

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 35309

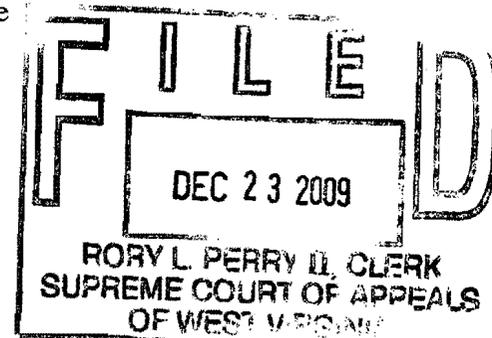
BARRY SWEARS, Plaintiff-Appellant

vs.

R.M. ROACH & SONS, INC., Defendant - Appellee

The Honorable Christopher C. Wilkes, Judge
Circuit Court of Berkeley County
Case No.: 07-C-493

BRIEF OF APPELLANT



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KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellant, Plaintiff below, Barry Swears, appeals the Judgment Order entered by the trial court below granting Defendant's motion for summary judgment and dismissing Mr. Swears' wrongful termination claim which termination Mr. Swears alleges was in contravention of a substantial public policy principle.

STATEMENT OF MATERIAL FACTS

Mr. Swears was employed by Defendant, R.M. Roach & Sons, Inc. (hereinafter “the Company”) in the capacity of Controller until he was terminated on January 30, 2006. (Pltf. Resp. to MSJ Exh. 1 ¶ 1)¹ In his capacity as Controller, Mr. Swears, among other duties, oversaw the day-to-day finances of the Company. (Id. at ¶ 2) Mr. Swears’ direct supervisor was Mr. Steve Roach who is one of three principals in Defendant’s corporation. (Id. at ¶ 3) The other two principals are Mr. Stan Roach and Mr. Scott Roach. Mr. Steve Roach, independent of the other two principals, created and operated a separate corporation doing business as Sunfire Patio & Spa (hereinafter “Sunfire”)(Def MSJ p. 2)

In the course of performing his duties as Controller for the Company, Mr. Swears discovered several issues, which he perceived to be serious fiscal misconduct by Steve Roach arising from his operation of his independent corporation Sunfire. (Pltf. Resp. to MSJ Exh. 1 ¶ 4) For example, Mr. Swears discovered the following: that Company employees were performing work on behalf of Sunfire during times that they were being paid by the Company; that Sunfire had approximately \$15,000 worth of the Company’s inventory in its possession; that the Company lost business revenues of approximately \$150,000 to the Sunfire Patio operation. (Id.) Most troubling, however, was that Mr. Swears discovered that Sunfire owner, Steve Roach, without authorization, altered Company financial records to delete a \$1,500.00 finance charge owed to the Company by Sunfire Patio & Spa. (Id. at ¶ 5)

Mr. Swears reported this improper conduct to the other two principals in the company, Scott and Stan Roach. (Id at ¶ 6) The other Company principals confronted Mr. Steve Roach

¹ Exhibit 1 to Plaintiff’s Response to Defendant’s Motion for Summary Judgment is the sworn

regarding the improper conduct reported by Mr. Swears and demanded in a written memo addressed to Steve Roach that he cease such conduct in the future and that he immediately pay the finance charges that he deleted without authorization on behalf of his separate corporation. (Id. at ¶ 7)

From that point forward, Steve Roach engaged in a course of retaliatory treatment against Mr. Swears in an effort to force Mr. Swears to resign. (Id. at ¶ 8) Mr. Roach ultimately terminated Mr. Swears on January 31, 2006. (Id. at ¶ 9)

Mr. Swears filed a complaint in Berkeley County Circuit Court on June 15, 2007, alleging he was wrongfully discharged in violation of a substantial public policy for reporting to his superiors the misappropriations committed by one of the principal owners of the Company. Defendants filed a motion for summary judgment on January 13, 2009, based upon their contention that Plaintiff failed to set forth an exception to his at-will employment relationship. The Circuit Court entered a final order granting Defendant's motion for summary judgment on February 25, 2009. The Court reasoned that because the alleged misappropriations were committed by one of the principals of a private entity it did not involve injury to the public and therefore no substantial public policy was violated. (Order p. 5) The Court also concluded that the report of criminal conduct by an employee does not implicate public policy protection if the report was made internally and not to outside authorities. (Id. at p. 8)

affidavit testimony of Barry Swears.

