WEST VIRGINIA
SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

TODD JARRELL,

Plaintiff Below, Petitioner,

v.

FRONTIER WEST VIRGINIA, INC. et al,

Defendants Below, Respondents.

CASE NO. 20-0040
Civil Action No. CC-18-2019-C-31
(Jackson County)

PETITIONER'S BRIEF

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I. ASSIGNMENT OF ERROR

2. The Circuit Court incorrectly found that Petitioner failed to identify a substantial public policy to form the basis of a Harless wrongful discharge claim

II. STATEMENT OF THE CASE

Petitioner was a cable technician for twenty-one years, beginning his career working for Bell Atlantic up until he was terminated by Frontier in 2019. Plaintiff became aware of his coworkers sabotaging cable service by tampering with the cable junctions for Frontier customers in order to be called in on weekends to earn overtime fixing the sabotaged equipment. When Petitioner attempted to report this, his reports were quashed at first, then swept under the rug as the perpetrators were shuffled around internally within Frontier without real disciplinary measures or any internal investigation by Frontier. Frontier only acted to curtail its technicians' abuses after Petitioner had repeatedly taken it upon himself to personally seek out and entreat his supervisors to address the issue. Shortly after Petitioner made enough noise that Frontier could no longer feign ignorance of its technicians sabotaging customer equipment, Frontier began targeting Petitioner with heightened scrutiny and with excessively harsh punishments in an attempt to give itself a plausible excuse to terminate him without seeming to be retaliating against an employee who had reported felonious actions by his coworkers. Eventually having concluded that it had laid enough groundwork to disguise the illegal motive for its termination, Frontier fired Petitioner for using a company bucket truck during off hours, a practice it had tolerated without incident on several other occasions.

West Virginia law makes it a felony to tamper with communal telecommunications equipment. The maintenance of functioning of telecommunications equipment in West Virginia is of paramount importance, particularly during a time when telework is so prevalent. The Circuit Court dismissed Petitioner's claim on Defendant's Motion to Dismiss, holding that W.V. Code

§61-3-49(b), the criminal code section which makes it a felony to tamper with telecommunications equipment providing service to ten or more persons, does not set forth a public policy sufficient to support a Harless claim. Petitioner has appealed to this Court, averring cable company technicians disrupting its own customers' service in violation of W.V. Code §61-3-49(b) is a violation of West Virginia's substantial public policy interest sufficient to support a Harless claim.

III. SUMMARY OF THE ARGUMENT

Plaintiff has clearly alleged that he was terminated in violation of a substantial public policy. Any violation of a law against sabotaging public communications equipment necessarily becomes a public policy issue, particularly when the company in charge of providing that service is covering up the sabotage. If the violation of a law that makes it a felony to tamper with public communications equipment does not implicate a substantial public policy in West Virginia, nothing can. The Circuit Court made no finding that Plaintiff failed to plead the case properly, so the only question before this Court is whether West Virginia law making it a felony to tamper with public communications equipment can be the basis of a Harless claim.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiff believes that oral argument is necessary in this case. The body of law regarding Harless decisions is substantial, but this case represents a question with immense import to the people of West Virginia who live in rural areas where cable service may be their only means of contact with the outside world in the event of an emergency. Furthermore, Plaintiff avers that this Court's decisions on Harless claims have been grossly misinterpreted by the Circuit Court and believe that oral argument could clarify the misapprehensions of the court below.

V. STANDARD OF REVIEW

An order granting a motion to dismiss is reviewed de novo. Factual findings are reviewed under a clearly erroneous standard. However, where a finding of fact is intimately connected to the lower court's legal conclusion, that finding of fact is reviewed de novo.

VI. FACTS AND PROCEDURAL HISTORY

Petitioner Jarrell worked in his position as a cable splicing technician for over 21 years. APPENDIX 007. He first worked in this position for Bell Atlantic, which was taken over by Verizon, which was then taken over by Frontier West Virginia, Inc. APPENDIX 007. At no point was Petitioner the subject of disciplinary action by Bell Atlantic or Verizon. Petitioner worked for Frontier for eight years prior to his termination. APPENDIX 007.

In 2016, when Petitioner was transferred to the Jackson County area, he became aware that several of his coworkers were intentionally knocking out cable services to customers in their area so they would be called out to fix the problems they had secretly created while being paid overtime to do so. APPENDIX 008. These coworkers were cutting cable lines and sabotaging cable junctions to cause service outages. APPENDIX 008. Petitioner reported this repeated misconduct to the supervisor, Respondent Daniel Jordan, who refused to take action to curb the problem. APPENDIX 008. One of Petitioner's coworkers also observed the sabotage and reported it; the reporting coworker was transferred away almost immediately thereafter. APPENDIX 008. Plaintiff observed that his coworkers were continuing to sabotage cable equipment to cause service outages. APPENDIX 009.

