

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

JASON NICHOLS,

Plaintiff,

v.

Civil Action No. 3:18-cv-00266

JURY TRIAL DEMANDED

COUNTY COMMISSION OF CABELL
COUNTY, a public corporation,
BETH THOMPSON, in her official capacity
and individually, and
PHYLLIS SMITH, in her official capacity
and individually,

Defendants.

COMPLAINT

Plaintiff Jason Nichols comes, by counsel, and makes and files his Complaint against Defendants the County Commission of Cabell County, Beth Thompson, and Phyllis Smith (collectively, “Defendants”) as follows:

PARTIES

1. Plaintiff, Jason Nichols, is a citizen and resident of Cabell County, West Virginia.
2. Defendant the County Commission of Cabell County (the “Commission”) is a political subdivision and a public corporation duly constituted in accordance with the West Virginia Constitution and West Virginia Code Section 7-1-1, et. seq. At all relevant times herein, the Commission was a joint employer of Plaintiff.
3. Defendant Beth Thompson (“Defendant Thompson”) is a citizen and resident of Wayne County, West Virginia and is the County Administrator of Cabell County, duly appointed

by the Commission on or about July 1, 2015. At all relevant times herein, Defendant Thompson was an agent of both the Commission and the Office of the Clerk of Cabell County. Defendant Thompson is also being named in this action in her individual capacity.

4. Defendant Phyllis Smith (“Defendant Smith”) is a citizen and resident of Cabell County and is the Clerk of Cabell County, having been duly appointed by the Commission on or about September 1, 2017. At all relevant times herein, Defendant Smith, as the Clerk of Cabell County, was a joint employer of Plaintiff. Defendant Smith is also being named in this action in her individual capacity.
5. At all times relevant hereto, the Commission was acting through its agents, supervisors, directors, officers, employees and assigns, including but not limited to, Defendants Thompson and Smith.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the claims asserted herein in accordance with 28 U.S.C. §1331 as Plaintiff’s claims arise pursuant to 42 U.S. C. §1983, along with pendent state law claims under the West Virginia Whistleblower Act and West Virginia common law.
7. Venue is appropriate in the U.S. District Court for the Southern District of West Virginia pursuant to 28 U.S.C. §1391(a)(1).

FACTS

8. Plaintiff was jointly employed with the Commission and Defendant Smith as a deputy clerk from August of 2015 until January 8, 2018, when he was unlawfully terminated from his employment. As a deputy clerk, Plaintiff was charged with responsibility for administrative and ministerial tasks related to Cabell County's budget. Plaintiff reported to the late Karen Cole, Clerk of Cabell County, until approximately August of 2017. After the death of Ms. Cole, Plaintiff began reporting to the newly appointed Clerk of Cabell County, Defendant Phyllis Smith on September 1, 2017. As set forth herein, Defendant Beth Thompson, an agent of the Commission and Defendant Smith, frequently sought to direct and control Plaintiff's work.
9. Beginning in or about the Spring of 2017, the Office of the Prosecuting Attorney of Cabell County (the "OPA") has been conducting an ongoing, investigation of the financial affairs of Cabell County. The scope of that investigation has increased over time, due in part, to reports made by Plaintiff to the OPA.
10. Plaintiff, in good faith, reported several instances of suspected misconduct to the OPA. Plaintiff made these reports outside of his normal duties and as a citizen and taxpayer of Cabell County. For example:
 - a. Plaintiff reported to members of the OPA his concern that Defendant Thompson intended to hand over full control, responsibility for, and privileges of Cabell County's payroll accounts to a third-party, out-of-state vendor. Plaintiff believed this conduct to be illegal under West Virginia law and to be to the detriment of Cabell County citizens: (1) West Virginia Code §7-5-1 requires, among other things, that all money in the possession of the Sheriff be kept in his possession, unless deposited by

him in a county depository, in which case an accurate daily deposit account thereof shall be kept in his office; (2) West Virginia Code §7-5-2 requires, among other things, that the Clerk of Cabell County keep proper accounts in the books of her office; and (3) West Virginia Code §7-5-4 requires, among other things, proper signatures of the president and clerk of the county court on checks that are issued;

