

13-0953

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
AUG 19 AM 10:39
CATHY S. CATRON, CLERK
KANAWHA COUNTY CIRCUIT COURT

CONSTANCE M. (CONNIE) BLESSING,

Plaintiff,

v.

Civil Action No.: 13-C-398
(Judge Zakaib)

THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA, BRENT D. BENJAMIN,
In his capacity as Chief Justice, THE WEST
VIRGINIA STATE BAR and ANITA R.
CASEY, in her capacity as Executive Director,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On the 28th day of June, 2013, came the plaintiff, Constance M. Blessing, by counsel, and the defendants, The Supreme Court of Appeals of West Virginia ("Supreme Court") and Brent D. Benjamin, in his capacity as Chief Justice, The West Virginia State Bar ("State Bar") and Anita R. Casey, in her capacity as Executive Director, by counsel, for a hearing on the defendants' Motion to Dismiss. After considering the memoranda and arguments of the parties with respect to the motion, the Court finds and concludes as follows:

1. Plaintiff Connie Blessing filed this lawsuit on February 26, 2013 against the Supreme Court and Chief Justice Brent D. Benjamin, as well as the State Bar and Anita R. Casey, the Executive Director of the State Bar. Plaintiff's claims arise from her employment with the State Bar and the supervision of her employment with the State Bar by Executive Director Casey.

2. In her Amended Complaint, plaintiff alleges that "she had been the Executive

Assistant” of the State Bar until February 28, 2011 and that “[s]he had been an employee of the West Virginia State Bar for over twenty-five (25) years.” *Amended Complaint at ¶¶ 2 and 3.* The Amended Complaint also asserts that Ms. Casey’s predecessor as Executive Director was Tom Tinder. *Amended Complaint at ¶¶9, 15.*

3. Plaintiff’s Amended Complaint alleges that, “[a]lmost immediately upon assuming [the] position [as Executive Director] Ms. Casey began criticizing operations of the state bar over the past 20 years.” *Amended Complaint at ¶12.* The Amended Complaint further alleges that after becoming Executive Director, Defendant Casey criticized “the state bar’s past performance, the plaintiff’s work performance, [the plaintiff’s] compensation, [the] compensation and work of other holdover state bar staff members, and [former Executive Director] Tinder.” *Amended Complaint at ¶17.*

4. Plaintiff was eligible to and did in fact retire from her position on February 28, 2011. *Amended Complaint at ¶2.* Almost two years after her retirement plaintiff filed this action, alleging invasion of privacy, constructive discharge, violation of public policy, intentional infliction of emotional distress, age discrimination and gender discrimination.

5. The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is “to test the formal sufficiency of the complaint.” John W. Lodge Distributing Co. v. Texaco, Inc., 161 W.Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

6. Thus, “[t]he policy of the rule is . . . to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied.” John W. Lodge Distributing Co., 161 W.Va. at 605, 245 S.E.2d at 158-59. The Court must construe “the factual allegations in the light most favorable to the plaintiff.” Murphy v. Smallridge, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (*citing* State ex rel McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 775-76, 461 S.E.2d 516, 521-22 (1995)).

7. However, “it has been held that essential material facts must appear on the face of the complaint.” Fass v. Nowasco Well Service, Ltd., 177 W.Va. 50, 52, 350 S.E.2d 562, 563 (1986) (*quoting* Greschler v. Greschler, 71 A.D.2d 322, 325, 422 N.Y.S.2d 718, 720 (1979)). Further, according to the West Virginia Supreme Court of Appeals, “[e]specially in the wrongful discharge context, sufficient facts must be alleged which outline the elements of the plaintiff’s claim.” Id. at 53, 564-65.

8. Plaintiff’s Amended Complaint, at Count Five, alleges an invasion of the plaintiff’s privacy by the defendants. This count fails on its face because it was filed beyond the applicable statute of limitations. Invasion of privacy claims are governed by a one-year statute of limitations. Slack v. Kanawha County Housing and Redevelopment Authority, 188 W.Va. 144, 423 S.E.2d 547 (1992).

