

**IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

TRICIA ROTH and BRIAN ROTH,

Appellants

vs.

DEFELICECARE, INC., a West  
Virginia Corporation, and LESLIE  
DEFELICE, individually,

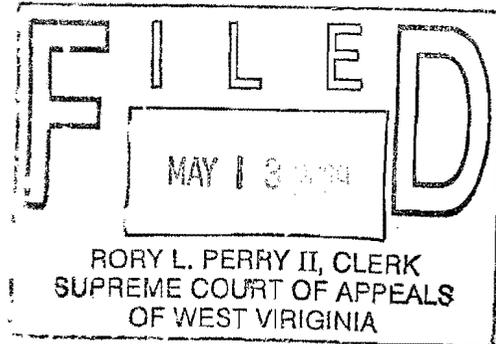
Appellees

Appeal No.: 34805

Ohio County Circuit Court  
Civil Action No.: 08-C-236

**APPELLANTS BRIEF**

To: The Honorable Justices of the Supreme Court of Appeals of the State of West Virginia:



Counsel for Appellants:  
Ronald W. Zavolta (W.Va. State Bar ID #8739)  
**ZAVOLTA LAW OFFICE**  
1605 Warwood Avenue  
Wheeling, WV 26003  
Telephone: (304) 217-2010

## Table of Contents

	<u>Page</u>
I. Kind of Proceeding and Nature of the Ruling	2 - 3
II. Statement of Facts	4 - 6
III. Assignments of Error	7
IV. Points and Authorities Relied Upon	8 - 15
V. Standard of Appellate Review	16
VI. Discussion of Law	17 - 29
VII. Relief Requested	30

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I.

**PROCEEDINGS AND NATURE OF RULINGS**

This egregious employment case arose as a direct and proximate result of Plaintiff Tricia Roth's employment and wrongful discharge in June 2006 by Defendant DeFeliceCare, Inc. and Defendant Leslie DeFelice.

A Complaint was timely filed and properly served in June 2008. The Complaint contained eight counts, specifically Count One, **Hostile Work Environment**; Count Two, **Wrongful Termination**; Count Three, **Employment Discrimination**; Count Four, **Retaliatory Discharge**; Count Five, **Common Law Reprisal**; Count Six, **Intentional Infliction of Emotional Distress / Tort of Outrageous Conduct**; Count Seven, **Punitive Damages**; and Count Eight, **Damages**.

The Defendants filed a Motion seeking to Dismiss this action pursuant to West Virginia Rules of Civil Procedure 12 (b) (6) for failure to state a claim.

Appellants / Plaintiffs timely filed a written response in opposition to Defendants Motion to Dismiss. Oral arguments of the parties were heard on August 29, 2008, and the trial judge granted Defendants Motion to Dismiss for failure to state a claim as to all eight counts of the Complaint.

It is the Appellants position that the trial Court erred in granting Defendants Motion to Dismiss all eight counts of Appellants Complaint. Appellants Complaint meets the well recognized standards of Notice Pleading. Additionally, application of the requisite legal analysis requires the Court to accept all allegations in Appellants Complaint as true.

Appellant timely filed a Petition for Appeal on February 12, 2009. Appellee timely filed a Response in Opposition to Petitioners Petition for Appeal on March 13, 2009. This Petition was granted by this Court on April 8, 2009.

## II.

### STATEMENT OF FACTS

Appellant, Tricia Roth, was hired as a Respiratory Therapist by Appellees DeFeliceCare, Inc. and Leslie DeFelice on or about January 2005. Appellant was an at will employee and her job performance was evaluated on a yearly basis. She was evaluated at the standard to above standard level on or about January 2006. At no time was Appellant written up or disciplined for poor performance during her one and a half years of employment with Appellee. Appellant, and her family were scheduled for summer vacation in June 2006. Prior to departing for her scheduled vacation, Appellee Leslie DeFelice, President and Chief Executive Officer of DeFeliceCare, Inc. contacted Appellant and directed and required her to stop by the office located at 410 South Front Street, Wheeling, Ohio County, West Virginia prior to commencing her vacation.

Appellant, in compliance with Appellee's directive stopped by the office on Saturday afternoon prior to leaving for vacation. Appellant entered Appellee's unlocked business front doors during business hours and proceeded to walk up the steps to the office area. Appellant observed Appellee's Leslie DeFelice partially unclothed, pants unbuttoned and his hands all over employee Michelle Kelly. Clearly, Appellee Leslie DeFelice and Michelle Kelly were engaged in a sexual act. The Appellant's observations were un-welcomed, obscene and inappropriate behavior by Appellee Leslie DeFelice and his employee, Michelle Kelly.

