

Other Events

2:13-cv-02497-RMG Taghivand v.
Eckerd Corporation et al

JURY

U.S. District Court

District of South Carolina

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II. Statement of Facts

Because the Court encounters this question on a motion to dismiss for failure to state a claim, the Court accepts as true the facts alleged in the Amended Complaint and all facts are viewed in a light most favorable to Plaintiff. Plaintiff began working for the Eckerd chain in 1983, which was purchased by Rite Aid in 2007. (Dkt. No. 6 at ¶ 1, 2.) Since 2004, and all at times relevant to this action, Plaintiff was a Store Manager. (*Id.* at ¶ 1.) On August 19, 2011, Plaintiff was the manager of the store located at 1934 Ashley River Road, Charleston, South Carolina (“Ashley River Road Store”). (*Id.* at ¶ 8.) The area near the Ashley River Road store had a “significant crime rate” in August of 2011, and, immediately prior to August 19, 2011, there had been several robberies or attempted robberies near the Ashley River Road Store. (*Id.* at ¶ 9.) The Ashley River Road Store itself had experienced inventory “shrinkage” issues. (*Id.*)

On August 19, 2011, Plaintiff approached a suspicious looking patron at the Ashley River Road Store.¹ (*Id.* at ¶ 8.) The patron acted strangely and milled about the store with no evident purpose. (*Id.* at ¶ 10.) The patron stopped briefly in the section directly in front of the cashier and purchased several items. (*Id.* at ¶ 11.) In response to questioning by Plaintiff, the cashier told Plaintiff that when the patron entered the store, his bag appeared empty, but that the bag now appeared to have items in it. (*Id.*) Plaintiff instructed the cashier to call the police, and the patron exited the store. (*Id.*)

A police officer arrived at the Ashley River Road Store and first brought in the items that the patron had purchased from the store; Plaintiff confirmed that these items were in fact

¹ The Amended Complaint does not allege any other details about what happened when Plaintiff approached the patron. (*See* Dkt. No. 6.)

purchased. (*Id.* at ¶ 12.) The officer then searched the patron's bag and informed Plaintiff that the bag only contained dirty clothes. (*Id.* at ¶ 12.) The officer, without Plaintiff's knowledge, placed the patron on trespass notice. (*Id.*)

Plaintiff had been trained to handle suspicious patrons and was instructed to call the police when "such an incident occurred." (*Id.* at ¶ 13.) Plaintiff's actions on August 19, 2011, were taken in good faith, in the interest protecting his employer from theft, and in the interest of ensuring the safety of himself and other store employees. (*Id.* at ¶ 15.) Plaintiff was terminated effective August 19, 2011, and was told that the August 19, 2011 incident was the reason for his termination. (*Id.* at ¶¶ 1, 14.)

III. Nature of the Controversy

Under South Carolina law, generally speaking, an "at-will employee may be terminated at any time for any reason or for no reason, with or without cause." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 713 S.E.2d 634, 636 (S.C. 2011). However, the South Carolina Supreme Court recognized a "public policy exception" to this at-will employment doctrine in *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (S.C. 1985). Under *Ludwick*, an at-will employee has a cause of action in tort for wrongful termination where "the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy." *Id.* at 225; *see also Barron*, 713 S.E.2d. at 636-37.

"The determination of what constitutes public policy is a question of law for the courts to decide." *Barron*, 713 S.E.2d at 617. The public policy exception "clearly applies in cases where either: (1) the employer requires the employee to violate the law, . . . or (2) the reason for the employee's termination itself is a violation of criminal law" but is not limited to these situations.

Id. at 637. Here, Plaintiff does not allege that he was required to violate the law or that his termination was itself a violation of criminal law. Thus, this Court must decide as matter of law the novel question of whether public policy exception applies to the facts as alleged here. *See Barron*, 713 S.E.2d at 638.

A. South Carolina Authority

Defendant contends that there is no clear declaration of public policy in South Carolina statutory or common law applicable to the facts of this case. Plaintiff contends that (1) S.C. Code Ann. § 16-9-340² declares an intention to protect witnesses, including those that report suspected criminal activity to the police³; (2) the common law crime of obstruction of justice shows an intention to protect witnesses, including those that report suspected crimes, and (3) that

²Section 16-9-340 provides that

(A) It is unlawful for a person by threat or force to:

(1) intimidate or impede a judge, magistrate, juror, witness, or potential juror or witness, arbiter, commissioner, or member of any commission of this State or any other official of any court, in the discharge of his duty as such; or

(2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court.

S.C. Code Ann. § 16-9-340 (2013).

³ To the extent that a termination actually violates this statute, this Court believes that the public policy exception would apply; in such a case, "the reason for the employee's termination itself is a violation of criminal law." *Barron*, 713 S.E.2d at 637; *see also Culler*, 422 S.E.2d at 92-93 (holding that the public policy "extends at least to legislatively defined 'Crimes Against Public Policy,'" defined in Chapter 17 of Title 16 of the South Carolina code). However, in this case, Plaintiff alleges that his employer terminated in him *in retaliation* for reporting a crime, not to affect his future behavior. Thus, the termination is not in violation of § 16-9-30. *See Love v. Cherokee Cnty. Veterans Affairs Office*, No. 7:09-cv-194, 2009 WL 2394369 at *2 (D.S.C. July 31, 2009). The question remains whether South Carolina has a broader public policy favoring the reporting of a crime.

S.C. Code Ann. § 16-3-1505⁴ declares a public policy favoring the reporting of crimes. (Dkt. No. 18.)

