



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 14-1262**

**JULIE CONRAD,**

**PETITIONER-PLAINTIFF BELOW,**

**v.**

**CIVIL ACTION NO.: 14-C-2**

**CIRCUIT COURT OF GILMER COUNTY  
HON. JUDGE JACK ALSOP**

**THE COUNCIL OF SENIOR CITIZENS OF  
GILMER COUNTY, INC,**

**RESPONDENT-DEFENDANT BELOW.**

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**PETITIONER'S REPLY TO RESPONDENT'S BRIEF**

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## ARGUMENT

Comes now the Petitioner who would respectfully offer the following in Reply to the Respondent's Brief.

The Petitioner, in her Amended Complaint, alleged facts sufficient to support a claim for retaliatory constructive discharge in violation of public policy and tort of outrage. There is a public policy in the State of West Virginia promoting safe working environments which is evidenced by W. Va. Code § 21-3-1. In its Response Brief, the Respondent/Defendant fails to fully understand and address the argument of the Petitioner/Plaintiff and attempts to apply a standard for deliberate intent on the Plaintiff, although the Plaintiff has not alleged a cause of action under the deliberate intent statute.

I. **The Petitioner/Plaintiff alleged sufficient facts to support a claim for retaliatory constructive discharge in violation of public policy and tort of outrage.**

In her Complaint, the Petitioner made the following factual allegations:

On or about February 8, 2002 Plaintiff began working as a homemaker under the direction of Defendant, wherein she would be placed in the homes of clients by Defendant.

On or about January 31, 2013, Plaintiff reported to her employer, Defendant, after previously making numerous previous complaints that the Plaintiff could no longer work for her assigned client, in that the client's relative would consistently block the driveway off so the Plaintiff could not go to the home, flatten her tires, and vandalize her vehicle. Plaintiff felt in danger and physically threatened. She stated to her supervisor that she could no longer care for the client at the home; she could no longer physically or emotionally handle it. She was directed by her employer to "stick it out".

Plaintiff felt as if she had no other choice but to quit or put herself and her property in danger and therefore with no choice, resigned.

Appendix 4-5.

As stated in Petitioner's brief, West Virginia employs a notice pleading standard. If a 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).

The Plaintiff has alleged sufficient facts under the notice pleading standard in West Virginia to allow her claim for both retaliatory discharge and tort of outrage, which are each discussed in more detail below.

#### **A. Constructive Retaliatory Discharge in Violation of a Substantial Public Policy**

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)).

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* 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.

162 W.Va. 116, 246 S.E.2d 270, Syl. Pt. 1 (1978).

Therefore, 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.*

Here the Plaintiff has alleged 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.

### **B. Tort of outrage/intentional infliction of emotional distress**

*Williams v. Harden* identifies four elements that must be established in order to prove intentional infliction of emotional distress.

It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

214 W. Va. 77 at 81, 585 S.E.2d 369 (2003).

In the instant case, as set forth above, the Plaintiff alleges that she was forced by her to work in a condition in which she felt her life and/or livelihood was being threatened. She alleges that “[t]he wrongful employment acts of directing Plaintiff to work in an unsafe and dangerous environment with knowledge that the same was unsafe was outrageous and were so extreme as to be intolerable in a civilized society.” Appendix 6.

All reasonable inferences can be made from the facts alleged in a Plaintiff's Complaint. *Kopelman and Assocs., L.C. v. Collins*, 196 W. Va. 498 at 493. (1992). It can be inferred, based on the allegations, that the employer acted recklessly when it was certain that emotional distress would result from this conduct.

Further, the Plaintiff alleges that she suffered emotional distress because of the actions of her employer. *Id.* Whether or not the emotional distress suffered by the Plaintiff was so severe that no reasonable person could be expected to endure it is a question for a jury and the Plaintiff has alleged enough facts that, if true, a reasonable jury could conclude that no reasonable person could be expected to endure the actions of Plaintiff's employer.

Therefore, as set forth above, the Plaintiff has alleged sufficient facts for each of her alleged causes of action to withstand a Rule 12(b)(6) Motion to Dismiss.