Appellee DeFelice hurriedly buttoned his pants, took his hands off employee

Kelly's person and ordered, in a harsh, aggressive tone, Appellant into a nearby conference room. Appellant followed Appellee's directives and Appellee entered the conference room, closed the doors and pointed his finger at Appellant stating in a loud, aggressive and intimidating tone **"you did not see anything."**

Appellant, in fear, frightened and severely intimidated responded, **"Les, I did not see anything."**

Appellee then stated **"no you don't understand, I can have your license, you did not see anything."** This statement was actually louder, more aggressive, more threatening and more intimidating than Appellee's prior statement.

Appellant responded, **"I would never say anything to anyone."**

Appellant was mortified, embarrassed, shaken and in fear for her job, her respiratory therapist license and her personal safety as a direct result of her aforementioned observations of Appellee Leslie DeFelice and his employee Michelle Kelly, in a sexually compromising position at the work place. The language, tone, manner and temperament of Appellee Leslie DeFelice was threatening, accusatory and emotionally overwhelming to Appellant.

Appellant and family returned from their scheduled vacation approximately seven to ten days after the incident at issue. Appellee had left a recorded telephone message for Appellant to immediately report to DeFelice upon her return from vacation. Once again, in compliance with Appellee's directives, she immediately contacted DeFelice and was ordered to report to his office location at 410 South Front Street, Wheeling, Ohio County West Virginia.

Appellant entered the office location and was directed by Appellee Leslie DeFelice to the conference room. Appellee Leslie DeFelice indicated and stated the following:

**"I don't think your hair style is professional therefore your fired"**

Appellant was in shock and indicated, **"Les, I never said anything and I have had the same hair style for a year and a half."**

Appellee then indicated, **"you don't understand, I don't think you dress professionally, therefore your fired."**

Appellant was upset and shocked with Defendant Leslie DeFelice's outrageous and atrocious statements and indicated **"Les, I have dressed the same way throughout my employment."**

Appellee stated **"your fired!"**

III.

**ASSIGNMENT OF ERROR**

A. The Trial Court erred in Granting Defendants Motion to Dismiss all Counts of Plaintiffs Complaint pursuant to West Virginia Civil Procedure Rule 12 (b) (6). Plaintiffs Complaint including the following Count;

1. Hostile Workplace
2. Wrongful Termination
3. Employment Discrimination
4. Retaliatory Discharge
5. Common Law Reprisal
6. Intentional and/or Reckless Infliction of Emotional Distress/Tort of Outrageous Conduct
7. Punitive Damages
8. Damages

IV.

**POINTS AND AUTHORITIES RELIED UPON**

**A.**

**Syllabus Points**

1. "The trial court in appraising the sufficiency of a complaint on a Rule 12 (b) (6) motion, should not dismiss the complaint unless it appears beyond doubt that the Plaintiff can provide **no set of facts in support of his claim which would entitle him to relief**" Syl. Pt. 3 Chapman v. Kane Transfer Company 160 W.Va. 530, 236 S.E. 2d 207 (1977) quoting Conley v. Gibson 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L Ed. 2<sup>nd</sup> 80 (1957).
2. Dismissal for Failure to State a Claim is only proper where, "it is clear that no relief could be granted **under any set of facts** that could be proved consistent with the allegation" Hishon v. King & Spalding, 467 U.S. 69, 73 104 S. Ct. 2229, 2232, 81 L Ed. 2d 59, 65 (1984) citing Conley v. Gibson 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L Ed. 2<sup>nd</sup> 80 (1957).
3. An Appellant Court is not limited to the legal grounds relied upon by the Circuit Court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support. Murphy v. Smallridge, 196 W.Va. 35, 468 S.E. 2d 167 (1996).
4. For the purpose of Motion to Dismiss, Complaint is construed in light most favorable to Plaintiff, and its **allegations are to be taken as true**. West Virginia Civil Procedure Rule 12 (b) (6), John W. Lodge Distributing Co.

- Inc., v. Texaco, Inc. 161 W.Va. 603, 245 S.E. 2d 157 (1978).
5. Pleadings are liberally construed so as to do **substantial justice**. West Virginia Rules Civil Procedure Rule 8(f) John W. Lodge Distributing Co. Inc., v. Texaco, Inc. 161 W.Va. 603, 245 S.E. 2d 157 (1978).
  6. If complaint states a claim upon which relief can be granted **under “any” legal theory**, motion to dismiss must be denied. West Virginia Civil Procedure Rule 12 (b) (6) John W. Lodge Distributing Co. Inc., v. Texaco, Inc. 161 W.Va. 603, 245 S.E. 2d 157 (1978).
  7. Trial court should **“not” dismiss complaint** merely because it doubts Plaintiff will prevail in action and whether Plaintiff can prevail is a matter properly determined on basis of “proof” and not merely pleadings. West Virginia Civil Procedure Rule 12 (b) (6) John W. Lodge Distributing Co. Inc., v. Texaco, Inc. 161 W.Va. 603, 245 S.E. 2d 157 (1978) and Federal Practice and Procedure, Civil s 1216 (1969).
  8. Motion to Dismiss for Failure to State Claim should be viewed with disfavor and rarely granted. West Virginia Civil Procedure Rule 12 (b) (6) John W. Lodge Distributing Co. Inc., v. Texaco, Inc. 161 W.Va. 603, 245 S.E. 2d 157 (1978).
  9. The trial court’s inquiry is directed to whether the allegations constitute a statement of a claim under West Virginia Civil Procedure Rule 8 (a) Chapman v. Kane Transfer Company 160 W.Va. 530, 236 S.E. 2d 207 (1977) quoting Conley v. Gibson 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L Ed.

