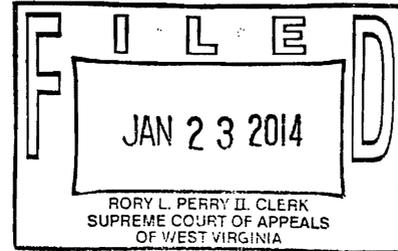


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CONSTANCE M. BLESSING**

Petitioner,



**Docket No. 13-0953**  
Appeal from a final order  
Of the Circuit Court of  
Kanawha County (13-C-398)

v.

**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,**

Respondents.

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**RESPONDENTS' BRIEF**

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## STATEMENT OF THE CASE

Petitioner Connie Blessing filed the instant lawsuit on February 26, 2013 against the Supreme Court and Chief Justice Benjamin as well as the West Virginia State Bar and Anita Casey, the Executive Director of the State Bar. Petitioner's claims arise from her employment with the State Bar and the supervision of her employment with the State Bar by Executive Director Casey. In her Amended Complaint, Petitioner 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." (Appendix Record at 20-21). As noted in the Amended Complaint, Ms. Casey's predecessor as Executive Director was Tom Tinder. (A.R. at 21-22).

Petitioner'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." (A.R. at 21). The Amended Complaint further alleges that after becoming Executive Director, Defendant Casey criticized "the state bar's past performance, the Petitioner's work performance, [the Petitioner's] compensation, [the] compensation and work of other holdover state bar staff members, and [former Executive Director] Tinder." (A.R. at 22).

Petitioner Connie filed the present case due to the alleged criticism she received in her position as Executive Assistant of the State Bar relating to her connection to former State Bar Executive Director, Tom Tinder. Petitioner admits this essential fact in her Brief to this Court.

The motivating factor behind this criticism of Blessing's past efforts over the years was the zeal of Casey and others to discredit Tom Tinder and anyone who happened to be associated with his tenure at the state bar.

(Petitioner's Brief at 30).

As with gender discrimination the lower court found Blessing had not alleged any conduct specifically attributed to age discrimination. This ignores those matters contained in the foregoing Statement of Facts with repeated criticism of Blessing' [sic] past performance of over twenty years in an effort to discredit Tinder.

(Petitioner's Brief at 31).

This unwarranted abuse was visited upon Blessing as the prime available target in the zeal to discredit Tom Tinder.

(Petitioner's Brief at 32-33).

As set forth repeatedly in her amended complaint the primary grounds for the abusive conduct toward Blessing had been solely in retaliation for her being the former executive director's top assistant, a prime example of "other unlawful discrimination."

(Petitioner's Brief at 24-25).

Petitioner's Brief to the Court as well as her Amended Complaint make it clear that the criticism and abuse she allegedly received were motivated by her connection to Mr. Tinder. However, as Petitioner's connection to Mr. Tinder does not afford her any protected status under West Virginia employment law, the Petitioner was left with attempting to contort her allegations into various cognizable causes of action in her Amended Complaint. This she failed to do.

Petitioner's efforts to invent a cause of action for harassment based upon her connection to Mr. Tinder resulted in her dressing up the Amended Complaint to contain six different Counts: 1) invasion of privacy; 2) constructive discharge; 3) violation of public policy; 4) intentional infliction of emotional distress; 5) age discrimination; and 6) gender discrimination. In his August 19, 2013 Order Granting Defendants' Motion To Dismiss, the Honorable Judge Zakaib of the Circuit Court of Kanawha County considered whether relief could be granted on each of Petitioner's claims. Even taking the allegations of the Amended Complaint to be true, Judge

Zakaib found that each of Petitioner's causes of action failed to state a claim upon which relief could be granted and dismissed them all.

Petitioner now appeals from the Order Granting Defendants' Motion To Dismiss. Petitioners' appeal should fail, as West Virginia jurisprudence supports the dismissal of her defective claims.

