IRINI H. MIKHAIL,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
PENNSYLVANIA ORGANIZATION FOR WOMEN IN EARLY RECOVERY D/B/A POWER,	:	
	:	
Appellee	:	No. 387 WDA 2011

Appeal from the Order Entered January 20, 2011
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD 2010 - 009685

BEFORE: BENDER, J., DONOHUE, J. and STRASSBURGER, J.*

DISSENTING OPINION BY BENDER, J.: Filed: February 27, 2013

For the same reasons set forth in the Majority Opinion, I agree that the trial court erred in holding that a public policy exception to the at-will employment doctrine must necessarily be based upon a policy that regulates the employer-employee relationship. However, I disagree that it is certain that Appellant's termination was not based upon violation of a clear mandate of public policy. Given our standard of review, particularly the directive that "where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it[,]" I would reverse the trial court's order granting POWER's preliminary objections. ***Krajewski v. Gusoff***, 53 A.3d 793, 802 (Pa. Super. 2012). Therefore, I respectfully dissent.

*Retired Senior Judge assigned to the Superior Court.

First, I find the Majority's reasoning flawed when it concludes that Appellant's complaint fails because she did not specifically allege that "she knew or had reason to know that the supervisor was not qualified by training or experience to perform client screening." Majority Opinion, at 13. The Pennsylvania Code prohibits the delegation of professional responsibilities to another person when the LPC "knows or has reason to know that the other person is not qualified by training, experience[,] or licensure to perform those responsibilities." 49 Pa. Code. § 49.72(c). It may be the case that a non-LPC, through training, experience, or both, is capable and authorized to perform the screening function at issue here. This seems to be the implicit assumption of the Majority. However, if licensure *is required* to perform the specific function at issue in this case - the screening of potential clients for inclusion in a particular group therapy session - then Appellant's allegation that her supervisor was not licensed is sufficient for demurrer purposes. Accordingly, I would conclude that trial court's dismissal at the preliminary objection stage on this basis was premature. "The question presented by the demurrer is whether, on the facts averred, **the law says with certainty that no recovery is possible.**" ***Krajewski***, 53 A.3d at 802 (emphasis added).

I also take issue with the Majority's reliance on ***McGonagle v. Union Fidelity Corp.***, 556 A.2d 878 (Pa. Super. 1989), to dismiss Appellant's other assertion of a public policy exception to the at-will employment

doctrine. Appellant also alleged a public policy exception premised upon more generalized ethical responsibility to protect group therapy members from harm.[1] The Majority rejects this claim, holding that:

> Here, none of the ethical guidelines cited by Mikhail expressly requires counselors to refrain from placing prior sex offenders in group therapy sessions that include victims of sexual abuse. Rather, they generally require her to exercise judgment to determine which patients are appropriate for group therapy and "to the extent possible" select compatible group members.
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> As in ***McGonagle***, we cannot conclude that POWER's decision to terminate Mikhail based upon differences in judgment violates the public policy of this Commonwealth.

Majority Opinion, at 14 (quoting ACA Code of Ethics § A.8.b.).

In ***McGonagle***, the discharged plaintiff claimed that his employer, an insurance company, fired him when he refused to authorize the issuance of insurance policies that he believed violated various state laws and regulations. As recited by the Majority in this case, this Court first acknowledged the professional's dilemma in an at-will employment setting.[2] But that was not the end of the ***McGonagle*** court's inquiry.

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[1] Pennsylvania law states that LPC "shall adhere to the ACA Code of Ethics, except when the ACA Code of Ethics conflict with this chapter." 49 Pa. Code § 49.71.

[2] The ***McGonagle*** court stated:

> An employee who is also a professional has a dual obligation: to abide by federal and state laws, in addition to staying within the bounds of his/her professional code of ethics. Such responsibility may necessitate that the professional forego the performance of an act required by his/her employer. However, when the act to

The defendants in ***McGonagle*** argued that "the 'policy filing problems' were minor in nature and easily reconciled without the loss of revenue or the contravention of any state's insurance requirements," a matter this Court found to be, if true, "more akin to a difference of opinion and not a request to have the plaintiff perform an 'illegal' or unethical act in furtherance of corporate profits." ***McGonagle***, 556 A.2d at 885. After reviewing the statutes at issue and a fully developed factual record, the ***McGonagle*** court determined that the statutory expression of policy underlying McGonagle's public policy exception claim were no more than "a 'general' expression of this Commonwealth's attempt to monitor a particular industry[,]" and that they were "purely 'voluntary' in nature." ***Id***.

In Pennsylvania, "a case-by-case analysis has been adopted in reviewing a wrongful discharge cause of action." ***Id***. at 884. While the instant case does share some similarities with ***McGonagle***, there are critical differences that I believe can only be reconciled through further factual development of this case. In ***McGonagle***, we had the benefit of a fully developed factual record when we reversed the order denying the

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> be performed turns upon a question of judgment, as to its legality or ethical nature, the employer should not be precluded from conducting its business where the professional's opinion is open to question.

McGonagle, 556 A.2d at 885 (internal citation omitted).

defendants' motion for judgment n.o.v. We relied on that developed record when we concluded that the actions the plaintiff refused to take were not specifically proscribed by statute. Furthermore, compliance with the statutory scheme relied on by the plaintiff in ***McGonagle*** was found to be voluntary in nature.

Here, we are faced with an undeveloped factual record. As a result, we simply do not know whether the inclusion of a sex offender in a group therapy session for victims of sexual abuse is a choice left to the judgment of each individual LPC, or if such action would be universally condemned by practitioners as violative of the statutory requirement that Pennsylvania certified LPCs adhere to the ACA Code of Ethics. Accordingly, I would also conclude that dismissal on this basis at the preliminary objections stage was premature.

I believe the dismissal of Appellant's claims on preliminary objections was premature under either theory of relief and, therefore, I would have instead reversed that order of the trial court and allowed the facts of this case to crystalize. I simply cannot say with a sufficient degree of "certainty" that, at this early stage, "no recovery is possible." ***Krajewski***, 53 A.3d at 802.

Because the Majority has undertaken a different course, I respectfully dissent.