

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0671

WILLIAM FROHNAPFEL AND MARY LOU FROHNAPFEL,

Petitioners,

v.

ARCELORMITTAL USAL LLC AND ARCELORMITTAL WEIRTON LLC,

Respondents.

PETITIONERS' BRIEF

Certified Question from the United States District Court
for the Northern District of West Virginia
(Civil Action No. 5:14-CV-45)

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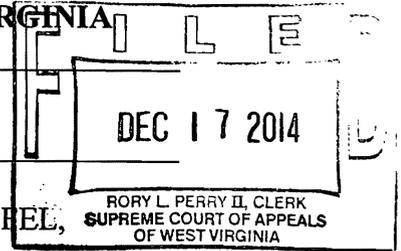


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TO: THE HONORABLE CHIEF JUSTICE
THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

AND NOW come Petitioners, William Frohnapfel and Mary Lou Frohnapfel, by and through counsel, Robert J. D’Anniballe, Jr., Esq. of the law firm Pietragallo Gordon Alfano Bosick & Raspanti, LLP, and hereby request that this Honorable Court affirmatively answer the certified question presented by the United States District Court for the Northern District of West Virginia and hold that the West Virginia Water Pollution Control Act establishes a substantial public policy of West Virginia to provide a basis for a *Harless* claim for retaliatory discharge as Petitioners have brought against Respondents in this matter.

I. CERTIFIED QUESTION

The District Court’s question certified to this Court seeks a determination as to whether the West Virginia Water Pollution Control Act is a substantial public policy sufficient for a plaintiff to rely upon in asserting a claim for retaliatory discharge. Petitioners request this Honorable Court to hold that the West Virginia Water Pollution Control Act establishes a substantial public policy of West Virginia to support a claim for retaliatory discharge where an employee is discharged for reporting violations of the permit issued under the Act and raising related concerns to his employer.

II. STATEMENT OF THE CASE

A. Parties

Petitioners, William E. Frohnapfel (hereinafter “Petitioner”) and Mary Lou Frohnapfel, husband and wife (hereinafter, collectively, “Petitioners”), are residents of Weirton, West

Virginia. Appendix, p. 1. Defendant, ArcelorMittal Weirton LLC is a tin plate manufacturer in Weirton, West Virginia. Appendix, p. 2. Defendant ArcelorMittal USA LLC is ArcelorMittal Weirton's parent company. Appendix, pp. 2-3.

Petitioner William E. Frohnepfel was employed by ArcelorMittal Weirton and its predecessors for forty-one years, working his way through various positions. Appendix, p. 2. Petitioner's position was part of a collective bargaining unit, represented by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (hereafter the "Union" or "USWA"). USWA and Respondents have a Collectively Bargaining Agreement (hereinafter "CBA"). Appendix, p. 2. At the time of his termination, Petitioner held a position as a Technician II Operator in the Environmental Control/Utilities Department. Appendix, p. 3. This department of ArcelorMittal Weirton is responsible for overseeing B-Outfall operation, which is located on the Ohio River and discharges hazardous byproducts from its manufacturing process directly into the Ohio River. Appendix, p. 3.

B. Facts and Proceedings Below

ArcelorMittal Weirton's B-Outfall is located near water intake lines that provide drinking water to local residents of Weirton, West Virginia and Steubenville, Ohio. Appendix, p. 4. B-Outfall is governed by a permit issued under the West Virginia Water Pollution Control Act (hereinafter "WPCA"), W.Va. Code §§ 22-11-1 *et seq.*, which regulates the discharge of hazardous materials. Appendix, p. 3. The WPCA requires Respondents to monitor B-Outfall's discharge and make reports related to the same to the West Virginia Department of Environmental Protection (hereinafter "WVDEP"). Appendix, p. 3.

