

In the Supreme Court of Appeals of West Virginia

Docket No. 12-1534

Jackie L. Brown, II, Plaintiff
Below,
Petitioner

v.)

Appeal from a final order
of the Circuit Court of Fayette County
(12-C-211-B)

**The City of Montgomery, a
Municipal corporation, and
James F. Higgins, Jr.,
individually and in his official
capacity as Mayor of the City of
Montgomery, Defendant**
Below,
Respondent.

Petitioner's Brief

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ASSIGNMENTS OF ERROR

I. The Circuit Court erred in dismissing Petitioner's Complaint under West Virginia Rule of Civil Procedure 12(b)(6) because Petitioner's Complaint set forth sufficient facts to support his claims of discharge without pretermination hearing and discharge in contravention of public policy.

II. The Circuit Court erred in finding that Plaintiff had not set forth any facts to support his contention that his termination was based upon his refusal to engage in illegal activities, including a refusal to participate in a pattern of illegal racial discrimination against a black officer.

III. The Circuit Court erred in finding that the Defendants were entitled to qualified immunity, because no such protection exists for illegal actions, which were alleged in Petitioner's Complaint.

STATEMENT OF THE CASE

Petitioner Jackie L. Brown, II was a police officer with the City of Montgomery from 2007 until 2011. In approximately 2009, he was offered and accepted a position as Chief of Police for the Montgomery Police Department under the authority of Mayor James F. Higgins. (Complaint, A.R. 17.)

During Petitioner's tenure with the Police Department, another officer, Lieutenant James Ivy instituted legal action against the City for racial discrimination and violations of constitutional rights. Ivy, who was black, alleged that he had been promoted to Lieutenant but

not given the commensurate pay increase or customary job duties of a lieutenant. The suit ultimately settled. (Complaint, A.R. 18.)

However, after the suit was resolved, Mayor Higgins ordered the Petitioner to retaliate against Ivy for his suit against the City. At one point, Higgins commented in reference to Ivy “that black son of a bitch needs to be fired.” Petitioner refused what he believed to be an unlawful order to track Ivy’s whereabouts via a GPS device, which the Mayor ordered Petitioner to hide on Ivy’s vehicle. Defendant Higgins became enraged and verbally abusive to Petitioner for this refusal. (Complaint, A.R. 18).

Shortly thereafter on November 29, 2011, Higgins delivered a letter to Petitioner, terminating him from his position with the City of Montgomery. The letter did not comply with the requirements of West Virginia Code §8-14A-1, *et seq* in that it failed to inform Petitioner of the reasons for his discharge and failed to provide him with a pre-termination hearing. This suit was brought as a result. (Complaint, A.R. 18).

The defendants filed a Motion to Dismiss the Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. (A.R.28). After a hearing before Circuit Court Judge Paul Blake, the parties were ordered to submit supplemental briefs and proposed findings of fact and conclusions of law. Each party did so, and the Plaintiff also filed a Motion for Leave to File an Amended Complaint more fully setting forth the facts. (A.R. 45). The Motion for Leave to File Amended Complaint was denied and the Defendant’s Motion to Dismiss was granted. (A.R. 1). It is from this final Order dismissing the Complaint that the Petitioner appeals.

SUMMARY OF ARGUMENT

Petitioner's Complaint, which the lower court was obligated to take as true under Rule 12(b)(6), contended that his firing was in retaliation for his refusal to harass and discriminate against a black officer, which firing would be in contravention of substantial public policy. Furthermore, Petitioner asserts that he was entitled to a pre-termination hearing under West Virginia Code §8-14A-1, et seq, (the Policeman's Bill of Rights) because he was not only dismissed as chief but fired from his position as a police officer with the City of Montgomery. Finally, dismissal under 12(b)(6) on the basis of qualified immunity was improper because qualified immunity does not and should not extend to illegal racial discrimination.(A.R. 18-19).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the record and briefs in this case will provide the Court with all necessary information needed to decide the issues, and therefore oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. The Circuit Court abused its discretion in granting Respondent's Rule 12(b)(6) Motion to Dismiss Petitioner's Complaint because Petitioner had set forth facts supporting his claim that he was fired without a pretermination hearing to which he was entitled.

Because the Petitioner was a police officer for the City of Montgomery prior to his appointment to the position of Chief, he was entitled to a hearing before the Police Hearing Board before being fired by the City. Montgomery, West Virginia is a class III city, whose

police officers are protected by West Virginia Code §8-14A-1, et seq, which requires a hearing for any officer who faces punitive action. Petitioner never resigned his position as a police officer for the City of Montgomery, but simply took the role of Chief of the department.

In the termination letter to Petitioner, Mayor Higgins specified that the Plaintiff was not only relieved from command as Chief but also terminated from employment with the City of Montgomery. Though the Mayor had the statutory authority to hire and fire the chief of police, he did not have such authority over police officers. Thus, Petitioner lost his employment as a police officer without benefit of a hearing.

Defendants argued below that the protections of §8-14A-3 do not apply to Petitioner because he was not an “*accused* officer”. Under this rationale, a police officer could be deprived of his or her right to a hearing by simply firing him or her without giving a reason, as was done to the Petitioner. This is not the intended result of the statutory framework and such an end-run around the protections afforded to police officers should not be condoned.

