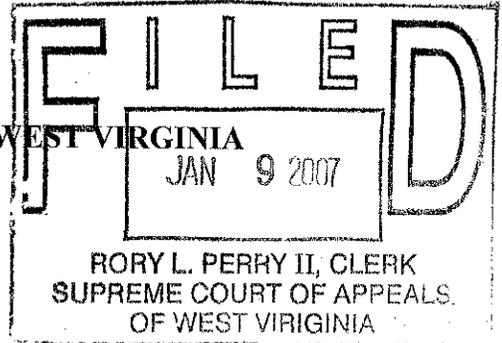


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 062519

Ohio County Civil Action No. 03-C-557
Judge Martin J. Gaughan

GRACE LONTZ AND BEVERLY PETTIT,
Plaintiffs/Appellants

v.

JOYCE THARP, ELIZABETH DOAK,
JAMES BAISH, SANDEEP THAKRAR, and
MONICA, LLC d/b/a HOLIDAY INN EXPRESS,
Defendants/Appellees.

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....2

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.....3

STATEMENT OF FACTS..... 3

ASSIGNMENTS OF ERROR.....6

POINTS AND AUTHORITIES.....7

DISCUSSION OF LAW.....8

A. The circuit court erred in finding Plaintiffs’ wrongful discharge claims preempted by the National Labor Relations Act since, as this Court has repeatedly held, if a state-law-based claim can be resolved without interpreting a collective bargaining agreement, the claim is not preempted by federal law......8

B. The Fourth Circuit Court of Appeals held that Plaintiffs’ claims are not completely preempted......9

CERTIFICATE OF SERVICE12

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Plaintiffs, former hotel supervisors, brought an action against Defendants for wrongful discharge, constructive discharge and violation of the West Virginia Wage Payment and Collection Act. Defendants removed the action to the United States District Court for the Northern District of West Virginia based upon federal question jurisdiction under the National Labor Relations Act, and then moved to dismiss the case. Plaintiffs moved to remand. The United States District Court dismissed the wrongful and constructive discharge claims but remanded the statutory wage payment claim. Plaintiffs then appealed to the United States Court of Appeals for the Fourth Circuit. In a published opinion, the Fourth Circuit vacated the District Court's order and remanded the case to the District Court with instructions to remand the case to state court. Thereafter, Defendants moved to dismiss the wrongful discharge and constructive discharge claims in the state court. The Circuit Court granted Defendants' motion over objection of Plaintiffs.

STATEMENT OF FACTS

Beginning in 2003, various employees at the Holiday Inn Express, located in Ohio County, West Virginia, began to undertake an effort to unionize. Because Plaintiffs were supervisors at the hotel, they were not part of any proposed collective bargaining unit. The management at the Holiday Inn Express, including Defendants, was adamantly opposed to any union organizing activities. Defendants blamed Plaintiff Pettit for commencing the union activity and as a consequence, wrongfully terminated her from employment. In addition, as set forth in the amended complaint, Plaintiff Pettit was

wrongfully discharged from her employment in violation of company policies, practices and procedures.

During Defendants' attempts to defeat the employees' efforts to unionize, Defendants met with Plaintiff Lontz and instructed her to seek the assistance of a deputy sheriff and arrange for a union organizer to be arrested. Because Plaintiff Lontz refused, Defendants thereafter created an intolerable work environment for Plaintiff Lontz and she was constructively discharged from her employment.

As set forth in the amended complaint, Defendants engaged in a conspiracy to discharge Plaintiff Pettit based upon Defendants' belief that Plaintiff Pettit assisted, cooperated and/or encouraged certain employees to engage in union organizing activities. Defendants discharged Plaintiff Pettit in violation of the company's practice of progressive discipline and good cause dismissal. Defendants engaged in a conspiracy to discharge Plaintiff Lontz because Plaintiff Lontz refused to engage in unlawful conduct to arrange for a union organizer to be arrested. As a consequence of Plaintiff Lontz's refusal to cooperate in unlawful conduct, Defendants made Plaintiff Lontz's working conditions intolerable, such that Plaintiff Lontz was forced to resign.

