No. 30845 – *Nick Wounaris, Jr., v. West Virginia State College*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring:

I concur entirely in the judgment rendered by the majority opinion and the reasons stated in support of that judgment. I write separately only to emphasize two points raised in that opinion.

First, an at-will public employee would not typically have a legitimate basis for filing a grievance with respect to his or her discharge. In the absence of an allegation that the employee's discharge breached a specific statutory right or that the discharge constituted a violation of public policy, an at-will public employee is bound by the at-will nature of the employment and cannot contest that discharge using the grievance process.

The case before us arose in the first instance by reason of alleged violation of the rights of a member of a protected class under the West Virginia Human Rights Act. As the case came before us it also involved an allegation that the second discharge of Mr. Wounaris constituted an attempt to frustrate the grievance procedure. While these allegations rest initially on rights created and prescribed by statute, they also should be seen as testing the vitality of basic tenets of the public policies the respective statutes were designed to

promote and protect, i.e., strongly discouraging racial discrimination and protecting public employees from arbitrary and capricious treatment.

This Court stated the public policy exception to at-will employment for all employees, public or private, in the syllabus of *Harless v. First National Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978): "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." In *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987), this Court explained as follows:

> One of the fundamental rights of an employee is the right not to be the victim of a "retaliatory discharge," that is, a discharge from employment where the employer's motivation for the discharge is in contravention of a substantial public policy . . . . Certainly it is in contravention of substantial public policies for an employer to discharge an employee in retaliation for the employee's exercising his or her state constitutional rights to petition for redress of grievances (*W. Va. Const*. Art. III, § 16) and to seek access to the courts of this State (*W. Va. Const*. Art. III, § 17) by filing an action . . . for overtime wages.

Id. at 450, 360 S.E.2d at 227.

Second, I wish to underline that the majority opinion rendered in this case *does not* stand for the proposition that a public employee *may not under compelling*

circumstances be discharged while a grievance filed by that employee is pending. The sad fact is that no such *compelling* circumstances appear in the record of the case before us, and one is left with the strong impression that the second discharge occurred primarily to frustrate the grievance process and its underlying public policy. In my judgment, that realization, more than any other, justifies the conclusion that the judgment of the lower court should be reversed.

Accordingly, I concur in the opinion and judgment rendered by the majority.