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 REPLY BRIEF

WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
Counsel for Plaintiff Below/Petitioner

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058

Table of Contents

Table of Authorities

West Virginia Cases

Other Authority

I. W. Va. Code § 61-3-49B is a legislative enactment properly regarded as a source of public policy

The Respondent hangs its response primarily on the Swears case, which states as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, a court looks to established precepts in the constitution, legislative enactments, legislatively approved regulations, and judicial opinions.
>
> Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 700, 696 S.E.2d 1, 2 (2010)

The Court further honed in on this question of what constitutes public policy as part of the elements for proving that a termination was wrongful in violation of public policy, stating that step one in proving such a claim is to demonstrate that "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)." Feliciano v. 7-Eleven, Inc., 210 W. Va. 740, 750, 559 S.E.2d 713, 723 (2001). Furthermore, Feliciano states that:

> A cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination. "Public 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.

Feliciano v. 7-Eleven, Inc., 210 W. Va. 740, 743, 559 S.E.2d 713, 716 (2001).

Thus Feliciano, too, stands for the proposition that statutes can serve as manifestations of public policy, and that a statute explicitly protecting the public good is an expression of substantial public policy.

Respondent claimed that, "this Court has clearly indicated, W. Va. Code § 61-3-49B cannot serve as [the] basis [for a Harless claim]." Respondent's Brief, p. 4. That is not the case.

Both Swears and this Court's other jurisprudence indicate that this Court recognizes that the legislature is perhaps the best source of articulated public policy.

> We have exercised the power to declare an employer's conduct as contrary to public policy with restraint (Syllabus Point 3, Yoho v. Triangle PWC, Inc., W. Va., 336 S.E.2d 204, 209 (1985)), and have deferred to the West Virginia legislature because it "has the primary responsibility for translating public policy into law." Collins v. AAA Homebuilders, Inc., W. Va., 333 S.E.2d 792, 793 (1985).

Shell v. Metro. Life Ins. Co., 183 W. Va. 407, 413, 396 S.E.2d 174, 180 (1990).

Respondent's quotation of Blanda v. Martin & Seibert is remarkable in its selectivity. Respondent quotes that "[c]ourts are to proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject. In addition, despite the broad power vested in the courts to determine public policy, courts are to "exercise restraint" when using such power." Blanda v. Martin & Seibert, L.C., 242 W. Va. 552, 554, 836 S.E.2d 519, 521 (2019).

Curiously, Respondent chose to omit the final sentence of that quotation, which reads "[s]o, it is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community so declaring." Id. This Court will doubtless understand why Respondent felt this last part might undermine its position. Regardless of Respondent's efforts to exclude the last line from its brief, it is clear that Petitioner's claim falls directly into that category; the policy implicated by Petitioner's claim is so obviously for the public interest, and the actions identified in his complaint so obviously against it, that it is perfectly appropriate for this Court to recognize this obvious expression set forth in W. Va. Code § 61-3-49B as the substantial public policy it is.

It is difficult to see how W. Va. Code § 61-3-49B could be anything other than an expression of the state's substantial public policy. It is a statute criminalizing only activity which affects the public, specifically the public's ability to use telecommunications. The law cannot be applied to conduct affecting only individuals, as larceny or embezzlement can. In light of these facts, W. Va. Code § 61-3-49B clearly constitutes a legislative enactment which evinces a substantial public policy.

II. Criminal statutes can evidence a substantial public policy

The Respondent repeatedly overstates its case, claiming that "this Honorable Court held that criminal statutes of this state did not constitute a substantial source of public policy, which would support a common-law wrongful discharge claim." Respondent's Brief, p. 3. That is incorrect. What Swears actually says on the issue is more fulsome:

> 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 a showing that the discharge violated the public policy that the cited provision clearly mandates.
>
> **As recognized by the lower court, Mr. Swears' action against R.M. Roach does not involve a claimed violation of public policy or anything that may be injurious to the public good. Rather, his allegations constitute an alleged violation of the financial interests of a private corporation** [emphasis added]**.** As such, Mr. Swears has not demonstrated the violation of any substantial public policy that would constitute an exception to the at-will employment doctrine.

Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 705, 696 S.E.2d 1, 7 (2010).

. As this Court can see, the Swears Court made no pronouncement that criminal statutes were forbidden from use in Harless claims. Rather, the Swears court underscored the fact that criminal statutes regarding crimes against individuals only, as opposed to against the public interest more generally, were not likely to constitute expressions of substantial public policy upon which a Harless claim could properly be based. By the reasoning adopted in Swears, Petitioner's claim is entirely proper within the Harless framework. The difference between an embezzlement or larceny statute and a statute proscribing the disruption of public communications and utility services is plain. Petitioner's claim does involve a claimed violation of public policy, and implicates activities clearly and dangerously injurious to the public good.

III. Conclusion

The statute at issue in this case is a clear expression of a substantial public policy, promulgated by the West Virginia Legislature to proscribe the conduct Petitioner was terminated for attempting to curtail. That conduct poses a direct threat to the lives and property of all West Virginia served by Appellant as their telecommunications carrier. That is the only question facing this Court, and it is one whose answer is staggeringly apparent, notwithstanding the flagrant omissions and misrepresentations the Respondent has made regarding this Court's precedent. Criminal statutes are not universal expressions of substantial public policies, nor are they forbidden from use in Harless claims. Based upon the framework this Court has set forth for evaluating public policy issues in Harless claims, it is quite clear that W. Va. Code § 61-3-49B constitutes a legislative enactment which evinces a substantial public policy. The dismissal of Petitioner's claim must be reversed.

Respectfully submitted,

TODD JARRELL,
Plaintiff Below/Petitioner by Counsel

WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058
(304) 485-6344 (fax)

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

TODD JARRELL,

Plaintiff Below, Petitioner,

v.

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

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 12th day of August, 2022, he served the foregoing and hereto annexed **Petitioner's Reply Brief** upon Respondents, by depositing a true copy thereof in the United States Mail, postage prepaid, to counsel of record addressed as follows:

Richard M. Wallace
Littler Mendelson, P.C.
Chase Tower
707 Virginia Street, E., Suite 1010
Charleston, WV 25301

WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB 12953)
Counsel for Plaintiff Below/Petitioner

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058