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EMPLOYERS BEWARE: SOUTH CAROLINA'S PUBLIC POLICY EXCEPTION TO THE AT-WILL EMPLOYMENT DOCTRINE IS LIKELY TO KEEP EXPANDING*

I. INTRODUCTION

The public policy exception, which gives an employee a cause of action in tort for violations of public policy, continues to erode the at-will employment doctrine in South Carolina. While the courts emphasize that the at-will employment doctrine is still alive and well, a number of recent decisions collectively exhibit an attitude toward broadening the scope of the public policy exception. Such an expansion restricts the permissible bases upon which employers may discharge their employees. This attitude may mean that plaintiffs will have increasingly more opportunities to sue their employers in tort for wrongful discharge and to get their claims to a jury. Accordingly, this seemingly pro-plaintiff attitude should have employers on the lookout when firing, because there are more at-will employment situations imposing liability.

Part II of this Note deals with the historical development of employment at-will and its common law exceptions. Part III focuses on the background of South Carolina's public policy exception. Finally, Part IV discusses recent developments in South Carolina's public policy exception and displays the courts' current attitude toward broadening the exception.

II. HISTORY OF THE EMPLOYMENT AT-WILL DOCTRINE AND ITS EXCEPTIONS

A. History of Employment At-Will

Legal authorities credit Horace Wood with first recognizing the employment at-will doctrine in his 1877 master and servant treatise.¹ He asserted the American rule as follows:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to

* This Note originally appeared in Book 2, Volume 51 of the SOUTH CAROLINA LAW REVIEW.

1. H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877); see *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 221, 337 S.E.2d 213, 214 (1985) ("Employment at-will, a court created doctrine, was first clearly articulated in an 1877 treatise, *Master and Servant*."). See generally 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.4, at 10 (4th ed. 1998) (providing history of the employment at-will rule).

establish it by proof. . . . [A]n indefinite hiring . . . is determinable at the will of either party. . . .²

Wood's treatise marked a departure from the English rule that presumed a yearly hiring for general or indefinite contracts.³ The American rule, derived largely in response to the Industrial Revolution,⁴ allowed termination at any time, for any reason, by the employer or the employee.⁵ Many legal commentators criticized Wood for the scant authority he cited in arriving at the American rule,⁶ but the nation nevertheless embraced the doctrine.⁷

In 1936, South Carolina first adopted Wood's American rule in *Shealy v. Fowler*.⁸ The *Shealy* court construed the plaintiff's employment contract as "a contract . . . for an indefinite term [that] could be terminated at the will of either party."⁹ The court found that because Mr. Shealy had a contract for an indefinite term, he was an at-will employee and had no claim for breach of contract.¹⁰ Since the *Shealy* decision, the South Carolina Supreme Court has

2. WOOD, *supra* note 1, §134, at 272.

3. See PERRITT, *supra* note 1, § 1.3, at 9 (quoting Blackstone's English rule, which explained that "[i]f the hiring be general without any particular time limited, the law construes it to be a hiring for a year").

4. See *id.* § 1.4, at 10 ("The Industrial Revolution thus led both parties to the employment relationship to desire greater freedom to negotiate employment terms.").

5. See, e.g., *Ludwick*, 287 S.C. at 221, 337 S.E.2d at 214, stating:

Professor H.G. Wood . . . is credited with formulating the 'American Rule' that, where an employment contract is indefinite as to its duration, the employer may discharge employees for good cause, no cause or even cause morally wrong [T]he doctrine is cast in mutuality, affording to employee as well as employer the right of at-will termination

6. See PERRITT, *supra* note 1, § 1.4, at 12 ("Application of Wood's version of the new American rule was never free from criticism"); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) ("[T]he four American cases he cited in direct support of the rule were in fact far off the mark [I]n the absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed."); Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 4 (1984) ("As courts and critics who would modify the rule have pointed out, none of the four cases Wood cited in support of his formulation actually do support it.").

7. See, e.g., STUART H. BOMPEY ET AL., *WRONGFUL TERMINATION CLAIMS: A PREVENTIVE APPROACH* 3 (2d ed. 1991) (explaining that Wood's "1877 treatise on master and servant law was influential in coalescing American jurisprudence around the new rule"); 1 C.B. LABATT, *MASTER AND SERVANT* § 160, at 519 (2d ed. 1913) ("The preponderance of American authority in favor of the doctrine that an indefinite hiring is presumptively a hiring at will is so great that it is now scarcely open to criticism.").

