

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Circuit Court Case No. 2024-CP-36-00087
Appellate Case No. 2024-001360

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JUN 11 2025

SC Court of Appeals

Abdellah El Farissi, Appellant,

v.

Newberry College, Respondent.

Appellant Final Brief

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Erickson v. Pardus, 551 U.S. 89, 94 (2007).

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STATUTES

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STATEMENT OF ISSUES ON APPEAL

1) DID THE TRIAL COURT ERR IN GRANTING RESPONDANT MOTION TO DISMISS APPELLANT'S COMPLAINT?

2) DID THE TRIAL COURT CREATE AN ENVIRONMENT THAT DOES NOT REFLECT JUDICIAL FAIRNESS AND IMPARTIALITY?

STATEMENT OF THE CASE

On February 8th, 2024, Appellant, Abdellah El Farissi, filed this action in the Court of Common Pleas in Newberry County against Newberry College. The complaint stated that a former student-athlete, Nastassia Chamoun, at the behest of the Head Tennis Coach Elias Fernandez, recorded and shared the private conversation with the Respondent's Head Tennis Coach, and the Associate Athletic Director, Wayne Alexander, which resulted in terminating Appellant's employment at Newberry College.

On February 22nd, 2024, Appellant filed an Amended Complaint adding Respondent's Athletic Director, Sean Johnson, alleging that the athletic Director, after Appellant emailed him to let him know about the situation, conspired with the Associate Athletic Director and Head Tennis Coach to find a good reason for terminating Appellant's employment after Appellant was told that he was terminated for "No Reason".

On March 7th, Respondent filed a Motion to Dismiss on the grounds that Appellant's Complaint failed to state a claim, and that Appellant was an At-Will employee.

On March 15th, 2024, Appellant filed an Opposition to Motion to Dismiss on the grounds that not only the recording violated Appellant's Privacy Rights, but it also violated the Federal Wiretap Act of 1968 and S.C. Code Ann. §§ 17-30-20.

On May 9th, 2024, Appellant filed a Motion to Add Respondent's former student-athlete, Nastassia Chamoun, a Party Defendant.

On May 15th, 2024, Respondent filed a Memorandum "Memo" in Support of Defendant's Motion to Dismiss asking the court to Dismiss the Case, insisting again that Appellant failed to state a "Cognizable Claim". This time, Defendant stated a wrong fact that Defendant's Head Tennis Coach was in the car with Appellant and Respondent's former student-athlete, Nastassia Chamoun.

On July 8th, 2024, a hearing was held in Newberry County. The Court issued an Order granting Defendant's Motion to Dismiss and dismissing Plaintiff's Complaint with prejudice.

On July 30th, 2024, the Court Order was signed and entered.

STATEMENT OF FACTS

In this STATEMENT OF FACTS, Appellant addresses herein the sections upon which the court had based its decision to grant Defendant's Motion to Dismiss.

Part I of the Order, titled "FACTS AND PROCEDURAL HISTORY", states:

"The Complaint's key focus is an alleged recording taken by a former Newberry College student-athlete. Plaintiff alleges the recording was shared with other parties in "a clear violation of [Plaintiff's] privacy rights." Compl. Plaintiff alleges the recording was specifically shared with Defendant's Athletic Department personnel, which subsequently resulted in Plaintiff's termination. See *id.* Plaintiff alleges that the recording violated his privacy rights, see *id.*, and that the recording was made in violation of the Federal Wiretap Act of 1968 and S.C. Code Ann. §§ 17-30-20 and 17-30-135 (2002). See Pl.'s Opp'n to Mot. to Dismiss."

S.C. Code Ann. § 17-30-20 states:

Except as otherwise specifically provided in this chapter, a person who commits any of the following acts is guilty of a felony and, upon conviction, must be punished as provided in Section 17-30-50 of this chapter:

(1) intentionally intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept any wire, oral, or electronic communication;

(2) intentionally uses, attempts to use, or procures any other person to use or attempt to use any electronic, mechanical, or other device to intercept any oral communication.

Appellant's Complaint and Opposition to the Motion to Dismiss states that former Respondent's student-athlete, Nastassia Chamoun, in clear violation of Appellant's Fourth Amendment, recorded, used, and shared the content of the recorded conversation with the Respondent's Athletic department's staff. This recording was done in the appellant's car, which constitutes his private setting.

The Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements. *Silverman v. United States*, 365 U. S. 505, 365 U. S. 511. P. 389 U. S. 353

Respondent's counsel stated that South Carolina Law S.C. Code Ann. § 17-30-30 (c) and The Federal Wiretap Act of 1968 (18 U.S.C.S. § 2511 (2)(d)) "maintain almost identical language". See *Order Granting Defendant's Motion to Dismiss*.

S.C. Code Ann. § 17-30-30 (c):

"It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception."

The Federal Wiretap Act of 1968

“It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.”

However, Defendant’s counsel did not include the exception part of The Federal Wiretap Act of 1968. See above the underlined exception of the Federal Wiretap Act of 1968 (18 U.S.C.S. § 2511 (2)(d)).

Defendant’s counsel also stated that “because the former student-athlete of Defendant was a party to the allegedly recorded conversation, her alleged action was not unlawful” *See Order Granting Defendant’s Motion to Dismiss.*

Defendant’s counsel failed to understand the Law as both, Federal Law 18 U.S.C.S. § 2511(1)(c)-(d), and State Law S.C. Code Ann. § 17-30-20 (3)-(4) also “maintain almost identical language” and State Law S.C. Code Ann. § 17-30-20 states that “a person who commits any of the following acts is guilty of a felony and, upon conviction, must be punished as provided in Section 17-30-50 of this chapter”.

S.C. Code Ann. § 17-30-20 (3)-(4):

(3) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

(4) intentionally uses or attempts to use the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

18 U.S.C.S. § 2511(1)(c)-(d):

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of the subsection.

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Again, in a clear violation of the aforementioned law, Respondent's former Student-Athlete, Nastassia Chamoun, not only recorded the private conversation, but the moment she intentionally used it and disclosed its content with Respondent's former Head Tennis Coach, Elias Fernandez, and Respondent's Associate Athletic Director, Wayne Alexander, she and the Respondent's Athletics staff broke the law and caused irreparable damages to Appellant's career and financial well-being. Ultimately, Respondent also broke the law as (a) the Respondent's staff were acting on behalf of the respondent, and (b) employers are responsible for their employees' actions. These two points ((a) and (b)) constitute the topic of this Lawsuit.

Part II of the Order, titled "LEGAL STANDARD", states:

"A complaint must contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8(a), SCRPC. Therefore, under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a complaint is subject to dismissal when it "fail[s] to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRPC."

On the contrary, Appellant, on both Complaint and Opposition to Defendant's Motion to Dismiss, stated a series of facts and factual events that Defendant's former student-athlete intentionally recorded, used, and shared the content of the recorded conversation with Defendant's Athletics Staff. Specifically, Respondent's former student-athlete, Nastassia Chamoun, at the behest of Respondent's former Head Tennis Coach Elias Fernandez recorded the private conversation, used it, and disclosed its content to Respondent's athletic Staff. Therefore, Newberry College is the party that instigated the entire issue.

The Order also states:

"In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint." *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537, 539 (S.C. 2011) (citing *Doe v. Marion*, 645 S.E.2d 245 (S.C. 2007)). Therefore, dismissal under Rule 12(b)(6) is appropriate if the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, do not entitle the plaintiff to relief on any theory. See *Stiles v. Onorato*, 457 S.E.2d 601, 602-03 (S.C. 1995) (citing *Toussaint v. Ham*, 357 S.E.2d 8 (S.C. 1987))."

As a response to this section, Appellant herein states that Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support his claim and entitle him to relief. Fed. R. Civ. P. 12(b)(6).

Additionally, "a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss . . . , factual allegations must be enough to raise a right to relief above the speculative level." Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010).

Furthermore, when the plaintiff proceeds Pro Se, the court is charged with liberally construing the factual allegations of the complaint in order to allow potentially meritorious claims to go forward. See Erickson v. Pardus, 551 U.S. 89, 94 (2007).

Therefore, under Federal Rule of Civil Procedure 8(a)(2), a plaintiff's complaint only needs to include "a short and plain statement of the claim showing that he is entitled to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)).