2<sup>nd</sup> 80 (1957).

10. A pleading which sets forth a claim for relief.....shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief. West Virginia Civil Procedure Rule 8 (a) John W. Lodge Distributing Co. Inc., v. Texaco, Inc. 161 W.Va. 603, 245 S.E. 2d 157 (1978).
11. In view of the liberal policy of the rules of pleadings with regard to the construction of Plaintiffs complaint and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which Plaintiff must meet and overcome in a Rule 12 (b) (6) motion is a liberal standard and few complaints fail to meet it. The Plaintiffs burden in resisting a motion to dismiss is a relative light one. Williams v. Wheeling Steel Corporation, 266 F. Supp. 651 (N.D.W.V. 1967) and John W. Lodge Distributing Co. Inc., v. Texaco, Inc. 161 W.Va. 603, 245 S.E. 2d 157 (1978).
12. Review by Supreme Court Appeals is limited to sufficiency of a complaint, and this Supreme Court must accept as true all well-pled facts and must draw all reasonable inferences in favor of dismissed party. State of West Virginia, ex. rel. Warren McGraw, Jr. v. Runyon Pontiac-Buick, Inc. 194 W.Va. 770, 461 S.E. 2d 516 (1995) West Virginia Civil Procedure Rule 12 (b) (6).
13. On appeal from dismissal for failure to state a claim, any facts asserted in

memorandum in opposition to motion to dismiss but not contained in the complaint are relevant to the extent that they could be proved consistent with allegations. State of West Virginia, Ex. Rel. Warren McGraw, Jr. V. Runyon Pontiac-Buick, Inc. 194 W.Va. 770, 461 S.E. 2d 516 (1995) West Virginia Civil Procedure Rule 12 (b) (6).

14. Although entitlement to relief must be shown in complaint, Plaintiff is not required to set out facts upon which claim is based. State of West Virginia, Ex. Rel. Warren McGraw, Jr. V. Runyon Pontiac-Buick, Inc. 194 W.Va. 770, 461 S.E. 2d 516 (1995) West Virginia Civil Procedure Rule 12 (b) (6).
15. A claim for retaliatory discharge based on alleged sex discrimination or sexual harassment does not require proof of the underlying claim of sexual discrimination or sexual harassment. Kalany v. Campbell, et. al. 220 W. Va. 50, 640 S.E. 2d 113.
16. It is against the public policy of the State for an employer to retaliate against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Acts and West Virginia's Annotated West Virginia Code, 5-11-1 et. seq. Kalany v. Campbell, et al. 220 W. Va. 50, 640 S.E. 2d 113. Syl Pt. 11 Hanlon v. Chambers 195 W.Va. 99, 464 S.E. 2d 741 (1995).
17. Discharged employee may maintain a common law claim for retaliatory discharge against employer based on alleged sex discrimination or sexual

harassment in employment that contravenes the public policy of this State articulated in the West Virginia Human Rights Act, Syl. Pt. 8 Williamson v. Greene, 200 W.Va. 421, 490 S.E. 2d 23 (1997), West Virginia Code, 5-11-1 et seq.

18. Sexual harassment cases are often inherently difficult to prove because of the he said / she said nature of the case. In recognition of this difficulty of proof, a claim for retaliatory discharge does not require proof of the underlying claim of sexual harassment or sexual discrimination. Syl. Pt. 4 Frank's Shoe Store v. West Virginia Human Rights Commission. 179 W. Va. 53, 365 s.E. 2d, 251 (1986) Kalany v. Campbell, et al. 220 W. Va. 50, 640 S.E. 2d 113.
19. Environment of employee bringing hostile environment sexual harassment under West Virginia Human Rights Act must be considered under all circumstances, taken as a whole. West Virginia Code 5-11-9 (7).
20. To establish claim for sexual harassment under West Virginia Human Rights Act, based on hostile or abusive work environment, employee must prove that subject conduct was:
  - ( a) Unwelcomed;
  - ( b) Conduct based on employee's sex;
  - ( c) Conduct sufficiently severe or pervasive to alter employee's conditions of employment and create an abusive work environment; and
  - ( d) Conduct was imputable on some factual basis to employer. West

Virginia code 5-11-1 et. seq.