8. 182 S.C. 81, 188 S.E. 499 (1936).

9. *Id.* at 88, 188 S.E. at 502.

10. *Id.*

applied the rule in various circumstances,¹¹ recognizing that employers can fire at-will employees for good cause, bad cause, or no cause at all.¹²

B. Exceptions to the Employment At-Will Doctrine

While employment at-will is widely accepted across the nation, courts in the 1980s and 1990s became increasingly concerned about the largely unrestrained right of the employer to terminate employees at-will. Therefore, almost every jurisdiction adopted some form of limitation to the doctrine.¹³ Courts carved out three common law exceptions to give at-will employees a remedy when their employers wrongfully terminated their employment: the public policy exception, the implied contract theory, and the implied covenant of good faith and fair dealing.¹⁴ Depending on the jurisdiction, these actions rest in either contract or tort.¹⁵

First, the public policy theory allows an employee to have “a cause of action against an employer when the termination of that employee would contravene some explicit, well-established public policy.”¹⁶ However, as many commentators note, pinpointing a precise definition of public policy can be troublesome.¹⁷ Second, the implied contract theory modifies the at-will relationship when “employer representations regarding the job security of employees and/or the manner in which termination decisions are to be made are treated by courts as enforceable, contractual provisions, even though an express contract is absent and employment would otherwise be at will.”¹⁸ The implied contract theory usually arises as a result of the employer’s handbook or oral

11. See *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979); *Ross v. Life Ins. Co. of Va.*, 273 S.C. 764, 765, 259 S.E.2d 814, 815 (1979); *Gainey v. Coker’s Pedigreed Seed Co.*, 227 S.C. 200, 205, 87 S.E.2d 486, 489 (1955); *Orsini v. Trojan Steel Corp.*, 219 S.C. 272, 276, 64 S.E.2d 878, 879 (1951); *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 538, 59 S.E.2d 148, 149 (1950); *Weber v. Perry*, 201 S.C. 8, 12, 21 S.E.2d 193, 194 (1942).

12. See *Culler v. Blue Ridge Elec. Coop.*, 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992); *Small v. Springs Indus., Inc.*, 300 S.C. 481, 484, 388 S.E.2d 808, 810 (1990); *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 221, 337 S.E.2d 213, 214 (1985).

13. See generally David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645 (1996) (analyzing the exceptions to the at-will employment doctrine across the fifty states).

14. See PERRITT, *supra* note 1, § 1.2, at 4-5; Walsh & Schwarz, *supra* note 13, at 646-47.

15. See PERRITT, *supra* note 1, § 1.2, at 4 (listing the elements of each theory). Generally, the public policy exception gives rise to a cause of action in tort while the other two theories are based in contract. See *id.*

16. Walsh & Schwarz, *supra* note 13, at 646.

17. See Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1593 (1994); Mark D. Wagoner, Jr., Comment, *The Public Policy Exception to the Employment at Will Doctrine in Ohio: A Need for a Legislative Approach*, 57 OHIO ST. L.J. 1799, 1807 (1996).

18. Walsh & Schwarz, *supra* note 13, at 646-47.

representations.¹⁹ Finally, the implied covenant of good faith and fair dealing rests on the idea that “neither party to a contract should be allowed to take actions that have the effect of denying the other party the benefits of the contractual relationship.”²⁰ Since these are general definitions, a closer look at any one jurisdiction may provide deviations particular to that state.

While the at-will employment doctrine is still alive and well in South Carolina,²¹ the courts recognize two of the common law exceptions mentioned above.²² The first exception, similar to the implied contract theory, modifies the at-will status of an employee by the terms contained in an employee handbook.²³ Termination under these circumstances gives rise to a claim for breach of contract.²⁴ The second exception applies where an employee’s discharge violates a “clear mandate of public policy.”²⁵ Termination under these circumstances gives rise to a claim in tort.²⁶ However, South Carolina does not seem to explicitly recognize the implied covenant of good faith and fair dealing exception as an independent basis for a claim against an employer. Nonetheless, the state does allow the claim for breach of the implied covenant of good faith and fair dealing to lie when an employer alters the at-will employment relationship by a handbook.²⁷

19. *See id.* at 647.

