

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 5616 (S.C. Ct. App. Filed January 16, 2019)
Appellate Case No. 2019-000481

James C. Owens, Petitioner,

-v-

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

RECEIVED

APR 18 2019

S.C. SUPREME COURT

Molly H. Cherry
Melissa F. Spence
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Counter Statement of Question Presented2

Counter Statement of the Case2

Counter Statement of the Facts.....3

Argument.....8

I. The Court of Appeals Correctly Ruled that Summary Judgment was Appropriate Because the Evidence Demonstrated that Owens, an At-Will Employee, was Terminated for Violating ADC’s Technology Policy.....9

II. The Court of Appeals Correctly Ruled that Owens’s Termination Did Not Violate Either Section 16-17-560 or a Clear Mandate of Public Policy, and, therefore the Case Does not Directly Involve a Substantial Constitutional Issue.....11

Conclusion18

COUNTER STATEMENT OF QUESTION PRESENTED

1. Whether the Court of Appeals correctly ruled that Petitioner's termination did not violate Section 16-17-540 of the South Carolina Code of Laws or a clear mandate of public policy when it found that Petitioner, an at-will employee, was terminated for violating Respondent's technology policy and thereby causing economic harm to Respondent.

COUNTER STATEMENT OF THE CASE

James "Jim" Owens ("Owens") filed a lawsuit against ADC Engineering, Incorporated ("ADC") and other defendants¹ on October 10, 2014, in the Charleston County Court of Common Pleas. (App. pp. 272-280). In his complaint, Owens alleged a single cause of action against ADC for wrongful termination. ADC filed its answer and a counterclaim on November 14, 2014, against Owens for breaching his duty of loyalty to ADC by using ADC's equipment and technology while at work to advance a personal cause against the construction of a parking garage on Shem Creek in Mt. Pleasant, South Carolina, a project on which ADC was the structural engineer. (App. pp. 289-295).

Following discovery, ADC moved for summary judgment on February 16, 2016. (App. pp. 26-30). The trial court heard arguments on ADC's motion on May 16, 2016, and granted summary judgment to ADC on June 22, 2016. (App. pp. 7-15). Owens filed a motion to alter or amend the judgment on June 30, 2016. (App. p. 21-25). The court heard Owens's motion to alter or amend on July 19, 2016, and issued a Form 4 order denying Owens's motion on August 8, 2016. (App. p. 16).

¹ The other defendants included Bryan Crabtree and Kirkman Broadcasting, Inc. d/b/a WQSC Radio. Owens alleged defamation against Crabtree and Kirkman Broadcasting. (App. p. 277.). Owens filed an amended complaint on June 19, 2015, wherein he added defendants Tyler Flesch and Red Drum Capital Group, LLC and asserted causes of action for defamation against both Flesch and Red Drum. (App. pp. 263-271). These defendants are not parties to the appeal.

The South Carolina Court of Appeals heard arguments on Owens's appeal on October 10, 2018. On January 16, 2019, the Court of Appeals affirmed the summary judgment order and held that "Owens's termination violated neither section 16-17-560 nor a clear mandate of public policy," because the "uncontroverted testimony was that Owens spent time at work actively opposing a project that ADC had a financial stake in and also disregarded a directive from ADC's management to keep ADC away from the controversy." (App. pp. 1303-1310). Thus, the court found that ADC "was within its right to discharge an at-will employee for a violation of rules that brought economic harm to the company." (App. p. 1310).

Owens filed a petition for rehearing on January 30, 2019, which the Court of Appeals denied on February 21, 2019. (App. pp. 1311-1315; pp. 1316-1317). Owens served his petition for writ of certiorari ("Petition") on March 21, 2019. This return to the Petition followed.

COUNTER STATEMENT OF THE FACTS

ADC is an engineering firm that handles generally every aspect of engineering, predominantly on commercial projects: envelope, structural, landscape architects and civil design. (App. p. 875, line 23 – p. 876, line 1; App. p. 878, line 20 – p. 879, line 4). Owens was a construction administrator with ADC for approximately ten years.

