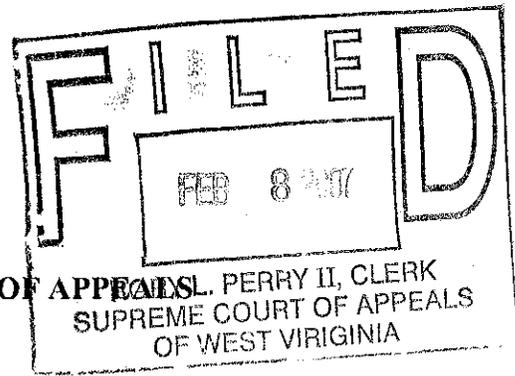


IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS



No. 33243
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.

APPELLEES' BRIEF

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I. INTRODUCTION

On October 31, 2003, the Plaintiffs/Appellants filed a three count complaint in the Circuit Court of Ohio County against the Defendants/Appellees¹ alleging a claim for wrongful discharge of Plaintiff Pettit (Count I), a claim for constructive discharge of Plaintiff Lontz (Count II), and a claim under the West Virginia Wage Payment and Collection Act (Count III). On November 19, 2003, the Plaintiffs filed an Amended Complaint which set forth the same three substantive counts raised in the original Complaint, with the only difference being a clarification that the actions complained of therein as already alleged in Counts I and II violated the public policy of West Virginia. (See original record, Amended Complaint).

The Defendants filed a Motion to Dismiss Counts I and II of the Amended Complaint but before the Court ruled on that Motion, the Defendants removed the case to the United States District Court for the Northern District of West Virginia on December 1, 2003. In support of their Removal, the Defendants asserted that the Plaintiffs' claims in both the original and amended Complaints set forth allegations arising under the provisions of federal law, specifically the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (See original record, Notice of Removal).

On December 10, 2003, the Defendants renewed their Motion to Dismiss in Federal Court while, at or near the same time, the Plaintiffs filed a Motion to Remand counts I and II. In a Memorandum Opinion and Order dated July 1, 2004, Judge Frederick P. Stamp, Jr. granted the Defendants' Motion to Dismiss as to counts I and II of the Amended Complaint and denied the Plaintiffs' Motion to Remand. (See original record, Memorandum Opinion and Order, pp. 10-11).

¹ To be consistent, and in following the lead set forth in the Appellants' Brief which refers to Lontz and Pettit as "Plaintiffs", Appellees Tharp, Doak, Baish, Thakrar, and Monica, LLC will use the designation "Defendants" throughout this brief.

On July 28, 2004, the Plaintiffs appealed Judge Stamp's decision to the United States Court of Appeals for the Fourth Circuit. Following briefing and oral argument, the Fourth Circuit Court vacated Judge Stamp's decision and remanded counts I and II of the Plaintiffs' Amended Complaint back to the Circuit Court of Ohio County. (See original record, Fourth Circuit Court of Appeals Opinion, p. 11). Importantly, the Fourth Circuit did not remand the case because it concluded that the Plaintiffs' claims are not pre-empted by the National Labor Relations Act; rather, the Fourth Circuit remanded the case because it concluded that the decision regarding whether or not Plaintiffs' claims are preempted should be made in state court, not federal court. Id. at 10.

Following the remand of the case from the United States Court of Appeals for the Fourth Circuit to the Circuit Court of Ohio County, the Defendants again renewed their Motion to Dismiss counts I and II of the Plaintiffs' Amended Complaint on or about March 16, 2006. Again following briefing and oral argument, the Circuit Court of Ohio County entered an Order granting the Defendants' Motion to Dismiss on or about May 10, 2006. (See original record, Order granting Defendants' Motion to Dismiss Counts I and II of Plaintiffs' Amended Complaint, p. 1). The Plaintiffs subsequently filed a Petition for Appeal of that Order to this Court and, on or about December 6, 2006, this Court granted the Plaintiffs Petition and agreed to hear the appeal.