- b. Plaintiff also reported to members of the OPA his concern that Cabell County taxpayers were paying large amounts of insurance for approximately \$30 million of fixed assets, when there had been no physical audit of the fixed assets to even verify if all such assets existed; and
 - c. Plaintiff reported to members of the OPA his concern that Defendant Thompson had stated that Cabell County employees were going to be required to pay more for medical insurance. Plaintiff reported that the required “increases” appeared to be unwarranted because the County had been given a refund on claims the previous year and the account holding the self-insured medical insurance funds contained an excessive amount of funds. Plaintiff further reported that Defendant Thompson had drawn on the medical insurance account to transfer funds to the general fund and then used those funds to pay the local jail invoices.
11. Prior to his reports to the OPA, Plaintiff had repeatedly expressed these same concerns to Defendant Thompson and Defendant Smith, who upon information and belief, conveyed Plaintiff’s concerns to the Commission.
 12. It was also known by Defendants Thompson and Smith that Plaintiff, of his own volition, had even contacted the Office of the West Virginia State Auditor regarding the

outsourcing of payroll. Upon information and belief, this information was further conveyed by Defendant Thompson to the Commission.

13. Defendants were also fully aware of the fact that the OPA investigation had expanded, at least due in part, to the reports Plaintiff had made. After Plaintiff had questioned the legality of the outsourcing of payroll and had raised concerns about the lack of a physical audit for \$30 million in fixed assets and had questioned the imposed increase on medical insurance contributions:
 - a. Members of the OPA contacted Defendants Thompson and Smith to ask questions about some of these same issues;
 - b. In full view of at least Defendant Smith, members of the OPA had frequently come to Plaintiff's office and requested him to provide additional information surrounding their investigation;
 - c. During a meeting in November of 2017, when Plaintiff questioned handing over the control of the payroll account to a third-party, Defendant Thompson warned Plaintiff "to stop stirring the pot." She informed those present that she was going to outsource the payroll function and hand over control of the payroll account to the third-party "whether anyone liked it or not;" and
 - d. In December of 2017, the OPA issued a West Virginia Freedom of Information Act request (the "WVFOIA request") for information surrounding some of the same issues Plaintiff had raised with Defendants. Approximately one week before Plaintiff was fired, Defendant Smith learned from the Chief Deputy Clerk that Plaintiff had been assisting with the preparation of documents in response to the WVFOIA request. At that time, the Chief Deputy Clerk also informed Defendant Smith that a member

of the OPA had come and spoken with Plaintiff in his office. In response, Defendant Smith cautioned the Chief Deputy Clerk that if anyone from the OPA came in the future, the OPA member should be directed to come to her personally and not Plaintiff.

14. Thereafter, it became clear to Plaintiff that Defendant Thompson intended to control what information was given to the OPA. For example, when Plaintiff asked questions of Defendant Smith about documents to be produced in response to the WVFOIA request, Defendant Smith would state that she had to ask Defendant Thompson. Defendant Smith further cautioned Plaintiff that nothing was to be produced in response to the WVFOIA request until both she and Defendant Thompson had reviewed the response.
15. On January 8, 2018, during a meeting with Defendant Thompson and Defendant Smith and others, Plaintiff again expressed concerns over the outsourcing of the payroll function and how that would be implemented in compliance with the law. Defendant Thompson became visibly agitated and told Plaintiff he was “no longer needed.”
16. On January 8, 2018, just hours before Plaintiff was preparing to release documents to the OPA in response to the WVFOIA request, Defendant Smith informed Plaintiff that he was being terminated from employment. When Plaintiff asked why he was being terminated, Defendant Smith told him, “They do not have to give you a reason.”

**COUNT ONE: 42 U.S.C. §1983
(DEFENDANTS THOMPSON and SMITH, IN THEIR INDIVIDUAL CAPACITIES)**

17. Plaintiff reincorporates herein each of the preceding paragraphs 1-16 as if set forth verbatim herein.

18. The issue of who has the control, responsibility for, and privileges of the payroll accounts of Cabell County is a matter of public concern, especially when the West Virginia Code sets forth requirements governing such accounts as set forth in West Virginia Code §7-5-1 *et. seq.*
19. The use and potential misuse of taxpayer money to pay high insurance premiums on approximately \$30 million of fixed assets –when there has not been a physical audit--is a matter of public concern.
20. The use and potential misuse of county medical insurance funds is a matter of public concern.
21. The right to report and question potential misuse of public funds is a matter of public concern.
22. By reporting his concerns to the OPA and to the West Virginia State Auditor's office and calling attention to these same concerns to Defendants Thompson and Smith, Plaintiff engaged in protected expression regarding matters of public concern. By reporting his concerns to the OPA and to the West Virginia State Auditor's office, Plaintiff also sought redress of grievances by his government.
23. Plaintiff's interests in First Amendment expression of this sort outweigh any prevailing interests of Defendants.
24. Plaintiff's exercise of his First Amendment rights to free speech and expression was a substantial or motivating factor in Defendants' decision to terminate Plaintiff.
25. Plaintiff's exercise of the right to redress his grievances through the Office of the Prosecuting Attorney and the West Virginia State Auditor's office was a substantial or motivating factor in Defendants' decision to terminate Plaintiff.