### **SUMMARY OF ARGUMENT**

A review of the facts alleged in Petitioner's Amended Complaint as well as the applicable law compels the conclusion that Petitioner failed to state a claim upon which relief may be granted. In her Brief, Petitioner alleges that the Court committed the following errors: 1) dismissing Petitioner's constructive discharge claim; 2) dismissing Petitioner's intentional infliction of emotional distress claim; 3) dismissing Petitioner's age and gender discrimination claims; 4) dismissing Petitioner's claim that the defendants violated a substantial public policy of the State of West Virginia; 5) dismissing Petitioner's invasion of privacy claim; 6) dismissing defendants The Supreme Court of Appeals of West Virginia and Brent D. Benjamin, in his capacity as Chief Justice, from the case; and 7) violating the standards governing motions to dismiss. However, a review of the record and the law makes clear that no error was committed by the Circuit Court.

Petitioner's claim of invasion of privacy fails because it was filed well after the one year statute of limitations. *See Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W.Va. 144, 423 S.E.2d 547 (1992). Further, Petitioner was in possession of all facts necessary to file her invasion of privacy within the statute of limitations but failed to do so. Therefore, the discovery rule is inapplicable.

Petitioner's constructive discharge claim fails because she fails to identify any type of unlawful discrimination which might support her claim. This Court 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 (i.e., age, race, gender, etc.). Syl.Pt.4, Slack. Further, Petitioner's efforts to convince the Court to ignore its holding in Slack are unavailing and should be ignored.

Petitioner's claim of violation of a substantial public policy fails because Petitioner failed to identify any specific substantial public policy of the State of West Virginia which was violated by the Respondents. As stated by this Court in Birthisel v. Tri-Cities Health Servs. Corp., 188 W. Va. 371, 377, 424 S.E.2d 606, 612 (1992), "[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." What little authority offered by Petitioner as the basis for an alleged public policy is inapplicable to the facts alleged in the Amended Complaint.

Petitioner's claim of intentional infliction of emotional distress was properly dismissed by the Circuit Court as the factual allegations of the Amended Complaint do not allege any "extreme and outrageous" conduct which would support such a claim. Syl. Pt. 3, Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419 (1998). Additionally, the Petitioner's claim for intentional infliction of emotional distress was filed after the applicable two-year statute of limitations had run. Syl.Pt.8, Travis. Thus, this claim is time-barred as well.

Petitioner's claims of age and gender discrimination fail because Petitioner makes clear in her Amended Complaint as well as in her Brief before this Court that the motivation behind the alleged harassing conduct was the Petitioner's connection and relationship with Mr. Tinder, not her age or her gender. Further, none of the one-hundred allegations of fact contained within

Petitioner's Amended Complaint, if taken as true, demonstrate any actionable age or gender discrimination.

With respect to Petitioner's claims against this Court and Justice Benjamin, those claims were properly dismissed as the Petitioner was not an employee of the Supreme Court. Additionally, the Petitioner does not allege that she was harassed in any way by any employee of this Court or that the Court was involved in any employment decision concerning the Petitioner.

Finally, although hard to decipher, Petitioner's final allegation of error appears to be that the Circuit Court failed to follow the law governing motions to dismiss. This argument fails because the Circuit Court, as it is required to do, viewed the allegations of the Amended Complaint in the light most favorable to the Petitioner. No matter how many allegations of fact, or how many separate causes of action Petitioner asserts, if none of those allegations state a claim upon which relief may be granted then the claims are subject to dismissal.

Given the allegations in this case it is clear that the Circuit Court did not abuse its discretion in making the above rulings. The rulings of the Circuit Court were consistent with controlling precedent established by this Court. Therefore, the Circuit Court's Order Granting Defendants' Motion To Dismiss should be affirmed.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is unnecessary in this case. With respect to each of the Petitioner's allegations of error, the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record. Therefore, the decisional process would not be aided by oral argument.

Importantly, this appeal is taken from an order granting a motion to dismiss. Accordingly, there is very little underlying record. To the extent the analysis of these issues by

the Court requires a review of the facts as alleged in the Amended Complaint and arguments of the parties, it is apparent that both sides have submitted detailed analysis of the issues in their briefs.

