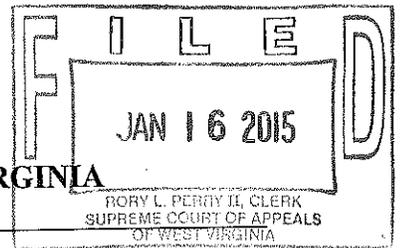


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-0671

WILLIAM FROHNAPFEL AND MARY LOU FROHNAPFEL,

Petitioners,

v.

ARCELORMITTAL USA LLC AND ARCELORMITTAL WEIRTON LLC,

Respondents.

RESPONDENTS' BRIEF

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

Bradley K. Shafer (Bar No. 7794)
SWARTZ CAMPBELL LLC
1233 Main Street
Suite 1000
Wheeling, WV 26003
(304) 232-2790 (phone)
(304) 232-2659 (fax)
bshafer@swartzcampbell.com

Raymond C. Baldwin, *pro hac vice*
SEYFARTH SHAW LLP
975 F Street, N.W.
Washington, DC 20004
Telephone: (202) 463-2400
Facsimile: (202) 828-5393
rbaldwin@seyfarth.com
Attorneys for Defendants
ArcelorMittal Weirton LLC and
ArcelorMittal USA LLC

TABLE OF CONTENTS

CERTIFIED QUESTION AS PHRASED BY THE U.S. DISTRICT COURT..... 1

CERTIFIED QUESTION AS REPHRASED BY THE RESPONDENT 1

STATEMENT OF THE CASE..... 1

FACTS 2

SUMMARY OF ARGUMENT 6

STATEMENT REGARDING ORAL ARGUMENT..... 8

STANDARD OF REVIEW 8

ARGUMENT 8

 A. Exceptions To The Doctrine of At-Will Employment Should Be Made
 With Restraint, Caution, and Deference to the West Virginia Legislature..... 8

 B. The West Virginia Water Pollution Control Act Cannot Support A Harless
 Wrongful Discharge Claim. 9

 C. Frohnappel’s Claim Is Distinguishable From Harless And Its Progeny. 14

 D. Even If The WPCA Could Support A Harless Claim, This Is Not The
 Right Case With Which To Expand The Tort. 19

CONCLUSION..... 23

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adair v. United States</i> , 208 U.S. 161 (1908).....	8
<i>Baisden v. CSC-PA, Inc.</i> , Civil Action No. 2:08-cv-01375, 2010 WL 3910193 (S.D.W.Va. Oct. 1, 2010).....	9
<i>Birthisel v. Tri-Cities Health Services, Corp.</i> , 188 W.Va. 371, 424 S.E.2d 606 (1992).....	10, 15, 16
<i>Bower v. Westinghouse Elec. Corp.</i> , 206 W.Va. 133, 522 S.E.2d 424 (1999).....	22
<i>Bowman v. State Bank of Keysville</i> , 331 S.E.2d 797 (Va. 1985).....	18
<i>City of Fairmont v. Retail, Wholesale, & Department Store Union</i> , 166 W. Va. 1, 283 S.E.2d 589 (1980).....	22
<i>Collins v. AAA Homebuilders, Inc.</i> , 175 W.Va. 427, 333 S.E. 2d 792 (1985).....	9, 16, 17
<i>Collins v. Elkay Mining Co.</i> , 179 W.Va. 549, 371 S.E. 2d 46 (1988).....	15
<i>Cordle v. General Hugh Mercer Corp.</i> , 174 W.Va. 321, 325 S.E. 2d 111 (1984).....	13
<i>Eddy v. Biddle</i> , 2013 U.S. Dist. LEXIS 1463 (N.D. W. Va. Jan. 4, 2013)	22
<i>Feliciano v. 7-Eleven, Inc.</i> , 210 W.Va. 740, 559 S.E.2d 713 (2001).....	8, 10, 11
<i>Harless v. First National Bank in Fairmont</i> , 162 W.Va. 116, 346 S.E.2d 270 (W.Va. 1978)	<i>passim</i>
<i>Kanagy v. Fiesta Salons, Inc.</i> 208 W.Va. 526, 541 S.E.2d 616 (2000).....	15, 17
<i>King v. Marriott, Int'l, Inc.</i> 866 A.2d 895 (Md. Ct. Spec. App. 2005)	18
<i>Light v. Allstate Ins. Co.</i> , 203 W.Va. 27, 506 S.E. 2d 64 (1998).....	8

Lilly v. Overnight Transportation Company,
188 W.Va. 538, 425 S.E. 2d 214 (1992).....15, 17, 19

McClung v. Marion Ctny Comm'n.,
178 W.Va. 444, 360 S.E.2d 221 (1987).....15, 17

Morningstar v. Black & Decker Mfg. Co.,
162 W. Va. 857, 253 S.E.2d 666 (1979).....20

Orr v. Ward,
73 Ill. 318 (1874)8

Page v. Columbia Natural Resources,
198 W.Va. 378, 480 S.E. 2d 817 (1996).....12, 15, 17

Roberts v. Adkins,
191 W.Va. 215, 444 S.E.2d 725 (W.Va. 1994)9, 13

Roth v. DeFeliceCare, Inc.,
226 W. Va. 214, 700 S.E.2d 183 (2010).....22

Shanhotlz v. Monongahela Power Company,
165 W.Va. 305, 270 S.E. 2d 178 (1980).....14, 17

Shell v. Metropolitan Life Ins. Co.,
183 W.Va. 407, 396 S.E.2d 174 (1990).....9, 15

Shell v. Metropolitan Life Insurance Company,
181 W.Va. 16, 380 S.E.2d 183 (1989).....15

Sierra Club v. Patriot Mining Co.,
No. 13-0256, 2014 W. Va. LEXIS 591 (W. Va. May 30, 2014)11

State ex rel. Advance Stores Co. v. Recht,
230 W. Va. 464, 740 S.E.2d 59 (2013).....19, 20

State ex rel. Ball v. Cummings,
208 W. Va. 393, 540 S.E.2d 917 (1999).....11

Swears v. R.M. Roach & Sons, Inc.,
225 W.Va. 699, 696 S.E.2d 1 (2010).....9, 10, 15, 16, 17, 18, 19

Tiernan v. Charleston Area Med. Ctr. Inc.,
203 W.Va. 135, 506 S.E. 2d 578 (1998).....9

Washington v. Union Carbide Corp.,
870 F.2d 957 (4th Cir. 1989)9, 15

Wiley v. Asplundh Tree Expert Co.,
4 F. Supp. 3d 840, 847 (S.D. W. Va. 2014).....14, 15, 16, 22

Wright v. Standard Ultramarine & Color Co.,
141 W.Va. 368, 90 S.E.2d 459 (1955).....8

Yoho v. Triangle PWC, Inc.,
175 W.Va. 556, 336 S.E.2d 204 (1985).....15

STATUTES

33 U.S.C. § 1342.....11

33 U.S.C. § 1367.....13

42 U.S. C. § 6922.....4

Federal-Water Pollution Control Act.....11

Labor Management Relations Act of 1947.....2

Unif. Certified Questions of Law Act § 4 cmt., 12 U.L.A. 74 (1996).....22

W.Va. Code §§ 22-11-1 *et seq.*.....1, 3, 11, 13

W.Va. Code § 22-11-12.....12

W.Va. Code §22-11-27.....13

OTHER AUTHORITIES

40 C.F.R. Part 262.....4, 12

Fed. R. Civ. P. 12(b)(6).....2

Rule 20.....8

CERTIFIED QUESTION AS PHRASED BY THE U.S. DISTRICT COURT

Whether 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 may undergird a *Harless* claim for retaliatory discharge where an employee is allegedly discharged for reporting violations of a Permit issued under the Act and complaining to his employer about such violations?

CERTIFIED QUESTION AS REPHRASED BY THE RESPONDENT

Whether 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 may allow an employee who is allegedly discharged for his “vigilance in encouraging [his employer to] adhere[] to and comply[] with environmental laws, rules and regulations,” to rely upon it to support a *Harless* claim for retaliatory discharge.

STATEMENT OF THE CASE

William Frohnappel, a member of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“the Union” or “USWA”), broadcast his opinion of management across his entire department, stating, among other things, that “opinions are like assholes, everybody has one, some people have two.” J.A. 8-9, 19. Frohnappel, on a “Last Chance Agreement” due to his previous threatening and intimidating conduct, was fired. J.A. 8, 19. Through the procedures set forth in the collective bargaining agreement to which he was a party, Frohnappel grieved his termination. J.A. 8. Following a hearing, an arbitrator upheld the termination, finding that Frohnappel had

“absolutely no credibility” and that his repeated intimidating conduct violated his Last Chance Agreement and the Company’s Fair and Equal Treatment Policy.¹

In February 2014, Frohnapfel sued his employer, ArcelorMittal Weirton LLC, as well as ArcelorMittal USA LLC, in the Circuit Court for Hancock County, West Virginia. J.A. 1. Frohnapfel claimed he was fired “in retaliation for his engagement in protected activities (Environmental Compliance).” J.A. 9. ArcelorMittal removed the case to the U.S. District Court for the Northern District of West Virginia, and filed a motion to dismiss. J.A. 13. Dismissal was sought based on “*Garmon* preemption,” preemption based on Section 301 of the Labor Management Relations Act of 1947 (“LRMA”), failure to adequately plead retaliatory discharge, and failure to demonstrate a causal connection between any alleged protected activity and the termination of his employment. J.A. 13-35.