At the time he was hired, Owens was presented an employment agreement that detailed a number of items, including working hours. (App. p. 871, line 16 – p. 872, line 4; App. pp. 95-97). His general work hours with ADC were 8:00 a.m. to 5:30 p.m., Monday through Thursday, and 8:00 a.m. to 12:00 p.m. on Friday. (App. p. 873, lines 20-23). He was also given an employee handbook. (App. p. 880, lines 16-24; App. p. 96). The employee handbook contains a number of policies, including a detailed policy addressing use of the company's technology, which provides in part:

[A]ll employees should remember that electronic media and services provided by the company are company property and their purpose is to facilitate and support company business. . . . All hardware, software, and all files on these systems are the sole property of ADC and may be accessed by ADC at any time. . . . E-mail messages can be traced to the sender even after they have been deleted. The employee should be aware that the firm might be required to produce e-mail messages if litigation develops. . . . Brief or incidental use of office technology for personal, non-business purposes is . . . acceptable as long as it is not excessive or inappropriate, and does not result in expense or loss to the company. . . . Failure to comply with these policies will result in discipline, up to and including termination of employment.

(App. p. 109-110). Some of the technology ADC provided to Owens included a cell phone, the number for which was: 843-991-7049. (App. p. 862, line 14 – p. 863, line 2). ADC provided him with use of a laptop computer that was hard-wired into a docking station at the office. (App. p. 838, lines 8-16).

During the last year of Owens's employment, he was intimately and actively involved in opposition efforts regarding the construction of a parking garage structure being built on Shem Creek in Mt. Pleasant, South Carolina. (App. p. 866, lines 18-24). ADC was the structural engineer for the Shem Creek parking garage building, having been hired by the architectural firm, Stubbs Muldrow Herin. (App. p. 530, line 11 – p. 531, line 12). In fact, Stubbs Muldrow Herin had been a client of ADC since 1990, was one of ADC's largest clients, and actually designed ADC's office building. (App. p. 577, line 17 – p. 578, line 5).

Owens had previously been involved in raising concern over projects for clients of ADC, including specifically the Charleston County School District. (App. p. 888, line 4 – p. 891, line 22). At that time of his actions, Owens informed ADC of his opposition because he knew the Charleston County School District was a client of ADC. (App. p. 891, lines 2-22).

Similarly, Owens informed ADC of his opposition activities involving the Shem Creek parking garage in June of 2014. (App. p. 904, lines 4-25). Owens contends that he did not know

ADC was the engineer on the project; however, he wanted to let ADC know of his activities “out of courtesy.” (App. p. 904, line 22) According to Owens, ADC related his opposition to the Shem Creek parking garage project to the project regarding the Charleston County School District and instructed him to keep ADC out of the media, or something “along those lines.” (App. p. 907, lines 6-22). In fact, ADC did not object to Owens’s actions with regard to the School District matter or the Shem Creek parking garage matter, as long as he was acting on a private basis on his own time. (App. p. 542, line 23 – p. 543, line 10).

As part of his efforts to oppose the Shem Creek parking garage, Owens personally set up a Saving Shem Creek Facebook page in March or April of 2014. (App. p. 840, lines 3-19). The purpose of setting up the Saving Shem Creek Facebook page was “[t]o make people aware of the ensuing project on Shem Creek.” (App. p. 865, lines 15-25). He was an administrator of the Facebook page, such that he could post and delete items on the page. (App. p. 849, lines 16-21; App. p. 851, lines 21-24). Owens explained that he “possibly” posted things to the Facebook pages he set up while he was employed at ADC and that he was “sure” he read posts while employed at ADC, either at home or at the office. (App. p. 854, line 22 – p. 855, line 1; App. p. 856, lines 13-19). He was not certain whether he ever made any copies at ADC of any documents related to the Saving Shem Creek Project, though he admitted he “could have.” (App. p. 858, line 23 – p. 859, line 2).

