THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Circuit Court Judge

Op. No.5122
(S.C. Ct. App. Filed May 1, 2013)

Ammie McNeil,.....Petitioner,

v.

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

Of whom South Carolina Department of
Correction is.....Respondent.

PETITION
FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certified that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 25, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that petitioner had failed to state a claim for wrongful termination in violation of public policy?

STATEMENT OF THE CASE

Petitioner Ammie McNeil (McNeil or petitioner) was employed by the South Carolina Department of Corrections (SCDC) at the Kirkland Reception and Evaluation Center (Kirkland) as a captain. (R. p. 6-7, ¶¶ 1, 6). SCDC maintains custody, exercises control of and provides for the care of inmates and prisoners incarcerated by the state, including Kirkland which is located in Richland County. (R. p. 6, ¶ 2).

Howard Melton, an inmate who had been convicted and sentenced to serve one year, committed suicide at Kirkland in August of that year while Plaintiff was on duty. (R. p. 7-8, ¶¶ 7, 14). He had earlier been pronounced a "suicide risk" at the Spartanburg Detention Center, where he was initially held following conviction. (R. p. 7, ¶ 8). Despite this fact, when he was transferred to Kirkland in the early morning hours of August 11, 2006, he was not given the appropriate medication, even after requesting it, he was not placed in a cell for persons with a "suicide risk" designation with closed-circuit television and other safeguards, and he was not monitored by four to six officers as required by regulation. (R. p. 7-8, ¶¶ 7-13) Appellant discovered that Melton took his own life by asphyxiating himself using toilet paper to stuff his mouth and nose. (R. p. 8, ¶ 14) Because Melton was in a prone position in his bunk with his face to the wall, his condition was not immediately evident. *Id.* Appellant and other officers had

previously requested additional officers and staff, in compliance with SCDC policies and procedures, due to the large size of the area to be monitored and the safety risk posed by dangerous inmates. (R. p. 8, ¶ 13).

Pursuant to SCDC policies and procedures, Respondent conducted an investigation following inmate Melton's death. (R. p. 8, ¶ 15). Respondent additionally called in SLED to perform its own investigation. *Id.* The plaintiff cooperated fully with the investigation and was told by her superiors that she had done nothing wrong and was cleared of any responsibility for Melton's death. *Id.* The family of Howard Melton filed wrongful death lawsuits in November 2007 against Spartanburg County and SCDC alleging various acts of negligence, but none of the claims alleged any particular wrongdoing on the part of Appellant. (R. p. 8-9, ¶ 17). Both defendants denied any responsibility. *Id.* Appellant's deposition was taken at Kirkland in connection to the lawsuits, where she was questioned by attorneys for both parties and was accompanied by a lawyer from SCDC. (R. p. 9, ¶ 18). The case was scheduled for trial in July of 2009, but the Appellant was not subpoenaed as a witness for the trial. (R. p. 9, ¶ 19). On July 31, 2009, the case was mediated and settled for $140,000 which was, upon information and belief, paid by the South Carolina Insurance Reserve Fund on behalf of both Respondent SCDC and Spartanburg County. *Id.*

After Melton's death, Appellant continued employment at Kirkland, even receiving a promotion to sergeant in November 2008. (R. p. 8, ¶ 16). Although the investigations into inmate Melton's death had been concluded by both the internal and external investigations in early 2007, immediately following the settlement of the civil case, Appellant was notified that she faced a suspension. (R. p. 9, ¶ 20). Shortly thereafter, her charge was upgraded to a terminal offense

because of alleged "negligence" on her part in connection to inmate Melton's death. *Id.* In spite of her continued employment and promotion in the time between Melton's death and September 2009, Appellant was terminated on September 11, 2009. (R. p. 9, ¶ 21).

