No. 27775 - Donna Kanagy and Tim Kanagy v. Fiesta Salons, Inc. and Myrna Disbennett, in her individual capacity

Maynard, Chief Justice, dissenting:

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I dissent because I do not believe that West Virginia Code of State Regulations § 3-5-3 provides a substantial public policy sufficient to support a claim for wrongful discharge.

The majority wrongly concludes that C.S.R. § 3-5-3 provides a substantial public policy solely because it creates an obligation to report a violation. However, a duty to report, standing alone, cannot constitute a substantial public policy. Courts must instead determine the purpose of the duty. In other words, what is the nature of the violation that people have a duty to report? C.S.R. § 3-5-3 creates a duty to report violations of the rules of the Board of Barbers and Cosmetologists, including, as here, a duty to report the practice of barbering and cosmetology without a license. The real issue, therefore, is whether the mandatory licensing of barbers and cosmetologists constitutes a substantial public policy. The clear answer must be "no."

As noted by the majority, the rule in this State is that an employer has an absolute right to discharge an at-will employee. This rule is subject to several exceptions one of which is that where an employer's motivation for the discharge is to contravene a substantial public policy, then the employer may be liable to the employee for damages. This Court has limited this narrow exception to

instances where employees were terminated for testifying truthfully in a legal action; reporting intentio violations of the West Virginia Consumer Credit and Protection Act; refusing to take a polygraph test; exercising their State constitutional rights; refusing to operate a motor vehicle with unsafe brakes; and reporting problems with staffing and patient safety in a hospital. These exceptions properly protect the public from threats to their health, financial well-being, or constitutional rights, and guarantee the effective operation of the legal system. Such weighty matters are in blatant contrast to the mandatory licensing of barbers and cosmetologists. I am not certain of all motivations behind the passage of this licensing provision, but I suppose a primary motivation is to protect the public from bad haircuts. Whi I deplore a bad haircut as much as the next person, I am confident that I can protect myself from a bad haircut without the government's assistance.

In sum, this case makes bad law because it establishes that a substantial public policy now can be found in the most obscure and petty State regulation and used to further erode the employment-at-will doctrine. When you consider that executive agencies churn out rules like Stephen King churns out novels, this is a scary development. Finally, I am wary of these duty-to-tell regulation If such regulations are applied to ensure the public's safety and well-being, they are legitimate. When applied to provisions promulgated by the Board of Barbers and Cosmetologists, these regulations move us closer to Big Brother. Therefore, I dissent.