20. *Id.*

21. *See Prescott v. Farmers Tel. Coop.*, 335 S.C. 330, 516 S.E.2d 923 (1999). The court stated:

Although this Court has recognized exceptions to employment at-will, the doctrine remains in force in South Carolina. We find the policy of employment at-will provides necessary flexibility for the marketplace and is, ultimately, an incentive to economic development. Accordingly, we affirm and adhere to the employment at-will doctrine in South Carolina.

Id. at 335, 516 S.E.2d at 925; *see also Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 224, 337 S.E.2d 216 (1985) (finding that the at-will employment doctrine is still alive in South Carolina).

22. *See Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 227, 516 S.E.2d 449, 452 (1999) (discussing the two exceptions to the at-will employment doctrine in the concurring opinion by Justice Toal.); *Small v. Springs Indus., Inc.*, 300 S.C. 481, 484, 388 S.E.2d 808, 810 (1990) (establishing South Carolina handbook exception and discussing public policy exception); C.F.W. Manning, II, Note, *Public Policy Exception Open to Possible Expansion In Employment- At-Will Situations*, 48 S.C. L. REV. 133, 134 (1996) (discussing the two exceptions).

23. *See Small*, 300 S.C. at 483, 388 S.E.2d at 810.

24. *Id.*

25. *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216.

26. *Id.*

27. *See Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 459 S.E.2d 851 (Ct. App. 1995), *aff’d on other grounds*, *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 481 S.E.2d 706 (1997). The court of appeals held, “[u]nder South Carolina law, there exists in every contract an implied covenant of good faith and fair dealing. Further, we find no authoritative case law holding the implied covenant of good faith and fair dealing is not applicable to employment contracts that alter the employee’s at-will status.” *Id.* at 91, 459 S.E.2d at 857 (citation omitted).

Since the recognition of these exceptions in South Carolina, there have been numerous cases defining when these exceptions are applicable. However, concentrating on the public policy exception, it is important to explore both its history and the courts' recent pro-plaintiff shift in attitude to understand the ramifications of this exception on the state's current employment practices.

III. HISTORY OF SOUTH CAROLINA'S PUBLIC POLICY EXCEPTION

A. Ludwick

Ludwick v. This Minute of Carolina, Inc.,²⁸ was the first case in South Carolina to establish a cause of action in tort for wrongful discharge following an employer's discharge of an employee in violation of "a clear mandate of public policy."²⁹ In *Ludwick*, the plaintiff's employer demanded that plaintiff, an at-will employee, disobey a subpoena given by the South Carolina Employment Security Commission under threat of termination.³⁰ The Employment Security Commission issued the subpoena according to state law, and there were criminal sanctions for failure to comply.³¹ Ludwick obeyed the subpoena, and the defendant discharged her.³² The South Carolina Supreme Court held that "the public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law."³³ *Ludwick* defines a clear violation of public policy as when an employer conditions employment upon a violation of criminal law.

B. *Limitation of the Public Policy Exception When a Statutory Remedy is Available*

Wary of the possible "outpouring of vexatious and frivolous litigation"³⁴ that modification of the at-will doctrine might induce, the supreme court fashioned a very limited public policy exception in *Ludwick*, and the judicial

28. 287 S.C. 224, 337 S.E.2d 216 (1985).

29. *Id.* at 225, 337 S.E.2d at 216.

30. *Id.* at 221, 337 S.E.2d at 213-14.

31. *Id.*

32. *Id.*

33. *Id.* at 225, 337 S.E.2d at 216.

34. *Id.* at 225, 337 S.E.2d at 216. The court explained that:

[O]ther jurisdictions which recognize the exception also acknowledge the peril that an outpouring of vexatious and frivolous litigation may be spawned by the modification of the doctrine. . . . In sharing these same concerns we emphasize that a cause of action for wrongful discharge of an at-will employee shall exist only where the alleged retaliatory discharge constitutes a clear violation of a mandate of public policy.