Respondents cite *Vetter v. Town of Moorefield*, No. 11-1353 (W.Va. Supreme Court, June 22, 2012) (memorandum decision) to support their argument that because the chief of police serves at the will and pleasure of the town, he or she can be fired for any reason or no reason, so long as his dismissal did not violate the law. (A.R. 58). However, nothing in *Vetter* indicates that petitioner had been an officer appointed to the position of chief, as was the Petitioner in the case at bar. Notably, for civil service officers, it is specifically stated in West Virginia Code §8-14-17 that an officer who is promoted to chief, if removed from the position of chief, “shall retain the regular rank within the paid police department which he or she held prior to his or her appointment to the office of chief...” While this statute is specific to civil service

officers, it nonetheless recognizes that an individual does not cease to be a police officer simply by virtue of his or her promotion to chief. Petitioner should have been returned to his position as a police officer or afforded a pretermination hearing before being discharged.

II. The Circuit Court erred in granting the Motion to Dismiss because Petitioner pleaded sufficient facts to support his claim of discharge in contravention of public policy.

Even if Petitioner was not entitled to a pretermination hearing, his termination was improper because it was motivated by an illegal purpose: Petitioner's refusal to participate in racial discrimination within the department. As Chief of Police for Montgomery, Petitioner answered directly to Mayor Higgins. Higgins made comments to the Petitioner about Lieutenant James Ivy, an officer under Petitioner's command, indicating his belief that Ivy should be fired due to his racial discrimination lawsuit against the City. Higgins at one point referred to Ivy as "that black son of a bitch." When Higgins ordered Petitioner to place a GPS tracking device on Ivy's cruiser, Petitioner refused to do so. Ivy was the only officer Higgins wanted tracked and Petitioner refused to participate in the targeted harassment of Lieutenant Ivy. Furthermore, Petitioner believed it to be a violation of Ivy's constitutional rights to plant a tracking device on Ivy's cruiser without his knowledge.¹ The lower court, at the hearing on the Motion to Dismiss, opined that the facts of the Complaint did not sufficiently allege that the order to place the GPS was discriminatory. Plaintiff moved for leave to file an amended complaint, in which it was

¹Petitioner had legitimate grounds for this belief; in January 2012, the United States Supreme Court ruled that the warrantless placement of a GPS device on a suspect's vehicle was an illegal search. *United States v. Jones*, 132 S. Ct. 935 (2012). Though Defendants argue, and the Circuit Court agreed, that the *Jones* decision would not apply because the cruiser was the property of the City, the issue is unclear and it is not a stretch of credulity for Petitioner to have questions regarding the legality.

more clearly alleged that the mayor's order was racially motivated. (A.R. 45-50). The Motion for Leave to file Amended Complaint was denied. (A.R. 2).

It was not long after this disagreement over the GPS device that Petitioner was given the letter relieving him of his position as chief and terminating his employment with the city. Petitioner has alleged facts that would support his claim that he was fired in retaliation for his refusal to participate in racial discrimination, which is surely "in contravention of substantial public policy." *Harless v. First National Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978); *Williamson v. Green*, 490 S.E.2d 23, 200 W.Va. 421 (1997) (holding that the West Virginia Human Rights Act is a substantial public policy"). Motions to Dismiss under 12(b)(6) should not be granted "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. US*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102; 2 L. Ed.2 80, 84. Plaintiff's Complaint did more than simply offer conclusory statements without supporting facts. For each of his claims, he set forth the relevant conduct of the Respondent which gives rise to the claim. The Court need not believe with certainty that these incidents occurred; it is enough that Petitioner alleged them in his Complaint. Since the facts of his Complaint were to be regarded as true for purposes of a 12(b)(6) Motion to Dismiss, the lower court erred in granting the motion, and Plaintiff should be permitted to proceed with the presentation of evidence to support his claim.

III. Qualified immunity does not apply to the Respondents because the protection does not extend to illegal activities.

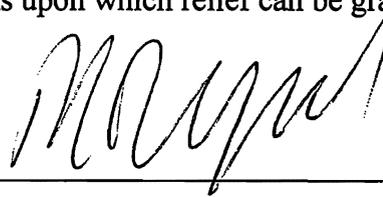
Respondents invoked qualified immunity in their Motion to Dismiss. However, qualified immunity does not shield public officials who engage in illegal activity. Petitioner has alleged that he was fired for refusing to retaliate against a black officer who had sued the City for racial

discrimination. The fact that Lieutenant Ivy was the only officer whom the Petitioner was ordered to secretly track via GPS, together with the racial discrimination lawsuit and the comments of the Mayor to Petitioner with regard to Ivy support Petitioner's claim that racial discrimination was the catalyst for the decision to fire the Petitioner. This discrimination is illegal, and cannot be covered by qualified immunity. *Parkulo v. West Virginia Board of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996) (holds that qualified immunity does not protect officials who violate the law or act with bad faith or malice.)

CONCLUSION

The Circuit Court's granting of the Motion to Dismiss was improper because the facts as pled in Plaintiff's Complaint sufficiently support claims upon which relief can be granted.

Signed: _____



Michael T. Clifford (WV Bar #750)

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

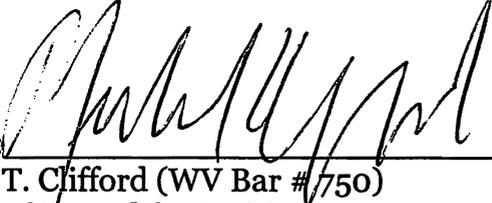
I hereby certify that on this 18 day of March, 2013, a true and accurate copy of the foregoing **Petitioner's Brief** was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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