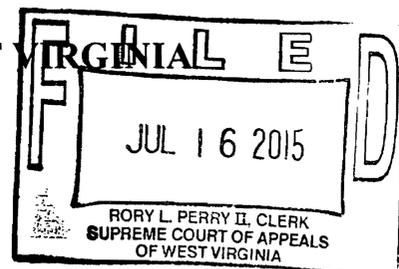


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-1262

**JULIE CONRAD,**  
**Plaintiff Below, Petitioner**

v.

**THE COUNCIL OF SENIOR CITIZENS OF GILMER COUNTY, INC.,**  
**Defendant Below, Respondent**

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Honorable Jack Alsop, Judge  
Circuit Court of Gilmer County  
Civil Action No. 14-C-2

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**BRIEF OF THE RESPONDENT**

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## I. STATEMENT OF THE CASE

On January 7, 2014, Petitioner, Julie Conrad [“Ms. Conrad”], filed a civil complaint against her former employer, Respondent, The Council of Senior Citizens of Gilmer County, Inc., alleging constructive retaliatory discharge in violation of public policy. (Am. App. 4-9). By order entered on October 28, 2014, the circuit court ultimately dismissed Ms. Conrad’s civil suit for failure to state a claim upon which relief can be granted against the respondent. (Am. App. 166-181). In response to Ms. Conrad’s appeal of the circuit court’s order, respondent respectfully submits that the circuit court committed no error in dismissing petitioner’s constructive retaliatory discharge claim for failure to state facts sufficient to support such claim and failure to assert violation of any legally recognized substantial public policy of the State of West Virginia.

Ms. Conrad worked as a Homemaker for respondent from February 8, 2002 until her resignation on or about January 31, 2013. (Am. App. 5, 102).<sup>1</sup> Ms. Conrad alleged that on or about January 31, 2013, she advised the respondent that she could no longer work for her assigned client,<sup>2</sup> allegedly because the client’s brother-in-law (later alleged to be the client’s son-in-law) would “consistently block the driveway off so Plaintiff could not go to the home, flatten her tires, and vandalize her vehicle.” (Am. App. 5, 102). Ms. Conrad alleged that she told her supervisor that she could no longer physically or emotionally handle caring for the client at the client’s home. (Am App. 5, 102). Ms. Conrad alleged that she was directed by the respondent to “stick it out.” (Am. App. 5, 102).<sup>3</sup> In her original complaint, Ms. Conrad concluded that she

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<sup>1</sup> As required, the allegations in the complaint and amended complaint were assumed to be true only for the purpose of Respondents’ motions to dismiss.

<sup>2</sup> Ms. Conrad had been working at this assigned client location for approximately 10 years.

<sup>3</sup> Ms. Conrad never went back to work for the assigned client.

“felt as if she had no other choice and resigned.” (Am. App. 5, 102). In her amended complaint, Ms. Conrad added the allegation that she “felt in danger and physically threatened,” (Am. App. 5, 102), and, thus, “felt as if she had no other choice but to quit or put herself and her property in danger and therefore with no choice, resigned.” (Am. App. 5, 102).

In her original complaint, Ms. Conrad asserted three causes of action for breach of the employee handbook and/or manual, constructive retaliatory discharge in violation of public policy, and the tort of outrage. (Am. App. 4-9). Ms. Conrad failed to state facts sufficient to support the general allegations in her complaint and the elements of each of her claims. Ms. Conrad failed to identify any definite promise set forth in the “Employee Reference Guide” that would have altered her status as an at-will employee in support of her breach of employment contract claim.<sup>4</sup> Ms. Conrad failed to specifically identify the source of any legally recognized substantial public policy allegedly violated by respondent in support of her constructive

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<sup>4</sup> See Syl. Pt. 6, Cook v. Heck’s, 176 W.Va. 368, 342 S.E.2d 453 (1986) (“[a]n employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons.”); Minshall v. Health Care & Retirement Corp. of America, 208 W.Va. 4, 537 S.E.2d 320 (2000) (Employee handbook given to employee by employer did not establish employment contract, for purposes of employee's breach of employment contract claim, absent language in handbook reasonably indicating contractual promise by employer not to discharge employee except for cause).

