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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-26-5964

William H. Bailey, Jr., Appellant,

v.

City of North Myrtle Beach, a South Carolina Municipal Corporation, Respondent.

RESPONDENT'S RETURN TO MOTION TO SUPPLEMENT RECORD

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RETURN TO MOTION TO SUPPLEMENT RECORD

Appellant asserts the Court should allow to be included in the record – and presumably consider – the answer filed by the Respondent City in unrelated federal litigation involving another employee. For the reasons set out below, Appellant's motion should be denied.

Appellant contends that the City has taken a position in the unrelated litigation that is inconsistent with the position it took in this litigation. Specifically, Appellant asserts that the City's admission in its answer in the unrelated litigation that "[Appellant] was suspended and ultimately terminated for lying regarding the theft of his City-issued weapon" is inconsistent with the position taken in this litigation that Appellant retired. (Proposed Appx, p. S-39) The City's consistent position throughout this litigation, however, has been that Appellant retired in lieu of being fired, which is entirely consistent with the City's pleading in the unrelated litigation. More importantly, the City's position is entirely consistent with Appellant's own admissions and actions.

Appellant was given the choice between resigning or being fired on April 28, 2010. Appellant testified at trial that, two days later on April 30, 2010, he purchased five years of service in the Police Officers Retirement System *and elected to retire that same day*. (R p. 164, *l.* 11 – p. 165, *l.* 25; p. 201, *l.* 19 – p. 203, *l.* 2; pp. 243, 318) According to PORS records, Appellant's last day of service was April 30, 2010, and his first day of retirement was May 1, 2010. (R. pp. 235, 243).

Appellant and his counsel stated numerous times following his separation from employment on April 30, 2010, that he retired. Appellant wrote in his grievance request that he was "forced into taking early retirement." (R p. 224, ¶ 1) Appellant's counsel,

who was intimately involved in the negotiations that preceded Appellant's separation from employment, gave an interview in the *Sun News* in which he claimed that Appellant retired before the City could take any threatened disciplinary action.

> Bailey filed his retirement paperwork when the state office opened at 8:30 a.m. on April 30, [Appellant's Counsel] Moss said – *before City Manager John Smithson could take any threatened disciplinary action.*
>
> "We were still negotiating with the city at the time William drove to Columbia," Moss said. "*The city didn't even know he had retired.*"

(R. p. 192, *l.* 14 – p. 194, *l.* 18; pp. 319-320 (emphasis added)). Appellant's counsel also wrote to the City's outside counsel, informing him on May 24, 2010, by email that "on the morning of April 30, 2010, . . . , [Appellant] elected to retire . . ." (R. p. 165, *ll.* 2-11; p. 318).

Appellant also swore under oath in a verified complaint filed in another action against the City that he was "constructively dismissed" and "constructive[ly] discharge[d]." (Supp. R p. 14, ¶ 101, pp. 22-23, ¶ 147) A constructive discharge is a well-settled term of art meaning that an employee is compelled to resign, or in this case retire, rather than actually being fired by the employer. *See Graves v. Horry-Georgetown Technical College*, 391 S.C. 1, 9-10, 704 S.E.2d 350, 355 (Ct. App. 2010) (constructive discharge where "employer deliberately makes the working conditions intolerable in an effort to induce the employee to quit"); *Cole v. Lexington-Richland School Dist. 5*, 2011 WL 441974, *2 (D.S.C. Feb. 8, 2011) (unpublished) (allegations employee given "option to resign from her position or be terminated [and who] tendered her letter of resignation under duress . . . to prevent a termination from appearing on her employment record . . . are sufficient to raise a valid claim for constructive discharge in the form of forced

resignation"); *accord, Tracey v. Sconnix Broadcasting of South Carolina, Inc.*, 284 S.C. 379, 381, 325 S.E.2d 542, 544 (1985) (noting when employee contracts to fill a position, material change in duties or reduction in rank constitutes "constructive discharge"); *Barr v. Board of Trustees of Clarendon County School Dist. No. 2*, 319 S.C. 522, 528, 462 S.E.2d 316, 319 (S.C. Ct. App. 1995) (analyzing allegation that an involuntary transfer was a constructive discharge). Quite simply, there is no conflict in the evidence in the record that Appellant retired.

