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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
DIVISION II

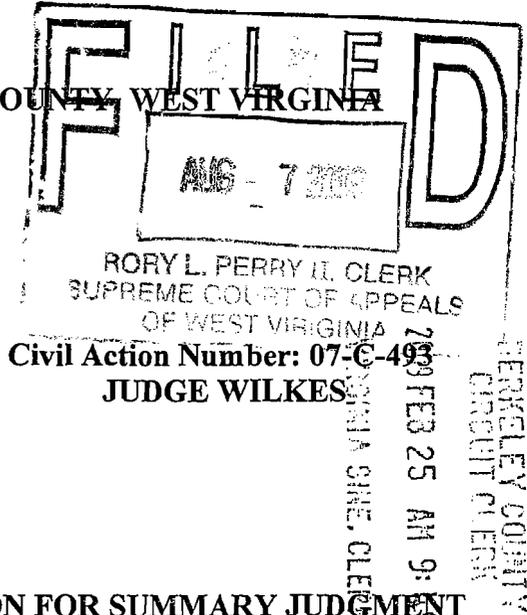
BARRY SWEARS,

Plaintiff,

v.

R.M. ROACH & SONS, INC.,

Defendant.



ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court this 24th day of February 2009, pursuant to the Defendant's Motion for Summary Judgment.

Upon the appearance of Plaintiff Barry Swears, by counsel Gregory A. Bailey, Esq., and upon the appearance of Defendant R. M. Roach & Sons, Inc., a West Virginia Corporation, by counsel Rochelle L. Brightwell, Esq.

FINDINGS OF FACT

1. Plaintiff filed the Complaint on or around June 15, 2007 alleging wrongful termination arising out of the termination of his employment with Defendant on or around January 31, 2006. Plaintiff's Complaint contains a cause of action for alleged wrongful termination in violation of public policy (Count I) and a claim for punitive damages (Count II).

2. Defendant was incorporated as a West Virginia corporation in 1957. Defendant is principally owned by 3 brothers, Stanley, Steven and D. Scott Roach.

3. Plaintiff began his employment with Defendant in June 2002 as Controller. Plaintiff's employment with Defendant was at all times on an at-will basis and Defendant could terminate him at any time, with or without cause or notice.

4. Steven Roach, one of Defendant's owners and its Chief Operations and Financial Officer, created and operates a separate business, Sunfire Patio & Spa. Plaintiff believed that the operation of Sunfire created a conflict of interest with Defendant, that Defendant lost business to Sunfire and that Sunfire had some of Defendant's inventory in its possession and reported his beliefs to members of Defendant's Board and Defendant's other owners, Scott and Stanley Roach. Plaintiff also believed that Sunfire was "improperly borrowing" Defendant's employees and reported his belief to Scott and Stanley Roach.

5. Plaintiff alleges the following in Count I of his Complaint in attempted support of his claim for wrongful termination in violation of public policy:

- He was terminated in retaliation for his report that Steve Roach was engaging in alleged "improper conduct detrimental to the company" and conduct "in breach of Mr. Roach's fiduciary duties owed to the company and that amounted to misappropriation of company funds" in alleged violation of state statutory and common law (Complaint at ¶¶ 23-24); and
- His termination "violated substantial public policy principles governing fiduciary relationships, misappropriation of funds and corporate requirements and standards" (Complaint at ¶ 25).

6. Plaintiff claims he is entitled to various damages as a result of his termination, including punitive damages (Complaint at ¶¶ 26, 29).

7. On January 13, 2009, the Defendant filed this Motion for Summary Judgment.

8. On or around January 30, 2009, the Plaintiff filed his Response.

9. On or around February 16, 2009, the Defendant filed its Reply.

CONCLUSIONS OF LAW

“Motion for summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be tried and inquiry concerning facts is not desirable to clarify application of law. Rules Civ. Proc., Rule 56(c).” *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

A. **Plaintiff Was an At-Will Employee and No Substantial Public Policy Exists to Warrant an Exception to the At-Will Relationship**

It has been a long-established rule that, unless employment is for a fixed term, it is presumed that an employee is an at-will employee. *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 744, 559 S.E.2d 713, 717 (2001). Therefore, absent some exception to the at-will doctrine, an employee may be terminated at any time, with or without cause. *Feliciano*, 210 W. Va. at 744-45, 559 S.E.2d at 717-18. Moreover, in this case, Plaintiff specifically acknowledged that his employment was at-will (See June 7, 2002 acknowledgement).

Since 1978, the West Virginia courts have recognized a public policy exception to the at-will rule. *Harless v. First Nat. Bank in Fairmont*, 162 W. Va. 116, 124 (1978), 246 S.E.2d 270, 275. The exception was stated by the *Harless* Court as follows:

The rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer’s motivation for the discharge contravenes some **substantial public policy** principle, then the employer may be liable to the employee for damages occasioned by the discharge.

