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What Constitutes a Substantial Public Policy in West Virgina for Purposes of Retaliatory Discharge: Making a Mountain out of a Molehill

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WHAT CONSTITUTES A "SUBSTANTIAL PUBLIC POLICY" IN WEST VIRGINIA FOR PURPOSES OF RETALIATORY DISCHARGE: MAKING A MOUNTAIN OUT OF A MOLEHILL?

I. INTRODUCTION

West Virginia law presumes at-will employment, meaning that the employee can normally be discharged at the will of the employer.[1] "The practical effect of this doctrine . . . is that 'an at-will employee serves at the will and pleasure of his or her employer and can be discharged at any time, with or without cause.'"[2] However, despite its practicality, in most jurisdictions the at-will employment doctrine is becoming wrought with exceptions that have all but swallowed the rule.[3] The most common sense exception is that an employer cannot terminate an employee with a contract of employment for a specific duration without cause.[4] In the absence of a written contract, courts can also find an implied contract of employment.[5] Statutory exceptions to at-will employment further prohibit discharge of an at-will employee for numerous policy-based reasons.[6] Finally, in many jurisdictions, an employer cannot terminate an at-will employee if the reason for the termination violates a substantial public policy – the public policy exception to at-will employment.[7] This article discusses the public policy exception in particular, focusing specifically on West

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1 Wright v. Standard Ultramarine & Color Co., 90 S.E.2d 459, 468 (W. Va. 1955); Bell v. South Penn Natural Gas Co., 62 S.E.2d. 285, 288 (W. Va. 1950) (holding that without contractual provisions to the contrary employment may be terminated with or without cause at the will of either party); Suter v. Harsco Corp., 403 S.E.2d 751, 754 (W. Va. 1991); Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713 (W. Va. 2001).

2 *Feliciano*, 559 S.E.2d at 717-18 (quoting Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616, 619 (W. Va. 2000)).

3 *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 2-4 (4th ed. 1998).

4 *See, e.g.*, Adkins v. Inco Alloys Int'l, 417 S.E.2d 910 (W. Va. 1992); Williamson v. Sharvest Management Co., 415 S.E.2d 271 (W. Va. 1992).

5 *See, e.g.*, Collins v. Elkay Mining Co., 371 S.E.2d 46 (W. Va. 1988).

6 *See infra* Part II.C.

7 *See infra* Part II.D.

Virginia's cause of action for retaliatory discharge based on a substantial public policy. In West Virginia, this exception was introduced by the case of *Harless v. First National Bank* ("*Harless* I").[8]

Part I of the article discusses the policies behind at-will employment and its history in West Virginia. Part II discusses some exceptions that have crept into the doctrine, both on a state and a federal level. Part III examines West Virginia's substantial public policy exception. Part IV then discusses *Harless* I's progeny, looking at the many cases that have been decided since *Harless* I involving claims of retaliatory discharge based on substantial public policy. These cases are divided into five groups based on the origin of the specific public policy used as a basis for the retaliatory discharge cause of action in each case. The groups are 1) the constitution, 2) statutes, 3) common law, 4) administrative regulations, and 5) an unexplained category known as "other." Next, Part V discusses the various problems that have come up since (or because of) *Harless* I. Part VI recommends greatly restricting the scope of the *Harless* public policy exception and returning to the original, more predictable, and truly at will "at-will employment" analysis. In the alternative, the West Virginia courts should outline a clearer test for determining what constitutes a "substantial" public policy in West Virginia sufficient to put an employer on notice as to what kinds of conduct will subject an employer to liability for wrongful discharge.

II. THE HISTORY AND REASONING BEHIND AT-WILL EMPLOYMENT

The "[p]revailing doctrine through the nineteenth and most of the twentieth centuries viewed public employment as a 'privilege,' which could be withdrawn without limitation by the government."[9] Private employment was viewed in a similar fashion.[10] The first credited recognition of the employment-at-will doctrine was in a 1877 treatise by Horace Wood, which outlined the "American Rule" for at-will employment.[11] The "American Rule" evidenced a clear departure from the "English Rule" that presumed yearly hiring.[12] Under the "Ameri-

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[8] 246 S.E.2d 270 (W. Va. 1978) [hereinafter *Harless* I]. Accordingly, in this article and in general parlance, a claim for retaliatory discharge based on a substantial public policy in West Virginia is often referred to as a "*Harless* claim," "*Harless* cause of action," or "*Harless*-type claim."

[9] Robert M. Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 325 (1988).

[10] H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

[11] *See, e.g.*, Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985) ("The termination at will doctrine represents a departure from the English common law rule that employment contracts for indefinite periods were presumed to extend for one year, absent termination for cause.").

[12] *See id.*

can Rule," employers were free to terminate their employees at any time for any reason:

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . . An indefinite hiring . . . is determinable at the will of either party.[13]

Conversely, employees were free to leave their employ at any time for any reason.[14] The rule of at-will employment was strict in that it allowed an employer to terminate an employee "for good cause or for no cause, or even for bad cause."[15] Because of this rigidity, the at-will employment rule has naturally led to some harsh applications.[16]

Despite the harshness of the rule, even today some jurisdictions still hold to the doctrine of at-will employment in a strict sense for several reasons.[17] One reason is the mutual fairness of its provisions – the employer is free to terminate the employee for any reason or no reason, just as the employee is free to leave his position for any reason or no reason.[18] Furthermore, any rule forcing an employee to work after that employee has left his employment would be tan-

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[13] WOOD, *supra* note 10, at 272.

[14] *See* Adair v. United States, 208 U.S. 161, 174 (1908) ("[T]he liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.").

[15] Payne v. W. & Atl. R.R., 81 Tenn. 507, 518 (1884) ("[T]he publication of the notice that the company would discharge employes who traded with plaintiff, was not an unlawful threat nor an unlawful act; was not a libel; and, though done wickedly and maliciously, and in pursuance of a wicked design, is still not actionable, because it was not an unlawful act, nor an act done in an unlawful manner."), *overruled on other grounds by*, Hutton v. Watters, 179 S.W. 134 (1915).

[16] *See, e.g.*, Clarke v. Atl. Stevedoring Co., 163 F. 423 (E.D.N.Y. 1908) (noting that blacks discharged to make jobs available for whites did not have a cause of action for wrongful discharge because employment was at-will).

[17] *See, e.g.*, Clinton v. State ex rel. Logan County Election Bd., 29 P.3d 543, 545 (Okla. 2001) ("The doctrine of employment-at-will is firmly embedded in the common law of Oklahoma. Under this doctrine, an employee with an employment contract of indefinite duration is at liberty to leave his or her employment for any reason or no reason without incurring liability to the employer. Notions of fundamental fairness underlie the concept of mutuality which extends a corresponding freedom to the employer. *Id.* Thus, under the employment-at-will doctrine an employer is also at liberty to fire an at-will employee for any reason or *no reason* without incurring liability to the employee.").

[18] An employee can terminate employment even for a reason that could be seen as violative of public policy. For example, an at-will employee who believed his employer was "too ethical" would be free to leave his employment and seek employment with a less ethical employer without the employer being able to seek damages from the employee for resignation in violation of a substantial public policy. *See* ROTHSTEIN, *supra* note 3, at 3 ("the employee was free to quit and seek alternate employment whenever he or she wanted, and the employer was free to fire the employee at any time.").

tamount to "involuntary servitude," resulting in a clearly unconstitutional rule.[19] A second reason is economics--the importance of a free market. The employment-at-will doctrine encourages both the freedom to contract and the freedom of employers to make decisions regarding their business in an economically efficient manner.[20] A third reason is that employment-at-will is a predictable and easy-to-administer rule.[21] Under strict employment-at-will, everyone knows where he or she stands in the employer-employee relationship. One final and equally important consideration is the difficulty in defining what constitutes a substantial public policy to support a public policy exception to the at-will employment doctrine.

Other jurisdictions have kept the notion of employment-at-will, but have riddled the doctrine with numerous statutory and common-law exceptions which will be discussed in more detail later in this article.[22] Only one jurisdiction, Montana, has codified its unfair dismissal law to impose a "good cause" requirement for the termination of all non-probationary, non-union, non-civil service workers in the state.[23] Similarly, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") drafted a Model Employment Termination Act ("Model Act") imposing a similar "just cause" requirement.[24] So far no state has adopted the Model Act.[25]

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19 U.S. CONST. amend. XIII.

20 *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (maintaining that an at-will contract is supported by principles of freedom of contract and rules of construction).

21 *See id.*

22 *See generally* ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 13-14 (1987) (stating that at-will rule has been "riddled with exceptions and exemptions" and noting that over "two-thirds of American jurisdictions have abandoned an absolute employment-at-will rule").

23 *See* Mark Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMPL. RTS. & EMPLOY. POL'Y J. 105 (1999) (discussing Montana's use of employment termination act). Other states have employee protection acts that limit the types of actions and amount of damages in retaliatory discharge actions. *See, e.g.*, Marzetta Jones, *The 1996 Arizona Employment Protection Act: A Return to the Employment-at-will Doctrine*, 39 ARIZ. L. REV. 1139 (1997).

24 *See* Jarsulic, *supra* note 23.

25 *See id.*

III. SOME EXCEPTIONS TO AT-WILL EMPLOYMENT

A. *Contract of Employment*

The most widely recognized exception to at-will employment occurs where there is a written contract that specifies a specific duration.[26] West Virginia recognizes this exception where there is an express contract of employment present between the employer and the employee.[27] This contract must meet all of the requisite elements of contract formation, e.g., offer, acceptance, consideration.[28] Only then will the court look to the provisions of the contract to see when termination is permissible based on the contractual definition of "cause."

B. *Judicial Exceptions to At-Will Employment*

1. Implied Contract of Employment

Sometimes, even if there is no express contract of employment between an employer and an employee, courts will find an implied contract of employment, and thus permit an action for wrongful discharge.[29] Under West Virginia law, if an employer furnishes a complete list of the reasons that would constitute discharge, such as contained in an employee handbook, this list constitutes "prima facie evidence of an offer for a unilateral contract of employment modifying the right of the employer to discharge without cause."[30] The promise of job security contained in the employee handbook is deemed to be the offer and the employee's continuing to work, while under no obligation to do so, is the acceptance and consideration to the contract.[31] However, merely listing the causes that *may* result in termination does not constitute a promise sufficient to create a contract of employment.[32]

To avoid forming an employment contract with an employee, a West Virginia employer can use a disclaimer[33] on the employment application itself or

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26 *But see* Barber v. SMH (US), Inc., 509 N.W.2d 791, 794 (Mich. Ct. App. 1993) ("Employment contracts of indefinite duration are presumed to provide for employment at will.").

27 *See* Adkins v. Inco Alloys Int'l, 417 S.E.2d 910 (W. Va. 1992); Williamson v. Sharvest Mgmt. Co., 415 S.E.2d 271 (W. Va. 1992).

28 *See id.*

29 *See, e.g.*, Cook v. Heck's, Inc., 342 S.E.2d 453 (W. Va. 1986).

30 *Id.*

31 Pleasant v. Elk Run Coal Co., Inc., 486 S.E.2d 798, 802 (W. Va. 1997) (quoting *Cook*, 342 S.E. 2d at Syl. Pt. 5).

32 Reed v. Sears, Roebuck & Company, Inc., 426 S.E.2d. 539 (W. Va. 1992).

33 In *Lilly v. Overnite Trans. Co.*, 995 F.2d 521 (4th Cir. 1993), before basing its ruling on a *Harless* public policy claim, the court first looked at whether the employee handbook created an

in the employee handbook.[34] Employers should be cautious, however, to state that a list of factors for which an employee can be terminated is not an exhaustive list and that the disclaimer is conspicuous and the employee has knowledge of the disclaimer.[35] Courts will often try to find an implied contract of employment before resorting to a retaliatory discharge claim on the grounds of public policy.[36]

2. Implied Duty of Good Faith and Fair Dealing

Contract law implies a duty of good faith and fair dealing into contracts.[37] The Uniform Commercial Code similarly requires "good faith" in all contracts for the sale of goods.[38] Some courts have extended the "implied covenant of good faith and fair dealing . . . to limit the employer's ability to fire for what the courts consider to be a bad faith reason."[39] However, the use of the good faith and fair dealing doctrine in employment cases in the absence of an

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employment contract. The Fourth Circuit found the language of the disclaimer sufficient to keep the employer from forming a contract with the employee. For the complete disclaimer language the court found sufficient, see *Lilly*, 995 F.2d at 523-24.

[34] In *Mace v. Charleston Area Medical Center Foundation, Inc.*, 422 S.E.2d 624 (W. Va. 1992), the court analyzed the following disclaimer:

> Because of court decisions in some states, it has become necessary for us to make it clear that this handbook is not part of a contract, and no employee of the Medical Center has any contractual right to the matters set forth in this handbook. In addition, your employment is subject to termination at any time either by you or by the medical center. . . . This handbook is not designed to be a total departmental manual; therefore, not all rules and regulations are listed herein.