Contrary to Appellant's contention, there is not a conflict between the City's position in this litigation and in its answer in the unrelated litigation.[1] As previously set out here and in the City's Brief, Appellant was given the choice to resign or be fired. "[A] forced resignation or constructive discharge is legally equivalent to a termination . . ." *Hess v. Multnomah County*, 216 F.Supp.2d 1140, 1155 (D. Or. 2001). *See also, Mathew v. N. Shore - Long Island Jewish Health Sys., Inc.*, 2013 WL 5799883, *8 (E.D.N.Y. Oct. 23, 2013) (unpublished) (discussing "termination through forced resignation" where employee given choice to resign or be terminated); *Bay v. Fairfield Resorts, Inc.*, 2006 WL 3484236, *1 (E.D. Tenn. Nov. 30, 2006) (unpublished) (plaintiff told to move to Florida or lose job was "constructively discharged and forced to resign"); *Mouser v. Hocking County Board of Mental Ret. & Dev. Disabilities*, 2009 WL 768561, *1 (Ohio

[1] Not only is there not a conflict, but the entire issue is potentially a red herring. The trial judge held that Appellant's declaratory judgment action seeking a ruling that he was entitled to a grievance hearing over his separation from employment was moot. (R pp. 13-16) The trial judge then held, in the alternative, that even if the action was not moot, Appellant was not entitled to the relief he sought because he had retired in lieu of being fired. (R pp. 16-19) Should the Court uphold the trial judge's determination that the action was moot, it need not reach the alternative ruling. SCACR 220(c) (appellate court may affirm on any ground in the record); *accord, Cowart v. Poore*, 337 S.C. 359, 365, 523 S.E.2d 182, 186 (Ct. App. 1999) ("We need not reach the issues raised on appeal based upon our dismissal on other grounds.").

Ct. App. March 23, 2009) (unpublished) ("Appellants each claim they were wrongfully terminated from their positions at HCMRDD in that they were forced to resign."); *accord, Schillinger v. Wells Fargo Bank, N.A.*, 268 Cal. Rptr. 368 (Cal. Ct. App. 1990), ("Appellant first claims the statute does not apply because the Bank did not 'dismiss' him, but rather laid him off and then involuntarily retired him. This is a distinction without a difference. As a result of the Bank's actions, appellant was no longer employed at the Bank, an outcome which was involuntary on appellant's part and which he challenged as a wrongful 'discharge' and wrongful 'termination.' Thus, the Bank did 'dismiss' appellant . . ."), *depublished*, 1990 WL 10554223.

In sum, there is no conflict between the City's answer in the unrelated litigation and the City's position – supported by the overwhelming and undisputed record evidence – that Appellant retired when given the choice between being fired or resigning. The statement that Appellant was "ultimately terminated" (Proposed Appx, p. S-39) is nothing more than a recognition that his "lying regarding the theft of his city-issued weapon" (*id.*) ultimately resulted in the end of his employment. Further, Appellant can hardly rely on the City's use of the generic word, "terminated," in the face of his own undisputed actions and testimony that he did, in fact, retire.

CONCLUSION

For the foregoing reasons, Appellant's motion to supplement the record should be denied.

(Signature page follows.)

Respectfully submitted,

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June 24, 2014

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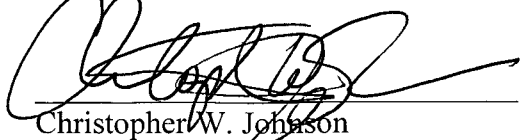
PROOF OF SERVICE

I hereby certify that I have this day caused to be served a copy of the Respondent's Return to Motion to Supplement Record on counsel of record by deposit in the United States mail, first-class postage prepaid, addressed to:

Kenneth R. Moss, Esq.
Wright, Worley, Pope, Ekster & Moss, PLLC
628A Sea Mount Highway
North Myrtle Beach, S.C. 29582



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June 24, 2014

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June 24, 2014

VIA HAND-DELIVERY

The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

Re: *Bailey v. City of North Myrtle Beach*
Appellate Case No. 2013-000195
C/A No. 2010-CP-26-05964

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the Respondent's Return to Motion to Supplement Record and Proof of Service of the same. Please file the original and return the clocked copy to me by our courier.

Should you have any questions, please do not hesitate to contact us.

With highest regards,

Sincerely,

Christopher W. Johnson

CWJ/ehg
Enclosure
Fltr COA- RetMotSuppRec.439.AJ

cc: Kenneth R. Moss, Esq., Counsel for Appellant (w/ encl.)(via U.S. Mail)