STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Circuit Court

The Honorable Robert E. Hood, Circuit Judge

Appellate Case No. 2017-000052

Marion E. Crocker, Jr.,..... Appellant,

v.

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

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This action was commenced on March 28, 2016 by the filing of a Summons and Complaint by Appellant Marion E. Crocker, Jr., against Respondent South Carolina Department of Health and Environmental Control, seeking damages for age discrimination and age discrimination retaliation. By Answer dated April 25, 2016, Respondent denied liability on all causes of action.

On July 7, 2016, Respondent moved for summary judgment on the alleged basis that Appellant's claims were barred by applicable statute(s) of limitation. On August 8, 2016, Appellant submitted his memorandum in opposition to Respondent's motion for summary judgment.

A hearing was held on October 26, 2016, wherein the Court hear oral argument on the motion for summary judgment. Also at that hearing, Appellant withdrew his claim for retaliation, leaving his cause of action for age discrimination before the Court. By Order dated November 16, 2016, the circuit court granted Respondent's motion and dismissed the case. Appellant received written notice of entry of the Order on November 21, 2016.

Appellant timely moved to alter or amend the Order on November 28, 2016. By Order dated December 8, 2016 and received by Appellant on December 13, 2016, the circuit court denied Appellant's motion. This appeal follows.

STATEMENT OF FACTS

From January 4, 1980 to September 17, 2013, Appellant was employed by Respondent. (R. 15-16, ¶ 3, 9) During his employment at DHEC, Appellant held three

job titles: Manager Operational Systems; Director IT Operations; and Project Manager. (R. 16, ¶ 10)

On or about September 27, 2012 and during the time of Appellant's employment, DHEC posted and sought applications for the position of Agency Chief Information Officer. At that time, Appellant was 55 years old and had worked for DHEC for over 32 years. (R. 16-17, ¶¶ 13, 23) Appellant's qualifications met or exceeded all posted requirements for the position. (R. 17, ¶14, 15) Approximately ten (10) other individuals applied for the job. (R. 68, ll. 4-8) Shortly thereafter, another applicant was given the job. (R. 17, ¶18)

The chosen candidate for the job was a former supervisee of Appellant's and did not meet the minimum or preferred qualifications for the job, but was substantially younger than Appellant. (R. 17, ¶¶19-21) Both in credentials and experience, Appellant was substantially more qualified than the applicant hired for the job. (R. 17, ¶22)

Appellant filed a grievance with Respondent regarding the selection process for the Agency Chief Information Officer, but Respondent denied said grievance on the stated basis that it did not fall within the provisions of the State Employee Grievance Procedure Act. (R. 17, ¶¶ 24, 25) Thereafter on August 7, 2013, Appellant filed his Charge of Discrimination on the basis of Age with both the South Carolina Human Affairs Commission ("SHAC") and the Equal Employment Opportunity Commission (the "EEOC") under the South Carolina Human Affairs Law and the Age Discrimination Act of 1967 (as amended). (R. 18, ¶26; R. 53) SHAC deferred to the EEOC for investigation of Appellant's Charge; forwarded all information concerning

the Charge to the EEOC; and took no further action regarding the Charge. (R. 18, ¶¶ 28, 29; R. 54)

On July 1, 2015, the EEOC made its Determination, in which it concluded that Appellant had been wrongfully denied the position of Agency Chief Information Officer on the basis of age discrimination and that the position had been given to a less qualified, younger candidate. (R. 18, ¶30; R. 39) Thereafter, the EEOC subjected the matter to voluntary conciliation.

On February 11, 2016, the EEOC issued its notice to the parties that conciliation had been unsuccessful, as well as its Notice of Right to Sue to Appellant. (R. 19, ¶33; R. 55-57) The Notice of Right to Sue sets forth that the charging party may file suit in state or federal court within 90 days of receipt of the Notice. (R. 19, ¶34; R. 57)

Appellant filed suit on March 28, 2016, well within 90 days of receipt of the Notice of Right to Sue. (R. 15)

ARGUMENT

I. S.C. Code Ann. §1-13-90(d)(6) does not operate as the statute of limitation on Appellant's claim.

The Circuit Court erred in finding that the limitation set out in S.C. Code Ann. §1-13-90(d)(6) bars Appellant's action for damages. That subsection requires that all actions brought under S.C. Code Ann. §1-13-90(d) be filed within one year of the date on which the violation occurred or within 120 days of the Commission's dismissal of a charge. The entirety of S.C. Code Ann. §1-13-90(d) is, however, expressly inapplicable to Appellant's claim.

