

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Rozann Wilcox,
Plaintiff Below, Petitioner**

vs) No. 11-0678 (Wood County 08-C-185)

**Ginny Conley and
The County Commission of Wood
County, West Virginia,
Defendants Below, Respondents**

FILED

**November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Rozann Wilcox appeals the circuit court's order granting summary judgment in favor of respondents, Ginny Conley and the County Commission of Wood County, West Virginia. Petitioner also appeals the circuit court's order dismissing Count V of her Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Respondents have filed their response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was hired as a legal secretary by the Wood County Prosecuting Attorney's Office in 1995, while Michele Rusen was the prosecutor. As the circuit court recognized, petitioner was an at-will employee. Petitioner signed a "Declaration of Confidentiality" when she began her employment in 1995, and then again on January 6, 1997, after Respondent Conley took office. The "Declaration of Confidentiality" signed on January 6, 1997, included petitioner's agreement not to divulge information regarding pending investigations, whether ongoing or closed, to anyone outside the prosecutor's office. By signing this agreement, petitioner acknowledged her understanding that "in the event that I breach my agreement not to divulge any confidential information as outlined herein, that I may be summarily discharged."

In 1998, pursuant to a grant, petitioner assumed the additional duty of Juvenile Justice Liaison for the office. She continued to work as a legal secretary, as well. She was the secretary of attorney Jim Leach while he worked in the prosecutor's office and they became friends. In 2000, Leach ran for county prosecutor against respondent Conley. Conley won the election. Petitioner alleged that Conley had negative feelings toward her due to her support for Leach in the 2000 election. At some point, Leach left the prosecutor's office.

On August 27, 2007, according to petitioner's testimony, Leach, who was representing a juvenile in an uncharged case, came to the prosecutor's office to meet with Conley. As Conley was not there, Leach asked petitioner about accessing the case file of A.T., the juvenile whom he represented.¹ Petitioner did not recognize A.T.'s name, but then realized that all the information about the alleged crime was contained in one file under another suspect's name, which included information about another juvenile who was not represented by Leach. Leach told petitioner that he was looking for the statement of his client, A.T. Petitioner remained in her office with Leach while he looked through the file. When he finished, per petitioner's deposition testimony, Leach indicated that the statement he was seeking was not in the file and left. Per the petitioner's complaint, the file reviewed by Leach involved accusations against at least two members of a local high school football team. Petitioner testified at her deposition that she did not speak to any attorney in the prosecutor's office prior to allowing Leach access to the file. Afterwards, however, two assistant prosecutors spoke to her about allowing Leach access to the file.

The next day, August 28, 2007, petitioner was called to prosecutor Conley's office and, after questioning petitioner about the incident involving Leach's access to the file in question, Conley discharged petitioner for admittedly showing Leach the file. In her deposition, petitioner admitted that charges had not yet been filed against Leach's client at the time she allowed him access to the file. Petitioner asserts that sharing this type of information with defense counsel was consistent with the practice of the lawyers and staff in the office. Per the respondents, "Mr. Leach was not entitled to discovery because the investigation in which his client was a suspect was ongoing and [Mr. Leach's] client had not yet been criminally charged, a fact which [petitioner] knew at the time she showed the file to Mr. Leach."

Petitioner instituted the case-at-bar against Conley and the County Commission of Wood County in a ten-count complaint, which included causes of action for retaliatory

¹ As is the practice of this Court in sensitive matters and matters involving children, we refer herein to the juvenile referenced in this case by the juvenile's initials only.

discharge, due process violations, and intentional infliction of emotional distress. The circuit court granted a Rule 12(b)(6) dismissal of certain counts of the Complaint, including Count V which concerned retaliatory discharge based upon allegedly improper prosecutorial decision-making. Discovery proceeded as to the remaining counts. On September 13, 2009, the circuit court granted summary judgment in favor of respondents on the remaining counts. Petitioner appeals both the summary judgment and the Rule 12(b)(6) dismissal of Count V of her Complaint.

