No. 31673 – Betty J. Gulas v. Infocision Management Corporation

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

Class actions are, in a word, intimidating. They are the long-distance marathons of the legal world. They are expensive, time-consuming, and difficult to manage.

They are also an indispensable tool for litigants, plaintiffs and defendants alike, to "secure the just, speedy, and inexpensive determination" of many actions. Rule 1, *West Virginia Rules of Civil Procedure*.

When employees sue a company for some wrongdoing by the company, they often find that the focus is on themselves. Questions are raised as to whether the plaintiff was a good employee or whether the plaintiff is believable on cross-examination. Oftentimes, the company can find some "dirt" so it can smear and intimidate the plaintiff or say, years after the plaintiff left the company's employ, that it would have fired the plaintiff anyway had the "dirt" been discovered earlier.

Class litigation by a group of employees, on the other hand, is focused just as relentlessly on the defendant. This is, in large part, why corporate defendants despise class actions.

But the bigger the class, the greater the likelihood that the defendant will argue that there is no common problem across the system. Defendants will argue, as they did in this case, that each plaintiff's case is different. Defendants will take the position that each

employee had a different contract, a different manager, or worked in different departments or different sites.

Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member's case. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on.

The test for the judge, though, is to step back and look at the similarities in class members. Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a "class" of oak trees. So, on remand, the judge in the instant case should do the same: focus on the class members and find their similarities. Assess the employees of defendant Infocision and determine their similarities. If these employees had a contract (which is hotly disputed by the employer), and that contract contained a similar term that was repeatedly (but not necessarily always) breached by the employer, it may be more expeditious for the circuit court to certify a class, and try once and for all that contract issue.

Likewise, if Infocision had a pattern and practice of violating the State's wage payment and collection laws, it may be more fair to both the employer and the employees for the circuit court to resolve that question in one proceeding, and then decertify the class for resolution of each employee's individual damages.

Creativity and determination by a circuit judge are key to the fair resolution of an action such as the one at bar, because the damages suffered by the plaintiffs are likely to be small but the cost of resolving the plaintiffs' legal contentions, for both plaintiffs and defendants alike, is likely to be great. The procedures available to a circuit court under Rule 23 of the *Rules of Civil Procedure* are much more effective tools for reaching a just, speedy, and inexpensive determination of the issues raised. The alternative – dozens if not thousands of individual trials by each plaintiff – would likely overwhelm the limited resources of the court and the parties.

I therefore respectfully concur.