9. As alleged in her Amended Complaint, plaintiff retired from her position as Executive Assistant of the State Bar on February 28, 2011. *Amended Complaint at* ¶2. Any allegation in the Amended Complaint which could conceivably relate to an invasion of privacy cause of action occurred prior to the plaintiff’s retirement. More specifically, the allegation that plaintiff found a tape recorder in her office (the allegation which

presumably supports her invasion of privacy claim) occurred, according to the plaintiff, during the final two weeks of her employment. *Amended Complaint* at ¶¶63-64.¹

10. Plaintiff's original Complaint was filed on February 26, 2013. The Amended Complaint was filed two days later, on February 28, 2013. Plaintiff's Complaint was filed nearly two years after the final day of her employment and more than two years after she allegedly found a tape recorder in her office. On the face of the pleadings it is clear that plaintiff did not file her Complaint within one year from the date this cause of action allegedly arose.

11. Plaintiff cannot rely on the discovery rule to save this claim. Generally, a cause of action accrues, and the statute of limitations begins to run, when a tort occurs. "[U]nder the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." Syl. Pt. 3, Gaither v. City Hosp., Inc., 199 W. Va. 706, 708, 487 S.E.2d 901, 903 (1997).

12. In the present case, the plaintiff filed a claim for invasion of privacy against the defendants based upon finding a recording device in her office. Therefore, plaintiff was aware of all of the information she needed to file her claim more than two years before she actually filed it. Plaintiff does not argue (as she must for the operation of the discovery rule) that she only learned of her claim within the year prior to her filing her claim. Instead, she argues that she needs to conduct discovery on the claim because, she argues, "[w]hat Connie Blessing knew and when she knew it has not been determined and is critical to the discovery rule which would apply here." *Plaintiff's Response to*

¹ Plaintiff does not allege that either the State Bar or the Supreme Court directed or authorized this alleged invasion of privacy or that any defendant was even aware of the tape recorder incident until after it happened.

Motion To Dismiss at 2. This argument is a *non sequitur*. Plaintiff is essentially arguing that she should be permitted to conduct discovery so she can determine what she knows and when she knew it. Plaintiff already knows what she knows and when she knew it. This argument is a tacit admission that the plaintiff has no facts which would support any argument in favor of the operation of the discovery rule in this case.

13. Plaintiff cannot rely on the provisions of the West Virginia Wiretapping and Surveillance Act because she did not file a claim under that Act and never even mentioned it in her Amended Complaint. Even if the plaintiff had a potential claim under the West Virginia Wiretapping and Surveillance Act, such a claim would be separate and distinct from plaintiff's invasion of privacy claim, which is still subject to the one-year statute of limitations. Moreover, if plaintiff had filed a claim under the Act, it would also be untimely as such claims would be governed by a one-year statute of limitations. *See* W.Va. Code §55-2-12; W.Va. Code §55-7-8a; Wilt v. State Auto. Mut. Ins. Co., 203 W.Va. 165, 506 S.E.2d 608 (1998) (discussing statute of limitations governing statutorily-based claims).

14. Count One of plaintiff's Amended Complaint states, in total, as follows:

As her first count in this action plaintiff states the deliberate and malicious conduct toward her creating an intolerable working environment that was aided or abetted by others as set forth above as well as tolerated and ignored by the state supreme court in its supervisory capacity constituted a constructive discharge that forced her to resign.

Amended Complaint at 13.

15. In this Count plaintiff attempts to plead a "constructive discharge" as a separate and distinct cause of action. The West Virginia Supreme Court of Appeals has held that a constructive discharge can only occur where an employer has created a hostile

working environment for an employee based upon some protected status of that employee.

A constructive discharge cause of action arises when the employee claims that because of age, race, sexual, or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment.

Syl. Pt. 4, Slack, supra, emphasis added.

16. In Count One, plaintiff fails to identify any type of unlawful discrimination which might support her “constructive discharge” claim. Moreover, the one-hundred allegations of fact contained in the Amended Complaint do not reveal any protected status of the plaintiff. Those allegations also fail to allege any actionable, unlawful discrimination on the part of the defendants. Because she has failed to identify either a protected status or an unlawful act on the part of any defendant, plaintiff has failed to plead a valid cause of action in Count One.

17. To the extent that plaintiff argues that her constructive discharge claim does not need to be supported by unlawful discrimination, such an argument ignores the clear authority of syllabus point 4 of Slack. If plaintiff’s position were the law, then a constructive discharge claim could be filed by an employee despite no underlying law being broken by the employer. This would essentially abrogate the employment-at-will doctrine. Because Slack is binding authority, this Court must follow it. A constructive discharge claim cannot stand alone.

18. At Count Four of the Amended Complaint, plaintiff alleges that her “forced resignation also constituted a violation of public policy.” *Amended Complaint at 14.* Plaintiff’s Amended Complaint does not reference any alleged public policy that she

contends was violated. Moreover, the Amended Complaint does not allege that, while employed by the State Bar, the plaintiff was engaged in any activity that would be protected by any public policy of this state, and that she was retaliated against by the defendants because she was engaged in that protected activity.

