No. 24434 -- Betty A. Tiernan, Plaintiff Below, Appellant v. Charleston Area Medical Center, Inc., a West Virginia Corporation, Defendant Below, Appellee

Workman, J., dissenting, in part, and concurring, in part:

While I concur with some of the principles set forth in the majority opinion, I vehemently dissent from the majority's holding that the Free Speech Clause of the state constitution is not applicable to private sector employers. This all-encompassing holding is wrong from a legal perspective and wrong from a policy perspective. I do not believe it is the law of the United States and I will not subscribe to it being the law of West Virginia.

Furthermore, I disagree with the majority's conclusion that truthful communications are always a defense to tortious interference with a business relationship, even if such communications are malicious and intended to do harm. Both of these issues should have been governed by a much more cautious analysis of the law in the context of this action and the two new points of law should have been far more narrowly drawn.

I. FREE SPEECH

The specific issue before this Court which gave rise to the free speech question was whether "public policy emanating from the Free Speech Clause of the state constitution applies to speech by private sector employees who criticize or disagree with policies or other lawful actions taken by their private sector employers." The majority, however, abandons this concrete and limited question to cut across the constitution with a sharp and wide swath. In moving their analysis from a very concrete to an all-encompassing framework, they elevate statutes over our state constitution, they misinterpret the law from other jurisdictions, give no deference to precedent, and, as the authorities cited below indicate, they depart from a lengthy body of jurisprudential law holding that West Virginia's constitution is in

many respects even more protective of our citizens' rights than the United States Constitution.

First, an examination of the case law upon which the majority relies reflects a gross misapprehension on the part of the majority as to what theses cases say:

The cases cited by the majority expressly connect the absence of a cause of action for the employee's exercise of free speech to speech that has a legitimate "employment-related nexus." Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985). In Johnson v. Mayo Yarns, 484 S.E.2d 840 (N.C. Ct. App. 1997), a case upon which the majority cites as supportive of its holding, the court determined that an employee's refusal to obey his private employer's directive to remove a Confederate flag decal from his workplace toolbox was not constitutionally protected speech or expression and therefore, no public policy violation occurred which would permit an actionable wrongful

discharge claim. Id. at 843. Accepting the employer's contention that "the right of free speech and expression does not extend to the workplace where a private employer must have flexibility in adopting and enforcing its employment policies and practices[,]" the court in Johnson ruled that "the plaintiff's conduct carried out in private employment is not constitutionally protected activity." Id. (emphasis supplied). Similarly, in another decision cited by the majority, Drake v. Cheyenne Newspapers, Inc., 891 P.2d 80 (Wyo. 1995), the court affirmed the dismissal of two employees' retaliatory discharge claim where the management-level employees were fired for refusing to wear buttons urging a "no" vote on union recognition. The court's ruling that "[t]erminating an at-will employee for exercising his right to free speech by refusing to follow a legal directive of an employer on the employer's premises during working hours does not violate public policy" was expressly predicated on the generally-applicable maxim that the right to free speech does not extend to private property. Id. at 82 (citing Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 567-70 (1972) and emphasis supplied).

In certain instances, this right of private employers to draw limits on their employees' freedom of speech may even extend beyond the physical premises of the place of employment. For example, in Korb v. Raytheon Corp., 574 N.E.2d 370 (Mass. 1991), the court determined that no public policy violation occurred where the discharged employee was the corporate spokesperson. Because the employee spoke out against the interests of his defense contractor employer during a press conference of a nonprofit organization of which he was a board member, the employer legitimately determined that the employee "had lost his effectiveness as its spokesperson." Id. at 372. The court expressly contrasted the situation present in Korb where the employer clearly "had a financial stake in not advocating th[e] position" stated by the employee to one in which "an employee is fired for speaking out on issues in which his employer has no interest, financial or otherwise." Id.; see also Prysak v. R.L. Polk Co., 483 N.W.2d 629, 634 (Mich. Ct. App. 1992) (finding no free speech violation where computer operator fired for writing a letter which threatened one of his employer's customers and noting distinction between speech that involves matters of public concern versus purely private speech).

In other words, while there is law across the United States that private employers, not being state actors, are not required to protect First Amendment rights of employees, and that they may even be allowed to restrict such rights if there is a nexus between the speech and a valid business-related interest of the employer, the law does not support the conclusion that the First Amendment has no application whatsoever to private employers.

Each of the above-discussed cases was cited by the majority to support its sweeping pronouncement that the Free Speech clause of the state constitution is not applicable to private employers, but none of them supports the extent to which the majority abrogates individual constitutional rights. This holding should have been narrowly drawn to pertain only to that speech which can be determined to have a legitimate "employment-related nexus" either through the location at which the speech is made, i.e. the place of employment, or through the ability of the speech to have a determinable effect on the employer or on the employee's job

responsibilities. Absent this limitation, we are clearly authorizing the abrogation of the freedom of speech rights of all private sector employees. I both fear and predict that the majority's holding may be used as a shield to protect private sector employers from wrongful discharge suits that are prompted when an employer discharges an employee when it disagrees with an employee's exercise of his right to freedom of speech even though such speech has nothing whatsoever to do with the employment.

Under the majority holding, for example, an employee could be fired for writing a letter to the editor, joining an organization, wearing a badge, or even speaking out on a public issue, even though such activities are done on his own time and have nothing to do with his employment. I am unable to find any body of law in modern American jurisprudence that permits such an Orwellian result. West Virginia, which has historically been immensely protective of individual rights, stands alone in such an all-encompassing holding.