On multiple occasions, Petitioner expressed concerns to Defendants regarding B-Outfall operations and compliance with its permit requirements. Appendix, pp. 4 – 8. Specifically, in or about February 2009, Petitioner took issue with Respondents' instruction to scrape labels off of barrels and replace them with new ones due to expiration issues. Appendix, p. 61. In or about March 2009, Petitioner informed Respondents' that a probe was placed in a buffer to conceal a PH issue. Appendix, p. 61. Then, in or about June 2010, Petitioner truthfully responded to questions regarding the B-Outfall, and the dumping and removal of hazardous chrome, raised by a West Virginia Department of Environmental Protection Inspector. Appendix, p. 61. After making these statements, Petitioner was summoned to Respondents' management office to discuss and discourage the same. Appendix, p. 61. Related to this, Respondents' Human Resources and Labor Relations Manager stated, "We just can't have him contacting the West Virginia Department of Environmental Protection every time he feels a need." Appendix, p. 62.

When Petitioner questioned insufficient incident commandeering training by Respondents in November 2010, he was disqualified from serving as a "Team Leader." Appendix, p. 62. In January 2011, Petitioner informed Respondents that a containment area was necessary for a tin by-product known as "Prussian Blue," and ultimately, in May 2012, a "Prussian Blue" excursion occurred at Respondents' B-Outfall operation. Appendix, p. 62. Around June of 2012, Petitioner questioned an outside broker's method regarding the removal of hazardous waste, which resulted in Petitioner's suspension and a Last Chance Agreement. Appendix, p. 62. On April 14, 2013, Respondents committed an improper lime discharge, and Petitioner noted that such action was a violation of the law. Appendix, p. 62. Finally, after this series of events, Petitioner was terminated by Respondents on April 18, 2013. Appendix, p. 63.

Respondents terminated Petitioner through a series of adverse employment actions, taken after Petitioner made statements regarding Respondents' violations of the WPCA. Appendix, p. 61.

The WPCA is a substantial public policy under West Virginia law. The West Virginia Legislature expressly noted, within the Act itself, that the WPCA is a public policy. Appendix, p. 73. Further, the WPCA provides many, specific regulations concerning hazardous chemicals and their output into public water made available to West Virginia residents. Appendix, p. 73

On February 26, 2014, Petitioners filed a Complaint alleging one count of retaliatory discharge and one count of loss of consortium in the Circuit Court of Hancock County, West Virginia. Appendix, p. 102. Respondents filed a Notice of Removal to the United States District Court for the Northern District of West Virginia (hereinafter "District Court") and, there, filed a Motion to Dismiss on April 11, 2014. Appendix, p. 102. The District Court issued an order deferring Respondents' Motion to Dismiss and staying the action, pending final decision by this Court on the Certified Question at issue here. Appendix, pp. 99-118.

III. SUMMARY OF ARGUMENT

In *Harless v. First Nat. Bank in Fairmont*, this Court held that an employer may be liable to an employee for a claim of retaliatory termination "where the employer's motivation for the discharge contravenes some substantial public policy principle." 162 W.Va. 116, 124, 246 S.E. 2d 270, 275 (1978). The West Virginia Water Pollution Control Act is a substantial public policy of West Virginia. As such, Petitioners' claim for retaliatory discharged for reporting violations of a permit issued under the WPCA is permitted under *Harless*. Petitioners' Complaint raises issues related to substantial local interests, specifically, regarding hazardous chemicals being discharged into a public drinking water source. Petitioner voiced concerns related to violations of

this substantial public policy, the WPCA, and was eventually discharged in retaliation for the same. Thus, Petitioners' Complaint pled sufficient factual allegations to raise a *Harless* claim due to Respondent's actions contravening the West Virginia Water Pollution Control Act, the substantial public policy at issue here.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court has made a determination that oral argument under Rule 20 of the Rules of Appellate Procedure is appropriate in this matter. Oral argument has been scheduled for February 25, 2015. As such, Petitioners will not present any further discussion regarding oral argument in this filing.