In its motion to dismiss the complaint, respondent produced specific provisions of the “Employee Reference Guide” and an acknowledgment signed by petitioner that established unequivocally that it did not alter petitioner’s at-will employee status in any way. (Am. App. 35-37). See Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008) (circuit court can consider documents fairly incorporated in a complaint, in plaintiff’s possession, or of which a plaintiff had knowledge and relied on in bringing suit, that confirms or refutes the allegations contained in a complaint without converting a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment.) The petitioner did not include a claim for breach of the employee handbook and/or manual in her amended complaint, and, thus, such claim is not at issue on appeal.

retaliatory discharge claim.<sup>5</sup> Likewise, "in this jurisdiction, a claim for the tort of outrageous conduct is duplicitous to a claim for retaliatory discharge."<sup>6</sup>

On April 14, 2014, a hearing was held on respondent's Rule 12(b)(6) motion to dismiss all counts of the complaint for failure to state a claim upon which relief can be granted. (Am. App. 76-99). The circuit court found that the complaint did not adequately set forth any violation of contract or legally recognized substantial public policy of the State of West Virginia or any other cause of action against the respondent. (Am. App. 95-96). The circuit court granted Ms. Conrad twenty (20) days to file an amended complaint and granted the respondent leave to file a motion to dismiss the amended complaint and bring it on for hearing. (Am. App. 95-96).

In her amended complaint, Ms. Conrad's allegations were virtually identical to those set forth in her original complaint. (Am. App. 101-106). Ms. Conrad abandoned her claim for breach of the employee handbook and/or manual. (Am. App. 101-106). Ms. Conrad asserted two causes of action for constructive retaliatory discharge in violation of public policy and the tort of outrage. (Am. App. 101-106). As the basis of her claim for constructive retaliatory

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<sup>5</sup> To determine whether a retaliatory discharge has occurred, a plaintiff must identify a substantial public policy that is based on the West Virginia Constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Syl. pt. 2, Birthisel v. Tri-Cities Health Servs. Corp., 188 W. Va. 371, 424 S.E.2d 606 (1992) ("[t]o identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions."). See also Syl. Pt. 7, Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 696 S.E.2d 1 (2010) (same). "A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Swears, supra at Syl. pt. 3; Syl. pt. 1, Cordle v. General Hugh Mercer Corp., 174 W. Va. 321, 325 S.E.2d 111 (1984); accord, Page v. Columbia Natural Res., Inc., 198 W. Va. 378, 480 S.E.2d 817 (1996).

<sup>6</sup> Harless v. First National Bank in Fairmont, 169 W. Va. 673, 697, 289 S.E.2d 692, 705 (1982)**Error! Bookmark not defined.** See also Harless, 169 W. Va. at 696, 289 S.E.2d at 705 ("It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A Plaintiff may not recover damages twice for the same injury simply because he has two legal theories....") (citations omitted).

discharge in violation of substantial public policy, Ms. Conrad alleged that respondent violated W. Va. Code § 21-3-1, a general workplace safety statute. (Am. App. 103).

On August 11, 2014, a hearing was held on respondent's Rule 12(b)(6) motion to dismiss all counts of the amended complaint for failure to state a claim upon which relief can be granted. (Am. App. 152-165). On October 28, 2014, the circuit court entered an order dismissing the petitioner's civil action on grounds that the amended complaint did not state facts sufficient to support her claims and did not adequately set forth any cause of action against the respondent. (Am. App. 166-181).

## II. SUMMARY OF ARGUMENT

In her appeal, which is characteristically vague and confusing, petitioner contends that the circuit court erred in granting respondent's motion to dismiss her amended complaint. She argues that she stated sufficient facts to support her constructive retaliatory discharge claim. She argues that the circuit court failed to recognize a public policy in West Virginia of maintaining a safe working environment. She also argues that the circuit court misapplied a negligence standard to her retaliatory discharge claim.

In reality, the circuit court ruled that petitioner failed to set forth specific facts which, even if true, would establish that a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death under the deliberate intent statute, W. Va. Code § 23-4-2(c)(2)(ii) (A). The circuit court ruled that W. Va. Code § 21-3-1 fails both explicitly and implicitly to establish a duty on an employer to protect employees from the criminal conduct of third parties (Am. App. 179). The circuit court ruled that it was undeniable that respondent had absolutely no control over the activities of the client's son-in-law because he was not a client of the respondent, nor did his alleged criminal conduct take place within the client's home (or workplace) of the petitioner. (Am. App 179).

The circuit court ruled that respondent did not own, lease or otherwise have a right to possession or ownership or control of the client's property where the alleged acts occurred. The circuit court also ruled that petitioner's amended complaint contained mere conclusory allegations without stating sufficient facts to support the elements of any plausible claim against the respondent.

