South Carolina Law Review

Volume 42
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 11

Fall 1990

Labor Law

Charles F. Thompson Jr.

Kendall R. Walker

Ellen A. Mercer

LABOR LAW

I. Implied Contract Exception to Employment At Will Doctrine Applied Retroactively

In *Toth v. Square D Co.*[1] the South Carolina Supreme Court held that courts should give retroactive effect to the implied contract exception to the employment at will doctrine adopted in *Small v. Springs Industries, Inc.*[2] An employee whose employment was terminated before June 8, 1987, the date of the *Small* decision, can now bring an action for breach of contract based on provisions included in an employee handbook.[3]

In *Small* an employer provided its employees with a handbook that outlined the company's four-step procedure for the employer to follow in an employee dismissal.[4] The employer distributed bulletins that described the procedure and assured the employees that they would follow it. When the employer dismissed one of its employees, however, the employer did not give the employee the benefit of the progressive four-step procedure. The employee sued the employer for breach of contract and claimed that the handbook, the bulletins, and the employer's verbal assurances could be used as evidence against the employer in the breach of contract action.[5]

The South Carolina Supreme Court in *Small* followed the majority of states[6] and held that "a jury can consider an employee handbook, along with other evidence, deciding whether the employer and employee had a limiting agreement on the employee's at-will employment status."[7] The court, however, did not state explicitly that the decision should be applied retroactively. Generally, when the South Carolina Supreme Court holds that a decision applies prospectively only, the

---

1. 298 S.C. 6, 377 S.E.2d 584 (1989).

2. 292 S.C. 481, 357 S.E.2d 452 (1987).

3. *See* 298 S.C. at 7, 377 S.E.2d at 585 (certified question presented by South Carolina District Court Judge Karen Henderson).

4. The four-step disciplinary process consisted of (1) a verbal reprimand, (2) a written warning, (3) a final written warning, and (4) discharge. *Small*, 292 S.C. at 483, 357 S.E.2d at 453.

5. *Id.*, 357 S.E.2d at 453-4.

6. *See* Annotation, *Right to Discharge Allegedly "At-Will" Employee as Affected By Employees Promulgation of Employment Policies as to Discharge*, 33 A.L.R.4th 120 (1984) (discusses implied contract exceptions to the employment at will doctrine).

7. *Small*, 292 S.C. at 486, 357 S.E.2d at 455.

court states this in its opinion.[8]

In *Toth* the plaintiffs were employees who had been dismissed by their employer prior to the date of the supreme court's decision in *Small*. The plaintiffs sued the employer for breach of contract based on the employer's violation of the provisions included in its employee handbook. The employer moved for summary judgment and asserted that the *Small* opinion could not be applied retroactively. In *Toth* the South Carolina Supreme Court accepted certification from the district court to answer the retroactivity question.[9]

The court in *Toth* stated that to limit the *Small* holding to prospective application, it had to find that the decision "created a new cause of action, with liability where none previously existed."[10] The court could not find a new cause of action and ruled that "[i]t is elementary that a cause of action for breach of contract is not a new one."[11]

Employers can argue that the retroactive application of the *Small* decision unfairly penalizes them. The retroactive application of *Small* in the employers' view substantially alters the doctrine of employment at will and imposes contractual obligations on the employers which they had not anticipated. Chief Justice Gregory argued in his dissent in *Toth* that "*Small* created a new contractual right to recover which should not be given retroactive effect. . . . The unfairness of imposing a new contractual liability by law without notice is manifestly clear."[12] Justice Finney, in a separate dissent, noted that "even if *Small* did not create a new contractual right to recovery, it enormously expanded the right to recover . . . ."[13]

"The use of employee handbook provisions in the construction of an employment relationship is not a novel idea. In fact, introduction of such provisions has previously been allowed in a *pro-employer* setting."[14] Also, at the time of the *Toth* decision, the supreme court already had given retroactive effect to the *Small* decision in a memorandum opinion.[15] Furthermore, the *Toth* decision follows an opinion from

---

8. *See, e.g.*, Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225-26, 337 S.E.2d 213, 216 (1985).

9. *Toth*, 298 S.C. at 7-8, 377 S.E.2d at 585.

10. *Id.* at 8, 377 S.E.2d at 585.

11. *Id.* at 9, 377 S.E.2d at 586.

12. *Id.* at 11, 377 S.E.2d at 587 (Gregory, C.J., dissenting).

13. *Id.* at 12, 377 S.E.2d at 587 (Finney, J., dissenting).

