

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Deadra Jefferson, Circuit Court Judge

Appellate Case No 2015-002533

C. A. No. 12-CP-26-4852

Jacklyn J. Donevant Respondent

v.

Town of Surfside Beach. Petitioner

PETITIONER'S REPLY

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SC SUPREME COURT

ARGUMENT

Donevant is trying to avoid the fact that she is, in fact, asking the court to dramatically expand the public policy exception to at-will employment

Donevant's response to the petition is a study in misdirection. The only question that needs to be examined is whether Donevant's authority to issue a stop work order was discretionary. If it is, then *Antley v. Shepherd* applies and Donevant cannot assert a public policy discharge claim. 532 S.E.2d 294, 297 (S.C. 2000). The Town ordinance authorizing stop work orders states that the Building Official "is authorized" to issue stop work orders. That language is discretionary and therefore, Donevant has no public policy claim. All of Donevant's discussion of evidence suggesting (1) she needed to issue the stop work order, (2) she would have been disciplined had she not issued the order, (3) she was the only one with authority to issue the order, and (4) other provisions of the building code required her, as a general principle, to enforce the building codes, is simply irrelevant. Once this court focuses on the only relevant question (what the stop work ordinance states) the decision is clear.

Of course, the Defendant is also asking the court to definitively limit the public policy discharge exception to at-will employment to situations in which the employee faces a criminal penalty if it obeys the employer.

The court should also not be swayed by Donevant's implied entreaty asking the court to prohibit governments from interfering with duties given by law to employees. Government, as employer, cannot function without the ability to control how an employee executes duties authorized by law. This court has already made clear that a government does have that right if the duty is discretionary. To rule to the contrary is to make every governmental employee with

some duty authorized by law unanswerable for their actions. In this case, the court of appeals has created a large class of government employees immune from oversight. This is a tremendous erosion of the at-will employment rule and will give rise to despotic bureaucracy which neither the government nor the people can regulate.

Donevant continues to raise the straw-man argument that the Town falsely asserts that the public-policy exception has been expressly limited to certain situations by this court. This is simply incorrect. This argument is a straw-man because Donevant thinks that, by knocking it down, she proves that the tort has been applied and approved for fact situations beyond those in which (1) the employer requires the employee to violate criminal law, or (2) the reason for the employee's termination itself is a violation of criminal law. The truth is that the Town has repeatedly acknowledged that this court has held the tort has not been expressly limited to these situations. Donevant has, however, repeatedly ignored the fact that the tort has not been expressly expanded beyond these two situations. This case is the first one in which the court must decide if the tort is to be approved outside the above two circumstances.

As the Town has acknowledged, this court, and the court of appeals, have held, that the public policy exception to the at-will employment rule has not been expressly limited to the above two situations. However, these courts did not expand the exception. They only held that dismissal of unique public policy discharge arguments (not involving criminal penalties) on 12(b)(6) motions was premature. *Garner v. Morrison Knudsen Corp.* 456 S.E.2d 907 (S.C. 1995) and *Keiger v. Citgo Coastal Petroleum*, 482 S.E.2d 792 (S.C. Ct. App. 1997).

In *Garner*, the plaintiff alleged termination in retaliation for reporting radioactive contamination and, in *Keiger*, the employee alleged termination in retaliation for reporting wage payment concerns to the South Carolina Department of Labor. Neither of these situations fit

within the two prongs identified in *Ludwick* and other cases. The appeal courts reversed dismissals based on S.C. R. Civ. P. 12(b)(6) only because the courts felt the issues were novel and required development through discovery. These courts specifically held that they were not expanding the tort of public policy discharge.

Because the facts of this case have not been fully developed, we do not address the ultimate question whether the public policy exception to the employment at-will doctrine is applicable in this case.

Garner v. Morrison Knudsen Corp., 456 S.E.2d 907, 910 (S.C. 1995).

The Barron court found the public policy exception is not limited to these two situations; however, the exception has not yet been extended beyond them.

McNeil v. S. Carolina Dep't of Corr., 743 S.E.2d 843, 846 (S.C. Ct. App. 2013), reh'g denied (June 25, 2013)

So, although it is true that the tort has not been expressly limited to the above two exceptions, neither has it been applied beyond them. If this court affirms the verdict in this case, then the exception, for the first time, will be expressly expanded.

What Donevant seeks to avoid stating is that she is asking this court to expand the public policy exception to at-will employment far beyond how it has been applied to date. Unlike in *Garner* and *Keiger*, Donevant's public policy theory went to trial. There was no premature dismissal based on Rule 12(b)(6). To affirm, this court must, for the first time, expand the exception. In this case that means expanding it to give an exception to at-will employment to every bureaucrat in the state who has some statutory or regulatory authority. The court should decline this invitation.

This case cannot be distinguished from *Antley v. Shepherd*

In *Antley v. Shepherd*, this court held that the public policy exception does not apply to government employees just because they have a legal "right" to exercise some duty. *Antley v.*

Shepherd, 532 S.E.2d 294, 297 (S.C. 2000) (aff'd as modified 564 S.E.2d 116 (S.C. 2002)).

Donevant is trying to distinguish herself from *Antley* by arguing that she had an “unfettered” right to issue a stop work order whereas Antley’s right to pursue tax appeals was discretionary. A quick view of the sources of Antley’s and Donevant’s authority clearly shows this argument is untenable.