Id.

decisions that followed were slow to expand its scope.³⁵ Furthermore, the court limited the applicability of the exception in *Epps v. Clarendon County*³⁶ and *Dockins v. Ingles Markets, Inc.*³⁷ In these cases, the court decided that an at-will employee is not entitled to relief under the public policy exception if the employee has an existing statutory remedy.³⁸ Justice Toal's concurrence in *Stiles v. American General Life Insurance Company*³⁹ explained these cases as making it clear that "the Ludwick exception is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists."⁴⁰

C. Public Policy Exception Ready for Expansion

While the courts limited the public policy exception where a statutory remedy existed, they also began to wrestle with what constitutes a clearly mandated public policy. *Miller v. Fairfield Communities, Inc.*,⁴¹ seemed to interpret *Ludwick* as asserting that the public policy exception was only

35. See *Miller v. Fairfield Communities, Inc.*, 299 S.C. 23, 382 S.E.2d 16 (Ct. App. 1989) (declining to extend the public policy exception to include instances where the employee had to choose between termination and receiving civil penalties or sanctions). The court stated:

From the discussion in *Ludwick* it seems clear that the Supreme Court did not consider public policy outside the sphere of criminal sanctions. The Supreme Court may want to consider this question and pass upon it. We choose not to expand the public policy exception to include the case before us.

Id. at 26-27, 382 S.E.2d at 19.

The court later explained that this decision was in accord with the decisions in both federal and state courts. *Id.* As an example, the court highlighted the Fourth Circuit's interpretation of Maryland's at-will statute in *Adler v. American Standard Corp.*, 830 F.2d 1303 (4th Cir. 1987). In that case the Fourth Circuit stated that "[i]mitation of the claim for abusive discharge to situations involving the actual refusal to engage in illegal activity, or the intention to fulfill a statutorily prescribed duty, ties abusive discharge claims down to a manageable and clear standard." *Miller* at 27, 382 S.E.2d at 19 (quoting *American Standard*, 830 F.2d at 1307).

36. 304 S.C. 424, 405 S.E.2d 386 (1991).

37. 306 S.C. 496, 413 S.E.2d 18 (1992).

38. In *Epps*, the court refused to expand the public policy exception where an individual receives relief under Title 42 U.S.C. § 1983 for a deprivation of constitutional rights by a government official. See *Epps*, 304 S.C. at 424, 405 S.E.2d at 386. The court stated, "[w]e decline to extend the *Ludwick* exception to a situation where, as here, the employee has an existing remedy for a discharge which allegedly violates rights other than the right to the employment itself." *Id.* at 426, 405 S.E.2d at 387. In *Dockins*, the court limited the employee's remedy to that prescribed under the Fair Labor Standards Act and did not expand the public policy exception. See *Dockins*, 307 S.C. at 496, 413 S.E.2d at 18. The court held, "[w]hen a statute creates a substantive right . . . the plaintiff is limited to that statutory remedy. We hold this applies when the right is created by federal law as well as state law." *Id.* at 498, 413 S.E.2d at 19 (citation omitted).

39. 335 S.C. 222, 516 S.E.2d 449 (1999).

40. *Id.* at 228, 516 S.E.2d at 452.

41. 299 S.C. 23, 382 S.E.2d 16 (Ct. App. 1989).

triggered when the employee had to choose between breaking a criminal law or retaining employment. However, *Culler v. Blue Ridge Electric Cooperative, Inc.*,⁴² disagreed with this interpretation and found that the exception extended “at least to legislatively defined ‘Crime Against Public Policy’”⁴³ located in Chapter 17 of Title 16 of the South Carolina Code. In *Culler* an employee sued Blue Ridge Electric Cooperative for wrongful discharge, alleging that Blue Ridge terminated him for refusing to contribute to a political action fund.⁴⁴ The court determined that Blue Ridge did not fire him for that reason, therefore, denying the employee any remedy in tort.⁴⁵ However, the court did say that he would be within the public policy exception if Blue Ridge had fired him for not contributing to a political action fund, basing its reasoning on South Carolina Code section 16-17-560, which proclaims it a “Crime Against Public Policy” to fire any person in South Carolina for his political beliefs.⁴⁶