V. ARGUMENT

A. Standard of Review

When presented with a certified question from a federal district court, this Court's review is plenary. *Bower v. Westinghouse Elec. Corp.* 206 W.Va. 133, 522 S.E. 2d 424, 429 (1999). Further, a determination on whether a substantial public policy of West Virginia exists is a question of law for the court. *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 383 , 480 S.E. 2d 817, 822 (1996) (internal citations omitted).

B. The West Virginia Water Pollution Control Act Explicitly Creates a Substantial Public Policy

This Court has provided for an exception to the general rule that employers may terminate at-will employees without liability consequences. In the Syllabus of *Harless*, this Court determined that

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

162 W.Va. at 124, 246 S.E. 2d at 275 (1978). As such, "a cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy effectuating the termination." *Swears v. RM Roach & Sons, Inc.*, 225 W.Va. 699, 704, 696 S.E. 2d 1, 6(2010) (internal citations and quotation omitted). This Court noted that ". . . retaliatory discharge cases are generally based upon a public policy articulated by the legislature." *Id.* (quoting *Shell v. Metropolitan Life Ins. Co.*, 183 W.Va. 407, 413, 396 S.E. 2d 174, 180 (1990)). This Court has not limited the sources of public policy, but has found that such public policies are found, among others sources, in the following:

. . . our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals, and general welfare of the people for whom government-with-us is factually established.

Birthisel v. Tri-Cities Health Services Corp., 188 W.Va. 371, 376, 424 S.E. 2d 606, 611 (1992) (internal citation and quotation omitted). Furthermore, this Court has noted that it will look to whether the public policy provides "specific guidance to a reasonable person," which is indicative of a substantial public policy required for a *Harless* claim. *Id.* at 377, 611. The West Virginia Water Pollution Control Act, which offers such guidance, is clearly a substantial public policy under this definition.

The West Virginia Water Pollution Control Act sets forth, "[i]t is ***declared to be the public policy*** of the state of West Virginia to maintain reasonable standards of purity and quality of the water of the state." W.Va. Code § 22-11-2(a) (emphasis added). Additionally, the West

Virginia Legislature made clear, “[i]t is also the *public policy* of the state of West Virginia that the water resources of this state with respect to the quantity thereof be available for reasonable use by all of the citizens of this state.” W.Va. Code § 22-11-2(b) (emphasis added). In addition to these explicit statements by the West Virginia Legislature that the WPCA is a public policy, other provisions of the WPCA, as the District Court noted, articulate specific regulations related to compliance with requirements established by the Act.

The WPCA defines “pollution” as “the man-made or man-induced alternation of the chemical, physical, biological and radiological integrity of the waters of the state.” W.Va. Code § 22-11-3(17). The Act further grants authority to the director to control water pollution, specifically setting forth that

[t]he director has the authority to enter at all reasonable times upon any private or public property for the purpose of making surveys, examinations, investigations and studies needed in the gathering of facts concerning the water resources of the state and their use, subject to responsibility for any damage to the property entered. . . All persons shall cooperate fully with the person entering such property for such purposes.

West Virginia Code § 22-11-4. Furthermore, regarding permits issued under the Act, the “director may make field inspections of the work on the activity, and, after completion thereof, may inspect the completed activity, and from time to time, may inspect the maintenance and operation of the activity.” W.Va. Code § 22-11-12. Such authority includes the ability to revoke, suspend, or modify a permit if any violations are discovered or if there are misrepresentations regarding the same. *Id.*

In addition to these specific regulations, the WPCA imposes substantial penalties for violations of the Act, as follows:

Any person [or entity] who [which] violates any provision of any permit issued under or subject to the provisions of this article . . . is subject to a civil penalty not to exceed \$25,000 per day of such violation.