One of Petitioner's duties for Frontier was to call customers affected by the outages and speak with them; during these calls, Petitioner was informed that during the outages, one

customer had suffered a health issue but was unable to call 911, and another customer had apparently died after being unable to call 911. APPENDIX 009. Petitioner reported this information to Jordan, to which Respondent Jordan responded by informing Petitioner that he would be reassigned. APPENDIX 009. Before that reassignment took place, however, Respondent Michael Linkous intervened and stopped the reassignment. APPENDIX 009. Another cable splicing technician reported what Plaintiff had to a different supervisor than Respondent Jordan, and that supervisor passed the information up the chain to Brian Stover, a manager in Frontier's security division. APPENDIX 009. Stover took no apparent action either. APPENDIX 0010. Petitioner resolved to go over Respondent Jordan's head to report the ongoing sabotage issues to Stover as well. APPENDIX 0010. Petitioner met with Stover and reported the repeated sabotage of cable services to customers in Jackson County and the surrounding areas. APPENDIX 0010. Petitioner emphasized the dire consequences that this sabotage already had, and those that could occur in the future. APPENDIX 0010. Stover told Petitioner that Stover had received similar reports from others like Petitioner. APPENDIX 0010.

In September 2017, Plaintiff and another cable technician who had come forward to report the misconduct were summoned to a meeting with Lauren Thacker, Kenny Williams, Mark Pennington, and Respondent Linkous. APPENDIX 0010-0011. Petitioner and his coworker reported the various acts of misconduct and sabotage they had witnessed. APPENDIX 0011. After the meeting, Petitioner's coworker was reassigned from Sissonville-Pocatalico to work in the Buffalo, WV area. APPENDIX 0011. Two of the bad actors who had been sabotaging equipment were reassigned to work in other areas, but as far as Petitioner knew, their employment was otherwise unchanged with Frontier. APPENDIX 0011.

In April 2018, Petitioner was suspended for five days after calling in to work late. APPENDIX 0011. Plaintiff had no disciplinary actions against him at the time. APPENDIX 0011. The suspension of Plaintiff was also phrased such that it was effectively used against Petitioner as a last chance agreement, despite being the first ever disciplinary action against Petitioner during his 20+ year career as a Cable Splicing Technician and his, at that time, 7-year career working for Frontier. APPENDIX 0011. Petitioner's union, the Communications Workers of America, filed a grievance, which has since been denied by Frontier. APPENDIX 0011.

Two weeks after the grievance, Petitioner was selected for a "random" drug test. APPENDIX 0011. The CWA informed Petitioner they were unaware of any other employees in Petitioner's position being drug tested. APPENDIX 0012.The CWA then filed another grievance alleging that Petitioner was being targeted for drug testing due to his reports of illegal activity. APPENDIX 0012.

In July 2018, Plaintiff learned that the attic of his tall log cabin was housing a bat infestation which had damaged his lungs as well as his daughter's health. APPENDIX 0012. Plaintiff used a bucket truck from Frontier, not on company time nor during hours when the truck would have been in use, to clean the bats out of his log cabin. APPENDIX 0012. Plaintiff returned the truck without incident. APPENDIX 0013. Later, Petitioner discovered that someone from Frontier had called the police and reported the truck stolen, despite the fact that Petitioner's vehicle had been parked in the space where the truck had been, which employees would do to signify that they had a truck out. APPENDIX 0013. Plaintiff was summoned to a meeting where Frontier claimed they were disciplining him for using the truck, and three weeks later, Frontier terminated Petitioner. APPENDIX 0013.

Petitioner noted in that meeting that he and other employees in his position had previously been instructed by other supervisors to use the bucket trucks for tasks including hanging a "Will you marry me?" banner and cleaning out a supervisor's church's gutters. APPENDIX 0013.

