IN THE CIRCUIT COURT OF PENDLETON COUNTY, WEST VIRGINIA

JASON GREASER,

Plaintiff,

v.

Civil Action No. 17-C-9
Honorable H. Charles Carl, III

HINKLE TRUCKING, INC., a West Virginia Corporation;
GARY HINKLE, Individually and in his capacity
as an officer of Hinkle Trucking, Inc.; and
TRAVIS HINKLE, Individually and in his capacity
as an officer of Hinkle Trucking, Inc., and
DETTINBURN TRANSPORT, INC., a West Virginia Corporation,

Defendants.

ORDER FROM JANUARY 23, 2019 PRE-TRIAL HEARING REGARDING DEFENDANTS' MOTION TO STRIKE, MOTION FOR SUMMARY JUDGMENT, AND MOTIONS IN LIMINE AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTIONS IN LIMINE

On the 23rd day of January, 2019, for purposes of a previously scheduled pre-trial hearing, came the Plaintiff, by his attorneys, L. Tom Price, Lia DiTrapano Fairless, and Harley O. Staggers, Jr., and the Defendants, Hinkle Trucking, Inc., Dettinburn Transport, Inc., Gary Hinkle, and Travis Hinkle, by their attorneys, Julie A. Moore, Jared T. Moore, and Jerry D. Moore, with Gary Hinkle also appearing in person. Following the hearing, the Court received a proposed Order from Mrs. Moore on March 4, 2019, and Plaintiff's Objections to Defendants' Proposed Order from Mr. Staggers on March 11, 2019, both of which the Court has carefully considered.

Upon consideration of the motions, responses, replies, and arguments advanced by counsel, and the transcript from the hearing, the Court makes the following findings of fact and conclusions of law:

1. Preliminarily, regarding *Defendants' Motion to Strike Untimely Responses by Plaintiff, or in the Alternative, to Require Plaintiff to Show Good Cause and Excusable Neglect*, in which the Defendants sought to strike the untimely response briefs filed by Plaintiff in

opposition to *Defendants' Motion for Summary Judgment* and *Defendants' Motions in Limine No. 4, 9, and 11*, such motion is DENIED. Plaintiff filed no response to Defendants' motion to strike in advance of the pre-trial conference but informed the Court via email that they had been unable to file timely responses because Lia DiTrapano Fairless' spouse had surgery on January 16 and Tom Price had to prepare for a federal criminal trial scheduled to take place on January 22. Accordingly, the Court finds such reasons to be good cause and rules that it will consider the response briefs filed by Plaintiff on January 20, 2019.

2. Regarding *Plaintiff's Motion for Summary Judgment Regarding Wage Payment and Collection Act Claim*, filed on July 9, 2018, such motion is DENIED.

3. Regarding *Plaintiff's Motion for Partial Summary Judgment Pursuant to the Doctrine of Collateral Estoppel*, filed on July 9, 2018, such motion is DENIED.

Defendant's Motion for Summary Judgment

4. The Court GRANTS summary judgment in favor of Travis Hinkle as to all claims. Additionally, the Court GRANTS summary judgment in favor of Hinkle Trucking, Inc., as to all claims. Both of these Defendants shall be DISMISSED WITH PREJUDICE from this civil action. The Court finds that, by Plaintiff's own admission, Dettinburn Transport, Inc., not Hinkle Trucking, Inc., was his employer, and Plaintiff's counsel concedes that Travis Hinkle was not an owner, officer, or agent of Dettinburn Transport, Inc. Going forth, the style of this civil action shall be *Jason Greaser v. Gary Hinkle and Dettinburn Transport, Inc.*

5. Regarding Count I, the Court GRANTS summary judgment in favor of the Defendants to the extent that Plaintiff purports to advance a claim for alleged violations of the notification requirements set forth in Section 21-5-9 of the West Virginia Wage Payment and Collection Act (WPCA), W.Va. Code § 21-5-1, *et seq.* Relying upon the rationale articulated in

Byard v. Verizon West Virginia, Inc., No. 1:11-cv-132, 2012 WL 1085775 (N.D.W. Va. Mar. 30, 2012), the Court finds that there is no private cause of action regarding the notification requirements of W.Va. Code § 21-5-9. For violations of the recordkeeping and notification requirements of W.Va. Code § 21-5-9, remedy rests solely with the Commissioner of West Virginia Division of Labor and the administrative processes.

6. Likewise, regarding Count I, the Court GRANTS summary judgment in favor of the Defendants regarding Plaintiff's demand for liquidated damages. The Plaintiff has neither pled nor proven a violation of W.Va. Code § 21-5-4(b), which regulates the timing of wage payments due upon separation from employment. Rather, Plaintiff alleges that the Defendants violated W.Va. Code § 21-5-3.