“‘A circuit court's entry of summary judgment is reviewed *de novo*.’ Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).” Syl. Pt. 1, *Mountain Lodge Ass’n v. Crum & Forster Indem. Co.*, 210 W.Va. 536, 558 S.E.2d 336 (2001). “‘A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’ Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

Petitioner argues that the circuit court erred in granting summary judgment in favor of respondents on petitioner’s claim that her termination was improperly politically motivated. Petitioner alleged that she was subjected to retaliatory discharge because respondent Conley believed that petitioner actively supported Conley’s political opponent, Jim Leach, in the 2000 election. The circuit court granted summary judgment on this cause of action, finding that since petitioner continued to work for the prosecutor’s office for another seven years after the 2000 election that “it flies in the face of common sense to assert that political motivations stemming from events that occurred surrounding the 2000 election played a part in the motivation to terminate the [petitioner] on August 28, 2007.” Further, the circuit court found that although petitioner tried to tie her termination to political motivations related to the then-upcoming elections in 2008, such would require “conjecture, surmise and speculation” as no facts were presented to support a reasonable inference that her termination was politically motivated. The Court finds no error in the circuit court’s grant of summary judgment on this ground.

Petitioner also alleged a violation of her due process rights based upon an asserted liberty interest in being able to work in her chosen profession without the burden of an unjustified label of infamy. The circuit court found that the nature of petitioner’s termination “is not sufficient to reach the level of stigmatization such that future employment opportunities were foreclosed or seriously damaged . . . the evidence indicates that no stigma was created.” Petitioner contends that she was entitled to a “name-clearing” hearing and that her only opportunity to respond to the charges against her was a brief meeting with Conley, without other witnesses or counsel present. Respondents contend that where an employer

tells the employee the reasons for the discharge privately, such as in the case *sub judice*, no stigma attaches. In addition to telling petitioner privately why she was discharged, Conley provided the reason for petitioner's termination on a form related to petitioner's unemployment claim. Respondents assert that these two scenarios do not constitute a public disclosure that would implicate any liberty interest. The Court finds that the circuit court did not err in granting summary judgment on this issue.

Next, petitioner argues that the respondents owe her unpaid wages pursuant to the West Virginia Wage Payment and Collection Act found at West Virginia Code § 21-5-1 to 18 based upon hours worked in excess of thirty-five hours per week. Respondents argue that petitioner was a salaried employee whose work was based on a forty-hour week and, therefore, she had no legitimate claim for hours worked under forty hours per week as she has been paid for the same. Respondents further argued that while overtime is paid for hours worked above forty hours, petitioner only reported overtime hours on one occasion and she was paid for those overtime hours. Petitioner argues that she waives the "premium" pay of time and half wages for any hours worked that she alleges constitute overtime and, instead, seeks her regular wage for any such additional hours. The Court is not persuaded by this argument. Based upon the particular facts and circumstances of the present case, the Court concludes that there was no error in the grant of summary judgment on this issue.

“Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.’ Syllabus point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).” Syl. Pt. 1, *Albright v. White*, 202 W.Va. 292, 503 S.E.2d 860 (1998). Petitioner challenges the Rule 12(b)(6) dismissal of Count V of her Complaint that “Ginny Conley took steps to protect certain members of the [local]football team, and others, by hiding information concerning their involvement in certain activities and by providing them with special treatment in criminal investigations and prosecutions that is not afforded to other criminal defendants and/or witnesses.” Petitioner further alleged that Conley did not “want to follow the normal office procedures with regard to files involving members of the team in order to protect persons on the team.” Petitioner also alleged that she was discharged for “not providing special treatment and protection additional to that which is provided to the average juvenile offender and/or witness to certain members of the [football team]”

The circuit court dismissed Count V indicating that the claim was barred by absolute immunity enjoyed by the prosecutor. As an alternative ground, the circuit court also found that Count V lacked specificity. Respondents argue that the circuit court properly dismissed this cause of action based upon the finding that respondent Conley had absolute immunity as prosecutor. Prosecutors enjoy absolute immunity from civil actions for the performance of their prosecutorial functions such as initiating prosecution. *See Mooney v. Frazier*, 225

W.Va. 358, 693 S.E.2d 333 (2010). The Court finds no error in the circuit court's dismissal of Count V of the Complaint.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh