

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

**TRICIA ROTH and BRIAN
ROTH,**

Appeal No.: 34805

Appellants

v.

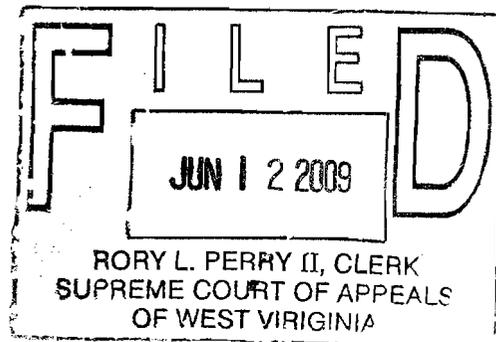
**Ohio County Circuit Court
Civil Action No.: 08-C-236**

**DeFELICECARE, INC. and
LESLIE DeFELICE**

Appellees.

APPELLEES' BRIEF

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



Counsel for Appellees:
Bradley K. Shafer (WV Bar#7794)
1233 Main Street, Suite 3000
P.O. Box 751
Wheeling, WV 26003-0751
(304) 231-0444
(304) 233-0014 Fax
Bradley.Shafer@steptoe-johnson.com

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I.

PROCEEDINGS AND NATURE OF RULINGS

The Appellants filed a Complaint in the Circuit Court of Ohio County West Virginia alleging a variety of employment related causes of action on behalf of Tricia Roth and then a loss of consortium claim for Brian Roth. Appellees filed a WVRCP 12(b)(6) Motion to Dismiss asserting that if everything in the Complaint were true, the Appellants still had not pled a cause of action. The Honorable Judge Martin Gaughan agreed and dismissed the case.

II.

STATEMENT OF FACTS

When reviewing the Complaint in its entirety, it is clear that the Appellants alleged that Tricia Roth interrupted the Respondent Les DeFelice and Michelle Kelly in an act of passion. As a result, the Appellants claimed Tricia Roth was ultimately discharged from her employment.

III.

ASSIGNMENT OF ERROR

The Appellants claim the Rule 12(b)(6) Motion should not have been granted and the case permitted to continue. Appellees state that the Circuit Court issued the correct ruling.

IV.

POINTS AND AUTHORITIES RELIED UPON

TABLE OF AUTHORITIES

CASES

Copley v. Mingo County Bd. of Ed., 195 W.Va. 480, 466 S.E.2d 139 (1995).

Collia v. McJunkin, 178 W.Va. 158, 358 S.E.2d 242, cert. denied, 484 U.S. 944 (1987).

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

Hanlon v. Chambers, 195 W.Va. 99 (1995) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993)).

Harless v. First Nat. Bank in Fairmont, 162 W.Va. 116 (1978).

Cordle v. General Hugh Mercer Corp., 174 W.Va. 321,(1984).

Cordle v. General Hugh Mercer Corp., 174 W.Va. 321, 325 S.E.2d 111 (1984).

Page v. Columbia Natural Resources, Inc., 198 W.Va. 378 (1996).

Birthisel v. Tri-Cities Health Services Corp., 188 W.Va. 371, 377 (1992).

Lilly v. Overnight Transp. Co.,188 W.Va. 538, 542 (1992).

Harless v. First National Bank in Fairmont, 169 W.Va. 673, 289 S.E.2d 692 (1982).

Dzingski v. Weirton Steel Corp., 191 W.Va. 278, 286, 445 S.E.2d 219, 225 (1994).

Farmer v. Carpenters, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.1978), cert. denied, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978).

Viestenz v. Fleming Cos., 681 F.2d 699 (10th Cir.1982), cert. denied, 459 U.S. 972, 103 S.Ct. 303, 74 L.Ed.2d 284 (1982).

Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1430 (7th Cir.1993).

State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc. 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995).

Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339 (1996).

Harrison v. Davis, 197 W.Va. 651, 478 S.E.2d 104 (1996).

