THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-07273
Appellate Case No. 2014-000961

Betty J. Keitt.....Appellant,

v.

City of Columbia.....Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. THE COURT BELOW ERRED IN FINDING THAT KEITT HAD AN EXISTING REMEDY UNDER THE SOUTH CAROLINA WHISTLEBLOWER STATUTE, S.C. CODE ANN. § 8-27-10 *ET SEQ.*

The City's Initial Brief does not address the conflicting findings of Judge Lee in the April 3, 2013 Order and the January 3, 2014 Order. Judge Lee found that the South Carolina Whistleblower statute ("Whistleblower statute"), S.C. Code Ann. § 8-27-10 *et seq.* does not provide an avenue of relief by way of an Order dated April 3, 2013. (*See* R. pp. 16-17). Judge Lee found that "Plaintiff filed a grievance through the Defendant's employee grievance policy and thus exhausted her administrative remedies. However, her grievance resulted in a finding upholding her termination. Therefore, the Whistleblower statute does not appear to apply." (*Id.*). Thus, in the April 3, 2013 Order, Judge Lee correctly found that a Whistleblower claim could not be stated because one of the two statutorily required elements was not satisfied. Under S.C. Code Ann. § 8-27-30(A), the previous proceeding did not result in a finding that Keitt would not have been disciplined but for reporting the alleged wrongdoing of Judge Turner.

There has been no additional evidence presented that would alter this legal decision, yet the circuit court issued an Order on January 3, 2014 with the opposite holding. Judge Lee found that "[w]hether the Plaintiff believes the other claims would be successful is irrelevant. The precedent is clear, and a common law cause of action for wrongful termination may not be invoked if another cause of action can be stated regardless of whether counsel thinks it will be successful." (R. p. 10). The previous order should be the law of the case and summary judgment should be denied.

II. KEITT DID NOT HAVE OTHER STATUTORY MEANS OF REDRESS.

There is a clear dispute of South Carolina law at issue as to whether Keitt is required to allege causes of actions for which she does not satisfy the statutory elements and *prima*

facie case requirements. Chief Justice Toal, in a concurring opinion, found that in South Carolina, a claim for wrongful termination in violation of public policy should "provide a remedy for a clear violation of public policy where no other reasonable means of redress exist." *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 228,516 S.E.2d 449, 452 (1999). Reasonableness is a key factor here and should not be disregarded when analyzing alternative remedies such as those discussed in this appeal. The "no other reasonable means of redress" limitation on wrongful discharge in violation of public policy claims should not be interpreted to require a plaintiff to bring claims that plaintiff, after seeking legal advice, has determined to be invalid or even frivolous. Here, the alternative remedies that the City suggests are not reasonable means of redress because there are insufficient facts here to support a race discrimination claim or age discrimination claim. The facts clearly reveal that Judge Turner retaliated against Keitt and terminated her employment because of her reports to HR and ODC, not because of her age or race. Thus, Keitt has no other available means of recourse than her claim for wrongful termination in violation of public policy.

In support of its position that Keitt's wrongful termination claim is barred by alleged available remedies, the City cited seven cases.[1] Of those seven cases, the City cites to two additional cases not previously discussed in Appellant's Brief: *Frazier v. Target Corp.*, 2009 U.S. Dist. LEXIS 99686, 2009 WL 3459221 (D.S.C. Oct. 27, 2009) and *Lawson v. Gault,* 2013 U.S. Dist. LEXIS 67696, 2013 WL 2010224 (D.S.C. May 13, 2013). Both cases are

[1] (1) *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999); (2) *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992); (3) *Epps v. Clarendon Cty.,* 304 S.C. 424, 405 S.E.2d 386 (1991); (4) *Lawson v. S.C. Dep't of Corrections*, 340 S.C. 346, 532 S.E.2d 259 (2000); (5) *Newman v. S.C. Dep't of Emp't and Workforce*, 2010 WL 4791932 (D.S.C. September 22, 2010), *adopted* 2010 WL 4666360 (D.S.C. November 18, 2010); (6) *Frazier v. Target Corp.*, 2009 U.S. Dist. LEXIS 99686, 2009 WL 3459221 (D.S.C. October 27, 2009); and (7) *Lawson v. Gault,* 2013 U.S. Dist. LEXIS 67696, 2013 WL 2010224 (D.S.C. May 13, 2013). Respondent's Initial Brief, pp. 4-5.

distinguishable from the case at hand, and are unpublished federal cases without precedential value pursuant to Rule 268(d)(2), SCACR.

