

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

Allison Renee Lee, Circuit Court Judge

Appellate Case No.: 2014-000961

Betty J. Keitt.....Appellant.

v.

City of Columbia.....Respondent.

RESPONDENT'S FINAL BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Circuit Court erred in finding that Appellant had statutory recourse arising from the termination of her employment.**
2. **Whether the Circuit Court erred in finding that Appellant had alternative statutory recourse that barred bringing a wrongful termination cause of action.**
3. **Whether the Circuit Court's order is supported by the additional sustaining grounds that Appellant cannot establish a retaliatory motive necessary to prove wrongful termination.**

STATEMENT OF THE CASE

Appellant, Betty J. Keitt (“Keitt”), was discharged from employment with Respondent, City of Columbia (“City”), based upon acts of insubordination. Keitt challenged her termination through the City’s grievance process. Following a hearing, the grievance committee unanimously recommended that the termination be upheld. As required by statute, the City’s manager considered and affirmed this recommendation. Thereafter, Keitt filed suit against the City alleging common law wrongful termination. The City moved for summary judgment, asserting that Keitt failed to state a cause of action upon which relief may be granted. By order filed January 2, 2014, the Honorable Alison R. Lee granted the City’s motion. Keitt’s motion to reconsider was denied on April 1, 2014. This appeal followed.

STANDARD OF REVIEW

Appeal from an award of summary judgment applies the same standard of review as the trial court. Under this standard, summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See, Rule 56(c), SCRPC; Green v. Cottrell, 346 S.C. 53, 550 S.E.2d 324 (Ct. App. 2001); Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000); see also, Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d. 187, 191 (1997) (Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law)

Under Rule 56(c), SCRPC, the party seeking summary judgment has an initial

burden of demonstrating the absence of a genuine issue of material fact. Carolina Alliance for Fair Employment v. South Carolina Department of Labor, Licensing, and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999) In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997) In responding to a motion for summary judgment, a plaintiff must offer evidence that a genuine issue of material fact exists as to each element necessary to establish the asserted claims. McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008)

As addressed below, the controlling facts and governing law support the challenged decision to grant summary judgment.

STATEMENT OF CONTROLLING FACTS

1. Keitt was formerly employed with the City as a Violations Clerk in the Municipal court, a position she held for approximately six years.

2. The City is a municipal subdivision of the state of South Carolina with a council-manager form of government. See, S.C. Code Ann. § 5-13-10 et seq. (Supp. 2012)

3. Keitt was supervised by Chief Administrative Judge Dana Turner.

4. Keitt filed an official written complaint with the Commission on Judicial Conduct's Office of Disciplinary Counsel ("ODC") on or about August 21, 2011. Keitt had previously reported complaints and concerns regarding Judge Turner to the City's Human Resources Department.

5. In December of 2011, ODC notified Keitt that it had concluded its

investigation and that the final disposition was confidential.

6. Keitt continued to make complaints about Judge Turner to the Human Resources Department. On June 11, 2012, Keitt emailed complaints to each City Council member and Mayor Benjamin.

7. Keitt was terminated for failure to follow supervisory directives and insubordination on July 3, 2012. As a municipal employee, Keitt had the opportunity to challenge her termination under the County and Municipal Employee's Grievance Act. S.C. Code Ann. § 8-17-110 et seq.

8. Keitt exercised her grievance rights following her termination. The City's grievance committee held a hearing on August 2, 2012. On or about August 13, 2012, Keitt was notified that the grievance committee and City's manager upheld her termination.

9. During her employment and following her discharge, Keitt filed charges of discrimination with the South Carolina Human Affairs Commission/Equal Employment Opportunity Commission alleging race discrimination, age discrimination and retaliation

10. Keitt received notices of right to sue on all charges filed against the City.

11. Keitt did not file suit against the City on either charge of discrimination filed with the South Carolina Human Affairs Commission/Equal Employment Opportunity Commission.

12. Keitt did not file suit against the City alleging any claim under the South Carolina Whistleblower's Act for making reports of alleged misconduct, unethical acts or unlawful acts.

