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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2016-001811

RECEIVED
JAN 30 2019
SC Court of Appeals

James C. Owens Appellant,

v.

Bryan Crabtree, Kirkman Broadcasting, Inc. d/b/a
WQSC Radio, ADC Engineering, Inc., Tyler Flesh,
and Red Drum Capital Group, LLC, Defendants,

of whom ADC Engineering, Inc., is Respondent,

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Appellant moves the Court for Rehearing and/or to Alter its Opinion number 5616 of January 16, 2019, which affirms the trial court's grant of summary judgment to Respondent, ADC Engineering, Inc.

Although agreeing with Owens that S.C. Code Ann. § 16-17-560 supports a cause of action for wrongful termination, the Court improperly weighed the evidence to affirm summary judgment and held that ADC was justified in terminating Owens. The Court quoted the standard of review that all evidence is to be viewed in a light most favorable to the non-moving party. (Op. p. 5) ("Quail Hill, LLC v. Cty. Of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505

(2010)"). However, one sentence confirms the Court weighed the evidence in affirming summary judgment: "We *believe* ADC was within its rights to discharge an at-will employee for a *violation of rules* that brought *economic harm to the company*." (Op. p. 8) (emphasis added). Belief is not sufficient as a matter of law to hold Owens was not terminated for exercising his constitutional rights in violation of § 16-17-560.

This action presented two scenarios that led to Owens termination: (1) Owens was terminated for exercising his constitutional rights that harmed ADC or (2) Owens was terminated for violating ADC's technology policy that specifically allowed personal use but harmed ADC. By holding as a matter of law that ADC was within its rights to terminate Owens for violating the technology policy, the Court improperly weighed the evidence in contravention of the well-established summary judgment standard.

As quoted by the Court, ADC's technology policy allowed for "[b]rief or incidental use of office technology for personal, non-business purposes . . . as long as it [was] not excessive or inappropriate, *and did not result in expense or loss to the company*." (Op. p. 7) (emphasis added). To warrant discipline or termination under the technology policy, the conjunctive *and* requires that the personal, non-business use be both (1) excessive or inappropriate and (2) result in expense or loss to the company. See Terry v. Lee, 314 S.C. 420, 425, 445 S.E.2d 435, 437 (1994) (holding the use of "the conjunctive term 'and'" in a statute required compliance with both stated requirements); Charleston Cty. Aviation Auth. v. Wasson, 277 S.C. 480, 483, 489, 289 S.E.2d 416, 418, 421 (1982) (finding the General Assembly's use of "the conjunctive word 'and'" in the language "duty of the Tax Commission and county assessor to determine" indicates "both the Tax Commission and assessor are to make the determination" (emphasis added)); Holman v. Bulldog Trucking Co., 311 S.C. 341, 345, 428 S.E.2d 889, 891 (Ct. App. 1993)

(stating the General Assembly’s prior use of the term “and” rather than “or” in a list of conditions made the conditions “conjunctive rather than alternative, so a claimant had to meet all of them or his claim failed”).

The Court does not hold Owens personal use was “excessive” or “inappropriate”, a prerequisite to a violation of the technology policy. It is a jury question as to whether his personal use was “excessive” or “inappropriate” as the Court cannot weigh this evidence and hold as a matter of law on summary judgment the personal use was “excessive” or “inappropriate”. The Court’s decision should be reheard on this basis alone.

Although not holding Owens conduct was excessive or inappropriate, the Court finds Owens’s conduct harmed the company: “rather, the evidence shows Owens was discharged because he used company equipment, materials, and time to engage in an activity that was a violation of company policy and *unquestionably detrimental to ADC.*” (Opinion p. 7) (emphasis added). The same conduct that the Court held is a constitutional right – “using the political process to actively oppose the Shem Creek project was within his rights as a private citizen” – is the same conduct that the Court held brought economic harm to ADC to warrant termination under the technology policy. The issue here is whether that constitutional conduct is and actually was a valid basis for his termination by ADC. As held by the Court, ADC could not terminate Owens for exercising his constitutional rights as that is a violation of § 16-17-560, but ADC can terminate Owens if the exercise of those constitutional rights caused expense or loss to ADC.¹ This is allowing a result to be done indirectly that cannot be done directly and is merely form over substance. Owens’s constitutionally permissible conduct in opposing the Project is the

¹ Owens submits there is no other expense or loss ADC suffered other than losing the contract with Stubbs Muldrow.

basis of his termination under either scenario set forth above. This inconsistency must be corrected on rehearing by the Court.

It should be for a jury to decide if Owens violated the policy when the evidence, viewed in a light most favorable to him, is that he did not know of ADC's involvement with the project, did not know his actions violated the policy, or were or could be a detriment to ADC.

For these and all other reasons put forth in Owens briefs and at hearing on this matter, the Court's decision affirming summary judgment should be reheard and reversed.

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

January 30, 2019
Hampton, South Carolina

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Bryan Crabtree, Kirkman Broadcasting, Inc. d/b/a
WQSC Radio, ADC Engineering, Inc., Tyler Flesch,
and Red Drum Capital Group, LLC,Defendants,

of whom ADC Engineering, Inc., is Respondent.

CERTIFICATE OF SERVICE

This is to certify that I, *Megan C. Davis*, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Appellant's Petition for Rehearing* to:

Molly H. Cherry, Esquire
Melissa A. Fried, Esquire
Nexsen Pruet, L.L.C.
Post Office Box 486
Charleston, SC 29402
Attorney for Respondent, ADC Engineering, Inc.


Megan C. Davis

January 30th, 2019
Hampton, South Carolina

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January 29, 2019

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The Honorable Jenny Abbott Kitchings
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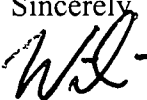
Re: James C. Owens v. Crabtree, et al.
Civil Action No.: 2014-CP-10-6265
Appellate Case No.: 2016-001811

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellant's Petition for Rehearing and Certificate of Service in the above referenced matter. Please file the original and return a clocked copy of same in the self-addressed stamped envelope provided. Also enclosed is our firm's check in the amount of \$50.00 for the filing fee.

By copy of this letter, Appellant's Petition for Rehearing is being served on all counsel of record.

With kind regards, I am

Sincerely


William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: Molly H. Cherry, Esquire
Melissa A. Fried, Esquire