19. In West Virginia, a cause of action for wrongful discharge may exist “when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination.” Feliciano v. 7-Eleven, Inc., 210 W.Va. 740, 745, 559 S.E.2d 713, 718 (2001). Whether a particular factor motivating a discharge is a matter of public policy is dictated by reference to various authorities. “To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.” Syl. Pt. 2, Birthisel v. Tri-Cities Health Servs. Corp., 188 W.Va. 371, 424 S.E.2d 606 (1992). See Syl. Pt. 3, Tiernan v. Charleston Area Med. Ctr., Inc., 203 W.Va. 135, 506 S.E.2d 578 (1998) (discussing procedure for basing substantial public policy on constitutional provision). “However, in order to sustain a cause of action for wrongful discharge, the public policy relied upon must not just exist; it must be substantial.” Feliciano, 210 W.Va. at 745, 559 S.E.2d at 718.

20. The burden is on the plaintiff to establish the existence of a substantial public policy. Syl. Pt. 8, Page v. Columbia Natural Res., 198 W.Va. 378, 480 S.E.2d 817 (1996).

21. “Inherent in the term ‘substantial public policy’ is the concept that the policy will provide specific guidance to a reasonable person.” Syl. Pt. 3, Birthisel. Further,

[t]he term ‘substantial public policy’ implies that the policy principle will be clearly recognized simply because it is

substantial. An 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, 612. Thus, to be substantial, a public policy must not just be recognizable as such but must be so widely regarded as to be evident to employers and employees alike.

22. In the context of this Motion to Dismiss, the Court must decide whether the plaintiff has plead that the defendants violated a substantial public policy which provides specific guidance to employers so as to support a cause of action for wrongful discharge. The existence of a particular public policy in West Virginia “is a question of law, rather than a question of fact for a jury.” Syl. Pt. 1, Cordle v. General Hugh Mercer Corp., 174 W.Va. 321, 325 S.E.2d 111 (1984).

23. Plaintiff has not implicated a substantial public policy in her Amended Complaint because she does not even attempt to identify the source for the alleged public policy. She simply states that the actions of the defendants violated a public policy. There is no reference to a constitutional provision, legislative enactment, legislatively approved regulation or judicial opinion. *See* Syl. Pt. 2, Birthisel.

24. In opposing defendants’ motion to dismiss, plaintiff argues that a provision of the Constitution of the State Bar addressing its purpose in advancing “the administration of justice” and upholding “the standards of honor, integrity, competency and courtesy in the legal profession” may serve as the source of public policy. *See Art. II. Objects and Purpose, Constitution of the West Virginia State Bar.* However, this provision simply describes the general purpose of a single organization which governs attorneys. It does not provide any type of specific guidance regarding the conduct of employers.

25. This provision cited by the plaintiff is vague and subject to multiple

interpretations. See Birthisil, supra. Additionally, the provisions are inapplicable to the plaintiff's employment situation. The allegations contained in the plaintiff's Amended Complaint have nothing to do with the "administration of justice." Further, the goal of upholding certain standards in the legal profession is not compromised in any way by the allegations in the Amended Complaint

26. In this regard, the plaintiff has failed to state a claim upon which relief may be granted. A claim for wrongful discharge in violation of public policy must have as its source a substantial public policy of the State of West Virginia. Without that essential element, there is no "public policy" cause of action upon which the plaintiff may recover.

27. At Count Six of her Amended Complaint, plaintiff alleges that "[t]he conduct described here constituted an intentional infliction of emotional distress that also harmed the plaintiff physically." *Amended Complaint at 14*. An intentional infliction of emotional distress claim requires a plaintiff to prove that the defendant's conduct was "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency." Syl. Pt. 3, Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419 (1998).

28. The factual allegations of plaintiff's Amended Complaint do not allege any "extreme and outrageous" conduct which would support such a claim. "Whether conduct may reasonably be considered outrageous is a legal question. . . ." Syl. Pt. 4, Travis. Even giving the plaintiff every benefit of a doubt, a review by this Court of the factual allegations in the Amended Complaint compels the conclusion that the defendants engaged in no conduct which could reasonably be considered "extreme and outrageous."