The U.S. District Court deferred a decision on the Motion to Dismiss with respect to preemption, and certified a question to this Court regarding retaliatory discharge. J.A. 99-116.

FACTS²

Frohnapfel’s Employment. ArcelorMittal Weirton LLC produces tin plate and cold rolled steel at its facility in Weirton, West Virginia. Approximately 900 people are employed at the facility. Frohnapfel was a Technician II Operator in the Environmental Control/Utilities Department. J.A. 3,18. His department oversaw the Company’s “B-Outfall”, located on the Ohio River. *Id.* The Company has a permit and order issued pursuant to the West Virginia

¹ A copy of the Arbitrator’s decision is attached as Exh. 1. In his Complaint, a part of the record before this Court, Frohnapfel referenced his grievance and its pendency before an arbitrator. J.A. 3. Given Frohnapfel’s reference to the arbitration and its significant role in these proceedings, ArcelorMittal is attaching a copy of the arbitrator’s decision hereto.

² The facts set forth herein are largely derived from Frohnapfel’s Complaint and Respondent therefore assumed their accuracy solely for purposes of its Motion to Dismiss as required pursuant to Fed. R. Civ. P. 12(b)(6).

Water Pollution Control Act that dictates certain limitations and requirements for the Company's operations. *Id.* The permit "provides for monitoring and reporting obligations" by the Company. *Id.* As part of his job, Frohnapfel was required to help ensure that the Company operated in compliance with its "permit" and abided by "applicable environmental laws, rules and regulations." J.A. 4, 18.

The CBA Governs the Union's Participation in Environmental Matters. The governing Collective Bargaining Agreement ("CBA") sets forth provisions delineating both the rights of the Union and its employees to raise environmental issues and participate in the Company's resolution of those issues as well as setting forth the Company's rights to terminate employees for proper cause. J.A. 38. These rights are set forth in, *inter alia*, the following provisions:

Article Three, Section A - Employee and Rights: This section provides that the Union has a right to participate in active and informed Joint Safety and Health and Environmental Committees. J.A. 42.

Article Three, Section B – The Right to a Safe and Healthful Workplace: This section provides that the Company will maintain safe and healthful conditions of work for its employees and will comply with all applicable laws and regulations concerning the health and safety of employees and protection of the environment. It also provides that the Company will keep equipment in a safe condition. *Id.*

Article Three, Section C – The Right to Refuse Unsafe Work: This section provides that an employee who is acting in good faith and on the basis of objective evidence, believes an unsafe or unhealthful condition exists, must notify his supervisor and may be permitted not to work in such conditions. Further, that the Union grievance chair and the plant manager will

investigate the condition and if there is a disagreement about the existence of the unsafe condition, the union may file a grievance. Additionally, that no employee who exercises his rights under this section will be disciplined. J.A. 43.

Article Three, Section I - The Union's Right to Participate in Environmental Issues: This section provides the Union the right to participate in this sub-committee of the Joint Safety and Health Committee (established in Article Three, Section H of the CBA). The sub-committee is to be comprised of employees appointed by the Union and the Company with the purpose of discussing environmental issues affecting the Company. In furtherance of these participation rights, the Company also agrees to make "all environmental reports, monitoring results, analyses, materials received from the EPA and other agencies, and any other documents related to the Company's environmental programs and obligations" available to the subcommittee. J.A. 44.

Frohnafel Approaches Management on Behalf of Union Members.

According to Frohnafel, as of April 2013, maintenance needs of the B-Outfall had been neglected, resulting in the accumulation of hazardous material³ "beyond acceptable levels" within the plant. J.A. 7. Also according to Frohnafel, union employees developed a plan to address the accumulation, and asked him to take the plan to management. J.A. 8. When he did so, Frohnafel was told that management had a different plan that would be implemented to fix the problem. J.A. 8. Frohnafel then informed the employees who asked him to convey the plan that a different plan would be implemented, and, in reference to Company management said, "opinions are like assholes, everybody has one, some people have two." *Id.* Frohnafel also said things like, "this place is all fucked up," and "all we have is more asshole management," and, "that fucking Kerr," in relation to the Shift Supervisor. Exh. 1 at 17.

³ The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S. C. § 6922, permits the accumulation of certain waste for up to 180 days, depending on amount. 40 C.F.R. Part 262.

Frohnappel Is Fired. Frohnappel's comments were broadcast throughout the Environmental Control Department. J.A. 7-8. According to Frohnappel's own Complaint, "as a result" of his broadcast statements, he was suspended and then fired. *Id.*

Frohnappel's Allegations of "Environmental Vigilance." Frohnappel now asserts that he was fired, not because he broadcast inappropriate and offensive comments throughout the department, but because of alleged "environmental vigilance." J.A. 9. Frohnappel states that in June 2010 he "truthfully" participated in an interview with a state inspector. J.A. 5. Frohnappel does not allege that the Company sought to prevent this interview or influence what he said, nor does he offer the substance of the interview or any alleged improprieties by the Company as a consequence of Frohnappel's speaking with the investigator—providing truthful information to an investigator was a required part of his job. Frohnappel also alleges a number of other events starting in 2009:

- In February 2009, Frohnappel had "concern" when he was told to replace expiration-date labels on barrels. J.A. 5.
- In March 2009, Frohnappel told the Company that there was a probe placed in a buffer that may be concealing a PH issue in March 2009. *Id.* The Company investigated. *Id.*
- In November 2010, Frohnappel questioned the effectiveness of hazardous material work site training offered through the Company. *Id.*
- Frohnappel advised the Company that it "should have a containment area" for the by-product of "Prussian Blue" in January 2011. *Id.*
- In June 2012, Frohnappel questioned the practices and billings of an outside vendor charged with the removal of hazardous waste. J.A. 6.
- In 2013, the Company told employees that the Company's environmental compliance manager would handle questions pertaining to an alleged excursion. J.A. 7.
- Frohnappel made a joke about breaking the law to another employee after a lime discharge occurred in April 2013. J.A. 7.

The Complaint does not identify any unlawful conduct by the Company or any request that Frohnapfel engage in, assist or cover-up any unlawful or otherwise improper conduct by the Company, or that Frohnapfel violate the law.

SUMMARY OF ARGUMENT.

At-will employment has long been established in West Virginia. It should be limited with restraint and caution, with strong deference to the legislature. A cause of action for wrongful discharge in abrogation of the at-will doctrine may exist, however, when an employee can demonstrate that his employer acted contrary to a substantial public policy in effectuating the termination. To be "substantial," the public policy must not just be recognizable as such, it must also be so widely regarded as to be evident to employers and employees alike. To do otherwise, would be to severely limit the ability of employers to operate their businesses and would likewise leave employees uncertain about the permitted parameters of their conduct. Indeed, determining what constitutes a substantial public policy has been difficult to define and not subject to a precise answer or rule, thus reinforcing the need for restraint and legislative deference.

This Court has set forth various sources where public policy may be found, and has also made clear that any source must provide specific guidance, such that it could be known and determined that dismissing an employee under the circumstances then present would jeopardize the public policy. The West Virginia Water Pollution Control Act, a statute intended primarily to provide a framework to implement the Federal Water Pollution Control Act, fails to provide employers and employees the specific guidance necessary to support a *Harless* claim. In fact, it provides no specific guidance or requirements. With respect to water discharges, certain guidance is found in various regulations and permits, and that guidance may change, vary and be subject to exceptions—depending on the circumstances of a given event. Moreover, and perhaps

because of the necessarily unsettled and changing requirements of the regulations and permits, there is no indication in the WPCA that the legislature intended that it protect those who complain to their employers about potential environmental hazards. In fact, the indications are to the contrary, *i.e.*, that the legislature specifically intended not to protect such individuals. Accordingly, to find that the WPCA supports a *Harless* claim would be to dilute the at-will doctrine and to further open a “Pandora’s box” of litigation in this area. Given the breadth of the WPCA, an employee who complains to his employer about virtually anything to do with water discharge, and was later fired, could mount a wrongful discharge claim under Frohnapfel’s construct. And in circumstances like those present here, where the job required discussion of environmental issues, recognizing a wrongful discharge claim under the WPCA would make it virtually impossible to terminate employment without expensive and time consuming litigation.

Frohnapfel’s claim is readily distinguishable from *Harless* and its progeny and, even were this Court inclined to permit the WPCA to support a *Harless* claim, this is not the case to do so. Frohnapfel, a union employee who grieved his termination and lost, sets forth allegations that are far too vague, both in terms of the facts and regulatory and statutory provisions upon which he purports to rely, and in terms of his alleged protected activity under the statute, to support a *Harless* claim. The lack of specificity is amplified in this case by the union’s contractual involvement in environmental matters at the plant, Frohnapfel’s job requiring that assist in monitoring and addressing environmental issues, and his ability, guaranteed by the CBA, to grieve an alleged termination for raising potentially unsafe conditions. Further, Frohnapfel has not and cannot allege that he was fired for refusing to break the law, threatening to make a report of illegal activity, or being directed to cover up a hazard. At essence, he alleges he was fired for doing his job as protected by the collective bargaining agreement to which he

was a party. Creating a *Harless* claim based on the facts of this case would leave employers, employees and the courts, to speculate as to the parameters of a *Harless* claim based on the WPCA.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 20, the Court scheduled oral argument for February 25, 2015 at 10:00 a.m.

STANDARD OF REVIEW

Certified questions from a federal district or appellate court are addressed *de novo*. Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E. 2d 64 (1998).