S.C. Code Ann. §1-13-90(d), by its terms, applies to:

> Employers, employment agencies or labor organizations, including municipalities, counties, special purpose districts, school districts, and local governments, but not including employers, employment agencies or labor organizations covered by Section 1-13-90(c)

S.C. Code Ann. §1-13-90(c) applies to violations by "a state agency or department or local subdivisions of a state agency or department." Respondent is undisputedly a state agency.

Where the language of a statute is clear and unambiguous, the rules of statutory interpretation are not needed, and the Court may not impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). The subsection on which the Circuit Court partly based its grant of summary judgment is unequivocally inapplicable to Appellant's claim.

Subsection (c) sets forth no similar limitation on the filing of an action; instead, it provides simply a time limit for filing a charge with the Commission. Appellant timely filed his charge, and the next time he was faced with a time limitation was upon receipt of the Notice of Right to Sue from the EEOC. This action was filed well within the 120-day limit set out in the Notice, and it is timely under the governing statute.

II. A private right of action exists under S.C. Code Ann. §1-13-90(c).

The Circuit Court found that there is no private right of action under S.C. Code Ann. §1-13-90(c) and that Appellant could therefore not pursue his claim for age discrimination in a civil action. Appellant submits that the Circuit Court's finding is in error.

Although S.C. Code Ann. §1-13-90(c) does not expressly set out a private right of action, our Courts have previously recognized private rights of action which are implied by the apparent intent of other statutes. *See Sloan Constr. Co. v. Southco*

Grassing, Inc., 377 S.C.108, 113, 659 S.E.2d 158, 161 (2008). In deciding whether a private right of action is implied under a statute which does not explicitly create one, the Court must discern the intent of the legislature in enacting the statute. *Id.*

Here, S.C. Code Ann. §1-13-90(c) provides a procedure for presenting complaints of violations by a state agency of S.C. Code Ann. §1-13-80. Under S.C. Code Ann. §1-13-80(a)(1), it is unlawful for an employer "to fail or refuse to hire . . . an individual . . .because of the individual's race, religion, color, sex, age, national origin, or disability." The statute thus creates a class of individuals who are protected by its terms. Courts often consider whether protections to certain individuals, rather than protection of the general public, are put in place by a statute in determining whether that statute impliedly creates a private right of action. *See Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993).

Respondent acknowledges that S.C. Code Ann. §1-13-90(d) expressly creates a private right of action against employers other than those subject to the more detailed administrative procedure set out in subsection (c), and there is no stated intent in the statute to deprive aggrieved employees subject to subsection (c) of the same right.

In fact, subsection (c) appears to anticipate civil actions after the conclusion of the administrative procedure set out therein. S.C. Code Ann. §1-13-90(c)(1) provides:

> Information gathered during an investigation under this subsection shall not be made public by the Commission, its officers or employees, **except for information made public as a result of being offered or received into evidence in an action brought under this subsection.** (emphasis supplied)

In the lengthy recitation of process in subsection (c), that process is never referred to as "an action," but rather as "a proceeding." For reference, S.C. Code Ann. §1-13-90(d)(6) sets out the limitation on time for filing an "action," during or at the end of the administrative process set out in that subsection.

Appellant submits that S.C. Code Ann. §1-13-90(c) gives rise to a private right of action, and the Circuit Court erred in determining that it did not.

III. If S.C. Code Ann. §1-13-90(d)(6) governs, Appellant is entitled to equitable tolling of the 1-year limitation, and facts in the record preclude summary judgment on equitable tolling.

Although Appellant believes that S.C. Code Ann. §1-13-90(d)(6) is by its terms inapplicable to his claim, he submits that, in the event this Court disagrees, the facts of his case justify equitable tolling of the time limit set out therein.

Appellant timely commenced the process required under S.C. Code Ann. §1-13-90(c) after her was wrongfully passed over for a promotion on the basis of his age. In its Determination, the EEOC found that there was "reasonable cause" to believe that Appellant was not promoted as a result of age discrimination, but nonetheless recommended that the matter be put to conciliation. (R. 39) More than seven (7) months elapsed before the EEOC issued its Notice of Conciliation Failure and Notice of Right to Sue. (R. 55-57) The record thus contains adequate evidence to indicate that **both** parties engaged in the conciliation process before the EEOC notified them that the process had failed.