Id. (emphasis added). The determination of the existence of a substantial public policy is “ ‘a question of law, rather than a question of fact for a jury.’ ” *Feliciano*, 210 W. Va. at 744, 559 S.E.2d at 717. Therefore, the question of whether or not Plaintiff in this matter was terminated in contravention to a substantial public policy of West Virginia may be properly decided by this Court on summary judgment.

In order to identify sources of public policy to determine whether a retaliatory discharge has occurred, West Virginia courts are to “ ‘look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.’ ” *Bowe v. Charleston Area Med. Center, Inc.*, 189 W. Va. 145, 149, 428 S.E. 2d 773, 777 (1993). It has been noted that courts are to “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, 141, 506 S.E.2d 578, 584 (1998). In addition, “despite the broad power vested in the courts to determine public policy,” courts are to “exercise restraint” when using such power. *Tiernan*, 203 W. Va. at 141, 506 S.E.2d at 584.

In order for a public policy to be substantial, it “must not just be recognizable as such but must be so widely regarded as to be evident to employers and employees alike.” *Feliciano*, 210 W. Va. at 745, 559 S.E.2d at 718. More specifically, a “[p]ublic 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*, 210 W. Va. at 745, 559 S.E.2d at 718. The rationale behind the public policy exception is that “protecting the employee from discharge is necessary to uphold a substantial public interest.” *Wounaris v. West Virginia State Coll.*, 214 W. Va. 241, 247, 588 S.E.2d 406, 412 (2003).

Based upon these principles, the Court in *Feliciano* recognized the following to be necessary for proof of a claim of relief for wrongful discharge in contravention of substantial public policy:

- (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);

- (2) [Whether] dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element);
- (3) [Whether t]he plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element); and
- (4) [Whether t]he employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

210 W. Va. at 750, 559 S.E.2d at 723 (citations omitted) (emphasis added).

Plaintiff in this action has alleged that he was retaliated against and terminated in violation of public policy. Therefore, Plaintiff is required to prove as an element of his cause of action that a clear and substantial public policy actually existed. The only allegations regarding any alleged public policy that Plaintiff has set forth in support of his claim for wrongful termination do not involve any substantial public policy. As set forth above, Plaintiff claims he was terminated in retaliation for his report that Steve Roach was engaging in alleged "improper conduct detrimental to the company" and conduct "in breach of Mr. Roach's fiduciary duties owed to the company and that amounted to misappropriation of company funds" in alleged violation of state statutory and common law (Complaint at ¶¶ 23-24). He further claims that his termination "violated substantial public policy principles governing fiduciary relationships, misappropriation of funds and corporate requirements and standards." (Complaint at ¶ 25) (emphasis added).

As evidenced by the allegations of the Complaint itself, Plaintiff's action against Defendant does not involve a claimed violation of any public policy or anything that may be injurious to the public good, but merely an alleged violation of the financial interests of a private corporation. Steve Roach, as a private employee, does not owe a fiduciary duty to the public at

large. See *United States v. ReBrook*, 837 F. Supp. 162, 171 (S.D. W.Va. 1993). Instead, as an officer of Defendant, a corporation, Steve Roach is required to act in the best interests of the corporation, a private entity.

Indeed, other courts have specifically held that claims like Plaintiff's did not involve a public policy that constituted an exception to the at-will employment doctrine and upon which a wrongful discharge claim could be based. In *Schwenke v. Wayne-Dalton Corp.*, 2008 Ohio App. LEXIS 1236, ** 2, 4-7 (Ohio. Ct. App. Mar. 27, 2008), the plaintiff-employee alleged that he questioned the president and chief financial officer of the defendant-employer about allegedly inappropriate accounting practices and misappropriations of corporate assets and was terminated as a result. The plaintiff-employee alleged that his termination violated public policy because such a termination "allows a company and/or individuals that are improperly and/or wrongfully conducting business to discharge an employee who raises concerns and/or objections to potential unlawful activity." *Schwenke*, 2008 Ohio App. LEXIS at ** 2, 7-8.

The Court of Appeals of Ohio agreed with the defendant-employer and found that the trial court should have entered summary judgment in favor of the defendant-employer, since plaintiff's allegations did not satisfy the "clarity" element needed for a public policy exception to the at-will doctrine, as the plaintiff-employee did not establish that his termination was in violation of a clear public policy. *Schwenke*, 2008 Ohio App. LEXIS at **17-18. The Ohio court noted:

[the plaintiff-employee] did not identify any constitution, statute or regulation that might provide a basis for his claims. Nor did [he] cite or present the trial court with any legal authority in support of his argument that his termination violated public policy. [He] merely alleged that he questioned [the defendant-employer] about alleged inappropriate accounting practices and misappropriation of corporate assets and was fired and that his firing violated public policy.