ARGUMENT

A. Exceptions To The Doctrine of At-Will Employment Should Be Made With Restraint, Caution, and Deference to the West Virginia Legislature.

At-will employment has long been established in West Virginia. Syl. Pt. 2, *Wright v. Standard Ultramarine & Color Co.*, 141 W.Va. 368, 90 S.E.2d 459 (1955). An at-will employee may be discharged or may leave his employment at any time, with or without cause. *See Feliciano v. 7-Eleven, Inc.*, 210 W.Va. 740, 745, 559 S.E.2d 713, 718 (2001) (citations omitted). The doctrine of at-will employment was embraced by U.S. courts, in part, because of an understandable reluctance to create the terms of a contract for the parties. *See, e.g., Adair v. United States*, 208 U.S. 161 (1908) (finding employer and employee had equality of right to contract and interference in such right would be arbitrary); *Orr v. Ward*, 73 Ill. 318 (1874) (“we have no authority to add to the contract as the parties have made it...and have no disposition to do so.”).

Exceptions to the settled doctrine of at-will employment have evolved over time and are statutorily based or, similarly, “generally based on 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).

Accordingly, the power to declare an employer's conduct against public policy is to be exercised with "great caution," *Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989), and "restraint." *Tiernan v. Charleston Area Med. Ctr. Inc.*, 203 W.Va. 135, 141, 506 S.E. 2d 578, 584 (1998). Due deference should be provided to the West Virginia legislature, "because it has the primary responsibility for translating public policy into law." *Collins v. AAA Homebuilders, Inc.*, 175 W.Va. 427, 333 S.E. 2d 792, 793 (1985) (relying on *Cooper v. Gwinn*, 171 W.Va. 245, 298, S.E.2d 781, 785-86 (1981)).

This Court has attempted to read *Harless* narrowly so as not to "unlock a Pandora's box of litigation in the wrongful discharge arena." *Baisden v. CSC-PA, Inc.*, Civil Action No. 2:08-cv-01375, 2010 WL 3910193 *5 (S.D.W.Va. Oct. 1, 2010) (citing *Roberts v. Adkins*, 191 W.Va. 215, 444 S.E.2d 725, 729 (W.Va. 1994)).

B. The West Virginia Water Pollution Control Act Cannot Support A *Harless* Wrongful Discharge Claim.

The WPCA is too broad and lacks sufficient specific guidance to support a *Harless* claim. Moreover, there is no indication that the legislature intended that the WPCA protect employees who complain to their employers about environmental issues. Indeed, Frohnafel cites to no case, state or federal, which has found a comparable statute sufficient to support a public policy wrongful discharge claim.

***Harless* Claim Standard.** The Supreme Court of West Virginia first recognized a claim for retaliatory discharge in *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 346 S.E.2d 270, 275 (W.Va. 1978). "[A] cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination." *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 704,

696 S.E.2d 1, 6 (2010) (quoting *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.” *Id.* (citation and internal quotations omitted).

“An employer should not be exposed to liability where a public policy standard is too general to provide specific guidance or so vague that it is subject to different interpretations.” *Birthisel v. Tri-Cities Health Services, Corp.*, 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992). “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.” *Feliciano*, 210 W. Va. at 745, 559 S.E.2d at 718.

The WPCA Is Too Broad To Support A *Harless* Claim. Rather than provide specific guidance, the WPCA provides only general policy pronouncements:

It 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 consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development.

W.Va. Code §22-11-2(a).⁴

This Court has made clear that such broad pronouncements are “too general to provide specific guidance” and “so vague that it is subject to different interpretations.” *Birthisel*, 188 W.Va. at 377, 424 S.E.2d at 612. The WPCA’s broad use of “reasonable standards” is akin to the concept of “good care” rejected by this Court in *Birthisel*. *Id.* at 378, 613.

⁴ Frohnapfel does not reference this provision of the WPCA in the Complaint. J.A. 1-10, *passim*. Rather, in his Opposition to ArcelorMittal’s Motion to Dismiss, Frohnapfel argued that this provision evidenced the “substantial public policy” requirements for the WPCA’s “comprehensive regulatory program.” Notably, Frohnapfel did not argue, likely because he did not allege, that his claim was based on permit violations. *See* J.A. 72-74. Indeed, Frohnapfel does not even mention a permit or alleged violation thereof in his arguments below that the WPCA is a “substantial public policy.” *Id.*

The WPCA Fails To Provide Specific Guidance. The WPCA contains no guidance regarding specific pollutants, permissible discharges, quantities, or concentrations. *See* W.Va. Code §§ 22-11-1 *et seq.*, *passim*. This absence of particulars precludes prohibited conduct from being “evident to employers and employees alike” and necessarily means that it cannot support a *Harless* claim. *See Feliciano*, 210 W. Va. At 745, 559 S.E.2d at 718.

NPDES Permits Cannot Support a *Harless* Claim. The District Court apparently recognized the inability of the WPCA to support a *Harless* claim, and looked for the specific guidance required in permits issued under the regulatory structure of which the WPCA is a part. *See* J.A. 110-114. Permits do not, however, provide the type of broadly applicable and consistent guidance required for a *Harless* claim.

The National Pollutant Discharge Elimination System (“NPDES”), establishes the regulatory framework under which a permit may be issued.⁵ *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 397, 540 S.E.2d 917, 921 (1999). “The NPDES Permit allows certain discharges of pollutants into state waters and requires the respondents to comply with specific terms and conditions including effluent discharge limitations and monitoring requirements.” *Id.*

⁵ The NPDES permit system is created by Section 402 of the Federal Water Pollution Control Act, also known as the Clean Water Act. *Sierra Club v. Patriot Mining Co.*, No. 13-0256, 2014 W. Va. LEXIS 591, *13 (W. Va. May 30, 2014) (*citing* 33 U.S.C. § 1342). States may apply for delegated authority to implement NPDES permitting and, if the United States Environmental Protection Agency approves, the state receives delegated authority over the program. *Id.* (*citing Nat'l Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119, 125 (D.D.C. 2012)). West Virginia has been granted such authority. *Id.* NPDES permits “typically contain numerical limits called ‘effluent limitations’ that restrict the amounts of specified pollutants that may be discharged... the procedure for determining the need for effluent limits is called a reasonable potential analysis. If the discharge does have the reasonable potential to cause an excursion above a numeric or narrative water quality standard set in accordance with Section 303 of the [Clean Water Act], the state must develop permit limitations to ensure compliance with that water quality standard.” *Id.*

Permits issued pursuant to the NPDES are, however, subject to modification, suspension or revocation, on as little as 20 days' notice, thus undermining their value—and ability to provide clear and consistent standards—as a source of guidance for employers and employees. *See* W.Va. Code § 22-11-12. A proposed *Harless* cause of action anchored by *individualized* NPDES permits is not therefore capable of broad applicability and consistent administration and enforcement.⁶ Put directly, an employee who discusses a vague “lime discharge” may or may not be discussing a violation of law or regulation; the discharge may actually be in compliance with all laws, permits and regulations. Similarly, the alleged accumulation of hazardous material may, depending on the circumstances, actually be allowable. *See*, 40 C.F.R. Part 262.

In sum, this is not a situation where the alleged protected conduct at issue is so plain that an employer will automatically know what is prohibited and the NPDES permit cannot therefore support a *Harless* claim. *See Page v. Columbia Natural Resources*, 198 W.Va. 378, 480 S.E. 2d 817 (1996) (reasonable employer would know not to attempt to interfere with truthful testimony). *See also, infra*, p. 17 (citing cases).

A Broad “Environmental Vigilance” Claim Fares No Better. Frohnapfel did not, of course, cite any specific permit sections for his claim and the uncertainty regarding permits could not, in any case, be remedied with a broad prohibition on reporting environmental issues. Frohnapfel’s broad claim of “environmental vigilance” should be rejected. Indeed, allowing any discussion of a discharge to constitute protected activity would be directly contradicted by the WPCA’s (and NPDES permit’s) specific allowance of such acts. Entities that have NPDES permits are allowed to discharge pollutants into state waters and take certain other actions that may appear to be inconsistent with a sweeping “environmental vigilance” claim, but are

⁶ For example, the permit and order at issue during the time period relevant to the Complaint is 85 pages.

nevertheless legally permitted. Obviously, employers cannot be subject to claims of wrongful discharge for an employee's report or complaint of lawful activity. Such a result would undoubtedly open "Pandora's Box" for wrongful discharge claims contrary to the intent of this Court. *See Roberts*, 191 W.Va. at 219, 444 S.E.2d at 729.

The Legislature Did Not Intend the WPCA to Support a *Harless* Claim. Where the West Virginia legislature wants to protect employees, it does so. *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325 S.E. 2d 111 (1984) (enacting legislation to prohibit polygraph requirement). And the Federal Water Pollution Control Act contains an express anti-retaliation provision.⁷ Here, however, and despite the otherwise significant alignment of the Federal Water Pollution Control Act and the West Virginia Water Pollution Control Act, the West Virginia legislature declined to include such a provision protecting employees or other individuals who report alleged violations of the WPCA. *Compare* W.Va. Code §§ 22-11-1 *et seq.*, with 33 U.S.C. § 1367. In fact, in contrast to such protections, the legislature expressly reserved all benefits under the WPCA for the state alone:

The provisions of this article inure solely to and are for the benefit of the people generally of the state of West Virginia, and this article is not intended to in any way create new, or enlarge existing rights of riparian owners or others. An order of the director or of the board, the effect of which is to find that pollution exists, or that any person is causing pollution, or any other order, or any violation of any of the provisions of this article shall give rise to no presumptions of law or findings of fact inuring to or for the benefit of persons other than the state of West Virginia.