In view of a provision in the termination section stating that employment was "based on mutual consent, either the employee or the employer is privileged to terminate employment," the court held that the plaintiff had no contractual rights as a result of the handbook. *Id.* In the seminal case which held that employee handbooks could form a contract of employment, the Michigan Supreme Court also found that employers could protect themselves by having the employee acknowledge the at-will relationship. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980) (holding a policy manual which stated that the company's policy was to discharge employees only for just cause sufficient to form a contract of employment).

[35] *See Mace*, 422 S.E.2d at 624.

[36] Sometimes courts looked at disclaimer and found no implied contract of employment before looking at the *Harless* public policy claims. *See Lilly*, 995 F.2d 521; *Mace*, 422 S.E. 2d 624.

[37] *See, e.g.*, Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co., 37 S.E.2d 519, 522 (W. Va. 1946) ("It is of frequent occurrence in the business world that a party to a contract finds that its performance is onerous and unprofitable; nevertheless, good faith and fair dealing call for performance.").

[38] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); *see also* U.C.C. § 1-203 (1994).

[39] Deborah A. Ballam, *Employment-at-will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 655 (2000).

express or implied contract of employment is limited to a few states[40] and has not been adopted in West Virginia.[41]

C. *Statutory Exceptions to At-Will Employment*

1. Discrimination

Even if there is no express or implied employment contract, there are statutory limitations on the ability of an employer to fire an employee for any reason. For example, many states have enacted statutes that protect employees from discrimination. In West Virginia, employees are protected from discrimination on the basis of "race, religion, color, national origin, ancestry, sex, age, blindness or disability"[42] by the West Virginia Human Rights Act ("WVHRA.")[43] The WVHRA also prevents an employer from terminating an employee in retaliation for the filing of a complaint with the West Virginia Human Rights Commission.[44] Additionally, several federal laws prohibit employment discrimination. Title VII of the Civil Rights Act of 1964[45] provides that employees cannot be discharged or discriminated against on the basis of race,

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[40] *See, e.g.*, Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (permitting recovery by at-will employee under breach of covenant of good faith and fair dealing where she was terminated for refusing to date her foreman).

[41] *See* Miller v. Mass. Mut. Life Ins. Co., 455 S.E.2d 799 (W. Va. 1995) (holding that employee's complaint alleging bad faith breach of employment contract was properly dismissed because the implied covenant of good faith and fair dealing is not recognized in West Virginia in the context of at-will employment).

[42] "The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. VA. CODE § 5-11-2 (2002). Under the West Virginia Human Rights Act, an employer must employ twelve or more persons to be covered under the act. *Id.* § 5-11-3(d). Under West Virginia Code section 5-11-3, "employer" is defined as "the state . . . and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the discrimination took place or the preceding calendar year." *But see* Williamson v. Greene, 490 S.E.2d 23 (W. Va. 1997) (holding employer who employed less than twelve employees liable due to *Harless* claim based on public policy of the West Virginia Human Rights Act).

[43] West Virginia Code section 5-11-2 states:

> Equal opportunity in the areas of employment . . . is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability.

[44] It is an "unlawful discriminatory practice to engage in any form of reprisal or otherwise discriminate against a person because he or she has opposed any practices or acts forbidden under [the West Virginia Human Rights Act] or because he or she has filed a complaint, testified or assisted in any proceeding" allowed by the West Virginia Human Rights Act. W. VA. CODE § 5-11-9(7)(C) (2000).

[45] 42 U.S.C. §§ 2000e to 2000e-17 (2000).

color, religion, sex, or national origin.[46] Persons with disabilities are protected from discriminatory discharge under the Americans with Disabilities Act with protections similar to those given on the basis of race, age, sex, etc.[47]

Other federal laws protect specific categories of employees. For instance, persons over 40 are protected under the Age Discrimination in Employment Act.[48] Pregnant women are also protected from discharge due to their pregnancy under an amendment to Title VII, the Pregnancy Discrimination Act of 1978.[49] Under the Family Medical Leave Act of 1993, reinstatement after leave is guaranteed to employees who meet certain criteria.[50] Many of these acts also prohibit discharge by a private employer in retaliation for invoking the rights provided under the act.[51]

2. Whistleblower Statutes

Some states, including West Virginia, have general "whistleblower" statutes that protect public employees from termination in retaliation for blowing the whistle on employer misconduct.[52] West Virginia Code section 6C-1-3 states that no *public employer* may discharge or discriminate against an employee who has made a good faith report about instances of wrongdoing[53] or waste.[54] This statute is only applicable to employees of the State, and not to private employees.[55] However, there are other "whistleblower" statutes in West Virginia and under federal law that prohibit retaliatory termination by private

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46 *Id.*

47 42 U.S.C. § 12101 (2000). *See generally* S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different,* 33 CONN. L. REV. 603 (2001).

48 29 U.S.C. §§ 621-34 (2000). *See generally* Tracy Karen Finkelstein, *Judicial and Administrative Interpretations of the BFOQ as Applied to the Age Discrimination in Employment Act,* 40 CLEV. ST. L. REV. 217 (1992) (overview of the ADEA, its history, and the bona fide occupational qualification defense).

49 42 U.S.C. § 2000e(k) (2000). *See generally* Julie Manning Magid, *Pregnant With Possibility: Reexamining the Pregnancy Discrimination Act,* 38 AM. BUS. L.J. 819 (2001).

50 29 U.S.C. § 2612 (2000). *See generally* G. John Tysse and Kimberly L. Japinga, *The Federal Family and Medical Leave Act; Easily Conceived, Difficult Birth, Enigmatic Child,* 27 CREIGHTON L. REV. 361 (1994).

51 *See infra* notes 59-64.

52 *See, e.g.*, W. VA. CODE §§ 6C-1-1 to -8 (2000).

53 Wrongdoing is defined as "a violation which is not merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or of a code of conduct or ethics designed to protect the interest of the public or the employer." *Id.* § 6C-1-2(f).

54 Waste is defined as "an employer or employee's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision sources." *Id.*

55 *See id.* §§ 6C-1-2 to -3.

employers against private employees. These include the retaliatory discharge provisions of the Worker's Compensation Act,[56] Mine Safety Act,[57] Mine Safety and Health Act,[58] Equal Pay for Equal Work Act,[59] Occupational Safety and Health Act,[60] Labor Management Relations Act,[61] Employee Retirement Income Security Act,[62] Energy Reorganization Act,[63] Clean Air Act,[64] Bankruptcy Act,[65] Consumer Credit Protection Act,[66] Judiciary and Judicial Procedure Act,[67] Toxic Substances Control Act,[68] Comprehensive Environmental Response, Compensation, and Liability Act,[69] Safe Drinking Water Act,[70] Water Pollution Control Act,[71] Solid Waste Disposal Act,[72] Energy Reorganization Act,[73] and the Surface Mining Control and Reclamation Act.[74] These statutory provisions involve retaliatory discharge for persons reporting violations of these particular acts or exercising rights under them.

D. Retaliatory Discharge Based on Public Policy

"The most widely-adopted common law exception to the at-will doctrine imposes liability on an employer who discharges a worker for reasons that contravene a substantial public policy."[75] *Petermann v. International Brother-*

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56 *Id.* §§ 23-5A-1 to -3.

57 *Id.* § 22A-1-22.

58 30 U.S.C. § 801 *et seq.* (1977).

59 W. VA. CODE § 21-5B-3 (2002).

60 29 U.S.C. § 660(c)(1) (2000); W. VA. CODE § 21-3A-13(a) (2002).

61 29 U.S.C. § 141 (2000).

62 *Id.* §§ 1140-1141.

63 42 U.S.C. § 5851 (2000).

64 *Id.* § 7622.

65 11 U.S.C. § 525(b) (2000).

66 15 U.S.C. § 674 (2000); W. VA. CODE § 46A-2-131 (1999).

67 28 U.S.C. § 1875 (2000); W. VA. CODE § 61-5-25(a) (2000).

68 15 U.S.C. § 2622 (2000).

69 42 U.S.C. § 9610 (2000).

70 *Id.* § 300j-9(i).

71 33 U.S.C. § 1367 (2000).

72 42 U.S.C. § 6971 (2000).

73 *Id.* § 5851.

74 30 U.S.C. § 1293 (2000).

75 Bastress, *supra* note 9, at 326; *see also* Ballam, *supra* note 39, at 656 ("The most significant

hood of Teamsters[76] is considered the seminal case on the public policy exception to the at-will employment doctrine.[77] In *Petermann*, the plaintiff at-will employee was subpoenaed to testify before a state legislative committee.[78] Disregarding the employer's instructions to falsely testify, the plaintiff testified truthfully at the hearing and was discharged upon his return to work.[79] The *Petermann* court held that it is "obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute."[80]

The rationale behind the public policy exception comes from the recognition of the unequal bargaining power present in the employer-employee relationship and the dependence of employees on their jobs:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages . . . . Such dependence of the mass of people upon others for all of their income is something new in this world. For our generation, the substance of life is in another man's hands.[81]

Given the dependence of employees on their employers for their livelihood, and the freedom given the employer by the employment-at-will doctrine, there is potential for abuse by employers, resulting in great economic, social and emotional losses to the discharged employee. The public policy exception was

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limitation on the employment-at-will doctrine has arisen from tort law with a cause of action for wrongful discharge based on public policy claims.").

76 344 P.2d 25 (Cal. 1959).

77 *See* Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 595, 598 n.4 (W. Va. 2000).

78 *Petermann*, 344 P.2d at 26.

79 *Id.*

80 *Id.* at 27.

81 FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951), *cited in* Lawrence E. Blades, *Employment At Will vs. Individiual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *see also* J. Noble Braden, *From Conflict to Cooperation*, Sixth Annual Labor Relations Conference 43 (Inst. of Indus. Rel., W. Va. Univ., 1956) ("There was a time when a worker's job was a thing of the hour; he could be hired or fired at will, and his only right was to be paid for the hour he worked. Today, the job has become a thing of value . . . the worker has come to have what might be called a *property right* in his job. His wages and benefits generally accrue with seniority, which increases the value of his job as time goes on . . . . Like any other property holder in our free, democratic society, he cannot be deprived of his rights except by due process.").

viewed as a way to curb the potential for abuse resulting from the employment at-will doctrine.

IV. THE *HARLESS* SUBSTANTIAL PUBLIC POLICY EXCEPTION

A. *Holding of* Harless *I*

The West Virginia substantial public policy exception to at-will employment was created in *Harless v. First National Bank.*[82] In *Harless* I, the West Virginia Supreme Court of Appeals held that:

> 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 the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge. [83]

B. *Facts of* Harless *I*

John Harless was the manager of a bank's consumer credit department.[84] He alleged that the bank "had intentionally and illegally overcharged customers on prepayment of their installment loans and intentionally did not make proper rebates."[85] He further alleged that he had been terminated because he tried to get the bank to comply with certain consumer credit laws, including provisions of the West Virginia Consumer Credit and Protection Act.[86] The circuit court dismissed both counts of his complaint[87] for failure to state a cause of action and certified the question of whether such a cause of action existed in West Virginia to the West Virginia Supreme Court.[88] The West Virginia Su-

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82 246 S.E.2d 270 (W. Va. 1978).

83 *Id.*

84 *Id.* at 272.

85 *Id.*

86 *Id.* The West Virginia Consumer Credit and Protection Act is found in West Virginia Code sections 46A-1-101 to 8-102. *See also* Vincent Cardi, *The West Virginia Consumer Credit and Protection Act*, 77 W. VA. L. REV. 401 (1975).

87 The first count was that he had been terminated for trying to get the bank to comply with consumer credit laws. The second count was that the bank's conduct was "intentional, malicious and outrageous conduct which caused the plaintiff severe emotional distress." *Harless* I, 246 S.E.2d at 273.

88 *Id.*

preme Court reversed the ruling of the trial court and held that the plaintiff's complaint did state a cause of action.[89]

C. *Reasoning of the Court*

The supreme court began its discussion in *Harless* I by recognizing that West Virginia is an at-will employment jurisdiction.[90] The court held that it is an "established rule" if there is no fixed term of employment, that the employment is "terminable at the will of either party, with or without cause."[91] Then the court recognized the "growing trend that . . . an employer may subject himself to liability if he fires an employee who is employed at will if the employee can show that the firing was motivated by an intention to contravene some substantial public policy."[92] The court looked at numerous cases from other jurisdictions including Oregon,[93] Pennsylvania,[94] Indiana,[95] Michigan,[96] Idaho,[97] Arizona,[98] Washington,[99] New Hampshire,[100] Massachusetts,[101] and California.[102]

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89 *Id.*

90 *Id.*

91 *Id.* (citing Wright v. Standard Ultramarine & Color Co., 90 S.E.2d 459, 468 (W. Va. 1955); Adair v. United States, 208 U.S. 161 (1908)).

92 *Id.* at 273.

93 Nees v. Hocks, 536 P.2d 512 (Or. 1975) (finding substantial public policy to support wrongful discharge where employee was fired for performing jury duty); Campbell v. Ford Industries, 546 P.2d 141 (Or. 1976) (refusing to sustain a cause of action for wrongful discharge when employee was fired for exercising his right to examine his corporations books because there is no substantial public policy in this right, only a private protection for stockholders).