ASSIGNMENT OF ERROR

- I. THE TRIAL COURT ERRED BY RULING THAT AN EMPLOYEE WHO REPORTS INTERNALLY FISCAL MISCONDUCT BY A CORPORATION'S PRINCIPAL IS NOT ENTITLED TO PROTECTION FROM RETALIATORY DISCHARGE IN CONTRAVENTION OF A SUBSTANTIAL PUBLIC POLICY.

TABLE OF AUTHORITIES

	Pages
West Virginia Statutes:	
W. Va. Code § 61-3-20	10
W. Va. Code §61-3-13	10
West Virginia Case Law:	
<i>Berthisel v. Tri-Cities Health Services Corp.</i> , 188 W.Va. 371, 424 S.E.2d 606 (1992) ..	8
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W.Va. 138, 459 S.E.2d 415 (1995)	8
<i>Cordle v. General Hugh Mercer Corp.</i> , 174 W.Va. 321, 325 S.E.2d 111 (1984)	7, 8, 12
<i>Feliciano v. 7-Eleven, Inc.</i> , 210 W.Va. 740, 559 S.E.2d 713 (2001)	8, 9
<i>Harless v. First National Bank</i> , 162 W.Va. 116, 246 S.E.2d 270 (1978)	8
<i>Tiernan v. Charleston Area Medical Center</i> , 203 W.Va. 135, 506 S.E.2d 578 (1998	8
Foreign Case Law:	
<i>Belline v. K-Mart Corp.</i> , 940 F.2d 184 (7 th Cir. 1991)	10, 11
<i>Murcott v. Best Western International</i> , 198 Ariz. 349, 9 P.3d 1088(2000)	10
<i>Vermillion v. AAA Pro Moving & Storage</i> , 146 Ariz. 215, 704 P.2d 1360 (Ct. App. Div. 2 1985)	9, 10
<i>Willard v. Paracelsus Health Care Corp</i> (Miss. 1996)	10

DISCUSSION OF LAW

The sole issue before the Court is whether an employee who reports to his superiors that criminal conduct is being committed by another principal in the workplace is entitled to protection from retaliatory treatment to protect the substantial public policy of reporting criminal misconduct.

In the present case, Mr. Swears, who oversaw Defendant's daily financial operations as Controller, reported to the Company that his supervisor, Steve Roach, had misappropriated company assets by improperly altering the company's accounts receivable records to remove finance charges that were owed to the company by Mr. Roach's competing business, and by using Company funds to pay employees to perform work for his independent corporation, Sunfire Patio & Spa.

The circuit court concluded that Mr. Swears fiscal misconduct report did not implicate a substantial public policy in this instance because Defendant is a private company not publicly traded, and because the report was made only internally. This Court has made clear that conduct that is prohibited by either statute or constitutional provision constitutes a substantial public policy. Theft through misappropriation of company assets is prohibited by West Virginia's criminal statute. Accordingly, if Mr. Swears was terminated for refusing to turn a blind eye to and reporting that criminal misconduct, such termination is in violation of a substantial public policy as a matter of law.

A. The Court Should Apply a De Novo Standard of Review

A determination of the existence of public policy in West Virginia is a question of law. Syl. pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325 S.E.2d 111 (1984). More

specifically, when this Court is asked to interpret a statute or address a question of law, its review is *de novo*. Syl pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995); *Feliciano v. 7-Eleven, Inc.*, 210 W.Va. 740, 559 S.E.2d 713 (2001)(citations omitted).

In the present case, the circuit court entered summary judgment and dismissed Mr. Swears' wrongful termination claim based on the court's conclusion that there existed no public policy exception to Mr. Swears' at-will employment status based upon his report of misconduct. The circuit court's ruling was based on a question of law, therefore, it should be reviewed *de novo*.

B. Mr. Swears Was Terminated in Contravention of the Substantial Public Policy of Prohibiting Fiscal Criminal Misconduct.

