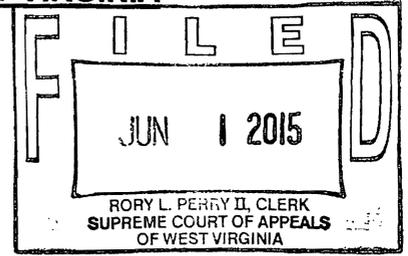


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Julie Conrad,
Plaintiff Below, Petitioner,**



v.

CASE NO.: 14-1262

**The Council Of Senior Citizens Of
Gilmer County, Inc.,**

**(Gilmer County Circuit Court Civil
Action 14-C-2)**

Defendant Below, Respondent.

PETITIONER'S/APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR ONE

The Court erred in granting the Defendant/Respondent's Motion to Dismiss on the issue of wrongful discharge in violation of public policy.

ASSIGNMENT OF ERROR TWO

The Court erred in failing to recognize a public policy in West Virginia of maintaining a safe working environment.

ASSIGNMENT OF ERROR THREE

The Court erred in misapplying the negligence standard to a wrongful discharge in violation of public policy claim.

STATEMENT OF THE CASE

The Council of Senior Citizens of Gilmer County, Inc. hired Julie Conrad on February 8, 2002, as a homemaker. Appendix Pg. 4-5. Ms. Conrad always performed her job duties in a satisfactory and/or excellent manner. Appendix Pg. 4-5. Beginning on January 31, 2013, Ms. Conrad began to make Complaints to her supervisor that she did not feel safe in her current placement location and could no longer work in said placement because the client for which she was providing homemaking services had a son that made the working environment hostile and unsafe by flattening Ms. Conrad's tires, vandalizing her vehicle and blocking the driveway so that Ms. Conrad could not come and go to and from the work site. Appendix Pg. 5. Despite Ms. Conrad's complaints regarding safety, her supervisor directed her to "stick it out" Appendix Pg. 5. Plaintiff felt that she could not work in the unsafe condition and had no other choice but to resign if her employer would not change her work site location.

On January 8, 2014, Plaintiff filed her verified Complaint in this matter alleging (1) Tort of outrage, (2) Violations of Employee Handbook and/or Manual and (3) Wrongful Discharge in Violation of Public policy. Appendix 4-9. Defendant, on the 14th day of February 2014, filed a Motion to Dismiss. Appendix 12-30. Attached to the Motion were several outside documents. Appendix Pg. 31-37. A timely response to the Motion to Dismiss was filed by the Plaintiff. Appendix Pg. 48-54. There was a hearing on the motion on April 14, 2014, before the Honorable Judge Alsop of the Gilmer County Circuit Court. Appendix Pg. 76-99. At the conclusion of the hearing, the Court ordered that the Plaintiff be permitted to file an Amended Complaint. Appendix Pg. 95-96, 125.

Plaintiff filed an amended complaint that only included claims for wrongful discharge in violation of public policy and tort of outrage. Appendix Pg. 101-106. Defendant again filed a Motion to Dismiss the Amended Complaint. Appendix Pg. 107-124. Plaintiff responded to the Motion via a timely written response. Appendix Pg. 129-135. The Court held a second hearing on August 11, 2014. Appendix Pg. 152-165.

On October 28, 2014, the Court entered an order granting Defendant's Motion to Dismiss Plaintiff's Amended Complaint. Appendix Pg 166-181. The Court held that there was not a duty by the Defendant employer to remedy an unsafe working environment created by a third party. *Id.*

SUMMARY OF ARGUMENT

Petitioner/appellant was constructively discharged after she refused to work in an unsafe working environment. There is a public policy in the State of West Virginia promoting safe working environments. Appellant made viable claims for Wrongful Discharge in violation of public policy and tort of outrage and the same was improperly dismissed by the Court. The Court applied the incorrect legal standard in dismissing the case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule 19(a) (1) and Rule 20(a) (2) of the Revised Rules of Appellate Procedure, the Plaintiff-Appellant believes that oral argument is necessary in this matter and would be helpful to the Court.

ARGUMENT

ASSIGNMENT OF ERROR ONE

The Court erred in granting the Defendant/Respondent's Motion to Dismiss on the issue of wrongful discharge in violation of public policy.

The law in West Virginia is well established regarding Motions to Dismiss pursuant to Rule 12(b) (6). Determining actions on the merits is preferred and therefore, motions to dismiss for failure to state a claim are to be viewed with disfavor and rarely granted. *Mandolitis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978); *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E. 2d 207(1977). The purpose of a Motion to Dismiss is to test the formal sufficiency of the Complaint and to determine whether Plaintiff is entitled to offer evidence to support claims set forth in the Complaint. *Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000); *Dimon v. Mansy*, 198 W.Va. 404, 79 S.E.2d 339 (1996). A Court may not dismiss a claim because it merely doubts Plaintiff will prevail. *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 655 S.E.2d 509 (2007).