*Garner v. Morrison Knudsen Corporation*⁴⁷ further expanded the public policy exception in wrongful discharge situations. In *Garner* a pipe fitter reported and testified about radioactive contamination and unsafe working conditions at a nuclear facility, and the facility subsequently fired him.⁴⁸ The trial court dismissed the employee’s public policy claim for wrongful discharge on a 12(b)(6) motion for “failure to state facts sufficient to constitute a cause of action.”⁴⁹ The South Carolina Supreme Court reversed this holding, stating that the issue was a novel one that should not be dismissed in a 12(b)(6) action.⁵⁰ In its reasoning, the court asserted “[w]hile we have applied the public policy exception to situations where an employer requires an employee to violate a criminal law, and situations where the reason for the employee’s termination was itself a violation of the criminal law, we have never held the exception is *limited* to these situations.”⁵¹ The court refused to address the ultimate question of the applicability of the exception to the case. However, in finding that the exception was not limited to those situations previously stated, the *Garner* court expressed its openness to expansion of the exception and, consequently, the possible further erosion of the at-will employment doctrine.⁵²

42. 309 S.C. 243, 422 S.E.2d 91 (1992).

43. *Id.* at 246, 422 S.E.2d at 93.

44. *Id.*

45. *Id.*

46. *Id.* See also *Moshataghi v. The Citadel*, 314 S.C. 316, 322, 443 S.E.2d 915, 919 (Ct. App. 1994) (stating that an employer could not terminate an at-will employee for exercising constitutional rights encompassed in S.C. Code Ann. § 16-17-560 (Law. Co-op. 1976).

47. 318 S.C. 223, 456 S.E.2d 907 (1995).

48. *Id.* at 224, 456 S.E.2d 908.

49. *Id.*

50. *Id.* at 226, 456 S.E.2d at 909.

51. *Id.*

52. *Id.*

IV. POST-GARNER EXPANSION OF THE PUBLIC POLICY EXCEPTION

In a series of opinions following *Garner*, South Carolina state courts began expanding the public policy exception. In three 1999 decisions, both the supreme court and the court of appeals gave employees more deference by exhibiting their willingness to entertain public policy claims in an increasing number of circumstances.⁵³

A. *Nolte*: *Surviving the 12(b)(6) Motion to Dismiss*

In *Nolte v. Gibbs International, Inc.*,⁵⁴ the court of appeals found a genuine dispute of material fact sufficient to reverse the trial court's finding of summary judgment on a wrongful discharge claim. *Nolte*, an accountant, was an at-will employee who objected and refused to participate in the unethical and illegal conduct of his employer; Gibbs International subsequently discharged him.⁵⁵ After his termination, *Nolte* brought an action for wrongful discharge, among other claims, alleging that Gibbs International fired him for objecting and refusing to participate in questionable business practices.⁵⁶ Furthermore, he claimed that his participation would have entailed breaking a number of state and federal laws including, for example, mail fraud and falsifying tax returns.⁵⁷ In response, his employer asserted that it terminated *Nolte* because Gibbs International eliminated his position.⁵⁸ The trial court granted summary judgment to the employer on the wrongful discharge claim, and *Nolte* appealed.⁵⁹ On review, the court of appeals found that "[i]nquiry into the facts is desirable to clarify the application of the law in this case; therefore, summary judgment is inappropriate. Upon a full development of the facts at trial, a violation of the public policy exception under *Ludwick* may be established."⁶⁰

In two prior cases, *Garner v. Morrison Knudsen Corp.*⁶¹ and *Keiger v. Citgo, Coastal Petroleum, Inc.*,⁶² the supreme court and the court of appeals, respectively, reversed the trial courts' grants of 12(b)(6) motions dismissing plaintiffs' wrongful discharge claims. In keeping with this trend, *Nolte* seems to reinforce the hypothesis that wrongful discharge claims in the future will survive these motions and make it to the jury. Because the "clear mandate of

53. See *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449 (1999); *Evans v. Taylor Made Sandwich Co.*, 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999); *Nolte v. Gibbs Int'l, Inc.*, 335 S.C. 72, 515 S.E.2d 101 (Ct. App. 1999).

54. 335 S.C. 72, 515 S.E.2d 101 (Ct. App. 1999).

55. *Id.* at 73-74, 515 S.E.2d at 102.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 75, 515 S.E.2d at 102-03.

60. *Id.* at 76, 515 S.E.2d at 103.

61. 318 S.C. 223, 456 S.E.2d 907 (1995).

