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Toy Story and a Recent Employment Case From the West Virginia Supreme Court of Appeals

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In 1995, Walt Disney Pictures and Pixar Animation Studios teamed up to produce what many ’90s kids and their parents now consider a classic animated film – Toy Story. (*Spoiler Alert*). It recounts a rivalry between a young boy’s favorite toy, Woody, and new toy, Buzz Lightyear. In an ironic twist, Woody has to rescue Buzz from an evil neighbor boy, Sid, to save his reputation with Andy’s other toys. To draw Sid’s attention away from Buzz in the film’s climactic scene, Woody uses his built-in voice box to say, “Somebody’s Poisoned the Waterhole!”

The allegations made in a recent decision of the West Virginia Supreme Court of Appeals (WVSCOA), ***Frohnapfel v. Acelormittal USA, LLC,*** sound just like Woody's line. There, the plaintiff alleged that he was terminated in violation of public policy for making complaints about his employer's compliance with a permit issued under the West Virginia Water Pollution Control Act ("WPCA"). The issue before the court, which came in the form of a certified question from the Northern District of West Virginia, was whether the WPCA established a clear and substantial public policy to support an action for wrongful discharge.

Our Supreme Court found that it did, holding that an employee alleging that he was discharged for reporting violations of a WPCA permit and making complaints to his employer about those permit violations, has established a predicate substantial public policy to support a *prima facie* case of discharge in violation of public policy. An examination of the case is useful to employers in similar situations who may find themselves making law.

The plaintiff worked for a tin plate manufacturer, within the environmental control and utilities department. The plaintiff's department was responsible for overseeing a portion of the plant that discharges byproducts from the manufacturing process directly into the Ohio River, near water intake lines that provide drinking water to residents of Weirton, West Virginia, and Steubenville, Ohio. In fact, part of the plaintiff's job was helping to ensure that the plant was discharging byproduct in accordance with his employer's permit under the WPCA, as well as other applicable environmental laws and regulations.

Prior to his termination, the plaintiff had been reporting violations of a permit issued under the WPCA and complaining to his employer about such violations. He alleged that he suffered adverse employment actions because of his complaints and filed suit against his employer in the West Virginia Circuit Court of Hancock County. The employer removed the case to the Northern District of West Virginia, a federal court covering northern West Virginia, and contended that Plaintiff had been fired for insubordination. The Northern District then certified the following question to the WVSCOA:

Whether the WPCA establishes a substantial public policy of West Virginia such that it may undergird a Harless claim for retaliatory discharge where an employee is allegedly discharged for reporting violations of a permit issued under [the WPCA] and complaining to his employer about such violations?

The WVSCOA recognized that the rule of at-will employment must be tempered by the public policy exception first established in West Virginia in the 1978 decision of *Harless v. First Nat'l Bank of Fairmont*. The predicate to a *Harless* claim, the court held, is establishing a substantial West Virginia public policy violated by an adverse employment action. A substantial public policy may be derived from West Virginia and/or federal constitutions, the West Virginia Code, the judicial opinions of state courts in West Virginia, administrative regulations, and prevailing concepts of federal and state government relating to safety, health, morals, and general welfare of the people for whom the government is established. To form the basis for a *Harless* claim, the public policy must be substantial, clearly recognized, and specific enough to give guidance to a reasonable person.

Here, the plaintiff pointed to the WPCA's declaration of policy as providing a substantial public policy. The employer responded by arguing that the cited provisions were too broad and general to constitute a substantial public policy, analogous to a statutory provision requiring "good care" in nursing homes which had been found to be too broad a statement to form the basis for a substantial public policy in an earlier decision, *Birthisel v. Tri-Cities Health Servs. Corp.* The WVSCOA disagreed.

The court noted that the federal court had taken judicial notice of other provisions in the statute, which provided a clear and substantial public policy, making it unlawful to increase the discharge of industrial waste in violation of a permit under the WPCA and creating civil and criminal penalties for such violations. Viewing these provisions in concert with the requirements of permits issued under the WPCA and the general policy declarations of the WPCA, the Court found that the WPCA sets out a clear and substantial public policy that may serve as a predicate to a *Harless* action under West Virginia law.

The takeaways for West Virginia employers are technical, while worthy of note. A court may take judicial notice of pertinent statutory provisions not explicitly referenced in a plaintiff's complaint in determining whether the complaint sets out a substantial public policy required for a *Harless* claim. And, permits issued under the WPCA may, in concert with the statute's more general provisions, constitute substantial public policy, even though the permit's standards are hypothetically subject to modification, suspension, or revocation. This could have application under other statutory provisions with similar set-ups.

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