94 Geary v. United States Steel Corporation, 319 A.2d 174 (Pa. 1974) (refusing to find a cause of action for wrongful discharge where employee was allegedly fired for complaints about the safety of a pipe manufactured by his employer). The court in *Geary* did not fully reject a cause of action for wrongful discharge based on substantial public policy, but only chose not to adopt it in this case. *Id.*

95 Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973) (finding substantial public policy in Indiana's workers' compensation laws).

96 Sventko v. Kroger Co., 245 N.W.2d 151 (Mich. 1976) (finding substantial public policy in Michigan's workers' compensation laws).

97 Jackson v. Minidoka, 563 P.2d 54 (Idaho 1977) (recognizing a general exception for discharge that contravenes public policy, but declining to apply it to the facts of the case).

98 Larsen v. Motor Supply Co., 573 P.2d 907 (Ariz. 1977) (recognizing a general exception for discharge that contravenes public policy, but declining to apply it to two employees allegedly discharged for refusing to take lie detector tests).

99 Roberts v Atl. Richfield Co., 568 P.2d 764 (Wash. 1977) (discussing the doctrine, but declining to decide whether to adopt it).

100 Monge v. Bebe Rubber Co., 316 A.2d 549 (N.H. 1974) (female employee fired for refusing to go out with her foreman) (holding that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best

The court also observed that "some suggestion of the applicability of equitable principles to the general rule against employer liability for the discharge of an at-will employee" could be found in earlier West Virginia cases.[103] After analyzing these cases, the court acknowledged that this was a case of first impression for the West Virginia Supreme Court,[104] and decided to adopt an exception to the absolute right to discharge an employee "where the employer's motivation for the discharge contravenes some substantial public policy principle."[105]

After adopting the rule, the court then applied it to the facts to determine whether Harless' discharge contravened a substantial public policy in the state of West Virginia. The court recognized that the West Virginia Consumer Credit and Protection Act "represents a comprehensive attempt on the part of the Legislature to extend protection to the consumers and persons who obtain credit in this State and who obviously constitute the vast majority of our adult citizens,"[106] and that the "Legislature intended to establish a clear and unequivocal public policy that consumers of credit covered by the Act were to be given protection."[107] The court reasoned that to allow an employee like Harless to be fired for trying to get the bank to comply with the Act would frustrate this purpose, and it concluded that Harless had stated a cause of action for his discharge.[108] Finally, the court concluded that Harless could state a cause of action and recover damages for his emotional injury due to his employer's conduct.[109]

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interest of the economic system or the public good and constitutes a breach of the employment contract").

101 Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (holding that firing of salesman to keep him from getting sales commissions was in "bad faith" and violated the implied covenant of good faith and fair dealing in all employment contracts).

102 Schweiger v. Superior Court of Alameda County, 476 P.2d 97 (Cal. 1970) (authorizing retaliatory eviction saying "one may not exercise normally unrestricted power if his reasons for its exercise contravene public policy"); Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793 (1961) (finding a cause of action for wrongful discharge against an employer who discharged employees because they had applied for membership to a union); Petermann v. Int'l Brotherhood of Teamsters, 344 P.2d 25 (Cal. 1959) (holding employer liable for discharge of employee when he refused to testify falsely before a legislative committee).

103 *Harless* I, 246 S.E.2d 270, 275 (W. Va. 1978) (referring to Chicago Towel Co. v. Reynolds, 152 S.E. 200 (W. Va. 1930)).

104 *Id.* at 275. The court considered *Harless* a case of first impression despite the court's holding in *Chicago Towel Co. v. Reynolds,* finding inequitable discharge of an at-will employee when the discharge occurred "without notice and without excuse or attempted justification for its action." 152 S.E. 200 (W. Va. 1930).

105 *Harless* I, 246 S.E.2d at 275.

106 *Id.* at 275-76.

107 *Id.*

108 *Id.* at 276.

109 *Id.*

D. Damages

After answering the certified question in *Harless* I, and holding that there was a cause of action for retaliatory discharge based on substantial public policy, *Harless* II,[110] the sequel, made it back to the West Virginia Supreme Court for consideration of the correctness of damages awarded to Harless by the trial court. Because the sole question in *Harless* I was whether a cause of action existed in West Virginia for wrongful discharge based on substantial public policy, the court never reached the question of damages in the case.[111] However, in a footnote to *Harless* I, the court stated the cause of action "is one in tort and it therefore follows that the rules relating to tort damages would be applicable."[112]

On remand, the jury awarded Harless $62,500 in compensatory damages and $62,500 in punitive damages.[113] The trial court judge reduced a portion of the damages, and both parties appealed.[114] In *Harless* II, after acknowledging that *Harless* claims were actions in tort,[115] the court discussed the availability of personal liability in a *Harless* claim and decided that an agent of the employer can be liable for damages in a *Harless* action.[116] The court then decided that because a *Harless* claim is a tort action, tort damage law is applicable.[117]

Under West Virginia tort law, damages for emotional distress are available for an intentional act without the presence of a physical injury.[118] However, whether damages were available for emotional distress resulting from a nonphysical injury in a retaliatory discharge case was not as clear when *Harless* I was decided.[119] Finding that the tort of retaliatory discharge "carries with it a sufficient indicia of intent," the court in *Harless* II held that "damages for emo-

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110 Harless v. First Nat'l Bank, 289 S.E.2d 692 (W. Va. 1982) [hereinafter *Harless* II].

111 *See Harless* I, 246 S.E.2d at 270.

112 *Id.* at 275 n.5.

113 *Harless* II, 289 S.E.2d at 695.

114 *Id.*

115 In the time between *Harless* I and *Harless* II, the court decided several cases based on a *Harless* theory. *See, e.g.*, Stanley v. Sewell Coal Co., 285 S.E.2d 679 (W. Va. 1981); Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980).

116 *Harless* II, 289 S.E.2d at 699.

117 *Id.* at 701.

118 *See id.*; *see also* Monteleone v. Co-Operative Transit Co., 36 S.E.2d 475 (W. Va. 1945) (damages available in tort where "there was no impact and no physical injury caused by the defendant's wrong, but an emotional or mental disturbance is shown to have been the result of the defendant's intentional or wanton wrongful act. In any of the foregoing classifications we believe that the plain weight of authority sustains a recovery.").

119 *See Harless* II, 289 S.E.2d at 702 ("In this area courts are more reluctant to permit recovery for emotional distress . . . .").

tional distress may be recovered as a part of compensatory damages."[120] The court itself recognized the holding gave the jury "a rather open-hand in the assessment of damages."[121]

Next, the court in *Harless* II discussed the issue of whether punitive damages are available in a *Harless* cause of action for wrongful discharge.[122] The court held that:

> Because there is a certain open-endedness in the limits of recovery for emotional distress in a retaliatory discharge claim, we decline to automatically allow a claim for punitive damages to be added to the damage picture. We do recognize that where the employer's conduct is wanton, willful or malicious, punitive damages may be appropriate.[123]

In West Virginia, punitive damages are allowed to punish the defendant for "willfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong."[124] After analyzing the facts underlying Harless' discharge, the court found that punitive damages were not appropriate in his case because sufficient evidence of egregious conduct beyond his retaliatory discharge was not present.[125]

However, in a footnote the court hinted that punitive damages might be appropriate in a *Harless* action where an employer circulates false rumors about the employee or interferes with the employee's attempts to find a new job.[126] Finally, the court discussed Harless's claim for outrageous conduct and found the claim duplicative of the emotional distress component of the retaliatory discharge claim.[127] To allow Harless to recover on both claims would be to allow him a double recovery, and double recovery for a single injury is not allowed under West Virginia tort law.[128]

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120 *Id.*

121 *Id.*

122 *See id.* at 703.

123 *Id.* at Syl. Pt. 5.

124 Syl. Pt. 1, O'Brien v. Snodgrass, 16 S.E.2d 621 (W. Va. 1941).

125 *Harless* II, 289 S.E.2d at 703 (noting that "[t]he plaintiff must prove further egregious conduct on the part of the employer" to recover punitive damages, in other words, more than just the act of retaliatory discharge).

126 *Id.* at 703 n.19.

127 *Id.* at 705.

128 *Id.* (quoting 25 C.J.S. *Damages* § 3 (1966) ("It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover

V. *HARLESS*'S PROGENY

A. Defining Substantial Public Policy

Although the supreme court's holding in *Harless* I made it clear that West Virginia recognizes at-will employment but will prohibit termination that contravenes substantial public policy, what constitutes a substantial public policy sufficient to overcome the at-will relationship is difficult to define.[129] Defining what does or does not constitute public policy has been referred to by at least one court as "the Achilles heel" of the public policy wrongful discharge tort.[130] The West Virginia Supreme Court has recognized that public policy "is sometimes defined as that principle of law under which freedom of contract or private dealings are restricted by law for the good of the community--the public good."[131] Public policy has also been defined by the West Virginia Supreme Court as "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."[132]

By its very definition of the cause of action as one based on a termination that contravenes a "substantial public policy," the holding in *Harless* I dictates that the public policy must be "substantial." The West Virginia Supreme Court has specifically acknowledged that the term "'substantial public policy' implies that the policy principle will be clearly recognized simply because it is substantial."[133] Further, in order to be substantial the policy "must not just be recognizable as such but must be so widely regarded as to be evident to employers and employees alike."[134] The policy must "provide specific guidance to a

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damages twice for the same injury simply because he has two legal theories . . . .").

[129] *See, e.g.*, Wounaris v. West Virginia State College, 588 S.E.2d 406, 413 (W.Va. 2003) (per curiam) ("The Court has sometimes struggled with just what constitutes a substantial public policy issue that would prevent an at-will employee from being fired."); Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616, 619 (W. Va. 2000) (quoting Yoho v. Triangle PWC, Inc., 336 S.E.2d 204 (W. Va. 1985)). For an earlier definition of public policy by the West Virginia Supreme Court, see *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111, 114 (W. Va. 1984) ("The rule of law, most generally stated, is that 'public 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.'") (quoting Allen v. Commercial Cas. Ins. Co. 37 A.2d 37, 39 (N.J. 1944)).

[130] Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

[131] *Kanagy*, 541 S.E.2d at 619 (quoting Higgins v. McFarland, 86 S.E.2d 168, 172 (Va. 1955)).

[132] Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 718 (W. Va. 2001) (internal quotations and citations omitted).

[133] *Id.* at 718 (quoting Birthisiel v. Tri-Cities Health Corp., 424 S.E.2d 606, 612 (W. Va. 1992)).

[134] *Id.*

reasonable person,"[135] however whether something is a "substantial public policy" that would support an exception to at-will employment is a question of law.[136] One limitation is that the policy cannot be so broad or vague that it would not provide specific guidance to a reasonable person.[137]

B. *Sources of Public Policy Recognized in West Virginia*

After defining "substantial public policy," the next step is to determine the allowable sources of that policy. In *Birthisiel v. Tri-Cities Health Services Corporation*,[138] the court held that "[t]o identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions."[139] Other West Virginia cases have found or have declined to find substantial public policy based on all of the *Birthisiel* sources: 1) the constitution,[140] 2) statutes,[141] 3) administrative regulations,[142] and 4) judicial opinions.[143]

Some cases seem to find substantial public policy exceptions in a fifth unexplained category – "other." [144] These cases may be somewhat analogous to the broad language from *Cordle v. General Hugh Mercer Corporation*[145] that public policy can be found in "the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals

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135 *Birthisel*, 424 S.E.2d at Syl. Pt. 3.

136 Syl. Pt. 1, Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984).

137 *Birthisel*, 424 S.E.2d at 612-13 ("Neither of these provisions contain [sic] any specific guidance. Their general admonitions as to the requirement of good care for patients by social workers do not constitute the type of substantial and clear public policy on which a retaliatory discharge claim can be based. If such a general standard could constitute a substantial public policy, it would enable a social worker to make a challenge to any type of procedure that the worker felt violated his or her sense of good service.").

138 424 S.E.2d 606 (W. Va. 1992).

139 *Id.* at 612.

140 *See, e.g.*, Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578 (W. Va. 1998).

141 *See, e.g.*, Lilly v. Overnight Transp. Co., 425 S.E.2d 214 (W. Va. 1992) (finding substantial public policy in motor vehicle safety statutes and regulations).

142 *See, e.g.*, Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616 (W. Va. 2000) (finding a substantial public policy in the administrative regulations of barbers and cosmetologists in West Virginia).

143 *See, e.g.*, Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713 (W. Va. 2001) (finding a cause of action for retaliatory discharge based on the common law right to defend oneself in the face of imminent lethal danger).

144 *See, e.g.*, Williamson v. Greene, 490 S.E.2d 23 (W. Va. 1997).