II. COUNTER STATEMENT OF THE FACTS

Sometime in 2003, employees at the Defendant Holiday Inn Express Hotel in Dallas Pike, West Virginia began an effort to unionize. The facts and circumstances which form the basis of this case occurred during that time. Although the Plaintiffs set forth in their brief a "Statement of Facts", the Defendants dispute much of what is set forth therein, particularly the reason(s) for the end of the Plaintiffs' employment with the Holiday Inn Express. However, since this appeal is from an order below granting the Defendants' Motion to Dismiss, the averments contained in the "Statement of Facts" in the Plaintiffs' Petition for Appeal are conceded for the purpose of addressing the legal issues before this Honorable Court.

III. AUTHORITIES RELIED UPON

Cases

<u>Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Employees of America v. Lockridge</u> , 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971)	8
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<u>Hinton v. Sigma-Aldrich Corp.</u> , 93 S.W.3d 755, 759-60 (Miss. Ct. of App. 2002)	9
<u>Lontz v. Tharp</u> , 413 F.3d 435 (4 th Cir. 2005)	11
<u>Marquez v. Screen Actors Guild</u> , 525 U.S. 33, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998)	8
<u>Operating Engineers Local 926 v. Jones</u> , 460 U.S. 669, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983)	8
<u>Owen v. The Carpenters' Dist. Council</u> , 161 F.3d 767, 776 (4 th Cir. 1998)	8
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San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236,
79 S. Ct. 773, 3 L. Ed. 2d 775 (1959) 7

Sears, Roebuck & Co. V. San Diego County Dist. Council of Carpenters, 436 U.S.
180, 192, 98 S.Ct.1745, 56 L.Ed.2d 209 (1978) 8

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Viestenz v. Fleming Companies, Inc., 681 F.2d 699, 701 (10th Cir. 1982) 8

Statutes

W. Va. Code § 21-1A-1 *et seq* 14, 15

W. Va. Code § 21-1A-1(a) 15

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W. Va. Code § 21-1A-2(a)(3) 16

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IV. ARGUMENT

- A. The Circuit Court of Ohio County properly dismissed Counts I and II of the Plaintiffs' Amended Complaint because the Court had no jurisdiction over the claims set forth therein.

1. Garmon Preemption

Counts I and II of the Plaintiffs' Amended Complaint allege wrongful and constructive discharge, respectively. At varying times in their briefing and argument, the Plaintiffs have characterized their discharges as wrongful either because of an alleged public policy violation or because the Defendants allegedly violated company policies and procedures in discharging them. Regardless of how the claims are characterized, the essence of the Plaintiffs' allegations in this case is that the discharges were unlawful because they were based upon union activity or union involvement – in Pettit's case because of her assistance, cooperation or encouragement of union activity, and in Lortz's case because she refused to contact the sheriff and make a complaint about a union organizer. Because both of these claims allege unlawful discharge based on activity regulated by §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158 (1998) (hereinafter, the "NLRA")², they are pre-empted. As such, the Circuit Court of Ohio County below properly concluded that those claims should be dismissed.

For nearly half a century, courts have recognized that state jurisdiction must give way to the exclusive realm of federal labor relations when claims arise from or are based upon union

² §7 of the NLRA protects the right of employees to form, join, or assist labor organizations, to bargain collectively, and to engage in other concerted conduct for the purpose of mutual aid and protection. §8(a) of the NLRA defines what conduct on the part of employers constitutes unfair labor practices because the conduct infringes on rights protected by § 7. §8(b) of the NLRA defines what conduct on the part of unions constitutes unfair labor practices because it infringes on the rights of employers.

activity regulated by §§ 7 and 8 of the NLRA. This principle was established by the United States Supreme Court in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), where the Court wrote:

When it is clear ... that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.

Id. at 244.