Respondent argued below that just because the petitioner, as an at-will employee, was free to quit over dissatisfaction with her work assignment or unpleasant or difficult working conditions does not make the respondent liable for constructive retaliatory discharge. The petitioner's burden, as defined by her amended complaint, was to set forth specific facts which, if true, would establish a cause of action for retaliatory discharge, which includes specifically identifying the source of legally recognized substantial public policy allegedly violated by the respondent in effectuating her alleged termination. Because the petitioner acknowledged that she quit her employment, the petitioner also was required to set forth specific facts which, if true, would establish constructive discharge, which includes stating facts to show that intolerable conditions caused her to quit, such conditions were created by the respondent, such conditions were related to those facts that gave rise to her alleged retaliatory discharge, and that such conditions were not merely uncomfortable or burdensome, but were so intolerable that a reasonable person would be compelled to quit.

In Owen v. Board of Education of the County of Mercer, et al., 190 W.Va. 677, 441 S.E.2d 398, 399 (1994), this Court affirmed the dismissal of a Harless-style retaliatory discharge claim where the plaintiff's complaint (1) did not provide sufficient facts to support the elements of her claim and (2) did not identify a substantial public policy. The plaintiff, a former school teacher, filed a complaint alleging, that she "was terminated because she was a strong advocate

for special education students and for the enforcement of their rights contained in the Education of Exceptional Children Act.” She contended that “her termination violated the substantial public policy contained in these statutory provisions.” Id. This Court determined that such a general complaint was insufficient to raise a cognizable retaliatory discharge claim:

In the present case, the complaint contained only the conclusionary statement that “Plaintiff was wrongfully and deliberately fired ... for unlawful reasons in violation of substantial public policies of the State of West Virginia and state and federal law, including, but not limited to, the Education of Exceptional Children Act, West Virginia Code § 18–20–1, et seq., and the Education of the Handicapped Act, 20 USCS § 1401.” It contains no specific facts which identify the event or policy. Under *Fass*, the dismissal was proper.

Id. (emphasis added).

Likewise, in this case, Ms. Conrad failed to set forth specific facts which, even if true, would support the elements of a claim for constructive retaliatory discharge. Ms. Conrad also failed to cite to a legally recognized substantial public policy allegedly violated by respondent.

As the basis of her claim for retaliatory discharge, Ms. Conrad attempted to assert that respondent violated W. Va. Code § 21-3-1, a general workplace safety statute. W. Va. Code § 21-3-1 applies only to workplace injuries. Petitioner was never physically injured in her status as an employee or at the workplace. Even if petitioner had been physically injured in her status as an employee or at the workplace, Henderson v. Meredith Lumber Co., 190 W. Va. 292, 438 S.E.2d 324 (1993), holds that the only cause of action against an employer for a workplace injury is under the deliberate intent statute, W. Va. Code § 23-4-2. Just as it has been held that W. Va. Code § 21-3-1 is too general and vague to satisfy the requirements of the deliberate intent statute, it is too general and vague to satisfy the requirements of a cause of action for retaliatory discharge. Moreover, there is no West Virginia authority that holds that an alleged violation of W. Va. Code § 21-3-1, a general workplace safety statute with no specific requirements or duties, can be the substantial public policy basis of a cause of action for retaliatory discharge.

Finally, to the extent, if any, that the circuit court misapplied any standard, negligence or otherwise, to dismiss Ms. Conrad's constructive retaliatory discharge claim, the standard of review applicable to the circuit court's dismissal of petitioner's amended complaint is *de novo*.<sup>7</sup> In determining whether dismissal is appropriate on appeal, this Court applies the same test that the circuit court should have applied initially and may rule on any alternative ground supported by the record.<sup>8</sup> The Court may affirm the circuit court's judgment when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the circuit court as the basis for its judgment.<sup>9</sup>

In this case, the record clearly reveals that Ms. Conrad failed to allege factual elements necessary to assert constructive retaliatory discharge against the respondent and failed to cite to any legally recognized substantial public policy allegedly violated by the respondent. Thus, the circuit court's dismissal of her amended complaint should be affirmed.

### III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the dispositive issues in this case have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and the record on appeal, respondent respectfully submits that the decisional process will not be significantly aided by oral argument,

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<sup>7</sup> Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).