At a minimum, however, Owens confirmed numerous email communications concerning the Shem Creek parking garage project that occurred during the work day, during working hours from equipment owned and provided by ADC. (App. p. 912, line 10 – p. 914, line 9; App. pp. 153-156; App. p. 917, line 12 – p. 918, line 25; App. pp. 157-161; App. pp. 162-163; App. p. 919, line 21 – p. 920, line 6; App. pp. 164-167; App. p. 923, line 10 – p. 925, line 11; App. pp. 168-

170; App. p. 925, line 19 – p. 926, line 24; App. pp. 171-174; App. p. 927, lines. 4-23; App. pp. 175-177; App. p. 928, line 3 – p. 929, line 4; App. pp. 178-181; App. p. 929, line 19 – p. 930, line 13; App. pp. 182-184).

Owens also admitted to receiving assistance from another ADC employee with his personal opposition to the Shem Creek parking garage project, while the employee was being paid by ADC. (R. p. 187, number 6; App. p. 574, line 6 – p. 575, line 5). Moreover, Owens sent innumerable text messages from the phone issued to him by ADC pertaining to his personal endeavor, during working hours when he was being paid by ADC.. (App. p. 188, number 8; App. p. 228, number 17). There is evidence, as well, that Owens attended meetings pertaining to the Shem Creek parking garage during working hours. (App. p. 540, line 16 – p. 545, line 6). Notably, Owens testified that, if he had known ADC was the engineer on the parking garage project, he would have backed off on his opposition efforts, as it would have presented a “conflict of interest.” (App. p. 909, line 18- p. 910, line 4).

On September 16, 2014, ADC met with Stubbs Muldrow Herrin and Tyler Flesch, a principal in the owner involved with the parking garage project, to discuss Mr. Flesch’s concerns over Owens’s opposition activities. (App. p. 533, line 18 – p. 534, line 15). Specifically, Mr. Flesch informed ADC that it would be fired from working on the Shem Creek parking garage project, unless it fired Owens. (App. p. 534, line 23 – p. 535, line 3). Mr. Flesch also threatened a lawsuit against ADC and Owens. (App. p. 545, line 24 – p. 546, line 12; App. p. 548, lines 6-23).

The partners at ADC informed Stubbs Muldrow Herrin that it was not going to fire Owens. (App. p. 550, lines 7-24; App. p. 571, lines 12-25). Stubbs Muldrow Herrin then sent a letter to ADC, terminating ADC from the Shem Creek project, which ADC received on or about September

18, 2014. (App. p. 549, line 24 – p. 550, line 1; App. pp. 231-232). Moreover, on September 18, 2014, ADC Engineering received an evidence preservation letter from the attorney for Shem Creek Development Group, the developer of the Shem Creek project. (App. pp. 233-237).

Owens also received a similar letter instructing him to preserve electronic evidence pertaining to the Shem Creek development, which he forwarded to ADC. (App. p. 932, line 17 – p. 933, line 11; App. pp. 238-243). At least one of the partners at ADC had concerns over whether Owens had been sending emails from company computers during office time. (App. p. 1165, line 22 – p. 1166, line 6; App. pp. 249-251; App. p. 571, line 12 – p. 572, line 10).

Owens requested to meet with ADC and did at the end of the day on Thursday, September 18, 2014, during which meeting he affirmed that he had used his work computer at ADC for matters associated with the Shem Creek parking garage opposition. (App. p. 940, line 17 – p. 941, line 8; App. p. 558, lines 11-25). On or about the same day, ADC had its IT specialist conduct an electronic search to preserve Owens's emails, in conjunction with the electronic preservation letter it received. (App. p. 733, lines 1-6; App. p. 734, line 1 – p. 735, line 8; App. p. 572, line 6 – p. 573, line 6). ADC also discovered Owens has used his cell phone for text messages related to the Shem Creek parking garage project. (App. p. 573, lines 4-6).