Syl. Pt. 5, Hanlon v. Chambers, 195 W.Va. 99, 464 S.E. 2d 741. Syl. Pt. 3, Conrad v. WV Regional Jail and Correctional Facility Authority and Edward Rudloff, 198 W.Va. 362, 480 S.E. 2d. 801 (1996).

21. To constitute harassment under West Virginia Human Rights Act, conduct must be unwelcomed in sense that employee did not solicit or incite it, and in the sense that employee regarded conduct as undesirable or offensive.  
West Virginia Code 5-11-1 et. seq.
22. West Virginia Human Rights Act imposes a duty on employers to ensure that work places are free of sexual harassment from whatever source.  
West Virginia Code 5-11-1 et . seq.
23. "The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for this discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge." Syl. Pt.1 Harless v. First National Bank in Fairmont, 162 W.Va. 116, 246 S.E. 2d 270 (1978), Syl. Pt. 5, Williamson v. Greene, et al. 200 W.Va. 421, 490 S.E. 2d 23 (1997).

B.

TABLE OF AUTHORITIES

CASES

Chapman v. Kane Transfer Company, 160 W.Va. 530, 236 S.E. 2d 207 (1977).

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L ED 2d 80 (1957)

Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L Ed 2d 59, 65 (1984) citing Conley,

Murphy v. Smallridge, 196 W.Va. 35, 468 SE 2d 167 (1996)

John W. Lodge Distributing Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 245 SE 2d 157 (1978).

Williams v. Wheeling Steel Corp., 266 F. Supp 651 (N.D.W.Va. 1967)

State of West Virginia, ex. rel. Warren McGraw, Jr. v. Runyon Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E. 2d 516 (1995)

Kalany v. Campbell, et al. 220 W.Va. 50, 640 S.E. 2d. 113 (2006)

Hanlon v. Chambers, 195 W.Va. 99, 464 S.E. 2d 741 (1995)

Conrad v. Regional Jail & Correctional Facility Authority and Edward Rudloff, 198 W.Va. 362, 480 S.E. 2d 801 (1996)

Harless v. First National Bank in Fairmont, 162 W.Va. 116, 246 S.E. 2d 270 (1978)

Williamson v. Greene, et al. 200 W.Va. 421, 490 S.E. 2d 23 (1997)

Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W.Va. 53, 365 S.E. 2d 251 (1986)

## **STATUTES**

West Virginia Civil Procedure Rule 12 (b) (6)

West Virginia Civil Procedure Rule 8 (a)

West Virginia Civil Procedure Rule 8 (f)

West Virginia Code § 5-11-1 et seq.

West Virginia Code § 5-11-9 (7)

West Virginia Code § 5-11-9 (7) ( c)

## **AUTHORITIES**

Federal Practice and Procedure, Civil s 1216 (1969).

V.

**STANDARD OF APPELLATE REVIEW**

The Supreme Court reviews this matter granting a 12 (b) (6) Motion to Dismiss under a de novo standard of review. Murphy v. Smallridge, 196 W.Va. 35, 468 S.E. 2d 167 (1996).

## VI.

### DISCUSSION OF LAW

This sole legal issue of this Appeal concerns whether or not the trial judge's granting of Defendants Motion to Dismiss pursuant to Rule 12 (b) (6) and Order dismissing all eight Counts of Plaintiffs Complaint was proper.

Other legal issues addressed herein were part of the trial judge's Order, the Motion to Dismiss Hearing transcript, Defendants oral arguments and/or Plaintiffs Memorandum in Opposition to Defendants Motion to Dismiss.

As this Supreme Court is well aware, "The trial court in appraising the sufficiency of a complaint on a Rule 12 (b) (6) motion, should not dismiss the complaint unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief" Syl. Pt. 3 Chapman v. Kane Transfer Company 160 W.Va. 530, 236 S.E. 2d 207 (1977) quoting Conley v. Gibson 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L Ed. 2<sup>nd</sup> 80 (1957).

Plaintiff will briefly review each Count of Plaintiffs Complaint. However, its important to understand the frame work of civil complaints within the confines of West Virginia Rules of Civil Procedure prior to embarking on an examination of Plaintiffs individual Complaint Counts.

Under the West Virginia Rules of Civil Procedure, all that a pleader is required to do is set forth sufficient information to outline elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a Complaint merely because it doubts that the Plaintiff will prevail in the action and

whether the Plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings. Wright v. Miller, Federal Practice and Procedure Civil s 1216 (1969).

The trial court legal analysis must focus on West Virginia Civil Procedure Rule 8(a) which in pertinent part indicates;

“A pleading which sets forth a claim for relief...shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief...”

