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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
Court of Common Pleas

The Honorable Clifton B. Newman, Fifth Judicial Circuit
Case No.: 2022-CP-40-00027

APPELLATE CASE NO.: 2024-001835

Teresa McWilliams.....Appellant,

vs.

South Carolina Department of Health and Environmental Control.....Respondent.

RESPONDENT'S FINAL BRIEF

David T. Duff, Esq.
Meredith L. Seibert, Esq

DUFF FREEMAN SEIBERT, LLC
3700 Forest Drive, Suite 404
P.O. Box 1436
Columbia, South Carolina 29203
Telephone: (803) 790-0603
Facsimile: (803) 790-0605

Attorneys for Respondent

Teresa McWilliams
105 Arborgate Circle
Columbia, South Carolina 29212
Telephone: (803) 530-4738
Appellant, *pro se*

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COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Did Appellant fail to preserve all issues for appellate review?
- II. Did the Trial Court properly conclude that Appellant's Amended Complaint fails to state facts sufficient to constitute a cause of action against Respondent?
- III. Had Appellant appropriately pled a claim for age discrimination under the South Carolina Human Affairs Law, would dismissal be warranted pursuant to the limitations outlined in the South Carolina Human Affairs Law?

STATEMENT OF THE CASE

On January 4, 2022, Appellant Teresa McWilliams (“Appellant”), who is proceeding *pro se*, initiated this action by filing a Summons and Complaint against the South Carolina Department of Health and Environmental Control (“DHEC”) (“Respondent”), as well as DHEC employees Georgette Lee-Jackson and Emma Kennedy, in the Court of Common Pleas for Richland County. All defendants filed motions to dismiss pursuant to 12(b)(6), SCRCP. On November 30, 2022, the Trial Court, retired Chief Justice Toal presiding, heard arguments from Appellant and Respondent on the Motions to Dismiss the Complaint. At the hearing, and in the subsequent written order, the Trial Court ruled that the individually named defendants were dismissed. As it relates to Respondent, however, Plaintiff stated in the hearing that she intended to pursue a cause of action for age-based employment discrimination. The Trial Court agreed that the original complaint lacked any factual support for, or attempted statement of, a legal cause of action for such a claim, and granted Appellant an opportunity to amend her complaint subject to specific directives. An Order memorializing the Trial Court’s leave to amend and associated directives was filed on January 18, 2023.

Prior to the issuance of the Order, on December 30, 2022, Appellant filed an Amended Complaint with the Trial Court, but she did not serve her Amended Complaint on Respondent. Respondent filed a Motion to Dismiss Appellant’s December 30, 2022 Amended Complaint on January 30, 2023. A hearing on Respondent’s Motion to Dismiss Appellant’s Amended Complaint was heard on August 8, 2023, before the Honorable Clifton Newman. Judge Newman took the matter under advisement and thereafter issued an Order on September 30, 2024, dismissing Appellant’s December 30, 2023 Amended Complaint. Appellant issued several Notices of

Appeal—with the first notice received by the courts on October 28, 2024. The docketed Notice of Appeal filed by Appellant with this Court is dated November 8, 2024.

FACTS

Appellant is a former employee of the Respondent, DHEC. (Amended Complaint p. 4; ROA p.46 ¶4). Appellant asserts that she reported what she believed to be discrepancies and inaccurate statements by her supervisors regarding a grant to DHEC Compliance. (Amended Complaint No. 6; ROA p.46 ¶6). Appellant states that this report was the incentive for her termination by her supervisor; but she believes that her supervisor was unsuccessful in this and various other attempts to terminate Appellant through Human Resources until the supervisor's allegations shifted to “veiled accusations that Plaintiff was too old to do her job.” (Amended Complaint No. 4, 6; ROA p.46 ¶4-47 ¶9). Appellant argued during the August 8, 2023 hearing that “the real reason I was being terminated was I found an amount of over \$5,000 in a grant I was given to oversee and it was not being disbursed, it was hidden in the grant. And when I began to ask questions was when my harassment began.” *See* August 8, 2023, Hearing Transcript, p. 10 (ROA p.175 ln 1-p.176 ln 8). Plaintiff alleges she was “terminated as an act of retaliation and the method used to argue cause was veiled age discrimination.” (Amended Complaint No. 4, 6; ROA p.46 ¶¶4-6).

