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

Chief Justice Ketchum, concurring:

I agree with the majority that the plaintiffs failed to identify how their discharges contravened the Ethics Act. They have no retaliatory discharge claim based on the Ethics Act. However, it is clear that the plaintiffs can, in fact, assert a valid retaliatory discharge claim under our Procurement Statute and should be permitted to amend their pleadings to conform to the evidence in this case. It is plain from the evidence that there is a substantial public policy relating to the plaintiffs' discharges under the statutory procurement procedures contained in West Virginia Code § 5A-3-1 *et seq.* The entirety of plaintiffs' case centers around their contention that they were discharged for investigating and revealing what they believed to be irregularities or errors with the administration and execution of the RFP process, as governed by statute. If a jury believes they were discharged for this reason, they have proven a retaliatory discharge.

The procurement statutes unquestionably reflect a substantial public policy of the State of West Virginia. The purpose of the statutory procedures set forth for the Purchasing Division of the Department of Administration is contained in West Virginia Code § 5A-3-1 and provides, in part, that the statutory procedures are established to "provide for increased public confidence in the procedures followed in public procurement," to "ensure the fair and equitable treatment of all persons who deal with the

procurement system of this state,” and to “provide safeguards for the maintenance of a procurement system of quality and integrity.” As this Court recently explained:

These laws were enacted to ensure that tax dollars for public works are spent wisely and to guard against public officials entering into contracts because of favoritism. *See generally SE/Z Constr., L.L.C. v. Idaho State Univ.*, 140 Idaho 8, 89 P.3d 848, 853 (2004) (holding purpose of competitive bidding statutes is to safeguard public funds and prevent favoritism, fraud and extravagance in their expenditure). One of the overriding purposes of our procurement laws is “to maximize to the fullest extent practicable the purchasing value of public funds [.]” W. Va. Code § 5A-3-1(a)(7). The essential safeguard of competitive bidding is to maintain quality and integrity in the procurement system. W. Va. Code § 5A-3-1(a)(9).

Wiseman Const. Co. v. Maynard C. Smith Const. Co., 236 W. Va. 351, 779 S.E.2d 893 (2015).

In a clear indication that the statutory procurement procedures reflect a substantial public policy of the State, the Legislature criminalizes certain conduct relative to the provisions of the procurement statutes in West Virginia Code § 5A-3-28 through -31. As stated, the express purpose thereof is to “promote equal and fair bidding for the purchase of commodities and services by the state, to eliminate fraud in the procurement of commodities and services by the state.” W. Va. Code § 5A-3-30(a). The Legislature’s expression of purpose and detailed prescription of the State’s statutory purchasing scheme for expenditures of public funds clearly constitutes a substantial public policy of the State. Discharge in contravention thereof may form the basis of a *Harless* retaliatory discharge claim.

Since the procurement statutes provide plaintiffs with a retaliatory discharge cause of action, they should be permitted to amend their pleadings to conform to the evidence. West Virginia Rule of Civil Procedure 15(b) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time[.]

Moreover, this Court has held:

[M]otions to amend should *always* be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.

Syl. pt. 3, in part, *Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973), *overruled on other grounds by Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E.2d 681 (2001) (emphasis added). While plaintiffs did not expressly plead the procurement statutes as the source of the substantial public policy and that their discharge was in contravention of these statutes, it is obvious that all parties and the circuit court understand that to be the case.

The circuit court dedicates the bulk of its order discussing the retaliatory discharge claim in relation to the procurement statutes, clearly indicating that this statutory scheme best represents the substantial public policy plaintiffs' discharge allegedly contravened. Moreover, the parties' arguments and briefing, both before this

Court and below, make plain that all parties to this litigation have operated with the understanding that plaintiffs contend that they were discharged for attempting to alert respondents to perceived irregularities in the RFP—an act that, if true, would clearly be in contravention of the procurement statutes. In fact, the respondents’ brief and the order prepared by them focus *nearly exclusively* on whether it was appropriate for plaintiffs to become involved with the RFP and whether their assessment of the RFP was correct. Plaintiffs should therefore be permitted to present this case to the jury under both the whistle-blower statute and our common law on retaliatory discharge.

Accordingly, I respectfully concur.