Proksel v. Gattis, 41 Cal. App. 4th 1626; 49 Cal. Rptr. 2d 322; 1996 Cal. App. LEXIS 62, (1996)

STATUTES

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

West Virginia Code 61-8-4

West Virginia Code 61-8-9

V.

STANDARD OF REVIEW

This Court's review of the granting of a Rule 12(b)(6) motion to dismiss is de novo. See e.g., *Copley v. Mingo County Bd. of Ed.*, 195 W.Va. 480, 466 S.E.2d 139 (1995).

VI.

DISCUSSION OF LAW

A. Brief review of the Rule 12(b)(6) standard.

At the outset, the Appellees wish to make clear that neither have admitted to any of the claims outlined in the Complaint filed by the Petitioner. Instead, Appellees seek to have upheld the Circuit Court's decision that the Complaint does not state a legally recognizable claim. The purpose of a Rule 12(b)(6) Motion is to test the formal sufficiency of a Complaint. *Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242, cert. denied, 484 U.S. 944 (1987). The question at this stage is whether or not the Appellants presented a set of facts that would entitle them to relief. See e.g. *Chapman v. Kane Transf. Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

Appellees also wish to address the underlying argument in the Appellants' brief regarding notice pleading. If read correctly, Appellants seem to be arguing that West Virginia is a notice pleading state and therefore, only the bare bones of a cause of action need to be pled and the meat and flesh can be added later. While it is true that West Virginia is a notice pleading state, the Appellants still have an obligation to put enough substance in their Complaint to set forth the elements of a claim. This Court said it best when it wrote "Nevertheless, despite the allowance in Rule 8(a) that the plaintiff's statement of the claim be "short and plain," a plaintiff may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint [,]" see *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir.1993), or where the claim is not authorized by the laws of West Virginia." *State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.* 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995). The burden throughout this action has rested with the Appellants to put forward a set of facts showing that they are entitled to relief. This is not the time to hold back or save allegations for use at some later date. The Appellants should have pled what they had at the outset or requested leave to correct the deficiencies. The fact that Appellants instead requested discovery and not a chance to amend the Complaint demonstrates that this case falls into the category of "fumb[ling] around searching for a meritorious claim within the elastic boundaries of a barebones complaint" which this Court does not permit.

B. The Appellants did not state a claim for hostile work environment.

The first claim is hostile work environment. Although not specifically stated in the Complaint, it is clear that the claim is hostile work environment based upon the protected class of gender, given the use of the term "sexual discrimination" in Paragraph 25 of the Complaint. Further, page three of Appellants' brief opposing the motion to dismiss filed in

the court below confirms that the claim meant to be asserted was hostile work environment based on gender. Finally, at no point during argument did the Appellants ever suggest that the hostile work environment claim was based on some other protected class, such as age, race, or national identity.

To state a claim for hostile work environment based upon gender, Tricia Roth must show she was subjected to conduct that was (1) unwelcome; (2) based on her gender; (3) was sufficiently severe or pervasive to alter her conditions of employment and create an abusive work environment; and (4) was imputable on some factual basis to the employer. Syl. Pt. 5, *Hanlon v. Chambers*, 195 W.Va. 99 (1995) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)). As a matter of law, the Complaint fails miserably in stating this claim. The Complaint, in pertinent part, states "...subjecting her to such sexually explicit conduct, threats of loss of license, loss of employment and termination for unwanted sexually explicit conduct she observed..." *Complaint*, ¶ 23. All of this refers to the alleged incident where Tricia Roth walked in on Kelly and DeFelice. *Complaint*, ¶ 11. There is nothing here that took place because Tricia Roth is a female. Therefore, there is no hostile work environment claim.

