the removal of the food? [No. There is no evidence of record to indicate such.] 3.) Do the claimant's actions meet the legal definition of "theft?" [Yes, the claimant "took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof."] 4.) Does theft constitute "gross misconduct?" [Yes. *See* W.Va. Code § 21A-6-3(2).] 5.) Is an employee who is discharged for gross misconduct eligible for unemployment compensation benefits? [No.]

VI. RELIEF PRAYED FOR

Based on the foregoing, the appellant respectfully requests that this Court reverse the decision of the Circuit Court and hold that James Kirk is ineligible for unemployment compensation benefits due to gross misconduct.

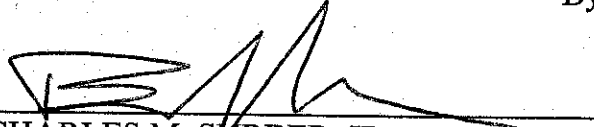
VII. REQUEST FOR ORAL ARGUMENT

Counsel for the appellant respectfully requests oral argument in this case.

Respectfully submitted,

**HERBERT J. THOMAS MEMORIAL
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By Counsel



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HOSPITAL,

Appellant,

APPEAL NO. 32054
(Kanawha County Circuit Court
Civil Action No. 03-AA-138)

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BOARD OF REVIEW OF THE WEST VIRGINIA
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A.L. BLOOM, as members thereof, GREG BURTON,
COMMISSIONER OF THE BUREAU OF EMPLOYMENT
PROGRAMS, JAMES M. KIRK

Appellees.

CERTIFICATE OF SERVICE

I, Brian J. Moore, counsel for Appellant Herbert J. Thomas Memorial Hospital do hereby certify that service of the foregoing *APPELLANT'S BRIEF* has been served upon Appellees by mailing a true and exact copy thereof in the United States mail, postage prepaid, to each of the following:

James M. Kirk
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on this 23rd day of November, 2004.


BRIAN J. MOORE (WV Bar #8898)