26. As a direct and proximate result of Defendants' actions, Plaintiff has suffered damages in the form of lost wages, emotional distress, and humiliation.

**COUNT TWO: 42 U.S.C. §1983
DEFENDANT CABELL COUNTY COMMISSION AND
(DEFENDANTS THOMPSON AND SMITH IN THEIR OFFICIAL CAPACITIES)**

27. Plaintiff reincorporates herein each of the preceding paragraphs 1-26 as if set forth verbatim herein.
28. The issue of who has the control, responsibility for, and privileges of the payroll accounts of Cabell County is a matter of public concern, especially when the West Virginia Code sets forth requirements governing such accounts as set forth in West Virginia Code §7-5-1 *et. seq.*
29. The use and potential misuse of taxpayer money to pay high insurance premiums on approximately \$30 million of fixed assets –when there has not been a physical audit--is a matter of public concern.
30. The use and potential misuse of county employee medical insurance funds is a matter of public concern.
31. The right to report and question potential misuse of public funds is a matter of public concern.
32. By reporting his concerns to the OPA and to the West Virginia State Auditor's office and calling attention to these same concerns to Defendants Thompson and Smith, Plaintiff engaged in protected expression regarding matters of public concern. By reporting his concerns to the OPA and to the West Virginia State Auditor's office, Plaintiff also sought redress of grievances by his government.

33. Plaintiff's interests in First Amendment expression of this sort outweigh any prevailing interests of Defendants.
34. Plaintiff's exercise of his First Amendment rights to free speech and expression was a substantial or motivating factor in Defendants' decision to terminate Plaintiff.
35. Plaintiff's exercise of the right to redress his grievances through the Office of the Prosecuting Attorney and the West Virginia State Auditor's office was a substantial or motivating factor in Defendants' decision to terminate Plaintiff.
36. Defendant Cabell County Commission's custom was to retaliate against individuals who reported waste or wrongdoing or engaged in protected speech. Indeed, Defendant Thompson, a policymaker and appointee of the Commission, was known by the Commission to be very likely to retaliate against individuals who reported waste or wrongdoing or who engaged in protected speech. In 2016, Defendant Thompson abruptly discharged the IT Director who had engaged in whistleblowing about the fact that Defendant Thompson and the Commission had repeatedly failed to purchase an adequate means for back up of financial data, resulting in loss of public financial data. Defendant Thompson discharged the IT Director without following the County's procedures for termination. A lawsuit is pending in that matter.
37. Since the discharge of the IT Director, Defendant Cabell County Commission has allocated to Defendant Thompson the oversight of the response of Defendants to the ongoing OPA investigation of the County's financial affairs. Upon information and belief, the Commission did so with full knowledge that Plaintiff had expressed the concerns discussed herein to Defendants Smith and Thompson, that he had made similar reports to the OPA that resulted in the expansion of the investigation, and that he was

participating in that investigation at the OPA's request. Nevertheless, the Commission, with reckless indifference to Plaintiff's constitutional rights, failed to adequately supervise or train Defendant Thompson, directly resulting in Plaintiff's unlawful termination.

38. Defendant Smith, in her official capacity as the County Clerk, also had actual or constructive knowledge that Defendant Thompson was engaging in conduct that posed a pervasive and unreasonable risk of constitutional injury to Plaintiff. Nevertheless, Defendant Smith's response to that knowledge was so inadequate, it showed deliberate indifference to or tacit authorization of the conduct of Defendant Thompson. Defendant Smith was known to defer to Defendant Thompson on every issue regarding the response to the OPA. Defendant Smith's conduct in this regard directly resulted in the unlawful termination of Plaintiff's employment.
39. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered damages in the form of lost wages, emotional distress, and humiliation.

**COUNT THREE: UNLAWFUL RETALIATION
IN VIOLATION OF THE WEST VIRGINIA WHISTLEBLOWER ACT
(ALL DEFENDANTS)**

40. Plaintiff reincorporates herein each of the preceding paragraphs 1-39 as if set forth verbatim herein.
41. At all times mentioned herein, Plaintiff was an "employee" within the meaning of W.Va. Code §6C-1-2(b).
42. At all times mentioned herein, each of Defendants was an "employer" within the meaning of W.Va. Code §6C-1-2(c).