It has been well-established through the common law of West Virginia that an employer's right to discharge an at-will employee is not absolute. It must be tempered by the principle that the motivation for the discharge may not contravene a substantial public policy. *See, Harless v. First National Bank*, 162 W.Va. 116, 124, 246 S.E.2d 270, 275 (1978)(citations omitted); *Tiernan v. Charleston Area Medical Center*, 203 W.Va. 135, 140, 506 S.E.2d 578, 583 (1998). Public policy is that principle of law which holds that no person can lawfully do that which has the 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. *Cordle 174 W.Va.* at 325.

Trial courts are instructed to look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions to identify the source of substantial public policy principles. *Tiernan*, 203 W.Va. at 140, *citing, Berthisel v. Tri-Cities Health Services Corp.*, 188 W.Va. 371, 424 S.E.2d 606 (1992). This Court has determined that the following elements are instructive to determining whether an employee has successfully presented a

wrongful discharge in contravention of substantial public policy: (1) whether clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in common law; (2) whether dismissing employees under the circumstances like those involved in plaintiff's dismissal would jeopardize the public policy; and (3) whether dismissal was motivated by conduct related to the public policy; and (4) whether the employer lacked overriding legitimate business justification for the dismissal. *Feliciano v. 7-Eleven, Inc.*, 210 W.Va. at 750, 559 S.E.2d at 723. In the case at bar, the circuit court erred by concluding that Mr. Swears failed to establish the first two elements of his wrongful discharge cause of action.

1. West Virginia Has Manifested A Clear Public Policy Against Fiscal Criminal Misconduct.

Although the West Virginia Supreme Court of Appeals has not confronted the precise issue of whether terminating an employee for reporting criminal misconduct violates a substantial public policy, the state of West Virginia has certainly made clear through legislative enactment that prohibiting criminal conduct constitutes a substantial public policy of West Virginia.

As an officer of the Company and in a position of trust, Steve Roach's act of deleting from the company books a debt that he owed to the Company for the purpose of evading that debt, at worse, seemingly satisfies the elements for the crime of embezzlement codified at W.Va. Code § 61-3-20. At best, such conduct constituted the crime of larceny codified at W.Va. Code §61-3-13. It goes without saying that embedded in the public policy of prohibiting theft is the public policy of exposing individuals engaged in such conduct.

Many courts in other jurisdictions that have addressed this precise issue have determined that terminating an employee for reporting a crime by a co-worker, supervisor, or member of management constitutes a wrongful discharge in violation of a substantial public policy. *See*

generally: *Vermillion v. AAA Pro Moving & Storage*, 146 Ariz. 215, 704 P.2d 1360 (Ct. App. Div. 2 1985)(termination for reporting violation of Arizona criminal code by employer constitutes wrongful discharge as exception to employment at will doctrine); *Belline v. K-Mart Corp.*, 940 F.2d 184 (7th Cir. 1991), *rehearing en banc denied*,(employee's termination for reporting to management that employee's supervisor was committing the crime of theft was wrongful discharge in violation of substantial public policy); *Willard v. Paracelsus Health Care Corp.*, 681 So.2d 437 (Miss. 1996)(citations omitted)(wrongful discharge claim supported by termination that was motivated by report to company that a company supervisor had committed a crime); *Murcott v. Best Western International*, 198 Ariz. 349, 9 P.3d 1088(2000)(officers internal reports of violations of Arizona law satisfied public policy exception for wrongful discharge claim – state's criminal code is the clearest expression of the state's public policy).

The West Virginia Legislature has articulated a clear public policy against such misconduct by criminalizing embezzlement and larceny. As the Arizona Supreme Court aptly noted in *Murcott*, the state's criminal code is the clearest expression of the state's public policy. Thus, Mr. Swears ought to be protected from retaliatory discharge for exposing to Company principals that another principal was engaged in criminal misconduct that injured both the Company and its principals. Granting West Virginia employees such protection will maintain and protect the substantial public policy of prohibiting the commissions of criminal acts.

2. Dismissing Employees Who Report Fiscal Misconduct Will Jeopardize The Public Policy of Prohibiting Criminal Fiscal Misconduct.

