

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

AUG 21 2013

G. Thomas Cooper, Circuit Court Judge

S.C. SUPREME COURT

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

Ammie McNeil,

Petitioner,

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 WRIT OF CERTIORARI

Steven M. Pruitt
Hannah K. Metts
McDonald Patrick Poston Hemphill &
Roper, LLC
P.O. Box 1547
Greenwood, SC 29648
(864) 229-2511
Attorneys for Respondent

Other Counsel of Record:
J. Lewis Cromer
Julius W. Babb, IV
J. Lewis Cromer & Associates, L.L.C.
P.O. Box 11675
Columbia, SC 29211
(803) 799-9530
Attorneys for Petitioner

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QUESTION PRESENTED

The Court of Appeals did not err in holding that Petitioner failed to state a claim for wrongful termination in violation of public policy.

STATEMENT OF THE CASE

In August of 2006, Ammie McNeil (hereinafter “Petitioner”) was an officer at Kirkland Reception and Evaluation Center (“Kirkland R&E”), which is a division of the South Carolina Department of Corrections (hereinafter “Respondent”).¹ (R. p. 6 ¶¶ 1-2; p. 7 ¶ 6). On August 10, 2006, Howard Melton, an inmate being held by the Spartanburg Detention Center, was transported to Perry Correctional Institution and thereafter transported to Kirkland R&E on August 11, 2006. (R. p. 7 ¶¶ 7-9). Petitioner was on-duty and working at Kirkland R&E during the morning of August 11, 2006. Sometime between four a.m. and four forty-five a.m. on August 11, 2006, Melton committed suicide. When Petitioner tried to rouse Melton for the four forty-five a.m. standing count, she discovered that Melton was dead. (R. p. 8 ¶ 14). After the death of the inmate, Respondent as well as SLED conducted an investigation into the matter. (R. p. 8 ¶ 15). Inmate Melton’s family also filed wrongful death lawsuits against Spartanburg County and Respondent. (R. pp. 8-9 ¶ 17). Petitioner was deposed as part of those lawsuits. The wrongful death lawsuits were settled in or about July 2009. (R. p. 9 ¶ 18). Petitioner’s employment with Respondent continued through September 11, 2009, at which time she was terminated by Respondent. (R. p. 9 ¶ 21).

On December 8, 2010, Petitioner filed a Complaint against Respondent and Jon E. Ozmint, Robert Ward, and Bernard McKie, in their individual capacities. (R. p. 6).

¹ For purposes of this appeal on a motion to dismiss, Respondent is bound by the allegations of the Complaint, but Respondent reserves the right pending the resolution of this appeal to object to the facts as alleged in the Complaint.

Petitioner alleged causes of actions for public policy discharge, due process violation, negligence, gross negligence, and defamation against Respondent. (R. pp. 6-13). She also alleged a cause of action for civil conspiracy against Ozmint, Ward, and McKie. (R. pp. 12-13). Respondent filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, and a hearing was held on Respondent's Motion to Dismiss before the Honorable Judge G. Thomas Cooper. Judge Cooper issued an Order granting Respondent's Motion to Dismiss, and Petitioner thereafter filed a Motion for Reconsideration, which Judge Cooper denied. (R. pp. 1-5, 32-34).

Petitioner subsequently filed and served a Notice of Appeal with the Court of Appeals. The Court of Appeals affirmed the trial court's decision. McNeil v. S.C. Dep't of Corr., 404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013). Petitioner then filed a Petition for Rehearing, which was denied, and now seeks a Writ of Certiorari from this Court to review the Court of Appeals' decision.²

ARGUMENT

The Court of Appeals' Order dismissing this case for failure to state a cause of action should be affirmed. 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). In considering a

² Petitioner failed to appeal the dismissal of her claims for negligence and gross negligence from the trial court, and therefore the trial court's dismissal of those claims is the law of the case. Further, Petitioner failed to appeal the Court of Appeals' affirmance as to the dismissal of her claims for defamation and due process violations, and the dismissal of those claims is the law of the case. Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 872 (2000) (finding that an unappealed ruling is the law of the case).

motion to dismiss pursuant to Rule 12(b)(6), the Court may only consider the facts of the complaint. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

South Carolina recognizes the doctrine of employment at-will, and in fact, employment is presumed at-will in South Carolina absent the creation of a specific contract of employment. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010). An at-will employee may be terminated at any time for good reason, no reason, or bad reason without liability to the employer. Id.; 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 applies 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. Id. The Court in Barron found that the public policy exception is not limited to these two situations, but the exception has not yet been extended beyond these two situations. Id.