Appellants have not cited a single solitary case for the proposition that someone who observes on one occasion two co-workers, or more specifically in this case two members of management, engaged in romantic activity has been sexually harassed. Counsel for Appellees could not find any case for that proposition either. Counsel also contacted LEXIS for assistance in formulating a search, and no such case could be found. Indeed, the closest scenario to what has been pled involve claims that an employee who is not having a romantic relationship with a member of management is not treated as favorably as an employee who is having such a relationship. Generally, courts have dismissed these types of allegations as the conduct being

complained of was not a result of the employee's gender, but as a result of the employee's status with the manager. In other words, both male and female employees were treated differently than the employee having the relationship. See e.g. *Proksel v. Gattis*, 41 Cal. App. 4th 1626; 49 Cal. Rptr. 2d 322; 1996 Cal. App. LEXIS 62, (1996). The same reasoning applies here as it is clear on the face of Roth's Complaint that she was treated differently because of what she allegedly saw, not her gender.

C. The Appellants did not state a claim for discharge in violation of substantial public policy.

The second cause of action is labeled "Wrongful Termination." This is Count 2 of the Complaint. The allegations contained in that Count claim Tricia Roth was fired "...in retaliation against Plaintiff Roth's observations of Defendant DeFelice and Michelle Kelly as hereinbefore described." *Complaint*, ¶ 27. Further, Roth claims she was fired in violation of West Virginia public policy.

The allegations contained in Count 2 show an intention to make a claim that Tricia Roth was discharged in violation of a substantial public policy of the State of West Virginia. This is also known as a "Harless claim." To succeed with this claim, the Appellants must establish the existence of a substantial public policy that would be overcome if her discharge were allowed to stand. An employer may not discharge an employee, even one employed "at-will," if doing so violates a substantial public policy. See, *Harless v. First Nat. Bank in Fairmont*, 162 W.Va. 116 (1978); *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321,(1984) (noting that "at will" employees need not be distinguished from other types in determining whether the termination violates public policy).

A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syl. Pt. 1, *Cordle v. General Hugh*

Mercer Corp., 174 W.Va. 321, 325 S.E.2d 111 (1984). But, in this case the Appellants have the burden of establishing the existence of a substantial public policy, *see*, Syl. Pt. 8, *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378 (1996). To identify a substantial public policy, the West Virginia Supreme Court of Appeals looks “to established precepts in [the West Virginia] constitution, legislative enactments, legislatively approved regulations, and judicial opinions,” *Birthisel v. Tri-Cities Health Services Corp.*, 188 W.Va. 371, 377 (1992). “Inherent in the term ‘substantial public policy’ is the concept that the policy will provide specific guidance to a reasonable person,” *Id.* While this Court has addressed numerous *Harless* actions, “[t]he common denominator of all these cases is that they not only involve individual employment rights for the employee, but also further the strong public policy of protection of the general public,” *Lilly v. Overnight Transp. Co.*, 188 W.Va. 538, 542 (1992) (internal citations omitted). This Court should be dismissed because there is nothing in this Complaint that would rise to the level of a substantial public policy being violated.

In response to the call to come forward with a substantial public policy, Appellant has cited to Virginia law concerning fornication and West Virginia law concerning indecent exposure. The citation to Virginia law is unnecessary as West Virginia has a similar statute, codified at 61-8-4. This law was enacted in 1849 and makes it illegal for “...any persons, not married to each other, [to] lewdly and lasciviously associate and cohabit together” or regardless of marital status to “be guilty of open or gross lewdness and lasciviousness.” It should be noted that in 1965, the West Virginia Attorney General issued an opinion that “secluded nudism” is not illegal under West Virginia law. 51 Op. Att’y Gen. 511 (1965). This leads us to 61-8-9 which makes it illegal for a person to expose particular body parts to another for the purpose of causing “affront or alarm.” Here, it is alleged that romantic activity took place

in a private office space, on private property, in seclusion. Neither one of these statutes apply to the facts as alleged in the Complaint. Further, it cannot be said that by upholding the dismissal that this Court is jeopardizing the enforcement of these laws or the protections they seek to bestow.