29. No amount of colorful descriptions by the plaintiff can overcome the fact

that, even taking her allegations to be true, no outrageous conduct occurred. For the conduct to be actionable, it must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *See Williamson v. Harden*, 214 W. Va. 77, 81, 585 S.E.2d 369, 373 (2003). Whatever manner is used to characterize the allegations contained in plaintiff’s Amended Complaint, it is apparent that it cannot be said that the defendants’ conduct goes beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community

30. Moreover, even if the Amended Complaint did allege sufficient “outrageous” conduct to satisfy the standards of *Travis*, such a claim is time-barred. Plaintiff’s Complaint was filed on February 26, 2013. Plaintiff’s last day of employment was February 28, 2011. The Amended Complaint does not allege that the defendants engaged in any conduct (“outrageous” or otherwise) in the last two days of the plaintiff’s employment with the State Bar. On the face of the Amended Complaint, the plaintiff’s claims in Count Six are barred by the statute of limitations. *See* Syl. Pt. 8, in part, *Travis*. (“In claims for intentionally or recklessly inflicted emotional distress . . . the two-year statute of limitation for personal injuries begins to run on the date of the last extreme and outrageous conduct, or threat of extreme and outrageous conduct.”).

31. As the plaintiff does not assert any allegedly outrageous conduct which occurred on February 26, 27, or 28, 2011 (or afterwards), it is apparent that the plaintiff did not file her Complaint within two years after the date of the last act by the defendants that plaintiff alleges was “outrageous.”

32. In Count Two and Count Three of her Amended Complaint, plaintiff alleges

causes of action based upon sexual discrimination and age discrimination, respectively.

33. In order to succeed on a claim for gender or age discrimination, the Plaintiff must establish that “the alleged forbidden bias was a motivating factor in the defendant's decision to take an adverse action against the plaintiff.” Barlow v. Hester Industries, Inc., 198 W.Va. 118, 136, 479 S.E.2d 628, 646 (1996), *quoting* Syl. Pt. 8, Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 74, 479 S.E.2d 561, 584 (1986). In her Amended Complaint, the plaintiff has asserted one-hundred allegations of fact. In Count Two and Count Three of the Amended Complaint, plaintiff makes clear that she is relying upon these one-hundred alleged facts to establish her claims of gender and age discrimination.

The conduct described in this document amounted to sexual discrimination

Amended Complaint at 13.

The conduct described in this document toward the plaintiff also constituted age discrimination

Amended Complaint at 14.

34. A review of the one-hundred allegations of fact which allegedly support her claims of gender and age discrimination, shows that not a single one of those allegations relates to gender or age in any way. There are no allegations that any of the defendants made any negative comments to the plaintiff on the basis of her age or gender. There are no allegations that the defendants made any employment decision affecting the plaintiff on the basis of her age or gender. There are no allegations that any of the conduct described in the Amended Complaint was motivated in any way by the plaintiff's age or gender.² Instead of alleging facts that might support an age or gender discrimination

² The Court notes that the plaintiff's supervisor, Defendant Casey, is also female and over the age of forty.

claim, plaintiff's Amended Complaint spends one-hundred paragraphs addressing matters that have nothing to do with plaintiff's age or gender.

35. Taking the allegations of the plaintiff to be true, simply telling employees that they are undereducated and overpaid are comments unrelated to gender or age discrimination and are not actionable. “[A]n unfortunate fact of life is that the modern workplace is sometimes a rough and tumble environment, where pettiness, inconsideration and discourtesy reign.... But age-based harassment is a very different animal, and must be contrasted with common office pettiness or politics.” Johnson v. Killmer, 219 W. Va. 320, 326, 633 S.E.2d 265, 271 (2006). Taking plaintiff's allegations to be true, they would, at best, establish office pettiness, not age-based or gender-based harassment. *See* Pronin v. Raffi Custom Photo Lab., Inc., 383 F.Supp.2d 628, 634 (S.D.N.Y.2005) (“Abusive conduct in the workplace, if not based on a protected class, is not actionable under [discrimination laws]. These [laws] prohibit discrimination and are not civility codes.”).

36. In response to defendants' motion, plaintiff argues that a newly hired male employee was paid more than some of the women in the office (although not the plaintiff) and argues that this is somehow evidence of gender discrimination. Importantly, plaintiff does not allege that the male employee was paid more for doing the same job as any of the female employees. Under disparate treatment analysis, unless the employees are “similarly situated” no inference of discrimination arises if such employees are treated differently. *See* Young v. Bellofram Corp., 227 W.Va. 53, 705 S.E.2d 560 (2010); Mayflower Vehicle Systems, Inc. v. Cheeks, 218 W.Va. 703, 629 S.E.2d 762 (2006).