<sup>8</sup> See Conrad v. ARA Szabo, 198 W.Va. 362, 369, 480 S.E.2d 801, 808 (1996) ("In determining whether a motion to dismiss or a summary judgment is appropriate, we apply the same test that the circuit court should have applied initially. We are not wed, therefore, to the lower court's rationale, but may rule on any alternate ground manifest in the record.").

<sup>9</sup> Syl. pt. 3, Barnett v. Wolfolk, 149 W.Va. 246, 140 S.E.2d 466 (1965) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.").

and requests disposition of Ms. Conrad's appeal by memorandum decision under Rule 21 of the Rules of Appellate Procedure.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

With respect to the standard of review for orders granting motions to dismiss, this Court has held as follows:

This Court has explained that “[t]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint.” Collia v. McJunkin, 178 W.Va. 158, 159, 358 S.E.2d 242, 243 (1987) (citations omitted). “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).” Syllabus Point 3, Chapman v. Kane Transfer Co. Inc., 160 W.Va. 530, 236 S.E.2d 207 (1977). “Dismissal for failure to state a claim is proper ‘where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’ “ Murphy v. Smallridge, 196 W.Va. 35, 37, 468 S.E.2d 167, 168 (1996). This Court has also held that “[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is de novo.” Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516(1995).

Mey v. Pep Boys–Manny, Moe & Jack, 228 W.Va. 48, 52, 717 S.E.2d 235, 239 (2011).

##### B. THE CIRCUIT COURT COMMITTED NO ERROR IN GRANTING RESPONDENT'S MOTION TO DISMISS PETITIONER'S AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM FOR CONSTRUCTIVE RETALIATORY DISCHARGE.

Ms. Conrad's very general and vague first assignment of error is that the circuit court erred in granting the respondent's motion to dismiss her claim for constructive retaliatory discharge in violation of public policy. She argues that she stated sufficient facts to support her claim.

The circuit court ruled that Ms. Conrad failed to set forth specific facts which, even if true, would establish that a specific unsafe working condition existed in the workplace which

presented a high degree of risk and a strong probability of serious injury or death under the deliberate intent statute, W. Va. Code § 23-4-2(c)(2)(ii) (A). (Am. App. 177). The circuit court also ruled that Ms. Conrad's amended complaint "is so sparsely populated with facts that it would not be proper for this Court to relieve the plaintiff of her obligation to 'set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist,' and in essence, to read into the Complaint, facts and inferences which are simply not there . . . especially . . . after the Court afforded plaintiff's counsel twenty (20) days to correct the deficiencies in the original complaint." (Am. App. 180 (citation omitted)).

The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is "to test the formal sufficiency of the complaint." John W. Lodge Distributing Co. v. Texaco, Inc., 161 W.Va. 603, 245 S.E.2d 157, 158 (1978).

"The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus Point 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

The court must construe "the factual allegations in the light most favorable to the plaintiff [ ]." Murphy v. Smallridge, 196 W.Va. 35, 468 S.E.2d 167, 168 (W.Va.1996) (citing State ex rel McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516, 521-22 (1995)). Further, the court must "draw all reasonable inferences in favor of the plaintiff." Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801, 808 (W.Va.1996).

Nevertheless, "it has been held that essential material facts must appear on the face of the complaint." Fass v. Nowasco Well Service, Ltd., 177 W.Va. 50, 350 S.E.2d 562, 563 (1986) (quoting Greschler v. Greschler, 71 A.D.2d 322, 422 N.Y.S.2d 718, 720 (1979)). According to

this Court, “especially in the wrongful discharge context, sufficient facts must be alleged which outline the elements of the plaintiff’s claim.” *Id.* at 564.

Based upon these standards, this Court has upheld the dismissal of retaliatory discharge complaints that failed to state plausible claims because they made conclusory statements without specific facts of the alleged event or did not cite or assert violation of legally recognized substantial public policy.<sup>10</sup>

In this case, notice pleading did not relieve Ms. Conrad of the obligation to state facts sufficient to establish the elements of a cause of action for constructive retaliatory discharge against respondent. To the contrary, this Court has stated that “although the Plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party’s legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted,” and

