No. 30248 - State of West Virginia ex rel. The Ogden Newspapers, Inc., a West Virginia corporation, dba The Journal Publishing Company, a West Virginia corporation v. Honorable Christopher C. Wilkes, Judge of the Circuit Court of Berkeley County, and Richard W. Shaffer

FILED
July 2, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 3, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
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Starcher, Justice, concurring:

I concur with the majority opinion and write separately to emphasize several points.

First, we are reviewing a decision of a lower court that specifically found, after a careful review of the record, that the respondents' prior legal work for the petitioners was not substantially related to the instant case. Although this finding should be entitled to a measure of consideration and deference, the dissent simply ignores this principle.

Second, the majority opinion properly concludes that the passage of time is a relevant *factor* for a court to consider in passing on a disqualification motion. This means that the fact of the partial disqualification in *Ogden I* is not *per se* controlling. The dissent does not dispute the principle that the passage of time may be a permissible factor, but goes on to ignore this principle as well.

Third, the dissent suggests that there have been no important changes in the law of employment discrimination since the decision in *Ogden I.* I beg to differ. To cite only one example, in *Stone v. St. Joseph's Hospital*, 208 W.Va. 91, 538 S.E.2d 389 (2000), we set

forth an independent approach to the determination of who is afforded protection by our state law against handicap discrimination. In the instant case, the evidence (under seal) of the respondents' prior research for the petitioner showed that what the respondents worked on was earlier federal law in this area that is essentially inapplicable or obsolete in West Virginia. The dissent ignores this fact.

Fourth, the majority opinion's discussion ably shows why "playbook" knowledge about a former client is not necessarily disqualifying. The dissent does not dispute this showing, nor the applicable authorities -- yet the dissent in fact principally focuses on the "playbook" aspect of the petitioners' arguments. Why? Because there is *no* showing of *any pertinent confidential information* that the respondents gained in their prior association with the petitioners.

Finally, the ink on *Ogden I* is ten years old. That ink is fully dry.

Today's decision is based on new facts, and today we write with new ink, to do justice between these parties in the instant case.

Accordingly, I concur.