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I. COURT CONSIDERS SCTCA'S LIABILITY CAP IN WHISTLEBLOWER CONTEXT

In McGill v. University of South Carolina\(^1\) the South Carolina Supreme Court held that the statutory liability cap contained in the South Carolina Tort Claims Act\(^2\) does not apply to damages awarded under the South Carolina Whistleblower Act (the "Act").\(^3\) In its holding, the court not only provided some guidance to the elements of retaliatory discharge under the Whistleblower Act, but it also increased the potential liability to public bodies taking adverse action against employees who report activities protected under the Act.

The source of the litigation in McGill was the University of South Carolina’s ("USC") discharge of Helen McGill on October 2, 1989, one day prior to her achieving full-time employee status.\(^4\) On April 3, 1989, USC hired McGill, an employee-at-will, as USC's Hazardous Waste Manager.\(^5\) Her responsibilities included ensuring the university’s compliance with state and federal regulations regarding hazardous waste storage and disposal. USC allegedly hired McGill in part because of her prior employment experience with the Department of Health and Environmental Control ("DHEC").\(^6\) In July and August of 1989, McGill reported suspected violations of state law and DHEC regulations to various public agencies and to USC's legal department.\(^7\) The alleged violations concerned spills and leaks from six drums of out-of-compliance waste.\(^8\) USC was fined for the violations.\(^9\) Shortly thereafter, USC fired McGill for "gross negligence and insubordination" in her work performance.\(^10\)

The jury awarded McGill $350,000 in her suit against USC under the South Carolina Whistleblower Act.\(^11\) Although the trial court denied USC's post-trial motion for JNOV, it granted USC's motion to reduce the verdict to

\(\text{Reference Notes:}\)

5. Id. at \_, 423 S.E.2d at 110.
8. Final Brief of Appellant/Respondent at 6 (citing Trial Record at 612-13).
9. Id. at 11 (citing Trial Record at 456). USC was fined for environmental violations, but not for civil penalties under the Whistleblower Act.
the statutory $250,000 liability cap provided by the South Carolina Tort Claims Act, and granted McGill’s motion for $86,000 in costs and attorney’s fees.12

The South Carolina Supreme Court affirmed the trial court’s denial of USC’s motion for JNOV and the award for costs and attorney’s fees, but reinstated the $350,000 verdict, thereby reversing the reduction imposed by the trial court.13 First, in addressing the denial of USC’s motion for JNOV, the court discussed the respective burdens, the available affirmative defenses, and the adoption of the good faith whistleblowing standard under the Act.14 Second, the court held that the South Carolina Tort Claims Act, limiting the liability of any governmental agency to $250,000 “for any action or claim for damages brought” thereunder, was on its face irrelevant to whistleblower suits.15 USC argued that because the Tort Claims Act applied to all claims brought against a government entity, then an action brought pursuant to the Whistleblower Act (which is available only against public entities in South Carolina) is also subject to the statutory cap.16 The court rejected this argument stating that there is no language in the Tort Claims Act from which one can infer that its statutory cap is applicable to whistleblower actions. Further, the court implied that the purpose of the two acts are separate, and it noted the lack of legislative intent to limit damages in whistleblower actions.17

Apparently, the court refused to adopt the rationale of a similar case briefed by USC which held that the Colorado Whistleblower Act was subject to that state’s Governmental Immunity Act.18 If influenced at all by this Colorado decision, the South Carolina Supreme Court agreed with the dissenting opinion, which noted that the Colorado legislature amended both acts in the same year and neither act referenced the other.19 Similarly, South Carolina’s General Assembly amended the Whistleblower Act in 1989 for the second time without adding any reference to the Tort Claims Act.20

McGill is only the second case interpreting the Whistleblower Act, and the supreme court addressed many of the issues commonly raised regarding

12. See McGill, ___ S.C. at ___, 423 S.E.2d at 110.
13. Id. at ___, 423 S.E.2d at 112.
14. Id. at ___, 423 S.E.2d at 110-11; see infra text accompanying notes 29-39.
16. Id. at ___, 423 S.E.2d at 111.
17. See id. at ___, 423 S.E.2d at 111-12.
19. See McGill, ___ S.C. at ___, 423 S.E.2d at 111-12; State Personnel Board, 752 P.2d at 566 (Mullarkey, J., dissenting).
whistleblower protection. 21 Whistleblower statutes generally contain six basic provisions: (1) scope of coverage, (2) protected acts, (3) causation, (4) defenses, (6) remedies, and (7) procedures. Each provision is discussed below.

