/s/ Lora A. Dyer
Circuit Court Judge
Ref. Code: 19W3UFD0

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CC-18-2019-C-31
Jackson County Circuit Clerk
Bruce DeWees

IN THE CIRCUIT COURT JACKSON COUNTY, WEST VIRGINIA

TODD JARRELL,
Plaintiff,
v.

Civil Action No. 19-C-31
Judge Lora A. Dyer

FRONTIER WEST VIRGINIA, INC., a West Virginia corporation, DANIEL JORDAN, and MICHAEL LINKOUS,
Defendants.

ORDER GRANTING DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS

Now pending is the *Rule 12(b)(6) Motion to Dismiss* ("Motion") Plaintiff Todd Jarrell's Complaint, filed on June 12, 2019, by Defendants Frontier West Virginia, Daniel Jordan, and Michael Linkous ("Defendants"). Plaintiff alleges Defendants wrongfully discharged him in violation of a substantial public policy of the State of West Virginia. This Court refrained from ruling on the Motion until the Supreme Court of Appeals for West Virginia issued its ruling in *Blanda v. Martin & Seibert, L.C.*, --- S.E.2d ---, 2019 WL 6258367, at *1 (W. Va. Nov. 22, 2019). *Blanda* addresses the Motion as to whether an employee of a non-public employer who was allegedly retaliated against for reporting suspected criminal conduct can assert substantial public policy under *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978), as the basis for a wrongful discharge claim.

After due consideration of the arguments of Counsel and the applicable filings, this Court **FINDS** as follows:

FINDINGS OF FACT

1. Plaintiff resides in Jackson County, West Virginia.

2. Defendant Frontier West Virginia, Inc. ("Frontier"), is a corporation with its principal place of business in Norwalk, Connecticut. Frontier is a non-public corporate entity.

3. Defendants Daniel Jordan ("Jordan") and Michael Linkous ("Linkous") are residents of West Virginia.

4. This Court has venue and jurisdiction over this matter because Plaintiff resides in Jackson County, West Virginia, and the alleged conduct occurred, at least in part, in Jackson County, West Virginia.

5. Plaintiff worked for Frontier from 2010 until Frontier terminated Plaintiff's employment on October 22, 2018.

6. Plaintiff filed a complaint on April 24, 2019, alleging Frontier terminated his employment because Plaintiff disclosed sabotage of equipment by certain Frontier employees that caused public utility outages. Plaintiff asserts a single *Harless* count of wrongful discharge on the basis Defendants terminated him in violation of substantial West Virginia public policy pursuant to W Va. Code §61-3-49(b).[1]

7. Plaintiff asserts he disclosed communications line cutting and sabotage to Jordan.

8. Plaintiff asserts Jordan and Linkous "aided and abetted" Frontier in its wrongful discharge of Plaintiff by "refusing to take appropriate action to address and ameliorate Plaintiff's complaints of wrongdoing."

9. Frontier suspended Plaintiff for five days in April 2018 on the allegation Plaintiff called in late for work.

10. Because of his suspension, Plaintiff filed a grievance through the Communication Workers of America Union as permitted under the collective bargaining agreement. No decision has been made regarding Plaintiff's grievance related to the five day suspension.

[1] The Complaint cites W. Va. Code § 61-3-49(b) but *Plaintiff's Response to Defendants' Rule 12(b)(6) Motion to Dismiss* cites W. Va. Code § 61-3-49b. The significance of what appears to be a typographical error by Plaintiff is discussed below.

11. On September 13, 2018, Plaintiff removed Frontier's bucket truck from Frontier's property and used the bucket truck at his cabin. Plaintiff asserts he borrowed the bucket truck to remove bats from the upper part of his cabin.

12. Frontier reported to authorities the bucket truck was stolen.

13. Plaintiff asserts other Frontier employees used bucket trucks for non-work activities; however, Plaintiff concedes supervisors authorized such use of bucket trucks for personal activities. Unlike those non-work activities, Plaintiff does not allege supervisors authorized his own personal use of the bucket truck on September 13, 2018.

14. Plaintiff further asserts Jordan previously authorized Plaintiff to take the bucket truck home every night for several weeks. Plaintiff concedes he received authorization for that activity versus his use of the bucket truck where he did not receive authorization.

15. Frontier asserts it terminated Plaintiff due to the unauthorized use of the bucket truck; Plaintiff asserts Frontier's stated rationale for terminating Plaintiff was pretextual.

16. Instead, Plaintiff alleges "[i]t is against the public policy of West Virginia for families to have their communications services repeatedly severed by their cable company," and claims his termination is related to his reporting of that unlawful equipment sabotage.

17. Plaintiff demands lost wages for wrongful termination.

18. Defendants argue Plaintiff failed to state a claim upon which relief can be granted.

19. On July 3, 2019, Plaintiff filed a response in opposition to Defendants' Motion.

20. After hearing the arguments of Counsel upon the Motion on October 21, 2019, the Court took the Motion under advisement pending the ruling of the Supreme Court of Appeals for West Virginia on the certified question presented in *Blanda*, which had just been argued before the Supreme Court on October 16. The Supreme Court issued its ruling on November 22, 2019.