Part III of the Order, titled "LEGAL ANALYSIS", "Even if Plaintiff alleged unlawful conduct, Plaintiff has failed to state a claim against Defendant" states:

"To the extent that Plaintiff attempts to raise a claim for wrongful termination, his Complaint fails to properly state that claim. South Carolina has long recognized the doctrine of employment at-will. See Lawson v. S.C. Dep't of Corr., 532 S.E.2d 259, 260 (S.C. 2000). "At-will employment is generally terminable by either party at any time, for any reason or for no reason at all." Prescott v. Farmers Tel. Co-op., Inc., 516 S.E.2d 923, 925 (S.C. 1999). Absent the creation of a specific contract of employment, employment is presumed to be at-will. See Mathis v. Brown & Brown of S.C., Inc., 698 S.E.2d 773, 778 (S.C. 2010). Plaintiff has not put forth any indicia he was not an at-will employee, so the common law presumption applies that his employment with Defendant was at-will."

It also states:

"Plaintiff also alleges that the reason for his termination was "[n]o [r]eason." The Supreme Court of South Carolina has held that "[a]t-will employment is generally terminable by either party at any time, for any reason or for no reason at all." Prescott v. Farmers Tel. Co-op., Inc., 516 S.E.2d 923, 925 (S.C. 1999). Because Plaintiff was an at-will employee of Defendant, his termination occurring for "no reason" is entirely lawful. Notably, South Carolina courts offer very limited exceptions to the at-will doctrine. Specifically, where "the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985). It is the burden of the plaintiff to establish that a clear mandate of public policy was violated due to the discharge. See id. at 223. The Court finds that Plaintiff has not pled any clear mandate of public policy at issue here. In fact, there is no allegation that any public policy was violated, or facts that would lead to a cognizable cause of action."

Appellant, a United States Citizen, although had been deemed qualified, was denied a promotion after he was told: (1) by Respondent's former Head Tennis Coach, Mark Gardiner, that he would be tapped as the next head tennis coach, and (2) by Respondent Athletic Director, Sean Johnson, that he would need to apply for the role because he has decided to post the job online for everybody to apply.

Instead, and after Appellant applied for the role, the job was given to a foreign national, Elias Fernandez, with little to no experience, and who at the time, was denied re-entry to the US despite the college's efforts to renew his legal work status.

Respondent, by denying Appellant's promotion in favor of a non-U.S. citizen, had violated 22 U.S.C. § 474(1), a clear public policy which provides for the hiring of non-citizens when "suitably qualified" U.S. citizens are unavailable. See *Grosdidier v. United States*, 77 Fed. Cl. 106 (Fed. Cl. 2007).

ARGUMENTS

1) DID THE TRIAL COURT ERR IN GRANTING RESPONDANT'S MOTION TO DISMISS APPELLANT'S COMPLAINT?

The Court found that there are no genuine issues of material fact that must be considered by the jury and not by a Judge.

S.C. Code Ann. § 17-30-15. Definitions:

“(3) "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”

S.C. Code Ann. § 17-30-135. Civil action for wrongful interceptions:

“(D) Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this chapter is entitled to a jury trial.”

Throughout the hearing, the court has demonstrated unfamiliarity with the law and statutes, specifically the ones mentioned in the Appellant's filings. It appears as though the court did not bother looking at Appellant's Complaint and Opposition to Dismiss the Motion, nor bothered to search the law at any allegations and simply ruled to try to dispose of the case from this court. Despite Appellant's efforts to explain the statutes, the court seemed confused and reluctant to interpret the Law and pleading correctly.

The following transcript excerpts from the July 8th hearing highlight this:

Page 12 Lines 17-25

Page 13 Lines 1-25

Page 14 Lines 1-25

Page 15 Lines 1-7

MR. EL FARISSI: Because she recorded the conversation, a private conversation and forwarded the private conversation to the former head coach, and him and the associate director, they both made the decision to ---

THE COURT: Alright. Well, is, I may be misunderstanding the law, but isn't it against the law to record a conversation over a communication system, cell phone, telephone, one party can't record another one's without permission of the secondary, they've got to be notified there's a conversation being recorded. And right now, your conversation now is being transcribed by a Court reporter, so everything you're saying and I'm saying, this lady in front of

me, she's recording it for us.

MR. EL FARISSI: Okay.

THE COURT: So that's just part of the Court system, everything's on the record. I wasn't aware it's against the law for one person to record a conversation they're having with another, outside a telephone communication system. It's in a car, she's recording you ---

MR. EL FARISSI: That's what makes it a private conversation.

THE COURT: But how is it a violation of a telecommunications law if there's no telephone involved?

MR. EL FARISSI: Well, she used her cell phone to record the conversation.