The four partners of ADC met on Friday, September 19, 2014, to discuss the matter. (App. p. 1172, lines 2-15). The decision was made to terminate Owens's employment as a result of his involvement of ADC, its time, resources and equipment in his personal pursuits that damaged the company. (App. p. 585, line 8 – p. 586, line 19). He was out sick on Monday, September 22, 2014, and did not come into the office. (App. p. 941, line 15 – p. 943, line 9; App. pp. 257-258). His employment was terminated the following day on September 23, 2014.

ARGUMENT

Owens's Petition fails to present any reason for this Court to issue a writ of certiorari. South Carolina Appellate Court Rule 242(b) provides that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons," such as those enumerated in subparts (1) through (5). Rule 242(b), SCACR. Here, there are no "special and important reasons" warranting the exercise of this Court's discretion. Rather, the Petition, the majority of which is lifted verbatim from Owens's Petition for Rehearing (App. p. 1311-1314), merely rehashes arguments previously presented to the Court of Appeals and properly rejected by that court.

The Petition does not indicate that the case involves novel questions of law or that the Court of Appeals' decision is in conflict with a prior decision of this Court. Rule 242(b), SCACR. Likewise, the decision was unanimous, there is no dissenting opinion, and the decision does not include a federal question, which conflicts with a decision of the United States Supreme Court. *Id.* Rather, Owens attempts to show that the decision directly involves "substantial constitutional issues" by arguing that he was allegedly discharged for exercising his constitutional rights. The Court of Appeals correctly rejected this argument, based on the "uncontroverted testimony . . . that Owens spent time at work actively opposing a project that ADC had a financial stake in and also disregarded a directive from ADC's management to keep ADC away from controversy." (App. p. 1310). Owens does not identify any other basis under Rule 242(b), SCACR for a grant of certiorari of this case. Accordingly, as the Court of Appeals correctly ruled that Owens's exercise of his constitutional rights was not the reason for his termination, there is no "special and important reason" to grant the Petition.

I. The Court of Appeals Correctly Ruled that Summary Judgment was Appropriate Because the Evidence Demonstrated that Owens, an At-Will Employee, was Terminated for Violating ADC's Technology Policy and, thereby, Causing Economic Harm to ADC.

The Court of Appeals correctly ruled that 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.” (App. p. 1309). Owens’s argument that the Court of Appeals weighed the evidence is meritless. Owens was an at-will employee who was discharged for violating ADC’s technology policy. South Carolina has a strong policy favoring at-will employment. Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 335, 516 S.E.2d 923, 925 (1999). The law is well-settled in this state that an employer may terminate an at-will employee at any time, for any reason or for no reason, and with or without cause. Taghivand v. Rite Aid Corp., 411 S.C. 240, 243, 768 S.E.2d 385, 386 (2015) (“[A]bsent a contractual provision to the contrary, an employee may be terminated at any time for any reason or no reason, with or without cause.”); Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011) (“An at-will employee may be terminated at any time for any reason or for no reason, with or without cause.”).

As indicated in the Court of Appeals’ decision, the overwhelming evidence before the court demonstrated that ADC terminated Owens for violating ADC’s technology policy, which resulted in substantial economic harm to ADC. Owens’s attempt to point at the following statement from the Court of Appeals’ decision: “We believe ADC was within the rights to discharge an at-will employee for a violation of rules that brought economic harm to the company,” to argue that the Court of Appeals weighed the evidence is misleading, at best. Notably, Owens does not cite to any legal authority to support his argument that “[b]elief is not sufficient to hold as a matter of law that Owens was not terminated for exercising his constitutional rights in violation of section 16-17-560.” (Pet. p. 15).

Moreover, Owens' reliance on the language of ADC's technology policy to argue that the Court of Appeals weighed the evidence is an ill-fated attempt to bring a new argument before this Court. Owens argues that under the technology policy, any "personal non-business use must be both (1) excessive and inappropriate and (2) result in expense or loss to the company," and cites to *Terry v. Lee*, 314 S.C. 420, 425, S.E.2d 435, 437 (1994), to argue whether Owens's emails were excessive and appropriate under ADC's technology policy is a jury question. (Pet. p. 15). However, *Terry v. Lee* is inapposite. That case addressed the conjunctive use of the term "and" in a statute, not a company policy. (Pet. p. 15). Again, Owens ignores the fact that he was an at-will employee, and his argument attempts to create an employment contract with ADC through ADC's technology policy. Owens has never disputed that he was an at-will employee, nor has he previously raised any argument that ADC's technology policy altered his at-will status and created a contract of employment. See Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court"); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Therefore, this argument is not properly before this Court.

