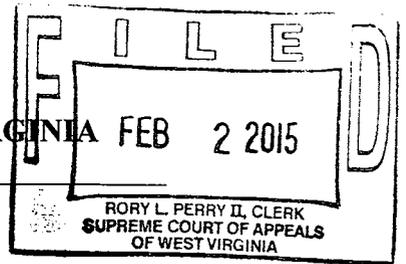


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-0671

WILLIAM FROHNAPFEL AND MARY LOU FROHNAPFEL,

Petitioners,

v.

ARCELORMITTAL USAL LLC AND ARCELORMITTAL WEIRTON LLC,

Respondents.

PETITIONERS' REPLY 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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TABLE OF CONTENTS

	Page
Table of Authorities	iii
I. Reply Argument	1
A. <u>The Court has Deliberately Provided for Exceptions to the Doctrine of At-Will Employment</u>	1
B. <u>The West Virginia Water Pollution Control Act (“WPCA”) Supports a Harless Wrongful Discharge Claim</u>	2
C. <u>Petitioner’s Claim Falls Squarely within Harless</u>	5
II. Conclusion	8

TABLE OF AUTHORITIES

	Page
<u>Case Law</u>	
<i>Birthisel v. Tri-Cities Health Services Corp.</i> , 188 W.Va. 371, 424 S.E. 2d 606 (1992).....	1
<i>Harless v. First Nat. Bank in Fairmont</i> , 162 W.Va. 116, 246 S.E.2d 270 (1978).....	1, 4
<i>Shell v. Metropolitan Life Ins. Co.</i> , 183 W.Va. 407, 396 S.E. 2d 174 (1990).....	1
<i>Swears v. RM Roach & Sons, Inc.</i> 225 W.Va. 699, 696 S.E. 2d 1 (2010).....	1, 6, 7
<u>Statues and Rules</u>	
West Virginia Code §§22-11-1 <i>et seq.</i>	2, 3

I. REPLY ARGUMENT

Petitioner's claim against Respondents is rooted in the fact that he was terminated because he reported and voiced concerns regarding Respondents' violations of West Virginia's Water Pollution Control Act (hereinafter "WPCA"), which protects the quality and availability of water to citizens of this State. Respondents' facility at issue in this case is located on the Ohio River, with operations leading to certain discharges into this public water resource. Therefore, Respondents' compliance with the WPCA is vital. A substantial public policy of this State would be frustrated if Respondents are found to have legally terminated Petitioner for reporting violations of the WPCA.

A. The Court has Deliberately Provided for Exceptions to the Doctrine of At-Will Employment

It is well established that this Court has provided for exceptions to the doctrine of at-will employment in this state and has found circumstances under which liability may be imposed upon an employer for terminating an at-will employee. *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978). Further, as Respondents indicated in their Brief, these exceptions are to "based upon a public policy articulated by the legislature." *Shell v. Metropolitan Life Ins. Co.*, 183 W.Va. 407, 413, 396 S.E. 2d 174, 180 (1990). Thus, this Court, for good reason, has found exceptions to the at-will employment doctrine where an employee's termination is adverse to a substantial public policy. *Swears v. RM Roach & Sons, Inc.*, 225 W.Va. 699, 704, 696 S.E. 2d 1, 6 (2010) (internal citations and quotation omitted).

Importantly, this Court has found such exceptions to the at-will employment doctrine in a variety of sources, including public statutes, and specifically, those that address the safety, health, and general welfare of society. *Birthisel v. Tri-Cities Health Services Corp.*, 188 W.Va.

371, 376, 424 S.E. 2d 606, 611 (1992). To determine whether a substantial public policy exists, this Court has determined that such regulations or statutes should “provide specific guidance to the reasonable person.” *Id.* at 377, 611. These exceptions to the at-will employment doctrine exist because this Court found it necessary to hold employers liable for terminating an employee for his or her actions or efforts in preventing or stopping his or her employer from violating a substantial public policy. *Harless*, at 162 W.Va. at 125, 246 S.E. 2d at 276. Petitioner is raising a claim based upon retaliatory termination for his actions in preventing or stopping Respondents from violating a substantial public policy of this State.

B. The West Virginia Water Pollution Control Act (“WPCA”) Supports a Harless Wrongful Discharge Claim

i. The WPCA Provides Specific Guidance

Contrary to Respondents’ assertion that the WPCA fails to provide specific guidance, Petitioners have clearly demonstrated that the WPCA is a substantial public policy which provides specific guidance to its reader. At the outset of the WPCA, the Legislature declares that it is a “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). The WPCA authorizes the director of the division of water and waste management of the Department of Environmental Protection (hereinafter “the Director”) to perform acts necessary to ensure compliance with this State’s participation in the National Pollutant Discharge Elimination System (hereinafter “NPDES”). W.Va. Code § 22-11-4 (a) (1).