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<sup>10</sup> See, e.g., *Fass*, 177 W. Va. at 53, 350 S.E.2d at 565 (upholding dismissal of a wrongful discharge complaint because “the appellants’ Complaint is conclusory and imprecise. The sole allegation regarding ‘the motivating reason’ for the appellants’ termination is that they ‘stopped to eat and relax’ after working continuously for a specified period of time. The allegations in this case are unsupported by essential factual statements. . . . General allegations in this regard are insufficient[.]”); *Owen v. Bd. of Educ.*, 190 W. Va. 677, 678, 441 S.E.2d 398, 399 (1994) (“In the present case, the complaint contained only the conclusionary statement that ‘Plaintiff was wrongfully and deliberately fired . . . for unlawful reasons in violation of substantial public policies of the State of West Virginia and state and federal law, including, but not limited to, the Education of Exceptional Children Act, West Virginia Code § 18-20-1, et seq., and the Education of the Handicapped Act, 20 USCS § 1401.’ It contains no specific facts which identify the event or policy. Under *Fass*, the dismissal was proper.”); *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 96-97, 479 S.E.2d 602, 606-07 (1996) (“[b]ecause of our policy of favoring the determination of actions on the merit, we generally view motions to dismiss with disfavor, and therefore, construe the Complaint in the light most favorable to the Plaintiff and consider its allegations as true. . . . However, this liberal standard does not relieve a Plaintiff or, in this case, a grievant of the obligation of presenting a valid claim, that is a claim upon which relief can be granted. In this case, Mr. Wilhelm failed to state a valid claim because he, as an at-will employee, could be discharged with or without cause by the Lottery Director unless such a discharge violated a substantial public policy. No substantial public policy was violated in this case because no liberty interest was harmed and no impermissible discrimination was alleged.”); *Gillespie v. Elkins Southern Baptist Church*, 177 W. Va. 88, 91, 350 S.E.2d 715, 719 (1986) (“There are at least two problems with Rev. Gillespie’s wrongful discharge claim. First, Rev. Gillespie does not assert that his termination violated any substantial public policy . . .”).

dismissal of a complaint is proper under the Rules of Civil Procedure where a plaintiff fails to set forth sufficient facts and information to outline the elements of a claim upon which relief can be granted against a defendant. Kopelman and Assocs., L.C. v. Collins, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996).<sup>11</sup>

The leading West Virginia decision addressing a claim of constructive retaliatory discharge is Slack v. Kanawha County Housing & Redevelopment Auth., 188 W. Va. 144, 423 S.E.2d 547 (1992), in which this Court instructed in three new syllabus points:

4. A constructive discharge cause of action arises when the employee claims that because of age, race, sexual, or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment.

5. Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish the retaliatory discharge. In addition, the employee must prove that the intolerable conditions that caused the employee to quit were created by the employer and were related to those facts that gave rise to the retaliatory discharge.

6. In order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit.

As in Slack, the instant case does not involve a claim of civil rights discrimination governed by the West Virginia Human Rights Act or Title VII. Consequently, the petitioner was required to state facts sufficient to establish a common law action for retaliatory discharge under

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<sup>11</sup> See also Dostert v. Washington Post Co., 531 F. Supp. 165 (N. D. W. Va. 1982)(In applying the standard applicable to motions to dismiss, courts have been careful to distinguish between material factual allegations which must be taken as true on a motion to dismiss, and legal conclusions which are not supported by the Complaint's factual allegations. Courts need only assume the veracity of the former.); National Coalition Government of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 358 (C.D. Cal. 1997)("The court is not required . . . to accept 'conclusory legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.'") (quoting Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994)).

Harless v. First Nat. Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978), wherein this

Court held in a single syllabus point:

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

“Thus, ‘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 v. 7-Eleven, Inc., 210 W. Va. 740, 745, 559 S.E.2d 713, 718 (2001)).

A West Virginia district court also explained an employee’s high burden of showing objectively intolerable working conditions where a constructive discharge is claimed in a retaliatory discharge case under West Virginia law:

In Williams v. Giant Food Inc., 370 F.3d 423 (4th Cir.2004), the Fourth Circuit found that a plaintiff failed to allege a constructive discharge claim where the plaintiff left her employment under less favorable circumstances than those alleged by Fisher.[] The plaintiff in Williams alleged that her supervisors yelled at her, told her she was a poor manager and gave her poor evaluations, chastised her in front of customers, and once required her to work with an injured back. Id. at 434. The court held that “these allegations, even if true, do not establish the objectively intolerable working conditions necessary to prove a constructive discharge.” Id. The court further noted, “**[d]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.**” Id.