CONCLUSIONS OF LAW

a. Standard of Review

"Rule 12(b)(6)" of the *West Virginia Rules of Civil Procedure* provides that the defense of "failure to state a claim upon which relief can be granted" may be asserted by motion. W. Va. R. Civ. P. 12(b). The Supreme Court of Appeals for West Virginia has provided guidance for a circuit court when determining whether a complaint should be dismissed under Rule 12(b)(6). In particular, "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). "A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice." *Cantley v. Lincoln Cty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007); *see* W. Va. R. Civ. P. 8(f). This Court recognizes that granting a motion to dismiss is a remedy that should only be granted after construing the complaint in the light most favorable to the plaintiff. *See John W Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).

b. Applicable Law

Plaintiff asserts one count in his Complaint, claiming Defendants wrongfully discharged him in violation of a substantial public policy of the State of West Virginia. Specifically, Plaintiff claims he was wrongfully discharged as a result of his reporting of criminal violations of the West Virginia Code to Frontier. On the other hand, Defendants argue in their Motion that the criminal statute cited by Plaintiff does not trigger the substantial public policy exception to create a wrongful discharge cause of action against a non-public employer.

"Under long-standing West Virginia law, employees are considered to be employed at will, meaning that absent a contract or statute to the contrary, they serve at the will and pleasure of their employer and can be discharged at any time, with or without cause." *Blanda* at *3 (citing *Kanagy v. Fiesta Salons, Inc.*, 208 W. Va. 526, 529, 541 S.E.2d 616, 619 (2000); *Wright v. Standard Ultramarine & Color Co.*, 141 W. Va. 368, 382, 90 S.E.2d 459, 468 (1955)). The exception to the doctrine of employment at-will that the West Virginia Supreme Court took up in answering the certified question presented in *Blanda* is referred to as the public policy exception, which was first recognized in *Harless*. *Id.* (citing *Harless v. First Nat. 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." *Harless* at Syl. Pt. 1. "[A] cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his/her employer acted contrary to a substantial public policy in effectuating the termination." *Blanda* at *4 (quoting *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 745, 559 S.E.2d 713, 718 (2001)). "'[P]ublic policy' is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good . . . even though no actual injury may have resulted therefrom in a particular case to the public." *Id.* (quoting *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325, 325 S.E.2d 111, 114 (1984)).

The West Virginia Supreme Court recognized "[d]etermining what constitutes a substantial public policy for purposes of a *Harless* claim is another matter." *Id.* The Supreme Court noted in Syl. Pt. 2, *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992), "[t]o 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." The Court further noted "[i]n that case [Birthisel], we clarified that our use of 'substantial' to modify 'public policy' in *Harless* was expressly 'designed to exclude claims based on insubstantial considerations.'" *Blanda* at *4 (quoting *Birthisel*, citations omitted). The Court went on to say:

> The term "substantial public policy" implies that the policy principle will be clearly recognized simply because it is substantial. An employer should not be exposed to liability *where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations*.

Id. (emphasis in original).

Here, Plaintiff alleges the "substantial public policy" is Frontier terminated him due to his reporting of illegal activity in violation of W. Va. Code § 61-3-49b ("Disruption of communications and utilities services").[2] §61-3-49b makes it a property crime in the State of West Virginia when "(a) Any person . . . causes a disruption of communication services or public utility services by the theft or by intentionally damaging communications or public utility equipment and by such conduct causes: (1) A disruption of communication services or public utility services to ten or more households or subscribers." Plaintiff claims "[t]ermination of the Plaintiff for truthful reporting of violations of service to customers of Frontier is a violation of the substantial public

[2] The Complaint alleges violation by Frontier of substantial public policy "as expressed in W.V. Code §61-3-49(b)." Complaint 9, ¶6. Defendants correctly assert W. Va. Code § 61-3-49(b) relates to "Purchase of scrap metal by scrap metal purchasing businesses, salvage yards or recycling facilities," whereas the similarly cited W. Va. Code § 61-3-49b is, in fact, the Code section that address "Disruption of communications and utilities services." It is apparent from the face of the Complaint that Plaintiff made a typographical error, albeit one with potentially significant consequences. However, Defendants acknowledged at hearing upon the Motion that this was likely a drafting error. More importantly, though, the error is not dispositive. As discussed herein, regardless of which criminal statute is cited by Plaintiff in support of his *Harless* claim, the same is not, as a matter of law, a source of substantial public policy of the State of West Virginia that would support a claim for wrongful discharge in violation of public policy.

policy of the State of West Virginia as expressed in W. Va. Code § [61-3-49b]," and thus the basis of a claim for wrongful discharge as outlined in *Harless*. Complaint 9, ¶¶ 76-77.