The Petition also incorrectly argues that the Court of Appeals' decision creates an inconsistent holding because it allows "ADC to do indirectly what it cannot legally do directly and is merely form over substance." The argument, however, is incorrect and wholly ignores that the same can be said of the opposite circumstance. Indeed, it would be illogical to suggest that an employer, who depends on business to generate revenue to pay its employees, would somehow be prohibited from terminating an employee who actively opposed a specific project on which the

employer was working, particularly where, as here, the employee used the employer's equipment and time as part of his efforts. The employment at-will doctrine is the longstanding policy of this state, and as the Court of Appeals correctly held, "ADC was within its rights to discharge an at-will employee for a violation of rules that brought economic harm to the company." (App. p. 1310).

II. The Court of Appeals Correctly Ruled that Owens's Termination Did Not Violate Either Section 16-17-560 or a Clear Mandate of Public Policy, and, therefore the Case Does not Directly Involve a Substantial Constitutional Issue.

Despite Owens's attempt to argue that ADC terminated him for exercising his "constitutional rights," the case does not directly involve a substantial constitutional issue to warrant review by this Court. As the Court of Appeals correctly found, "[w]e do not believe, however, that Owens's decision to enjoy those rights was the reason for his termination; 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." (App. p. 1309). In his Petition, Owens merely rephrases his arguments that were already considered and properly rejected by the Court of Appeals.

This case does not directly involve substantial constitutional issues; rather, the issue at all times has been whether Mr. Owens's termination falls under South Carolina's public policy exception to the at-will employment doctrine. The law is well-settled in this state that in certain limited situations, the discharge of an at-will employee may give rise to a cause of action for wrongful termination when there is a violation of a clear mandate of public policy. *Id.* To constitute a claim for wrongful termination under this theory, the employee's termination must "contravene a clear mandate of public policy." Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 223. 337 S.E.2d 213, 215 (1985). This exception is a narrow one, to be very narrowly applied.

Id.; see also Taghivand v. Rite Aid Corp., 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015) (noting the court exercises “restraint when undertaking the amorphous inquiry of what constitutes public policy.”). “Courts have invoked the public policy exception in two instances: (1) where an employer requires an employee, as a condition of continued employment, to break the law, and (2) where an employer’s termination is itself illegal.” Taghivand, 411 S.C. at 243, 768 S.E.2d at 387 (citing Culler v. Blue Ridge Elec. Coop., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992)). While the courts in this state have made clear that this exception is not limited to the two identified situations, the courts have recognized no others. Id. Likewise, the Court of Appeals was not compelled to recognize this case as another situation because the “uncontroverted testimony was that Owens spent time at work actively opposing a project that ADC had a financial stake in and also disregarded a directive from ADC’s management to keep ADC away from controversy.” (App. p. 1310).

Owens cannot attempt to create a substantial constitutional issue by arguing that his termination violated his constitutional rights to free speech. Owens has always argued that Section 16-17-560 of the South Carolina Code is the public policy that ADC allegedly violated by terminating his employment. However, this statute does not expand to all speech. Rather, Section 16-17-560 of the South Carolina Code addresses only “political” speech. Section 16-17-560 specifically states: “It is unlawful for a person to assault or intimidate a citizen, discharge a citizen from employment or occupation, or eject a citizen from a rented house, land, or other property because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.” S.C. Code Ann. § 16-17-560 (emphasis added). Any activity by Owens in opposing the Shem Creek parking garage project does not amount to protected political speech under § 16-17-

560. See Vanderhoff v. John Deere Consumer Products, Inc., No. C.A. 3:02-0685-22, 2003 WL 23691107, at *2 (D.S.C. Mar. 13, 2003) (finding that the displaying of a confederate flag decal on an employee's toolbox at work as an expression of his political view of the Confederate flag coming down from the state house is not political opinion that is covered by Section 16-17-560). Similar to the Vanderhoff court's determination, Owens's opposition to the Shem Creek parking garage "is not a political opinion or the exercise of any political right or privilege as that phrase is intended by this criminal statute because such expression is not protected as a matter of clear public policy either as set forth in section 16-17-560 or otherwise." Id. at *2.