STANDARD OF REVIEW

This Court applies the same standard of review as the trial court when reviewing a motion to dismiss. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012). Under Rule 12 of the South Carolina Rules of Civil Procedure, a Circuit Court must dismiss a complaint when the defendant demonstrates the plaintiff's complaint fails to allege facts sufficient to constitute a cause of action. *See* Rule 12(b), SCRPC; *see also Doe v. Greenville Cty. Sch. Dist.*,

375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007) (“Generally, in considering a Rule 12(b)(6), SCRC, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.”); *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 412, 415 (Ct. App. 2003) (recognizing that a motion to dismiss may be granted when “the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.”). “Viewing the evidence in favor of the plaintiff, the motion [to dismiss] must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to any relief on any theory of the case.” *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (internal citations omitted). “Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.” *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct.App.2004), *aff’d* 645 S.E.2d 245, 2007 WL 1321978; *accord Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *see also Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on face of complaint); *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001) (finding trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff). However, an allegation of a mere legal conclusion is insufficient to state a cause of action. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (1986); *see also Russell v. City of Columbia*, 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989) (“The court must take well pleaded factual allegations as true. However, allegations which are conclusory rather than factual should be disregarded.”).

ARGUMENT

I. **Appellant has raised new arguments for the first time on appeal, which arguments should not be considered by this Court.**

This Court must disregard new arguments raised by Appellant for the first time on appeal. Specifically, Appellant's Initial Brief raises for the first time issues regarding a full and fair opportunity to participate in a hearing on the Respondent's Motion to Dismiss Appellant's Amended Complaint, as well as arguments regarding the appropriate pleadings under consideration by the Trial Court. Lastly, Appellant's Initial Brief raises for the first time that the Trial Court would have found information and facts necessary to state a claim within unincorporated and otherwise unidentified attachments to Appellant's Amended Complaint. These arguments have not been preserved for appellate review and, therefore, are not proper for consideration or adjudication as the basis for relief.

A "great number of reported cases in South Carolina[], and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and **absolute necessity** of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review **only when they are raised to and ruled on by the lower court.**" *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (emphasis added); *see also Herron v. Century BMW*, 396 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'") (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)); *Gurganious v. City of Beaufort*, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995) ("It is well settled that one cannot present and try his case on one theory and then change his theory on appeal.") (citing *McClary v. Witherspoon*, 251 S.C. 523, 164 S.E.2d 220 (1968)); *State v. Bailey*, 298 S.C. 1, 377

S.E.2d 581 (1989) (finding that a party cannot argue one ground at trial and an alternative theory on appeal); Rule 210(c), SCACR (record on appeal “**shall not . . . include matter which was not presented to the lower court . . .**”) (emphasis added). “If the [appellant] has raised an issue in the lower court, but the court fails to rule upon it, the [appellant] *must* file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 704, 869 S.E.2d 859, 867 (Ct. App. 2022) (quoting *I ‘On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added)).

Here, Appellant failed to raise or preserve any objection to proceeding with the August 8, 2023, hearing on Respondent’s Motion to Dismiss Appellant’s Amended Complaint on the grounds that technology issues impaired her right to a fair and equitable hearing, failed to previously make or raise any argument that the Amended Complaint under consideration should be one other than the December 30, 2022 submission, and failed to assert or raise any argument that she has stated a cause of action because she provide access to records, without specific reference or explanation, that could provide some information for the claim along with her Amended Complaint.

Appellant argues in her Initial Brief that she experienced technological disturbances in the virtual courtroom, preventing her from speaking intelligibly and fully during the hearing, thus denying her the opportunity for a fair and equitable hearing on the motion to dismiss her Amended Complaint. Appellant asserts that she “should have been allowed either the ability to have an in-person hearing as she requested, or the Court should provide a room with IT equipment . . . and invite the *pro se* complainant to use it if she wishes” and that any less “results in an unjust hearing.” The record establishes Appellant was well aware of how to contact the court to request changes to scheduled hearings, as demonstrated by several motions for continuance filed with the Trial Court. However, Appellant has not provided evidence, documentation, or filings indicating that Appellant