37. Significantly, plaintiff admits that while she worked as an “Executive Assistant” the male employee in question was hired as a “Technical Expert”. See *Amended Complaint* at ¶¶2, 33. The West Virginia Supreme Court of Appeals has recognized that disparity in pay, by itself, is not actionable. See Syl. Pt. 4, West Virginia University/West Virginia Bd. of Regents v. Decker, 191 W.Va. 567, 447 S.E.2d 259 (1994). (“There is nothing in the Human Rights Act, *W.Va. Code* 5-11-1 [1967] *et seq.*, that forbids employers from paying workers based upon their market value. In specialized fields, subtle distinctions in technical knowledge may be rewarded by greater compensation.”).

38. None of plaintiff’s allegations of fact, taken as true, demonstrate any actionable gender or age discrimination. The only time plaintiff mentions age or gender discrimination is in the conclusory statements contained in the separate counts indicating that the conduct of the defendants “amounted to” age and sexual discrimination. See *Amended Complaint* at 13-14. However, the sufficiency of the Complaint must be determined by the factual allegations, not legal conclusions disguised as factual allegations. More than conclusory allegations must be provided to withstand a Rule 12(b)(6) motion to dismiss. See Fass v. Nowsco Well Service, 177 W.Va. 50, 350 S.E.2d 562, 564 (1986) (*per curium*) (dismissing complaint as “conclusory and imprecise” for failure to allege sufficient facts to establish the motivation behind plaintiff’s termination). “[A] trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* §12(b)(6)[2] at 347 (footnote omitted), *quoted*

approvingly by Forshey v. Jackson, 222 W.Va. 743, 756, 671 S.E.2d 748, 761 (2008).

The conclusory statements of plaintiff's Amended Complaint are insufficient to state a claim of age or gender discrimination,

39. Taking each of the one-hundred allegations as true, plaintiff has failed to plead any facts which indicate that she was discriminated against based on her age or gender. At best, these allegations may be considered "general harassment" not perpetrated on the basis of a protected status. The West Virginia Supreme Court of Appeals has held that "general harassment" is not prohibited under the law. "[N]o general public policy against harassment in the workplace is created by the West Virginia Human Rights Act for purposes of West Virginia wrongful discharge law." *Travis*, 202 W.Va. at 383, 504 S.E.2d at 433. The *Travis* Court further explained that, "we can discern no legislative policy contained in the Human Rights Act protecting employees from harassment in general." *Id.* at 384, 434. Any allegations of "general harassment" asserted in plaintiff's Amended Complaint cannot support the causes of action alleged in Counts Two and Three.

40. Because the plaintiff has failed to plead any facts which indicate she was discriminated against on the basis of her age or gender, plaintiff has failed to state a claim under the Human Rights Act.

41. Plaintiff's Amended Complaint alleges that "she had been the Executive Assistant" of the State Bar until February 28, 2011 and that "[s]he had been an employee of the West Virginia State Bar for over twenty-five (25) years." *Amended Complaint at* ¶¶ 2, 3. The State Bar is an administrative agency of the Supreme Court. *See W. Va. Code § 51-1-4a(d)* ("The West Virginia State Bar shall be a part of the judicial

department of the state government and is hereby created for the purpose of enforcing such rules as may be prescribed, adopted and promulgated by the court from time to time under this section. It is hereby authorized and empowered to perform the functions and purposes expressed in a constitution, bylaws and amendments thereto as shall be approved by the supreme court of appeals from time to time.”). *See also West Virginia State Bar Constitution, Article I.* Pursuant to its constitution, the State Bar is “governed by a board of governors.” *West Virginia State Bar Constitution, Article IV.*

42. The By-Laws of the State Bar provide that “[t]he powers of the state bar shall be exercised by the board of governors.” *West Virginia State Bar By-Laws, Article IV, §1.* Pursuant to the By-Laws, the Board of Governors “shall fix salaries and provide for the payment thereof and of other necessary expenses of the State Bar.” *Id.* The Board of Governors selects the Executive Director of the State Bar, who holds office “at the pleasure of the board.” *West Virginia State Bar By-Laws, Article V, §3.* The By-Laws also provide that, “[t]he executive director, with the approval of the board, may employ such assistants as the work of his or her office may require.” *West Virginia State Bar By-Laws, Article V, §10.*

43. Although it is an agency of the Supreme Court, the State Bar is a separate and distinct entity. The State Bar is not funded through the Court’s budget, but rather by fees imposed on lawyers who practice in this state. *See Daily Gazette Co., Inc. v. Committee on Legal Ethics of the West Virginia State Bar*, 174 W.Va. 359, 362 n. 5, 326 S.E.2d 705, 708 n.5 (1984). Under the By-Laws, the Board of Governors of the State Bar is specifically charged with the supervision of the Executive Director and her assistants.