Plaintiff Lontz further alleged Defendants failed to pay to her all wages to which she is entitled under the terms of her employment, in violation of the West Virginia Wage Payment and Collection Act.

On October 31, 2003, the Plaintiffs filed an action in the Circuit Court of Ohio County, West Virginia, alleging the Defendants violated West Virginia's public policy by terminating their employment. Defendants removed the case to the United States District Court for the Northern District of West Virginia based upon federal question jurisdiction.

Defendants argued Plaintiffs' claims were preempted by the National Labor Relations Act. The District Court adopted Defendants' position and dismissed the wrongful discharge claims and remanded to state court the wage claim. Plaintiffs appealed to the Fourth Circuit Court of Appeals. In *Lontz v. Tharp*, 413 F.3d 435 (2004), the Fourth Circuit reversed, finding Plaintiffs' claims were not completely preempted and therefore removal was inappropriate. After the case was remanded to the Circuit Court of Ohio County, Defendants brought a motion to dismiss based upon preemption under the National Labor Relations Act. The Circuit Court granted the motion as to the wrongful discharge claims.

ASSIGNMENTS OF ERROR

1. The circuit court erred in granting Defendants' motion to dismiss based upon preemption under the National Labor Relations Act because, as the Fourth Circuit held in this case, Congress did not intend that state law be entirely displaced by the NLRA.
2. Plaintiffs stated viable causes of action for wrongful discharge and constructive discharge for violation of the public policy in West Virginia, specifically codified in West Virginia Code §21-1A-1(a).

POINTS AND AUTHORITIES

Cases

Birthisel v. Tri-Cities Health Services Corp., 424 S.E.2d 602, syl. pt. 2 (W. Va. 1992).....8

Feliciano v. 7-Eleven, 559 S.E.2d 713 (W. Va. 2001).....8

General Motors Corporation v. Hubert J. Smith and The West Virginia Human Rights Commission, 602 S.E.2d 521 (W. Va. 2004).....9

Harless v. First National Bank, 246 S.E.2d 270 (W. Va. 1978).....8

Lontz v. Tharp, 413 F.3d 435 (2004).....5,10

Wounaris v. W. Va. State College, 588 S.E.2d 406 (W. Va. 2003).....8

Statutes

W. Va. Code § 21-1A-1 *et seq.*.....8,9

29 U.S.C. § 151 *et seq.*.....9

29 U.S.C. § 152.....9

29 U.S.C. §§ 157, 158.....10

DISCUSSION OF LAW

The circuit court erred in finding Plaintiffs' wrongful discharge claims preempted by the National Labor Relations Act since, as this Court has repeatedly held, if a state-law-based claim can be resolved without interpreting a collective bargaining agreement, the claim is not preempted by federal law

West Virginia recognizes a wrongful discharge cause of action, when the discharge is based on contravention of substantial public policy. *E.g. Harless v. First National Bank*, 246 S.E.2d 270 (W. Va. 1978); *Feliciano v. 7-Eleven*, 559 S.E.2d 713 (W. Va. 2001); and *Wounaris v. W. Va. State College*, 588 S.E.2d 406 (W. Va. 2003). Public policy exceptions are to be found in “established precepts in our Constitution, legislative enactments, legislatively approved regulations and judicial opinions.” *Birthisel v. Tri-Cities Health Services Corp.*, 424 S.E.2d 602, syl. pt. 2 (W. Va. 1992).

In this case, the public policy is found in the “legislative enactment” of West Virginia Code § 21-1A-1, of the West Virginia Labor Management Relations Act: “It is hereby declared to be the public policy of this State and the purposes of this article to encourage the practice and procedure of collective bargaining by protecting the exercise by employees of full freedom of association....” This general pronouncement expresses the public policy of West Virginia.