The legal analysis for the trial judge on a 12(b)(6) motion requires inquiry as to whether the allegations in the complaint constitute a statement of a claim under Rule 8 (a) Chapman v. Kane Transfer Co., 236 S.E. 2d 207, 212 (1977). Essentially, Plaintiffs complaint, to constitute a sufficient statement of claim under a Rule 8 (a) analysis merely requires adequate information outlining elements of the claim or permits inferences to be drawn that the elements exist.

Plaintiffs complaint and eight individual Counts meets this requirement under West Virginia Civil Procedure Rule 8 (a). The requisite elements and/or the reasonable inferences drawn therefrom, provide adequate notice pleading to the Defendant.

The trial court went well beyond the permissible legal precepts in granting Defendant's Motion to Dismiss pursuant to West Virginia Civil Procedure Rule 12 (b) (6). Wright v. Miller, Federal Practice and Procedure Civil s 1216 (1969) addressed this very issue indicating,

...the trial court should not dismiss a complaint merely because it doubts that the Plaintiff will prevail in the action and whether the Plaintiff can prevail in a matter properly determined on the basis of proof and not merely on the pleadings.

The first Count of Plaintiffs Complaint is for **Hostile Work Environment**. The only contention by defense counsel in opposition to this count was that Plaintiff could not demonstrate anything took place because Plaintiff is a female. Judge Gaughan's Order also documents and adopts Defendants position.

It is Appellants position that the Court has misapplied the law pertaining to Rule 12 (b) (6), Rule 8 (a) and applicable case law. Plaintiffs are not required to provide all allegations and elements to prevail against Defendants Motion to Dismiss.

Appellants are mindful that applicable law does require them to set out facts upon which a claim is based, but only an entitlement to relief must be demonstrated.

**State of West Virginia v. Ex. Rel. Warren McGraw, Jr. V. Runyon Pontiac - Buick, Inc.** 194 W.Va. 770, 461 S.E. 2d 516 (1995). However, Appellants strenuously maintain the Complaint and allegations more than adequately demonstrate entitlement to relief for Hostile Work Environment. Specifically, Appellant was subjected to (1) unwelcome conduct i.e. the observation of her boss and fellow female employee in a sexually explicit position within the work place. Appellant was required and directed to present to said work place by Leslie DeFelice, her supervisor and President of DeFelice Care, Inc. Therefore, Leslie DeFelice had actual notice and knowledge that Ms. Roth was presenting to work at his direction.

Additionally, it is reasonable to conclude that a similarly situated male employee would not have been subjected to summarily firing under these factual circumstances at issue. All too often, males view such inappropriate, unwelcomed sexually explicit harassing acts and behaviors as a sexual conquest to be admired. It is unclear, how

the Circuit Court Judge could dismiss the Hostile Work Environment Count pursuant to a 12 (b) (6) Motion, taking into consideration Appellees only contention was that the conduct in question was not based on gender.

The second Count of Plaintiffs Complaint is for **Wrongful Termination**. Curiously, this Count is not specifically addressed by the trial Court's order. The Order does reference in a convoluted fashion that the allegations in Count Two will be separately addressed in the Court Order pertaining to Count Four and Count Five.

Appellants again reiterate, under a Rule 8(a) and 12 (b) (6) analysis, along with applicable case law and Plaintiffs Memorandum in Opposition to Defendants Motion to Dismiss that Appellant has sufficiently filed a Complaint adequately advising Appellees of their position and demand for judgment.

The sole argument Appellee puts forth in opposition to Appellants wrongful Termination Count is a failure to show a substantial public policy being violated.

Appellant counsel agrees with Appellees counsel that the West Virginia Supreme Court looks "to establish precepts in the West Virginia constitution, legislative enactments, legislative approved regulations and judicial opinions," concerning public policy issue in employment cases. Birthisel v. Tri Cities Health Services Corp. 188 W.Va. 371, 377 (1992).

This has resulted in the West Virginia Supreme Court consistently examining other jurisdictions throughout the country for guidance on wrongful discharge cases involving substantial public policy allegations. See Wounaris v. West Virginia State College, 214 W.Va. 241, 247, 588 S.E. 2d 406, 412 (W.Va. 2003); Harless v. First National Bank in Fairmont, 162 W.Va. 116, 246 S.E. 2d 270 (1978).

Appellants Response in Opposition to Appellee's 12 (b) (6) Motion provided the Circuit Court with two Virginia Supreme Court cases, Mitchem v. Counts, 259 Va. 179 523 S.E. d 246 (2000); Watson v. Paramount Mgf., LLC, 2006 WL 2995196 (W.D.Va.), dealing specifically with the substantial public policy issue.

The Virginia Supreme Court held, criminal statutes involving fornication, lewd and lascivious behavior are sufficient public policy to serve as a basis for wrongful termination. Holding, Plaintiff stated a valid claim for wrongful discharge as the criminal statutes were enacted to protect the general public and the Plaintiff was a member of the class of persons the statutes were designed to protect.