Petitioner filed her complaint in this case on December 8, 2010 alleging causes of action for Due Process Violations, Public Policy Discharge, Defamation, and Negligence and Gross Negligence against SCDC. Additionally, Petitioner's complaint alleged a cause of action for Civil Conspiracy against three individual Defendants, Jon E. Ozmint, Robert Ward, and Bernard McKie. SCDC filed a Motion to Dismiss which was granted by order of Judge Cooper on August 15, 2011. Petitioner filed a subsequent Rule 59(e), SCRCP, motion which was also denied. Petitioner appealed the order granting summary judgment to the Court of Appeals for the claims of public policy discharge, due process violation and defamation. The Court of Appeals affirmed the trial court's decision, however Judge Lockemy dissented in part as to the public policy discharge claim. Ammie McNeil v. S.C. Department of Corrections, Op. No. 5122 (S.C.Ct.App. filed May 1, 2013). Petitioner filed a petition for rehearing, which was denied by order dated June 25, 2013. Petitioner now seeks a Writ of Certiorari from the South Carolina Supreme Court to review the Court of Appeals' decision.

ARGUMENT

1. THE PETITIONER STATED A CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY.

The Court of Appeals incorrectly held that the petitioner failed to state a claim of wrongful discharge in violation of public policy (public policy discharge); finding that the complaint does not allege facts from which a court could determine a violation of any public policy, that petitioner failed to allege the termination was retaliatory, and that this case does not pose a novel issue such

that petitioner deserves an opportunity to develop the facts.

Unless there is a specific contract of employment, employment at-will is presumed in South Carolina. Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). "An at-will employee may be terminated at any time for any reason or for no reason, with or without cause." Id. However, the at-will employee has a cause of action for wrongful discharge in violation of public policy under the "public policy exception" to the at-will employment doctrine "where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." Id. (citing to Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985)).

It is established that the public policy exception clearly applies in cases where the employer requires the employee to violate the law or the reason for the termination itself is a violation of law. Barron, 393 S.C. at 614, 713 S.E.2d at 637. However, this Court held in Barron that "the public policy exception is not limited to these situations." Id. at 614-16, 713 S.E.2d at 637; see also Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907 (1995); Keiger v. Citgo, 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997). In fact, in both Garner and Keiger the courts have reversed a trial court's dismissal of a public policy discharge claim pursuant to a 12(b)(6) motion finding the allegations were novel and deserving of further development of the facts. Id.

In Garner, the employee appealed the trial court's grant of a Rule 12(b)(6), SCRCP, motion to dismiss where employee claimed retaliation for reporting and testifying—not pursuant to a subpoena— about radioactive contamination and unsafe working conditions at a nuclear facility. Garner at 226, 456 S.E.2d at 909. The Garner court reversed the order granting dismissal, noting

that the case raised a "novel issue" of whether the public policy exception applied, and "such issues should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss." Id.

In Keiger, the employee alleged she was terminated for instructing her employer that she contacted the state labor board over violations of state and federal law and would file a formal complaint if they failed to correct the situation. Keiger at 371, 482 S.E.2d at 793. The Keiger court found that public policy discharge allegations were a novel issue worthy of further proceedings and reversed the trial court's order granting dismissal pursuant to a 12(b)(6) motion. Id. at 373, 482 S.E.2d at 794.

Similar to Garner and Keiger, this case presents novel allegations that deserve further development of the facts. The dissent in the underlying Court of Appeals opinion noted, "While the trial court and, to some extent, the majority, seem focused on only these two situations, our supreme court has made clear the public policy exception is not limited to only these situations." McNeil v. S.C. Department of Corrections, Op. No. 5122 (S.C.Ct.App. filed May 1, 2013). In affirming the trial court's decision, the majority acknowledge the ruling in Barron that public policy discharge is not limited to just the two aforementioned situations, yet they seem to conclude that petitioner "must allege that she was required to break the law, that her termination was a violation of law, or that the facts of this case are identical to previous cases in this area." Id. The law does not require that the facts in this case be identical to those in Garner and Keigar. On the contrary, this case would not be novel if the facts were indeed the same. Accordingly, the trial court's decision should be reversed and the case remanded for further proceedings.