In the syllabus point of Harless v. First National Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978), this Court held:

> The rule than 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.

See also, Tudor v. Charleston Area Medical Center, Inc., __ W. Va. __, __ S.E.2d __ (No. 23948, Dec. 16, 1997); syl. pt. 1, McClung v. Marion County Comm., 178 W.Va. 444, 360 S.E.2d 221 (1987).

In that regard, this Court has made clear that the Constitution of West Virginia is a source of public policy in the area of employment law. As this Court observed in syllabus point twp of

Birthisel v. Tri-Cities Health Services Corp., 188 W.Va. 371, 424 S.E.2d 606 (1992): "To 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. 6, Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997).

Thus, the suggestion in syllabus point four of the majority opinion that a statute would be required to impose or recognize public policy emanating from the Constitution of West Virginia with regard to free speech is slightly absurd. Certainly, the Constitution of West Virginia is already the law of the land in this State and enjoys a

priority over statutory law. In fact, as this Court recognized in syllabus point two of Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979): "The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." See also, Syl. pt. 1, State v. Bonham, 173 W.Va. 416, 317 S.E.2d 501 (1984). In Cordle v. General Hugh Mercer Corp., 174 W.Va. 321, 325 S.E.2d 111 (1984), as the majority acknowledges, this Court indicated that public policy is a question of law which a court must decide in light of the particular circumstances of each case. 174 W.Va. at 325, 325 S.E.2d at 114. While the principle thus expressed in Cordle may provide certain parameters in considering free speech in the private sector, public policy, as discernable in the Constitution of West

Virginia, need not be selectively incorporated into West Virginia law by statute.

Furthermore, we held in Tudor v. CAMC, ___ W. Va. __, __ S.E.2d __ (No. 23948, Dec. 16, 1997) that a constructive discharge claim may be grounded upon public policy emanating from a mere state regulation. In Tudor, the evidence of the plaintiff indicated that her discharge from employment was brought about, in part, because she had voiced concerns about the nurse-patient ratio. Thus, inasmuch as the claim in Tudor was upheld by this Court upon the basis of public policy emanating from a regulation, it seems ludicrous to say that public policy cannot emanate from the Constitution of West Virginia.

Lastly, I am disappointed in the concurring opinion. It is full of bombast, but I see not one citation of authority within its body. It parades the horribles, claiming that the reasoning of the dissent would result in all manner of mayhem, including threats of fire and pestilence. But I see no law cited, nor any meaningful discourse of the legal issues presented. I'd rather "stand the constitution on its ear," as the concurring opinion claims Justice Starcher does, than to throw it out the window.

West Virginia is a state of employees. Under the majority opinion, many could very well be called upon to decide --- your freedom of speech or your job! After Tiernan v. CAMC, our state slogan "Mountaineers are always free" certainly needs modification.

II. TORTIOUS INTERFERENCE

Similarly, with regard to the issue of tortious interference with a business relationship, I am of the opinion that the syllabus point should have been more narrowly drawn and that a

case-by-case analysis is warranted. Pursuant to the adoption of the Restatement in syllabus point five, truth would be an absolute bar to a claim of tortious interference with a business relationship. Dealing in absolutes, however, is a dangerous game, especially in the world of business and human relations that has evolved since the Restatement was drafted.

Thus, a more practical approach was developed by this Court in Torbett v. Wheeling Dollar Savings & Trust Co., 173 W.Va. 210, 314 S.E.2d 166 (1983), syllabus point two of which states in part:

> If a plaintiff makes a prima facie case [of tortious interference], a defendant may prove justification or privilege, affirmative defenses. Defendants are not liable for interference that is

> negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper.

To borrow a phrase from this Court's decision in Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 445 S.E.2d 219 (1994), however, "a bad motive will defeat a qualified privilege defense." See also, 41 Harv. L. Rev. 728 at p. 749-50 (1928), stating that "[t]he privilege is conditional and if the occasion were used not to give bona fide advice, but to injure the plaintiff for any ulterior reason, the defendant should lose his privilege and therefore fail in his defense."

The above language of Torbett, indicating that truth is only a factor to be considered in a tortious interference claim, allows for unforeseen circumstances where a bad motive on the part of the defendant may be dispositive. See also, Voorhees v. Guyan Machinery Company, 191 W. Va. 450, 446 S.E.2d 672 (1994), citing Torbett and affirming a judgment for the plaintiff for tortious interference, where the former employer, who notified the plaintiff's new employer of the plaintiff's covenant not to compete, failed to show "legitimate competition" between it and the plaintiff's new employer.

Thus, the holding of the majority not only departs from existing law, but may under some circumstances license malicious conduct. When one tortiously interferes with another's employment,

even if the truth is employed in such endeavor, such conduct should under some limited circumstances be actionable if there is malicious intent to do substantial economic harm.

I am, therefore, of the opinion that the Restatement adopted by the majority, pursuant to which truth is an absolute defense in a tortious interference action, is "too tenuous a premise upon which to anchor any steady standard of law." State ex rel. J.L.K. v. R.A.I., 170 W.Va. 339, 346, 294 S.E.2d 142, 149 (1982). Accordingly, I dissent from the holding of the majority in syllabus point five.