W.Va. Code §22-11-27 (emphasis added).

⁷ 33 U.S.C. § 1367 provides: No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

In short, by its decision not to include the anti-retaliation provisions found in the federal water pollution control act, and its express statement that the statute was not intended to create or enlarge rights, all indications are that the West Virginia legislature did not intend or want to create a public policy wrongful discharge or similar claim by enacting the WPCA.

Indeed, it is undisputed that a state law claim of wrongful discharge for reporting water pollution did not lie before the enactment of the WPCA. It also appears undisputed that Frohnapfel's alleged rights in his wrongful discharge claim are underpinned solely by the WPCA. Thus, this provision foreclosing expansion of private rights based on this Act, at a minimum, counsels against permitting a *Harless* claim reliant on the statute, if not negating the viability of such a claim outright by the expressed legislative intent to limit any benefits, including protections, under the WPCA to the state itself. *See Wiley v. Asplundh Tree Expert Co.*, 4 F. Supp. 3d 840, 847 (S.D. W. Va. 2014) ("Notably, there is some evidence that the West Virginia legislature has affirmatively elected not to unduly burden a private sector employer's generally absolute right to discharge an at-will employee. For example, the West Virginia legislature enacted whistle-blower legislation to protect public employees from retaliation for reporting or assisting in an investigation of an employer's misconduct; the statute, however, does not extend protection to private sector employees.").

C. Frohnapfel's Claim Is Distinguishable From *Harless* And Its Progeny.

As set forth above, in *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978), this Court first recognized the viability of a wrongful discharge claim based on public policy. It did so based on an allegation of "*intentional* violations of W.Va. Code, 46A-1-101 by the defendants, which [Harless] *endeavored to have stopped.*" *Id.* at 125, 275 (emphasis added).

Cases Which Have Recognized *Harless* Claims Based On Statute. The Court has recognized *Harless* claims based on various statutes. *See, e.g., Shanhotlz v. Monongahela Power Company*, 165 W.Va. 305, 270 S.E. 2d 178 (1980) (Workers' Compensation, W.Va. Code, § 23-5A-1); *McClung v. Marion Ctny Comm'n.*, 178 W.Va. 444, 360 S.E.2d 221 (1987) (public employee bringing claim for wages, W.Va. Code § 21-5C-8); *Collins v. Elkay Mining Co.*, 179 W.Va. 549, 371 S.E. 2d 46 (1988) (West Virginia Mine Safety Act, W.Va. Code, § 22A-1A-20); *Lilly v. Overnight Transportation Company*, 188 W.Va. 538, 425 S.E. 2d 214 (1992) (Motor Vehicle Safety, W.Va. Code, § 17C-15-1(a)); *Page v. Columbia Natural Resources*, 198 W.Va. 378, 480 S.E. 2d 817 (1996) (intimidating/impeding witness, W.Va. Code, § 61-5-27); *Kanagy v. Fiesta Salons, Inc.* 208 W.Va. 526, 541 S.E.2d 616 (2000) (cosmetology statute requiring reporting of violations, W.Va. C.S.R. § 3-5-3.1).

No *Harless* Claim Found. This Court has also declined to permit a wrongful discharge claim based on various statutes. *See, e.g., Yoho v. Triangle PWC, Inc.*, 175 W.Va. 556, 336 S.E.2d 204 (1985) (workers' comp by union employee, W.Va. Code § 23-5A-1); *Shell v. Metropolitan Life Insurance Company*, 181 W.Va. 16, 380 S.E.2d 183 (1989) (insurance agent statute, W.Va. Code § 33-12A-1); *Birthisel v. Tri-Cities Health Services, Corp.*, 188 W.Va. 371, 424 S.E.2d 606 (1992) (social work licensing statute, W.Va. Code, § 30-30-1); *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E.2d 1 (2010) (criminal statutes, W.Va. Code, § 61-3-20). Other courts have also declined to permit public policy claims based on statute. *See, e.g., Washington v. Union Carbide Corp.*, 870 F.2d 957, 964 (4th Cir. 1989) (West Virginia has not recognized a statutory public policy discharge for reporting safety violations) (cited in *Shell v. Metropolitan Life Insurance Company*, 183 W.Va. 407, 396 S.E.2d 174 (1990)); *Wiley v.*

Asplundh Tree Expert Co., 4 F. Supp. 3d 840 (Wage Payment Collection Act, W.Va. Code §21-5-3).

The cases, while not entirely consistent, nevertheless provide guidance that distinguishes Frohnapfel's claim from those in *Harless*, and the other cases in which a tort has been recognized.

Frohnapfel's Claimed Statutory Basis Offers No Indication of Legislative Intent to Interfere With the At-Will Relationship. As mentioned above, the WPCA contains no indication that the West Virginia Legislature intended it would modify the at-will relationship in the State by enacting the statute. *See, Birthisel*, 188 W.Va. at 378, 424 S.E.2d at 613 ("we cannot impute to the General Assembly an intent to modify the contractual relationships between [employers and employees]...nor can we impute an intent to create a claim for relief..."). The WPCA contains no anti-retaliation/discrimination provision, unlike the statutes at issue in *Collins* and *Shanholtz*, and the absence of such provisions indicates that the Legislature did not intend it to limit the at-will relationship. *Wiley*, 4 F. Supp. 3d at 847 (noting that because whistleblower statute protected only public sector employees, legislature specifically intended that it not protect private employee whistleblowers).

Indeed, in *Roach*, one of this Court's more recent pronouncements on this issue, the plaintiff claimed that when he was fired for allegedly reporting criminal violations by his employer, his discharge violated public policy. *R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E.2d 1. This Court rejected that argument, taking note of the fact that, unlike those statutes that included anti-retaliation provisions, the criminal statutes at issue were silent on this point and, as such, there was no indication that stifling a report by terminating an employee who complained would contravene the public policy embodied in the statute. *R.M. Roach & Sons*,

Inc., 225 W.Va. at 703, n. 4, 705 (“The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates.”). *Roach* makes clear that this Court will not infer legislative intent to protect those who complain, absent inclusion of an anti-retaliation/discrimination provision in the statute.

Similarly, in *Collins*, this Court took specific note of the fact that the primary purpose of the Mine Safety Act’s anti-retaliation provisions was to ensure the reporting of violations. *Collins*, 179 W.Va. at 48. And in *Kanagy*, this Court placed considerable import on the fact that the cosmetology regulation imposed a specific duty on the plaintiff to report violations. *Kanagy*, 208 W.Va. at 533.

There is no indication that the West Virginia legislature intended that the WPCA would protect those who complain to their employers about water issues. This Court should not recognize a new public policy claim in the absence of such intent.

Frohnapfel Does Not Allege He Engaged In Recognized Protected Activity.

Frohnapfel does not and cannot allege that the Company directed him to take any action in contravention of that Act or that he was put to the choice of breaking the law or losing his job. Instead, Frohnapfel asserts only that he was “vigilant” in the performance of his job. These facts readily distinguish his claim from those cases where employees have taken or refused to take specific acts that could readily be understood as protected activity. *See, e.g., Lilly*, 188 W.Va. 538, 425 S.E. 2d at 214 (refused to operate unsafe vehicle); *McClung*, 178 W.Va. 444, 360, (filed a lawsuit); *Page*, 98 W.Va. at 378, 480 S.E. 2d at 817 (gave or would give testimony); and *Shanhotz*, 165 W.Va. 305 (filed workers comp claim).

At best, Frohnapfel offers a claim indicating that he disagreed with his employer's approach to resolving an issue with respect to how to address allegedly hazardous waste *inside* the plant. He took no significant actions and certainly was not fired for refusing to break the law—a predicate requirement for claims involving the reporting of violations. This alone should defeat his claim. In *Roach*, this Court made clear that in the absence of an anti-retaliation provision, reporting could only rise to the level required to sustain a public policy claim where the employee was fired for refusing to engage in illegal activity. *R.M. Roach & Sons, Inc.*, 225 W.Va. at 705, 696 S.E.2d at 7, n. 9 (“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.”).⁸

Additionally, Frohnapfel has not identified any actual or threatened Company violation of the Water Pollution Control Act or the permit and order. This readily distinguishes his claim from *Harless* and the other cases, in which specific illegal activity was alleged to be afoot that the employee's actions sought to stop. In fact, he does not even allege a specific violation of the WPCA or the permit or order, much less a violation of a specific statutory provision. He does not even describe any such provision, instead describing the regulations as containing “monitoring and reporting” requirements. J.A. 3, 18. Moreover, he does not and cannot allege, unlike *Harless*, that ArcelorMittal *intended* to or actually did violate the law and that he endeavored to stop them. *Harless*, 162 W.Va. at 125, 246 S.E.2d at 275. Instead, he contends

⁸ This formulation is consistent with the law of neighboring jurisdictions. *See, e.g., King v. Marriott, Int'l, Inc.* 866 A.2d 895, 904 (Md. Ct. Spec. App. 2005) (public policy claims exist only where employee is fired for exercising legal right or duty, and where employee was fired for refusing to violate the law); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985) (public policy claims exist only where employer interferes with exercise of statutorily created right, where employer violates statutory right intended to protect plaintiff, and where employee fired for refusing to engage in criminal act).

that because he was allegedly “vigilant” in reminding his employer of the need to comply with unspecified statutory provisions, he engaged in protected activity. No previous case has recognized a wrongful discharge claim based upon mere “vigilance.”

