No. 24434: *Betty A. Tiernan v. Charleston Area Medical Center, Inc., a West Virginia corporation*

McCUSKEY, Justice, concurring:

In its zeal to have this Court, rather than the Legislature, draft and adopt two new causes of action for litigants in West Virginia, the dissent stands the West Virginia Constitution on its ear. I fully concur with the result reached by the Chief Justice's well-reasoned opinion. I write separately to aid the public's understanding of these complex, but vital, issues, and also to highlight the public danger that would have arisen had the minority position prevailed.

It is important to reiterate clearly what this case is, and is not, about: The plaintiff, Betty Tiernan, was a salaried, management employee of CAMC when she was terminated on May 2, 1994, for violating her employer's rules by bringing a newspaper reporter into a private meeting of CAMC management and staff. Although she claimed otherwise, the circuit court judge found no evidence that the plaintiff was terminated for any spoken words or speech, or for any activity related to union organizing. Plainly stated, she was fired for refusing to follow the work rules related to the security of her employer.

After her termination, Ms. Tiernan worked for several months as a union organizer and then took a part-time job as a nursing supervisor with a private nursing home.

CAMC informed this employer of the fact that the plaintiff had been recently employed as a union organizer, after which the nursing home ceased employing her. After the second termination, the plaintiff sued CAMC for both terminations, alleging that CAMC (1) violated her Constitutional rights of free speech by terminating her and (2) wrongfully caused the nursing home to terminate her by relating to it the truthful information about her work as a union organizer. The plaintiff and her attorney chose **not** to cast her lawsuit, or seek a remedy, against CAMC for possible violations of the unfair labor practices provision of the National Labor Relations Act (such as blacklisting) or against the nursing home for wrongful termination.[1]

Thus, the issues facing this Court were whether the Circuit Court of Kanawha County was correct in dismissing Ms. Tiernan's Constitutional Free Speech claim and also dismissing her claim for damages against CAMC for the results of relating truthful information to her subsequent employer.

[1]The dissent's claim that the majority opinion limits a citizen's rights to bring either of these types of actions is simply not true. "Blacklisting" is clearly an unlawful act under federal labor law. *See* Labor Management Relations Act, 29 USCA § 158(a)(1); *see also, Phelps Dodge Corp. v N.L.R.B.*, 313 U.S. 177 (1941), and its progeny. Blacklisting has been tacitly recognized as a common law tort in West Virginia. Retaliatory discharge has also long been actionable at common law in West Virginia. *See Harless v. First National Bank of Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982), for both propositions.

The dissent's arguments on the second point are most seriously flawed, and, therefore, I address that area of the law first. In recent years, potential tort liability arising from providing employment information and recommendations to a prospective employer has been the subject of considerable attention and debate. With a growing and mobile population, employers can no longer rely on the traditional "community reputation" of a person for making hiring decisions, but must, instead, by necessity, increasingly rely on employment references and job recommendations. Concomitant with this reliance has been an increasing number of civil actions by employees against those who give employment information.[2]

[2]*See* 50 ALR Fed 722, *Adverse Employment References as Unlawful under Title VII of Civil Rights Act of 1964*, for a review of cases supporting the proposition that an employee's dissemination of adverse references is unlawful where a discriminatory intent is shown.

These common law actions, usually styled as *tortious interference with contract* claims, have caused several states to enact legislation defining the parameters of such suits; courts in other states have adopted the Restatement (Second) of Torts, section 722 (1979). Although West Virginia has not enacted such legislation, two bills were introduced in the West Virginia House of Delegates in the 1997 Session.[3] Thus, in the absence of legislation, the task has properly fallen upon this Court to interpret the common law and decide whether to adopt the standards of the Restatement. In choosing to adopt the relevant provision of the Restatement, the majority opinion brings common sense and uniformity to employment law by concluding that a person can not be successfully sued for giving "truthful information" about a former or prospective employee. This is quite analogous to the time honored corollary to Constitutional provisions regarding libel and slander in which "truth" is an absolute defense to a claim, regardless of the motive or intent of the writer or speaker.

Rather than depriving a wronged plaintiff of a remedy, as the dissent would have the public believe, the majority opinion merely refuses to create a new cause of action in West Virginia. By this decision, our Court has clarified a previously ambiguous area of employment law and, most importantly, we have acted to **protect**, not stifle, the right of

[3]House Bill 2165, introduced on February 20, 1997, related to employer immunity for disclosure of information regarding former law enforcement officers; House Bill 2733, introduced March 25, 1997, related to immunity of all employers for employment information.

free speech by allowing a person to give truthful employment information without the risk of legal reprisal.

A trip by the dissent down the ladder from the ivory tower to the realities of the world at ground level might be an eye opening experience as to why courts in other states have rejected the minority's reasoning. If previous employers, and those who have knowledge about job applicants, are muzzled by the fear and threat of lawsuits, the result will, as Chief Justice John Marshall once said, "come(s) home in its effects in every man's fireside."

It is a realistic expectation that, under the minority position, every facet of our lives would be endangered: workers whose lives depend on the level of safety in workplaces would be placed at risk by newly hired co-workers whose background and safety record could no longer be checked; children in day care, the sick, the aged and infirm would not be protected from caretakers who have a history of molesting or preying upon these defenseless groups; small business owners, whose entire livelihood is invested, sometimes for generations, could be financially ruined, and their employees left jobless, by the actions of one employee whose background could not be effectively questioned or verified. Indeed, every citizen who depends upon police officers, firefighters, or emergency personnel has a stake in the pursuit of truth in the hiring and employment process.

As indicated earlier, the issue of Constitutional Free Speech did not have to be addressed by the majority, since speech of the plaintiff was not truly involved. I would have disposed of that issue by simply affirming the circuit court's dismissal of the plaintiff's free speech claim on the grounds that her right of free speech was not in question. Ironically, it was CAMC's right of free speech that actually was at issue; it was sued for stating the truth about the plaintiff.

Nonetheless, the reasoning of the majority opinion is right and firmly grounded in State and Federal Constitutional jurisprudence. West Virginia's Bill of Rights, Article III, Section 7, has been part of our State Constitution since its introduction at West Virginia's first Constitutional Convention in 1861 at Wheeling. Entitled "Right of Speech and Press Guaranteed," it reads the same today as it did 137 years ago. Clearly and unambiguously, the framers of our Constitution, borrowing from the United States Constitution, acted to protect our citizens from *governmental interference* with their free speech by saying: **No law abridging the freedom of speech, or of the press, shall be passed.**

There is no mention through the three volumes of verbatim transcripts constituting the *Debates and Proceedings of the First Constitutional Convention of West Virginia, 1861-1863,* that our framers intended, as the plaintiff urges, to provide a cause

of action by which private parties can sue each other for the results of their mutual exercise of free speech. Quite obviously, the above quoted Constitutional provision, and its federal counterpart, were intended to protect citizens from governmental, not private, infringement on their rights of free speech. If the government were to intercede, like a verbal referee, in the free speech debate between private citizens, it would, in reality, be infringing on the rights of free speech of one party over the other. I, for one, do not like the thought or the likely results. If my neighbor insults me, I believe I should retain my right to tell him to leave my property without fear of reprisal by lawsuit.

Perhaps President Harry Truman demonstrated the clearest understanding of the practical nature of American life when he responded to the charge that he was prone to verbal abuse of his enemies. He replied, "I have never deliberately given anybody hell. I just tell the truth and they think it's hell."

The cherished right of Free Speech in America is best protected if it is not expanded beyond our right to speak freely without governmental interference.