It is further well-settled that this deference not only applies to matters which, on their face, plainly and clearly are preempted by §§7 and 8 of the NLRA, it applies to any activity which is **arguably** subject to the Act. As the Garmon court stated:

When an activity is **arguably** subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245 (emphasis added). Subsequent decisions have supported the application of Garmon preemption to encompass those matters which *may* constitute unfair labor practices. See e.g., Shane, 868 F.2d at 1061; Silchia v. MCI Telecommunications Corp., 942 F.Supp. 1369, 1373 (D. Col. 1996).

There is a sound justification for Garmon preemption. As the Fourth Circuit has stated, entrusting the NLRB with exclusive jurisdiction:

serves to ensure that state law does not frustrate either the substantive policies established by the NLRA or the regulatory mechanisms through which those policies are implemented ... '[C]entralized administration of specially designed procedures [is] necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid [the] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies'.

Richardson v. Kruchko & Fries, 966 F.2d 153, 155-56 (4th Cir. 1992), in part *quoting* Sears, Roebuck & Co. V. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 192, 98 S.Ct.1745, 56 L.Ed.2d 209 (1978).

The landmark holding of the Garmon Court has been recognized and repeated so often that it has come to be known as “Garmon preemption.” In fact, in the half-century since Garmon, the Supreme Court has emphasized its continued application on a number of occasions. Amalgamated Ass’n of St., Elec. Ry. and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971); Operating Engineers Local 926 v. Jones, 460 U.S. 669, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983); Marquez v. Screen Actors Guild, 525 U.S. 33, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998). Moreover, among the many cases that have applied “Garmon preemption” to state law claims, there are several which deal with allegations of wrongful discharge. See Owen v. The Carpenters’ Dist. Council, 161 F.3d 767, 776 (4th Cir. 1998)(recognizing that there may be instances where the NLRA pre-empts state law based on the subject matter in question); Shane v. Greyhound Lines, 868 F.2d 1057, 1061 (9th Cir. 1997)(state wrongful termination claim based on union activity pre-empted by §§ 7 and 8 of the NLRA); Viestenz v. Fleming Companies, Inc., 681 F.2d 699, 701 (10th Cir. 1982)(state cause of action for wrongful discharge preempted as arguably subject to NLRA); Carr v. Local Union 1953, International Brotherhood of Electrical Workers, 326 F.Supp.2d 999, 1005 (D. N.D. 2004)(North Dakota Labor-Management Relations Act regulating the same activity as the NLRA is preempted by the NLRA); Barns v. Sundstrom Pressed Steel Co., 1987 U.S. Dist. LEXIS 7382, *4-5, (N.D. Ill. 1987)(employee’s state law claim for wrongful discharge based on successful unionization attempt preempted by the NLRA); Danculovich v. Eckrich & Sons, Inc., 1982 U.S. Dist. LEXIS 12629, *6 (W.D. Mich. 1982)(employee’s state law claim for wrongful discharge based on

union activities preempted by NLRA); Hinton v. Sigma-Aldrich Corp., 93 S.W.3d 755, 759-60 (Miss. Ct. of App. 2002)(supervisors' state law claims for wrongful discharge based on union activity in contravention of state public policy preempted by the NLRA); Bowlen v. ATR Coil Co., 553 N.E.2d 1262, 1263-64 (Ind. Ct. of App. 1990)(supervisors' claims for wrongful discharge based on union activity in violation of state public policy preempted by the NLRA).

Looking at Garmon preemption in the context of the foregoing wrongful discharge cases yields the conclusion that claims such as those made by Plaintiffs in this case are preempted and should be dismissed. For instance, in Shane, 868 F.2d 1057, a group of employees sued their employer because they were fired just a few months after they played active roles in a strike. The employer moved for summary judgment on the ground that the employees' state law claims were preempted under the NLRA, and the District Court agreed. On appeal, the Ninth Circuit Court of Appeals affirmed, citing the importance of Garmon preemption as a vehicle to protect the NLRB's exclusive jurisdiction over such matters. Id. at 1061.