In the present case, Mr. Swears alleges that he was terminated in retaliation for reporting the improper conduct that arguably constitutes violations of West Virginia criminal law by one

of the Company's principal owners and officers. In short, Mr. Swears was terminated for doing his job, which was to oversee and protect the Company's assets. Allowing Mr. Swears to be terminated for exposing misconduct by one of the company's owners would injure the public policy of prohibiting such criminal conduct. The Seventh Circuit Court of Appeals reasoning in *Belline v. K-Mart* for shielding employees who report crimes from termination is compelling: "Although no law compels an individual to step forward and communicate his suspicions regarding criminal activity, public policy clearly favors the exposure of a crime." *Id.* at 187. The *Belline* Court goes on to explain that the fundamental concern for the lives and property of its citizens is embodied in the criminal code, but the risk of discharge may deter employees from bringing criminal conduct to light. *Id.* If employees are subject to termination for reporting fiscal misconduct by their superiors, the public policy of prohibiting corporate fiscal misconduct will surely be jeopardized.

3. The Fact That Defendant's Corporation is Not Publicly Traded Does Not Insulate it From the Substantial Public Policy at Issue.

The circuit court erroneously reasoned that Mr. Swears internal report of misconduct did not implicate a substantial public policy because Defendant's corporation is a private entity i.e., not publicly traded. Such a distinction should be rejected to preserve the public policy of preventing such fiscal misconduct in all businesses – whether publicly traded or not. There are victims irrespective of whether the corporation is publicly traded or privately owned by more than one individual. Such a distinction fails to recognize that co-owners of a non-publicly traded corporation are injured by the fiscal misconduct of a co-owner.

The employer in *Belline* made the same argument that the Corporation made in the

present case; that this was a private concern, not a matter of public policy because the matter was reported internally only and thus a private matter. The *Belline* court rejected that argument and reasoned that to hold otherwise would create incentives to by-pass internal procedures, when public policy favors an approach that allows dutiful employees who report wrongdoing to be free from termination. *Id.*

Moreover, the circuit court's reasoning that there was no injury to the public because the alleged misconduct involved a private entity is in error. First, Steve Roach is one of three owners of the Defendant corporation. His misconduct was to the detriment of the two other principals in the company. Indeed, those innocent owners immediately took steps to halt Steve Roach's misconduct upon learning of the same through Mr. Swears' report. Moreover, as the Court made clear in *Cordle v. General Hugh Mercer Corp.*, when identifying the presence of a substantial public policy, the question is whether the act **has a tendency** to be injurious to the public or to the public good even where no actual injury may have resulted therefrom in a particular case to the public. *Cordle* 174 W.Va. at 325 (emphasis added). Accordingly, the mere fact that Mr. Roach's misconduct was halted and reversed, does not mean that the misconduct did not have the tendency to be injurious to the Company's co-owners.

C. Conclusion

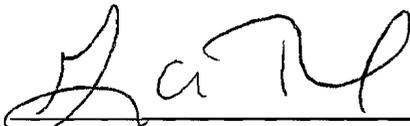
West Virginia's criminal code indicates in the clearest of terms that criminal activity violates public policy. Employees who report suspected criminal activity by their employer or supervisor should be shielded from retaliatory discharge to further the state's public policy of prohibiting criminal conduct as a matter of law. To hold otherwise, would work against the state's public policy of preventing crime. Mr. Swears was charged with the job of overseeing

and protecting the Company's finances. Steve Roach fired Mr. Swears for exposing his superior's improper and unlawful conduct, which was injurious to the Company and to the Company's other two principals. Mr. Swears was therefore terminated in contravention of a substantial public policy that is codified in the West Virginia criminal code.

RELIEF PRAYED FOR

WHEREFORE, for the foregoing issues, Appellant, Barry Swears requests that the Court reverse the trial court's ruling that Plaintiff did not set forth a claim for wrongful termination in violation of a substantial public policy as a matter of law and remand the case to circuit court for a jury trial on the retaliatory discharge claim.

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BARRY SWEARS,

Plaintiffs,

v.

CIVIL ACTION NO. 07-C-493

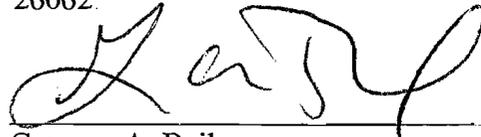
R.M. ROACH & SONS, INC.

Defendants.

CERTIFICATE OF SERVICE

I, Gregory A. Bailey, counsel for Plaintiff, hereby certify that I have served a true copy of the foregoing BRIEF OF APPELLANT upon the following counsel, by placing the same in the United States Mail, first class, postage prepaid, this 22nd day of December, 2009.

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