Authority granted to the Director includes that to enter property to examine and investigate water resources and to inspect compliance with permits issued under the WPCA. W.Va. Code § 22-11-12. Further, the legislature clarifies the significance of compliance with the

WPCA, imposing fines up to \$25,000 per day for initial violations and up to \$50,000 per day for subsequent violations; likewise, criminal liability in the form of a misdemeanor exists for initial violations and a felony for subsequent violations. W.Va. Code §§ 22-11-22, 24. In addition to these fines and criminal liability, the Legislature also specifies that is unlawful to

. . . . increase in volume or concentration any sewage, industrial wastes or other wastes in excess of the discharges or disposition specified or permitted under any existing permit. . . .

W.Va. Code § 22-11-8(b)(4). Likewise, it is also unlawful to

. . . . extend, modify or add to any point source, the operation of which would cause an increase in the volume or concentration of any sewage, industrial wastes or other wastes discharging or flowing into the waters of the state

W.Va. Code § 22-11-8(b)(5).

Language clearly articulated by the West Virginia Legislature illustrates the specific guidance limiting pollution of water resources in this State. Respondents maintain a very large facility, and certainly, are aware of the regulations imposed upon such facility by the WPCA and, surely, related permits issued to their facilities. Respondents' suggestion that the WPCA does not provide guidance as to the prohibitions and limitations on polluting water resources in this State must fail. Any reasonable person, or entity, would gather from a reading of the WPCA, that certain limitations on pollutants exist and that compliance with the permits issued under the WPCA is absolutely required. Certainly, even for a large corporation, fines of up to \$50,000 per day for violations of these permits are not arbitrary, but rather, exemplify specific guidance from the Legislature that compliance with permits issued under the WPCA is mandatory.

Though Respondents directly misrepresent the District Court's Order in their brief¹, it is very clear that the District Court recognizes that "there is a strong argument that the WPCA articulates a public policy sufficient to support a *Harless* retaliatory discharge claim." Appendix,

¹ Contrary to the District Court's Order, Respondents' Brief states, "the District Court apparently recognized the inability of the WPCA to support a *Harless* claim." Respondent's Brief, p. 11.

p. 112. Further, the District Court recognized, as Petitioner has argued, that the public policies in the WPCA could be frustrated if employees were terminated for reporting violations of the same. Appendix, p. 112.

ii. NPDES Permits are Issued Pursuant to the WPCA and Support a Harless Claim

Respondents contend that the NPDES permits issued under the WPCA, and Petitioner's reports regarding violations of the same, cannot support a *Harless* claim. The permits at issue in this case are issued pursuant to the WPCA, which, as illustrated above, makes clear that compliance with the same is essential. While Respondents argue that Petitioner's reports of violations of certain permits "is not a situation where the alleged protected conduct at issue is so plain that an employer will automatically know what is prohibited . . . ," (Respondents' Brief, p. 12) the WPCA is very clear that violations of the permits and increased output of certain discharges into public water resources, such as those raised by Petitioner here, are strictly prohibited. Petitioner raised concerns regarding specific violations of the WPCA by Respondents' actions which were in the form of violations of the NPDES permits issued under the WPCA. Surely, a reasonable employer would also know not to terminate an employee who reported violations of the WPCA and its permits.

iii. Employee Protection from Retaliatory Discharge Does Not Require an Explicit Statutory Prohibition

Exceptions to the at-will employment doctrine were created by this Court because such there was no other protection available to at-will employees to protect them from retaliatory discharge. *See, generally, Harless*, 162 W.Va. 116, 246 S.E. 2d. 270. In fact, the *Harless* Court made its decision absent any language in the West Virginia Consumer Credit and Protection Act stating that employees should not be terminated for reporting alleged violations for the same. *Id.*

at 125, 276. Indeed, this Court found that the *Harless* plaintiff was wrongfully terminated for reporting alleged violations of the West Virginia Consumer Credit Protection Act, even though the Legislature had not provided such a protection for employees reporting these violations. *Id.*

Thus, Respondents' assertion that the Legislature did not intend for the WPCA to support a *Harless* claim because the WPCA does not explicitly say employers cannot terminate employees for reporting alleged violations is wholly flawed and entirely inconsistent with the holding in *Harless*. Logically, nowhere in *Harless*, or the cases that have followed, has this Court held that a *Harless* claim must be supported by explicit legislative language prohibiting termination of employees for reporting alleged violations of the public policies at issue.

C. Petitioner's Claim Falls Squarely within Harless

i. Petitioner's Termination is Similar to the Plaintiff's Termination in Harless

Petitioner has asserted a claim that he was terminated by Respondents for reporting violations of the WPCA and taking action to ensure Respondents' compliance with the WPCA. Specifically, Petitioner expressed concerns regarding such violations to an inspector from the West Virginia Department of Environmental Protection. After this, and a series of related events, Petitioner was eventually terminated from employment with Respondents. Petitioner contends such termination was a result of his reporting violations of the WPCA. As such, Petitioner's claim is a *Harless* claim.