In Carr, 326 F.Supp. 2d 999, the plaintiff sued his union alleging that it committed unfair labor practices. Carr tried the same tactic that Pettit and Lontz are attempting in this case; *i.e.*, bringing his claim under state law rather than federal law. Carr's tactic did not work. The United States District Court for the District in North Dakota noted that the state Labor Management Relations Act that Carr was relying upon governed the same topics as those regulated by the NLRA – employee rights to organize, engage in collective bargaining, present unfair labor practices, etc. According to the court, Carr's claims were preempted by the NLRA. Id. at 1005-06.

The Hinton case, 93 S.W. 3d 755, is perhaps the most analogous to the case at bar. Like Lontz and Pettit, Hinton was a supervisor. Hinton claimed that his employer fired him because

he would not cooperate in the employer's effort to create false reports about union supporters. Id. at 757. The employer filed a motion to dismiss on the ground that Hinton's claims were preempted by the NLRA. According to the Court of Appeals of Missouri, Hinton's state law claims for wrongful discharge in violation of public policy were preempted by the NLRA because the conduct at issue was arguably subject to regulation by the NLRA. Id. at 759-60.

A discussion of Garmon preemption would not be complete without noting that there are two exceptions to the doctrine: (1) preemption is not necessarily required where the allegations raise issues that are of only peripheral concern under the NLRA. See Richardson, 966 F.2d at 156, *quoting Jones*, 460 U.S. at 676; and (2) preemption is not necessarily required where "the conduct at issue ... touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act". Id. The narrowness of these exceptions serves to illustrate that the Plaintiffs' allegations in this case are not a close call, but rather fall squarely within the scope of Garmon preemption.

With regard to the first exception, the essence of the Plaintiffs' case is that they were terminated (actually or constructively) as a consequence of taking stances that were in conflict with how their employer wanted to deal with union organizing efforts at the Holiday Inn Express. This goes to the very heart of the reason that the NLRA was enacted, and the reason why the NLRB exists; *i.e.*, to govern labor-management relations. The first exception clearly does not apply in this case.

The second exception likewise does not apply. Pettit essentially contends that she was fired for supporting the union. Any attempt to argue that her allegations are of such a local nature that it can be inferred that Congress decided to leave the matter to the State falls apart in the face of the

plain language of the NLRA and the well-developed law on preemption, beginning with Garmon. Lontz essentially contends that she was fired because she would not call the sheriff to report an organizer. The request that Lontz contact the sheriff concerning a union organizer engaged in activities at the hotel related to union organizing. Thus, this is a labor/management issue. Indeed, both Pettit and Lontz recognized from the very beginning that they were embroiled in labor/management issues of the sort regulated by the NLRA. This conviction led Pettit and Lontz to file unfair labor practice charges with the NLRB based upon the exact same conduct as alleged in this lawsuit. (See original record, Memorandum Opinion and Order, pp. 8-9). They should not now be heard to argue that their allegations are of a strictly local nature and not the sort of allegations that Congress intended to entrust to the NLRB.

2. *The Fourth Circuit Court of Appeals Opinion*

In their Brief, the Plaintiffs submit that the Fourth Circuit Court of Appeals “rejected” outright the Defendants’ argument that the Plaintiffs’ claims truly derived from, and were thus preempted by, the NLRA. That is not accurate. The Fourth Circuit did not conclude that the Plaintiffs’ claims for unlawful termination were not pre-empted by the NLRA. Rather, the Fourth Circuit Court held that it was not the one to decide whether the wrongful and constructive discharge claims alleged to be under West Virginia law in this case were pre-empted by the NLRA. Lontz v. Tharp, 413 F.3d 435, 443 (4th Cir. 2005). Instead, the Fourth circuit concluded, that issue should be resolved by the state court. Id.