The defendants' contention that there is no wrongful discharge cause of action for discharge based on union activities is not dispositive, nor is the statement that *Feliciano* itself does not provide this particular cause of action. Development of which public policies support wrongful discharge causes of action has been case by case. Until *Feliciano*, there was not a claim for wrongful discharge based on exercise of the right to self-defense. Until *Wounaris* there was not a claim based on exercise of the right to use

the available grievance procedure. And so forth. Plaintiffs stated a valid wrongful discharge cause of action for violation of public policy enunciated in West Virginia Code § 21-1A-1.

In *General Motors Corporation v. Hubert J. Smith and The West Virginia Human Rights Commission*, 602 S.E.2d 521 (W. Va. 2004), this Court discussed on 526, at length, federal preemption:

Several decisions of this Court explain that federal preemption of state law is generally disfavored, and is more often the exception than the rule. The Court has also noted that state courts have jurisdiction to determine whether or not federal law should preempt a claim filed in a state court. We have explained that '[i]t is clear that state courts, including our own, have the authority to decide whether a state provision is indeed preempted by federal law.' *In re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 42, 592 S.E.2d 818, 821 (2003). Or, more succinctly: 'West Virginia state courts have subject matter jurisdiction over federal preemption defenses.' Syl. pt. 3, *State ex rel. Orlofske v. City of Wheeling*, 212 W.Va. 538, 575 S.E.2d 148 (2002).

Our law has a general bias against preemption: 'Moreover, both this Court and the U.S. Supreme Court have explained that federal preemption of state court authority is generally the exception, and not the rule.' *In re: West Virginia Asbestos Litigation*, 215 W.Va. at 42, 592 S.E.2d at 821. And preemption should not be considered lightly: 'Despite the existence of this doctrine, however, preemption is disfavored in the absence of convincing evidence warranting its application [.]' *Hartley Marine Corp. v. Paige*, 519 U.S. 1108, 117 S.Ct. 942, 136 L.Ed.2d 832 (1997). Finally we have noted, '[a]s a result, there is a strong presumption that Congress does not intend to preempt areas of traditional state regulation.' *Chevy Chase Bank v. McCamant*, 204 W.Va. 295, 300, 519 S.E.2d 217, 222 (1998) (citing, *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990))

Here Plaintiffs' claims do not depend upon interpretation of a collective bargaining agreement. Defendants argued to the circuit court that Plaintiffs are subject to the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* However, under § 152 of the NLRA, the term "employee" does not include "any individual employed as a supervisor." Plaintiffs were supervisors and not part of the collective bargaining unit. Plaintiffs' wrongful discharge claims are not preempted by the NLRA.

The Fourth Circuit Court of Appeals held that Plaintiffs' claims are not completely preempted

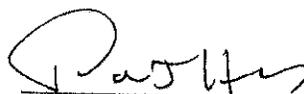
The Fourth Circuit Court of Appeals decided in *Lontz v. Tharp*, 413 F.3d 435, 438 (4th Circuit 2005) "whether state wrongful discharge claims are completely preempted by the National Labor Relations Act, 29 U.S.C. §§ 157, 158 (2000). We conclude that they are not. We express no view as to whether such claims on the merits are preempted by federal law, as this is a question for state courts to resolve. We accordingly vacate the judgment of the district court and remand with instructions to remand the case in turn to state court." On page 442, the court rejected Defendants' attempt to recharacterize Plaintiffs' state law claims as deriving from sections 7 and 8 of the National Labor Relations Act. This Court should likewise reject Defendants' effort to convert Plaintiffs' wrongful discharge claims into violations of the National Labor Relations Act.

CONCLUSION

The circuit court erred in finding that the National Labor Relations Act preempts Plaintiffs' wrongful discharge claims, because Plaintiffs are not part of any collective

bargaining unit and Plaintiffs' claims do not depend upon an interpretation of a collective bargaining agreement.

Dated this 8th day of January, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that a true accurate copy of the Appellants Brief was served via
US Mail, postage prepaid, this 8th day of January, 2007, to the following:

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