14. *Id.* at 9, 377 S.E.2d at 586 (emphasis in original); *see also* Dew v. City of Florence, 279 S.C. 155, 160-61, 303 S.E.2d 664, 666-67 (1983), *cert. denied*, 464 U.S. 936 (1983); Hogsed v. Lancaster Area Schools Bd. of Trustees, 283 S.C. 42, 47, 320 S.E.2d 724, 727 (Ct. App. 1984).

15. Francisco v. Black River Elec. Coop., No. 87-MO-325, mem. op. (S.C. July 27, 1987). A memorandum opinion has no precedential value. *See* S.C. SUP. CT. R. 23.

another jurisdiction.[16]

Strong policy reasons exist to support retroactive application of the *Small* decision. The supreme court does not want employers to mislead employees with provisions in their employee handbooks while reserving the right as employers to deviate from the handbook provisions at their discretion.[17] In the court's view, improved employee attitudes and improved quality in the workforce arise when the employment relationship is spelled out in a handbook, and, therefore, it would be unjust to allow an employer to couch a handbook in mandatory terms and then allow the employer to ignore these policies whenever it is advantageous to him.[18] In *Toth* the supreme court reasoned that employers themselves create contractual obligations through their promises made in employee handbooks, and, therefore, they cannot be allowed to retract their promises and ignore the handbooks they have drafted.[19] Because of the *Toth* holding, employees now can reasonably believe that company policies outlined in printed company materials will be honored by the company as the terms and conditions of employment.

Employers who fear liability, however, may feel compelled to retain unfit employees. Also, litigation may increase substantially in this area, which creates disharmony in the workplace and financial stress for South Carolina businesses. Also, the *Toth* decision may create a disincentive for businesses to move their operations to South Carolina. Chief Justice Gregory argued in his dissent in *Small* that the *Small* holding "tends to stifle quality economic growth and development and hinder expanded job opportunities in this State."[20] The *Toth* holding may aggravate whatever economic burdens resulted from the *Small* decision.

The *Toth* decision, however, is fair and prudent. Although the South Carolina Supreme Court cut back on the employment at will doctrine in South Carolina in the *Small* and *Toth* decisions, it has done so within the existing principles of contract law.[21] Employers are

16. *See* Preston v. Claridge Hotel & Casino, Ltd., 231 N.J. Super. 81, 555 A.2d 12 (App. Div. 1989). *Preston* retroactively applied the decision in Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985), in which the court held that provisions in an employee handbook can be construed as contractual. *Preston*, 231 N.J. Super. at 84, 555 A.2d at 14.

17. *See Small*, 292 S.C. at 485, 357 S.E.2d at 454; Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 259, 335 S.E.2d 79, 83 (1985).

18. *Small*, 292 S.C. at 485, 357 S.E.2d at 454-55; *see also* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 619, 292 N.W.2d 880, 895 (1980).

19. *Toth*, 298 S.C. at 9, 377 S.E.2d at 586.

20. *Small*, 292 S.C. at 488, 357 S.E.2d at 456 (Gregory, C.J., dissenting).

21. *Toth*, 298 S.C. at 9, 377 S.E.2d at 586; *see also* Toth v. Square D Co., 712 F. Supp. 1231 (D.S.C. 1989). The district court held that the implied contract exception is

under no obligation to print terms and conditions of employment in employee handbooks and other materials,[22] but if they do so in South Carolina, they will be held to their promises.

Matthew J. Norton

II. PUBLIC POLICY EXCEPTION NOT EXPANDED TO EMPLOYMENT AT WILL DOCTRINE

In *Miller v. Fairfield Communities, Inc.*[23] the South Carolina Court of Appeals held that the public policy exception to the employment at will doctrine applies only when the employer requires the employee to violate a law, which would subject the employee to criminal sanctions, as a condition of his employment.[24] The court of appeals, however, called upon the South Carolina Supreme Court to consider whether the public policy exception should be expanded.[25]

Fairfield Communities, Inc. (Fairfield) employed Ronald Miller as a golf professional at its Edisto Island resort. Fairfield claimed that Mr. Miller had a conflict of interest because his wife, Jan Miller, was a real estate agent for a competitor of Fairfield. Fairfield complained that Mr. Miller allowed his wife's customers to use the Fairfield golf course. Fairfield demanded that Mr. Miller either resign or force his wife to leave her employment. In response to the demand, Mr. Miller resigned.[26]

Mr. and Mrs. Miller sued Fairfield for wrongful discharge, violation of the Unfair Trade Practice's Act, and tortious interference with Mrs. Miller's employment contract.[27] The Millers specifically claimed that if Mrs. Miller quit her job, she would have to transfer her real estate listings to another brokerage firm without her employer's consent in violation of South Carolina Code section 40-57-170(7).[28] The Millers also claimed that Fairfield required Mr. Miller to interfere with his wife's contractual relationships with her customers.[29] Furthermore,

---

based on a unilateral employment agreement. The district court also rejected the notion that an employer can later modify the unilateral agreement, as a matter of law, by issuing a revised handbook that contains a disclaimer of intent to create contractual rights. *Id.* at 1234.