With the enactment of its Whistleblower Act in 1988, South Carolina joined the majority of states in recognizing a statutory cause of action for retaliatory discharge of public-sector employees. 22 Coverage extends to employees of public bodies, thereby encompassing both state and local government employees. Section 8-27-10 broadly defines the term "public body" to include "all state agencies, commissions, boards, and departments; all public or governmental bodies or political subdivisions of the state . . . and any organization, corporation, or agency, supported in whole or in part by public funds." 23

The South Carolina Act protects reports of suspected governmental waste and abuse as well as violations of federal, state, and local laws and regulations. The Whistleblower Act provides:

No public body may discharge [or otherwise retaliate against] any employee of a public body whenever the employee reports a violation of any state or federal law or regulation . . . or . . . exposes governmental criminality, corruption, waste, fraud, gross negligence, or mismanagement or testifies as a witness . . . involving any of [these] matters . . . . 24

The Act does not specify the form, content, or transmission manner of the whistleblowers' report. The Act's silence apparently indicates that the report may be either oral or written and need not be made internally. 25 South Carolina imposes two requirements for a whistleblower to fall within the Act's

21. The first South Carolina case construing the Whistleblower Act provided insight into only one aspect of the statute. See Gamble v. City of Manning, 304 S.C. 536, 405 S.E.2d 829 (1991) (holding that a violation of the Act does not occur if an employee is fired for an independent cause). For a more extensive discussion of Gamble and the South Carolina Act, see generally Craig Berman, Note, South Carolina Whistleblower Protection: The Good, the Bad, and the Ugly, 43 S.C.L. Rev. 415 (1992) (analyzing the policy arguments surrounding whistleblower acts and comparing South Carolina's Act to others).

22. Thirty-five states provide statutory protection for public employees. Eleven of these states protect both public and private employees. For a recent listing of state whistleblower acts, see Hunter R. Hughes, III et al., Counseling the Whistleblower (Part 1), PRAC. LAW. July 1992, at 37.


25. See Berman, supra note 21, at 430. Although not required, McGill notified USC's legal department of the violation (i.e., internal whistleblowing). See supra text accompanying note 7.
protection. First, the employee's report must be based on a reasonable foundation and a good faith belief that the alleged violation occurred. McGill adopted the majority view in holding that only "good faith whistleblowing and good faith refusal to follow malevolent instructions are protected" activities. By adopting a good faith standard and not requiring a showing of an actual violation, South Carolina encourages whistleblowing by employees who may be reluctant to report suspected violations. Second, the Act specifies that a report is unprotected if made without "probable cause." Consequently, public employers may fire employees making unfounded or false reports. These two requirements restrict the potential for abuse by disgruntled, vindictive employees.

The South Carolina Act sets up a burden of proof scheme and a causation standard for whistleblower actions. Because "it is highly unlikely that an employer will declare retaliation as the motive for discharge," section 8-27-30(A) creates a rebuttable presumption of "wrongful treatment" if an employer takes adverse action against a public employee within one year of the employee's reporting of a violation. This presumption allows a whistleblower to present a prima facie case within one year of a reported violation without proof of a retaliatory motive. The employer may rebut the presumption by demonstrating (not proving) that the "discharge or discipline was unrelated to . . . [the] . . . whistleblowing." However, this requirement clearly places the burden on the employer to show legitimate reasons for any adverse action. Although the Act is silent on the issue, cases and commentaries note that the Act's scheme is similar to Title VII pretext cases


27. See Berman, supra note 21, at 432 (arguing for South Carolina's adoption of a good faith standard prior to the McGill supreme court decision).


29. Id. § 8-27-30(A); see also Berman, supra note 21, at 432-33 (discussing the burdens and causations imposed by the Act).


32. Berman, supra note 21, at 432.

33. McGill, ___ S.C. at ___, 423 S.E.2d at 111 (citing S.C. CODE ANN. § 8-27-30(B) (Law. Co-op. Supp. 1992)). Arguably, to "demonstrate" requires something less than to "prove." If the General Assembly intended the presumption to shift the burden of proof rather than the burden of production, it probably would have chosen the stronger term. Bettis, supra note 23, § 44 n.2.