Fisher v. AT & T Mobility, LLC, No. 2:07-0764, 2008 WL 4870996, at \*6 (S.D.W. Va. Nov. 10, 2008) (emphasis added) (internal footnote omitted).<sup>12</sup>

As the circuit court correctly found, Ms. Conrad failed to state sufficient facts to support any claim that (1) the respondent acted contrary to substantial public policy; (2) the respondent constructively terminated the petitioner; (3) intolerable conditions caused petitioner to quit; (4) those intolerable conditions were created by the respondent (as opposed to a third party); (5) those intolerable conditions were related to facts that gave rise to retaliatory discharge in violation of substantial public policy; and (6) working conditions created by or known to the respondent were so intolerable that a reasonable person would be compelled to quit.<sup>13</sup>

Ms. Conrad failed to meet her burden to set forth specific facts which, even if true, would support any plausible constructive retaliatory discharge cause of action against the respondent upon which relief could be awarded, and, thus, the circuit court's dismissal of her amended complaint should be affirmed.

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<sup>12</sup> See also Anderson v. Clovis Mun. Schools, 265 Fed. Appx 699 (10th Cir.2008) ("It is not enough that [plaintiff's] conduct constituted adverse employment action or that it was discriminatory; a constructive discharge claim 'requires a showing that the working conditions imposed by the employer are not only tangible or adverse, but intolerable.' (citation omitted). [Plaintiff] may have felt 'ganged up on' and 'alone oftentimes,' but 'given the objective standard, an employee's subjective feelings or beliefs are not relevant in a constructive discharge claim.' " (citation omitted)).

<sup>13</sup> Indeed, this Court stated that "[p]roof of this element may be determinative of the case: If the working conditions are not found to be intolerable, then there is no need for the court to consider the constructive discharge claim any further." Slack, 188 W. Va. at 153, 423 S.E.2d at 556 (citations omitted).

**C. THE CIRCUIT COURT COMMITTED NO ERROR IN FINDING THAT AN ALLEGED VIOLATION OF WEST VIRGINIA CODE § 21-3-1, A GENERAL WORKPLACE SAFETY STATUTE WITH NO SPECIFIC REQUIREMENTS OR DUTIES, CANNOT BE THE BASIS OF A RETALIATORY DISCHARGE CLAIM IN VIOLATION OF SUBSTANTIAL PUBLIC POLICY.**

Ms. Conrad's very general and vague second assignment of error is that the circuit court erred in failing to recognize a public policy in West Virginia of generally maintaining a safe working environment.

In actuality, the circuit court ruled that petitioner failed to set forth specific facts which, even if true, would establish that a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death under the deliberate intent statute, W. Va. Code § 23-4-2(c)(2)(ii) (A). (Am. App. 177). The circuit court ruled that W. Va. Code § 21-3-1 fails both explicitly and implicitly to establish a duty on an employer to protect employees from the criminal conduct of third parties (Am. App. 179). The circuit court ruled that it was undeniable that respondent had absolutely no control over the activities of the client's son-in-law because he was not a client of the respondent, nor did his alleged criminal conduct take place within the client's home (or workplace) of the petitioner. (Am. App. 179). The circuit court also ruled that respondent did not own, lease or otherwise have a right to possession or ownership or control of the client's property where the alleged acts occurred. (Am. App. 180).

To support her retaliatory discharge claim, Ms. Conrad was required to identify a substantial public policy that is based on the West Virginia Constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Syl. pt. 2, Birthisel v. Tri-Cities Health Servs. Corp., 188 W. Va. 371, 424 S.E.2d 606 (1992) (“[t]o identify the sources of public policy

for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.”); Syl. p. 7, Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 696 S.E.2d 1 (2010) (same).

“[T]he term ‘substantial public policy’ implies that the policy principle will be clearly recognized simply because it is substantial. An employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.” Birthisel, 188 W. Va. at 377, 424 S.E.2d at 612.

In other words, an employer will not be exposed to liability in situations where a statute or regulation does not clearly acknowledge its public protections. Otherwise, if an individual could bring a claim for retaliatory discharge by relying on a general standard in a vague statute or regulation, any given plaintiff could “make a challenge to any type of procedure that the worker felt violated his or her sense of good service.” Id. at 378, 424 S.E.2d at 613.

The existence of a particular public policy in West Virginia “is a question of law, rather than a question of fact for a jury.” Syl. pt. 3, Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 696 S.E.2d 1 (2010) (there was no public policy interest supporting exception to at-will employment doctrine for employee alleging that he was wrongfully terminated in retaliation for reporting alleged criminal misconduct of a principal of employer; Absent some substantial public policy exception to the at-will employment doctrine, an employee may be terminated at any time, with or without cause); Syl. Pt. 1, Cordle v. General Hugh Mercer Corp., 174 W. Va. 321, 325 S.E.2d 111 (1984).