22. *Small*, 292 S.C. at 481, 357 S.E.2d at 454.
23. 299 S.C. 23, 382 S.E.2d 16 (Ct. App. 1989).
24. *Id.* at 26, 382 S.E.2d at 18.
25. *Id.* at 26-27, 382 S.E.2d at 19.
26. *Id.* at 24-25, 382 S.E.2d at 17-18.
27. *Id.* at 25, 382 S.E.2d at 18.
28. *Id.* at 26, 382 S.E.2d at 18.
29. *Id.* at 27-28, 382 S.E.2d at 19.

the Millers claimed that when Fairfield asked Mrs. Miller to quit her job, it violated the South Carolina Unfair Trade Practices Act.[30]

At trial the court dismissed with prejudice the Millers' tortious interference claim.[31] The court granted Fairfield's motion for summary judgment on the issues of wrongful discharge and unfair trade practice. On appeal, the South Carolina Court of Appeals found no basis for Miller's allegations in either claim.

The court noted that, at most, the Millers might be subject to administrative sanctions.[32] The court declined to expand the public policy exception to cover a threat of administrative sanctions. The court of appeals, however, relied on its decision in *Ludwick v. This Minute of Carolina, Inc.*[33] and declined to apply the public policy exception outside the sphere of criminal sanctions.[34] The court, however, called upon the South Carolina Supreme Court to consider this question.[35]

Under the employment at will doctrine employees may be dismissed with or without cause.[36] The doctrine has begun to erode, however, because the legislature has implemented prohibitions against dismissal on the basis of sex, age, religion, color, and being handicapped.[37] The South Carolina Supreme Court further eroded the doctrine in *Ludwick* when it held that although at-will employment would remain the law in South Carolina, if the retaliatory discharge violated a clear mandate of public policy, the fired employee would have a cause of action in tort for wrongful discharge.[38] The supreme court declined to determine the scope of the public policy exception, but noted that "the threat of retaliation for refusing [to violate the law] is intolerable and impermissible."[39] In *Miller* the court of appeals interpreted the *Ludwick* opinion as restricting the public policy exception to criminal violations and declined to expand its scope.[40]

In *Hudson v. Zenith Engraving Co.*[41] an employee brought an ac-

30. *Id.* at 28, 382 S.E.2d at 19.
31. *Id.* at 25, 382 S.E.2d at 18.
32. *Id.* at 27, 382 S.E.2d at 19.
33. 287 S.C. 219, 337 S.E.2d 213 (1985).
34. *Miller*, 299 S.C. at 26-27, 382 S.E.2d at 19.
35. *Id.* at 27, 382 S.E.2d at 19.
36. Smalls v. Springs Indus., Inc., __ S.C. __, 388 S.E.2d 808 (1990).
37. *See* S.C. CODE ANN. § 1-13-80 (Law. Co-op. 1976 & Supp. 1989) (unlawful employment practices); *Id.* §§ 43-33-530, -540, -570 (Law. Co-op. 1976).
38. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 224-25, 337 S.E.2d 213, 216 (1985). In *Ludwick* an employer fired an employee for honoring a subpoena to appear at a State Employment Security Commission hearing. *Id.* at 221, 337 S.E.2d at 213-14.
39. *Id.* at 225, 337 S.E.2d at 216.
40. *Miller*, 299 S.C. at 26-27, 382 S.E.2d at 19.
41. 273 S.C. 766, 259 S.E.2d 812 (1979).

tion against his employer for retaliatory discharge. The South Carolina Supreme Court noted that the public policy exception had been recognized in a minority of jurisdictions,[42] but would not apply the exception to Hudson's case.[43]

Courts in other jurisdictions have held that an employee may not be terminated for a refusal to engage in illegal conduct that could subject them to a civil penalty. For example, such conduct would include a refusal to act in restraint of trade,[44] a refusal to violate consumer protection laws,[45] and a refusal to violate environmental protection laws.[46] Courts less frequently have recognized a public policy exception if an employee refuses to violate administrative regulations or ethical codes.[47]

Other states, along with South Carolina, cautiously have examined and applied the public policy exception to the employment at will doctrine.[48] If the South Carolina Supreme Court rules on the question of expanding the public policy exception, it is doubtful that any major changes will result.