7. Summary judgment as to Count I is DENIED, however, as to Plaintiff's claim under Section 21-5-3 of the WPCA, alleging that he is owed unpaid wages. The Court finds that there is a question of fact as to what the employment agreement was between Plaintiff and Dettinburn Transport regarding his rate of pay. Specifically, the Court finds that Plaintiff testified he was to be paid 25 percent of what his loads paid and rules that it is a question for the jury to determine whether he was so paid.

8. For the same reasons that summary judgment is denied as to Plaintiff's claim under W.Va. Code § 21-5-3, summary judgment is also DENIED as to Count II of the Complaint in which Plaintiff advances a claim for breach of contract, contending that he was not paid all wages due for his services as an employee of Dettinburn Transport.

9. Summary judgment is GRANTED in favor of the Defendants as to Plaintiff's claim for the tort of outrage in Count III. In support of its ruling, the Court makes the following findings of fact and conclusions of law:

a. As set forth in *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), *modified on other grounds as stated in Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997), in order to establish liability for the tort of outrage in the employment context, an employee must prove that his employer effected his discharge via conduct that is extreme and outrageous and exceeds all bounds of decency.

b. Here, Plaintiff testified that his emotional distress is due to litigation-induced stress related to pursuing the instant lawsuit and financial-induced stress caused by the challenge of paying bills after losing his job at Dettinburn.

c. As set forth in *Dzinglski*, stress associated with financial loss stemming from an employee's firing cannot sustain a claim for the tort of outrage. Likewise, litigation-induced stress is not compensable. *See, e.g., State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 347 n.18, 801 S.E.2d 216, 225 n.18 (2017).

d. Thus, here, the Court concludes summary judgment is warranted as to Count III.

e. Moreover, because Plaintiff's claim for the tort of outrage is a derivative claim and because summary judgment is entered in favor of Defendants as to Count IV, as discussed *infra*, summary judgment is also proper as to Count III on this basis.

10. Summary judgment is GRANTED in favor of the Defendants as to Plaintiff's claim for retaliatory discharge in Count IV. In support of its ruling, the Court makes the following findings of fact and conclusions of law:

a. The framework for analysis of a claim of retaliatory discharge in violation of public policy was established in *Harless v. First National Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978), wherein the Supreme Court held: "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 princip[le], then the employer may be liable to the employee for damages occasioned by this discharge."

b. The West Virginia Supreme Court of Appeals has noted that the following elements should guide the analysis of whether an employee has successfully presented a wrongful discharge claim in contravention of public policy:

> (1) Whether a clear public policy existed and was manifested in a state or federal constitution, statute, or administrative regulation, or in the common law (the clarity element);
> (2) Whether dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element);
> (3) Whether the plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and
> (4) Whether the employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 704, 696 S.E.2d 1, 6 (2010) (quoting *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 750, 559 S.E.2d 713, 723 (2001) (citation omitted)).

c. It is axiomatic that a *Harless*-style claim cannot lie absent a substantial West Virginia public policy allegedly violated in terminating the employee. The plaintiff must show that a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law. Syl. pt. 2, *Birthisel v. Tri-Cities Health Servs., Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). The Supreme Court of Appeals has acknowledged that "to be substantial, a public policy must not just be recognizable as such but must be so widely regarded as to be evidence to employers and employees alike." *Feliciano*, 210 W. Va. at 745, 559 S.E.2d at 718. For a viable Harless claim, a plaintiff cannot simply cite a source of public policy and then make a bald

allegation that the policy might somehow have been violated. There must be some elaboration upon the employer's act jeopardizing public policy and its nexus to the plaintiff's discharge. "The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates." *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 386, 795 S.E.2d 530, 541 (2016).

d. Whether a substantial public policy exists "is a question of law, rather than a question of fact for a jury." Syl. pt. 1, *Cordle v. Gen'l Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). In this vein, our Supreme Court of Appeals has directed circuit courts to "proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject." *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 141, 506 S.E.2d 578, 584 (2998) (citations omitted). *See also Yoho v. Triangle PWC, Inc.*, 175 W. Va. 556, 561, 336 S.E.2d 204, 209 (1985) (instructing court to "exercise restraint" when determining whether a substantial public policy exists). The existence of a "substantial public policy" as articulated in *Harless* is to be construed narrowly. *See Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989). While our Supreme Court has addressed numerous *Harless*-style actions, "[t]he common denominator of all these cases is that they not only involve individual employment rights for the employee, but also further the strong public policy of protection of the general public." *Lilly v. Overnight Transp. Co.*, 188 W. Va. 538, 542, 425 S.E.2d 214, 218 (1992) (internal citations omitted).