13. The only suit brought by Keitt against the City seeks relief on the basis of alleged wrongful termination.

LEGAL ARGUMENT

I. Keitt had alternatives to filing a wrongful termination claim.

The affidavit of Pamela Benjamin, Human Resources Director for the City, and Keitt's admissions establish that the elements necessary for the relief requested in the Complaint cannot be proven. The affidavit and admissions verify that Keitt filed charges of discrimination with the South Carolina Human Affairs Commission/Equal Employment Opportunity Commission alleging, among other charges, race discrimination and retaliation. (Affidavit of Pamela Benjamin dated July 11, 2013, R. pp. 148-149; Plaintiff's Response to Request for Admissions dated July 29, 2013, R. pp. 132-146) Keitt elected not to file suit against the City on these charges.

Keitt alleges that her termination was in retaliation for making reports of unethical and unlawful conduct to the City's Human Resources Department and to the Office of Disciplinary Council. (Complaint ¶¶ 6, 7, 21 and 25, R. pp. 20-24) The exclusive statutory remedy for adverse employment action resulting from reports of public wrongdoing or malfeasance is through the South Carolina Whistleblower's Act. S.C. Code Ann. § 8-27-10 et seq. Keitt elected not to pursue any relief under this statute.

II. Available alternatives bar Keitt's wrongful termination claim.

The only cause of action in Keitt's Complaint is under common law for wrongful termination in violation of public policy. (Complaint ¶¶ 24 and 25, R. p. 24) Controlling Supreme Court precedent provides that a claim for common law wrongful termination is not available "where the employee has a statutory remedy." Stiles v. American General

Life Ins. Co., 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999), *citing* Dockins v. Ingles Markets, Inc., 306 S.C. 496, 413 S.E.2d 18 (1992) (FLSA claim available) and Epps v. Clarendon County, 304 S.C. 424, 405 S.E.2d 386 (1991) (42 U.S.C. § 1983 claim available); *see also*, Lawson v. S.C. Dep't. of Corrections, 340 S.C. 346, 532 S.E.2d 259 (2000) (dismissing wrongful discharge cause of action based upon availability of a statutory remedy under the state's Whistleblower Act even though the plaintiff did not invoke it); Newman v. S.C. Department of Employment and Workforce, 2010 WL 4791932 (D.S.C. September 22, 2010), *adopted* 2010 WL 4666360 (D.S.C. November 18, 2010) (dismissing wrongful discharge cause of action based upon availability of statutory remedies even though untimely); Frazier v. Target Corp., 2009 WL 3459221 (D.S.C. October 27, 2009) (wrongful termination claims must be dismissed as a matter of law if another cause of action **can be stated**); Lawson v. Gault, 2013 WL 2010224 (D.S.C. May 13, 2013) (Epps decision requires dismissal if an alternative claim is available) Keitt's filing of discrimination claims and her status as a public employee demonstrate that she had the opportunity to seek relief under through the State Human Affairs Act, Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 1983 and the South Carolina Whistleblower's Act, S.C. Code Ann. § 8-27-20(A).

As a matter of law, the availability of alternative recourse bars Keitt's common law cause of action for wrongful discharge. Keitt seeks to circumvent this bar by asserting that her potential statutory claims would not have been successful. This argument has no support in established precedent. For example, Keitt argues that reinstatement of her wrongful termination claim is supported by cases where private sector employees, with no statutory right to review and no alternative remedies, were

discharged for complying with law or refusing to violate law. (Appellant's Initial Brief, pp. 7-8) Unlike private sector employees, Keitt possessed and pursued a statutory remedy under the County and Municipal Employee's Grievance Act. Keitt also initiated proceedings under state and federal civil rights statutes.

Keitt cannot meaningfully distinguish controlling precedent offered in Epps and Lawson, where public employees had alternatives to dismissed common law wrongful termination causes of action. As Keitt admits, in Epps the Supreme Court refused to allow a wrongful termination cause of action where there existed a potential § 1983 claim. (Appellant's Initial Brief, p. 11) Nothing in the Epps opinion remotely suggests that an alternative statutory cause of action must be plead or meritorious. See, Epps, 304 S.C. at 426, 405 S.E.2d at 387 (affirming summary judgment on wrongful discharge with leave to "commence a § 1983 action") Similarly, Keitt acknowledges that the wrongful discharge claim in Lawson was dismissed without a finding that available statutory causes of action had merit. (Appellant's Initial Brief, p. 12) In fact, Lawson affirmed summary judgment on all causes of action, **including** the Whistleblower claim that barred plaintiff's cause of action for wrongful discharge. Lawson 340 S.C. at 351, 532 S.E.2d at 261.