In *Harless*, the employee plaintiff's claim was based upon an alleged retaliatory discharge resulting from the plaintiff voicing concerns and ensuring his employer's compliance with West Virginia and federal consumer credit protection laws. 162 W.Va. at 117, 246 S.E. 2d at 272. There, the Court analyzed the West Virginia Consumer Credit and Protection Act, which

regulates consumer and credit practices and, as the Court pointed out, intends to protect consumers of this State and also imposes criminal sanctions for willful violations of the same. *Id.* at 125, 276. With this, the Court found that the employer's termination of the plaintiff frustrated public policy, here, the West Virginia Consumer Credit and Protection Act. *Id.*

In the instant case, Petitioner has specifically asserted that he voiced concerns to Respondents with their B-Outfall's operations and compliance with its permits. Appendix, pp. 4-8. Specifically, Petitioner informed Respondents' that a probe was placed in a buffer to conceal a PH issue. Appendix, p. 61. Additionally, 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. Further, 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. Respondents committed an improper lime discharge, and Petitioner noted that such action was a violation of the law. Appendix, p. 62. These events demonstrate the specific violations and compliance concerns raised by Petitioner to both Respondents and State officials related to the WPCA. Further, Petitioner has asserted that Defendants' Human Resource and Labor Relations Manager boldly stated, on more than one occasion, that Petitioner was not promoted to Team Leader because Respondents believed that he made inappropriate statements to State Environmental Inspectors in June of 2010 and that he could not call the State whenever he had environmental concerns. Appendix, p. 6. Regarding Petitioner, 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.

Petitioner's circumstances, and the public policy at issue, are very similar to those in *Harless*. Petitioner has alleged that he was terminated as a result of voicing concerns and reporting violations of the WPCA. Where the Consumer Credit and Protection Act protected the interests of credit consumers of this State, the WPCA, as outlined above, protected the interests of citizens of this State by ensuring safe water is available to them. Moreover, the WPCA, just as the Act at issue in *Harless*, imposes criminal sanctions for intentional violations of its provisions. It follows that, just as in *Harless*, where Petitioner was terminated for voicing concerns about violations of and ensuring compliance with WPCA, a public policy of this State is frustrated if the employee has no cause of action in response to his termination.

ii. *Petitioner's Claim can be Distinguished from Those where the Court Found no Statutory Intent*

As set forth above, the WPCA's silence on a prohibition of retaliatory discharge does not indicate that the Legislature intended to permit employers to terminate employees who report violations of the WPCA. In *Roach*, this Court found that the statutes cited by the plaintiff employee did not support a basis for a claim for wrongful discharge and held that his termination was lawful. *Swears v. RM Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E. 2d 1 (2010). In that case, the employee complained to a principal of the company of possible criminal conduct and was thereafter terminated. *Id.* The *Roach* plaintiff then pointed to two criminal statutes concerning embezzlement and larceny as the requisite public policies to support his *Harless* claim. *Id.* The *Roach* Court found that the plaintiff's termination was lawful and that the statutes relied upon by the plaintiff did not support a *Harless* claim. *Id.*

Petitioner's claim can be distinguished from *Roach* for two significant reasons: (1) his claim is not based upon criminal statutes and (2) the violations alleged by Petitioner harm the interests of the public good. In *Roach*, the Court made clear that criminal conduct allegations are

reviewed differently in terms of a retaliatory discharge claim.² Additionally, the Court noted that the employee's claims in *Roach* did not concern violations which harmed the public good, but rather, harmed a private company. *Id.* at 7. Here, Petitioner's claim is based upon the WPCA, a clear substantial public policy that is designed to protect the public at large, rather than a single private entity. Specifically, in this case, tens of thousands of residents of Weirton, West Virginia and Steubenville, Ohio are served by water intake lines near Respondents' B-Outfall Facility. Thus, as set forth at great length above, Petitioner's claim is a permissible claim as intended by the *Harless* Court.

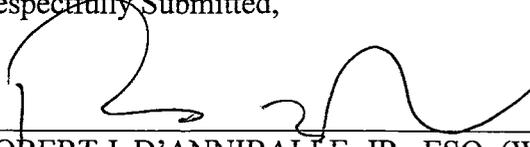
II. CONCLUSION

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.

² In footnote 9, the Court stated, "Other cases that have reviewed assertions of criminal conduct have found a substantial public policy violation to exist only when the claimant was terminated for refusing to engage in illegal activity." *Swears v. RM Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E. 2d 1 (2010).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on this 30th day of January, 2015, I served the foregoing *Petitioners' Reply Brief* by U.S. First Class mail to the parties at the addresses set forth below:

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