Petitioner was an at-will employee, which means she could be discharged, for any reason, whether good or bad, as long as it was not in violation of a substantial public policy. However,

based upon her conclusory statement that she subjectively “felt as if she had no other choice but to quit or put herself and her property in danger,” (Am. App. 5), the petitioner alleged in her amended complaint that the respondent violated “clear established public policy in West Virginia that employers shall furnish employment which shall be reasonably safe for employees” under W. Va. Code § 21-3-1. (Am. App. 103). Citing *Freeman v. Dal-Tile Corp.*, \_\_\_ F.3d \_\_\_, 2014 WL 1678422 (4<sup>th</sup> Cir. (N.C.) 2014), which involves racial and sexual hostile work environment claims under Title VII,<sup>14</sup> petitioner further alleged that “[respondent] is liable for this unsafe environment because the [respondent] knew about the same and failed to take prompt remedial action to remedy the situation and rather directed that [petitioner] work in this environment.” (Am. App. 103).

First, this case does not involve a racial or sexual hostile work environment claim governed by the West Virginia Human Rights Act and Title VII. See *Taylor v. City National Bank*, 642 F.Supp. 989, 998 (S.D.W.Va.1986) aff’d, 836 F.2d 547 (4th Cir. 1987) (**HarlessError! Bookmark not defined.**-type common law action challenging constructive discharge and retaliation complaints preempted by the West Virginia Human Rights Act and Title VII); *Talley v. Caplan Indus., Inc.*, CIV.A. 2:07-0067, 2007 WL 634903 (S.D.W. Va. Feb. 26, 2007) (“[d]istrict courts in the Southern District of West Virginia ... have uniformly held that where a statutory scheme provides both a public policy and a cause of action for violation of that policy, a Harless-type action may not be substituted for the statutory cause of action.”).

Second, in order to claim the benefit of W. Va. Code § 21-3-1, Ms. Conrad must have been physically injured in her status as an employee, and if she was physically injured in her

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<sup>14</sup> Under Title VII, once an employer has notice of harassment because of age, race, sexual, or other unlawful discrimination, it must take prompt remedial action reasonably calculated to end the harassment.

status as an employee, then Henderson v. Meredith Lumber Co., 190 W. Va. 292, 438 S.E.2d 324 (1993), holds that the only cause of action against an employer for a workplace injury is under the deliberate intent statute, W. Va. Code § 23-4-2. In this case, W. Va. Code § 21-3-1 applies only to workplace injuries, and Ms. Conrad was not physically injured in her status as an employee or at the workplace.

Third, it has been held that W. Va. Code § 21-3-1 is too general and vague to satisfy the requirements of the deliberate intent statute, W. Va. Code § 23-4-2. For example, in Smith v. Dodrill, 718 F. Supp. 1293 (N.D. W. Va. 1989), the court held that W. Va. Code § 21-3-1 imposed no affirmative obligation on employers under federal law to protect its employees against violent acts by third parties. Likewise, in Pack v. Van Meter, 177 W. Va. 485, 354 S.E.2d 581 (1986), this Court held that liability for deliberate intent could be sustained only because the employee's cause of action alleged violation of a specific safety statute, W. Va. Code § 21-3-6, which required handrails on stairways and safe treads on steps.<sup>15</sup>

Just as W. Va. Code § 21-3-1 is too general and vague to satisfy the requirements of the deliberate intent statute, it is too general and vague to satisfy the requirements of a cause of action for retaliatory discharge in violation of substantial public policy. “[T]he term ‘substantial public policy’ implies that the policy principle will be clearly recognized simply because it is substantial. An employer should not be exposed to liability where a public policy standard is too

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<sup>15</sup> See also Bowden v. Frito-Lay, Inc., 2010 WL 3835222 at \*8 (S.D. W. Va.) (“Plaintiff has failed to identify a genuine issue of material fact as to whether the condition of the tires violated a statute, rule, regulation or standard that was specifically applicable to the particular work and working condition involved. *West Virginia Code Section 21-3-1 only imposes a general safety requirement upon employers, with no specific requirements or duties*, as in *Ryan*.”)(emphasis supplied). Indeed, the Court will notice that all of the sections of Article 3, Chapter 21 of the Code which follow W. Va. Code § 21-3-1 contain specific provisions regarding workplace safety.

general to provide any specific guidance or is so vague that it is subject to different interpretations.” Birthisel, 188 W. Va. at 377, 424 S.E.2d at 612.