On April 24, 2019, the Petitioner filed his complaint in Jackson County Circuit Court. APPENDIX 0002-0022. On June 12, 2019, Respondents then filed a Motion to Dismiss in Lieu of an Answer. APPENDIX 0052-0058. Petitioner filed a response to the motion to dismiss on July 3, 2019. APPENDIX 0059-0067. Respondents replied to Petitioner's response to Respondent's Motion to Dismiss on September 18, 2019. The Circuit Court held a hearing on

VII. ARGUMENT

Respondents have argued that Petitioner's reports of the cable sabotage are somehow not a reflection of West Virginia Public Policy, despite the fact that to allow retaliation for these reports directly endangers public health and safety. Petitioner appeals to this Court to request that the order granting dismissal of his case be reversed and the case remanded to Jackson County Circuit Court. In the order from which Petitioner appeals, the Circuit Court dismissed Petitioner's complaint on the basis that Petitioner has allegedly failed to identify a substantial public policy to form the basis of a Harless claim. This is not so. Petitioner wrote the following in paragraph 76 of his complaint: "Termination of the Plaintiff for truthful reporting of violations of service to customers of Frontier is a violation of the substantial public policy of the State of West Virginia as expressed in W.V. Code §61-3-49(b) ('Disruption of communications and utilities services')."

WEST VIRGINIA CODE, CHAPTER 61. CRIMES AND THEIR PUNISHMENT, ARTICLE 3, CRIMES AGAINST PROPERTY, §61-3-49b. Disruption of communications and utilities services.

> (a) Any person who causes a disruption of communications 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; or

(2) A loss in the value of the property in an amount of one thousand dollars or more, shall be guilty of a misdemeanor and, upon conviction thereof, for a first offense, shall be sentenced to not more than two thousand hours of court-approved community service or fined not more than $10,000, or both. For a second offense, the person is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one nor more than five years or fined not more than $10,000, or both. For third and subsequent offenses, the person is guilty of a felony and, upon conviction thereof, shall be imprisoned in a correctional facility for not less than one nor more than ten years, or fined not more than $10,000, or both.

(b) As used in this section, communications and public utility equipment includes but is not limited to public safety communications towers and equipment, telephone lines, communications towers and tower equipment, radio towers and tower equipment, railroad and other industrial safety communication devices or systems, electric towers and equipment and electric transmission and distribution lines.

This provision could not possibly be a clearer expression of public policy. It is a legislatively-enacted provision which identifies that the crime is one that can only be said to occur when the public is harmed. It also identifies that the crime must be against the public collectively or equipment of public utility.

In its dismissal order below, the Circuit Court cited to Blanda v. Martin & Seibert, L.C., No. 19-0317, 2019 W. Va. LEXIS 617 (Nov. 22, 2019), which itself discusses Swears v. R.M Roach & Sons, Inc., 225 W. Va. 699, 696 S.E.2d (2010). The Circuit Court states that Swears is analogous to the instant case because it features an employee being terminated for reporting illegal activity, without a clearly expressed public policy present to underpin a Harless claim.

First, that is not the case here. There is a statute which is directly and exclusively relevant to public welfare on all fours with the conduct Petitioner reported. Not only that, but in Swears, that plaintiff relied on a broader criminal statute criminalizing fraud and false pretenses. The statute at issue in this case is exceedingly specific, and its text repeatedly evinces the fact that it is a statute

to protect the public interest which proscribes activities which interfere with public utilities. This Court will no doubt see that unlike in Swears or Blanda when this Court was being asked to read a public policy into enactments which made no mention of them, here, the expression of public policy is clear as day. Petitioner is not asking this Court to read tea leaves to determine what does or does not constitute an expression of public policy; the State Legislature has already done so by enacting this statute.

Furthermore, when assessing a motion to dismiss, the Circuit Court was required to view all factual allegations made by Petitioner in the light most favorable to the Petitioner. The factual allegations made by Petitioner included his reports of persons being without phone services or cable for days and weeks. Beyond the typical consequences of such a state of affairs, Petitioner found that one Frontier customer reported someone dying when they were unable to call 911 during the service outage, and another customer being stranded during a health crisis, unable to summon an ambulance. These facts demonstrate the serious public policy implications which gave rise to the legislature's law against interference with public utilities such as the ones at issue. These facts also demonstrate that the Circuit Court erred when it claimed that there was no public policy basis for Petitioner to bring a Harless claim.

The Circuit Court also seems to take the position in its dismissal order that a plaintiff must show not only that a public policy exists, and not only that the plaintiff was terminated for attempting to abide by it, but also that there is some stated public policy which specifically says that persons cannot be terminated for abiding by that public policy. That is not the law. The reason that is not the law is because the Harless case exists.

> "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 principal, then the

> employer may be liable to the employee for damages occasioned by this discharge"

Harless v. First Nat'l Bank, 162 W. Va. 116, 117, 246 S.E.2d 270, 272 (1978).