Antley’s Authority to Pursue Tax Appeals

The assessor is responsible for the operations of his office and **shall . . . have the right of appeal** from a disapproval of or modification of an appraisal made by him . . .¹

Donevant’s Authority to Issue a Stop Work Order

Whenever the building official finds any work regulated by this code being performed in a manner contrary to the provisions of this code or dangerous or unsafe, the building official **is authorized** to issue a stop work order.²

Donevant had no greater leeway to issue a stop work order than Antley had to pursue appeals. In fact, the statutory expression of Antley’s duty as a “right” is far stronger than the regulatory expression that Donevant “is authorized” to issue a stop work order.

Donevant cites testimony of some co-workers, and her expert, to support the argument that her authority was unfettered. Even if the testimony could be construed that way, the scope of her authority is a legal question—not a fact question. It is one for the court to decide. *See*,

¹ S.C. Code Ann. § 12-37-90. (emphasis added).

² (R. 423) From Section 115 of the International Building Code adopted by the Town of Surfside Beach. (emphasis added).

e.g., *Rauton v. Pullman Co.*, 191 S.E. 416, 420 (S.C. 1937) (“any evidence by an expert as to the meaning of these statutes would be incompetent.”); *Kirkland v. Peoples Gas Co.*, 237 S.E.2d 772 (S.C. 1977) (an expert is not allowed to interpret regulations of the Department of Transportation); *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 93 (S.C. 2013) (“court is obligated to follow and to enforce the stated meaning [of the statute]”); *Barth v. Barth*, 360 S.E.2d 309, 311 (S.C. 1987) (It is the right and duty of this court to interpret statutes”); *Benat v. State Farm Mut. Ins. Co.*, 333 S.E.2d 57, 58 (S.C. Ct. App. 1985) (“It is the duty of this court to interpret the [statutory] law.”).

What matters, as in *Antley*, is what the ordinance states regarding Donevant’s authority. The ordinance manifestly makes the issuance of a stop work order discretionary.

Whenever the building official finds any work regulated by this code being performed in a manner contrary to the provisions of this code or dangerous or unsafe, the building official **is authorized** to issue a stop work order.

(R. 423) (P. Ex. 26) (emphasis added).

The inquiry as to the nature of Donevant’s authority ends with the wording of this ordinance. It simply does not matter whether her authority was “unfettered” or if she might be subjected to discipline if she failed to issue a stop work order.

Donevant’s Authority to Issue a Stop Work Order was Not Unfettered

As stated above, it only matters whether or not Donevant was required by the ordinance to issue a stop work order. Clearly, according to the ordinance, the stop work order was discretionary. Donevant seeks to confuse this issue by arguing her authority was “unfettered.” In other words, that no one else had authority to second-guess her or override her decision. As a matter of law, this is untrue. There is nothing in the building code that prevents the government

(The Town) from reversing Donevant's stop work order. There is no language surrendering the Town's authority to govern employees. A government does not surrender its right to regulate an employee by granting that employee certain authority. That is the lesson of *Antley*. In fact, it is even clearer here because Donevant's authority came from the Town's ordinances and not higher statutes issued by the State. Additionally, Donevant ignores the fact that her situation at the Town was unique. Most Municipal building departments have more than one building official and would have a supervisor with authority to overrule his or her subordinates. Donevant was in the unusual situation of being the only Surfside building official. Finally, the Town's ordinances provided for an appeal panel that could reverse Donevant's decisions. Section 113.1 of the building code provides:

In order to hear and decide appeals of orders, decisions or determinations made by the *building official* relative to the application and interpretation of this code, there shall be and is hereby created a board of appeals. The board of appeals shall be appointed by the applicable governing authority and shall hold office at its pleasure. The board shall adopt rules of procedure for conducting its business.³

The board of appeals could decide that Donevant was simply wrong in issuing a stop work order and overturn that decision.

For these reasons it is clear Donevant's discretion to issue a stop work order was not unfettered. Of course, once again, this question is really irrelevant to the appeal. What matters, under *Antley*, is whether or not the law required Donevant to issue a stop work order and the law (Town Ordinance) made such orders discretionary.

³ http://publicecodes.cyberregs.com/icod/ibc/2012/icod_ibc_2012_1_sec015.htm

**The public policy in favor of building codes and enforcement of those codes
is not relevant to this case**

Donevant argues at length that there is a strong public policy in favor of having, and enforcing, building codes. She refers to building codes being required of municipalities and of the strong “public policy” in favor of code implementation and enforcement.

The public policy in favor of building codes, and the enforcement of them, cannot be disputed. But the point is without purpose. The question is whether Donevant was required by law to issue a stop-work order. Even broadening the issue, would she be required to issue a stop-work order to effectively enforce the building codes? The answer to that question is clearly no. Even Donevant admitted she had discretion when to issue stop-work orders and did not do so in every circumstance.

The general public policy supporting the codes is simply not in question.

CONCLUSION

For the foregoing reasons, the judgment on Donevant’s claim that she was terminated in violation of public policy should be reversed.



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January 19, 2014

STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

The foregoing Reply to Respondent's Response to the Petition for Writ of Certiorari was served on plaintiff, via first class mail, postage prepaid and addressed to Plaintiff's counsel of record:

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January 20, 2016