**II. W. Va. Code § 21-3-1 imposes a statutory duty upon employers in West Virginia to maintain places of employment in a reasonably safe condition.**

The rulings of the Circuit Court and the arguments of the Respondent show a lack of understanding of the Petitioner's alleged cause of action for constructive retaliatory discharge. The Petitioner is not arguing that the Respondent actually violated the deliberate intent statute or that she was physically injured due to an unsafe working condition. The Petitioner is not bringing a deliberate intent action against the Respondent. Rather, the Petitioner seeks to be compensated due to her constructive retaliatory discharge in violation of public policy. Essentially, the Petitioner is claiming that in order to keep her job, her employer was forcing her to continue to work in an environment that was unsafe for her. She is not alleging that her employer is responsible for the actions of a third party. The allegation is simply that the employer cannot force an employee to either work in an unsafe condition, of which the Defendant has knowledge, or lose her job.

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 (1992). The Respondent correctly points out that “[a]n employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.” *Id.* at 377.

West Virginia Code § 21-3-1 states that “[e]very 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.” According to *Smith v. Dodrill*, “West Virginia Code § 21-3-1 is the introductory section of a chapter in the Code relating primarily to the safety and welfare of employees in the workplace. By virtue of this provision, a statutory duty is imposed upon employers in West Virginia to maintain places of employment in a reasonably safe condition.” 718 F. Supp. 1293 at 1296 (N.D. W. Va. 1989). (Internal citations omitted.) This statute is not vague; rather it specifically states that an employer “shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of [its] employees.”

If the Petitioner were attempting to bring a claim involving injury in the workplace, she would have to do so under W. Va Code § 23-4-2 as W. Va. Code §21-3-1 is tempered by the deliberate intent statute due to statutory immunity under the Worker’s Compensation Act. However, this is not a deliberate intent action. The Plaintiff does not claim to be injured from a workplace injury. Therefore, it is error to evaluate

Plaintiff's claim under the deliberate intent standard.

The Defendant errantly states that the Petitioner must have suffered some injury in the workplace in order to be able to "claim the benefit of W. Va. Code § 21-3-1;" however, the Defendant is unable to cite any support for this proposition. The Defendant cites *Henderson v. Meredith Lumber Co.*, 190 W. Va. 292 (1993); however that case simply stands for the fact that a cause of action for a workplace injury must be made under W. Va. Code § 23-4-2. The case does not support Defendant's argument that a Plaintiff claiming that she was constructively terminated in violation of the public policy expressed in W. Va. Code § 21-3-1 must have suffered a physical injury.

Defendant states that W. Va. Code § 21-3-1 has been held by various courts to be too general and vague to satisfy the requirements of the deliberate intent statute. However, the cases cited by Defendant do not support this proposition. The *Smith v. Dodrill* case held that there was "no authority in the statute or in the cases interpreting the statute which would infer that it creates a contractual property interest for the employee." 718 F. Supp. 1293 at 1296, (N.D. W. Va. 1989). That case dealt with an employment contract and whether there was a property interest in providing a safe environment for workers. *Id.*

The Defendant also incorrectly applies the ruling of the Court in *Gibson v. Shentel*, 2013 W. Va. LEXIS 129. The Court in that case upheld the Circuit Court's ruling, but the ruling was based on a number of different causes of action alleged by the Plaintiff, including both deliberate intent and retaliatory discharge. That Plaintiff's deliberate intent claim was dismissed because the Plaintiff did not allege any facts to support his claim. The retaliatory discharge claim was dismissed because it did not

identify a substantial public policy. That Complaint merely states that a substantial public policy was violated, but does not identify a public policy. The Plaintiff in that case cited to W. Va. Code § 21-3A-1a and 21-3A-13 of the West Virginia Occupational Safety and Health Act. The Court concluded that the same did not provide a substantial public policy applicable to that case because the Plaintiff was not a public employee.

Gibson does not state that W. Va. Code § 21-3-1 does not illustrate a substantial public policy in West Virginia for providing safe working environments to employees and the Respondent has cited no support for its assertion that there is no such public policy in West Virginia. As stated above, W. Va. Code § imposes a statutory duty on an employer to provide a reasonably safe working environment to its employees.

WHEREFORE, Petitioner, Julie Conrad, requests that this Honorable Court overrule the orders and findings of the Circuit Court of Gilmer County, or, in the alternative, remand this case with specific instructions to the lower court, and grant such other relief as the Court may deem appropriate.

Respectfully submitted,  
Julie Conrad

  
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By Counsel

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and accurate copy of the foregoing "Petitioner's Reply to Respondent's Brief" was served upon the Respondent by mailing via United States Mail, a true and correct copy thereof, postage prepaid, to the following counsel of record, at his last known address this 5th day of August, 2015 to:

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By Counsel,



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