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in which the burden of production, but not the burden of proof, shifts to the employer.\textsuperscript{35} If the analogy to Title VII cases is accurate, then after the employer meets its burden, the employee must show that the employer’s explanation was not the true reason for the discipline.\textsuperscript{36}

Section 8-27-40 of the Act maintains some of the employer’s prerogative in making personnel decisions by stating “a public body may discharge, otherwise terminate, or suspend an employee for causes independent of those provided in [the Act].”\textsuperscript{37} Reliance even on improper motives absolves employers of liability under the statute if employers can prove they took the action for an “independent cause.”\textsuperscript{38} In addition, the Act enumerates the following affirmative defenses (per se independent causes) that defeat a whistleblower’s claim: “willful or habitual tardiness or absence from work; being disorderly or intoxicated while at work; destruction of any of the employer’s property; malingering; and embezzlement or larceny of the employer’s property.”\textsuperscript{39}

The South Carolina Act provides for a broad range of remedies including civil damages, equitable remedies (reinstatement, lost wages, and injunctions), or both.\textsuperscript{40} Further, the Act allows recovery for actual damages, court costs, and reasonable attorney’s fees.\textsuperscript{41} However, the Act does not make allowanc-

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\item 35. Berman, \textit{supra} note 21, at 433 (citing Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)); see also Wallace, 300 S.C. at 557, 389 S.E.2d at 450 (adopting a substantial factor test in which a claimant retains the ultimate burden throughout a worker’s compensation retaliatory discharge case).
\item 36. Berman, \textit{supra} note 21, at 434 (citing Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 256 (1991)).
\item 38. See Gamble v. City of Manning, 304 S.C. 536, 405 S.E.2d 829 (1991) (finding independent cause to be a jury question). Unlike pretext cases that assume a single cause for the adverse personnel action, this mixed-motive analysis (implicitly addressed in the Act’s reference to “independent cause”) assumes the decision involves many causes, one of which may be retaliatory as long as another is legitimate. Final Brief of Respondent/Appellant at 14 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring)); see also Berman, \textit{supra} note 21 at 434 (stating that the Act effectively adopts the standard for mixed-motive cases stated in Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).
\item 41. Id. § 8-27-30(C); see also McGill, ___ S.C. at ___, 423 S.E.2d at 110, 112 (allowing recovery of approximately $86,000 in court costs and attorney’s fees). McGill’s prayer for damages included back and front pay, loss of reputation, loss of earning capacity, loss of self-confidence and esteem, mental anguish, and humiliation. Final Brief of Respondent/Appellant at 34. Fringe benefits and seniority rights may also be available as an element of damages. Jack R. Clary et al., \textit{State and Local Government Bargaining}, 5 LAB. L.J. 434, 441 (1989).
\end{itemize}
es for recovery of punitive damages. Commentators argue that this omission is troubling because the deterrent effect of punitive damages does not fit easily into a cost-benefit analysis that an employer may rely on in its potentially retaliatory decision. The South Carolina Act contains an unusual provision designed to encourage whistleblowing which results in public savings. The employee may be rewarded the lesser of $2,000 or twenty-five percent of estimated net savings accumulated during the first year of any cost-saving changes implemented as a result of the employee’s report. Neither the Act nor case law addresses the issues of exhaustion and exclusivity of remedies in whistleblower actions. Further, the Act does not impose any civil penalties on public bodies that violate the Act although such fines or suspensions could lead to greater enforcement and deterrence.

Some final aspects of the Act are worth mentioning. The Act allows the employee to choose between a jury or nonjury civil trial in one of two forums: the court of common pleas in the county where the employee resides when the action is filed, or the county where the retaliation occurred. Finally, the Act imposes a two-year statute of limitations commencing from the accrual time of the cause of action.

The South Carolina Supreme Court’s decision in McGill v. University of South Carolina clarifies some of the elements of claims brought under the South Carolina Whistleblower Act. To be effective, the statute not only must be drafted to provide maximum protection to whistleblowers, but also must receive favorable judicial interpretation. The significance of McGill lies in the supreme court’s broad reading of the Act which furthers its deterrent goal. By adopting a good faith reporting standard and refusing to cap the size of


44. See Clary, supra note 41, at 441.


verdicts, the court balances the competing interests of employees, employers, and the public. At a minimum, this case should serve as a clear warning to public employers of the potential liability exposure involved in their personnel decisions.49 Only future decisions will clarify all the issues surrounding the statutorily created whistleblowing exception in this yet untested area of employment law in South Carolina. Although McGill still leaves many questions open, it serves as impetus for future litigation in this growing area of practice.

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