This Court has also found a South Carolina statute explicitly declaring that it is against South Carolina's public policy to change an employee's status because the employee reports the abuse, neglect or exploitation of vulnerable adults under the Omnibus Adult Protection Act (*see* S.C. Code Ann. § 43-35-75(B)) and other statutes that provide immunity from liability to persons who, in good faith, report certain types of crime. *See* S.C. Code Ann. § 63-7-390 (2013) (granting immunity to those persons "required or permitted" to report child abuse); S.C. Code Ann. § 38-55-580 (2013) (granting immunity to persons that report insurance fraud). However, it is not clear to this Court whether South Carolina has a clear mandate of public policy favoring the reporting of criminal activity in general.

⁴ Section 16-3-1505 provides that:

In recognition of the civic and moral duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and to the general effectiveness and the well-being of the criminal and juvenile justice systems of this State, and to implement the rights guaranteed to victims in the Constitution of this State, the General Assembly declares its intent, in this article, to ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights and services extended in this article to victims of and witnesses to a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants...

S.C. Code Ann. § 16-3-1505 (2013). Another section of Article 16 protects witnesses who lawfully respond to a subpoena from retaliation by their employers. *See* S.C. Code Ann. § 16-3-1550 (2013).

B. Authority in Other Jurisdictions

Some states have enacted statutes making it a crime to retaliate against those that report a crime. *See* Md. Code Ann., Crim. Law § 9-303 (2005) (formerly cited as Md. Code Art 27, § 762); Ark. Code Ann. § 5-53-112 (2005); Or. Rev. Stat. Ann. § 659A.230. Unsurprisingly, courts in these states have seen these statutes as clear mandates of public policy such that an employee terminated for reporting a crime has a cause of action for wrongful termination. *See Wholey v. Sears Roebuck*, 803 A.2d 482, 494 (Md. 2002) (“From these statutory provisions, a clearly definable public policy goal is derived: the Legislature sought to protect those witnesses who report suspected criminal activity to the appropriate law enforcement or judicial authority from being harmed for performing this important public task.”)⁵; *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 386 (Ark. 1988) (“Ark. Code Ann. § 5–53–112 illustrates that there is an established public policy favoring citizen informants or crime fighters. In order to further the public good, citizens of the state should be encouraged to report illegal activity”). South Carolina does not have such a statute.

However, other states without such statutes have also found that public policy favors the reporting of crime and have allowed wrongful termination claims where employees allege that they were terminated for reporting criminal activity. *See Garrity v. Overland Sheepskin Co. Of*

⁵ Notably, before the enactment of Md. Code Ann., Crim. Law § 9-303, Maryland statutes “only prohibited intimidating, influencing or corrupting jurors or witnesses in the ‘discharge of his duty,’” just like S.C. Code Ann. § 16-9-340. *Wholey*, 803 A.2d at 500. The Maryland Supreme Court found “no public policy mandate regarding the reporting of criminal activity was discernible” from this earlier statute and, thus, neglected to find a cause of action for wrongful discharge in an earlier case. *Id.* “The critical distinguishing factor between *Adler* [finding no cause of action for wrongful termination] and the case *sub judice* is at the time *Adler* was decided, the Legislature had not enacted the provision prohibiting retaliation against a witness for reporting a crime.” *Id.*

Taos, 917 P.2d 1382, 1387 (N.M. 1996) (“In the present case, the public policy at issue is the reporting of suspected illegal activities, namely, the use of illegal drugs. Although our legislature has not provided any specific rights or remedies for employees who discover or suspect that a coworker or supervisor is committing a crime, it has clearly enunciated a strong public policy against condoning criminal activity and in favor of uncovering and eradicating it.”); *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981) (“Public policy favors [Plaintiff’s] conduct in volunteering information to the law-enforcement agency.”); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 670 (Cal. 1988) (noting that “a tort action for discharge in violation of public policy” protects employees who “report[] criminal activity to proper authorities”); *Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755, 758-59 (Neb. 1988) (reasoning that the enforcement of the criminal code is a basic public policy and that the enactment of the criminal statute was a declaration of public policy, but finding an action for wrongful discharge can only lie with the employee “acts in good faith and upon reasonable cause”); *Shea v. Emmanuel College*, 682 N.E.2d 1348, 1350 (Mass. 1997) (allowing wrongful discharge claims where an employee reports criminal activity internally, even if not reported to public authorities); *Dunnigan v. City Of Lorain*, No. 02-CA-008010, 2002 WL 31313216 at * 5 (Ohio Ct. App. Oct. 16, 2002) (“Ohio has a clear public policy in favor of reporting crimes and that an employee’s dismissal for reporting possible criminal conduct of another employee while at work would jeopardize that public policy.”). However, such cases are frequently in the whistle blower context, which this case is not.


IV. Conclusion

In sum, the Court concludes that the answer to the question certified herein may be determinative of a cause of action in this case, and there is no controlling precedent in the decisions of the Supreme Court of South Carolina. Accordingly, pursuant to South Carolina Appellate Rule 244, the Court respectfully:

CERTIFIES the question stated in Part I of this Order to the Supreme Court of South Carolina; and

ORDERS the Clerk of this court to forward to the Supreme Court of South Carolina, under the official seal of this court, a copy of this Certification Order together with the original or copies of the record before this court to the extent requested by the Supreme Court of South Carolina.

IT IS SO ORDERED.



Richard Mark Gerge
United States District Judge

January 9, 2014
Charleston, South Carolina

UNITED STATES DISTRICT COURT

District of South Carolina

Clerk's Office

CHARLESTON, SOUTH CAROLINA 29402

Official Business