145 325 S.E.2d 111 (W. Va. 1984).

and general welfare of the people . . . ."[146] In *Cordle*, the court held that an employee's discharge for refusing to take a polygraph test gave rise to a cause of action for retaliatory discharge.[147] The court took a broad view of public policy, as evidenced by its use of nebulous terms in its definition of public policy such as "acknowledged prevailing concepts" and "relating to and affecting the safety, health, morals, and general welfare of the people." By using these terms the court did not restrict itself to constitutional provisions, legislative enactments, or even administrative regulations or common law. This definition allows for an "other" category of conduct – conduct constituting a substantial public policy interest of the state of West Virginia because it is an "acknowledged prevailing concept" relating to the "safety, health, morals, or general welfare of the people" even if not in any case law, legislative enactments, or in the Constitution.

Most recently, the West Virginia Supreme Court has laid out a list of four factors "particularly instructive" to a determination of whether a discharge has been in contravention of a substantial public policy.[148] First, the court should determine 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)."[149] Second, the court should analyze whether "dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element)."[150] Third, the court should determine whether the "plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element)."[151] Finally, the court should consider whether the "employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element)."[152]

These factors, specifically the first factor, may be helpful in determining what constitutes substantial public policy, and narrowing substantial public policies to those found in the state or federal constitution, statute, administrative regulation, or common law. However, these factors, although "instructive" to a determination of the employee's cause of action, are not law, and the court is not bound by the parameters of the factors in its determination. Further, the factors have not been applied to any subsequent cases as of the date of this article and their true impact remains to be seen. Adopting the first factor, ironically the "clarity element," as a definition of "substantial public policy" in West Virginia and narrowly construing it, would restrict the scope of the public policy exception in West Virginia, provide guidance to employers and employees as well as

146 *Id.* at 114 (quoting Allen v. Commercial Cas. Ins. Co., 37 A.2d 37 (N.J. 1944)).

147 *Id.* at 117.

148 *Feliciano*, 559 S.E.2d at 723.

149 *Id.* at 723 (quoting Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 375 (6th Cir. 1999)).

150 *Id.*

151 *Id.*

152 *Id.*

the courts, and generally clarify the law in this area. The following sections will survey West Virginia *Harless* wrongful discharge cases in an attempt to determine what constitutes "substantial public policy" in the state of West Virginia.

1. Substantial Public Policy Based on the West Virginia and United States Constitutions

The West Virginia Supreme Court of Appeals has been reluctant in the case of a private employee to find a cause of action for retaliatory discharge based on a public policy emanating from the West Virginia or the United States Constitution. The West Virginia Supreme Court has found actionable retaliatory discharge where a public employer discharged an employee in retaliation for exercise of the employee's state constitutional rights to petition for redress of grievances where the employee sought access to the courts by filing an action for overtime wages.[153] However, the court has been reluctant to find substantial public policy based on constitutional provisions in the case of a private employee where there is no statute expressly applying a particular constitutional provision to the private employee.[154]

For example, the West Virginia Supreme Court determined, as a matter of first impression, that an employee did not have a public policy wrongful discharge cause of action against a private employer emanating from the free speech clause of the state constitution.[155] In *Tiernan v. Charleston Area Medical Center, Inc.*,[156] an employee who was discharged for exercising her constitutional right to free speech brought a cause of action against her employer for wrongful discharge.[157] The court held that whether a public policy exists against a private employer emanating from the state constitution must be done on a case by case basis, and that the Free Speech clause is not applicable to a private sector employee.[158] If there had been a statute "expressly imposing public policy emanating from the State constitutional Free Speech Clause upon private sector employees," the employee probably would have been able to maintain a *Harless* claim for wrongful discharge.[159]

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153 Syl. Pt. 3, McClung v. Marion County Comm'n, 360 S.E.2d 221 (W. Va. 1987) (citing W. VA. CONST. art. III, §§ 16, 17; W. VA. CODE § 21-5C-8 (1975)).

154 *See, e.g.*, Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578 (W. Va. 1998).

155 *Id.*

156 506 S.E.2d 578 (W. Va. 1998).

157 *Id.*

158 *Id.* at Syl. Pt. 3 ("Determining whether a state constitutional provision may be applied to a private sector employer must be done on a case-by-case basis, i.e., through selective incorporation and application.").

159 *Id.* at Syl. Pt. 4 ("The Free Speech Clause of the state constitution is not applicable to a private sector employer. In the absence of a statute expressly imposing public policy emanating from the state constitutional Free Speech Clause upon private sector employers, an employee does

2. Substantial Public Policy Based on Federal and State Statutes

In contrast to West Virginia's reluctance to finding a substantial public policy based on constitutional rights, the West Virginia Supreme Court has readily allowed wrongful discharge causes of action and found substantial public policy in various legislative enactments. For example, an employee who was denied employment on the sole basis that he received services for mental illness, mental retardation, or addiction was found to state a cause of action for wrongful discharge because the employer's conduct violated West Virginia Code section 27-5-9(a).[160] Prior to the enactment of a specific retaliatory discharge provision within the West Virginia's Workers' Compensation Act,[161] the court also recognized a cause of action for wrongful discharge where an employer terminated an employee because the employee filed a worker's compensation claim against the employer in violation of the retaliation provision of the Worker's Compensation Act.[162] In addition, the court recognized a cause of action for wrongful discharge where an employer fired an employee for his efforts to ensure that his employer complied with federal and state mine safety laws and for his refusal to operate unsafe equipment despite the fact that the employee did not exercise his statutory remedies under the antidiscrimination provisions of both federal and state mining laws.[163] The West Virginia Supreme Court further recognized a *Harless* claim under the West Virginia Mine Safety Act where an employee was discharged for refusing to falsify safety reports concerning a safety inspection at the employer's plant.[164] Finally, an employee stated a cause of action for wrongful discharge where the employer discharged him in retaliation for exercising rights under the Veterans Reemployment Rights Act.[165]

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not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's state constitutional right of free speech.").

[160] Hurley v. Allied Chemical Corp., 262 S.E.2d 757 (W. Va. 1980) (certified question) (statute providing that no person shall be deprived of any civil rights solely by reason of his receipt of services for mental illness created implied private cause of action against private employer who allegedly denied employment to otherwise qualified individual on sole basis that such individual had received services for mental illness, mental retardation or addiction); *see also* W. VA. CODE § 27-5-9(a) ("No person shall be deprived of any civil right solely by reason of his receipt of services for mental illness, mental retardation or addiction, nor shall the receipt of such services modify or vary any civil right of such person . . . .")

[161] W. VA. CODE § 23-5A-3.

[162] Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980) (*Harless* claim based on termination in retaliation of filing a workers' compensation claim).

[163] Wiggins v. Eastern Assoc. Coal Corp., 357 S.E.2d 745 (W. Va. 1987).

[164] Collins v. Elkay Mining Co., 371 S.E.2d 46 (W. Va. 1988); *see also* W. VA. CODE §§ 22A-1A-1 to -35 (1988), *repealed by* 1994 W. Va. Acts c. 61 (current version at W. VA. CODE §§ 22A-2-1 to -79 (2000)).

[165] Mace v. Charleston Area Med. Ctr. Found., Inc., 422 S.E.2d 624 (W. Va. 1992); *see also* 38 U.S.C. §§ 2021-2066 (2000).

The West Virginia Supreme Court has also found substantial public policy in several state and federal statutes despite the absence of retaliatory discharge provisions within those statutes. For instance, statutes regulating the safety of brakes, making it a misdemeanor to drive an unsafe vehicle, and providing for the promulgation of safety rules and regulations applicable to motor vehicles were the basis of a cause of action for wrongful discharge where an employee was fired for refusing to operate a motor vehicle with unsafe brakes.[166] After this answer by the West Virginia Supreme Court to a certified question,[167] the Fourth Circuit held that the discharge of a driver for refusing to drive a delivery truck with defective brakes would violate a substantial West Virginia public policy as codified in West Virginia Code sections 17C-15-1(a), 17C-15-31, and 24A-5-5(j).[168]

A wrongful discharge cause of action was also found to exist under West Virginia Code section 21-5-5, which prohibits an employer from coercing an employee to purchase goods in payment of wages due him.[169] In *Roberts v. Adkins*, an employee who worked for an oil company, where his employer also owned an automobile dealership, was allegedly fired for purchasing a vehicle from a competitor's automobile dealership.[170] The court held that where the employee did not work for the employer's automobile dealership, and where the purchased goods were in no way related to or within the scope of his employment, there was a cause of action for wrongful discharge.[171]

The *Roberts* court reasoned that section 21-5-5 prohibits not only coercing an employee to purchase goods from a "company store," but also "that the legislature also intended to eliminate and to prevent employment practices where the employee was being coerced or compelled to purchase goods under other circumstances utilized by the employer, for instance the threat of losing, or actual loss of the employee's job."[172] The court further reasoned that the purpose of the legislation was to "eliminate the employer practices of forcing employees to purchase goods at companies owned by the employer but which had nothing to do with the employees' employment."[173]

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166 Lilly v. Overnight Transp. Co., 425 S.E.2d 214 (W. Va. 1992) (answering certified question at to whether a public policy existed in W. VA. CODE §§ 17C-15-1(a) (1991), 17C-15-31 (1991), 24A-5-5(j) (1992)).

167 *See id.*

168 Lilly v. Overnite Transp. Co., 995 F.2d 521 (4th Cir. 1993).

169 *See* W. VA. CODE § 21-5-5 (2002); Roberts v. Adkins, 444 S.E.2d 725 (W. Va. 1994).

170 *Roberts*, 444 S.E.2d at 725.

171 *Id.*

172 *Id.* at 729.

173 *Id.*

Despite its holding in *Roberts*, the court voiced its intention not to "unlock a Pandora's box of litigation in the wrongful discharge arena."[174] To help keep the "Pandora's box" from opening all the way, there have been cases declining to find public policy in a federal or state statute. For example, a substantial public policy will not be found where a statute is designed only to protect a narrow class of citizens, e.g., insurance agents, rather than a broad societal interest.[175] In *Shell v. Metropolitan Life Ins. Co.*,[176] an insurance agent tried to bring a cause of action for retaliatory discharge under West Virginia Code section 33-12A-1 *et seq.*, relating to the contract between insurance agents and insurance companies.[177] The agent alleged that he had been terminated for objecting to his employer's illegal use of client funds to finance new insurance policies.[178] The *Shell* court held that where a statute is only designed to protect one specific group and not a broad societal interest, it does not consist of substantial public policy that will justify state interference with the private contractual obligation of the parties.[179] Public policy must protect the public in general, not a small group of individuals.

Sometimes *Harless* claims brought under the same act can bring forth conflicting results. For example, an employee's discharge for attempting to enforce rights granted by West Virginia's Consumer Credit and Protection Act for protection of all consumers has been held to be a violation of substantial public policy that may give rise to retaliatory discharge claim.[180] However, where a retaliatory discharge claim is based upon the assertion by the plaintiff that he was terminated due to his attempt to enforce warranty rights granted him pursuant to the West Virginia Consumer Credit and Protection Act,[181] the plain-

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174 *Id.* at 719.

175 *See* Shell v. Metropolitan Life Ins. Co., 380 S.E.2d 187 (W. Va. 1990) (answering certified question finding no substantial public policy in W. VA. CODE §§ 33-12A-1 to -5 (1984).

176 380 S.E.2d 187 (W. Va. 1990).

177 *Id.* West Virginia Code section 33-12A-1 provides that:

> [i]t is hereby found and determined by the legislature that it is essential to the best interests of the citizens of this State that the contractual relationship between insurance agents and insurance companies be established; and that this article is enacted for the purpose of prohibiting arbitrary and capricious cancellation of such contractual relationships.

178 *Shell*, 380 S.E.2d at 187.

179 *See id.* at 191 (questioning whether W. VA. CODE §§ 33-12A-1 to -5 "strikes an appropriate balance between the reasonable exercise of the State's police powers and legislation that simply benefits a special interest group . . . .").

180 *See* Reed v. Sears, Roebuck & Co., Inc., 426 S.E.2d 539 (W. Va. 1992). *Harless* I was also brought under the Consumer Credit and Protection Act.

181 W. VA. CODE §§ 46A-6-101 to -107 (2000).

tiff had no basis for such a claim unless he could demonstrate that a valid warranty was created at the time of the sale of the goods.[182]

When the Fourth Circuit has been asked to find public policy based on a West Virginia Code provision when the West Virginia Supreme Court had not yet addressed whether there is a substantial public policy inherent in that statute, it has exercised judicial restraint because the issue has not yet been decided in West Virginia. Further, the Fourth Circuit has also recognized the importance of deference to the West Virginia legislature, stating that "[t]he power to declare an employer's conduct as contrary to public policy is to be exercised with restraint, and with due deference to the West Virginia legislature as the primary organ of public policy in the state."[183] For example, in *Tritle v. Crown Airways, Inc.*,[184] two West Virginia statutes regulating airplane safety were not held to support a cause of action for retaliatory discharge based on public policy because the West Virginia Supreme Court had not yet addressed the question whether West Virginia Code sections 29-2A-12 and 29-2A-20, relating to airplane safety, supported a *Harless* cause of action.[185]

The Fourth Circuit stated in *Washington v. Union Carbide Corporation*[186] that "West Virginia courts have proceeded with 'great caution' in applying public policy to wrongful discharge actions . . . . Prior cases in this area underscore the need for retaliatory discharge actions to rest upon a statutory articulation of public policy by the West Virginia legislature."[187] In *Washington*, the Fourth Circuit found no retaliatory discharge by a private employee under West Virginia's Occupation Safety and Health Act,[188] which applied only to public employees, because no statutory recognition of an action for retaliatory discharge for reporting safety violations had been generally conferred in West Virginia.[189] In both *Tritle* and *Washington*, the Fourth Circuit stated that these questions would not be answered in the absence of West Virginia precedent,

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182 *Reed*, 426 S.E.2d at 539.