In *Frazier*, the employee alleged that she was wrongfully terminated from her position as a stocker at a Target store after missing work to appear in a Department of Social Services case involving her daughter. *Frazier*, 2009 U.S. Dist. LEXIS 99686, 1-2, 2009 WL 3459221. The employee claimed that she told Target about the required court appearance in advance, and that Target told her that she could not miss work to attend court. *Id.* The employee alleged that she attended court as she was required to do and, as a result thereof, was terminated by Target. *Id.* The employee's Complaint alleged two causes of action: (1) a statutory claim for retaliatory discharge in violation of S.C. Code Ann. § 41-1-70 ("Count One"); and (2) a common law tort claim for wrongful discharge in violation of public policy ("Count Two"). *Id.* Target moved to dismiss Count Two pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the employee could not maintain her tort claim for wrongful discharge in violation of public policy as a matter of law because the statutory remedy set forth in S.C. Code Ann. § 41-1-70 is exclusive and bars a separate tort claim for wrongful discharge in violation of public policy. *Id.*

The Court in *Frazier* cited to some of the same cases as the City in its arguments; however, in *Frazier* the employee alleged two causes of action. Clearly there is an alternative statutory remedy available when the employee herself is alleging a second cause of action. Here, Keitt has not overlapped her wrongful termination claim with any other causes of action. Keitt's sole cause of action against the City is a claim that she was wrongfully discharged in violation of public policy. Thus, she has not benefited from multiple employee statutory or contractual rights as a means of redress.

Furthermore, it is important to put the City's contention that *Frazier* holds, "wrongful termination claims must be dismissed as a matter of law if another cause of action can be stated" into proper context of the case. *See* Respondent's Initial Brief, p. 5. In *Frazier*, the employee alleged two causes of action and in her memorandum in opposition to Target's motion to dismiss, she argued that she should be able to plead a tort claim for wrongful discharge in violation of public policy in the alternative to her statutory claim under S.C. Code Ann. § 41-1-70. *Frazier*, 2009 U.S. Dist. LEXIS 99686, 7, 2009 WL 3459221. The Court agreed with Target in that to accept the employee's argument that she can plead her claims in the alternative would essentially nullify two District Court decisions which held that no common law public policy wrongful termination claim could be stated where the employee had an existing statutory remedy. *Id.* The Court indicated that the two District Court cases evidence the common law requiring a Plaintiff to plead statutory remedies or a common law public policy wrongful termination claim, but not both. *Id.*

Gault is also distinguishable from the case at hand. Comparable to *Frazier*, the employee yet again unsuccessfully plead multiple causes of action in the alternative, one of which was a wrongful discharge in violation of public policy. In her amended complaint, the employee alleges that the Union County Clerk of Court, in his official capacity, violated S.C. Code Ann. § 16-17-560, which makes it unlawful to "discharge a citizen from employment . . . because of political opinions or the exercise of political rights and privileges," when he terminated her employment after she ran against him in an election. *Id.* In addition to her wrongful discharge in violation of public policy claim, the employee brought claims pursuant to §§ 1981, 1983, 1988 and the First Amendment against the Union County Clerk of Court, in his individual capacity. *Id.* Thus, *Frazier* and *Gault* and the five cases distinguished in Appellant's Brief are similarly

distinguishable from the case at hand because the employees alleged multiple causes of action in their pleadings. Correspondingly, the courts found that there were additional avenues of redress available to employees who plead more than one cause of action.

These cases are distinguishable as Keitt does not allege facts to support other available remedies, nor are such facts in evidence before this Court. Keitt's Complaint does not allege that Keitt was terminated for racial reasons in violation of Title VII or § 1983, or age reasons in violation of the ADEA, nor does it allege the requirements and *prima facie* elements for a claim under the Whistleblower statute. The City has failed to establish that there were facts supporting another remedy available to Keitt such that the public policy discharge claim should be dismissed. The Affidavit of Pamela Benjamin and Keitt's Admissions that are proffered by the City do not establish that the alleged alternative remedies are actually available and viable remedies. (R. pp. 132-150).