D. Appellants did not state a claim for sexual discrimination.

Count 3 is labeled “Employment Discrimination.” Paragraph 32 in that Count states that “Plaintiff Roth is a member of a protected class on the basis of gender.” Then, in Paragraph 35, Appellants boldly claimed that “but for her protected status, the plaintiff would not have been terminated...” While this at best is a recitation of the elements of a sexual discrimination claim, when one reviews the facts alleged in the Complaint, there is no claim. Again, assuming Roth walked in on DeFelice and Kelly and she was fired for it as she claims in the Complaint, her discharge has absolutely nothing to do with her gender. Thus, Count 3 must be dismissed.

Appellant responds by arguing that the Court did not properly maintain a Rule 12(b)(6) analysis because it did not take the facts as alleged to be true. However, this argument can be made only if one is to examine Count 3 in a void. To do so would be entirely inappropriate, especially when, at the beginning of each count, it is stated that all previous allegations are to be considered restated for that particular count. The Court did take the Appellants’ allegations as true. It assumed the alleged romantic interlude took place and it also assumed Roth was terminated for inadvertently interrupting it just as alleged in the Complaint.

E. Appellants did not state a claim for retaliatory discharge.

Count 4 is labeled “Retaliatory Discharge.” The West Virginia Human Rights Act expressly prohibits discrimination in employment, based upon certain enumerated

classes. The Act also prohibits retaliation against employees for engaging in protected activities. A prima facie case under the West Virginia Human Rights Act requires evidence that: (1) the employee engaged in a protected activity; (2) the employer was aware that the employee engaged in a protected activity; (3) the employee was subsequently discharged; and (4) the discharge followed protected activities within such a period of time that the court can infer a retaliatory motivation. *Hanlon v. Chambers*, 195 W.Va 99 (1995). However, there is nothing in the Complaint identifying Tricia Roth as being engaged in any protected activity. If she was not engaged in a protected activity, she cannot be the victim of retaliatory discharge and therefore, this claim must be dismissed.

In their brief, Appellants claim that Roth was engaged in a protected activity and such was pled in Paragraph 38. In other words, Appellants claim that employment in and of itself is a protected activity. Such an argument is fatally flawed. First, West Virginia is an at-will state. As such, any employee can be terminated at any time with or without cause and with or without notice. Such is hardly the makings of a protected activity. Second, the argument makes no sense as it requires one to believe that an employer would retaliate against an employee simply for being an employee.

What is not pled anywhere in the Complaint but argued by Appellants is that Roth was terminated in anticipation of testimony she had not yet provided. In their petition, Appellants make reference to a second case and state that Tricia Roth might have been a witness in that case, though she was never disclosed as a witness by either party. Roth was never deposed either. Somehow, this is supposed to rise to the level of Tricia Roth being engaged in a protected activity. How we reach that level is not at all clear from Appellants' brief. Again, there is no allegation anywhere in the Complaint that states Roth was terminated because she

might be a witness. There is no allegation in the Complaint of any witness tampering such as threats or coercion to testify one way or another, or the like. There is no mention whatsoever in the Complaint about Tricia Roth being linked to a separate civil action. At no time did Appellants ever move to amend the Complaint to make such an allegation. Given that counsel for the Appellants in this action and counsel for the Plaintiff in the other case are the very same lawyers, one would think that this claim would have been pled if there was an intention to make it. Accordingly, the Complaint does not allege a cognizable claim for retaliatory discharge.

F. Appellants did not state a claim for “common law reprisal.”

Count 5 is titled “Common Law Reprisal.” At the hearing and in briefing, Appellants withdrew Count 5, the claim of common law reprisal. Indeed, in their brief, Appellants wrote “...this Count was improperly averred as the elements for a common law reprisal claim are the same as a retaliatory discharge claim...” “Plaintiffs Motion in Opposition to Defendants Motion to Dismiss,” page 9. The Appellants should not be permitted to revive a claim on appeal that they themselves agreed was inappropriate at the trial court level.