62. 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997).

public policy” exception does not specifically define what constitutes public policy, it is often up to the jury to make that determination.⁶³

B. Evans: Expansion of the Public Policy Exception for Violations of Civil Statutory Law

The most recent decision on the public policy exception by the court of appeals, *Evans v. Taylor Made Sandwich Co.*,⁶⁴ truly expanded the exception. For the first time, the jury recognized a cause of action under the public policy exception for a violation of a civil statutory law in finding for the plaintiffs.⁶⁵ The appellate court affirmed the jury’s determination.⁶⁶

When their employer cut wages without notice, Evans and Eagleton, along with other employees, filed a complaint with the South Carolina Department of Labor reporting a violation of South Carolina’s Payment of Wages Act.⁶⁷ The employees claimed that their employer quoted them one price in a bulletin posted on the workplace wall, a wage calculated per sandwich, but then paid them at a lower rate, a wage calculated per package.⁶⁸ They further testified that their employer threatened to fire employees that complained.⁶⁹ One hour after the completion of the Department of Labor’s investigation, the owner of Taylor Made fired Evans.⁷⁰ However, Taylor Made claimed the dismissal was for excessive absenteeism.⁷¹ Likewise, on her first day back to work after the investigation, the owner of Taylor Made fired Eagleton.⁷² Again, Taylor Made claimed the discharge occurred due to excessive absenteeism.⁷³ Evans and Eagleton, along with a number of co-employees, filed a complaint for wrongful discharge in violation of public policy.⁷⁴

The *Evans* court recognized that the situation was similar to the one presented to the court in *Keiger v. Citgo, Coastal Petroleum, Inc.*⁷⁵ In *Keiger*, the defendant employer cut a waitress’s wages without notice from \$5.00 per

63. *Ludwick* did not clearly state that public policy claims were limited by the contents of state statutes. See *Ludwick*, 287 S.C. at 219, 337 S.E.2d at 213. While courts often look to statutes, *Garner* explicitly suggested that the courts would not limit public policy claims to the situations defined in *Ludwick*. See *Garner*, 318 S.C. 226, 456 S.E.2d at 909. Therefore, when factual disputes arise as to the nature of the public policy exception and its expansion, South Carolina allows the jury to participate in defining the public policy standard.

64. 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999).

65. *Id.* at 102, 522 S.E.2d at 351.

66. *Id.* at 103, 522 S.E.2d at 351.

67. *Id.* at 98, 522 S.E.2d at 351.

68. *Id.*

69. *Id.* at 103, 522 S.E.2d at 352.

70. *Id.* at 98, 522 S.E.2d at 354.

71. *Id.*

72. *Id.* at 98-99, 522 S.E.2d at 351.

73. *Id.*

74. *Id.* at 99, 522 S.E.2d at 351.

75. 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997).

hour to \$3.50 per hour.⁷⁶ Keiger called the South Carolina Department of Labor and found out that the law required notice before an employer can reduce an employee's wages.⁷⁷ She confronted her boss and threatened to turn him in for violations of state (Payment of Wages Act) and federal (Fair Labor Standards Act) laws if he did not remedy the violations.⁷⁸ Instead of correcting the violations, Keiger's boss fired her.⁷⁹ She filed a wrongful discharge claim that the trial court eventually dismissed on a 12(b)(6) motion.⁸⁰ The court of appeals found that this allegation was novel in terms of a violation of public policy and therefore could not be dismissed on a 12(b)(6) motion.⁸¹ The court remanded the case for further proceedings.⁸² The *Evans* court found the distinction between these cases to be that the facts in *Keiger* were not as fully developed as the facts in *Evans*.

Since the facts were sufficiently developed, the *Evans* court looked at the remedies available under the Payment of Wages Act. The court reasoned that while the Act affords a remedy for the lost wages, it does not afford a remedy for wrongful discharge.⁸³ Therefore, the court found that it was up to the jury to determine whether to expand the public policy exception to apply in this case, reasoning "[w]hile the public policy exception applies to an employee who is required to violate criminal law or where an employer's termination of an employee is itself a violation of criminal law, it has never been explicitly applied to the violation of a civil statutory law."⁸⁴ The court further explained:

First, the jury had to determine whether Taylor Made terminated Evans and Eagleton because they had filed a wage complaint with the Department. If the jury concluded the termination was for that reason and was therefore a retaliatory discharge, then they were to determine if such a retaliatory discharge violated public policy Having determined that the terminations were in fact retaliatory, the jury then obviously determined that discharging an employee on those grounds is, and should be, a violation of the public policy of this State.⁸⁵

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Evans*, 337 S.C. at 102, 522 S.E.2d at 353 (finding that these employees, unlike the employees in *Epps* and *Dockins*, did not have a statutory remedy for wrongful discharge).