There is a substantial public policy in society against public nudity and performing sexual acts in public. See West Virginia Code § 61-8-9. Defendant Roth is in the class of persons the public policy was designed to protect.

The West Virginia Supreme Court of Appeals has noted that the outlines of "public policy are elusive, and described the concept as both "nebulous" and "hard to define" see Kanagy v. Fiesta Salons, Inc., 208 W.Va. 526, 529, 541 S.E. 2d, 616, 619 (200); Yoho v. Triangle PWC, Inc., 175 W.Va. 556, 366 S.E. 2d 204, 209 (1985).

Additionally, the law in West Virginia permits a discharged employee to maintain a claim for wrongful discharge against an employer based on allegations of sex discrimination and/or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, West Virginia Code 5-11-1 et seq. Kalany v. Campbell, 220 W.Va. 50, 52, 640 S.E. 2d 113, 115 (W.Va. 2006) Syl. Pt. 8 Williamson

v. Greene, 200 W.Va. 421, 490 S.E. 2d 23 (1997).

The West Virginia Code 5-11-9 (7) (c) (1992), prohibits an employer or other person from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Act. See Syl. Pt. 11, Hanlon v. Chambers, 195 W.Va. 99, 103, 464 S.E. 2d 741, 745 (W.Va. 1995).

Furthermore, as articulated by the West Virginia Supreme Court in Kalany at page 54, the Plaintiff could maintain a Harless type cause of action even if Plaintiff was unable to prove a sexual discrimination and/or sexual harassment allegations.

Finally, as previously referenced in Plaintiff's Response Opposing Appellee's 12 (b) (6) Motion, Leslie DeFelice and DeFelice Care, Inc. were involved in similar litigation with similar allegations in 2006, presided over by Judge Martin Gaughan (Suellen Champion v. DeFelice Care Inc., et al., Civil Action No.: 05-C-519). Specifically, the allegations involved Appellee Leslie DeFelice's legendary propensities for womanizing and inappropriate sexual acts and behaviors in the workplace. Appellant Roth's observations of Leslie DeFelice and Michelle Kelly's sexually explicit acts and/or behaviors in 2006, would have not only supported the allegations of Plaintiffs Champion, but would have demonstrated the prior under oath deposition testimony of DeFelice and Kelly to be blatantly untrue. Both indicated under oath in their discovery depositions that no sexual relationship or affair ever occurred. Contrary to Appellees counsel assertion, Plaintiff Champion and counsel were prepared to call Tricia Roth as a rebuttal witness if Appellee's DeFelice and Kelly continued to persist in lying under oath. As this Court is well aware, in West Virginia it is against substantial public policy

to discharge an employee who may be called to give truthful testimony in a legal action. See Syl. Pt. 4, Page v. Columbia Natural Resources, Inc. 198 W.Va. 378, 480 S.E. 2d 817 (1996). It is reasonable to conclude that this may well have been a contributing fact to Appellant Roth's termination. Once again, there can be no dispute as to the factual chronology of these compelling events.

Plaintiffs third Count, alleges **Employment Discrimination** under the West Virginia Humans Rights Act, West Virginia Code § 5 -11 -1 et seq. Appellees and the trial Court Order indicate once again, that Plaintiff was not fired do to her gender.

The Complaint at Count Three specifically alleges Plaintiff Roth as a member of a protected class based on gender (see Plaintiffs Complaint at paragraph number thirty-two). It is apparent that Plaintiffs allegations as to Count Three were not accepted as true. In fact, it appears a misapplication of this fundamental legal principle of law occurred with dismissal of this Count by the trial judge.

Plaintiff's Fourth Count was for **Retaliatory Discharge**. The legal elements required to demonstrate a prima facie case under the West Virginia Human Rights Act requires:

- (1) Employee engaged in a protected activity;
- (2) Employer was aware that employee engaged in a protected activity;
- (3) Employee was subsequently discharged; and
- (4) Discharge followed protected activities within such period of time that the Court can infer a retaliatory motivation;

Appellees counsel only argument in opposition to this Count is that Plaintiff Roth

was not engaged in any protected activity. However, Plaintiffs Memorandum in Opposition to Defendants Motion to Dismiss, as to Plaintiffs Count Four, Retaliatory Discharge, clearly argues Plaintiff can maintain a retaliatory discharge cause of action based on reporting or expressing her displeasure for actions she believes is a violation of the West Virginia Human Rights Act. Kalany v. Campbell, et al. 220 W. Va. 50, 640 S.E. 2d 113, Williamson v. Greene, et al. 200 W.Va. 421, 490 S.E. 2d 23 (1997) Syl. Pt. 8 and Hanlon v. Chambers 195 W.Va. 99, 464 S.E. 2d 741 (1995).