Charles F. Thompson, Jr.

III. STATE LAW OUTRAGE CLAIMS NOT EXEMPT FROM SECTION 301 PREEMPTION

In *Nash v. AT&T Nassau Metals*[49] the South Carolina Supreme Court held that a suit brought by an employee against his employer for intentional infliction of emotional distress[50] is not automatically immune from preemption under section 301 of the Labor Management Relations Act (LMRA).[51] The court, however, stated that a case-by-

---

42. *Id.* at 769, 259 S.E.2d at 813.

43. *Id.* at 770, 259 S.E.2d at 813.

44. *See, e.g.*, Callahan v. Scott Paper Co., 541 F. Supp. 550 (E.D. Pa. 1982) (employees fired because they exposed unlawful price discounts).

45. *See, e.g.*, Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978) (bank employee fired for asking employer to comply with consumer protection laws).

46. *See, e.g.*, Phipps v. Clark Oil & Ref. Co., 408 N.W.2d 569 (Minn. 1987) (employee refused to dispense leaded gas into car that used unleaded).

47. *See, e.g.*, Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1982) (pharmacist fired for refusal to close business on a holiday).

48. J. Kauff & H. Silverstein, *Recent developments in the Law of Unjust Dismissal*, 4 PRACTICING LAW INST. 9 (1988).

49. 298 S.C. 428, 381 S.E.2d 206 (1989).

50. In South Carolina this action is also known as the tort of outrage or outrageous conduct and is described in Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

51. Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988) states:
Suits for violation of contracts between an employer and a labor organization

case analysis is necessary to determine whether the resolution of a particular state law tort claim requires the court to interpret a collective bargaining agreement between a unionized employee and his employer. The South Carolina Court of Appeals had stated in its *Nash* opinion that "the tort of [intentional infliction of emotional distress], when arising in the context of a labor-related contract, [has] . . . at most only a tangential connection with the contract"[52] and is not preempted by section 301. The South Carolina Supreme Court, however, granted AT&T Nassau Metals' (Nassau) petition for certiorari, reversed the court of appeals, and clarified the relationship between a state law tort claim for outrage and section 301 of the LMRA.

In 1980 William Nash, an employee of Nassau and a member of the Communications Workers of America (the CWA), suffered two injuries at work. As a result of these injuries, Nash underwent surgery and received psychiatric treatment for depression. Workers' compensation benefits covered his medical expenses. In December 1982 Nassau offered to settle Nash's workers' compensation claim for $30,000 and to pay all of his nonpsychiatric expenses for one year. Nassau conditioned its offer on Nash's resignation and agreement to release the company from all of his future expenses. Nash declined to settle.[53]

Nassau filed an application to stop payment of compensation with the South Carolina Industrial Commission. The hearing on Nassau's application resulted in a court order in Nash's favor. In May 1985 Nassau chose a doctor and scheduled two appointments for Nash. It is unclear whether Nassau notified Nash or his attorney that it was exercising its rights under the collective bargaining agreement to schedule these appointments.[54] Nash did not go to the doctors that Nassau chose. In a letter dated July 18, 1985, Nassau informed Nash that, because he refused to observe the terms of the collective bargaining agreement, which required Nash to consult with a physician of Nassau's choice, Nassau had terminated Nash's employment effective June 1, 1985. Nassau also notified Nash on July 19, 1985, that Nash's group insurance benefits would end on the last day of the month in which he was terminated, but that he could convert to nongroup insurance within thirty-one days. Because of a misunderstanding about the date by which he had to convert his insurance, Nash let the coverage

---

representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

52. Nash v. AT&T Nassau Metals, 294 S.C. 248, 256, 363 S.E.2d 695, 700 (Ct. App. 1987) (per curiam), *rev'd*, 298 S.C. 428, 381 S.E.2d 206 (1989).

53. *Nash*, 298 S.C. at 429-30, 381 S.E.2d at 207.