Plaintiff does not allege that she was an employee of the Supreme Court and in fact, she was not.

44. One of plaintiff's claims involves an alleged violation of public policy by the defendants. In addition to the deficiencies found above, plaintiff's "public policy" claim against the Supreme Court fails as a matter of law even if plaintiff had articulated some public policy applicable to her employment situation with the State Bar.

45. The genesis of the "public policy" exception in West Virginia is Harless v. First Nat. Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978). The principles enunciated in Harless apply only to employers.

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 this discharge.

Syl. Harless, emphasis added. As plaintiff herself pleads, she was not employed by the Supreme Court.

46. Plaintiff's claims of age and gender discrimination against the Supreme Court fail for similar reasons. In certain situations, it may be possible for an entity that is not a plaintiff's employer to be held liable for discrimination under the West Virginia Human Rights Act. For such liability to exist, however, the entity must control the plaintiff's working conditions and/or be directly involved in a discriminatory employment decision affecting the plaintiff. See Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996).

47. "The West Virginia Human Rights Act, as well as Title VII, imposes on

employers a duty to ensure, as best they can, that their workplaces are free of sexual harassment that creates a hostile or offensive working environment.” Conrad, 198 W.Va. at 370, 480 S.E.2d at 809 (emphasis added), *citing* Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995). Entities which are considered “employers” under the Human Rights Act can only ensure that “their workplaces” are free from harassment. Neither Conrad nor the Human Rights Act imposes a duty to monitor the workplaces of other entities on an “employer.”

48. In this case, the plaintiff’s location of employment was at the State Bar office. While the State Bar is an administrative agency of the Supreme Court, it is a separate and distinct entity that has control over its own workforce. Significantly, the plaintiff does not allege that she was “harassed” in any way by any employee of the Supreme Court. Further, there is no allegation that the Supreme Court was directly involved in any employment decision concerning the plaintiff (as there was in Conrad with respect to the Regional Jail Authority). The plaintiff’s allegations against the Supreme Court are limited solely to her assertion that she complained to employees of the Supreme Court about her treatment as an employee of the State Bar. *Amended Complaint at* ¶95. However, plaintiff does not even plead that her complaints had anything to do with age, gender, or any conduct of the plaintiff that would be protected under some recognized public policy of the State of West Virginia. That allegation is not enough to impose any duty on the Supreme Court under Conrad, the Human Rights Act, or otherwise.

49. Additionally, contrary to plaintiff’s assertions, the doctrine of *respondeat superior* does not apply because the Supreme Court was not the employer of defendant Casey. “The doctrine of *respondeat superior* imposes liability on an employer for the

tortious acts of its employees” Syl. Pt. 12, Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255 (2009), emphasis added.

50. Finally, while the plaintiff has named Chief Justice Benjamin as a defendant, the sole allegations against him are that he is the present Chief Justice of the Supreme Court and that he is a friend of Anita Casey. *Amended Complaint at ¶¶ 7, 10*. Neither of these allegations states any viable claim against Chief Justice Benjamin

51. For all of these reasons, the Court concludes that the plaintiff has failed to state any claim upon which relief could be granted against any of the defendants named in this action.

WHEREFORE, the Court hereby GRANTS the Motion to Dismiss of defendants and ORDERS that the plaintiff’s Complaint against defendants be and hereby is dismissed with prejudice.

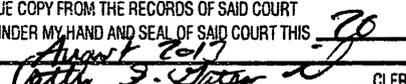
The objection of the plaintiff to the rulings of this Court is noted.

The Clerk shall enter this Order as of this date and shall issue attested copies of this Order to all Counsel of record.

Enter this 19th date of Aug., 2013.



Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19
DAY OF August, 2013


CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared by:

John J. Polak

Mark A. Atkinson (WVSB #184)
John J. Polak (WVSB #2929)
Paul L. Frampton, Jr. (WVSB#9340)
ATKINSON & POLAK, PLLC
P.O. Box 549
Charleston, WV 25322-0549
(304) 346-5100
Counsel for Defendants