e. Here, Plaintiff contends that he was terminated because he had expressed intentions to file a WPCA lawsuit against the Defendants and/or because he had refused to implicate

another former employee named Mark Lantz, who had previously filed a claim against the Defendants under the WPCA, in a theft of company property – a crime for which Plaintiff was arrested, charged, and remains under indictment.

f. The Court finds that the civil provisions of the West Virginia Wage Payment and Collection Act, specifically the requirements of W.Va. Code § 21-5-3, have not been recognized by the West Virginia Supreme Court of Appeals as a source of substantial public policy upon which a *Harless* claim may be premised.

g. In opposing Defendants' Motion for Summary Judgment, Plaintiff advanced no legal support for the notion that the civil provisions of the WPCA, specifically W.Va. Code § 21-5-3, constitute a source of substantial public policy upon which a *Harless* claim may be premised.

h. The fact that the civil provisions of the WPCA have not been recognized as being a substantial public policy sufficient to sustain a *Harless* claim was recently recognized in *Baisden v. CSC-Pa. Inc.*, No. 2:08-cv-01375, 2010 WL 3910193 (S.D.W. Va. Oct. 1, 2010), *Wiley v. Asplundh Tree Expert Co.*, 4 F. Supp. 3d 840 (S.D.W. Va. 2014), and *Hartman v. White Hall Pharmacy*, LLC, 112 F. Supp. 3d 491 (N.D.W.Va. 2015).

i. Furthermore, in *Roberts v. Adkins*, 191 W. Va. 215, 444 S.E.2d 725 (1994), the Supreme Court of Appeals held that Section 21-5-5 of the WPCA, which renders it a criminal misdemeanor for an employer to coerce or compel employees to purchase goods or supplies from the employer in payment of wages due to the employee, may serve as the predicate of a *Harless* claim. In doing so, however, the *Roberts* Court expressly tethered and carefully limited its holding to Section 21-5-5 and no other section of the WPCA. The

Roberts Court explained its rationale and emphasized the narrowness of its holding as follows:

> West Virginia Code § 21-5-5 was originally enacted to alleviate the situation in which coal companies required miners to make their purchases at the company store, owned by the coal company, either by deducting said purchases from their wages or by being paid in company script which was spendable only at the company store. By enacting this statutory provision, the legislature not only denounced the unfair practices of the coal companies, but also set forth, via the statute, a substantial public policy against such practice, which is evidenced by the legislature making such practice constitute a criminal misdemeanor.
>
> ***This interpretation of West Virginia Code § 21-5-5 is in no way intended to unlock a Pandora's box of litigation in the wrongful discharge arena.***

Roberts, 191 W. Va. 219-20, 444 S.E.2d 729-30 (emphasis added).

11. Here, upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment, the Court's rulings granting Defendants' Motion for Summary Judgment as to Counts III and IV shall be an immediately appealable, final judgment pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

12. The Court's rulings granting in part and denying in part Defendants' Motion for Summary Judgment as to Counts I and II are not a final judgment, and therefore, shall not be immediately appealable under Rule 54(b).

Defendants' Motions in Limine No. 1-13

13. Regarding *Defendants' Motion in Limine No. 1 – Prohibit Testimony Implicating a Third Party as Having Committed the Tire Theft*, the Court DEFERS RULING on such motion. The Court admonishes Plaintiff that, unless he presents substantial proof of a third-party perpetrator to the Court for a preliminary finding outside the presence of the jury, he may not advance speculative accusations to the jury that someone else perpetrated the tire theft from Dettinburn's shop.

14. Regarding *Defendants' Motion in Limine No. 2 – Prohibit Delmer Vance from Stating his Belief as to Whether the Tires Could Fit Into the Plaintiff's Truck*, the Court GRANTS Defendants' motion and rules that Mr. Vance is not permitted to offer a lay opinion about whether tires could fit into the Plaintiff's assigned truck because there is no evidence that Mr. Vance has personal knowledge that would enable him to render such an opinion. Moreover, Mr. Vance is not permitted to offer expert opinion testimony as he was not timely disclosed as an expert. On a related note, the Court reiterated its prior ruling that Glen Cook will not be permitted to testify at trial regarding his inspection of the Plaintiff's assigned truck or otherwise. On a related matter, the Court GRANTS Plaintiff's motion to permit the jury to view the truck that the Defendants allege Plaintiff used to steal tires from Dettinburn's shop; however, the Court DEFERS RULING regarding the manner in which such viewing and any demonstration will be conducted before the jury and instructs counsel to confer amongst themselves and make a proposal to the Court.

15. Regarding *Defendants' Motion in Limine No. 3 – Exclude Timothy Rollins as an Expert Witness*, the Court takes the motion and arguments of counsel under advisement and DEFERS RULING at this time.

16. Regarding *Defendants' Motion in Limine No. 4 – Exclude Testimony of Clifford Hawley*, the Court DEFERS RULING on such motion pending the outcome of Plaintiff's appeal regarding Counts III and IV.