Since Frohnapfel was not fired for refusing to break the law or for refusing to take an action in violation of the statute, and there is no claim that he was attempting to stop illegal activity by his employer, there can be no public policy claim. Further, he cannot contend that any alleged discussion with his employer about the best manner to address an alleged hazardous waste condition within a plant had the potential to injure the public and, as such, there can be no public policy wrongful discharge claim. *R.M. Roach & Sons, Inc.*, 225 W.Va. at 705, 696 S.E.2d at 7 (rejecting public policy claim where complaint of illegal financial activity did not risk injury to public good). This is particularly true where there is no allegation that the alleged condition was not going to be fixed, it was simply by which method.

D. Even If The WPCA Could Support A *Harless* Claim, This Is Not The Right Case With Which To Expand The Tort.

This Court, in performing its *de novo* review, is not constrained by the District Court’s *sua sponte* interpretation of the Complaint. *See* J.A. 100-101. In fact, the review should be “circumstances of this case.” *See Lilly*, 188 W. Va. 538, 538-539, 425 S.E. 2d at 214-215 (Fourth Circuit certified question to what constitutes “substantial public policy of West Virginia so that an employee may maintain an action for wrongful discharge **under the alleged circumstances of this case**[?]” (emphasis added)).

“A certified question will not be considered by this court unless the disposition of the case depends wholly or principally upon the construction of law determined by the answer, regardless of whether the answer is in the negative or affirmative.” *State ex rel. Advance Stores Co. v. Recht*, 230 W. Va. 464, 468, 740 S.E.2d 59, 63 (2013) (citations omitted); *see also*

Morningstar v. Black & Decker Mfg. Co., 162 W. Va. 857, 861, 253 S.E.2d 666, 669 (1979)

("[C]ertification is limited to those questions which may be determinative of the cause then pending in the certifying court[.]" (internal quotations and citations omitted)). It follows that "[t]his Court will not issue an advisory opinion [and t]his Court will likewise decline to respond to certified questions which are anticipatory in nature." *Recht*, 230 W. Va. at 469, 740 S.E.2d at 64 (citation omitted).

Despite the Court's generous reading of Frohnapfel's Complaint, it provides no allegations sufficient to (1) establish ArcelorMittal violated an NPDES permit and related order, (2) Frohnapfel reported or complained of any violation of an NPDES permit and related order, or (3) Frohnapfel was asked to take any action in violation of an NPDES permit and related order.

Frohnapfel alleges the existence of an NPDES permit and a related order. J.A. 3. He states that "the [p]ermit imposes certain limitations concerning the discharge of hazardous materials into the Ohio River. This [p]ermit also provides for monitoring and reporting obligations upon the Defendants." *Id.* No additional information regarding the substance of any NPDES permit and order are pled. Plaintiff goes on to state he was "vigilant" with regard to Defendant's adherence to a Permit and order. J.A. 4. Again, no facts beyond that conclusory description are alleged.

By contrast, Plaintiff describes his alleged "protected activity" as follows: (1) having concern about scraping off barrel labels and replacing them with new labels, (2) questioning the effectiveness of training, (3) questioning a vendor's method, manner and billing practices associated with the removal of waste, and (4) developing a plan that would permit the employees to operate "B- Press" to remedy accumulating waste *within* the facility. J.A. 5-8. There is no reference to any portion of a permit or order relating to these actions and, based on Plaintiff's

own description, they are unrelated to the discharge of effluent into state waters. Accordingly, it is highly unlikely that any of these alleged circumstances could have been or was the subject of an NDPEs permit.

Plaintiff also references responding to West Virginia DEP's questions—in June 2010, some three years before he was fired—regarding “hazardous waste,” suggesting a containment area for “Prussian Blue” and “facetiously” thanking a young foreman “for helping him break the law” after an “improper lime discharge” occurred. J.A. 5-8. While these allegations seemingly reference pollutants or chemicals, none of them identifies any permit violation or constitutes reporting or complaining about a NDPEs permit violation to an employer or the DEP.

This reading of the Complaint is consistent with other portions of the record. Until the District Court issued its Order, Plaintiff never once raised the violation of an NPDES permit as the basis for his wrongful discharge claim. J.A. 72-74. Plaintiff's failure to ever raise the statutory provisions or permit violation now advanced by the District Court confirms that, the District Court's misinterpretation of Plaintiff's allegations augmented the Complaint beyond the intent of the Plaintiff.

Thus, review of the allegations themselves confirms that the certified question is not properly confined to asking whether the WPCA can undergird a *Harless* claim under the “circumstances of this case.” Rather, it asks a hypothetical, the answer to which would be an advisory, or at a minimum anticipatory, opinion as there are no facts or allegations in the record at this juncture to demonstrate that a response to that certified question would be determinative of the issues presented in the Complaint.

Accordingly, the Court's answer to the certified question posed by the District Court is, based on the record, not dispositive of the issues in this case. The deficiency of the pleading that

gave rise to this certified question would render the Court's response an advisory opinion and, as such, the Court should decline to answer the certified question as phrased.

Alternatively, ArclorMittal submits that the certified question must be reformulated to conform to the record in the District Court. "Upon receiving certified questions, [this Court] retain[s] some flexibility in determining how and to what extent they will be answered." *City of Fairmont v. Retail, Wholesale, & Department Store Union*, 166 W. Va. 1, 3-4, 283 S.E.2d 589, 590-91 (1980). "The term 'reformulate' is intended to connote a retention of the specific terms and concepts of the question while allowing some flexibility in restating the question in light of the justiciable controversy pending before the certifying court." *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 137, 522 S.E.2d 424, 428 (1999) (quoting *Unif. Certified Questions of Law Act* § 4 cmt., 12 U.L.A. 74 (1996)).

Here, where the alleged protected activity is only "vigilance in encouraging [his employer to] adhere[] to and comply[] with environmental laws, rules and regulations," the certified question is properly reformulated to address those facts actually alleged. Once properly rephrased, the certified question must be answered in the negative as, as pled, Plaintiff has identified no substantial public policy (*i.e.*, specific guidance) sufficient to undergird a *Harless* claim based on the circumstances in this case.⁹ *See*, Section B, *supra* .

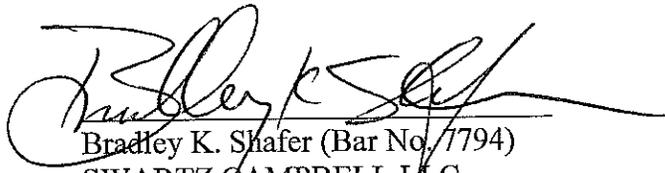
⁹ In a wrongful discharge claim, the plaintiff bears the burden of establishing the underlying substantial public policy. *Eddy v. Biddle*, 2013 U.S. Dist. LEXIS 1463, 11 (N.D. W. Va. Jan. 4, 2013) (citing *Roth v. DeFeliceCare, Inc.*, 226 W. Va. 214, 221, 700 S.E.2d 183, 190 (2010) (citation omitted)). At the motion to dismiss stage, a plaintiff "need[s] to specify the source of legal authority that recognizes that a substantial West Virginia public policy is as a matter of law at stake." *Wiley v. Asplundh Tree Expert Co.*, 4 F. Supp. 3d at 845. Consequently, the failure to adequately plead that element should have merited dismissal notwithstanding the response to the certified question. *Id.* (dismissing *Harless* claim for failure to plead a substantial West Virginia public policy).

Moreover, recognizing a *Harless* claim on these facts, where Frohnapfel is a union member whose job required him to address environmental issues, and the union has a contractually guaranteed right to raise and address environmental issues, would effectively provide guaranteed employment for those employed in environmentally related jobs, and would also interfere with the collective bargaining contractual relationship between employers and the union.

CONCLUSION

The WPCA cannot support a public policy wrongful discharge claim. It is too vague and fails to provide a reasonable person with sufficient specific information upon which conduct may be based. Moreover, there is no indication that the West Virginia legislature intended that the statute would protect individuals who make complaints to their employers. In fact, the indications are to the contrary. Moreover, Frohnapfel's alleged actions do not rise to the level required to invoke public policy protections. Accordingly, this Court should defer to the legislature and decline to erode the doctrine of at-will employment by recognizing a public policy claim grounded in the WPCA.

Respectfully submitted,



Bradley K. Shafer (Bar No. 7794)

SWARTZ CAMPBELL LLC

1233 Main Street

Suite 1000

Wheeling, WV 26003

(304) 232-2790 (phone)

(304) 232-2659 (fax)

bshafer@swartzcampbell.com

Raymond C. Baldwin, *pro hac vice*

SEYFARTH SHAW LLP

975 F Street, N.W.

Washington, DC 20004

Telephone: (202) 463-2400

Facsimile: (202) 828-5393

rbaldwin@seyfarth.com

Attorneys for Defendants

ArcelorMittal Weirton LLC and

ArcelorMittal USA LLC

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM FROHNAPFEL, *et al.*)
)
) Plaintiffs,)
)
) v.)
)
) ARCELORMITTAL WEIRTON LLC, *et al.*)
)
) Defendants.)