The Complaint allegations indicate Plaintiff engaged in a protected activity (see Complaint, paragraph number thirty-eight). Additionally, the allegations at paragraph number thirteen indicate in part, Defendant Leslie DeFelice threatened Plaintiff Roth with loss of her Respiratory Therapist license and loss of her employment with Defendant DeFeliceCare, Inc. Appellants vigorously maintain the allegations in the Complaint and reasonable inferences which can be drawn there from include but may not be limited to; Plaintiff reporting Defendant Leslie DeFelice's illegal threats concerning her license and adverse testimony against Defendant Leslie DeFelice in the Champion v. DeFeliceCare, Inc., et al. pending case demonstrate her involvement in a protected activity. Therefore, it is Plaintiffs position under applicable law, Plaintiffs Complaint meets the requisite minimum requirements of West Virginia Civil Procedure Rule 8 (a).

Plaintiffs Fifth Count is for **Common Law Reprisal**. The principle of law applicable to this Count involves an employer not being permitted to discharge an employee, including an at will employee, if doing so violates substantial public policy. Harless v. First National Bank in Fairmont, 162 W.Va. 116, 246 S.E. 2d 270 (1978), Syl.

Pt. 5.

Appellees only argument and one adopted by the trial Court's Order dismissing Plaintiff's Complaint focuses on Plaintiffs inability to demonstrate a substantial public policy implication.

Plaintiffs Memorandum in Opposition to Defendant's Motion to Dismiss acknowledges the allegations in Count Two, Wrongful termination are the same as Count Five, Common Law Reprisal. Plaintiff has adequately addressed these issue in Count Two of this petition for Appeal and in Plaintiffs Memorandum in Opposition to Defendants Motion to Dismiss and hereby incorporates the same as if fully restated herein.

Plaintiffs Count Six, **Intentional Infliction of Emotional Distress / Tort of Outrage** requires a showing of the following four elements:

- (1) Defendant conduct was atrocious, intolerable and so extreme and outrageous as to exceed the bounds of decency;
- (2) Acted with intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct;
- (3) That actions of Defendant caused the Plaintiff to suffer emotional distress;  
and
- (4) That the emotional distress suffered by the Plaintiff was so severe that no reasonable person could be expected to endure it. Syl Pt. 3, Travis v. Alcon Laboratories, Inc., 202, W.Va. 369, 504 S.E. 2d 419 (W.Va. 1998).

The Appellees counsel only argument as to dismissal of this Court is that there are no allegations within the Complaint regarding the manner in which the discharge was carried out.

It is Appellants position that a review of the Complaint, Plaintiff's Response in Opposition to Defendants Motion to Dismiss, Oral Arguments at the Hearing in Opposition to Defendants 12 (b) (6) Motion and applicable law demonstrate error in dismissal of this Court of the Complaint.

Plaintiffs strenuously maintain that Plaintiffs Complaint at Count Six meets the minimum requirement of West Virginia Civil Procedure Rule 8 (a). Plaintiffs at paragraph number forty-seven incorporates / re-alleges each and every allegation contained in paragraphs one through forty-six. Specifically, a review of Plaintiffs Complaint allegations at paragraphs numbered ten through twenty, ample information is supplied of the unmistakably atrocious, intolerable and outrageous acts and omissions of Defendant Leslie DeFelice in terminating Plaintiff Tricia Roth.

No reasonable person can take issue with the fact that Appellees conduct was atrocious, intolerable, extreme and outrageous. Said conduct was atrocious, intolerable, extreme and outrageous not only in his sexual acts and behavior but in terminating Appellant in the malicious, outrageous and intolerable manner utilized. Although, Appellee Leslie DeFelice may well have been litigation savvy and/or counseled prior to his futile attempt to discharge Appellant Roth for no cause, the factual chronology of events unmistakably demonstrate the outrageous, malicious and intolerable nature of this termination.

As this Court is well aware, the trial court concluded the wrongful termination was

caused by Appellant's unwanted observations of Appellee Leslie DeFelice and an employee, Michelle Kelly in a sexually compromising position. If somehow the facts at issue in this case and the unmistakable nexus between said facts and Appellant's termination does not demonstrate egregious, outrageous and intolerable conduct to society then Appellant and counsel cannot envision any claim meeting these elements.

It is Appellants position that the trial court judge committed clear error as reflected in the Transcript of the Hearing on Defendant's 12 (b) (6) Motion wherein he states:

"... you know, there's no question she was discharged because she stumbled across them, but everything else. I think does not meet the requirements, did not occur in the time sequence that would be necessary, did not occur for longer period of times."

Appellant finds the Court's articulated position troubling where Judge Gaughan indicates, the events did not take long enough or for longer time periods. Appellant's counsel is aware of absolutely no West Virginia case law that requires the Tort of Outrage to take a minimum length of time. A tort of outrage in an employment setting has no artificial minimum time limits or time period; however, all too often the adverse affects of said outrageous tort stays with innocent victims like Appellant Roth for years and years.