For example, in Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992), the Court held that a cause of action for retaliatory discharge may exist under W. Va. Code § 17C-15(a), § 17C-15-31 and § 24A-5-5(j), where an employee is discharged from employment in retaliation for refusing to operate a motor vehicle with brakes that are in such an unsafe working condition that operation of the vehicle would create a substantial danger to the safety of the general public. Id. at Syl. Pt. 2. Of course, unlike the general statute upon which petitioner herein relied, the statutes addressed in Lilly were specific safety statutes regulating brakes, making it a misdemeanor to drive an unsafe vehicle, and providing for the promulgation of safety rules and regulations applicable to motor vehicles.

Finally, there is no West Virginia authority that holds that an alleged violation of W. Va. Code § 21-3-1, a general workplace safety statute with no specific requirements or duties, can be the basis of a cause of action for retaliatory discharge in violation of substantial public policy. Indeed, in its memorandum decision in Gibson v. Shentel Cable Co., 2013 WL 500202 (February 11, 2013), this Court affirmed a circuit court’s dismissal of a retaliatory discharge claim on grounds that there is no substantial public policy of the State of West Virginia that protected the employee’s generalized safety complaints of “hazardous working conditions” to his employer for which he claimed he was discharged.

In addition to failing to allege factual elements necessary to assert constructive retaliatory discharge. Ms. Conrad failed to cite to any legally recognized substantial public policy allegedly violated by the respondent. Thus, the circuit court’s dismissal of her amended complaint should be affirmed.

**D. THIS COURT MAY AFFIRM THE CIRCUIT COURT’S JUDGMENT WHEN IT APPEARS THAT SUCH JUDGMENT IS CORRECT ON ANY LEGAL GROUND DISCLOSED BY THE RECORD.**

Ms. Conrad’s third assignment of error is that the circuit court erred by misapplying a negligence standard to her retaliatory discharge claim. Petitioner argues, and respondent agrees, that she did not allege any type of negligence claim in her original complaint or amended complaint. Petitioner also argues, but respondent disagrees as discussed in previous sections, that the circuit court failed to understand that W. Va. Code § 21-3-1 “prohibits employers from directing employees to work in conditions the employer knows to be unsafe and hazardous, regardless of who is creating the hazard.” (Petitioner’s Brief at 16).

To the extent, if any, that the circuit court misapplied any standard, negligence or otherwise, to dismiss Ms. Conrad’s constructive retaliatory discharge claim, the standard of review applicable to the circuit court’s dismissal of petitioner’s amended complaint is *de novo*. Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).

In determining whether dismissal is appropriate on appeal, this Court applies the same test that the circuit court should have applied initially and may rule on any alternative ground supported by the record. See Conrad v. ARA Szabo, 198 W.Va. 362, 369, 480 S.E.2d 801, 808 (1996) (“In determining whether a motion to dismiss or a summary judgment is appropriate, we apply the same test that the circuit court should have applied initially. We are not wed, therefore, to the lower court’s rationale, but may rule on any alternate ground manifest in the record.”).

The Court may affirm the circuit court’s judgment when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the circuit court as the basis for its judgment. Syl. pt. 3, Barnett v. Wolfolk, 149

W.Va. 246, 140 S.E.2d 466 (1965) (“This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.”).

In this case, the record clearly indicates that Ms. Conrad failed to allege factual elements necessary to assert constructive retaliatory discharge against the respondent and failed to cite to any legally recognized substantial public policy allegedly violated by the respondent. Thus, the circuit court’s dismissal of her amended complaint should be affirmed.

#### V. CONCLUSION

WHEREFORE, for the reasons stated herein, Respondent respectfully requests that the judgment of the Circuit Court of Gilmer County be affirmed.

**THE COUNCIL OF SENIOR CITIZENS  
OF GILMER COUNTY, INC.,**

By Counsel

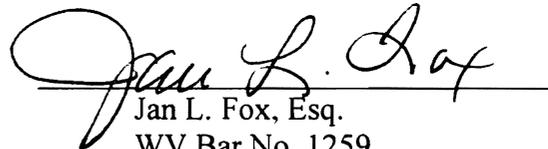


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CERTIFICATE OF SERVICE

I do hereby certify that on July 16<sup>th</sup>, 2015, I caused to be deposited in the United States Mail, postage prepaid, a true copy of the BRIEF OF THE RESPONDENT, addressed as follows:

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