In addition, although the Fourth Circuit confirmed that Garmon need not preempt every state law wrongful discharge claim that somehow touches upon some aspect of labor/management relations, the Fourth Circuit did not conclude that Garmon preemption could

never be found, and did not conclude that it could not be found in this case. As set forth above, the allegations in the Plaintiffs' Amended Complaint are not peripheral concerns to the NLRB; rather, they are at the core of determinations the Board is charged with making so as to ensure uniform national labor policy. Thus, by holding that it was up to the state court to decide whether preemption was proper, the Fourth Circuit was plainly indicating that such pre-emption could, indeed, be found, both in general and in reference to the case at bar, if so determined *by the state court* under the circumstances.

In this case, the Circuit Court of Ohio county found that there was such preemption, concluding that the conduct which formed the basis of the Plaintiffs' wrongful and constructive discharge claims was union activity which had its genesis in a federal law over which it had no jurisdiction, specifically §§ 7 and 8 of the NLRA:

“[I]t is the opinion of this Court that the National Labor Relations Act pre-empts the Plaintiffs' allegations in this case of wrongful and/or constructive discharge *because of union activity* as set forth in counts I and II of their Amended Complaint.

(See original record, Order Granting Defendants' Motion to Dismiss Counts I and II of Plaintiffs' Amended Complaint, p. 1) (emphasis added). This was all the court below was required to find to dismiss the Plaintiffs' claims.

3. *The Plaintiffs' status as supervisors*

Plaintiffs may contend that their claims cannot be preempted by the NLRA because, as supervisors, they have no remedy under the NLRA.³ That argument is a classic red-herring. The issue is not whether Plaintiffs ultimately succeed or fail under the NLRA; it is whether the subject

³ §2(3) of the NLRA, 29 U.S.C. § 152(3) (1998), excludes supervisors from the definition of “employees” covered by the Act and therefore protected in their exercise of rights found under §7.

matter of the Plaintiffs' claims is one that Congress addressed by enacting the NLRA and subsequently charging the NLRB with the task of administering it. It is for the NLRB to look at the provisions of the NLRA, to perform a factual inquiry into the nature of Plaintiffs' responsibilities, and then to come to a conclusion as to whether they are entitled to the protection of the NLRA. And, it is worth noting that even if the NLRB were to consider the Plaintiffs as supervisors not covered by the NLRA, that does not mean their claims are not pre-empted. It is well settled that state law does not automatically afford supervisors a cause of action they do not have under the NLRA. St. Thomas - St. John Hotel & Tourism Ass'n, Inc. V. Government of the U.S. Virgin Islands, 357 F.3d 297, 304 (3rd Cir. 2004), *citing* Beasley v. Food Fair of North Carolina, 416 U.S. 653, 662, 94 S. Ct. 2023, 40 L.Ed.2d 443 (1974).⁴

In sum, whether the Plaintiffs are supervisors or not is not the issue here. The focus is whether the subject matter of the Plaintiffs' claims is one that Congress addressed by enacting the NLRA and charging the NLRB with administering it. That is what the essence of Garmon preemption is all about – defining those areas where deference to the NLRB is called for. As set forth above, the Plaintiffs' claims clearly are the sort that fall squarely within the scope of the NLRA, and are therefore preempted under Garmon and its progeny.

⁴ This principle has its genesis in Section 14(a) of the Act, which provides that “no employer ... shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national **or local**, relating to collective bargaining.” 29 U.S.C. §164(a)(1998)(emphasis added).

- B. The Circuit Court of Ohio County below also properly dismissed the Plaintiffs' claims in Counts I and II that the Defendants wrongfully and constructively discharged them contrary to West Virginia public policy.

Plaintiffs contend that their claims should not have been dismissed by the Circuit Court because they are viable claims for wrongful discharge in violation of the public policy set forth in the West Virginia Labor Management Act for the Private Sector. W. Va. Code § 21-1A-1 *et seq.* This contention is wrong for two reasons. The first reason is that, as Carr and Hinton indicated, it does not matter to the preemption analysis if a plaintiff has a viable state law claim, if that claim is based upon facts and circumstances that fall within the scope of matters regulated by §§ 7 and 8 of the NLRA. Garmon preemption is not defeated by the existence of a state law claim. Indeed, Garmon preemption assumes the existence of potential state law claims, for it is the state law claims that are preempted. If the nature of the allegations is such that Garmon preemption would apply, the fact that state law may also provide a cause of action does not alter the fact that the matter is preempted.