Section 16-17-560 expressly protects only "political" opinion, and the statute does not define what is meant by this phrase. However, "because Section 16-17-560 is a criminal statute, it must be construed narrowly." Id. (citing State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct.App.1999)); see also Powell v. Media Gen. Operations, Inc., No. CIV.A. 7:10-3170-HFF, 2011 WL 4501836, at *3 (D.S.C. Apr. 26, 2011), report and recommendation adopted, No. CIV.A. 7:10-03170, 2011 WL 4501564 (D.S.C. Sept. 28, 2011) ("The plain language of § 16-17-560 reveals that it does not protect all opinions, rights, and privileges. Instead, the statute expressly provides that it protects only political opinions, rights, and privileges.").

The Vanderhoff court engaged in an extensive, detailed analysis of South Carolina law and the statute at issue in addressing the political rights under the statute. Indeed, the court highlighted that the "available case law suggests the [South Carolina] state court would not construe the phrase to extend to all opinion and expression which, if a matter of public concern, may be protected under the First Amendment of the United States Constitution or the Constitution of the State of South Carolina." Id. Owens, a private employee of a private employer, appears to conflate alleged "free speech" rights under the First Amendment regarding state employees and actors. The statute

is not as broad as Owens's suggests, and, therefore, does not create a substantial constitutional issue to warrant this Court's review.

Under the narrow construction of the statute, dictated by South Carolina state law, Owens's opposition to the construction of a parking garage structure on Shem Creek, for which his employer was the structural engineer, does not constitute protected "political" speech. The Vanderhoff court further defined what speech was to be covered by the statute at issue:

Further, the available case law suggests the state court would not construe the phrase to extend to all opinion and expression which, if a matter of public concern, may be protected under the First Amendment of the United States Constitution or under Article I, section 2, of the Constitution of the State of South Carolina. **Rather, this court concludes that the political opinion and expression covered by section 16-17-560 extends only to matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote.**

Id. (emphasis added) (citing Culler, 309 S.C. at 246, 422 S.E.2d at 92-93 (finding that if plaintiff was discharged "because he refused to contribute to a political action fund [supported by his employer], he would have a cause of action under Ludwick and ... [section] 16-17-560")). In that case, the court found to hold that the plaintiff's actions constituted protected political speech would allow an infinite number of social issues to fall within the ambit of public debate. Id.

Similarly, Owens's opposition to the construction of a parking garage on Shem Creek does not constitute "political" speech governed under the statute. Notwithstanding how much of Owens's activities took place on company time using company resources, the issue for purposes of the statute is not the amount of activity, but the activity itself. Owens opposed the building of a parking garage on Shem Creek in Mt. Pleasant, South Carolina. The fact that other individuals in the area along with Owens opposed the building of the parking garage or that he and the others were vocal and active in their opposition does not somehow transform the opposition into political speech. Notably, Owens's actions do not pertain to political party affiliation, political campaign

contributions or the right to vote. They simply are not actions that fall under the purview of Section 16-17-560. As in the Vanderhoff case, “[s]uch expression or belief may be a matter of public concern generally protected under the United States and South Carolina Constitutions. It is not, however, a ‘political’ opinion or the exercise of a political right or privilege within contemplation of section 16–17–560.” See id. at *3. As the Vanderhoff court astutely observed, “[t]o hold otherwise, the court would extend the application of section 16-17-560 to an infinite number of social issues that fall within the ambit of public debate and, as a consequence, at times become issues in the political arena.” Owens’s actions in opposing a project on which his employer was working, regardless of whether or when he knew his employer was involved, simply does not amount to political speech protected under section 16-17-560.