183 Washington v. Union Carbide Corp., 870 F.2d 957, 962-63 (4th Cir. 1989).

184 928 F.2d 81 (4th Cir. 1990) (per curiam) (refusing to find a substantial public policy creating a cause of action for retaliatory discharge under W. VA. CODE §§ 29-2A-20 and 29-2A-12 (1986) because the West Virginia courts had not yet recognized it).

185 *See id.*

186 870 F.2d 957, 962-63 (4th Cir. 1989).

187 *Id.* The court went on to state that "[t]here is no instance in which the West Virginia Supreme Court of Appeals has recognized a retaliatory discharge action of any sort in the absence of legislative recognition that such discharge contravenes the public policy of the state." *Id.* at 963. *But see* Birthisel v. Tri-Cities Health Services Corp., 424 S.E.2d 606. 611 (W. Va. 1992) ("*Most* of our retaliatory discharge cases involve violations of statutes that we deem to articulate a substantial public policy.") (emphasis added).

188 W. VA. CODE § 21-3A-13 (2002).

189 *Washington*, 870 F.2d at 957.

giving due deference to the West Virginia legislature.[190] Conversely, the West Virginia Supreme Court only seems to exercise judicial restraint in creating public policy exceptions based on statutes in a few instances – specifically, (1) where the statute protects individuals and not the public and (2) where there is a conflict between a collective bargaining agreement and a *Harless* action. In the latter instance, the court is reluctant to undermine the policy behind collective bargaining and punish an employer for adhering to the provisions of the collective bargaining agreement. For example, although it violates public policy to discharge an employee for filing a worker's compensation claim,[191] there was no retaliatory discharge claim stated by an employee who was off work on workers' compensation, but who was discharged pursuant to a collective bargaining provision that mandated termination of an employee who is unavailable for work during a twelve-month period.[192]

3. Substantial Public Policy Based on the Common Law

Turning to the issue of when the West Virginia Supreme Court has recognized a substantial public policy based on the common law, sometimes it is difficult to identify whether a substantial public policy in West Virginia is based on common law or arises from the Constitution. For example, cases based upon an employee's right to privacy appear to be based on a common law right of privacy, not on constitutional rights, but in some jurisdictions similar cases arise under the Constitution.[193] In West Virginia, several cases have found a substantial public policy in an individual's right to privacy sufficient to support a *Harless*-type claim.[194] In West Virginia, it is contrary to the public policy in favor of an individual's common law right to privacy for an employer to require or request an employee to submit to a polygraph test or similar test as a condition of employment.[195] Similarly, it is also contrary to public policy for an employer to require employee drug testing unless the testing is based upon reasonable suspicion or the employee's job involves public safety.[196]

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[190] *See* Tritle v. Crown Airways, Inc., 928 F.2d 81, 84 (4th Cir. 1990) (this case is one of the drawbacks of federal diversity jurisdiction).

[191] Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 (W. Va. 1991) (*Harless* claim based on W. VA. CODE §§ 23-5A-1 to -4).

[192] Yoho v. Triangle PWC, Inc., 336 S.E.2d 204 (W. Va. 1985).

[193] *See* Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984); Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990).

[194] *See Cordle*, 325 S.E.2d at 111 (polygraph test); *Twigg*, 406 S.E.2d 52 (drug test).

[195] *Cordle*, 325 S.E.2d at 111. West Virginia now has legislation that prohibits most employers from requiring or requesting that an employee submit to a polygraph test. W. VA. CODE § 21-5-5b (2002).

[196] *Twigg*, 406 S.E.2d 52 (holding that while drug testing by an employer would generally violate public policy in West Virginia, it is not an intrusion into a person's right to privacy, where

Also, in West Virginia it is against substantial public policy to discharge an at-will employee because the employee has given or may be called to give truthful testimony in legal action.[197] In *Page v. Columbia Natural Resources, Inc.*, [198] the trial court found that there existed a public policy in favor of the right to testify, and that the employer's discharge of an employee who testified in a deposition, taken in an unrelated lawsuit against the employer, gave rise to a cause of action for wrongful discharge in violation of that public policy.

Recently, the West Virginia Supreme Court held in *Feliciano v. 7-Eleven, Inc.*,[199] that "when an at will employee has been discharged from his/her employment based upon his/her exercise of self-defense in response to lethal imminent danger, such right of self-defense constitutes a substantial public policy exception to the at will employment doctrine and will sustain a cause of action for wrongful discharge."[200] In *Feliciano*, a convenience store employee thwarted a robbery attempt in violation of the store's safety policy prohibiting employees from trying to subvert robbery attempts.[201] The employee was then discharged for violating the store's policies, and sued his employer for retaliatory discharge.[202]

In determining the source for the substantial public policy in *Feliciano*, the court first looked to the Constitution and legislation of West Virginia.[203] Finding these sources inadequate, the court found a clear existence of the right to defend oneself in the jurisprudence of the state.[204] After weighing the substantial public policy of self-defense against the dangers of self-defense in this context, the court found that there is a retaliatory discharge cause of action based on the exercise of self-defense in response to lethal imminent danger.[205]

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it is conducted by an employer based upon a good faith, reasonable, and objective suspicion of drug usage, or where the employee's job responsibility involves public safety or the safety of others).

197 *See* Page v. Columbia Natural Res., Inc., 480 S.E.2d 817 (W. Va. 1996).

198 480 S.E.2d 817 (W. Va. 1996).

199 559 S.E.2d 713 (W. Va. 2001).

200 *Id.*

201 *Id.*

202 *Id.*

203 *See, e.g.*, W. VA. CONST. art. III, § 22 (securing an individual's "right to keep and bear arms for the defense of self"); W. VA. CODE § 61-7-1 (2000) (acknowledging the right to bear arms for self-defense); *see also* W. VA. CODE § 61-6-21(e) (2000) (permitting the teaching of self-defense techniques in civil rights context).

204 *Feliciano* cites the following cases: State v. Cain, 20 W. Va. 679 (1882); State v. Hughes, 476 S.E.2d 189 (W. Va. 1996); State v. W.J.B., 276 S.E.2d 550 (W. Va. 1981); State v. Miller, 102 S.E. 303 (W. Va. 1919); State v. Cook, 515 S.E.2d 127 (1999); State v. Laura, 116 S.E. 251 (1923) (extending the right to defend oneself and to take the life of one's assailant to one's place of business).

205 *Feliciano*, 559 S.E.2d at Syl. Pt. 8.

However, since the West Virginia Supreme Court was answering a certified question from the Northern District of West Virginia, the court never reached the question of whether the facts of the case supported Feliciano's cause of action for wrongful discharge based on substantial public policy.[206]

In Justice Maynard's dissenting opinion in *Feliciano*, he articulated the dangers caused by the recognition of a substantial public policy exception for self-defense.[207] First, Justice Maynard pointed out that instead of supporting a substantial public policy interest, the court's holding will actually result in an increased risk of harm to the public.[208] He further indicated that 7-Eleven's safety policies were enacted in order to keep store employees and innocent bystanders safe from harm in the event of a robbery because employees who interfere with robberies are more likely to injure themselves and others.[209] Now, instead of following the employer's safety procedures, an employee is free to disregard those procedures and try to subdue a robber himself.[210]

Justice Maynard also stated that employer no-fighting policies will be discouraged because an employee discharged for violating those policies could always invoke the substantial public policy exception for self-defense.[211] It is clear that the *Feliciano* decision puts store owners in a difficult position – safety policies will not be upheld or encouraged by the courts, but suits brought by employees and customers who are injured by the lack of safety policies will be upheld, and will be costly to employers.[212]

4. Substantial Public Policy Based on Administrative Regulations

Sometimes the courts have looked to administrative agency regulations as sources of substantial public policy. For example, there is a substantial public policy in the State of West Virginia, embodied in West Virginia Code section 30-1-5(b) and sections 30-27-1 to -16 and the regulations established thereunder.[213] These provisions supported a claim for wrongful discharge where an employee was allegedly discharged for providing truthful information to an Investigator for the Board of Barbers and Cosmetologists.[214]

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206 *Id.* at 723.

207 *Id.* at 724 (Maynard, J., dissenting).

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *See id.* For a more thorough treatment of the *Feliciano* case, see Thomas Ewing, Note, *Bad Facts, Bad Law:* Feliciano v. 7-Eleven, Inc. *and Self-Defense as a Substantial Public Policy*, 106 W. VA. L. REV. 781 (2004).

213 Syl. Pt. 5, Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616 (W. Va. 2000).

214 *Id.*

Similarly, the staffing regulation, contained in regulations governing licensure of hospitals, was found to set forth a specific statement of a substantial public policy that contemplates that a hospital unit will be properly staffed.[215] The public policy found in this regulation was "to accommodate the regulation's directive to ensure that patients are protected from inadequate staffing practices and to assure that medical care is provided to hospital patients, especially children and young adolescents, who must depend upon others to protect their medical interests and needs."[216]

Conversely, if the source of the public policy is too vague, the court will decline to find a substantial public policy in the regulation.[217] In *Birthisel v. Tri-Cities Health Services Corp.*,[218] the discharge of a social worker by a hospital, for her refusal to enter data on master treatment plan for patients, including some whose files were closed, did not violate the public policy of West Virginia.[219] The hospital did not force the social worker to compromise her professional ethics standards, so as to overcome its right to discharge her at will.[220] There was no falsification of records involved, rather she was simply required to transfer to the plan valid data contained in other records.[221]

Birthisel held that to identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred "we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions."[222] "Inherent in the term 'substantial public policy' is the concept that the policy will provide specific guidance to a reasonable person."[223] Regulations that are too vague to constitute substantial public

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215 Tudor v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 554, 567 (W. Va. 1997) (*Harless* claim based on W. VA. CODE ST. R. § 64-12-14.2.48 (1987), as amended in 1994).

216 *Id.*

217 *See* Birthisel v. Tri-Cities Health Serv. Corp, 424 S.E.2d 606 (W. Va. 1992).

218 424 S.E.2d 606 (W. Va. 1992).

219 *Id.* at 612-13.

220 *Id.* at 614.

> Neither of these provisions contain [sic] any specific guidance. Their general admonitions as to the requirement of good care for patients by social workers do not constitute the type of substantial and clear public policy on which a retaliatory discharge claim can be based. If such a general standard could constitute a substantial public policy, it would enable a social worker to make a challenge to any type of procedure that the worker felt violated his or her sense of good service.

Id. at 612-13.

221 *Id.*

222 *Id.* at Syl. Pt. 2.

223 *Id.* at Syl. Pt. 3.

policy cannot be the basis of a cause of action for wrongful discharge.[224] In this case, the regulations were too vague to constitute substantial public policy.[225] However, there has been criticism of using regulatory minutia as a source of "substantial public policy" in West Virginia because of the sheer volume of administrative regulations in this state.[226]

5. Cases Finding Substantial Public Policy Based on Other Reasons

This "other" category is specifically reserved for cases where (1) a plaintiff attempted to articulate a "substantial public policy" but the source of the policy is unknown or (2) where a statute specifically excluded the plaintiff from its purview but the plaintiff nonetheless attempted to maintain a *Harless* claim. For instance, in an answer to a certified question, the West Virginia Supreme Court held in *Williamson v. Greene*[227] that even though a discharged at-will employee has no statutory claim for retaliatory discharge under the WVHRA,[228] the discharged employee might nevertheless maintain a common law claim for retaliatory discharge against the employer.[229] In *Williamson*, the employer was not subject to the WVHRA because the employer did not employ twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed.[230] However, despite

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224 *Id.* at 612.

225 *Id.* at 612-13.

226 *See* Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616, 624 (W. Va. 2000) (Maynard, C.J., dissenting) ("[A] substantial public policy now can be found in the most obscure and petty State regulation and used to further erode the employment-at-will doctrine. When you consider that executive agencies churn out rules like Stephen King churns out novels, this is a scary development."). Justice Maynard also discussed the use of administrative regulations as the basis for *substantial* public policy:

> I agree with the appellants that the appellee failed, as a matter of law, to show that any of her actions were in support of a substantial public policy of the State . . . . I believe the West Virginia Code of State Regulations § 64-12-14.2.4 (1987) is simply too general and indefinite to be considered a substantial public policy. When this Court chose the phrase "substantial public policy" . . . it was articulating the narrow parameters of an exception to the at will employment doctrine. The substantial public policy exception certainly does not encompass every broad policy pronouncement found in the voluminous code of state regulations.

