

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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AUG 30 2013

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

S.C. Supreme Court

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.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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In reply to Respondent's Response to Petition for Writ of Certiorari, Petitioners respectfully submit as follows:

QUESTION PRESENTED

The Court of Appeals erred in holding that Petitioner failed to state a claim for wrongful termination in violation of public policy.

ARGUMENT

Respondent argues that Petitioner's Complaint fails to plead that her termination was retaliatory because it does not use the word "retaliation" nor does the Complaint reasonably infer the same. This argument fails to address the standard for a motion to dismiss pursuant to Rule 12(b)(6), SCRPC. "In evaluating a motion to dismiss pursuant to this rule, the circuit court must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff." Benedict College v. Nat'l Credit Sys., 400 S.C. 538, 544, 735 S.E.2d 518, 521 (Ct. App. 2012) (citing Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). "If those facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to state a claim is improper." Id. (citing Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009)). "A complaint should not be dismissed merely because doubt exists that the plaintiff will ultimately prevail." Id.

The fact that the word "retaliation" is not used in the Complaint does make it insufficient, because it can be reasonably inferred from the pled allegations which should be viewed in "the light most favorable to the plaintiff." Benedict, 400 S.C. 538 at 544, 735 S.E.2d at 521. As discussed in the Petition, the Complaint alleges several problems in the institution including SCDC's failure to follow their own policies concerning an inmate that is a suicide risk by not properly notifying staff, not placing the inmate in a room with a closed circuit camera, and a lack

of sufficient staff to cover all of the necessary duties. (R. pp. 7-8, ¶¶ 10-12). Petitioner had repeatedly requested assistance but none was ever given. (R. p. 8, ¶ 13). Petitioner complied with SCDC and SLED in their investigations interviews and questions, was cleared of any wrongdoing, and was even promoted. (R. p. 8, ¶¶ 15-16). The inmate's family filed a wrongful death action that resulted in Petitioner being deposed at Kirkland where she was accompanied by a lawyer from SCDC. (R. p. 9, ¶ 18). The Complaint then alleges that the lawsuit settled for six-figures which caused the Respondent to fear problems with the media and legislators for their actions, thus they had an agenda to scapegoat the Petitioner; which they proceeded to do only a month and a half after the settlement. (R. pp. 7-8, ¶¶ 10-12).

The fact that the word "retaliation" is not in the Complaint is irrelevant as the allegations reasonably infer that Petitioner was terminated in retaliation for her involvement with the incident. If she had not been involved in the incident, she would have never been chosen to be a scapegoat. It is more than reasonable to infer that this same involvement, including truthful compliance with the SLED investigation, her truthful deposition testimony and her previous requests for assistance for a lack of manpower, angered Respondent and caused them to identify her as the scapegoat.

Respondent also argues that S.C. Code Ann. § 24-1-130 applies only to prisoners and not employees. This limited view of Section 24-1-130 is erroneous. Section 24-1-130 states that "[t]he director shall manage and control the prison system." (emphasis added). This section is not limited to only prisoners, but includes the prison system to which employees are a part. This means that Respondent has a duty to regulate the safety of the prisoners and the employees in the prison system, and is allowed to implement policies and procedures to accomplish this task. While the Complaint does not specify the explicit code section, it sets forth the many violations of policy by

Respondent concerning the safety of the inmates which are in violation to the charge to manage the prison system as set forth in Section 24-1-130. To terminate Petitioner in retaliation for her involvement in disclosing these violations and cover up their own wrongdoings is in violation of the public policy of this state.

Respondent also argues that Petitioner's Complaint does not allege nor reasonably infer that Petitioner was terminated for compliance with her deposition testimony. Petitioner disagrees as the Complaint reasonably infers that Petitioner was terminated in retaliation for her deposition testimony. As previously discussed, the Complaint sets forth violations of policy attributable to Respondent surrounding the death of the inmate, and that the Plaintiff later gave deposition testimony concerning the same inmate death. It is reasonably inferred that she discussed these same matters in that deposition instead of lying or failing to disclose the truth. The case was set for trial in July 2009, yet the Petitioner was never subpoenaed as a witness. Instead the case settled for a large sum of money and Petitioner was terminated only a month and a half later. The allegations reasonably infer that Petitioner's decision to give truthful testimony instead of committing perjury thus resulted in her termination. This basis for termination is against public policy and may even fall into the category of a clearly established basis for the exception to the at-will doctrine.

Respondent further argues that Petitioner has not alleged a novel issue and references the Court of Appeals decision to distinguish the Garner and Keiger cases. See 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). This is a distinction without a difference. For the reasons set forth herein and in the Petition, the Petitioner has established that the Complaint properly alleged retaliatory

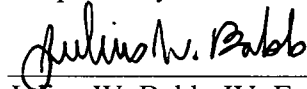
termination in violation of a clear mandate of public policy. The fact that the present case uses reasonable inferences drawn from the allegations instead of explicit language (such as the word “retaliation”) does not distinguish this from those cases such that this is not a novel issue.

Finally, the Respondent appears to raise concerns that allowing Petitioner’s claim for wrongful discharge in violation of public policy would have an adverse effect on the at-will employment doctrine and create a chilling effect. There is no basis for this assertion. The public policy exception is limited and does not abrogate the at-will doctrine except in specific circumstances. While there are two clearly established cases where the public policy exception applies, this Court recognized that “the public policy exception is not limited to these situations.” Barron v. Labor Finders of S.C., 393 S.C. 609, 614-16, 713 S.E.2d 634, 637 (2011). To dismiss Petitioner’s claim because it may have a chilling effect would instead abrogate the public policy exception itself.

CONCLUSION

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

Respectfully submitted,



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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 Reply to the Return to Petitioner's Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on August 30, 2013, addressed to the below indicated parties at the indicated addresses:

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