requested an in-person hearing at any point in this case or on this particular motion. Further, once the August 8, 2023, hearing commenced, Appellant made no argument or request that the hearing be held in person nor did she indicate that she was experiencing technology issues to the point that she was unable to participate fully in the arguments and hearing. Appellant stated only, “I apologize but I have an echo in my cellphone, so everything I say is being repeated in my ear” before proceeding to make several points in response to opposing counsel’s argument in support of the motion to dismiss and in support of her position that her lawsuit should be allowed to proceed. *See* August 8, 2023 Transcript p. 9-11, 13-14 (ROA p.174 ¶11-p.176 ¶20). Any issue related to Appellant’s alleged impaired participation in the August 8, 2023, hearing has not been preserved for appellate review because it was never raised before or ruled upon by the lower court; Appellant failed to make any contemporaneous objection at the trial level; and Appellant failed to file a motion to alter or amend the lower court’s judgment following issuance of the Order. “For an appellate court to review an issue, a contemporaneous objection at the trial level is required.” *State v. Thompson*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (citing *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994)). “[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.” *Id.* (quoting *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001)).

Appellant has also raised for the first time on appeal that the amended complaint under consideration—a December 30, 2022, filing titled “Amended Complaint”—should include “an addendum to the original complaint” filed on January 2, 2024. On January 2, 2024, Appellant filed with the Trial Court a pleading titled “Memorandum: An Analysis of Freedom of Information Response from DHEC” (ROA pp. 243-244). Even if the Appellant intended the filing to constitute a second amended complaint, which is not clear on the face of the document, leave to amend was

not obtained from the Court nor was consent provided by Respondent. *See* Rule 15, SCRCp. In fact, the September 30, 2024 Trial Court order specifically states that “Appellant filed an Amended Complaint with the Court on December 30, 2022, prior to the issuance of the Court’s January 18, 2023 Order. [Appellant] filed no other proposed amended complaint or revisions . . .” (ROA p. 23). Respondent further notes that this filing was made almost an entire year after the Trial Court’s January 18, 2023, Order granting Appellant thirty days to file an amended complaint and almost five months after the August 8, 2023, hearing on the motion to dismiss the amended complaint. Prior to this appeal, Appellant had never argued that she was seeking or had filed further amendments to her Amended Complaint nor did she file a motion to alter or amend the lower court’s judgment following issuance of the Order to address the Court’s purported omission. Therefore, any argument that a different, supplemental, or second amended complaint should have been considered has been waived.

Lastly, in support of her position that her Amended Complaint did include the necessary facts sufficient to constitute a cause of action upon which relief may be granted, Appellant argues that the Court could have found information to support the factual averments necessary for Appellant to state a claim for age discrimination by searching the unincorporated and otherwise unidentified pages submitted at the same time as Appellant’s pleadings. When filing the December 30, 2022, Amended Complaint, Appellant also included 48 pages of miscellaneous documents, with no identification and/or only minimal reference within the Amended Complaint to just a few of those documents. However, at no point following Respondent’s Motion to Dismiss—whether as a written response/explanation or in oral arguments during August 8, 2023—did Appellant contend that the referenced documents were ancillary to and incorporated within her Amended Complaint, contained the requested missing information, and/or should be considered as part of

the motion to dismiss. As a result, the court never considered if the attachments were incorporated into the complaint and, if so, whether there was sufficient information therein. Further, Appellant filed no motion to alter or amend the September 30, 2024 Order addressing this argument. As a result, Appellant is barred from now pursuing this argument.

The above issues have not been preserved for appellate review, should be deemed wived, and should not be considered as part of this appeal.

II. The Trial Court properly concluded that Appellant failed to state a cause of action against Respondent.

Despite an opportunity to amend her original complaint, which opportunity was paired with specific directions from the Trial Court regarding the content that should be included, Appellant's December 30, 2022, Amended Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted.