### ARGUMENT

With respect to the present appeal, the Petitioner allege seven errors were committed by the Circuit Court in this case: 1) dismissing Petitioner's constructive discharge claim; 2) dismissing Petitioner's intentional infliction of emotional distress claim; 3) dismissing Petitioner's age and gender discrimination claims; 4) dismissing Petitioner's claim that the defendants violated a substantial public policy of the State of West Virginia; 5) dismissing Petitioner's invasion of privacy claim; 6) dismissing defendants The Supreme Court of Appeals of West Virginia and Brent D. Benjamin, in his capacity as Chief Justice, from the case; and 7) violating the standards governing motions to dismiss. However, a review of the law, the record and the Circuit Court's rulings make clear that the decisions below were correct.

**1. The Circuit Court Did Not Err In Finding That Petitioner's Claim Of Invasion Of Privacy Was Barred By The Applicable Statute Of Limitations**

Petitioner's Amended Complaint, at Count Five, alleges an invasion of the Petitioner's privacy by the Respondents. (A.R. at 33). While the Amended Complaint does not allege any conduct on the part of the Respondents which would constitute an actionable invasion of privacy,<sup>1</sup> this count fails on its face because it was filed beyond the applicable statute of limitations.

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<sup>1</sup> The Amended Complaint makes clear that the person who hid the tape recorder was a coworker. (A.R. at 28). Petitioner 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.

As determined in Slack, invasion of privacy claims are governed by a one-year statute of limitations.

Invasion of privacy is a personal action that does not survive the death of the individual at common law or under W.Va. Code, 55-7-8a(a) (1959). Consequently, a claim for invasion of privacy is governed by the one-year statute of limitations provided by W.Va. Code, 55-2-12(c) (1959).

Syl. Pt. 1, Slack.

As alleged in her Amended Complaint, Petitioner retired from her position as Executive Assistant of the State Bar on February 28, 2011. (A.R. at 1-2). Any allegation in the Amended Complaint that could conceivably relate to an invasion of privacy cause of action occurred prior to the Petitioner's retirement. In fact, the allegation that Petitioner found a tape recorder in her office (the allegation which presumably supports her invasion of privacy claim) occurred, according to the Petitioner, during the final two weeks of her employment. (A.R. at 27-28).

Petitioner's original Complaint was filed on February 26, 2013. The Amended Complaint was filed two days later, on February 28, 2013. Petitioner'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 Petitioner did not file her Complaint within one year from the date this cause of action allegedly arose. Because of this failure, the Circuit Court dismissed the Petitioner's cause of action for invasion of privacy.

In an effort to avoid the operation of the statute of limitations, Petitioner makes a nebulous argument regarding the discovery rule. Generally, a cause of action accrues (i.e., 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).

In the present case, the Petitioner filed a claim for invasion of privacy against the Respondents based solely upon finding a recording device in her office. Therefore, she was aware of all of the information she needed to file her claim more than two years before she actually filed it. The Petitioner 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 argued before the Circuit Court that she needed to conduct discovery on the claim because, she argued, “[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.” (A.R. at 57). The Circuit Court failed to find this argument persuasive, finding as follows:

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.

(A.R. at 4-5).

Realizing the lack of merit to her initial argument, the Petitioner now argues before this Court that, because she never found what the purpose of the recording device was, the statute of limitations has yet to run on her claim. However, she does not cite any authority for this proposition. Petitioner does cite the Slack case and argues that the Circuit Court erred because it “it fails to note in Slack the time period began to run only when the protagonist admitted to planting such device, not when it was found as the lower court rules should govern here.” (Petitioner’s Brief at 34, citations omitted). Critically, the Petitioner fails to note that in Slack,

the way the plaintiff found out a listening device had been used was that the defendant admitted it in a criminal trial. Slack, 188 W.Va. at 146-47. The Slack Court ruled correctly that the plaintiff in that case could not have reasonably known about the use of the listening device until the admission was made by the defendant. *Id.* at 151.