THE COURT: That's just a recording device, that's not using the cell phone as a transmission. I think you're conflating the two laws. One, you can't record a telephone whether it be cell phone, and you have no expectation of privacy on a cell phone conversation because it can be intercepted, but a regular traditional landline telephone, it's against the rules without notifying the others, I'm recording this conversation. Those facts don't fit here, you're in the car with her, talking to her.

MR. EL FARISSI: The Federal Wiretap Act says it's not just a conversation from the phone to another, to use any device to record a private conversation.

THE COURT: I think a party to a private conversation can be recorded, I may be wrong, but I think that's the law, that it's okay. So what she did wasn't illegal. You're unhappy about it, but what she did wasn't illegal based upon what you've alleged because there was no transmission of the conversation. There was a private conversation recorded by her with a device that's also used as a cell phone, but the device, a cell phone is a mini-faceted device. Of course, it's got a calendar, record, search the internet, all sorts of things, but if you're just using it as a recording device, which many people do, video, pictures, I'm not sure that's a violation of any law. Do you know that it is, can you point me to some law?

MR. EL FARISSI: Well, the Federal Wiretap Act, that is what it states, you know, I, it took me more than six months to find this law. I understand that South Carolina it's legal for one person to record another person without their knowledge, but with this federal law, you know, it's a different story.

THE COURT: I think it's the same story. There's no wire being tapped. You and her are in the same vicinity and she records a conversation you're having with her. I don't believe that's a violation of the law with the facts you're telling me, if I'm missing something, please tell me. And I've got an experienced lawyer slash Judge here with me as well, he's new to the circuit bench, but he's done a lot of administrative hearings in seven years when he was on the Administrative Law Court, so he's not a rookie Judge, he's a new Judge to the circuit bench. Alright. I'm going to sit on that one, but I don't believe it's a violation of the law.

2) DID THE TRIAL COURT CREATE AN ENVIRONMENT THAT DOES NOT REFLECT JUDICIAL FAIRNESS AND IMPARTIALITY?

Appellant argues that the Court's treatment throughout the hearing raises concerns about impartiality and potential conflicts of interest. The lack of neutrality undermines the public's confidence in the court's ability to provide a fair hearing.

The following transcript excerpt from the July 8th hearing highlights this:

THE COURT: What Ms. Abron is saying is the complaint is insufficient for Newberry College to respond meaningfully because they really don't know what you're asking. How is Newberry College connected to this girl, and why would Newberry College owe her money, I mean, if the girl miscondacted herself, why is Newberry College responsible. That's in a nutshell, it's not clear. *Page 12 Lines 8-14*

THE COURT: And see, I haven't even addressed any contractual relationship you have with Newberry College whether you were an employee at-will or a contractual employee, I don't know, I don't think that really matters, we don't get there. The analysis fails before then. *Page 15 Lines 14-18*

THE COURT: I'm going to grant the college's motion. I don't believe there's a violation of the wiretapping act, federal or state because there was no transmission of the conversation over any type of device. There was a recording by a recorder, albeit built into the cell phone. The cell phone wasn't utilized to transmit that conversation during the recording. I don't believe that's a violation of law. So I don't believe Newberry College would owe you for that violation because she did it. *Page 16 Lines 1-9*

THE COURT: --- you're wrong and that's just how it works. *Page 16 Line 25*

The court is clearly taking Respondent's side whereas it should have been about being fair and unbiased.

The US Supreme Court holds that Pro se litigants' court submissions are to be construed liberally and held to less stringent standards than submissions of lawyers.

If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with rule requirements. *Boag v. MacDougall*, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982).

Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) emphasizes the importance of judicial impartiality and avoiding even the appearance of bias. The Appellant argues that the court's actions create doubt about its neutrality.

CONCLUSION

The Court of Common Pleas, in an absolute showcase of favoritism, departed from its ethical behavior in mistreating a pro se litigant and delivered a biased and controversial order that failed to address the Appellant's serious civil rights concerns.

The Court of Common Pleas' actions and decisions have significantly undermined the principles of justice, fairness, and due process.

Therefore, the Appellant anticipates serious corrective action from this honorable Court of Appeals.

Appellant respectfully requests this honorable court to reverse the Court of Common Pleas Order to dismiss the case, recognizing the procedural errors and the impact of judicial misconduct on the Appellant's right to due process.

Respectfully submitted,

December 2, 2024

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