Tudor, 506 S.E.2d at 576 (Maynard, J., concurring in part and dissenting in part).

227 490 S.E.2d 23 (W. Va. 1997).

228 W. VA. CODE §§ 5-11-1 to -21 (2000).

229 *Williamson*, 490 S.E.2d at 33.

230 *Id.* at 29-30. The employment of twelve or more persons is required by West Virginia Code section 5-11-3(d) for an employer to be subject to the West Virginia Human Rights Act.

the express language of the statute that excluded the employer, the employer was still liable for the employee's discharge.[231] The cause of action was allowed based on a *Harless* claim, not a claim under the WVHRA, because the court found that "sex discrimination and sexual harassment in employment contravene the public policy of [West Virginia] articulated in the [WVHRA]."[232]

However, in *Travis v. Alcon Laboratories, Inc.*,[233] when a white male under forty claimed harassment under the WVHRA, but was not discriminated against based on any of the protected grounds under the WVHRA, the court held that the WVHRA creates no general public policy against harassment in the workplace for purposes of West Virginia wrongful discharge law.[234] Other West Virginia state and federal courts have declined to find a substantial public policy in the discharge of employee for refusing to work on Sunday[235] or for the discharge of an employee because he has been accused of or indicted for a crime.[236]

C. *The* Harless I *Scheme of Proof*

The scheme of proof in a *Harless* substantial public policy claim is the same as the scheme of proof in a disparate treatment case and most other employment related causes of action.[237] "[O]nce the plaintiff . . . has established the existence of such policy and established by a preponderance of the evidence that an employment discharge was motivated by an unlawful factor contravening that policy, liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive."[238] Therefore, under this scheme of proof, even if an employee can show by a preponderance of the evidence that there was an unlawful motivating factor in her termination, the employer could still prove by a preponderance of the evidence that, regardless of any unlawful motive, the employee still would have been terminated. It would

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231 *Id.* at 33.

232 *Id.* The West Virginia Supreme Court, although not basing its decision on *Harless*, used a similar "collateral doctrine" to allow persons under forty to maintain an action under the WVHRA for age discrimination despite the express language of the statute defining "age" as persons over forty. Bailey v. Norfolk & W. Ry. Co., 527 S.E.2d 516, 533 (W. Va. 1999).

233 504 S.E.2d 419 (W. Va. 1998).

234 *Id.* at 433.

235 Speelman v. Smith's Transfer Corp., No. 85-1883 (4th Cir. May 22, 1986) (unpublished opinion).

236 Terry v. Bethlehem Mines Corp., 84-C-3173 (Kanawha Cty. Cir. Ct. January 17, 1987) (Workman, J.); Sipe v. Shop'n Save Supermarkets, Inc., No. 87-0023-E(K) (N.D. W. Va. Oct. 28, 1987) (Kidd, J.); Burton v. The Pittston Co., No. 84-C-3387 (Raleigh Cty. Cir. Ct. Dec. 29, 1987) (Canterbury, J.).

237 *See* Skaggs v. Elk Run Coal Co., 479 S.E.2d 561 (W. Va. 1996).

238 Page v. Columbia Natural Res., Inc., 480 S.E.2d 817, 829 (W. Va. 1996).

then be up to the employee to show that the reasons given by the employer were pretextual, and that the true reason for the discharge was founded in public policy.[239] An example of how this scheme of proof has been applied is *Yarnevic v. Brink's, Inc.*[240] In *Yarnevic,* a discharged employee argued that his decision to report the embezzlement scheme to the FBI was a substantial public policy principle and that the discharge was, therefore, improper under *Harless.*[241] A retaliatory discharge claim, however, fails if an employer proves that an employee would have been terminated even if he had not engaged in the protected conduct.[242] Because the district court found that Brink's had established legitimate, nonpretextual reasons for the employee's discharge, the plaintiff could not maintain his cause of action.[243]

VI. PROBLEMS WITH *HARLESS* I AND II AND THEIR PROGENY

A. *Unpredictability*

Professor Bastress of the West Virginia University College of Law has noted that "[r]epresenting a client who seeks relief for an employment discharge is a lot like playing bingo: you hope the client calls out facts that permit you to maneuver the case into the right squares of forbidden employer motive or conduct in order to win a prize."[244] By the same token, advising an employer thinking of discharging an employee is equally as difficult.[245] Because of its nature as an at-will relationship imposing no duties on the parties, at-will em-

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239 *See id.* A similar scheme of proof has been applied where an employee claims discharge for exercise of a constitutional right. *See* Syl. Pt. 3, McClung v. Marion County Comm'n, 360 S.E.2d 221 (W. Va. 1987) ("In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct."); *see also* Syl. Pt. 9, Mace v. Charleston Area Med. Cent. Found., Inc., 422 S.E.2d 624 (W. Va. 1992).

240 102 F.3d 753, 757 (4th Cir. 1996) (upholding district court's decision finding that employer provided legitimate, nonpretextual reasons for employee's discharge).

241 *Id.*

242 *See id.*

243 *Id.* at 757-58.

244 Bastress, *supra* note 9, at 319.

245 *See* Bobbi K. Dominick, *What Is the Definition of "Public Policy" Wrongful Discharge? Time for the Idaho Courts to Provide Guidance, Without Judicial Legislation, of Public Policy by Interpreting the Wrongful Discharge Cause of Action,* 35 IDAHO L. REV 285, 307 (1999) ("Employers need some method of determining, prior to acting, whether their conduct is likely to result in liability.").

ployment is a doctrine that theoretically should be easy to administer and provide guidance for employers and employees, as well as a bright-line rule for the courts to follow, but "[r]ecent decades have brought significant change and uncertainty to common-law principles governing employment termination."[246] In the beginning, many courts were reluctant to adopt, or declined to adopt at all, the tort of public policy wrongful discharge because it was "too nebulous" a standard,[247] but most states have now adopted the tort of public policy wrongful discharge,[248] adding the greatest exception to at-will termination of an employee.

Different jurisdictions find public policy in different sources. Some courts require that the source of public policy for the purposes of retaliatory discharge be a constitutional or statutory provision, while others allow administrative regulations and decisions, case law, and even professional codes of ethics,[249] and still other courts have found public policy without a statutory or other legal source.[250] In a Washington case, where public policy was found not based on any statutory or legal source, the dissenting Justice accused the Washington court of creating an "other" category of public policy: "The result of the majority's analysis is that the public policy exception to employment-at-will now applies to a fifth, completely incompatible category; that is, where this court *disagrees* with an employer's definition of just cause . . . ."[251] Some courts have also commented that this type of judicial legislation gives judges an opportunity "to apply their own personal views of what is right and wrong."[252]

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246 Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 632 (1988) (Employment-at-will "has experienced great erosion, leaving uncertainty and wide variations in law between the states.").

247 Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1132 (Ala. 1977).

248 *See* Ballam, *supra* note 39, at 664.

249 *See* Green v. Ralee Eng'g Co., 960 P.2d 1046, 1052 n.4 (Cal. 1998) ("For example, the New Jersey Supreme Court favored broadly defining public policy exceptions: 'The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy.' By contrast, the Michigan Supreme Court held that wrongful discharge tort actions must be based on public policies found in statutes or constitutional provisions.") (quotation and citation omitted).

250 *See, e.g.*, Gardner v. Loomis Armored, Inc., 913 P.2d 377, 386 (Wash. 1996) (finding that discharging an employee "for leaving the truck and saving a woman from an imminent life threatening situation violates the public policy encouraging such heroic conduct.").

251 *Id.* at 387 (Madsen, J., dissenting). Justice Madsen also notes similar criticisms to those in *Feliciano*: "Relying on a dubious formulation of public policy, the majority today invalidates a company work rule designed to protect the lives of men and women employed as drivers in the unique and highly dangerous occupation of operating armored cars." *Id.*

252 Dominick, *supra* note 245, at 285 n.3; *see, e.g.*, Md.-Nat'l Captial Park & Planning Comm'n v. Wash. Nat'l Arena, 386 A.2d 1216, 1228 (Md. 1978) ("Judges are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity.").

B. *Restriction of Private Freedoms*

Whether public policy is defined broadly or narrowly affects the level of intrusion on the employer. "In its narrowest form, public policy must be derived from clear and specific legislation designed to protect employees in their jobs . . . . Under this standard, courts assume very little discretion in identifying public policy and only minimally intrude on employer prerogatives."[253] Conversely, a broad definition of public policy finds public policy in legislative history, administrative regulations, common law, and other sources.[254] The dangers of this type of broad approach to finding public policy was recognized by the Wisconsin court in *Brockmeyer v. Dun & Bradstreet*,[255] where the court held that the public policy must be found in a constitutional or statutory provision.[256] The court recognized that "[c]ourts should proceed cautiously when making public policy determinations."[257] "No employer should be subject to suit merely because a discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it."[258] Without clearly defined public policy standards, the employer is left wondering if what was simply a dispute between the employee and the employer will be found to violate public policy.[259]

In looking at various examples of substantial public policy recognized by the West Virginia Supreme Court, protecting citizens of West Virginia from everything from trucks with bad brakes[260] to what Justice Maynard termed "a bad haircut" in *Kanagy v. Fiesta Salons, Inc.*,[261] it appears that West Virginia takes a broad view of what constitutes public policy. In his dissent in *Kanagy*, Justice Maynard recognized that West Virginia has defined what constitutes a substantial public policy *too* broadly:

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253 Bastress, *supra* note 9, at 331.

254 *See Green*, 960 P.2d at 1051-52.

255 335 N.W.2d 834 (Wis. 1983).

256 *Id.* at 840.

257 *Id.*

258 *Id.*

259 *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388 (Conn. 1980) ("The issue then becomes . . . deciding where . . . to draw the line between claims that genuinely involve the mandates of public policy . . . and ordinary disputes between employee and employer . . . .").

260 *See, e.g.*, Lilly v. Overnight Transp. Co., 425 S.E.2d 214 (W. Va. 1992) (recognizing an employee's refusal to drive a truck with bad brakes as a substantial public policy in the state of West Virginia).

261 541 S.E.2d 616, 623-24 (W. Va. 2000) (Maynard, C.J., dissenting) (criticizing the majority for finding a substantial public policy in providing truthful information, in compliance with the requirements of a West Virginia Board of Barbers and Cosmetologists regulation).

> While I deplore a bad haircut as much as the next person, I am confident that I can protect myself from a bad haircut without the government's assistance. In sum, this case makes bad law because it establishes that a substantial public policy now can be found in the most obscure and petty State regulation and used to further erode the employment-at-will doctrine.[262]

Substantial public policy should be used sparingly because it restricts private dealings for the public good:

> The power to declare an action against public policy is a broad power and one difficult to define. 'No fixed rule can be given to determine what is public policy. It is sometimes defined as that principle of law under which freedom of contract or private dealings are restricted by law for the good of the community--the public good.'"[263]

Because it restricts private freedoms, the policy must "provide specific guidance to a reasonable person."[264]

> An employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations. . . .[265]

Courts have usually looked to statutes for substantial public policy and are aware of the dangers of stretching public policy too far.[266] Finding public policy in the Constitution poses the greatest threat to employers:

> The recognition of constitutional provisions as a source of limitation on private employers could provide a most significant expansion, particularly through protection of employees who promote controversial or unpopular causes. In addition, employees' rights of privacy could also add a significant limitation

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262 *Id.* at 624.

263 Yoho v. Triangle PWC, Inc., 336 S.E.2d 204, 209 (W. Va. 1985) (quoting Higgins v. McFarland, 86 S.E.2d 168 (Va. 1955)).

264 Syl. Pt. 3, Birthisel v. Tri-Cities Health Services Corp., 424 S.E.2d 606 (W. Va. 1992).

265 *Id.* at 612.

266 *See id.* at 611 ("Most of our retaliatory discharge cases involve violations of statutes that we deem to articulate a substantial public policy.").

on employers' abilities to discharge employees for their off-duty activities.[267]

The West Virginia Supreme Court has on rare occasions recognized a substantial public policy from the common law or the Constitution,[268] but has yet to recognize a substantial public policy emanating from the Freedom of Speech clause in the West Virginia Constitution to support a claim for retaliatory discharge.[269] However, public policy based on administrative regulations also presents the same dangers of unpredictability and vagueness as finding public policy in the Constitution or the common law due to the sheer number of such regulations and the minute details covered in the regulations.[270]

C. *Tort Damage Awards*

Because an action for wrongful discharge is a tort action, the Supreme Court held in *Harless* II that tort damages apply.[271] Despite the employee's duty to mitigate damages, allowing tort damages in retaliatory discharge actions can be costly to employers.[272] In a contract action, damages are usually limited to compensatory damages, seeking to give the parties the benefit of their bargain.[273] Conversely, in a tort action for wrongful discharge, emotional distress and even punitive damages are available against an employer.[274] The employer is also at a disadvantage in defending these types of cases because juries may identify themselves with the employee.[275] For example, in *Page*, the jury awarded the plaintiff approximately $280,000 in damages, which included $130,000 for past economic damages and $150,000 in emotional distress dam-

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267 Bastress, *supra* note 9, at 334.