54. *Id.* at 430, 381 S.E.2d at 207.

lapse.[55] Nash's Union, the CWA, requested arbitration of the matter,[56] but Nassau and the CWA reached an agreement before the issue was arbitrated. Nassau reinstated Nash retroactively and reimbursed his medical expenses under the benefit plans in the collective agreement.[57]

In February 1986 Nash brought this action against Nassau and alleged (1) tortious interference with a contractual relationship, (2) fraudulent breach of an employment contract, (3) intentional infliction of emotional distress, and (4) wrongful termination. The trial court dismissed the action with prejudice and granted summary judgment for Nassau on all four claims.[58]

Nash appealed on only two of his claims, (1) tortious interference with a contractual relationship, and (2) intentional infliction of emotional distress. The South Carolina Court of Appeals affirmed the dismissal of the tortious interference claim because section 301 of the LMRA preempted it. The court of appeals reversed the lower court's dismissal of Nash's claim for outrage, however, because it held that the claim was only tangentially connected with the labor contract and, therefore, section 301 did not preempt it.[59] The court remanded the case to the trial court to resolve the factual disputes on the outrage claim.[60]

Nassau petitioned the South Carolina Supreme Court for a writ of certiorari to determine (1) whether federal law preempted the outrage claim, and (2) whether the court could grant relief on Nash's claim of outrage. The supreme court granted certiorari and reversed the court of appeals on the preemption issue. The supreme court held that section 301 of the LMRA preempted the outrage claim. As a result, the court did not determine whether Nash had stated a claim for which it could grant relief.[61]

The supreme court applied the test enunciated by the United States Supreme Court in *Allis-Chalmers Corp. v. Lueck*[62] to determine whether section 301 of the LMRA preempted Nash's outrage claim. "If

---

55. The confusion could have been caused in part by a conversation Nash had with someone at the insurance company, but this confusion does not appear to have been caused by Nassau. *Id.* at 431 n.1, 381 S.E.2d at 207 n.1.

56. Nash stated that he was unaware of the CWA's arbitration request until the trial court's summary judgment hearing on May 12, 1986. *Id.* at 431, 381 S.E.2d at 208.

57. Nash v. AT&T Nassau Metals, 294 S.C. 248, 252-53, 363 S.E.2d 695, 698 (Ct. App. 1987), *rev'd*, 298 S.C. 428, 381 S.E.2d 206 (1989).

58. Nash v. AT&T Nassau Metals, 298 S.C. 428, 431, 381 S.E.2d 206, 208 (1989).

59. *Nash*, 294 S.C. at 256, 363 S.E.2d at 700 (court of appeals' decision).

60. *Id.*, 363 S.E.2d at 701.

61. *Nash*, 298 S.C. at 431, 381 S.E.2d at 208. The crux of Nash's outrage claim was that "Nassau was purposefully vague and intentionally created a situation whereby Nash's failure to comply with the contract was inevitable." *Id.* at 435, 381 S.E.2d at 210.

62. 471 U.S. 202 (1985).

the state tort law purports to define the meaning of the [collective bargaining] contract relationship, that law is preempted."[63] The *Allis-Chalmers* test requires courts to examine "whether the state claim exists independently of the collective bargaining agreement or whether it is 'inextricably intertwined' with a consideration of the terms of the agreement."[64] The United States Supreme Court emphasized that a plaintiff's choice to proceed in tort rather than in contract would not avoid preemption of the claim.[65]

The Court in *Alllis-Chalmers*, however, narrowed the breadth of its holding in several significant ways. First, the Court exempted private labor agreements from preemption under section 301 of the LMRA.[66] Second, the Court stated that Congress did not intend "to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."[67] Finally, the Court noted that the rights that exist independently of a labor contract may be waived or altered by agreement.[68]

The South Carolina Supreme Court relied on *Allis-Chalmers* to challenge the court of appeals' opinion that Nash's outrage claim automatically was immune from section 301 preemption.[69] The court of appeals cited its earlier decision in *Butts v. AVX Corp.*[70] and held that in the context of a collective bargaining agreement, "the tort of intentional infliction of emotional distress, when arising in the context of a

---

63. *Id.* at 213. Once section 301 preempts a state law claim, the court must either dismiss it or treat it as a claim that arises under section 301. *See id.* at 220.

64. *Nash*, 298 S.C. at 432, 381 S.E.2d at 208 (quoting *Allis-Chalmers*, 471 U.S. at 213). Because each collective bargaining agreement may be different, this analysis must be on a case-by-case basis. *See Allis-Chalmers*, 471 U.S. at 220.

65. *Allis-Chalmers*, 471 U.S. at 211. The court stated:

> Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Id.

66. *Id.* at 211-12. *See also* Caterpillar, Inc. v. Williams, 482 U.S. 386, 394-95 (1987) (employees sued employer for breach of individual employment contracts, and employees claims not barred by section 301).