If the Complaint states allegations, which if proven will provide a basis of recovery, then the motion must be denied. *Kopelman and Associates, L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996). The Court shall construe the Complaint in a light most favorable to the Plaintiff and **the allegations are to be taken as true** in examining a Motion to Dismiss. *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487,

655 S.E.2d 509, (2007); *Cantley v. Lincoln County Com'n*, 221 W.Va. 468, 655 S.E.2d 490 (2007). *Wiggins v. Eastern Associated Coal Corp.*, Syl. Pt. 1, 178 W.Va. 63, 357 S.E.2d 745 (1987). The Complaint should not be dismissed unless it appears **beyond doubt** that the Plaintiff can prove no set of facts to support his claim which would entitle him to relief. *Id.* If the Complaint states a claim for which relief may not be granted under ANY legal theory, only then should the motion be granted. *Id.* The burden of the Plaintiff in refuting a motion to dismiss for failure to state a claim is a light one. *McCormick v. Walmart Stores*, 215 W.Va. 679, 600 S.E.2d 576, (2004).

Only matters contained in the pleadings may be considered in connection with such a motion. *Stemple v. Dobson*, 184 W.Va. 317, 400 S.E.2d 561 (1990); *West v. National Mines Corp.*, 168 W.Va. 578, 265 S.E.2d 670 (1981); *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207, (1977); *Barker v. Traders Bank*, 152 W.Va. 774, 166 S.E.2d 331, (1969); *U.S. Fidelity & Guaranty Co., v. Eades*, 150 W.Va. 238, 144 S.E. 2d 703, (1965).

A Circuit Court in weighing a motion to dismiss must view all facts in a light most favorable to the non moving party and may only grant the motion to dismiss if it appears beyond doubt that Plaintiff cannot prove any set of facts in support of a claim which would entitle the Plaintiff to relief. *State ex rel McGraw v. Scott Bunyan Pontiac Buick, Inc.*, 194 W.Va. 770, 775-776, 461 S.E.2d 516 (1995). The standard of review for the appellate court in reviewing a Circuit Court's ruling on a motion to dismiss is de novo. *Id.* at page 775. An appellate court in reviewing a Circuit Court's order granting a motion to dismiss is limited to sufficiency of the Complaint and thus must view as true all pled

facts and must draw all reasonable inferences in favor of the dismissed party. *Id* at page 775-776.

West Virginia provides for a common law action for wrongful termination in violation of public policy. This cause of action was defined in *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270, Syl. Pt. 1 (1978), as follows:

The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.

A common law claim for wrongful discharge follows the legal rules relating to tort damages and also allows a claim for damages due to intentional infliction of emotional distress, also known as tort of outrage. *Wiggins v. Eastern Associated Coal Corp.*, Syl. Pt. 3, 178 W.Va. 63, 357 S.E.2d 745 (1987).

It is a fundamental right of an employee in West Virginia "not to be the victim of a 'retaliatory discharge,' that is, a discharge from employment where the employer's motivation for the discharge is in contravention of a substantial public policy" *Tierman v. Charleston Area Medical Center*, 203 W. Va. 135,142, 506 S.E.2d 578 (1998) (citing *McClung v. Marion County Commsn.*, 178 W. Va. 444 at 450 (1987)).

"The threshold issue in any wrongful discharge case is whether the plaintiff engaged in an act that is protected by a substantial public policy." *Kanagy v. Fiesta Salons, Inc.*, 208 W. Va. 526 at 541, 541 S.E.2d 616 (2000). To determine whether there has been a violation of a public policy, "courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or

regulatory provision or scheme.” *Tiernan*, 203 W. Va. at 140-141 (1998).

The West Virginia Supreme Court of Appeals has said the following about a claim of constructive retaliatory discharge.

Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish the retaliatory discharge. In addition, the employee must prove that the intolerable conditions that caused the employee to quit were created by the employer and were related to those facts that gave rise to the retaliatory discharge.

Love v. Georgia Pacific Corp., 209 W. Va. 515 at 520, 555 S.E.2d 51 (2001) (citing *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W. Va. 144 at 423 (1992)).

Essentially, in order to show constructive retaliatory discharge, a Plaintiff must be able to show a violation of a substantial public policy, followed by intolerable conditions, so intolerable that a reasonable person would be compelled to quit. These intolerable conditions must be created by the employer and related to the facts that give rise to the retaliatory discharge. A Plaintiff must establish “that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit” in order to establish constructive discharge. *Id.* “It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.” *Id.*

Reporting and refusing to work in unsafe working conditions is certainly an activity protected by West Virginia public policy as later discussed. Plaintiff alleges in her complaint that she was discharged after being directed to work in an unsafe working

condition, which she refused. These conditions included physical threats, confinement and vandalism of her property. No reasonable person would be able to work on said conditions. This is the exact scenario anticipated by the common law ruling in *Harless*.