The Trial Court correctly noted that Appellant's Amended Complaint failed to include information necessary to state a claim against Respondent and specifically a cause of action for age discrimination. Importantly, the Trial Court recognized that the December 30, 2022, Amended Complaint lacked relevant information, including but not limited to Appellant's age (as needed to establish she fell within a protected class) and the statutory basis for her purported age-discrimination claim. (ROA p.24). The Order specifically noted that Appellant failed to provide her age at the time of her termination and, further, that her allegations were primarily based on conclusory statements that her termination was motivated by her age. (ROA p.24). Moreover, the Trial Court determined that, because there is no common law cause of action for age discrimination and retaliation, "it was incumbent upon [Appellant] to include the statutory basis for her purported claim, whether the SC Human Affairs Law (SCHAL), the Age Discrimination in Employment Act

(“ADEA”), or the Title VII of the Federal Civil Rights Act of 1964 (Title VII).” (ROA p.24). Despite a January 18, 2023, Order advising Appellant of the components Appellant needed in an Amended Complaint to survive a motion to dismiss, including specific designation of the statutory basis for the claim, Appellant’s Amended Complaint still included no such statement or reference. (ROA pp.24-25). As a result of these omissions, in whole and part, the Trial Court properly determined that Appellant failed to state facts sufficient to constitute a cause of action upon which relief may be granted. (ROA pp.22-25).

As part of Appellant’s Initial Brief, she asserts that the Trial Court’s conclusion that she failed to provide her age at the time of termination was incorrect because a copy of her driver’s license was included “in the attachments to the Amended Complaint,” thus allowing the Court to determine her age. *See* Appellant’s Initial Brief, p. 21. As noted above, Appellant’s argument that facts establishing a cause of action for age discrimination could have been culled from attachments filed contemporaneously with her Amended Complaint was initially raised as part of the appeal. The referenced attachments consist of 48 pages of miscellaneous documents, with no identification and/or only minimal reference or explanation within the Amended Complaint.

As an initial matter, the referenced attachments submitted to the Court on December 22, 2022 do **not** include the documents identified by Appellant in her Initial Brief, including but not limited to a copy of her driver’s license, a copy of an EEOC right to sue notice, or Appellant’s personnel file. *Compare* Appellant’s Initial Brief p.21-22, 24, with December 30, 2022 submission. Therefore, they cannot be used by the Courts as argued by Appellant. Even if Appellant had included the identified documents in the attachment, merely attaching, without further explanation, a miscellaneous hodgepodge of documents that have not been identified in any way in the Complaint, incorporated by reference in the Complaint, or have been brought to

the Trial Court's attention in some way, in the hopes the Court will conduct an aimless search for some relevant facts is not sufficient defense to a motion to dismiss for failure to state a claim. Respondent acknowledges that documents or exhibits that are attached to and incorporated by reference to a complaint may be considered part and parcel of the pleading pursuant to Rule 10(c), SCRPC. However, South Carolina case law establishes that an attachment to a complaint must be clearly attached to, incorporated by reference into the complaint, and be brought to the attention of the court if it is to be considered as part of a 12(b)(6) motion. *See Burns v. Gardner*, 328 S.C. 608, 614 n.2, 493 S.E.2d 356, 359 n.2 (Ct. App. 1997) (Because [a document] was attached to and incorporated in the amended complaint, court may consider it when ruling on the defendants' motion to dismiss."); *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) ("Petitioners explicitly stated that [a document] was attached and incorporated by reference into the complaint. Thus, they brought the [document] to the attention of [the circuit] court and were on notice of any information contained in it."). Here, even assuming the records contained relevant facts, Plaintiff failed to identify specific documents, incorporate them into the complaint, or otherwise bring them to the Trial Court's attention.

III. Even if the matter had been properly pled with the factual allegations and information newly stated in Appellant's Initial Brief, dismissal was appropriate under the South Carolina Human Affairs Law.

Even assuming Appellant had presented an amended complaint that included the necessary factual allegations to state a claim for age discrimination, including, but not limited to statements establishing Appellant's age and/or status of member as a protected class and the statutory basis for the purposed claim, information newly provided in Appellant's Initial Brief establishes grounds for dismissal. Appellant's Initial Brief states – again, for the first time - that the South Carolina Human Affairs Law, at S.C. Code Ann. §1-13-80, is the basis for the underlying age discrimination

claim she was attempting to assert. *See* Appellant’s Initial Brief p. 5, 11, and 20. Appellant also states in that brief – again, for the first time – that the date of termination from DHEC is August 5, 2020. *See* Appellant’s Initial Brief p. 21. Based on the information provided therein, Appellant’s purported claim, even if properly pled warrants dismissal pursuant to the South Carolina Human Affair Law (SCHAL). More specifically, the SCHAL does not provide a private right of action by Appellant against Respondent and, further, any remaining claim that Appellant might otherwise have pursuant to the SCHAL is barred by the statute of limitations outlined in S.C. Code Ann. § 1-13-90(d)(6).