G. Appellants did not state a claim for the intentional infliction of emotional distress.

Lastly, is Count 6, labeled “Intentional Infliction of Emotional Distress.” This cause of action is also known as the Tort of Outrage. To make a claim for intentional infliction of emotional distress, the Appellants must show (1) that the defendant’s conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the 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. *See generally Syllabus pt. 1, Harless v. First National Bank in Fairmont, 169 W.Va. 673, 289 S.E.2d 692 (1982).* “Liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 286, 445 S.E.2d 219, 225 (1994).*

When examining claims of tort of outrage in the employment context, the law is very careful to separate claims for wrongful discharge from the tort of outrage. The West Virginia Supreme Court of Appeals has held that when analyzing a tort of outrage claim in the employment context, the question must be whether or not something socially intolerable and outrageous took place in the manner in which the discharge was effectuated. *Dzinglski supra, syl pt. 2.* The discharge itself and whether it was proper is not the subject of inquiry. The only case cited by the Dzinglski Court as qualifying for the tort of outrage involved a discharged employee being held up to public ridicule. *Farmer v. Carpenters, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).* The Court cited many other cases where there was no tort of outrage because the emotional distress was a result of the discharge itself. *See Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.1978), cert. denied, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978)* and *Viestenz v. Fleming Cos., 681 F.2d 699 (10th Cir.1982), cert. denied, 459 U.S. 972, 103 S.Ct. 303, 74 L.Ed.2d 284 (1982).* Here, there are no allegations whatsoever regarding the manner in which the discharge was carried out. Therefore, there is no claim.

H. Conclusion

West Virginia Rule of Civil Procedure 12(b)(6) exists so that a determination can be made as to whether or not a plaintiff is entitled to offer evidence to support the claims made in the Complaint. *Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339 (1996).* It also exists as a mechanism to weed out unfounded suits. *Harrison v. Davis, 197 W.Va. 651, 478*

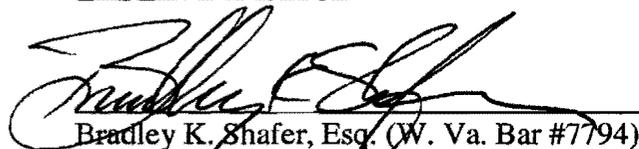
S.E.2d 104 (1996). Here, as shown above, the Appellants did not set forth any claim for which relief could be granted as a matter of law. Accordingly, this Court should deny the Appellants' request for appeal.

VII.

REQUESTED RELIEF

None, in other words, this Court should uphold the dismissal entered by the Circuit Court of Ohio County.

Respectfully Submitted,
**DeFELICE CARE, INC., and
LESLIE DeFELICE**



Bradley K. Shafer, Esq. (W. Va. Bar #7794)
Steptoe & Johnson PLLC
1233 Main Street, Suite 3000
P. O. Box 751
Wheeling WV 26003-0751
(304) 231-0444
(304) 233-0014 Fax
Bradley.Shafer@steptoe-johnson.com
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CERTIFICATE OF SERVICE

Service of Response on behalf of Appellees was had upon the parties herein by mailing true and correct copies, by United States Mail, postage prepaid, this 8th day of June, 2009 to:

Ronald W. Zavolta, Esq.
Zavolta Law Office
1605 Warwood Avenue
Wheeling WV 26003



Bradley K. Shafer, Esq. (W. Va. Bar #7794)
Steptoe & Johnson PLLC
1233 Main Street, Suite 3000
P. O. Box 751
Wheeling WV 26003-0751
(304) 231-0444
(304) 233-0014 Fax
Bradley.Shafer@steptoe-johnson.com
Counsel for Appellees