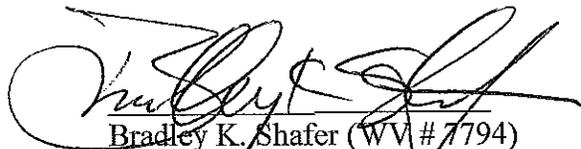
No. 14-0671

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing **Respondents' Brief**, has been filed and served this 16th day of January, 2015 via U.S. mail, postage prepaid, to:

Robert J. D'Anniballe, Jr., Esq. (WV #920)
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
333 Penco Road
Weirton, WV 26062

Respectfully submitted by:



Bradley K. Shafer (WV # 7794)
SWARTZ CAMPBELL LLC
1233 Main Street, Suite 1000
Wheeling, WV 26003
(304) 232-2790 (phone)
(304) 232-2659 (fax)
bshafer@swartzcampbell.com

IN THE MATTER OF THE ARBITRATION)
)
Between)
)
ARCELORMITTAL WEIRTON)
)
and)
)
UNITED STEELWORKERS OF AMERICA)

OPINION AND AWARD

RONALD F. TALARICO, ESQ.
ARBITRATOR

GRIEVANT

William Frohnapfel

ISSUE

Discharge

HEARING

February 27, 2014
Weirton, West Virginia

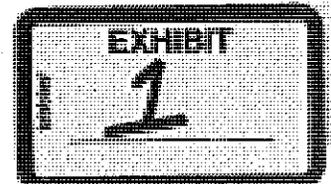
APPEARANCES

For the Employer

Peter D. Post, Esq.
Ogletree, Deakins, Nash, Smoak
& Stewart, P.C.

For the Union

Robert J. D'Anniballe, Jr., Esq.
Pietragallo Gordon Alfano Bosick
& Raspanti, LLP



ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the to hear and determine the issues herein. An evidentiary hearing was held on February 27, 2014 in Weirton, West Virginia at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. The record was closed at the conclusion of the hearing. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

ARTICLE FIVE - WORKPLACE PROCEDURES

...

Section J. Management Rights

The management of the plants and the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.

In the exercise of its prerogatives set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

* * * * *

PLANT RULES AND REGULATIONS

Dear Fellow Employee:

This communication is designed to alert all Employees to the specific rules and regulations that are to be adhered to at MITTAL STEEL USA Weirton. It is important that you are aware of and comply with these rules. Noncompliance may result in disciplinary action. In general, discipline will be implemented utilizing a common-sense progressive discipline approach. However, it is important to recognize that discipline must always reflect the seriousness of the offense. For that reason, within these rules, we have attempted to identify where violations may likely result in more severe action. If you do not understand one or more of the rules, please contact your Supervisor of the Labor Relations/Human Resources Department for clarification.

* * * * *

10. Any employee who intimidates or threatens a fellow employee or member of management will be subject to immediate suspension and discharge.

* * * * *

26. Employees who are Insubordinate (including refusal or failure to comply with a Supervisor or Team Leader directive or the use of profane language) will be placed on immediate suspension with intent to discharge.

FAIR & EQUAL TREATMENT POLICY

* * * * *

B. Non-Discrimination and Anti-Harassment Policy

ArcelorMittal is committed to a work environment in which all individuals are treated with respect and dignity. Each and every employee has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment. Therefore, ArcelorMittal expects that all relationships among persons in the workplace will be business-like and free of bias,

prejudice and harassment. In accordance with these commitments, it is the policy of ArceorMittal to forbid sexual and all other forms of unlawful harassment, as well as any inappropriate or unprofessional conduct, whether or not such conduct rises to the level of unlawful harassment. ArcelorMittal will not tolerate any conduct that violates this policy; anyone found to be a violation of the policy will be subject to discipline, up to and including discharge.

BACKGROUND

The Grievant, William Frohnäpfel, was a long-term employee of Weirton Steel. For the last several years, he was assigned to the Environmental Control Department as a technician. During February, 2010 the Company began receiving complaints from vendors, employees and management personnel regarding Grievant acting in a threatening and intimidating manner. Several vendors contacted the Company and stated they were not comfortable sending their employees into the facility as they were being threatened by him. One vendor, John Pichi of American Waste Management Service, reported a tirade by Grievant at the Weirton Plant wherein he accused Pichi of overcharging the Company for services, badgered Pichi about environmental issues, said that Pichi was the "reason the steel industry was in the tank" and asked Pichi for a "piece of the action." Mr. Pichi also reported that Grievant verbally attacked Pichi's co-worker and used multiple "attacking profanities". Mr. Pichi concluded his report by saying that, "in all of my 20 years, I have never been exposed [to] this kind of threatening environment."

Grievant was warned by the Company that this type of behavior would not be tolerated. Grievant apologized to the vendor and management at that time and the matter was closed. However, he was reported for the same behavior just a few months later. In October, 2010 ISC Training and Consulting Services conducted a Hazardous Materials/Waste Operations and

Emergency Response training at the Weirton facility. Fourteen employees attended the training. Grievant was the only employee not to complete the training. During the week long training, he became disruptive. The vendor teaching the class notified management that it would not return for any future classes if Grievant attended due to his threatening and intimidating conduct. Grievant was again warned by the Company that this type of behavior would not be tolerated. The warning stated that any future behavior of this type could result in further disciplinary action up to and including discharge.

In December, 2010 Grievant again began acting in an unprofessional manner and was disqualified from being a Team Leader due to his threatening and intimidating behavior toward management, his fellow workers, and vendors. Grievant was warned that the Company would not tolerate this type of behavior on Company premises. He acknowledged his wrong doing and agreed to refrain from this type of behavior.

On June 20, 2012 another vendor, EAP Industries, contacted the Company reporting that one of its employees was threatened and intimidated by Grievant. In particular, it was reported that Grievant accosted the vendor's driver and referred to EAP's President as "that Greek motherfxxxxr". The vendor requested that this situation be rectified, and that their employee not be subjected to this type of behavior. Based upon this incident Grievant was suspended for a two month period and returned to work pursuant to the following Last Chance Agreement dated August 14, 2012:

"LAST CHANCE AGREEMENT"

On Wednesday June 20, 2012 the Company was notified that you had verbally accosted an outside vendor, Andrew Diamond working for EAP Industries. A meeting was held with you on that day where you did not deny any of the allegations that were stated. You were suspended pending further notice at that meeting.

On November 29, 2011 a similar incident occurred with ISC Training and Consulting Services, whereas a similar complaint of your conduct was made. Prior to this meeting another complaint had been filed by John Piche regarding your conduct in February, 2010. At the meeting that was held with you on November 29, 2011 the Company notified you that any further conduct of this nature would not be tolerated and you would be disciplined up to and including discharge for not complying with the written warning.

Your conduct whether directed at a fellow employee or one of our vendors, creates a hostile work environment and is in violation of Company policy as well as our Work Rules.

While the Company maintains that this is a dischargeable offense and does not condone this type of conduct, based upon your tenure with the Company, we will suspend you without pay for a period of sixty day (60) or 2 months from the date of your suspension, June 20, 2012. Without precedence or prejudice to either party, the following agreement is hereby entered into by Mr. Fritz Frohnafel and the respective representatives of the parties involved:

1. You will be suspended without pay for a period of sixty days effective June 20, 2012. You will retain your health benefits during this period. You will return to work on or about August 20, 2012.
2. Mr. Frohnafel agrees to seek professional help through the EAP and complete the program they establish prior to his return to work.
3. Mr. Frohnafel agrees that he will not violate any Plant Rule or Safety procedure of any kind upon his return. He agrees to follow instruction from both Management and/or his team leader.

4. It is agreed that any violation of this agreement will be cause for immediate suspension and irrevocable discharge for the duration of Mr. Frohnapfel's employment with ArcelorMittal.
5. This agreement is without precedent or prejudice and shall not be referenced in any other pending or future matter by the Union or the Company, except those involving Mr. Frohnapfel. This agreement shall remain as a permanent part of Mr. Frohnapfel's employment record.
6. It is further agreed by Mr. Frohnapfel, the Union, and the Company, that this agreement is predicated on the total acceptance of all of the requirements and stipulations set forth herein, and a guarantee by signature below that no grievance or any other cause of action will be filed by Mr. Frohnapfel; the Union or any other person or agency regarding the implementation or application of this agreement."

During the negotiations surrounding the Last Chance Agreement, the Company was very specific with both Grievant and the Union that the Company would not tolerate such behavior on Company property. Grievant was instructed that he could not create any type of situation that could be construed as threatening or intimidating and had to follow all plant safety regulation and rules of conduct or be immediately discharged. Grievant was also encouraged to seek professional help for his uncontrolled behavior. Both the Union and the Company also told him that should he encounter a situation that caused him to become angry or frustrated, that he should bring the situation to the attention of the Union President, or the Manager of Labor Relations.

On April 16, 2013 just eight months after he agreed to the Last Chance Agreement, Grievant was told by the Department Manager, Matt Caparese, to follow his supervisor's directives. Grievant became angry immediately after the call and began screaming vulgarities and making profane derogatory statements about Caparese and a team leader. During the rant to two of his co-workers, a microphone on a radio was open, so that the vulgarities and

unprofessional rant was heard throughout the plant, including by hourly and management employees in the Environmental Department. Grievant called Mr. Caparese "more axhxhx management". And among other things said that the Company was "fxxxxd up". He had earlier ranted about "fxxxing Kerr", another employee.

On April 16, 2013 Grievant was issued a Notification of Violation of Rules. He was informed that he was being suspended until further notice with intent to discharge. During a fact finding meeting on April 16, 2013, Grievant by his own admission stated he knew he made a mistake and that his conversation was unprofessional and demeaning, but kept stating that he was frustrated. He did not deny that he said the things that were reported, including the vulgarities, nor did he deny that he called management by the names heard over the radio.