43. The Office of the Prosecuting Attorney of Cabell County is an “appropriate authority” within the meaning of W.Va. Code §6C-1-2(a).
44. The Office the West Virginia State Auditor is an “appropriate authority” within the meaning of W.Va. Code §6C-1-2(a).
45. With their unlawful termination of Plaintiff’s employment, Defendants have unlawfully retaliated against Plaintiff, in violation of the West Virginia Whistleblower Act, based upon (1) his reports of waste and wrongdoing and (2) the fact that he was requested to participate in an investigation of the Office of the Prosecuting Attorney. More specifically:
 - a. Violation of West Virginia Code §6C-1-3(a): The reports made by Plaintiff described herein to the Office of the Prosecuting Attorney, the Office of the West Virginia State Auditor, and Defendants Thompson and Smith (individually and as agents and policymakers of the Commission) were reports of Plaintiff’s own volition, without consideration of personal benefit, and in good faith. Such reports were reports of suspected waste and wrongdoing as defined in W.Va. Code §6C-1-2(f) and (h), respectively; and
 - b. Violation of West Virginia Code §6C-1-3(b): Plaintiff was requested by an “appropriate authority” –i.e., the Office of the Prosecuting Attorney—to participate in an investigation of the financial affairs of Cabell County. As set forth above, it was known to Defendants that Plaintiff had been requested to provide information and that he was participating in the investigation.

46. Plaintiff was known by Defendants to be both supplying information to the Office of the Prosecuting Attorney and to be participating in the investigation of the Office of the Prosecuting Attorney of Cabell County as set forth in W.Va. Code §6C-1-3(b).
47. In direct retaliation for Plaintiff's repeated good faith reports and his participation in the investigation of the Office of the Prosecuting Attorney as described herein, Defendants unlawfully terminated Plaintiff's employment.
48. As a direct result of such unlawful conduct, Plaintiff has suffered injury and damages, including but not limited to, lost wages, emotional distress, humiliation, mental anguish and other damages for which Defendants are liable.
49. Plaintiff is also entitled to recover his attorneys fees and costs.

**COUNT FOUR: UNLAWFUL RETALIATORY DISCHARGE
IN VIOLATION OF SUBSTANTIAL PUBLIC POLICY**

50. Plaintiff reincorporates herein each of the preceding paragraphs 1-49 as if set forth verbatim herein.
51. The West Virginia Constitution provides for both the freedom of speech and the right to redress grievances to the government. *See* W.Va. Const. Art. III §3-7 and §16.
52. In addition, the West Virginia Whistle Blower Act prohibits an employer from retaliating against an employee who reports waste or wrongdoing or who participates in an investigation by an "appropriate authority." *See* W.Va. Code §6C-1-3.
53. Plaintiff's exercise of his constitutional rights and his participation in the investigation of the Office of the Prosecuting Attorney was a substantial or motivating factor for Plaintiff's discharge from employment. Defendants' actions in discharging Plaintiff were

unlawful and retaliatory in contravention of the substantial public policy of West Virginia as set forth above.

54. As a direct result of Defendants' unlawful conduct, Plaintiff has suffered and will suffer injury and damages, including but not limited to, lost wages with interest, lost benefits, aggravation, emotional distress, humiliation, loss of dignity, mental anguish and other damages for which Defendants are liable.
55. Based upon Defendants' willful and/or malicious conduct, Plaintiff is entitled to recover punitive damages.

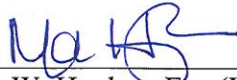
PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

- (a) That he may have a trial by jury;
- (b) That he be awarded all damages provided by law, including but not limited to, lost wages and benefits, damages for emotional distress, humiliation and mental anguish, and other damages for which Defendants are liable;
- (c) That he be awarded punitive damages;
- (d) That he be awarded attorneys fees and costs;
- (e) That he be awarded such other relief as this Court may deem as just and equitable.

JASON NICHOLS

By Counsel



Maria W. Hughes, Esq. (WV Bar No. 7298)

Mark Goldner, Esq. (WV Bar No. 11286)

HUGHES & GOLDNER, PLLC

10 Hale Street, Second Floor

P.O. Box 11662

Charleston, West Virginia 25339

(304) 400-4816

(304) 205-7729 *facsimile*

maria@wvemploymentrights.com

mark@wvemploymentrights.com