The facts of Slack are at odds with the facts in this case. In this case the Petitioner actually found the recording device and thus was aware of its presence more than two years prior to filing her Amended Complaint in this case. Further, even if it were necessary for the party at fault to acknowledge the invasion of privacy before the statute of limitations begins to run, it is clear that happened in this case as well. In her Amended Complaint Petitioner alleges that she was aware of who placed the recorder in her office.<sup>2</sup> (A.R. at 28). Petitioner also alleges that she reported the incident in November 2011 to her former employer. (A.R. at 28-29). As the instant case was filed on February 26, 2013, Petitioner's invasion of privacy claim was not only filed more than two years after she became aware her privacy was allegedly invaded and by whom, but also over a year after she complained about it to her former employer. Accordingly, the Circuit Court properly dismissed Petitioner's invasion of privacy claim and that ruling should be affirmed.

**2. The Circuit Court Did Not Err In Finding That Petitioner Failed To Plead A Valid Constructive Discharge Claim**

Count One of Petitioner'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

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<sup>2</sup> In her brief Petitioner states that the individual who placed the recorder in Petitioner's office admitted that "it had been a well-intentioned prank simply to capture some of Blessing's zany office comments for posterity." (Petitioner's Brief at 6).

supervisory capacity constituted a constructive discharge that forced her to resign.

(A.R. at32).

In this Count Petitioner attempted to plead a “constructive discharge” as a separate and distinct cause of action. As the Circuit Court found, this Court 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.

In Count One, Petitioner completely 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 Petitioner that may have been the cause of her alleged harassment. Petitioner notes that she did allege in other counts of her Amended Complaint that she was discriminated against on the basis of her gender and age. Yet, it is clear from the face of the Amended Complaint that the Petitioner asserts her claims of age discrimination, gender discrimination and constructive discharge as separate counts. Instead of arguing that the reason for the alleged harassment was her age or gender, the Petitioner admits that the alleged harassment she received was due to her connection to Mr. Tinder.

As set forth repeatedly in her amended complaint the primary grounds for the abusive conduct toward Blessing had been solely in retaliation for her being the former executive director’s top assistant, a prime example of “other unlawful discrimination.”

(Petitioner’s Brief at 24-25).

The allegations of the Amended Complaint also fail to allege any actionable, unlawful discrimination on the part of the Respondents. The lack of a protected status as well as any actionable, unlawful discrimination compels the conclusion that the Circuit Court reached: the Petitioner’s claim of constructive discharge should be dismissed.

A large portion of Petitioner’s argument both at the Circuit Court level and before this Court is centered on her contention that her constructive discharge claim does not need to be supported by unlawful discrimination. This argument simply ignores the clear authority of syllabus point 4 of Slack. As the Circuit Court found, if the Petitioner’s position were the law, it would have dire consequences.

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.R. at 6).

Because Petitioner has failed to identify either a protected status or an unlawful act on the part of any defendant she failed to plead a valid cause of action for constructive discharge. Accordingly, the Circuit Court did not err in dismissing the Petitioner’s claim.

**3. Petitioner Has Failed To Identify A Substantial Public Policy Violated By Respondents’ Alleged Conduct**

At Count Four of the Amended Complaint, Petitioner alleges that her “forced resignation also constituted a violation of public policy.” (A.R. at 33). Petitioner’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 Petitioner was

engaged in any activity that would be protected by any public policy of this state or that she was retaliated against by the Respondents because she was engaged in that protected activity.

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. 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. “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.

In the context of a motion to dismiss, a 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). The Petitioner did not implicate a substantial public policy in her Amended Complaint because she did not even attempt to identify the source for the alleged public policy. She simply stated that the actions of the Respondents violated a public policy. There was no reference to a constitutional provision, legislative enactment, legislatively approved regulation or judicial opinion. See Syl. Pt. 2, Birthisel.

Presumably recognizing this deficiency, in her Response To Motion To Dismiss as well as Petitioner’s Brief before this Court, Petitioner argues to that she may base her public policy upon the Constitution of the West Virginia State Bar. First, Petitioner 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 *West Virginia State Bar Constitution, Art. II*. However, these provisions simply describe the general purpose of a single organization which governs attorneys. They do not provide any type of specific guidance regarding the conduct of employers. Following the Petitioner’s logic, if any employee of the State Bar felt that the executive director was not courteous (as mentioned in the Constitution), he or she could resign employment and bring a lawsuit based upon violation of public policy. This is obviously not the law nor should it be. The provision cited by the Petitioner is inapplicable to the alleged facts of her case and cannot serve as the basis for a cause of action of violation of public policy.

The Circuit Court found as follows with regard to this argument:

The allegations contained in the Plaintiff's Amended Complaint have absolutely 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.

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.

(A.R. at 9).

The Circuit Court's interpretation of the law on this point was correct. Despite having ample opportunity in her Amended Complaint, her Response to Motion to Dismiss, her Response to Defendants' Reply regarding the Motion to Dismiss and now the Petitioner's Brief before this Court, Petitioner has completely failed to identify a substantial public policy upon which she may base her claims. The Circuit Court's decision in this regard should be affirmed.

**4. The Circuit Court Did Not Err In Finding That Petitioner Failed To State A Claim For Intentional Infliction Of Emotional Distress**

At Count Six of her Amended Complaint, Petitioner alleges that "[t]he conduct described here constituted an intentional infliction of emotional distress that also harmed the Petitioner physically."<sup>3</sup> (A.R. at 33). 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. Importantly, the Circuit Court found that the factual allegations of Petitioner's Amended Complaint "do not allege any 'extreme and outrageous' conduct which would support such a claim." (A.R. at 9). "Whether

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<sup>3</sup> To the extent the Petitioner alleges a physical injury which occurred during her employment, then the Petitioner's remedy was to file a workers' compensation claim.

conduct may reasonably be considered outrageous is a legal question. . . .” Syl. Pt. 4, Travis. Given this legal question, the Circuit Court ruled that “[e]ven giving the Petitioner every benefit of a doubt, a review by this Court of the factual allegations in the Amended Complaint must compel the conclusion that the defendants engaged in no conduct which could reasonably be considered ‘extreme and outrageous.’” (A.R. at 9).

In Petitioner’s Brief to this Court, she reiterates the same allegations of critical and impolite comments made by Respondent Casey (as well as by other state bar members) that were contained in her Amended Complaint and argues that this conduct is outrageous. No amount of colorful descriptions by the Petitioner can overcome the fact that even taking her allegations to be true, the conduct as alleged does not rise to the levels required by the law. It is important to remember that 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). As determined by the Circuit Court,

[w]hatever 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.

(A.R. at 10).

Moreover, even if the Amended Complaint did allege sufficient “outrageous” conduct to satisfy the standards of Travis, the Circuit Court found that any such claim was time-barred. Petitioner’s Complaint was filed on February 26, 2013. Petitioner’s last day of employment was February 28, 2011. The Amended Complaint does not allege that the Respondents engaged in any conduct (“outrageous” or otherwise) in the last two days of the Petitioner’s employment with

the State Bar. On the face of the Amended Complaint, the Petitioner's claims in Count Six are barred by the statute of limitations.

This Court has held:

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.

Syl. Pt. 8, in part, Travis.

The Circuit Court found that “[a]s the Petitioner does not assert any allegedly outrageous conduct which occurred on February 26, 27, or 28, 2011 (or afterwards), it is apparent that the Petitioner did not file her Complaint within two years after the date of the last act by the defendants that Petitioner alleges was ‘outrageous.’” (A.R. at 10). Petitioner argues before this Court that, although she may not have been subjected to any extreme and outrageous conduct in her last days of work, she was threatened with such conduct. (Petitioner’s Brief at 28).

However, there is no allegation in the Amended Complaint that there was any type of threat to the Plaintiff during her last days of employment. In Travis, the plaintiff argued that although he suffered no extreme and outrageous conduct within two years of his termination, the actions of his employer assisting and ratifying the outrageous acts which previously occurred were within the required two-year period. 202 W.Va. at 382-83. The Travis Court agreed with this argument. *Id.* However, in the present case there is no allegation that there was any assisting or ratifying previous “outrageous” acts. The Petitioner announced her retirement two weeks in advance. (A.R. at 27). Unlike Travis, this is not a case where an employee’s decision to resign (ostensibly motivated by the threat of further outrageous conduct) occurred on the last date of employment. Here the Petitioner’s decision to retire was communicated to her employer and she decided to continue working for a couple more weeks, during which time there is no

allegation that she was harassed or threatened in any way. In fact, her employer held a retirement luncheon for her during this time. (A.R. at 29).

The Amended Complaint sets forth no actionable extreme and outrageous conduct, or threat of such conduct, within two years of the date the lawsuit was filed. Therefore, the Circuit Court's decision to dismiss this count should be affirmed.

**5. The Circuit Court Did Not Err In Finding That Petitioner Did Not Allege An Actionable Claim Of Age Or Gender Discrimination**

In Count Two and Count Three of her Amended Complaint, Petitioner alleges causes of action based upon sexual discrimination and age discrimination, respectively. Petitioner failed to state a claim under either scenario.

In order to succeed on a claim for gender or age discrimination, the Petitioner must establish that "the alleged forbidden bias was a motivating factor in the defendant's decision to take an adverse action against the Petitioner." 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 Petitioner asserted one-hundred allegations of fact. In Count Two and Count Three of the Amended Complaint, Petitioner 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 . . . .

(A.R. at 33).

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

(A.R. at 33).

Is assessing these counts of the Amended Complaint, the Circuit Court properly looked to the Petitioner's own allegations of fact. Significantly, 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 Respondents made any negative comments to the Petitioner on the basis of her age or gender. There are no allegations that the Respondents made any employment decision affecting the Petitioner 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 Petitioner's age or gender.<sup>4</sup>

Instead of alleging facts that might support an age or gender discrimination claim, Petitioner's Amended Complaint spends one-hundred paragraphs addressing matters that have nothing to do with Petitioner's age or gender. For instance, the Amended Complaint contains the following allegations:

- 32 paragraphs out of 100 address the Petitioner's dissatisfaction with a co-worker and that co-worker's actions. (A.R. at 20-34, ¶¶33-45, 52-55, 64-78).
- 4 paragraphs address the Petitioner's dissatisfaction with the scheduling of her knee surgery and her use of sick leave. (A.R. at 20-34, ¶¶48-51).
- 11 paragraphs allege the Petitioner's unhappiness with the fact that Ms. Casey and others may have believed that the Petitioner was overpaid, notwithstanding the fact that Petitioner did not allege that her compensation was ever decreased. (A.R. at 20-34, ¶¶14, 16, 19-23, 26, 28-29, 32).

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<sup>4</sup> It should be noted that the Petitioner's supervisor, Respondent Casey, is also female and over the age of forty.

- 10 paragraphs address the Petitioner’s dissatisfaction with the fact that Ms. Casey and others may have been critical of the State Bar’s operation under Mr. Tinder. (A.R. 20-34, ¶¶12-13, 15, 24-25, 27, 29, 31, 60, 82). In fact, Petitioner specifically alleges that, “[m]uch of Ms. Casey’s criticism of both the state bar and the Petitioner was related to her predecessor and the Petitioner’s former supervisor, Thomas R. Tinder.” (A.R. at 22).

- 3 paragraphs address the fact that Ms. Casey changed employment policies of the State Bar. (A.R. at 20-34, ¶¶57-58, 91). Of course, employers have a right to unilaterally modify their policies. *See Hogue v. Cecil I. Walker Machinery Co.*, 189 W.Va. 348, 351-52, 431 S.E.2d 687, 690-91 (1993).

- 2 paragraphs address the Petitioner’s complaints that Ms. Casey and the State Bar did not send flowers to Petitioner after deaths in her family and that several individuals did not attend the Petitioner’s retirement luncheon. (A.R. at 20-34, ¶¶62, 79).