Schwenke, 2008 Ohio App. LEXIS at ** 15-16. The concurring judge noted: “I know of no case law, nor has Appellee identified any, which has recognized the breach of that fiduciary duty rises to the level of a matter of public policy.” *Id.* at 19.

Plaintiff correctly states in his Response that the West Virginia Supreme Court of Appeals has never held that terminating an employee for reporting criminal conduct violates a substantial public policy that would provide an exception to the at-will doctrine and a basis for his wrongful discharge claim. In other jurisdictions, any such exception based upon criminal activity has been limited to situations where an employee refuses to engage in illegal activity. *DeGirolamo v. Sanus Corp. Health Systems*, No. 90-2146, 1991 U.S. App. LEXIS 12281, * 5 (4th Cir. June 17, 1991) (recognizing that abusive discharge tort is limited in scope and only applies “ ‘to situations involving the actual refusal to engage in illegal activity . . .’ ”) (applying Maryland law); *Jordan v. Town of Front Royal*, No. 5:07CV00101, 2008 U.S. Dist. LEXIS 46533, *5-6 (W.D. Va. June 16, 2008) (Supreme Court of Virginia finds circumstance in which claims sufficient to satisfy public policy exception when employer terminates employee for refusing to commit a criminal act); *Greene v. Quest Diagnostics Clinical Laboratories, Inc.*, 455 F. Supp.2d 483, 489 (D. S.C. 2006) (South Carolina Supreme Court recognizes action for wrongful discharge when employer requires employee to violate a criminal law as a condition of maintaining employment). The fact that the West Virginia Supreme Court has required a “substantial” public policy to warrant an exception to the at-will employment rule demonstrates the narrowness of such exception and such exception should not be broadened.

Courts have also held that the public policy exception does not apply where employees internally report alleged illegal conduct to their employers. *See Greene*, 455 F. Supp.2d at 490-91. In *Greene*, the court found that the plaintiff was unable to point to any law or other source

that constituted a clear public policy “supporting the rights of employees to internally report potentially illegal conduct to their superiors,” and granted the defendant-employer’s motion for summary judgment. 455 F. Supp.2d at 490, 491. Plaintiff alleges that he reported Steve Roach’s conduct internally to “the other principals in the company,” Scott and Stan Roach (Response at p. 3). Plaintiff did not, however, make any report to any outside authority, including law enforcement, regarding any alleged criminal or other conduct by Steve Roach.

Therefore, since no genuine issue of material fact exists as to whether a public policy exception to the at-will doctrine exists, summary judgment is granted in favor of the Defendant.

B. Count II is Dismissed Because There Is No Independent Cause of Action For Punitive Damages

Plaintiff’s claim for wrongful termination in violation of public policy fails as a matter of law. Thus Count II must be dismissed because Plaintiff has not asserted any other claims against Defendant in his Complaint, and West Virginia law does not recognize an independent cause of action for punitive damages. *Miller v. SMS Schloemann-Siemag, Inc.*, 2003 U.S. Dist. LEXIS 2394, * 12 (S.D. W. Va. Feb. 21, 2003) (citing *Cook v. Heck’s, Inc.*, 176 W. Va. 368, 376 n. 3, 342 S.E.2d 453, 461 n. 3 (1986)). *See also, Susko v. Cox Enterprises., Inc.*, 2008 U.S. Dist. LEXIS 69901, ** 11-12 (N.D. W. Va. Sept. 16, 2008) (“West Virginia law clearly prohibits the plaintiffs from asserting a distinct cause of action for punitive damages”; thus, court held: “if no defamation or other liability exists, plaintiffs cannot seek an award of punitive damages”). Punitive damages are, rather, a form of relief. *Id.* Therefore, since no genuine issue of material fact exists as to whether a claim for punitive damages may proceed independently of a cause of action, summary judgment is granted.

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court ORDERS that the Circuit Clerk shall retire this matter from the docket.

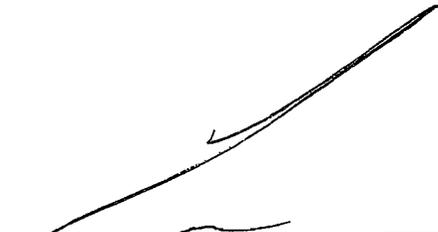
The Circuit Clerk shall distribute attested copies of this order to the following counsel of record:

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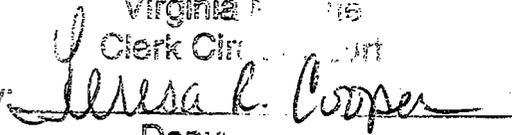
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CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

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ATTEST

Virginia M. The
Clerk Circuit Court
By: 
Deputy