Defendants argue the alleged basis for "substantial public policy" does not meet the standard espoused in various cases by the Supreme Court of Appeals in West Virginia. In particular, Defendants rely on *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 696 S.E.2d 1 (2010). In *Swears*, Mr. Swears asserted his supervisor Steven Roach committed serious financial misconduct in violation of State law, and Mr. Swears reported his concerns to the other company principals. The company later terminated Mr. Swears, who then filed a lawsuit claiming the company terminated him in retaliation for his reporting of the alleged financial misconduct. Mr. Swears claimed his termination "violated substantial public policy principles governing fiduciary relationships, misappropriation of funds and corporate retirements and standards." In reaching its decision, the Supreme Court observed previous wrongful discharge cases in West Virginia that have reviewed assertions of criminal conduct have found a substantial public policy violation to exist only when the claimant was terminated for *refusing* to engage in illegal activity. *Blanda* at *6 (citing *Swears* at n.9; *Lilly v. Overnight Transp. Co.*, 188 W. Va. 538, 425 S.E.2d 214 (1992)) The Supreme Court concluded Mr. Swears failed to identify any source of public policy that his employer had contravened:

> While Mr. Swears cites to two criminal statutes to support his assertions, this Court takes note that the statutes, W. Va. Code § 61-3-20 (2004) (Repl. Vol. 2005) and W. Va. Code § 61-3-13 (1994) (Repl. Vol. 2005), deal with embezzlement and larceny, respectively, Mr. Swears explains that the 'West Virginia Legislature has articulated a clear public policy against such misconduct by criminalizing embezzlement and larceny.' However, neither criminal statute expresses a public policy component such that the statutes may form the basis for a possible violation of a substantial public policy to support a claim for wrongful discharge. The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without showing that the discharge violated the public policy that the cited provision clearly mandates.

Swears, 225 W. Va. at 705, 696 S.E.2d at 7. *See also Blanda* at *6 ("Ms. Blanda does not allege retaliation because she *refused* to engage in an illegal activity, but rather, because she engaged in whistleblower activity.").

Similar to *Blanda* and *Swears*, this Court concludes Plaintiff failed to allege a substantial public policy supporting a wrongful discharge exception to a non-public employer terminating an employee. In so concluding, this Court also recognizes the following warning from the Supreme Court: "courts are to 'proceed cautiously if called upon to declare public policy absent prior legislative or judicial expression on the subject.'" *Blanda* at *5 (quoting *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 141, 506 S.E.2d 578, 584 (1998)). "In addition, 'despite the broad power vested in the courts to determine public policy,' courts are to 'exercise restraint' when using such power." *Id.* The Supreme Court also explained its retaliatory discharge cases are "generally based on a public policy articulated by the legislature." *Blanda* at *7 (citing *Shell v. Metropolitan Life Ins. Co.*, 183 W. Va. 407, 413, 396 S.E.2d 174, 180 (1990)). Of particular note to this Court, the Supreme Court's recent decisions consistently have found criminal conduct does not meet the substantial public policy standard unless "the claimant was terminated for refusing to engage in illegal activity." *See Swears*, 225 W. Va. at 705 n.9, 696 S.E.2d at 7 n.9.

Furthermore, the Complaint acknowledges Frontier had other bases on which to terminate Plaintiff, including the unauthorized use of Defendant Frontier's bucket truck. Plaintiff does not allege he was forced to participate in or refuse to participate in the alleged unlawful conduct, just that he reported it. This Court agrees with the Supreme Court's pronouncement that "[a]n employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that is subject to different interpretations." *Birthisel*, 188 W. Va. at 377, 424 S.E. 2d at 612. This Court also is bound by the Supreme Court's prior rulings, as

affirmed in *Blanda*, wherein the Court concluded criminal statutes alone do not constitute substantial public policy under *Harless* and its progeny "to protect an employee of a non-public employer who reported suspected criminal conduct to the appropriate authority and claims to have been retaliated against as a result." *Blanda* at *9. Since Plaintiff's entire theory is based on Plaintiff's alleged reporting of alleged unlawful activity, Plaintiff asserts no facts supporting a viable cause of action for a *Harless* claim of wrongful discharge.

ORDER OF THE COURT

WHEREFORE, based upon all of the foregoing, it is **ORDERED:**

i. Defendants' Motion to dismiss is **GRANTED**;

ii. Plaintiff's exceptions or objections to this Order are **NOTED** and preserved for the record;

iii. This is a **FINAL ORDER**, appealable to the West Virginia Supreme Court of Appeals;

iv. The Circuit Clerk **SHALL** strike this matter from the Court's active docket; and

v. The Circuit Clerk **SHALL** distribute attested copies of this order to all Counsel of record.

SO ORDERED.

ENTERED the 23rd day of December 2019.

Hon. Lora A. Dye, Circuit Judge
Fifth Judicial Circuit of West Virginia