67. *Allis-Chalmers*, 471 U.S. at 212 (footnote omitted).

68. *Id.* at 213. In a later case, the Court defined "independent" to mean that "resolution of the state-law claim does not require construing the collective-bargaining agreement." Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988) (footnote omitted).

69. Nash v. AT&T Nassau Metals, 298 S.C. 428, 432-34, 381 S.E.2d 206, 208-09 (1989).

70. 292 S.C. 256, 355 S.E.2d 876 (Ct. App. 1987).

labor related contract, has at most only a tangential connection with the contract and is not preempted by § 301."[71] The supreme court noted, however, that the court of appeals failed to decide the preemption question on an *ad hoc* basis, and, thereby, ignored not only the United States Supreme Court's requirement set forth in *Allis-Chalmers*,[72] but also the court of appeals' own directive in *Butts*.[73]

Nash claimed that Nassau had fired him intentionally to deprive him of his benefits under Nassau's contract with the CWA. Nassau responded that it was exercising its contractual right to require an employee who claims an injury to consult a physician that Nassau chooses and to terminate the employee's benefits and employment if the employee fails to cooperate.[74] To resolve the parties' contradictory positions, the South Carolina Supreme Court concluded that Nash essentially was alleging that Nassau had abused the procedures it agreed upon in its contract with the CWA.[75] The court then observed that to determine whether Nassau had abused the procedures it would need to decide whether the parties had complied with the collective bargaining agreement.[76] Because the compliance issue required the supreme court to interpret the facts that surrounded Nassau's contract with the CWA, the supreme court held that section 301 preempted Nash's claim.[77] The supreme court, however, declined to decide whether Nash had stated a claim for outrage and vacated the decision of the court of appeals on that claim.[78]

The supreme court's opinion in *Nash* demonstrates how state law interacts with the body of evolving federal labor law in cases in which a court interprets the preemption issue under section 301.[79] Although in

---

71. *Nash*, 298 S.C. at 433, 381 S.E.2d at 208-09.

72. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985) (court must look at preemptive effect of federal labor-contract law on a case-by-case basis).

73. 298 S.C. at 433, 381 S.E.2d at 209. In *Nash* the supreme court cited a number of cases in which the court applied the requisite case-by-case analysis to determine whether section 301 preempted the state law claims. *Id.* at 432-33 n.3, 381 S.E.2d 208-09 n.3.

74. *Id.* at 434, 381 S.E.2d at 209.

75. *Id.* at 434-35, 381 S.E.2d at 209-10.

76. *Id.*

77. *Id.* at 435, 381 S.E.2d at 210.

78. *Id.* A recent Fourth Circuit decision has held, however, that a federal district court has the discretion to dismiss state claims on the merits before reaching the preemption issue. Washington v. Union Carbide Corp., 870 F.2d 957, 960 (4th Cir. 1989).

79. Section 301 preemption should be distinguished from two other types of federal labor law preemption (along with preemption under other federal laws). The first type of preemption protects the primary jurisdiction of the National Labor Relations Board over practices listed in sections 7 and 8 of the National Labor Relations Act. *See, e.g.*, Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 296-97 (1977). (NLRA indicates compelling congressional direction for preemption). The

Butts the South Carolina Court of Appeals correctly applied the *Allis-Chalmers* test when it determined that section 301 did not require pre-emption, that same court erred in its analysis in *Nash*. In *Nash*, therefore, the South Carolina Supreme Court refined the application of *Allis-Chalmers* to assure that South Carolina courts will follow federal labor law directives. Furthermore, the court's opinion in *Nash* is a good example of how a state court follows the United States Supreme Court's directive that "[t]he full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."[80]

Kendall R. Walker

IV. HOSTILE WORK ENVIRONMENT CLAIM PERMITTED UNDER TITLE VII

In *Paroline v. Unisys Corp.*[81] the Fourth Circuit Court of Appeals permitted a "hostile work environment" claim under Title VII of the

---

other type of preemption deals with "[labor] conduct that Congress intended to be unregulated." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 749 (1985). *Accord* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 n.6 (preemption under sections 7 and 8 of the NLRA). *See generally* Schwartz & Parrot, *A New Look at Federal Labor Law Preemption: Unionized Employees' Claims in State Court*, 7 ST. LOUIS U. PUB. L. REV. 297 (1988) (thorough discussion of the three federal labor law preemption doctrines); Baxter & Alter, *Preemption of State Law Causes of Action: Recent Developments*, 14 EMPLOYEE REL. L.J. 407 (1988) (article examines recent federal decisions that focus on preemption of state actions by federal labor laws).