W.Va. Code § 22-11-22(a). The Act further states that any person who does not comply with the WPCA is guilty of a misdemeanor. W.Va. Code § 22-11-24(c). A subsequent violation is a felony, with fines up to \$50,000 per day. W.Va. Code § 22-11-24(d).

Therefore, it is clear that the WPCA fulfills the *Harless* public policy requirement. This is illustrated by the Legislature's explicit statements noting that the WPCA is public policy and further by the specific and extensive regulations established by the same. The clear intent of the WPCA is health and safety considerations of public water supplies, and therefore, the WPCA is the type of regulation for which a *Harless* claim was intended.

In *Harless*, the plaintiff alleged a retaliatory discharge resulting from voicing his concerns and seeking to have his employer comply with certain West Virginia and federal consumer credit and protection laws. 162 W.Va. at 117, 246 S.E. 2d at 272. There, this Court held that “[s]uch manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without be furnished a cause of action for such discharge.” *Id.* at 125, 276. Petitioner is alleging facts very similar to those in *Harless* in that he was discharged for discussing and seeking to prevent Respondents' violations of the WPCA.

In *Birthisel*, this Court did not find that a substantial public policy had been violated when a social worker was terminated by her former hospital employer for refusing to transfer data within medical records. 188 W.Va. 371, 424 S.E.2d 606. Petitioner's circumstances can be differentiated from *Birthisel*. The public policies upon which the plaintiff in *Birthisel* relied dealt with general requirements for good care given by social workers in this State. *Id.* at 378, 613. There were no specific requirements related to the actions the *Birthisel* plaintiff took with respect refusing to transfer medical record data; the plaintiff employee instead disagreed with what her

employer asked her to do. *Id.* These facts are in contrast to Petitioner's actions related to specific violations of the WPCA by Respondents.

In the instant case, Petitioner expressed concerns to Respondents and an inspector from the West Virginia Department of Environmental Protection regarding Respondents' specific violations of the WPCA. Additionally, Petitioner answered questions and provided information regarding such violations and even offered suggestions to Respondents to prevent further violations of the WPCA. As a result of these and other occurrences related to hazardous chemicals entering the Ohio River at Respondents' B-Outfall operation, in violation of permits issued under the WPCA, as set forth above, Petitioner was eventually terminated from his position with Respondents. Respondents have effectively silenced Petitioner in order to avoid the potential consequences of permit violations at their B-Outfall operation.

Certainly, a substantial public policy of this state is being frustrated where, as in the instant case, an employee is terminated for reporting violations of WPCA and for taking action to ensure future compliance with WPCA. The WPCA sets forth specific guidance and regulations pertaining to discharges of hazardous materials into waters in West Virginia, such as those at issue here. Petitioner has set forth factual allegations that he was discharged due to a threat he posed as a potential whistleblower, and Respondents' actions in terminating him for these reasons clearly violates a substantial public policy. Petitioner has sufficiently asserted a *Harless* claim.

VI. CONCLUSION

For the foregoing reasons, the West Virginia Water Pollution Control Act, W.Va. Code §§22-11-1 *et seq.* establishes a substantial public policy of West Virginia such that it supports a *Harless* claim for retaliatory discharge.

WHEREFORE, the Petitioners respectfully request that this Honorable Court affirmatively answer the certified question submitted by the District Court and for any such other relief as this Honorable Court deems necessary, appropriate, and proper.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'RJD', written over a horizontal line.

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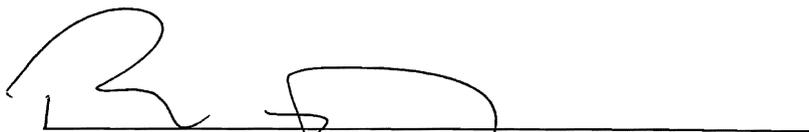
CERTIFICATE OF SERVICE

I do hereby certify that on this 16th day of December, 2014, I served the foregoing *Petitioners' Brief and Joint Appendix* by U.S. First Class mail to the parties at the addresses set forth below:

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