The Court of Appeals correctly held that ADC was within its rights to discharge Owens, an at-will employee, “for a violation of rules that brought economic harm to the company.” (App. p. 1310). The uncontroverted testimony before the Court demonstrates only that Owens was terminated for using ADC’s equipment to pursue a personal endeavor on company time, while being paid by ADC. Owens admitted that he conducted some of his personal efforts to oppose the Shem Creek parking garage on company time during working hours and on company equipment. (App. p. 912, line 10 – p. 914, line 9; App. pp. 153-156; App. p. 917, line 12 – p. 918, line 25; App. pp. 157-161; App. pp. 162-163; App. p. 919, line 21 – p. 920, line 6; App. pp. 164-167; App. p. 923, line 10 – p. 925, line 11; App. pp. 168-170; App. p. 925, line 19 – p. 926, line 24; App. pp. 171-174; App. p. 927, lines 4-23; App. pp. 175-177; App. p. 928, line 3 – p. 929, line 4; App. pp. 178-181; App. p. 929, line 19 – p. 930, line 13; App. pp. 182-184; App. p. 940, line 17 – p. 941, line 8). He also admitted to receiving assistance from another ADC employee with his personal opposition to the Shem Creek parking garage project, while the employee was being paid by ADC.

(App. p. 187, number 6; App. p. 574, line 6 – p. 575, line 5). Notably, Owens testified that his opposition efforts presented a conflict of interest for ADC. Specifically, he testified that, if he had known ADC was the engineer on the parking garage, he would have backed off his opposition efforts, because they would have presented a “conflict of interest.” (App. p. 909, line 18 – p. 910, line 4).

On September 16, 2014, ADC met with Stubbs Muldrow Herrin and Tyler Flesch, a principal in the owner involved with the parking garage project, to discuss Mr. Flesch’s concerns over Owens’s opposition activities. (App. p. 533, line 18 – p. 534, line 15). Specifically, Mr. Flesch informed ADC that it would be fired from working on the Shem Creek parking garage project, unless it fired Owens. (App. p. 534, line 23 – p. 535, line 3). Mr. Flesch also threatened a lawsuit against ADC and Owens. (App. p. 545, line 24 – p. 546, line 12; App. p. 548, lines 6-23). According to Owens, ADC knew at that time that he had been using its equipment to oppose the Shem Creek parking garage. He seems to suggest that ADC should have terminated him then and, because ADC did not, his termination must have been because of his political activities. Owens’ argument, however, is wholly illogical.

The partners at ADC informed Stubbs Muldrow Herrin that they did not intend to fire Owens. (App. p. 550, lines 7-24; App. p. 571, lines 12-25). Stubbs Muldrow Herrin then sent a letter to ADC, terminating ADC from the Shem Creek project, which ADC received on or about September 18, 2014. (App. p. 549, line 24 – p. 550, line 1; App. pp. 231-232). Moreover, on September 18, 2014, ADC received an evidence preservation letter from the attorney for Shem Creek Development Group, the developer of the Shem Creek project. (App. pp. 233-237).

Owens also received a similar letter instructing him to preserve electronic evidence pertaining to the Shem Creek development, which he forwarded to ADC. (App. p. 932, line 17 –

p. 933, line 11; App. pp. 238-243). At least one of the partners at ADC had concerns over whether Owens had been sending emails from company computers during office time. (App. p. 1165, line 22 – p. 1166, line 6; App. pp. 249-251; App. p. 571, line 12 – p. 572, line 10). At that time, Owens affirmed to ADC that he had used his work computer at ADC for matters associated with the Shem Creek parking garage opposition. On or about the same day, ADC conducted an electronic search to preserve Owens's emails, in conjunction with the electronic preservation letter it received. (App. p. 733, lines 1-6; App. p. 734, line 1 – p. 735, line 8; App. p. 572, line 6 – p. 573, line 6). ADC also subsequently discovered Owens has used his cell phone for text messages related to the Shem Creek parking garage project. (App. p. 573, lines 4-6).