Keitt, by and through counsel,[2] determined that the facts do not support a claim under Title VII, the ADEA, § 1983, or the Whistleblower Statute. However, based on the allegations which have been set forth in the Complaint, there is a valid claim for wrongful termination in violation of public policy. The City seems to argue that every cause of action that could be even considered by a plaintiff must be alleged regardless of whether a plaintiff can determine that one or more required elements is absent.[3] Furthermore, the City's position that a claim must be brought just because there was a SCHAC/EEOC investigation resulting in a "no cause" finding is

[2] Keitt is not waiving the attorney-client privilege, which applies to the actual communications between Keitt and her attorney.

[3] The City's Motion for Summary Judgment stated, "[p]laintiff had available remedies 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). Plaintiff's failure to invoke these potential statutory remedies precludes her cause of action for common law wrongful termination." [Defendant's Motion and Memorandum in Support of Summary Judgment, p. 2].

unreasonable. Such an assertion draws into question when Rule 11 would be triggered and such a requirement would force plaintiffs to file frivolous claims that could be in violation of Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act. Rule 11, SCRCP; S.C. Code Ann. § 15-36-10. Rule 11 states, "[t]he written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." Rule 11, SCRCP. If every plaintiff in this state alleged every contemplated cause of action the floodgates of litigation would be opened. The pleadings of every plaintiff would include numerous causes of action that would result in a seemingly never-ending string of motions to dismiss and motions for summary judgment. Furthermore, the assertion of deficient claims would result in undue burden and excessive costs on both parties and the Court as they would ultimately result in a grant of summary judgment upon a motion by the defendant.

III. RESPONDENT'S ADDITIONAL SUSTAINING GROUNDS SHOULD BE REJECTED, AND APPELLANT CAN ESTABLISH RETALIATORY MOTIVE.

Respondent City has raised two additional sustaining grounds in Respondent's Brief to this appeal. It appears that these issues and defenses have not been previously raised by the City in their earlier memoranda or arguments, and thus are not properly preserved on appeal. Should the Court consider these arguments, then the Appellant relies on the argument below as well as the record on appeal to establish that she can establish sufficient retaliatory motive.

The City contends two additional sustaining grounds; the first alleges that Keitt cannot show that she was terminated in retaliation for complying with a legal duty or refusing to violate

a legal duty.[4] However, the hallmarks of this case are Judge Turner's instructions to Keitt to change the disposition of cases to dispositions with harsher penalties on defendants than those previously ordered in Court and the subsequent retaliation and termination after Keitt reported concerns to Human Resources and the Office of Disciplinary Counsel. Judge Turner's actions were retaliatory, but the City in making this sustaining ground argument seems to argue that it should not be liable for those retaliatory actions because the City's Manager and Grievance Committee upheld the termination of Keitt's employment. This newly raised statutory decision maker argument was not reviewed by the lower court and it is unpersuasive because the City itself is the named defendant in this case; Judge Turner, the City Manager, and the Grievance Committee members are not named defendants. Judge Turner, as Keitt's supervisor, made the decision to terminate Keitt's employment. After her termination, Keitt appealed her termination from employment to the Grievance Committee. Following a hearing, the Grievance Committee recommended that the termination be upheld and the City Manager concurred in the Grievance Committee's recommendation. (*See* R. pp. 148-149). Thus, the City, through the conduct of its agents, is liable for the wrongful termination of Keitt's employment.

In regards to the second sustaining ground raised by the City, the facts of this case align with previous South Carolina case law prohibiting termination in violation of the clear mandate of public policy and protecting employees without a remedy when terminated in violation of public policy. *Stiles*, 335 S.C. 228, 516 S.E.2d 452. A strong regard for the facts before the Court is crucial when considering the applicability of the public policy exception. The employee

[4] The City cites *McNeil v. S.C. Dept. of Corrections*, 404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013) as support for sustaining the grant of summary judgment. Unlike *McNeil*, Keitt has alleged and produced evidence to support her allegations that Judge Turner improperly and/or illegally changed the disposition of punishments, Keitt reported Judge Turner's conduct to internal and external bodies, and thereafter Judge Turner retaliated against Keitt because of her violations of public policy.

in *Ludwick* was forced to choose between disobeying a subpoena or losing his job. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985). In *Culler*, the employee alleged he was fired because he refused to join an organization which gives money to campaigns of politicians who support cooperative utilities. *Culler v. Blue Ridge Elec. Coop.*, 309 S.C. 243, 244-245, 422 S.E.2d 91, 91-92 (1992). The employee in *Garner* worked at a nuclear plant and after testifying voluntarily regarding radioactive contamination and working conditions, the employee was discharged. *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 224, 456 S.E.2d 907, 908 (1995). In *Keiger*, the employee, a waitress paid an hourly wage, was discharged after the employee threatened to invoke her rights under the Payment of Wages Act when the employer reduced the hourly wage. *Keiger v. Citgo*, 326 S.C. 369, 371, 482 S.E.2d 792, 793 (Ct. App. 1997). The employee in *Barron* was terminated the day after notifying her employer that it had not paid her the full amount of commissions she had earned. *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 612-613,713 S.E.2d 634, 636 (2011).