These allegations, as well as the remaining allegations of fact in Petitioner’s Amended Complaint, have nothing to do with the Petitioner’s age or gender or with the Respondents’ policies relating to age or gender. At best, these allegations may be considered “general harassment” not perpetrated on the basis of a protected status. This Court 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.

Given the allegations of the Amended Complaint, the Circuit Court found as follows:

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.”).

(A.R. at 12).

Petitioner’s arguments to this Court demonstrate that she does not even believe that her alleged treatment was due to her age or her gender. As referenced above, the Petitioner admits that the alleged harassment was due to her connection to Mr. Tinder, essentially admitting that this alleged treatment was “office pettiness or politics.”

The motivating factor behind this criticism of Blessing’s past efforts over the years was the zeal of Casey and others to discredit Tom Tinder and anyone who happened to be associated with his tenure at the state bar.

(Petitioner’s Brief at 30) (emphasis added).

As with gender discrimination the lower court found Blessing had not alleged any conduct specifically attributed to age discrimination. This ignores those matters contained in the foregoing Statement of Facts with repeated criticism of Blessing’ [sic] past performance of over twenty years in an effort to discredit Tinder.

(Petitioner’s Brief at 31) (emphasis added).

This unwarranted abuse was visited upon Blessing as the prime available target in the zeal to discredit Tom Tinder.

(Petitioner's Brief at 32-33) (emphasis added).

As set forth repeatedly in her amended complaint the primary grounds for the abusive conduct toward Blessing had been solely in retaliation for her being the former executive director's top assistant, a prime example of "other unlawful discrimination."

(Petitioner's Brief at 24-25) (emphasis added).

None of Petitioner's allegations of fact, taken as true, demonstrate any actionable gender or age discrimination. The only time Petitioner mentions age or gender discrimination in the Amended Complaint is in the conclusory statements contained in the separate counts indicating that the conduct of the Respondents "amounted to" age and sexual discrimination. (A.R. at 13-14). However, the sufficiency of the Complaint must be determined by the factual allegations, not by legal conclusions disguised as factual allegations. As noted by the Circuit Court:

More than conclusory allegations must be provided to withstand a Rule 12(b)(6) motion to dismiss. *See Fass v. Newsco Well Service*, 177 W.Va. 50, 350 S.E.2d 562, 564 (1986) (per curiam) (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.

(A.R. at 13-14).

Petitioner failed to plead any facts which indicate she was discriminated against on the basis of her age or gender. More importantly, the Amended Complaint and Petitioner's legal arguments both allege that the Respondents' motivation for the discriminatory conduct was

something other than age or gender. Based on her own allegations Petitioner cannot recover on these claims and the Circuit Court was correct to dismiss them.

**6. The Circuit Court Did Not Err In Dismissing The Supreme Court And Justice Benjamin**

As noted above, Petitioner'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." (A.R. at 20-34, ¶¶ 2, 3). In dismissing the Petitioner's claims against this Court, the Circuit Court correctly determined that the Petitioner could state no viable cause of action against an entity that was not her employer and had not participated in any alleged harassment or discrimination.

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.*

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*.

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

As previously noted, one of Petitioner’s claims involves an alleged violation of public policy by the Respondents. In addition to the deficiencies noted above, Petitioner’s “public policy” claim against the Supreme Court would fail as a matter of law even if Petitioner had articulated some public policy applicable to her employment situation with the State Bar.

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 Petitioner herself pleads, she was not employed by the Supreme Court.

Petitioner'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 Petitioner'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 Petitioner's working conditions and/or be directly involved in a discriminatory employment decision affecting the Petitioner. *See Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996).

In Conrad, the plaintiff worked in the kitchen at the Eastern Regional Jail. Id. at 367, 806. She was employed by ARA Szabo, a private contractor engaged by the West Virginia Regional Jail and Correctional Facility Authority ("Regional Jail Authority"). Id. The plaintiff alleged that during her employment, she was sexually harassed by correctional officers employed by the Regional Jail Authority. Id. at 368-69, 807-08. The plaintiff reported the conduct of the correctional officers and her employment with the private contractor was subsequently terminated. Id. The plaintiff's employment was terminated at the request of the Regional Jail Authority. Id.