In the instant case, Plaintiff alleges that she was given no other choice from her employer than to work in an unsafe environment and therefore was constructively discharged. Although, the Defendant did not create the unsafe working condition, it created the requirement for Plaintiff to be required to work in said condition. As hereinafter set forth, there is a public policy in the State of West Virginia of safe working environments as well as employers not directing employees to work in conditions that are known to be unsafe. Pursuant to the earlier cited case law, presuming these allegation are true as alleged, Plaintiff filed a Complaint alleging valid causes of action. Therefore, the trial court erred in failing to use the applicable legal standards regarding Motions to Dismiss and in granting Defendant's Motion to Dismiss.

ASSIGNMENT OF ERROR TWO

The Court erred in failing to recognize a public policy in West Virginia of maintaining a safe working environment.

In order to identify what constitutes a substantial public policy the Court looks to established precepts in the Constitution, legislative enactments, legislatively approved regulations and judicial opinions. *Birthisel v. Tri-Cities Health Services Corp.*, Syl. Pt.2, 188 W.Va.371, 424 S.E.2d 606 (1992). The West Virginia Supreme Court of Appeals has previously indicated that the notion of public policy is “nebulous” and hard to define. *Wounaris v. West Virginia State College*, 214 W.Va. 241, 588 S.E.2d 406 (2003) , citing

Kanagy v. Fiesta Salons, Inc, 208 W.Va. 526, 529, 541 S.E.2d 616 (2000) and *Yoho v. Tri-angle PWC, Inc*, 209,175 W.Va. 556, 561, 336 S.E.2d 204 (1985).

Because the court looks to the established precepts in the Constitution, legislative enactments, legislatively approved regulations and judicial opinions to determine the public policy of the State of West Virginia W.V. Code § 21-3-1 supports the conclusion that it is the clear public policy of West Virginia that employer must provide reasonable safe environments for workers.

West Virginia has a substantial public policy in promoting a safe working environment. This is reflected in West Virginia Code § 21-3-1 which states that “Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged.” The statute goes on to require employers to “furnish employment which shall be reasonably safe for the employees therein engaged... and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees.”

Therefore, the Court erred in failing to hold that the State of West Virginia has a public policy of promoting safe working environments and not permitting employers to direct employees to work in conditions that are known to be unsafe.

ASSIGNMENT OF ERROR THREE

The Court erred in misapplying the negligence standard to a wrongful discharge in violation of public policy claim.

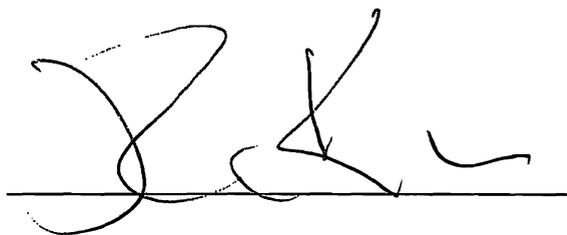
In the instant case, the Appellant in no way alleged any type of negligence claim in her Complaint. However, the Court in granting Defendant's Motion to Dismiss analyzed the elements of a negligence cause of action. Appendix Pg. 171 The Court held that wrongful discharge is a negligence claim and that the element of Duty was not properly analyzed by either of the parties. Appendix Pg. 170-173. This is clear evidence that the Court failed to understand Appellant's legal causes of action and apply the correct legal standard. Although the Court attempts to rationalize why the Defendant should not have a duty to protect the Plaintiff from third parties, the Court fails to understand that the statute as previously discussed prohibits employers from directing employees to work in conditions the employer knows to be unsafe and hazardous, regardless of who is creating the hazard.

CONCLUSION

Plaintiff filed a timely complaint alleging legally valid causes of actions. The Gilmer County Circuit Court erred in granting Defendant's Motion to Dismiss. The Court failed to properly evaluate the Complaint, viewing the allegations of Plaintiff as true and giving Plaintiff all inferences. For these reasons, Appellant/Plaintiff respectfully requests that the West Virginia Supreme Court of Appeals reverse the decision of the Gilmer County Circuit Court and remand this case for further proceedings.

Respectfully submitted,

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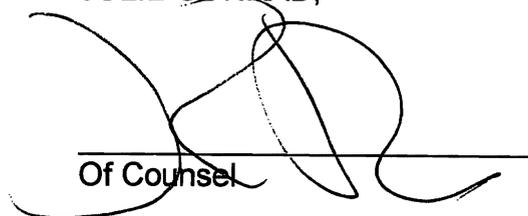
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing Petitioner's/Appellant's Brief was served upon the Defendant by hand delivering a true and accurate copy via USPS this 1st day of June, 2015 to:

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Respectfully Submitted,
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