268 *See, e.g.*, Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713 (W. Va. 2001).

269 *See* Tiernan v. Charleston Area Med. Center, Inc., 506 S.E.2d 578 (W. Va. 1998) (holding that an employee did not have a public policy wrongful discharge cause of action against a private employer emanating from the free speech clause of the state constitution).

270 This is especially "scary" "[w]hen you consider that executive agencies churn out rules like Stephen King churns out novels." *Kanagy*, 541 S.E.2d at 624 (Maynard, C.J., dissenting).

271 *See Harless* II, 289 S.E.2d 692, 698 (W. Va. 1982); *Harless* I, 246 S.E.2d 270, 275 n.5 (W. Va. 1978).

272 *See* Seymour v. Pendleton Community Care, 549 S.E.2d 662 (W. Va. 2001) (per curiam) (reinstating damages in the amount of $526,000 in retaliatory discharge action despite employee's failure to mitigate damages); *see also* Jarsulic, *supra* note 23 (discussing Montana's use of employment termination act and the difference between the contract damages under the act and the higher tort damages in states using a tort system for wrongful discharge).

273 *See* Jarsulic, *supra* note 23.

274 *See Harless* II, 289 S.E.2d at 692.

275 *See* Joseph C. Telezinski, Jr., *Without Warning – The Danger of Protecting "Whistleblowers" Who Don't Blow the Whistle*, 27 W. ST. U.L. REV 397, 397 (2000).

ages.[276] The West Virginia Supreme Court affirmed this award.[277] The court gave deference to the fact-finders in the case in reaching their verdict.[278] Despite its affirmance, the Supreme Court suggested that the "question of whether Mrs. Page was terminated in retaliation for her testimony is not strikingly obvious from the record in [the] case."[279]

Damages for emotional distress can be given in a *Harless* action even in the absence of any direct supporting evidence.[280] In *Page*, the court concluded that testimony by Mrs. Page, her husband, and three other individuals as to her emotional symptoms was enough to justify a $150,000 award for emotional distress.[281] Appealing these outrageous awards is often futile. Courts in West Virginia will not set aside a jury verdict as excessive unless it is "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous and manifestly show[s] jury passion, partiality, prejudice, or corruption."[282] Any damage award that does not meet this extremely harsh standard will be upheld on appeal.[283]

Also despite a plaintiff's duty to mitigate damages in a *Harless* action,[284] the West Virginia Supreme Court has upheld awards of lost wages, emotional distress and even punitive damages where the plaintiff did not apply for one job in a twenty month period.[285] In *Seymour v. Pendleton Community Care*,

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276 Page v. Columbia Natural Res., Inc., 480 S.E.2d 817, 823 (W. Va. 1996).

277 *Id.* at 822.

278 *Id.* at 827.

279 *Id.* Also, the court mentions in its opinion that Mrs. Page stole a document from her employer and that the unemployment commission found that she had been terminated for gross misconduct.

280 *See* Mace v. Charleston Area Med. Cent. Found., Inc., 422 S.E.2d 624 (W. Va. 1992).

281 *Page*, 480 S.E.2d at 835 ("Even in the absence of direct evidence supporting the claim of emotional distress, the *Mace* court declined to disturb the jury's award of emotional distress damages. Consequently, we find that Mrs. Page's testimony regarding the emotional symptoms she suffered as a result of her termination, along with the supporting testimony of her husband and three other individuals was sufficient evidence upon which to base this damage award.").

282 Syl. Pt., Addair v. Majestic Petroleum Co., Inc., 232 S.E.2d 821 (W. Va. 1977).

283 *See* Seymour v. Pendleton Community Care, 549 S.E.2d 662 (W. Va. 2001) (per curiam) (reversing trial court's reduction of jury verdict, and reinstating damages in the amount of $526,000 in retaliatory discharge action).

284 Syl. Pt. 2, Mason County Bd. of Educ. v. State Superintendent of Schools, 295 S.E.2d 719 (W. Va. 1982) ("Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer."). On the other hand, where a discharge is malicious, the employer is estopped from asserting the employee's duty to mitigate. *See id.* at 725.

285 *Seymour*, 549 S.E.2d at 662 (reversing trial judge's reduction in jury award for failure to

a jury damage award was upheld even though the plaintiff had failed to apply for a job within the twenty-month period between her termination and the trial and had earned less than one hundred dollars making stained glass at home during that period.[286] These so-called "attempts" to mitigate her damages were upheld despite the fact that they did not seem diligent or reasonable.[287]

D. *Laissez-Faire Economics, Economic Efficiency, and Freedom of Contract*

Some jurisdictions prefer a stricter at-will employment doctrine because it is economically efficient and promotes freedom of contract, two guiding principles of Anglo-American jurisprudence.[288] On the other hand, the tort of public policy discharge can be economically inefficient and burden the parties' freedom to contract. Consider an example of the economic inefficiency of the *Harless* doctrine. A husband and wife decide to open a business and responsibly learn the myriad regulations covering employment and the uncertainty of the *Harless* doctrine. One of their employees is excessively absent. When he does show up, he comes into work late all the time, leaves early, and takes a long lunch. The couple needs some advice. They want to terminate the at-will employee, but there is a problem. Two months ago the employee gave testimony in an unrelated legal proceeding involving the store. The couple is now afraid to terminate the worthless employee because he may bring suit and claim that he has been discharged for giving truthful testimony in a legal proceeding. Not wanting to involve themselves in expensive litigation, and risk a jury verdict against them, the couple keeps the worthless employee. The West Virginia Supreme Court has recognized the "obvious merit" to the argument that the finding of a public policy "binds the hands of an employer" with regard to that employee.[289] However, the court felt that this imposition on the employer was

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mitigate damages and reinstating jury award).

[286] *See id.* at 668 (Davis, J., concurring in part and dissenting in part). Mrs. Seymour, in her own defense, testified with regard to her attempt to mitigate her damages: "I've watched the paper, and I've kept my eye on things -- and kept an eye for what's out there, and kept my eyes open. I just haven't gone to apply." *Id.* at 664.

[287] *See id.* at 668 (Davis, J., concurring in part and dissenting in part) ("In the *Mason County* case, we explained *vis-a-vis* mitigation that 'the wrongfully discharged employee who has not secured employment must be prepared to demonstrate that he or she did not make a voluntary decision not to work, but rather used reasonable and diligent efforts to secure acceptable employment.'").

[288] *See generally* Epstein, *supra* note 20, at 951 (maintaining that at-will contract is supported by principles of freedom of contract and rules of construction).

[289] Page v. Columbia Natural Res., 480 S.E. 2d 817, 826 (W. Va. 1996) ("We are also mindful of appellants' assertion that any endorsement of a public policy against discharge for giving testimony in a legal proceeding 'binds the hands of an employer' with respect to any employee who so testifies. We understand the thrust of that argument to be that our recognition of such a public policy will shield employee wrongdoers from discipline or discharge, in effect because whenever

outweighed by the public policy at issue in the case – the giving of truthful testimony.[290] These decisions show a paternalistic side of the courts, carving out exceptions into the at-will doctrine believing that employees cannot protect themselves on their own while forcing employers to stand on their own two feet.[291]

E. Unilateral Application

The doctrine of at-will employment is "cast in mutuality, affording to the employee as well as employer the right of at-will termination . . . ."[292] One of the difficulties with the erosion of the employment-at-will doctrine is that it creates added responsibilities for only one side of a two-sided relationship. An employee at-will has always been free to quit his or her job and look for employment elsewhere. That employee does not have to show cause, and can even quit his or her job for a reason that would seem to violate a substantial public policy.[293] Under strict at-will employment, employers had the same freedom.[294]

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an employee has so testified, whether truthfully or not, any subsequent discharge will be subject to challenge on public policy grounds. In the practical scheme of things, there is obvious merit to appellants' position. However, such an objection may be raised to practically every ground that may be asserted in a *Harless* type action.").

290 *Id.* ("We cannot conclude that the unfettered discharge of at-will employees ought to take precedence over the search for truth, free of the threat of retaliatory discharge, especially where a means is available to distinguish proper reasons for discharge from retaliation.").

291 *See* Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge--A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW 1 (1984) ("Socioeconomic and equalitarian arguments, advanced in an incessant stream of legal commentary, have also persuaded some courts of the need for change. The nature of the employment relationship is said to have undergone a radical change since the at-will rule won acceptance at the turn-of-the-century and flourished in the *laissez-faire* milieu of the early 1900s. Today's employees are perceived to be more dependent on their corporate employers for economic survival, while in the nonunion situation, they suffer from a marked inferiority of bargaining power, which debilitates them from protecting themselves against unfair terminations. Moreover, the proponents of change perceive an inequity in job security between unionized and nonunionized employees and argue that employers' widespread acceptance of collectively bargained restrictions on their discharge rights should pave the way for redressing, via the common law, these inequalities and inequities.") (citing Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 493-94 (W.D. Ark. 1982); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 920-22 (Cal. Ct. App. 1981); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981); Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 509 (N.J. 1980)).

292 Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 214 (S.C. 1985). For a discussion of the tort of wrongful discharge in South Carolina, see generally Melanie Robin Galberry, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine Is Likely to Keep Expanding*, 51 S.C. L. REV 406 (2000).

293 For instance, a securities broker who works on commission may want to violate certain Securities Exchange Act regulations in order to increase his commission. If his employer tells the employee not to violate the act, the employee is still free to quit his job because he believes his firm is "too strict" or "too ethical" when it comes to following these regulations. The employer has no cause of action against the employee for "wrongful resignation" based on violation of

In fact, in the early 1900's the United States Supreme Court held that the right of an employer to terminate an employee at-will was constitutionally protected because an employer could not be required to retain an employee against his will any more than an employee could be forced to work against his will.[295] Now, besides the state and federal statutes governing private employers, the public policy cause of action further ties the hands of employers to make important decisions concerning their business.

F. Lack of Deference to the Legislature

In the early days of the tort of retaliatory discharge, many courts concluded that "the meaning of 'contrary to public policy' was simply 'too nebulous' to justify the judicial creation of a new tort."[296] Many courts took the position that the exceptions to at-will employment "are best and most appropriately explored and resolved by the legislative branch of our government."[297] Today, some courts still believe that substantial public policy should only be found in those things about which "there is a virtual unanimity of opinion,"[298] and that any "issue which is fairly debatable or controversial in nature is one for the legislature and not for [the courts]."[299] In *Shell v. Metropolitan Life Ins. Co.*,[300] the court recognized the importance of restraint in this area:

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substantial public policy. Conversely, if the employer wanted the broker to violate provisions of the Securities Exchange Act, but the employee refused and was discharged, the employee could arguably maintain a *Harless* claim against the employer.

294 *See* Bell v. South Penn Natural Gas Co., 62 S.E.2d. 285, 288 (W. Va. 1950) (holding that without contractual provisions to the contrary employment may be terminated with or without cause at the will of either party); *see also* Clinton v. State ex rel. Logan County Election Bd., 29 P.3d 543, 545 (Okla. 2001) ("Notions of fundamental fairness underlie the concept of mutuality which extends a corresponding freedom to the employer."); *Ludwick*, 337 S.E.2d at 214. *See generally* ROTHSTEIN, *supra* note 3, at 3 (noting that "the employee was free to quit and seek alternate employment whenever he or she wanted, and the employer was free to fire the employee at any time.").

295 *See* Coppage v. Kansas, 236 U.S. 1, 13-14 (1915); Adair v. United States, 208 U.S. 161, 172-75 (1908). These cases were overruled in the case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that an employer may be liable for wrongful termination for discharging an employee exercising his legal right to participate in a union). *See generally* Note, *Protecting Employees at Will against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983).

296 Ballam, *supra* note 39, at 661.

297 Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89 (N.Y. 1983).

298 Yoho v. Triangle PWC, Inc., 336 S.E. 2d 204, 209 (W. Va. 1985) (quoting Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941)).

299 *Id.*

300 396 S.E.2d 174 (W. Va. 1990).

> We have exercised the power to declare an employer's conduct as contrary to public policy with restraint,[301] and have deferred to the West Virginia legislature because it "has the primary responsibility for translating public policy into law."[302]

The Fourth Circuit has also recognized the importance of deference to the West Virginia legislature: "The power to declare an employer's conduct as contrary to public policy is to be exercised with restraint, and with due deference to the West Virginia legislature as the primary organ of public policy in the state."[303] Hence, these courts recognize that if the legislature has not put a cause of action for wrongful discharge into a piece of legislation, it may be because the legislature did not intend to do so, and if there is no statute supporting a particular public policy, it may be because the legislature has not recognized that as a public policy of the state. Similarly, if the legislature has limited the applicability of a certain act to employers with only twelve or fewer employees, there must be a reason for the limitation.