The United States Supreme Court set the general course of federal labor law under section 301 in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). The Court emphasized in *Lincoln Mills* that Congress intended for federal courts to apply section 301 and fashion a body of federal law to govern suits that alleged violations of labor contracts. *Id.* at 450-51. The Court in *Lincoln Mills* also expressed its commitment to arbitration as the preferred solution to labor problems. *Id.* at 454-55. The Court has noted the need for a uniform federal law to interpret labor contracts:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . . Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of dispute.

Teamsters v. Lucas Flour Co., 369 U.S. 102, 103-04 (1962).

During the same term that it announced *Lucas Flour Co.*, the Court ruled that state courts had concurrent jurisdiction over section 301 claims. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). Finally the court held that section 301 preempts a state law tort claim when a court must interpret a collective bargaining agreement to resolve the claim. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

80. *Allis-Chalmers Corp.*, 471 U.S. at 220.

81. 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990).

Civil Rights Act of 1964.[82] The court identified two material issues of fact that precluded summary judgment for the defendants. First, a jury could reasonably conclude that Paroline, or a reasonable person in similar circumstances, could believe that a hostile and abusive work environment existed.[83] Second, the court believed that the plaintiff had advanced sufficient evidence to avoid summary judgment on her two theories for imputing liability to her employer for sexual harassment. The case is significant because the Fourth Circuit incorporated the Sixth Circuit's approach to hostile work environment cases, which is, a plaintiff must satisfy a subjective-objective test to demonstrate sexual harassment.[84]

Unisys Corporation employed Elizabeth Paroline as a word processor in 1986. Edgar L. Moore, a Unisys employee and co-defendant in this case, participated in Paroline's interview. Prior to Paroline's employment, several clerical employees at Unisys complained that Moore and other male employees improperly made sexual comments and improperly touched female employees. Management met with the male employees and warned them to cease behavior that could be construed as sexual harassment. Management also met privately with Moore.[85]

After Paroline began working at Unisys, Moore allegedly specifically focused his attention toward her. One evening Moore gave Paroline a ride home after the plant closed because of a snowstorm. Paroline alleged that despite protests, Moore made suggestive comments and kissed her. She further alleged that Moore accompanied her to her apartment against her will and, in spite of repeated protests, continued to kiss and touch her. Paroline eventually persuaded Moore to leave.[86]

---

82. 42 U.S.C. § 2000e-2(a)(1) (1988). "[I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." *Id.*

83. The plaintiff also alleged (1) constructive discharge under Title VII, (2) pendent state law claims for intentional infliction of emotional distress, (3) a claim against Moore for assault and battery, and (4) claims against Unisys for negligent failure to warn and reckless endangerment. Although the constructive discharge claim initially survived summary judgment on appeal before a Fourth Circuit panel, the Fourth Circuit vacated the original decision in an en banc rehearing of this issue. Paroline v. Unisys Corp., 900 F.2d 27 (4th Cir. 1990) (en banc). The parties agreed to a voluntary dismissal of the assault and battery claim and the Fourth Circuit affirmed the trial court's grant of summary judgment on all other claims. *Paroline*, 879 F.2d at 102.

84. *Paroline*, 879 F.2d at 106-08 (citing Rabidue v. Osceola Ref. Co. 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)).

85. *Id.* at 103. Because the district court had granted Paroline's motion for summary judgment, the Fourth Circuit accepted the allegations she raised in her complaint. *Id.* at 102-03.

86. *Id.* at 103.

Paroline reported the incident to Unisys management the next day. Unisys conducted an investigation, which resulted in a written warning to Moore, instructions that Moore seek counseling, and termination of Moore's access to the secured portion of the building. Paroline considered her employer's actions inadequate. She resigned and filed a sexual harassment suit under Title VII against both Unisys and Moore.[87] The Fourth Circuit reversed the district court's decision to grant the defendants' motion for summary judgment on the Title VII sexual harassment claim.[88]

In *Paroline* the court reaffirmed the four-part test it outlined in *Swentek v. USAir, Inc.*[89] to determine whether a hostile environment exists in a sexual harassment claim under Title VII. The plaintiff must show "(1) that the conduct in question was unwelcome, (2) that the harassment was based on sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis exists for imputing liability to the employer.[90] Moreover, the *Paroline* court stated that the plaintiff would have to satisfy a subjective-objective standard of proof to show that "the harassment was sufficiently severe or pervasive" under the second part of the test.[91]

