

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

2008 OCT 16 PM 12:43

TRICIA ROTH and BRIAN
ROTH,

Plaintiffs,

v.

Civil Action No. 08-C-236
Judge Gaughan

DeFELICECARE, INC. and
LESLIE DeFELICE,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On Friday, August 29, 2008 came the Plaintiffs through their counsel Theodore L. Tsoras and came the Defendants through their counsel Bradley K. Shafer for a hearing on the Defendants' Motion to Dismiss. The Court having reviewed the pleadings and hearing oral argument makes the following findings of fact and conclusions of law and in doing so, grants the Defendants' Motion.

Plaintiffs filed a Complaint asserting variety of claims as a result of her employment being terminated by the Defendants in June 2006. Defendants filed a motion seeking to dismiss this action pursuant to West Virginia Rule of Civil Procedure 12(b)(6) for failure to state a claim.

The purpose of a Rule 12(b)(6) Motion is to test the formal sufficiency of the Complaint. *Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242, cert. denied, 484 U.S. 944 (1987). 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). The question at this stage is whether or not the Plaintiffs can present 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). Therefore, for purposes of analysis, the Court is to accept every allegation contained in the Complaint as being true. Therefore, the Court must find that in June 2006 Roth “observed Defendant DeFelice and/or Michelle Kelly partially clothed and in a compromised position” as alleged in Paragraph 11 of the Complaint. The Court must find further that Plaintiff Tricia Roth was fired for those observations, as alleged in Paragraph 27 of the Complaint.

The first claim in the Complaint is one for hostile work environment. Although not specifically stated, it is clear that the claim is a hostile work environment based upon the protected class of gender, given the use of the term “sexual discrimination” in Paragraph 25 of the Complaint. 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)). 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.

The second cause of action is amorously 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. Both of these claims are repeated separately and individually as Count 4 labeled "Retaliatory Discharge" and Count 5 labeled "Common Law Reprisal." The substance of those claims will be addressed separately.

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, Plaintiffs boldly claim 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.

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 and no argument

was made during briefing that she was. If she was not engaged in a protected activity, she cannot be the victim of retaliatory discharge and therefore, this claim must be dismissed.

Count 5 is titled "Common Law Reprisal." The allegations contained 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 Plaintiff 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, the Plaintiff bears 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 the 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). Plaintiffs have attempted in their briefing and oral argument to identify a substantial public policy by directing this Court's attention to statutes prohibiting public nudity. However, a public policy disfavoring public nudity is not at issue in this case and upholding Plaintiff's discharge would not compromise this policy.

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, Plaintiffs 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." *Dzingski 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. *Dzingski supra, syl*

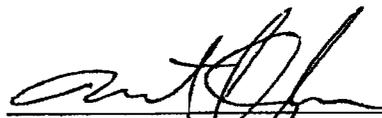
pt. 2. Here, there are no allegations whatsoever regarding the manner in which the discharge was carried out. Therefore, there is no claim.

Lastly, Plaintiffs requested that discovery be permitted if the Court was inclined to grant the Defendants' Motion. Such a request would be permissible and considered if this were a motion for summary judgment pursuant to West Virginia Rule of Civil Procedure 56. However, this is not a motion for summary judgment, it is a motion to dismiss for failure to state a claim. As explained above, the Plaintiff has no claim.

Accordingly, this Court hereby GRANTS the Defendants' Motion to Dismiss and this matter is DISMISSED WITH PREJUDICE.

The Clerk shall provide a copy of this Order to all counsel of record upon entry.

Entered this 15th day of Oct, 2008.


Martin J. Gaughan, Judge
Circuit Court of Ohio County

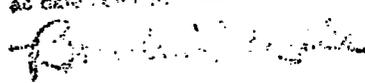
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Seen and Agreed to by: Brenda X. Miller
Circuit Clerk

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as dated for this

CLERK OF THE CIRCUIT
COURT OF OHIO COUNTY, WV

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