The Circuit Court is essentially attempting to reconstrue this Court's cases in a manner that would reconstruct the gap that the Harless case bridged to begin with. Harless made it clear that a cause of action existed when an employer discharged an employee who was acting in furtherance of a substantial West Virginia public policy. There is no requirement that the public policy itself state that employees cannot be terminated for supporting the policy; that was the finding of the Harless case itself, to clarify and enshrine that cause of action where it did not exist.

Petitioner has alleged that his discharge by Frontier contravened a substantial public policy principal. There is no ambiguity in the criminal statute at issue, and there are no concerns that Frontier would be exposed to liability where a public policy standard is too general or vague. And it is clear that a cable company's employees and managers should be aware that it is against public policy for them to repeatedly sabotage the public's cable access. There is no concern that the public policy is too general to provide specific guidance. The policy Petitioner has identified is not only specific on its face but is of obvious common-sense application to a cable company.

If Petitioner were a nurse who knew that a doctor at her hospital was poisoning patients, the doctor could not argue she could legally fire Petitioner since there was no specific public policy stating that nurses cannot be fired for reporting poisonings. "To be substantial, a public policy must not just be recognizable as such but be so widely regarded as to be evident to employers and employees alike. Inherent in the term 'substantial public policy' is the concept that the policy will

provide specific guidance to a reasonable person." Frohnapfel v. ArcelorMittal USA LLC, 235 W. Va. 165, 166, 772 S.E.2d 350, 351 (2015).

The instant case also has far-reaching public policy implications. Utility companies must not be permitted to engage in reprisal against employees who reported wrongdoing by their coworkers, thereby compromising those utilities. That reprisal would make it less likely for future employees to report similar acts of sabotage, acts which could again jeopardize public safety or bilk unsuspecting consumers out of the use of utilities they are paying for.

The Circuit Court cites to Tiernan in support of its dismissal of Plaintiff's claim, echoing the language that courts should "proceed cautiously without cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject." Id. APPENDIX 0087-0088. First, there is legislative expression on the subject; there is a statute criminalizing the act of interfering with public utilities. Second, the Circuit Court seemingly ignored the language of that decision immediately preceding that line. The quote in context reads thusly:

> In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should 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, 137, 506 S.E.2d 578, 580 (1998).

The Circuit Court paid seemingly no mind to the statute criminalizing the behavior that Plaintiff reported, leaning heavily on the reasoning that because some general criminal behavior

was found insufficient to form the basis of a Harless claim in the past (see Blanda), that it cannot do so now. That is not the case, as the Court may see.

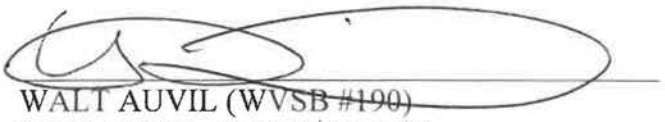
As to the Circuit Court's assertion that Harless claims for criminal activity may only be brought where an employee refuses to engage in illegal activity, that is not the law either. The Circuit Court bases that portion of its ruling on the Swears case, which talks about how historically, substantial public policy violations based on criminal statutes are found where an employee refused to commit the crime at issue. However, the Court made it clear in Swears that the reason the plaintiff could not prevail was due to the criminal statute at issue being a statute of general applicability against embezzlement and larceny, which were laws, but not laws which pertained to a substantial public policy in that regard. The statute at issue in the instant case is absolutely a statutory expression of public policy; it could not be anything else. Furthermore, just because the Court has typically found a criminal statute to be a substantial public policy in cases where a plaintiff refuses to commit a criminal act does not mean that the Court is somehow unable to find such a statute to be a suitable basis for a Harless claim in the instant case.

VIII. CONCLUSION

Once again this Court is called upon to adjudicate what precisely constitutes West Virginia's expressed public policy. Plaintiff has identified extraordinary public policy concerns in his complaint, statutorily and practically. The Circuit Court's rigid and crabbed interpretations of this Court's rulings on Harless law must not be allowed to curtail Plaintiff's clear and unambiguous right to sue for being discharged contrary to West Virginia's substantial public policy. To allow that would be both dangerous and deadly for the people of West Virginia. The risks to West Virginia's rural citizens are far too great for this Court to state, as a matter of law, that it is open season on any employee who tries to stop their company from taking advantage of West Virginians in ways that are dishonest and dangerous.

Respectfully submitted,

TODD JARRELL,
Plaintiff Below/Petitioner by Counsel



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

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned Counsel for the Petitioner hereby certified that on the 10th day of June, 2022, he served the foregoing and hereto annexed **Petitioner's Brief** upon Respondents, by depositing a true copy thereof in the United States Mail, postage prepaid, to counsel of record addressed as follows:

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