17. Regarding *Defendants' Motion in Limine No. 5 – Exclusion of Delmer Vance's Personal Disagreements with Defendants*, the Court GRANTS such motion. Plaintiff shall not be permitted to introduce evidence of Mr. Vance's personal disagreements with the Defendants unless the Defendants open the door and render such evidence relevant.

18. Regarding *Defendants' Motion in Limine No. 6 – Prohibit Argument that Liability*

Under the WPCA is Established by Absence of Written Agreement Regarding Rate of Pay, the Court GRANTS such motion. Plaintiff shall not be permitted to argue or introduce evidence that the Defendants violated the WPCA's notification requirements because Plaintiff's rate of pay was not committed to writing upon his hire and/or argue to the jury that liability as to Plaintiff's WPCA claims is established against Defendants, or may be inferred, based upon the absence of a written agreement setting forth the Plaintiff's rate of pay. Plaintiff will be permitted to testify to the simple fact that his rate of pay was not set forth in writing upon his hire at Dettinburn; however, he is not permitted to testify that (a) the law required it to be, (b) that the Defendants failed or neglected to put his rate of pay in writing, or that (c) Defendants thereby violated the WPCA.

19. Regarding *Defendants' Motion in Limine No. 7 – Exclusion of Other Lawsuits*, the Court GRANTS such motion. Plaintiff shall not be permitted to introduce evidence that other current or former employees of Dettinburn Transport or Hinkle Trucking have filed lawsuits against the Defendants under the WPCA.

20. Regarding *Defendants' Motion in Limine No. 8 – Exclusion of Pay Practices at Other Trucking Companies*, the Court GRANTS such motion. Plaintiff shall not be permitted to introduce evidence regarding the pay practices of other trucking companies unless the Defendants open the door and render such evidence relevant.

21. Regarding *Defendants Motion in Limine No. 9 – Exclusion of Defendants' Wealth or Assets*, the Court DEFERS RULING on such motion.

22. Regarding *Defendants' Motion in Limine No. 10 – Exclusion of Death of Plaintiff's Son and Father*, the Court GRANTS such motion, finding such evidence to be irrelevant to the dispute at hand, unless Defendants open the door by raising the issue, at which time the *Motion* may be revisited. Further, the picture of the missing armrest is relevant but the parties or witnesses

shall not mention the Plaintiff's son, who appears in the picture.

23. Regarding *Defendants' Motion in Limine No. 11 – Exclude Allegation that Mike Weaver Told Kessel Mulch Not to Hire Plaintiff*, such motion is GRANTED as unopposed by Plaintiff.

24. Regarding *Defendants' Motion in Limine No. 12 – Exclude Allegation that Corporal Vaubel Instructed Plaintiff to Falsely Accuse Mark Lantz of Tire Theft*, such motion is HELD IN ABEYANCE.

25. Regarding *Defendants' Motion in Limine No. 13 – Preclude Plaintiff from Impeaching Jody Paugh Based upon Criminal History*, such motion is HELD IN ABEYANCE.

Plaintiff's Motions in Limine No. 1 and 2

26. Regarding *Plaintiff's Motion in Limine No. 1*, seeking to exclude Workforce West Virginia's determination in Plaintiff's claim for unemployment compensation benefits, the Court GRANTS such motion as unopposed by the Defendants. Although Workforce West Virginia's determination shall not be admissible, the underlying testimony and documentary evidence advanced by the parties before Workforce West Virginia may be used in the trial of this case.

27. Regarding *Plaintiff's Motion in Limine No. 2*, seeking to exclude evidence of Plaintiff's prior criminal history, the Court DEFERS RULING on such motion.

Pre-Trial Memoranda

28. Turning to the parties' pre-trial memoranda, the Court ORDERS as follows:

a. Glen Cook is stricken from Plaintiff's witness list.

b. John Burkholder is stricken from Plaintiff's witness list.

c. Kathy Greaser is stricken from Plaintiff's witness list.

Conclusion

29. Upon the agreement of the parties, the trial of Counts I and II and Defendants' counterclaims will be continued, and by agreement of the parties after discussion, this matter will be stayed pending the outcome of Plaintiff's anticipated appeal regarding the entry of summary judgment as to Counts III and IV.

30. Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment, the Court's rulings granting Defendants' Motion for Summary Judgment as to Counts III and IV shall be an immediately appealable, final judgment.

It is further **ORDERED**:

- The Circuit Clerk shall transmit true copies of this Order to all counsel of record.
- The Court notes the objections and exception of the parties to any adverse findings or rulings herein.
- There being nothing further, this matter is hereby continued generally.

ENTERED this 26 day of March, 2019.

Honorable H. Charles Carl, III