The plaintiff in Conrad subsequently filed suit against the Regional Jail Authority alleging gender discrimination (sexual harassment) and reprisal in violation of the West Virginia Human Rights Act. The Conrad Court held that, although the plaintiff was not employed by the Regional Jail Authority, she could maintain a cause of action against it because the Regional Jail Authority was an "employer" under the Human Rights Act. The Court held:

W. Va. Code § 5-11-9(1) (1992) prohibits any person who is an employer from discriminating against any "individual" regarding his or her employment opportunities irrespective of whether the individual is an employee of or seeks work with that employer.

Syl. Pt. 8, Conrad.

In Conrad, the Regional Jail Authority directly controlled the plaintiff's working environment. The Regional Jail Authority contracted with the plaintiff's employer to provide kitchen services on its property, which necessarily led to interaction between the plaintiff and correctional officers employed by the Regional Jail Authority. "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."

In this case, the Petitioner'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 Petitioner 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 Petitioner (as there was in Conrad with respect to the Regional Jail Authority). The Petitioner'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. (A.R. at 20-34, ¶95). That allegation is not enough to impose any duty on this Court under Conrad or the Human Rights Act.

In addition to dismissing the Petitioner’s claims for the above reasons, the Circuit Court also rejected the Petitioner’s contention that this Court could be held liable under the doctrine of *respondeat superior*.

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.

(A.R. at 17-18).

Finally, the Court also dealt with the Petitioner’s claims against then-Chief Justice Benjamin.

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.

(A.R. at 18).

Because both this Court and Justice Benjamin cannot be held liable under the causes of action asserted against them given the facts as alleged in the Amended Complaint, those claims were properly dismissed by the Circuit Court. Accordingly, the Circuit Court’s Order in this respect should be affirmed.

**7. The Circuit Court Did Not Err In Applying The Standards Governing A Motion To Dismiss**

Petitioner’s final argument for reversal of the Order Granting Defendants’ Motion To Dismiss comes in the form of a curious assertion that the Circuit Court somehow did not follow the applicable jurisprudence relating to motions to dismiss in considering the Petitioner’s Amended Complaint. Further, the Petitioner recounts in this section of her Brief in some detail

the order of events at the hearing on Respondents' Motion To Dismiss. Petitioner's argument seems to be that while one or more of the counts in her Amended Complaint may be faulty, the dismissal of all of them as a whole (whether each is individually faulty or not) was improper. Petitioner argues that the fact that the Amended Complaint had one-hundred allegations of fact and six causes of action somehow means that it should not have been dismissed.

The number of allegations and causes of action in a complaint is irrelevant to the issue of whether the complaint actually states a cause of action. If the complaint does not state a cause of action, the mere fact that it contains a significant amount of bluster will not save it from dismissal. A review of the Circuit Court's Order in this matter reveals that it understood and applied the applicable law. Therefore, the Circuit Court committed no error in this regard.

**CONCLUSION**

Based upon the foregoing, it is apparent that the Circuit Court did not commit error as alleged by the Petitioner. Therefore, the Circuit Court's Order Granting Defendants' Motion To Dismiss should be affirmed.

THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA, BRENT D.  
BENJAMIN, THE WEST VIRGINIA  
STATE BAR and ANITA R. CASEY,  
By Counsel



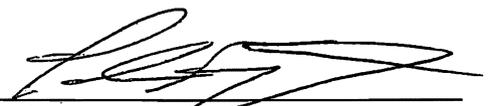
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**CERTIFICATE OF SERVICE**

I, Paul L. Frampton, Jr., counsel for Respondent, do hereby certify that service of the "RESPONDENT'S BRIEF" was made upon the parties listed below by mailing a true and exact copy thereof to:

Richard A. Robb, Esq.  
P.O. Box 8747  
South Charleston, WV 25303  
*Counsel for Petitioners*

in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 23<sup>rd</sup> day of January, 2014.

  
Paul L. Frampton, Jr. (WVSB#9340)  
*Counsel for Respondents*