The second reason that Plaintiffs' contention is wrong is that they, in fact, do not have viable claims under state law. The Plaintiffs' wrongful discharge claims have their genesis in the Harless decision and its progeny. See Harless v. First Nat. Bank, 246 S.E.2d 270 (1978). According to the Harless court, the general rule that an employer has the absolute right to discharge an at-will employee is limited by the occasion when the employer's motivation for terminating that employee would contravene a substantial state public policy. Id. at 275. Public policy exceptions to the employment at-will doctrine are limited, but have been recognized in certain circumstances based on "established precepts in our Constitution, legislative enactments, legislatively approved regulations

and judicial opinions.” See Feliciano v. 7-Eleven, 210 W. Va. 740, 559 S.E.2d 713,718 (2001), quoting Birthisel v. Tri-Cities Health Services Corp., 188 W. Va. 371, 424 S.E.2d 606, syl. pt. 2 (1992).

As mentioned above, the Plaintiffs argue that a legislative enactment, the Labor Management Relations Act for the Private Sector, W. Va. Code § 21-1A-1 *et seq.*, (“the State Act”) is the basis for their claims that state public policy was violated when the Plaintiffs were supposedly discharged because of their union activity, assistance, support and/or involvement. The State Act provides that it is the public policy of the state to encourage collective bargaining, freedom of association, and the rights of individuals in their relations with labor organizations. See W. Va. Code § 21-1A-1(a). However, the State Act does not provide a source of public policy upon which the Plaintiffs in this particular case can rely.

There are two reasons why the State Act does not provide Plaintiffs with a source of public policy which supports their state-law wrongful discharge claims. First, the State Act, by its plain language, does not apply to the Defendants. In the “Definitions” section of the Act, W. Va. Code § 21-1A-2, the term “employer” is specifically defined to “not include ... any person subject to the provisions of the ‘National Labor Relations Act’, as amended, unless the National Labor Relations Board has declined to assert jurisdiction ...” W. Va. Code § 21-1A-2(a)(2).⁵ It is undisputed that Defendant Monica, LLC, and its employees named as individual defendants in this lawsuit, are subject to the NLRA.

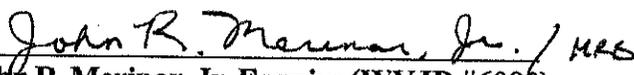
⁵ In this regard, the State Act is secondary to the NLRA. Essentially, it is a state law which fills in the gap when the NLRA does not apply to a particular West Virginia employer. Given this limitation to the scope of the State Act, it can reasonably be inferred that the West Virginia legislature recognized that in matters where the NLRA applies, there is no need for, or indeed room for, parallel State enforcement.

Second, the State Act does not apply to Plaintiffs because they are supervisors. The term "employee" is defined in the State Act to exclude "any individual employed as a supervisor." W. Va. Code 21-1A-2(a)(3). The plain language of the State Act and the protections thereunder – obviously intended to be limited and not something of general application – thus excludes both the Defendants and Plaintiffs. As a consequence, the public policy that the Plaintiffs in this particular case rely upon is not a basis upon which they can support their wrongful discharge claims and the Circuit Court of Ohio County below properly dismissed them.

IV. CONCLUSION

For all the foregoing reasons, the Defendants respectfully request that this Honorable Court affirm the Order of the Circuit Court of Ohio County.

Dated this 7th day of February, 2007.


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CERTIFICATE OF SERVICE

I, Mario R. Bordogna, counsel for Defendants-Respondents, hereby certify a true and exact copy of this "Appellees Brief" was served via United States mail, postage prepaid, this 7th day of February, 2007, upon counsel of record for Plaintiffs-Appellants:

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A handwritten signature in black ink, appearing to read "Paul J. Harris", is written over a horizontal line.