Importantly, Owens never denies that he used ADC's time, equipment and other resources in pursuing his opposition efforts to the Shem Creek parking garage project. Nevertheless, he contends that his termination was because of his opposition efforts to the Shem Creek parking garage project, in violation of S.C. Code Ann. § 16-17-560. Owens's termination was undoubtedly related to the Shem Creek parking garage project but that is the direct result of Owens having used company property, time and resources to oppose a project on which the company was working which ultimately resulted in damage to the company, not because of any political opinion or speech.

Interestingly, under Owens's theory, ADC could have terminated him for using company property to work on a personal building project, such as a home addition, or using company resources to create a "Go Fund Me" campaign to raise money for an individual or a charity. Moreover, according to Owens, ADC could have terminated him for opposing the Shem Creek parking garage because he did not like the material used to construct the garage, because it blocked his view of the water or because he did not like the color paint being used, regardless of whether

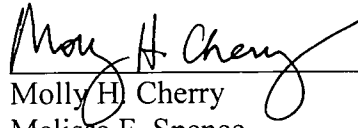
those actions occurred on company time or using company property. However, under Owens's theory, he cannot be terminated for using company property and time to oppose the construction of the parking garage altogether, individually or as a group endeavor. His argument is fundamentally flawed and illogical, at best, but, in any event, does not amount to a political opinion or speech under the statute or otherwise constitute a violation of South Carolina's public policy.

This case does not directly involve a substantial constitutional issue. The uncontroverted testimony indicates only that Owens's termination does not give rise to any claim for wrongful termination in violation of public policy. The Court of Appeals correctly affirmed summary judgment in favor of ADC, and there is no ground for this Court to issue a writ of certiorari to review the decision.

CONCLUSION

ADC respectfully requests that this Court decline Owens's Petition. The Supreme Court is a court of limited review and Owens's arguments do not satisfy the grounds identified by Rule 242(b), SCACR, as bases for granting certiorari. This case presents no novel issue of law; the opinion of the Court of Appeals was unanimous; the decision is not in conflict with this Court's precedent; no substantial constitutional issues are at issue; and this decision does not involve a federal question and is not inconsistent with U.S. Supreme Court precedent. Accordingly, Owens cannot meet any of the requirements for the issuance of a writ of certiorari. For the foregoing reasons, ADC respectfully requests this Court deny the Petition.

Respectfully submitted,



Molly H. Cherry
Melissa F. Spence
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
Phone: 843.577.9440
Facsimile: 843.414.8209
E-mail: mcherry@nexsepruet.com
E-mail: mspence@nexsenpruet.com

April 17, 2019

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 5616 (S.C. Ct. App. File January 16, 2019)
Appellate Case No. 2019-000481

James C. Owens, Petitioner,

-v-

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.

PROOF OF SERVICE

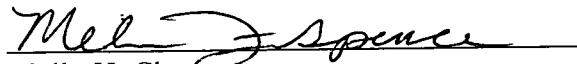
I, Melissa F. Spence, Esquire, hereby certify that on the 17th day of April 2019, I served a copy of the RETURN TO PETITION FOR WRIT OF CERTIORARI, submitted by Respondent ADC Engineering, Inc., upon counsel for Petitioner via United States Mail, postage prepaid, and addressed as follows:

RECEIVED
APR 18 2019
S.C. SUPREME COURT

RECEIVED
APR 18 2019
S.C. SUPREME COURT

John E. Parker, Esquire
William F. Barnes, III
Peters, Murdaugh, Parker, Eltzroth &
Detrick, PA
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924

*ATTORNEYS FOR APPELLANT
JAMES C. OWENS*



Molly H. Cherry
Melissa F. Spence
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

ATTORNEYS FOR RESPONDENT
ADC ENGINEERING, INC.

RECEIVED

APR 18 2019

S.C. SUPREME COURT