Appellant states that “South Carolina Code of Laws SECTION 1-13-80 applies” and that she should be allowed to proceed “based on the SC Humann [sic] Affairs Law found in South Carolina Code of Laws Section 1-13-80.” Appellant Initial Brief p. 21. SCHAL, at S.C. Code Ann. §1-13-80(A)(1), provides that “it is an unlawful employment practice for an employer: to fail or refuse to hire, bar, discharge from employment, or otherwise discriminate against an individual with respect to the individual's compensation or terms, conditions, or privileges of employment because of the individual's race, religion, color, sex, age, national origin, or disability.” However, Section 1-13-90(c) sets forth the procedures of the SC Human Affairs Commission (SCHAC) for investigating complaints asserting a violation by a state agency or department. After investigating the complaint, a hearing on the claim may be ordered before a panel of three members of the SCHAC. *See* § 1-13-90(c)(5), (11). After hearing the evidence from both the complainant and respondent, if the panel finds the respondent engaged in unlawful discriminatory practice, it will issue an opinion and order requiring the respondent to discontinue the practice and requiring other such action as the panel finds will “effectuate the purposes of [the SCHAC].” *See* §1-13-90(c)(16). Either party can appeal the decision to the Administrative Law Court (ALC) within thirty days

after receipt of notice. See §1-13-90(c)(19)(ii). However, “[t]here is no provision in the [SCHAL] for the filing of independent suits to enforce private rights against state departments, agencies, or subdivisions. The only avenue of judicial redress for state public employees under the [SCHAL], unlike ... the ADEA, is through an agency enforcement action.” *Crocker v. S.C. Dep't of Health & Env't Control*, 428 S.C. 1, 6–7, 831 S.E.2d 924, 927–28 (Ct. App. 2019)(referencing 5 Emp. Discrimination Coordinator § 45:70 (citation omitted). In short, because the SCHAL expressly outlines an administrative remedy for claims against state employers, no private cause of action is available to Appellant under S.C. Code Sec. 1-13-90(c). See *Crocker* at 7.

The statute of limitations in S.C. Code Sec. 1-13-90(d)(6) also bars Appellant’s claim. Even assuming for purposes of this argument that Appellant satisfied all of the prerequisites to bring her claim under federal in federal court, Appellant has stated that her intent was to bring a claim in state court under the SCHAL. Because the SCHAL—specifically section 1-13-90(d)—applies to this case, the statute of limitations in S.C. Code Sec. 1-13-90(d)(6) further operates to bar Appellant’s claim because she failed to bring his action within a year of the alleged violation. See § 1-13-90(d)(6) (The action must be brought within one year from the date of the violation alleged, or within 120 days from the date the complainant's charge is dismissed, whichever occurs earlier.) Here, Appellant is alleging that she was improperly terminated in violation of the Human Affairs Law, which termination occurred on August 5, 2020. However, Appellant did not initiate the present action until January 4, 2022 – some 17 months and well over one year after termination. Therefore, even had Appellant properly pled the claim, S.C. Code Sec. 1-13-90(d)(6) bars this action under the SCHAL. See *Crocker v. S.C. Dep't of Health & Env't Control*, 428 S.C. 1, 10, 831 S.E.2d 924, 929 (Ct. App. 2019) (finding SCHAL statute of limitations was further bar to state employee).

CONCLUSION

For the reasons outlined above, this Court should affirm the Trial Court's Order dismissing Appellant's Amended Complaint, with prejudice.

Respectfully Submitted:

DUFF | FREEMAN | SEIBERT, LLC

By: s/Meredith L. Seibert
David T. Duff, Esq., (SC Bar #1768)
Meredith L. Seibert, Esq., (SC Bar #72935)
P.O. Box 1486
Columbia, SC 29202
Telephone: (803) 790-0603
Facsimile: (803) 790-0605
dduff@dfs-lawfirm.com
mseibert@dfs-lawfirm.com

Attorneys for Respondent

June 25, 2026
Columbia, South Carolina