The Court of Appeals further erred by finding that the petitioner failed to allege sufficient facts from which a court could determine a violation of any public policy and that petitioner failed

to allege her termination was retaliatory. Petitioner alleged that SCDC failed to take steps as required by regulation and procedures to insure the safety of an inmate at risk of suicide such as placing the inmate in a special cell with closed circuit television or ensuring there was enough officers to monitor the inmates. Petitioner even conveyed her concerns over inadequate manpower by repeatedly requesting assistance to no avail. Petitioner complied with SLED in the investigation that ensued and was even told by her supervisors that she did nothing wrong and was cleared of responsibility for the inmate's death; and petitioner maintained an excellent record and was even promoted during the three year period between the inmate's death and her termination. Despite knowing she did nothing wrong and even promoting petitioner, SCDC suddenly terminated petitioner less than a month and a half after the $140,000.00 settlement of a wrongful death action by the inmate's family right before trial. Importantly, petitioner alleges that she testified in a deposition in this civil action, in which it can be reasonably inferred she discussed the same issues alleged above concerning SCDC's failures and thus angered SCDC who retaliated against her.[1] Petitioner further alleges that she was terminated as a scapegoat to relieve legislative pressure on the officials within SCDC. Petitioner has alleged more than enough to raise the issue of retaliatory termination.

The petitioner has also alleged sufficient facts from which a court could determine a violation of any public policy. Terminating an employee as a scapegoat to relieve legislative pressure and in retaliation for compliance with a subpoena and/or sworn deposition testimony is a violation of public policy or at a minimum raises a novel issue which is deserving of further factual

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1 "The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory." Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (S.C. 1999). See also Stiles v. Onorato, 318 S.C. 297, 300, 458 S.E.2d 601, 602-603 (1995).

development. The regulations and laws concerning the treatment and safety of public employees who work in prisons and the prisoners themselves constitutes a mandate of public policy which should be applicable in the case at hand. For example, the state requires that the "proper care, treatment, feeding, clothing and management" be given to prisoners by the Director of Prisons, who then delegates to his employees by the chain of command. S.C. Code Ann. §24-1-130 (1993). Petitioner alleges she was terminated in retaliation for her compliance with the subpoena and/or deposition testimony about the severe understaffing and failure to place a suicide risk inmate in the correct cell. It is against public policy to terminate petitioner's employment in retaliation for giving sworn testimony and to relieve political pressure on SCDC officials who failed to uphold the duties charged to them by this statute by instead making petitioner a scapegoat.

It would be a further violation of public policy to terminate petitioner for testifying truthfully instead of committed perjury. South Carolina law makes it a crime to "wilfully induce, procure, or persuade another person to give false, misleading, or incomplete testimony while under oath in a civil action or proceeding." S.C. Code Ann. § 16-9-20 (2012). By terminating the petitioner for her truthful compliance, SCDC has violated the public policy of South Carolina.

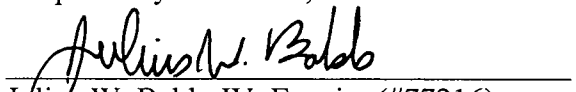
Accordingly, the trial court's dismissal of the public policy discharge claim should be reversed.

CONCLUSION

This Court made it clear in the Barron case that a claim for wrongful discharge in violation of public policy is not limited to only situations where an employer requires an employee to break the law or the termination itself is a violation of law. Prior case law establishes that novel issues of public policy discharge should not be so easily dismissed on a motion to dismiss under Rule

12(b)(6), SCRCP, but instead should be allowed an opportunity to develop the facts.[2] In this case, petitioner has established sufficient allegations to survive a 12(b)(6) motion to dismiss. At a minimum, this case raises novel issues and should be remanded for further proceedings. For the reasons stated, the petitioner asks the Court to grant the petition for the writ of certiorari.

Respectfully submitted,



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July 25, 2013

2 As the dissent in the Court of Appeals order explains, they are not asserting that bare assertions of public policy discharge without supporting allegations would be enough to establish a claim; however, this petitioner has pled sufficient allegations to raise a novel issue that deserves further factual development. The public policy discharge claim can always be revisited at summary judgment. McNeil v. S.C. Department of Corrections, Op. No. 5122 (S.C.Ct.App. filed May 1, 2013).

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PROOF OF SERVICE

I certify that I, the undersigned employee of J. Lewis Cromer & Associates, L.L.C., have caused to be served a copy of Petitioner McNeil's Petition for Writ of Certiorari & Appendix by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 2013, addressed to the below indicated parties at the indicated addresses:

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