

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil,

Appellant,

v.

South Carolina Department
of Corrections and Jon E.
Ozmin, Robert Ward and
Bernard McKie in their
individual capacities,

Defendants,

Of whom South Carolina
Department of Corrections is

Respondent.

RESPONSE TO PETITION FOR REHEARING

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Respondent respectfully requests the Court to deny Appellant's Petition for Rehearing on the Order filed May 1, 2013, affirming the trial court's order to dismiss Appellant's claims against Respondent. See McNeil v. S.C. Dep't of Corr., Op. No. 5122 (S.C. Ct.App. Filed May 1, 2013).

ARGUMENTS

I. THE SUBJECT OPINION DID NOT OVERLOOK OR MISAPPREHEND THAT APPELLANT FAILED TO STATE A CLAIM FOR PUBLIC POLICY DISCHARGE.

As the trial court and the majority of this Court have both ruled, Appellant failed to state a claim for public policy discharge because (1) Appellant does not allege her termination was retaliatory and (2) Appellant failed to set forth specific allegations that her termination was a violation of a mandate of clear public policy. Instead, Appellant alleges that Respondent terminated her for "personal, political, pretextual or scapegoating purposes". This general statement is insufficient to state a cause of action for wrongful discharge.

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). When reviewing a dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRPC, the appellate court applies the same standard of review as the trial court. Sloan Constr. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008).

An at-will employee may be terminated at any time for good reason, no reason, or bad reason without liability to the employer. Mathis v. Brown & Brown of S.C., Inc.,

389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010); see also Lawson v. S.C. Dep't of Corr., 340 S.C. 346, 350, 532 S.E.2d 259, 260 (2000). An at-will employee has a cause of action for wrongful termination “where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy.” Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 637 (2011). The public policy exception has been held to apply to situations where an employer requires an employee to violate the law and to situations where the reason for termination itself is a violation of the criminal law, but the Court has explicitly held that the public policy exception is not limited to these two situations. Id.

The trial court found, and the majority of this Court affirmed, that Appellant’s allegations in her Complaint were insufficient to state a cause of action for wrongful discharge because the law of this State allows an at-will employee to be terminated for a good reason, bad reason, or no reason. The trial court and this Court considered whether Appellant’s allegations that she was discharged for personal, political, pretextual, or scapegoating reasons were sufficient to state a claim for public policy discharge and found that they were not. As the Supreme Court recently held in Barron, the determination of what constitutes public policy is a question of law for the Court to decide and is not a function of the jury. Id. at 617, 713 S.E.2d at 638. The trial court considered the allegations in Appellant’s Complaint, as did the majority of this Court in its Opinion, and determined that Appellant failed to allege a valid public policy exception.

In her Petition, Appellant asserts that the allegations in her Complaint are in violation of S.C. Code § 24-1-130 (2007). Appellant does not mention S.C. Code § 24-1-

130 in her Complaint, and thus that argument is outside the scope of the matters before the Court. Appellant also argues in her Petition that she was retaliated against for complying with a subpoena and testifying under oath. As the majority of this Court noted in its Opinion, Appellant failed to plead retaliation in her Complaint, and therefore, Appellant has failed to state a claim for public policy discharge. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (finding that in considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may only consider the facts of the complaint).

Also, the trial court and this Court expressly noted that the Court in Barron had ruled that the public policy exception was not limited to situations where an employer requires an employee to violate the law and to situations where the reason for termination itself is a violation of the criminal law. The trial court and a majority of this Court considered whether the allegations in Appellant's Complaint presented a novel issue that should not be dismissed upon a 12(b)(6) motion, and found that they did not. Appellant's mere allegation that public policy has been violated is insufficient to state claim for wrongful discharge, and to allow Appellant's claim to go forward would have a chilling effect on at-will employment in this State. The law of this State is clear that an employer can terminate an at-will employee, such as Appellant, for no reason, good reason, or bad reason without liability, and Appellant does not allege sufficient facts in her Complaint to implicate the public policy exception to the at-will employment law. This Court did not overlook or misapprehend Appellant's claim or the relevant law, and thus Appellant's Petition for Rehearing should be denied.

II. THE SUBJECT OPINION DID NOT OVERLOOK OR MISAPPREHEND THAT APPELLANT FAILED TO STATE A CLAIM FOR DEFAMATION.

Appellant has failed to state a claim for defamation. An action for defamation requires a plaintiff to show the defendant made and published a false or defamatory statement that was unprivileged to a third person that injured the plaintiff's reputation. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997). First, Appellant's action must be dismissed because Appellant has failed to state a claim for wrongful discharge. If Appellant fails to state a claim for wrongful discharge, then her claim for defamation cannot proceed because Respondent did not act wrongfully.

Second, in her Complaint, Appellant fails to allege that any statements made by Respondent were unprivileged and further fails to allege that any statements made by Respondent were published to a third party. The mere fact of termination does not equate to publication to a third party. Appellant does not allege in her Complaint how Respondent allegedly communicated her termination to third parties or specifically to whom Respondent made these alleged communications. Although Appellant alleges that her termination was widely known in the community, Appellant does not allege that Respondent conveyed or publicized her termination to any third party. Furthermore, the Appellant alleged in her Complaint that Respondent made a false statement, but failed to set forth what the false statement was with any specificity and further failed to set forth with any specificity what were the alleged "publications, re-publications, writings, words, and actions" made by Respondent. This Court did not overlook or misapprehend any of the elements of defamation, and Appellant's claim for defamation was properly dismissed because Appellant has failed to allege facts sufficient to state a claim for defamation.

CONCLUSION

For the reasons stated, Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

May 24, 2013



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