On April 18, 2013 the Company notified Grievant that his suspension was being converted to discharge effective that day for violation of his Last Chance Agreement, including violation of plant rules and the Company's anti-harassment policy.

A timely grievance was filed on April 22, 2013 challenging that discharge.

ISSUE

Whether the Employer had just cause to discharge the Grievant? If not, what should be the appropriate remedy?

POSITION OF EMPLOYER

The grievance should be denied. Mr. Frohnaphel could have been discharged in 2012 for acting threatening and in an intimidating manner to a fellow employee. There is no dispute about what happened there. There was no dispute about the vulgar language calling the person a m-f---er, a liar, cheater, etc. No dispute about that and so that gives you an indication of the type

of language that Mr. Frohnapfel uses and how he can get upset and go off on people. However, recognizing his tenure with the Company he was awarded a Last Chance Agreement which provided he would be discharged if he violated the Plant Rules or the Agreement. Only eight months after signing the Agreement he exhibited threatening, intimidating and insubordinate behavior and violated the Plant Rules and the Company's Anti-Harassment Policy. The resulting discharge was clearly for proper cause. It was in accordance with the Last Chance Agreement to which Mr. Frohnapfel was a signatory as well as the Union.

Now the Last Chance Agreement must be enforced. It is well accepted that these agreements are a benefit to the employee and the employer and must be enforced. And I got to tell you from my experience, and I believe the Company's experience, it is the Union that requests these things. And the idea is the employee avoids termination. It allows another chance to save his job by ceasing the poor behavior. To be sure the Employer benefits by allowing the employee to cease his poor behavior and to be able to discharge the employee without argument if the employee violates the Agreement. Arbitrators encourage such progressive programs of salvage and rehabilitation by strict enforcement of the terms which the parties agree to including the employee in this case. The Agreement was in writing, agreed to by the Company, Union and Mr. Frohnapfel. The terms were not onerous. It simply required that he not violate the Plant Rules and to follow the instruction of management and his team leader. The terms of the Agreement were carefully explained. We believed Mr. Frohnapfel understood them and initialed each term. Instead of obeying the Rules and accepting direction from Supervision Mr. Frohnapfel reverted to poor past behavior within eight months of the effective date of the Agreement and was properly discharged.

He violated Rule 10 when he engaged in threatening and intimidating behavior by his angry tirade on April 16, 2013. Therein, according to Mr. Kozar, according to all of the managers at the meeting they heard the transmission from Mr. Frohnapfel that he called his Supervisor an asshole and announced that the company was fucked up. He also had said "that fucking Kerr", etc. He used the f-word repeatedly. He violated Rule 26 by responding to his Supervisor's directive to follow Company procedures with an angry tirade. Because the angry tirade came on right after his conversation with Matt when Matt told him that he had to follow supervision. It wasn't, "oh, Matt's right, I think Matt is okay, I respect him." No. It was an angry tirade immediately after that phone call, and it was directed against Matt. He used profane language in violation of Rule 26 which prohibits such language. Say what you will, witnesses have come here and said there was profane language used. It was exactly what Mr. Kozar testified to and what the other witnesses testified they heard Mr. Frohnapfel state.

The Policy prohibits any inappropriate or unprofessional conduct. These Rules are reasonable and require compliance. Mr. Frohnapfel obviously was aware of all of the Rules, he has had numerous incidents of violations. They all led up to this Agreement. After each incident he was sorry. He is not a bad guy. I'm not saying that. But we just can't have him around because he is too volatile, too insubordinate. He always said he wouldn't violate the Rules then he goes and does it. Now, he has to be discharged under the Agreement according to its terms. It is not the Arbitrator's role to mitigate the Agreement. This has been negotiated by three parties. Even if the terms were harsh or strict, which they aren't, even though you might consider them unfair, which I would find hard to believe that you do, that is not your concern - respectfully. Once the Arbitrator starts substituting his judgment he has exceeded his jurisdiction

and, more importantly, he has jeopardized the future for the use of such agreements for other employees.

Now we believe the Union's arguments are unavailing. What we've heard in the Third Step was that this was a private conversation and they didn't know it was on the radio – that doesn't matter. The only thing that occurred, because it was on the radio, is that Management heard it and that he gave himself away that he violated his Last Chance Agreement. Even if it was one employee who heard this it would be enough. It was also being insubordinate, using profane language and violating Rule 10 as well. Mr. Frohnäpfel was acting in a threatening, intimidating manner in violation of Rule 10. He had done it before. He was also insubordinate in that he was complaining about the directive which he was doing. He was unprofessional in violation of the anti-harassment policy and he was profane in violation of Rule 26. Even if unintended, the broadcast of his anger and rage surely added to the hostile, threatening, intimidating, and insubordinate work environment. Accordingly, whether or not the broadcast was intentional, Mr. Frohnäpfel violated the Last Chance Agreement and must be discharged.

Any argument seeking mitigation based on years of service must also be rejected. The Award of the Last Chance Agreement already recognized Mr. Frohnäpfel's long service. He also agreed that any violation of the Agreement would result in discharge notwithstanding his prior employment.

Now a couple of words about the testimony here today. I was struck by Mr. Duke's testimony where he said that the Company witnesses were honest. He said it appeared they were honest. But he was hesitant to say that they were lying, Mr. Pozar – there was literally no reason for this young man to come in here and lie. He came here on his own free will and now he is being called a liar. Matt I think is credited with being an honest person and so was Falbo who

sat here today and you will make up your own mind about her. But respectfully they are not liars and were not told to lie. They came in here and said that Fritz admitted saying these things in the meeting. Now, finally, this idea if it is out there, I'm sure that it is, that Fritz was fired to remove him from the Environmental Department. This is the first time we ever heard any of this. This idea of retribution was not brought up before in the Third Step. So with all due respect the Arbitrator really can't get into any of that. It is totally misplaced.

So, in summary we will say that Fritz Frohnapfel is not a bad guy. But we had an agreement. He told us he was going to obey the Agreement and frankly he didn't. So, in accordance with the Agreement he must be terminated.

POSITION OF THE UNION

We are asking you to consider what we believe the arbitration clearly defines as missing in this case. Whether there was in fact a violation of the Last Chance Agreement on April 16, 2013. And, if you start out there, there were three witnesses that were in the trailer when this comment was made. And it was just one comment and you heard that from three witnesses. One witness had heard it but the other two witnesses who were in close proximity, a few feet from the Grievant, did not hear what was said and the method and manner in which it was said -- the tone, whether he was loud, confrontational, or it was threatening. Mr. Duke, Mr. Carducci and Mr. Frohnapfel all clearly were able to lay out for you that it was one statement, it was one comment, it was accidentally communicated across the Plant. Incidentally, I believe the arbitration authority that I reviewed is very clear that threatening, intimidating conduct has to be of a nature that is intended to incite confrontation. I have a hard time understanding how you intend to incite

confrontation when you don't react to the comment you heard and it's merely a casual comment in a general sense not directed to anyone in particular.

I also find it particularly interesting in this case that the paper that was introduced by the Company does not include what they take the position now as being statements that Fritz admitted to have made on that day. What is particularly telling is that they fail to bring you Company exhibits for Union Exhibit No. 1 which they readily admit should have been attached to the Step III minutes. That was prepared close in time to the Step III minutes. As soon as they had it typed up their position clearly points out that it was one statement that was not directed to anybody and it was a statement about "opinions are like assholes, everyone has one and some have two". The only documents that include any specific statements were prepared by the Company and were not included in any of the documents provided to the Union that did not surface until we were at this hearing today. Two rebuttal witnesses were put on and also prepared statements according to their testimony. They did not include specific statements that the Company would want us to believe was stated and acknowledged by Mr. Frohnappel. As a matter of fact the last rebuttal witness does not recall hearing anything other than the f-word which he acknowledged is utilized all the time here. So, in our opinion clearly, we believe that the evidence supports that the Last Chance Agreement was not violated.

Now, whether they believe that they should have discharged him back in 2012 is irrelevant. On April 16, 2013 he was an employee at ArcerlorMittal who, absent a violation of a Plant Rule or a contract provision, was entitled to come to work, punch a clock, earn a living and provide for his family. That is exactly what he has done since 2012. And what we have is a trail of documents - we don't even hear Plant Rule 10, you don't even hear Plant Rule 26. It's not contained in any of the documents. There is not a paper in the world that has that. As a matter

of fact, there is not a piece of paper in this case prior to almost a month later in the middle of May that even references what Plant Rule they are talking about, that they believe he violated. The mid-May 2013 Step III minutes talk about intimidating and threatening conduct. It's not on the Notice of Violation, it's not on his Discharge Letter, that was the first indication to the Union what Plant Rule or what conduct they felt was a violation of the Last Chance Agreement. We believe, just as Ms. Falbo indicated, that since 2010 they believe Mr. Frohnapfel should not be in the Environmental Control Department. They wanted to get him out of there. They never afforded him an opportunity to be transferred that had been done in another case and had worked out so well. We are talking about a 41 year employee.