III. Keitt cannot establish the retaliatory motive necessary to pursue wrongful termination.

The cause of action for wrongful termination provides a narrow exception to the employment at-will doctrine. There is no dispute that Keitt's at-will employment was subject to the provisions of the County and Municipal Employee's Grievance Act. S.C. Code Ann. § 8-17-110 et seq. To maintain a wrongful termination claim, a plaintiff must

establish a “public policy exception” **and** must demonstrate that termination was in retaliation for complying with public policy. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985); Barron v. Labor Finders of S.C., 393 S.C. 609, 713 S.E.2d 634 (2011) (public policy is a question of law for the court to determine)

Pursuant to Rule 220(c), SCACR, this Court may affirm summary judgment upon any grounds appearing in the record. As an additional ground for sustaining the order on appeal, Keitt cannot show that she was terminated in retaliation for complying with a legal duty or refusing to violate a legal duty. Specifically, Keitt directs allegations of retaliation to her supervisor, the City’s Chief Administrative Judge. Keitt offers no evidence or argument that the City’s grievance committee or manager was motivated by retaliation in exercising their statutory duty to review the reasons for her termination from employment. By law, the City’s manager alone had the ultimate authority to terminate Keitt’s employment. S.C. Code Ann. § 8-17-160. In the absence of retaliation by the statutory decision maker, there can be no “wrongful” termination.

As a second sustaining ground, our Supreme Court has never extended wrongful termination beyond retaliation in violation of established public policy. See, Ludwick, supra. (public policy exception invoked when an employer requires an at-will employee to violate the law); Culler v. Blue Ridge Elec. Co-op, Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) (wrongful discharge arises for refusal to contribute to a political fund); Barron, supra. (plaintiff failed to take measures necessary to invoke a statutory retaliation claim) Only last year, this Court recognized wrongful termination is limited to “a retaliatory termination of the at-will employee in violation of a **clear mandate of public policy.**” McNeil v. South Carolina Dept. of Corrections, 404 S.C. 186, 195, 743 S.E.2d 843, 848

(Ct. App. 2013) (Emphasis added) citing Ludwick 287 S.C. at 235, 337 S.E.2d at 216. McNeil arose from dismissal of a complaint on a Rule 12(b)(6) motion. The issue was whether plaintiff's complaint contained sufficient allegations to support wrongful termination. The majority opinion concluded that plaintiff's failure to allege that SCDC required her to violate law or that her termination violated law warranted dismissal of her wrongful termination cause of action.

As in McNeil, Keitt's complaint does not allege that she was required to violate a statutory mandate or that her termination in itself violated a statute. Unlike McNeil, however, this appeal arises from summary judgment following exchange of documents and responses to requests for admission. Keitt's internal complaints about her supervisor, and report to ODC that did not result in a finding of illegality, cannot support a judicial determination that her termination violated a "clear mandate of public policy." Absent a supporting violation of law, Keitt may not obtain relief on the basis of wrongful termination. Accordingly, summary judgment was appropriate even absent alternative opportunities to seek relief.

CONCLUSION

The governing law of this State, as applied below and in the federal decisions noted by Judge Lee, uniformly confirms that a plaintiff may not bring a common law cause of action for wrongful termination if alternative recourse exists. There is no requirement that the alternative be raised by the plaintiff or be meritorious. To the contrary, our Supreme Court has affirmed the unavailability of wrongful termination even when the alternative is dismissed in the same order. Additionally, to maintain a cause of action for wrongful termination a plaintiff must offer some evidence of retaliation in

violation of a clear mandate of public policy. For each of these reasons, Keitt cannot establish a legal entitlement to seek relief on grounds of alleged wrongful termination and the order granting summary judgment should be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondent's Final Brief complies with Rule 211(b).

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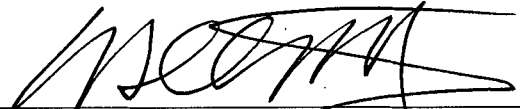
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served Respondent's Final Brief by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

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