Petitioner acknowledges in her Petition that she was an at-will employee of Respondent. As an at-will employee, Respondent could terminate Petitioner for no reason or for any reason, good or bad, without liability. Mathis, 389 S.C. at 310, 698 S.E.2d at 778. In order for the discharge to be actionable it must be retaliatory and it must have violated a clear mandate of public policy. Barron, 393 S.C. at 614, 713 S.E.2d at 637. As this 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 and the Court of Appeals found that Petitioner's allegations in her Complaint were insufficient to state a cause of action for wrongful termination because the law of this State allows an at-will employee to be terminated for good reason, bad reason, or no reason. In her Petition, Petitioner claims that she alleged in her Complaint that her termination was retaliatory. (Petition, p. 6). In reviewing a motion to dismiss pursuant to 12(b)(6), the Court is limited to the allegations in Petitioner's Complaint and Petitioner does not once use the word "retaliation" in her Complaint nor can this be reasonably inferred from her Complaint, as the allegations in the Complaint are limited to "personal, political, pretextual and scapegoating purposes." (R. p. 10, ¶ 24). Clearly, personal, political, pretextual and scapegoating reasons fall within the established law of South Carolina that allows an employer to terminate an at-will employee for any reason, good or bad, without liability. Petitioner also asserts that it can be reasonably inferred from the allegation in her Complaint that she testified in a deposition in a civil matter that her testimony "angered [Respondent] who retaliated against her." (Petition, p. 6). This is not a reasonable inference from the allegations in Petitioner's Complaint because the allegations in her Complaint do not expressly state or even insinuate that her deposition testimony angered Respondent. Rather, Petitioner alleges she was terminated for "personal, pretextual, political or scapegoating purposes." (R. p. 10, ¶ 24).

Petitioner also alleges in her Petition, but not in her Complaint, that S.C. Code § 24-1-130 (2007) and other regulations and laws concerning the treatment and safety of public employees who work in prisons and the prisons themselves constitute a mandate of public policy. Respondent disagrees that Section 24-1-130 applies to public employees and contends that this statutory provision applies only to prisoners, but again

Petitioner fails to even mention this statute in her Complaint. Further, although Section 24-1-130 may have been applicable to a wrongful death action by a prisoner's family, it does not apply to the wrongful termination claim made by Petitioner. Regardless, Petitioner did not plead this issue in her Complaint, which is the only document that can be reviewed by the Court on a motion to dismiss.

Petitioner next alleges in her Petition that she was terminated for compliance with the subpoena and/or for her deposition testimony and that it would be a violation of public policy to terminate her for testifying truthfully instead of committing perjury. (Petition, pp. 6-7). These allegations by Petitioner are first raised in her Petition for Writ of Certiorari. They are not included in her Complaint; they were not raised to the trial court at the hearing on the motion to dismiss; nor were they raised to the Court of Appeals. It is clearly established law that the public policy exception applies in cases where the employer requires the employee to violate the law, such as by requiring an employee to commit perjury, or where the termination itself is a violation of the law. Barron, 319 S.C. at 614, 713 S.E.2d at 637. However, Petitioner did not allege in her Complaint that she was terminated because Respondent requested her to commit perjury or because she testified truthfully at a deposition, nor can this be reasonably inferred from the allegations in her Complaint. Petitioner's arguments in her Petition related to her deposition testimony cannot be reasonably inferred from the allegations in her Complaint. Petitioner failed to allege facts in her Complaint sufficient to state a cause of action for wrongful termination, and therefore, the trial court and Court of Appeals properly granted Respondent's motion to dismiss this case.