Here, as alleged in the Complaint, Judge Turner instructed Keitt to change the disposition of cases to dispositions with harsher penalties on defendants than those previously ordered in Court. (R. p. 20 ¶¶ 3-4). Keitt reported concerns involving Judge Turner's actions to HR, yet Keitt's complaints were not resolved. (R. pp. 14-15). After multiple instances of Judge Turner altering the sentence and/or fine of defendants, Keitt filed a written complaint and accompanying documents with the ODC. [5] Subsequently, Judge Turner retaliated against Keitt by causing Keitt

[5] In a letter dated December 13, 2011, Keitt received a Notice of Final Disposition of her complaint with the Commission on Judicial Conduct concerning Judge Turner. The body of the letter stated: "You previously filed a complaint with the Commission on Judicial Conduct concerning Municipal Court Judge Dana Davis Turner. This matter was concluded on December 6, 2011. Your complaint was not dismissed, but the disposition is confidential under the provisions of the Rules of Judicial Disciplinary Enforcement, Rule 502, SCACR. This constitutes final disposition of the proceedings in this matter. Your cooperation with the

to leave the building no later than 6:30 P.M., holding Keitt to a higher standard than other Violation Clerks, denying Keitt opportunities for training, photographing Keitt's work station, and not answering or responding to Keitt's phone calls. (*Id.*).

Keitt was then further retaliated against by Judge Turner and held to different and higher standards than other Violation Clerks. (R. pp. 21-23 ¶¶ 9-11, 14-18). Keitt again complained to HR about Judge Turner. April 4, 2013 Order. On June 11, 2012, Keitt emailed her concerns and complaints to each City Council member and Mayor Stephen K. Benjamin. (*Id.*). Thereafter, on July 3, 2012, Keitt was terminated for pretextual reasons for failure to follow supervisory directives and insubordination. (R. p. 23 ¶ 21). These facts clearly indicate that after reporting Judge Turner's prohibited actions to HR to no avail and then to ODC, Judge Turner retaliated against Keitt and ultimately fired Keitt. Thus, Keitt's discharge is wrongful and falls within the narrow public policy exception. The Court would not need to create a new avenue for the public policy exception as Keitt's facts align with the public policy exception discussed in *Ludwick, Culler, Garner, Keiger,* and *Barron.*

Even if the present case fell outside of the two clear situations identified in *Ludwick*, the Appellant's claim is still valid as a termination in violation of public policy. In *Barron,* the S.C. Supreme Court held that while the public policy exception applies where an employer requires an employee to violate the law and in situations where the reason for termination is itself a violation of criminal law, the exception is <u>not limited</u> to those two narrow scenarios. In support of this contention, the *Barron* court cited to *Garner v. Morrison Knudsen Corp.,* 318 S.C. 223, 456 S.E.2d 907 (1995), a case given by Appellant in support of her argument. Should the Court

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Commission and this office is appreciated." Keitt is not privy to the full details of the Office of Disciplinary Counsel's investigation, yet it is reasonable to conclude that Keitt's allegations could have resulted in findings of wrongdoing or even illegality.

determine that Appellant's situation differs from the two *Ludwick* scenarios, it would still be a novel issue arising to the level of an exception to the at-will doctrine as contemplated in *Barron*. Thus both sustaining grounds raised by Respondent fail.

CONCLUSION

For the reasons set forth above, in addition to the arguments made in the Initial Brief, Appellant respectfully requests that this Honorable Court reverse the order of the lower court granting Respondent's Motion for Summary Judgment and remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Iris W. Jennings, an employee of J. Lewis Cromer & Associates, L.L.C., hereby certify that I have caused to have served the Final Brief and Final Reply Brief on the City of Columbia by hand-delivery, on January 6, 2015, to the City of Columbia's attorney of record, W. Allen Nickles, III, at the following address:

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