Finally, it is important for this Court to know the employment environment at DeFeliceCare, Inc. at the time of Plaintiff Tricia Roth's wrongful termination.

DeFeliceCare, Inc and Leslie DeFelice were involved in litigation as party Defendants in a 2006 case styled, Suellen Champion v. DeFeliceCare, Inc and Leslie

DeFelice, Civil Action No.: 05-C-519. This case was pending in Ohio County Circuit Court, Judge Gaughan presided at the time of Appellant Roth's wrongful termination.

The allegations by Plaintiff Champion who was Vice President of DeFeliceCare, Inc. included but were not limited to; hostile work environment, sexual discrimination, sexual harassment and retaliatory discharge. All such allegations were levied against Defendant Leslie DeFelice and DeFeliceCare, Inc.

The under oath depositions of Leslie DeFelice and Michelle Kelly were taken in the Champion v. DeFeliceCare, Inc, et al. case well prior to the incident at issue and Appellants egregious termination. The Champion v. DeFeliceCare, Inc, et al. case had not yet resolved and was set for Trial. Defendant Leslie DeFelice and Michelle Kelly in their under oath discovery depositions denied any sexual relationship with each other.

Additionally, the Champion v. DeFeliceCare, Inc, et al. case documented numerous other allegations of inappropriate conduct by Defendant Leslie DeFelice concerning other employees including but not limited to: sexual harassment, sexual discrimination and retaliatory discharge. In fact, Defendant Leslie DeFelice and/or DeFeliceCare, Inc. had put out an Employee Memo concerning the pending Champion v. DeFeliceCare, Inc, et al. litigation.

At no time was Plaintiff Tricia Roth disclosed as a witness by the Defendants in the Champion v. DeFeliceCare, Inc, et al. case. However, as previously referenced, Plaintiff Champion's counsel intended to utilize Tricia Roth as a rebuttal witness in the Champion case contingent upon Defendant Leslie DeFelice and Michelle Kelly lying at trial about their sexual relationship.

Plaintiffs response in Opposition to Defendants Motion to Dismiss addresses the

West Virginia Code (West Virginia Human Rights Act) §5-11-9 (7) (A) (C) which reads as follows:

“It shall be an unlawful discriminatory practice, unless based upon a bonafide occupational qualification, or except where based upon applicable security regulation established by the U.S. or the State of West Virginia or its agencies or political subdivisions.”

“(7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:

(A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;

(C) Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this section or because he or she has filed a complaint testified or assisted in any proceeding under this article.”

Plaintiff maintains the Complaint and its allegations demonstrate a violation of the West Virginia Human Rights Act and/or reasonable inferences that the West Virginia Human Rights Act was violated by the egregious acts and omissions of Defendant Les DeFelice.

VII.

**RELIEF REQUESTED**

Appellants respectfully pray that the trial court's Order of October 15, 2008, granting Appellee's 12 (b) (6) Motion to Dismiss be reversed that the trial court be directed to enter an Order Denying Appellees Motion to Dismiss and this case be placed on Judge Gaughan's active docket in the Ohio County Circuit Court, Ohio County, West Virginia. That construing Appellants Complaint in a light most favorable to Appellant and accepting its allegations as true, Appellants can demonstrate facts in support of their claim entitling them to relief and for such further relief as this Court deems just and proper.

Respectfully Submitted,  
TRICIA ROTH, et ux.



Ronald W. Zavolta (W.Va. State Bar ID #8739)

**ZAVOLTA LAW OFFICE**

1605 Warwood Avenue

Wheeling, WV 26003

Telephone: (304) 217-2010

**IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

TRICIA ROTH and BRIAN ROTH,

Appeal No.: 34805

Appellants.

vs.

Ohio County Circuit Court  
Civil Action No.: 08-C-236

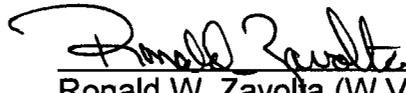
DEFELICECARE, INC., a West  
Virginia Corporation, and LESLIE  
DEFELICE, individually,

Appellees.

**CERTIFICATE OF SERVICE**

Service of **Appellants Brief** was had upon the parties herein by mailing true and correct copies, by United States Mail, postage prepaid, this 12<sup>th</sup> day of May, 2009 to:

Brad Shafer, Esquire  
Steptoe & Johnson, PLLC  
1233 Main Street, Suite 3000  
Wheeling, WV 26003-0751



Ronald W. Zavolta (W.Va. State Bar ID #8739)

**ZAVOLTA LAW OFFICE**

1605 Warwood Avenue

Wheeling, WV 26003

Telephone: (304) 217-2010