Cases such as *Williamson v. Greene*[304] and *Bailey v. Norfolk & Western Railway Co.*[305] exemplify judicial legislation in the area of wrongful discharge. In *Williamson*, the court effectively lifted the small business exemption of the WVHRA by holding an employer with less than twelve employees liable under a *Harless* claim public policy exception despite the lack of a constitutional, statutory, administrative, or common law basis.[306] The decision in *Williamson* could also allow plaintiff employees to maintain a *Harless* claim where their employers fail to meet the definition of an "employer" under the WVHRA for other reasons, such as an independent contractor relationship. This misuse of the *Harless* cause of action renders definitions and exceptions contained in the WVHRA meaningless and expands the scope of the Act beyond what the legislature intended.

Other courts have similarly lifted small business exceptions by holding that the exemption of small businesses by the legislature is to relieve the burdens of administrative compliance only, and not from the antidiscrimination

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301 *See also Yoho*, 336 S.E.2d at Syl. Pt. 3 ("Ordinarily the courts will not decide on public policy grounds issues which are fairly debatable, but will instead leave them for legislative decision.").

302 *Shell*, 396 S.E.2d at 180 (citations omitted).

303 Washington v. Union Carbide Corp., 870 F.2d 957, 962-63 (4th Cir. 1989).

304 490 S.E.2d 23 (W. Va. 1997).

305 527 S.E.2d 516 (W. Va. 1999). In *Bailey*, although not a *Harless* case, the court used the "collateral victim doctrine" to allow persons under forty to maintain a suit for age discrimination under the WVHRA although the Act dictates that "age discrimination" under the WVHRA means discrimination against a person based on their status as a person over forty. *Id.* at 533.

306 *See Williamson*, 490 S.E.2d at 33.

provisions of the acts.[307] These courts have therefore allowed wrongful discharge claims based on public policy grounds, despite the fact that the legislature specifically exempted small businesses.[308] One dissenting justice has characterized this type of expansion as "an egregious and inexcusable abuse of judicial power," because the court defied "clear and specific legislative enactments."[309]

G. *Abuse by Disgruntled Employees*

The West Virginia Supreme Court has held that " [i]t is against substantial public policy of West Virginia to discharge an at-will employee because such employee has given or may be called to give truthful testimony in a legal action."[310] In *Page*, an employee was allegedly terminated for deposition testimony in a wrongful discharge case.[311] In its reasoning, the *Page* court acknowledges that sometimes unscrupulous employees who are terminated for legitimate reasons will try and use this public policy exception to their advantage, but feels that this misuse is outweighed by the public interest in protecting truthful testimony.[312]

Justice Neely has also recognized that the substantial public policy exception held potential for abuse by disgruntled employees. In his dissent in *Stanley v. Sewell Coal Co.*, Neely points out that "[t]he plaintiff here has used *Harless* as the basis for a cause of action which on its face seems groundless . . . I submit that this is a nuisance lawsuit made possible only by the improvident holding in *Harless*."[313] Thus, the potential for a legitimately terminated employee to come up with some reason for her termination based on the substantial policy exception has long been recognized. This kind of deception is to be expected with an exception that is so broadly defined.

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307 *See, e.g.*, Collins v. Rizkana, 652 N.E.2d 653, 661 (Ohio 1995) (holding that legislature's intent was "to exempt small businesses from the burdens of [administrative compliance], not from the antidiscrimination policy").

308 *See* Molesworth v. Brandon, 672 A.2d 608 (Md. 1996) (holding that small business exemption was from administrative process only); *Collins*, 652 N.E.2d 653. *See generally* Ballam, *supra* note 39, at 678-79.

309 Payne v. Rosendaal, 520 A.2d 586, 592 (Vt. 1986).

310 Syl. Pt. 4, Page v. Columbia Natural Res., Inc., 480 S.E.2d 817 (W. Va. 1996).

311 *Id.* at 821.

312 *Id.*

313 Stanley v. Sewell Coal Co., 285 S.E.2d 679, 684 (W. Va. 1981) (Neely, J., dissenting) (retaliatory discharge claim based on termination for reporting accidents to the Mine Enforcement Safety Administration).

VII. RECOMMENDATIONS

The current system obviously leaves employers wondering what kinds of behaviors subject them to liability for wrongful discharge and leaves many employees unprotected from arbitrary adverse employment action. With that said, the question becomes how to fashion a workable solution that balances the legitimate and sometimes competing interests of employees and employers in West Virginia. One obvious solution would be to return to truly at-will employment where an employee could be discharged for good, bad, or no reason. This solution may promote mutuality, freedom of contract, and laissez-faire economics. However, despite its practicality and ease of application, this solution ignores the public's legitimate interest in keeping employers from terminating their employees in contravention of the substantial public policies of the state as well as an employee's legitimate interest in being free from such ill-motivated discharges.

Another solution would be to retain the *Harless* exception, but provide a clearer definition of what constitutes a public policy *substantial* enough to override at-will employment and subject an employer to liability for retaliatory discharge. This option could include restricting the sources of the public policy to those that have been clearly articulated in a constitution, statute, or common law. Keeping administrative regulations, obligations of professional responsibility, and general notions of what constitutes public policy out of the *Harless* framework would go a long way to provide some needed guidance and restraint. The definition of "public policy" could even be restricted to constitutional provisions or statutes, or further yet, to "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision or statute."[314] This latter solution would 1) involve due exercise

[314] *See* MONT. CODE ANN. § 39-2-903(7) (2002). The Montana statute also defines administrative rule as a source of public policy. This has been removed from the definition used and recommended in this article as administrative regulations, especially at a state level, are promulgated by an unelected fourth branch of government and too numerous to constitute a "substantial" public policy. *See* Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616, 624 (Maynard, C. J., dissenting) ("[A] substantial public policy now can be found in the most obscure and petty State regulation and used to further erode the employment-at-will doctrine. When you consider that executive agencies churn out rules like Stephen King churns out novels, this is a scary development."). Justice Maynard also discussed the use of administrative regulations as the basis for *substantial* public policy:

> I agree with the appellants that the appellee failed, as a matter of law, to show that any of her actions were in support of a substantial public policy of the State . . . . I believe the West Virginia Code of State Regulations § 64-12-14.2.4 (1987) is simply too general and indefinite to be considered a substantial public policy. When this Court chose the phrase "substantial public policy" . . . it was articulating the narrow parameters of an exception to the at will employment doctrine. The substantial public policy exception certainly does not encompass every broad policy pronouncement found in the voluminous code of state regulations.

Tudor, 506 S.E.2d at 576 (Maynard, J., concurring in part and dissenting in part).

of judicial restraint; 2) defer to the legislature on matters of creating public policy for the state of West Virginia; 3) resolve some of the unpredictability and ambiguity created by the current state of the law; and 4) restrict *Harless* actions to those based on currently existing and clearly articulated public policy. This definitional approach would further curb some of the abuse by disgruntled employees who misuse *Harless* as a fallback position to other employment protections by making it more difficult for an employee to prevail on such a theory. However, simply narrowing the definition of public policy offers employers little protection from litigation expenses, tort damages, and outrageous jury awards once a cause of action is stated under the new definition.

In the alternative, West Virginia could adopt legislation constituting a compromise position – an equitable tradeoff of the competing interests of employers and employees. To balance the need for employee protection from unscrupulous terminations with an employer's need for protection from run-away jury verdicts, the state of Montana passed the Wrongful Discharge from Employment Act in 1987.[315] Prior to the Act, Montana, like West Virginia, recognized the tort of wrongful discharge, but was having the same problems as West Virginia – large jury awards, high defense costs, and uncertainty as to the exact parameters of the law. The Montana Act gives rise to a cause of action for terminations that, among other things, are in retaliation for an employee's refusal to violate public policy.[316] Additionally, Montana's statute creates a "just cause" standard of review for most termination cases and encourages arbitration and exhaustion of internal remedies.[317] This law replaces the at-will doctrine in Montana and severely limits remedies available to employees. Since the enactment of the Wrongful Discharge Act in Montana, significant effects have occurred. One effect is that the average award in a wrongful termination act was reduced from $166,700 to $36,800.[318] Part of this reduction comes from the fact that damages under the Act are based on the employee's level of income and not on a jury's estimation of damages.[319] Another effect is that the average time for employment litigation decreased from four years to two years after the passage of the Montana Act.[320]

In addition to Montana's legislative alternative, the National Conference of Commissioners on Uniform State laws drafted and approved the Model Em-

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315 MONT. CODE ANN. §§ 39-2-901 to -915 (2002). Administrative regulation has been removed as a source of public policy.

316 *See id.*

317 *See id.*

318 *See* Jarsulic, *supra* note 23 (discussing Montana's use of employment termination act and the difference between contract damages under the act and the higher tort damages in states using a tort system for wrongful discharge).

319 *See id.*

320 *See id.*

ployment Termination Act ("Model Act") in August 1991.[321] The primary purpose of the Model Act is to provide uniformity in employment termination among the states that adopt it.[322] Such efficiency and predictability is significant to an employer because the employer "benefits from being able to have standardized personnel policies that would be effective beyond state lines."[323] Similar to the Montana Act, the Model Act changes the underlying nature of the employment relationship, providing as a general rule that "an employer may not terminate the employment of an employee without good cause."[324] The Model Act also includes mandatory arbitration provisions and an opt-out provision that allows an employee to opt out of coverage by agreeing to a guaranteed schedule of graduated severance payments.[325]

In West Virginia, this legislation could take the form of an "Employment Termination Act," modeled after the Montana Wrongful Discharge from Employment Act and the Uniform Law commissioners' Model Employment Termination Act, taking the best parts from each. The West Virginia Act could be designed to work with existing federal and state statutes governing employment discharge, but preempt all actions arising in tort, express contract (except for a written contract for a term) or implied contract. The Act could further provide that if an employee has any other remedy available, the employee cannot maintain a cause of action under the Act. The legislation would set forth rights and remedies with respect to wrongful discharge and provide the exclusive remedy for a wrongful discharge from employment in West Virginia.

The legislation would have a dual purpose. First, it would create a statutory cause of action for wrongful discharge that would protect West Virginia employees from arbitrary discharge. At the same time, the legislation could potentially save West Virginia employers thousands of dollars every year in excessive jury awards and litigation expenses by removing tort damages from the mix of available remedies, prohibiting emotional distress damages, limiting damages to back pay and benefits or reinstatement, and either prohibiting or providing a cap on punitive damages. The legislation could also encourage or require arbitration and the exhaustion of internal remedies, further discouraging litigation and promoting compromise. Another advantage would be a shorter

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321 *See* MODEL EMPLOYMENT TERMINATION ACT, *available at* http://www.nccusl.org. The findings of the NCCUSL indicate that nationwide, in the last several years, wrongful termination cases have increased 400%, and that in California, plaintiffs won 70% or more and averaged between $300,000 -- $500,000 in damages, that attorneys' fees and expenses add on at least another $70,000. The findings also cite another study, done several years ago, that compared the litigation costs of an employment suit to the recovery and found that the average employee recovery was $125,000, but that the average litigation expenses were $164,000. *See generally* Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994).

322 *See id.*

323 *See id.*

324 *See* MODEL EMPLOYMENT TERMINATION ACT, *supra* note 321.

325 *See id.*

statute of limitations period applicable to a *Harless* claim, encouraging the prompt filing of any claim under the Act. All in all, if carefully drafted, this legislation could provide a "win-win" situation for all involved -- employees would be granted an expanded substantive right to "good cause" protections against discharge while the range of available remedies for wrongful discharge would be sharply limited. Not only could this legislation obviate the need for a *Harless*-type cause of action, but it could also preempt all causes of action by an employee against his employer for intentional infliction of emotional distress, breach of an implied employment contract (created either by an employer's oral statement or by a written personnel manual), breach of the implied covenant of good faith and fair dealing (not yet adopted in West Virginia) and defamation. Therefore, this legislation, if properly crafted, could bring fairness, balance, and much needed clarity into the employer-employee relationship.

VIII. CONCLUSION

Since the court's holdings in *Harless* I and II, numerous cases have been decided based on *Harless*-type claims. These cases find (or sometimes do not find) substantial public policy to support a cause of action for wrongful discharge in the state and federal constitution, state and federal statutes, administrative agency regulations, the common law, as well as other less well-defined sources even when a statute expressly exempts an employer from its provisions. Despite *Harless* I's requirement of "substantial" public policy, the courts have been willing to find "substantial" public policy in regulatory minutia. Accordingly, as applied, the *Harless* doctrine is (1) unfair and unpredictable to employers; (2) difficult for courts to administer; (3) a usurpation of the legislative power; and (4) economically inefficient. Because of the ambiguity, inefficiency, and unfairness of the doctrine, the courts in West Virginia should restrict the scope of the exception and return to a more traditional at-will employment analysis. In the alternative, the court should more precisely define what constitutes a "*substantial* public policy" that would support a cause of action for retaliatory discharge, or the legislature should act to balance the sometimes competing interests of the employer and employee in West Virginia.

Parween S. Mascari[*]

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