There were three individuals who were in the best position to assess what occurred that day, who were in the trailer, who were all in close proximity of each other. He was talking about something that benefits this Company on an important issue that this Company is facing and that would be Mr. Carducci, Mr. Duke and Mr. Frohnapfel. All three of them, without question, indicated what was said, what was not said in an intimidating, threatening or confrontational manner. As a matter of fact, it was not even intended to be heard. It was a general comment about "opinions are like assholes, everybody has one and some people have two". That was it. That was the extent of it. Words even more profane than that such as the f-word were recognized by management officials as being said every day in this Plant. We believe that what was actually said is shop talk, even if the f-word had been said, but it was not in a threatening or intimidating manner nor intending to be a confrontation, but that too would be shop talk and not a violation of the Plant Rules.

We would urge you, and we know you will, to please look at the paper, please consider the testimony, please consider who was in the best position to judge what was said and the

manner in which it was said and we believe that you will conclude that the Company has not met its burden of establishing that just cause exists to terminate and extinguish and write the obituary on a 41 year career here.

FINDINGS AND DISCUSSION

Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority, other contractual benefits and reputation are at stake. Because of the seriousness of this penalty, the burden is on the Employer to prove guilt of wrongdoing. Quantum of proof is essentially the quantity of proof required to convince a trier of fact to resolve or adopt a specific fact or issue in favor of one of the advocates. Arbitrators have, over the years, developed tendencies to apply varying standards of proof according to the particular issue disputed. In the words of Arbitrator Benjamin Aaron, on some occasion in the faraway past, an arbitrator referred to the discharge of an employee as "economic capital punishment". Unfortunately, that phrase stuck and is now one of the most time honored entries in the "Arbitrator's Handy Compendium of Cliches". However, the criminal law analogy is of dubious applicability, and those who are prone to indiscriminately apply it in the arbitration of discharge cases overlook the fact that the employer and employee do not stand in the relationship of prosecutor and defendant. The basic dispute is still between the two principals to the collective bargaining agreement. In general, arbitrators use the "preponderance of the evidence" rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases such as within.

It is very important to note at the outset the scope of review of the grievance before me. At the time of his discharge Grievant was working under the auspices of a "LAST CHANCE

AGREEMENT" dated August 15, 2012. In general, a Last Chance Agreement is precisely what its name connotes, i.e. a last chance for an employee to salvage their employment, which would otherwise be lost, and to continue to hold gainful employment subject to certain expressed conditions. These agreements are being used more and more frequently by employers. They represent a trade-off: the employee gets something he was not entitled to prior to the agreement, continued employment, in return for relinquishing certain employment rights. For example, when considering whether there is just cause for discharge under such agreements Arbitrators do not apply the same due process considerations or procedural protections as under a normal discharge or disciplinary matter. In fact, Paragraph No. 4 of Grievant's Last Chance Agreement specifically provides just that: **"It is agreed that any violation of this Agreement will be cause for immediate suspension and irrevocable discharge . . ."**

Accordingly, by agreement (which is essentially a modification of the collective bargaining agreement) the parties have established an automatic and immutable penalty. As such, there is no authority for an arbitrator under such circumstances to require the application of progressive discipline nor to consider any mitigating factors. The sole question to be decided is whether Grievant violated his Last Chance Agreement. If that question is answered in the affirmative then the discharge must be upheld.

Turning now to the merits of the within matter, there is no question that if Grievant engaged in the misconduct described by the Employer then discharge clearly would be warranted. The Employer's version of the misconduct was presented primarily through the testimony of Aaron Pozar, Matt Caprarese and Susan Falbo. Grievant (and his witnesses) related a markedly different version of those events. Accordingly, when witnesses having personal knowledge of the facts testify in conflict the arbitrator must address the issue of witness

credibility. In such situations arbitrators have applied varying criteria to resolve such conflicts. Perhaps the most important of all the tests that are normally applied is that of the self-interest of the witness. Is there any reason why the outcome of the arbitration would benefit the witness and, therefore, bias their testimony or motivate them to lie? It is important to note, however, that having an interest or stake in the outcome does not disqualify the witness. Rather, it merely renders their testimony subject to very careful scrutiny. Obviously, Grievant as the accused has an incentive for denying the charges in that he stands immediately to gain or lose in the case, i.e. continued employment vs. termination. Pozar, Caprarese, and Falbo on the other hand, have absolutely nothing to gain or lose from their testimony in this matter.

Shortly after noon on April 16, 2013 Matt Caprarese, Division Manager, Environmental and Utilities, received a phone call from the Grievant who began expressing concern over the job with the B Outfall filter press and making suggestions for changes. It appears that the Grievant and several of his co-workers had been discussing how to best complete this job and decided they would bring their ideas to management. Unfortunately, Mr. Caprarese told Grievant that he could not suggest changes to this job scope until he understood the details better. Mr. Caprarese had only been on the job approximately 3½ months at that time. Mr. Caprarese told the Grievant that he needed to express his concerns to the shift manager or engineers (Robbie Kerr or Rick Martin) who were assigned to this job. Mr. Caprarese reiterated that he did not want to create any communication issues with what the Shift Managers or Engineers had planned to this point. The Grievant indicated that he understood and hung up.

Shortly thereafter, Aaron Pozar, a Water Quality Specialist, was heading towards the environmental file room when Mike Mieczkowski walked in with a radio over which someone could be heard talking. It quickly became clear to Pozar that it was Grievant who was

unknowingly broadcasting his comments over the radio. Pozar testified unequivocally that he heard Grievant make numerous profane statements such as "that fucking Kerr" -- referring to Robbie Kerr the Shift Supervisor. Pozar also heard Grievant make statements to the effect that "this place is all fucked up", and "all we have is more asshole management". Grievant apparently was "dismayed" that his repair suggestions were not being accepted. By this time numerous individuals were attempting to alert Grievant that his radio was inadvertently keyed open and that his comments were being broadcasted throughout the entire Plant and could be heard by anyone whose radio was on that channel.

Caprarese testified that it was reported to him that numerous individuals (including Rick Martin) heard the Grievant's radio broadcasts in which he used profanities towards the Company in general as well as certain members of management. Caprarese assumed Grievant's statement to the effect that "all we have is one more management asshole on our hands" was a direct reference to himself because he was the newest manager on site and he had just concluded a phone conversation with Grievant in which he had to inform Grievant to stick to the original repair plans regarding the B Outfall filter press and declined to accept Grievant's suggestions. In fact, it was right after their conversation ended that Grievant began his profane tirade and making comments about Caprarese and Kerr.

Later that day Grievant was called into a meeting with his Union representative, Matt Caprarese, Wally Jancura, and Susan Falbo. Ms. Falbo testified that during their meeting she directly asked Grievant if he made the various profane statements being attributed to him as referenced in this opinion. Ms. Falbo testified unequivocally that Grievant admitted making those comments. Wally Jancura, the Manager of Utilities, testified that he was also in that meeting and he specifically heard Grievant admit making those profane statements.

For his part Grievant put forth the following sterling defense, i.e. "all of the Company witnesses are lying". While Grievant did admit to making the rather innocuous statement that "opinions are like assholes, everyone has one and some have two" he totally denied uttering any of the alleged profanities, and he denied ever admitting to Ms. Falbo that he had made those profane statements. Needless to say the Grievant has absolutely no credibility with this finder of fact. In fact, it was interesting to observe how Grievant's fellow Union members struggled to agree with him that all of the Company witnesses were liars, and that they heard none of the profanities that everyone else seems to have heard.

The only remaining issue is whether Grievant's conduct constitutes a violation of his Last Chance Agreement. Under the Last Chance Agreement Grievant is prohibited from violating any Plant rules and is required to follow instructions from management and/or his team leader. The Company initially argues that Grievant violated Plant Rule No. 10 which generally provides that any employee who intimidates or threatens a fellow employee or member of management would be subject to immediate suspension and discharge. I have reservations as to whether Grievant's rambling profanities, which in essence were broadcast to the world in general but no one in particular (i.e. "this company is fucked up") would constitute intimidating or threatening conduct towards a co-worker or a member of management. Those comments, while certainly disrespectful, inappropriate and uncalled, under these circumstances do not constitute intimidating and threatening behavior.

Grievant is also cited for a violation of Rule 26 which prohibits insubordination, which is defined as including a refusal to comply with a Supervisor or Team Leader or the use of profane language. Grievant clearly violated this Rule in two distinct fashions. First, and quite obviously, was his repeated and uncalled for use of profane language. Second was his reluctance to follow

his Team Leader's instructions with respect to the B Outfall filter press which precipitated his profane outbursts.

Grievant's conduct is also a blatant violation of the Company's Fair and Equal Treatment Policy. That Policy prohibits, inter alia, any inappropriate and unprofessional conduct whether or not such conduct rises to the level of unlawful harassment, or has the purpose or effect of creating an intimidating, hostile or offensive working environment. Grievant's profanity-laced rants against management in general, and several of his supervisors in particular, which were overheard by numerous individuals throughout the Plant, clearly and unequivocally violates these provisions of the Policy.

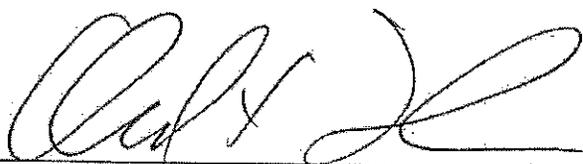
Finally, since I find that Grievant's conduct violates his Last Chance Agreement I have no authority but to uphold the mutually agreed upon appropriate penalty for such a violation, i.e. immediate and irrevocable termination.

AWARD

The grievance is denied.

Date:

March 26, 2014
Pittsburgh, PA



Ronald F. Talarico, Esq.
Arbitrator