Appellant brought suit within the time period set forth in the Notice of Right to Sue. Although that notice made reference to the Federal statutes regarding employment discrimination based on age, it appears that all of Appellant, Respondent

and the EEOC were unaware of the United States Supreme Court case of *Kimmel v. Florida Board of Regents, et al,* 528 U.S. 62 (2000), which held that the Federal Age Discrimination in Employment Act, to the extent it allowed suits for damages against state employers, could not override the states' sovereign immunity from such suits.

S.C. Code Ann. § 1-13-70(k) allows for SHAC to defer to the EEOC on complaints such as Appellant's. In this instance, the SHAC did so immediately upon receipt of Appellant's charge, and the entire process was carried out through the EEOC. (R. 54)

Thus, despite the fact that the parties and the EEOC had completed a lengthy administrative process regarding Appellant's claim, the Circuit Court found that the Notice of Right to Sue issued by the EEOC was effectively of no import with regard to the time for filing suit under State law. Respondent has not asserted that Appellant failed to meet any administrative deadline or procedure, and the EEOC made a determination within that process that there was "reasonable cause" to believe that Appellant had been discriminated against. (R. 39)

The Circuit Court nonetheless found that Appellant would not be given a trial, depriving Appellant of his claim as the result of circumstances over which Appellant had no control, as well as Appellant's full participation in the EEOC's processing of his charge.

Our Courts have recently adopted the doctrine of "equitable tolling," which our Supreme Court described as follows:

> . . . in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, 54 C.J.S. Limitation of Actions Section 115 (2005).

Hooper v. Ebenezer Senior Services and Rehabilitation Center, 386 S.C. 108, 687 S.E.2d 29 (2009).

Equitable tolling is judicially created and stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Rodriguez v. Superior Court*, 176 Cal. App. 3d 728 (2000). Here, the EEOC has already found merit in Appellant's claim, and Respondent engaged in the months-long conciliation process to try to resolve that claim long after the date on which the Circuit Court found Appellant's claim was barred by S.C. Code Ann. §1-13-90(d)(6).

In finding that equitable tolling was unavailable to Appellant, the Circuit Court cited the Federal District Court case of *Brown v. Lexington County Health Svcs. Dist., Inc.* 2013 WL 5467623 (D.S.C. July 11, 2013), which was not reviewed by any appellate Court. In that case, the District Court did find that Brown was not entitled to equitable tolling of certain statutes of limitation, but that finding was based on Brown's failure to present sufficient facts to justify equitable tolling. Appellant respectfully submits that *Brown* is not binding on this Court and includes additional findings that Brown failed to timely present certain charges to the EEOC even before filing suit.

The Circuit Court granted summary judgment under Rule 56, *South Carolina Rules of Civil Procedure*, finding that there was no genuine issue of material fact. In *Tanner v. Florence City-County Building Commission*, 511 S.E. 2nd 369, 333 S.C. 549 (Ct. App. 1992), the Court of Appeals held that at the summary judgment stage of the proceedings, it is only necessary for the non-moving party to submit a **scintilla** of evidence warranting a trial on the merits for summary judgment to be denied. The

Courts and Black's Law Dictionary have defined "scintilla" as being a trace or a spark of evidence.

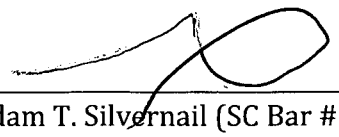
South Carolina law does not favor summary judgment where there is dispute as to the facts and/or the conclusions that can be drawn therefrom. It is a drastic remedy to be "cautiously invoked" so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Telephone & Telegraph Co.*, 10 S.E.2d 537 (1991).

At the very least, the determination and notices issues by the EEOC present a scintilla of evidence that the alleged statute of limitation (if found to be applicable at all) must be equitably tolled. In the event this Court disagrees with Appellant's earlier argument that the statute in question is wholly inapplicable to his case, he respectfully submits that the Circuit Court's grant of summary judgment should be reversed in light of the question(s) of fact as to equitable tolling.

CONCLUSION

For the reasons set out above, Appellant respectfully submits that the Orders on appeal should be reversed, and this matter should be remanded for trial on the merits.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the final brief filed herewith complies with Rule 211(b).

Adam T. Silvernail