

FILED

June 8, 2010

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., dissenting:

I respectfully dissent from the majority opinion because the plaintiffs' complaint does not state a cause of action.

The complaint is very detailed and alleges facts that completely lay bare the plaintiffs' grievance. In fact, even though the majority opinion makes clear that a plaintiff is not required to set out facts upon which a claim is based, I would go so far as to say the complaint is so well drafted that it meets the heightened pleading requirements in federal courts outlined in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ____ (No. 07-1015, May 18, 2009).¹

But the elegantly drafted facts alleged in the complaint support the trial judge's dismissal of the complaint. The complaint has 7 counts. In essence, these counts complain of (1) hostile work environment because of sexual discrimination, (2) wrongful or retaliatory

¹Because of the problems created by "strike suits" and the high cost of frivolous litigation, the Supreme Court tightened the pleading standards in federal courts. "Thus, in *Iqbal*, the Court stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief *that is plausible on its face.*"” *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009), *quoting Iqbal*, 556 U.S. at ____ (129 S.Ct. at 1949), *quoting Twombly*, 550 U.S. at 570.

discharge and (3) intentional infliction of emotional distress. While the complaint paints defendant Leslie DeFelice as a pretty despicable actor, I do not see how his actions rise to an actionable level.

The detailed facts in the complaint do not allege that the defendant's firing of plaintiff Tricia Roth was because of her gender, or because she was a victim of or threatened to report unwanted sexual advances, or because she engaged in a protected activity, or that the defendant's misconduct violated a state law, or that the plaintiff's discharge itself took place in an intolerable or outrageous manner. The complaint merely alleges that she stumbled upon her boss and another employee in a sexually compromising position in the office, and then later got fired. While her discovery of this sexual escapade was unfortunate, it does not prohibit her later termination as an at-will employee, no matter how ridiculous Mr. DeFelice's stated reasons for her termination were. Our laws prohibiting gender discrimination, sexual harassment, retaliatory discharge and outrage are not a general civility code.

Accordingly, I respectfully dissent.