As determined by trial court and the Court of Appeals, Petitioner has not alleged a novel issue. Petitioner's mere allegation that the public policy of this State was violated by her termination is insufficient to state a claim for wrongful termination. The majority of the Court of Appeals correctly found that Petitioner's Complaint is distinguishable from Garner v. Morrision Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907 (1995) and Keiger v. Citgo. Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997). In contrast to the allegations in Garner and Keiger, Petitioner fails to specifically allege in her Complaint that her termination was retaliatory and was a violation of a clear mandate of public policy. Moreover, despite Petitioner's argument in her Petition, she does not allege or insinuate in her Complaint that she was terminated in retaliation for compliance with a subpoena and/or sworn deposition testimony nor can this be reasonably inferred from the allegations in her Complaint. In fact, Petitioner does not once allege in her Complaint that the termination was retaliatory.

Further, the trial court and the Court of Appeals considered whether Petitioner's allegations that she was discharged for "personal, political, pretextual, or scapegoating purposes" were sufficient to state a claim for public policy discharge and found that they were not. Specifically, the trial court found that "even if [Petitioner] was terminated for personal reasons or as a scapegoat as she alleges, she still fails to state a claim and her action must be dismissed." (R. p. 4). The trial court and the Court of Appeals both found that Petitioner's allegations that Respondent terminated her for "personal, political, pretextual and scapegoating purposes" were insufficient to state a cause of action and that she failed to allege in her Complaint that her termination was retaliatory.

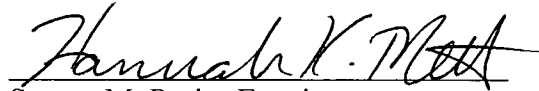
The law of this State is clear that an employer can terminate an at-will employee, such as Petitioner, for no reason, good reason, or bad reason without liability, and Petitioner does not allege sufficient facts in her Complaint to implicate the public policy exception to the at-will employment law. As this Court has stated, “the policy of employment at-will provides necessary flexibility for the marketplace and is, ultimately, an incentive to economic development.” Prescott v. Farmers Tel. Co-op. Inc., 335 S.C. 330, 334-35, 516 S.E.2d 923, 925 (1999); see also Grant v. Mount Vernon Mills, Inc., 370 S.C. 138, 146, 634 S.E.2d 15, 19 (Ct. App. 2006) (“The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace.”). To find that Petitioner has stated a claim for wrongful termination in violation of public policy would in effect abrogate the long recognized doctrine of employment at-will in this State and would have a chilling effect on at-will employment in South Carolina. The Court of Appeals correctly applied the law to Petitioner’s allegations and affirmed the trial court’s ruling that Petitioner had failed to set forth a claim for public policy discharge. Therefore, Petitioner’s Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated, Petitioner’s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

August 20, 2013

A handwritten signature in cursive script that reads "Hannah K. Metts". The signature is written in black ink and is positioned above a horizontal line.

Steven M. Pruitt, Esquire

Hannah K. Metts, Esquire

McDonald Patrick Poston Hemphill & Roper, LLC

Post Office Box 1547

Greenwood, South Carolina 29648

(864) 388-1014

Attorneys for Respondent

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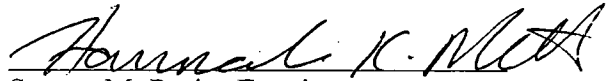
Of whom South Carolina
Department of Corrections is

Respondent.

PROOF OF SERVICE

I certify that I have served the Response to Petition for Writ of Certiorari on J. Lewis Cromer, Esq. by depositing a copy of it in the United States Mail, postage prepaid, on August 20, 2013, addressed to as follows: J. Lewis, Cromer, Esq., J. Lewis Cromer & Associates, L.L.C., P.O. Box 11675, Columbia, South Carolina, 29211.

August 20, 2013



Steven M. Pruitt, Esquire

Hannah K. Metts, Esquire

McDonald Patrick Poston Hemphill & Roper, LLC

Post Office Box 1547

Greenwood, South Carolina 29648

(864) 229-2511

Attorneys for Respondent