The subjective-objective test requires a plaintiff to demonstrate that the harassment subjectively interfered with the employee's work or significantly affected her psychological well being.[92] Second, after the plaintiff satisfies the subjective test, she needs to satisfy an objective test that indicates that "the harassment would interfere with the work performance or significantly affect the psychologcal well-being of a reasonable person in the plaintiff's position."[93]

In *Meritor Savings Bank v. Vinson*[94] the United States Supreme Court held that sexual harassment, which creates a hostile work environment, may give rise to a claim under Title VII. The Court, however, did not specify the standard of proof that the plaintiff must meet in a Title VII claim. A majority of jurisdictions have adopted a "but for" test, which requires the fact finder to determine that the alleged har-

87. *Id.*

88. *Id.* at 103-04.

89. 830 F.2d 552 (4th Cir. 1987).

90. *Paroline*, 879 F.2d at 105 (citing Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987)).

91. *Id.* (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)).

92. *Id.*

93. *Id.*

94. 477 U.S. 57 (1986).

assment would not have occurred but for the victim's gender.[95] The subjective-objective standard adopted by the *Paroline* court, which is usually applied in cases with constructive discharge claims under Title VII,[96] is a minority approach.

The second issue in *Paroline* concerned imputing liability to the employer in a Title VII "hostile work environment" claim. Paroline advanced two theories that imputed liability to Unisys for Moore's conduct. First, Paroline argued that Unisys failed to take adequate remedial action after Paroline complained about Moore's conduct. Second, Paroline argued that Moore's prior conduct put Unisys on notice and imposed a duty on Unisys to prevent further sexual harassment.[97]

The Fourth Circuit primarily relied on two sources to justify a duty to prevent foreseeable harassment. First, the court noted that, although courts previously have focused on after-the-fact remedial actions taken by the employer, "[p]revention is generally more efficacious than cure."[98] Second, the court supported its decision by relying on its reasoning in *Katz v. Dole*[99] and *Swentek v. USAir, Inc.*[100]

In both *Katz* and *Swentek* the court stated that a plaintiff must establish that the employer took no remedial steps even though the employer knew or should have known of the unwelcome conduct. *Paroline* makes clear that a plaintiff may establish the employer's liability by showing that the objectionable conduct existed prior to the complained of incident. The plaintiff may accomplish this by examining prior complaints by other employees and the employer's subsequent remedial actions. This is not only consistent with *Katz* and *Swentek*, but also extends the rule in those cases.

The extent of the employer's duty, however, remains unclear. For example, in *Swentek* the court recognized that the employer need not "credit all of [the complainant's] allegations in order to escape liability" when the employer takes remedial action.[101] If plaintiffs are allowed to rely on prior notice to the employer, courts will have to inquire into the nature of the previous complaints, the subjective

95. *See, e.g.*, Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Porta v. Rollins Envtl. Servs., Inc., 654 F. Supp. 1275 (D.N.J. 1987), *aff'd*, 845 F.2d 1014 (3d Cir. 1988); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569 (W.D.N.Y. 1987).

96. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

97. *Paroline*, 879 F.2d at 106.

98. *Id.* at 107.

99. 709 F.2d 251, 256 (4th Cir. 1983) (air traffic controller claiming hostile environment sexual harassment).

100. 830 F.2d 552 (4th Cir. 1987) (flight attendant alleging sexual harassment).

101. *Id.* at 558.

reaction of the complaining party, and the effect the employer's remedial action would have on future complaints if the remedial action failed to end the harassment. Thus, the employer would be forced to consider not only the complaining party's reaction, but also what a reasonable employee's response would have been.

The subjective-objective test and the duty of prevention are compatible standards. For a plaintiff to succeed, she must show that the harassment would have interfered with the work of a "reasonable" person in the plaintiff's position. Likewise, the duty of prevention makes the employer consider the reaction of a reasonable person in the plaintiff's position when the employer takes remedial action. By adopting the Sixth Circuit's subjective-objective test, the Fourth Circuit adds to the plaintiff's burden by requiring her to show that it was reasonable to expect that the harassment would interfere with her work. On the other hand, the plaintiff may rely on the employer's duty to prevent foreseeable sexual harassment. Employers should be aware of this duty and recognize that previous complaints and remedial action may be used in subsequent Title VII claims. Consequently, employers will have to handle sexual harassment claims at an early stage to avoid breaching the duty to prevent foreseeable sexual harassment.

Ellen A. Mercer