84. *Id.*

85. *Id.* at 103, 522 S.E.2d at 353 (citations omitted).

The court of appeals found that enough evidence existed to support the jury's verdict and affirmed their decision.⁸⁶

This marks the first real tangible expansion of the public policy exception since *Culler*⁸⁷ and exhibits the courts' willingness to broaden the public policy exception. Furthermore, this decision will likely prompt more wrongful discharge cases dealing with possible violations of public policy, because it shows that more cases are getting to the jury and that tort damages are available.

C. *Stiles: Contracts with Notice Provisions Subject to the Public Policy Exception*

While not expanding the public policy exception per se, *Stiles v. American General Life Insurance Co.*,⁸⁸ the most recent South Carolina Supreme Court case on the topic, expanded the number of at-will situations where an employer may bring a wrongful discharge claim based on a public policy violation. In a certified question from the United States District Court for the District of South Carolina, the supreme court decided whether it considered an employee, subject to a thirty day notice provision in a contract for at-will employment, truly at-will for the purposes of the public policy exception.⁸⁹ Since courts have traditionally considered a contract with a notice provision as employment for a definite term,⁹⁰ the supreme court had to decide whether it would go along with tradition or recognize that this type of contract was sufficiently similar to an at-will contract to trigger the public policy exception.⁹¹ In keeping with its pro-plaintiff attitude, the court decided to allow the claim of wrongful discharge in violation of public policy when a contract with a notice provision was essentially at-will.⁹²

In *Stiles*, the plaintiff and his employer signed two employment agreements containing terms that essentially made him an at-will employee. However, the employment agreement provided for thirty days written notice before termination.⁹³ A few years later, the defendant exercised its power to terminate and provided the requisite thirty days notice to the plaintiff.⁹⁴ The plaintiff then sued the defendant in circuit court for breach of contract and wrongful discharge.⁹⁵ The defendant removed the action to federal court, conducted

86. *Id.*

87. 309 S.C. 243, 422 S.E.2d 91 (1992).

88. 335 S.C. 222, 516 S.E.2d 449 (1999).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 223, 516 S.E.2d at 450.

94. *Id.*

95. *Id.* Plaintiff based the wrongful discharge claim on allegations that the defendant fired him in retaliation for reporting and protesting the employer's illegal actions. *Id.*

discovery, and then moved for summary judgment as to both causes of action.⁹⁶ While the court granted the motion as to the breach of contract claim, it reversed the wrongful discharge claim in order to certify this question to the Supreme Court of South Carolina.⁹⁷

In analyzing the question, the supreme court looked at the characteristics of both employment contracts for a definite term and at-will contracts.⁹⁸ Discussing employment contracts for a definite term, the court explained:

An employment contract containing a notice provision is a contract for a definite term. An employment contract containing a notice provision does not provide for a specific termination date, but is continually in force until notice is given. Once notice is given the employment contract assumes a definite term which is the last day of the notice period. A person hired under an employment contract for a definite term may not be discharged before the completion of the term without just cause. The measure of damages when an employee is wrongfully discharged under a contract for a definite term generally is the wages for the unexpired portion of the term.⁹⁹

Comparing employment at-will contracts to those with a definite term, Justice Toal stated in her concurring opinion that at-will contracts differ in two ways: “(1) there is no fixed period of time; and (2) employers can discharge employees for good cause, no cause, or even cause that is morally wrong.”¹⁰⁰ Thus, an employee has no remedy for termination in an at-will situation unless he can prove one of the two exceptions: handbook modification of his at-will status¹⁰¹ or public policy.¹⁰²

The defendant asserted that the public policy exception was inapplicable because an at-will employee with a contractual notice provision had a remedy for discharge unavailable to a typical at-will employee.¹⁰³ The defense felt that the notice provision gave the at-will employee “a contractual remedy for termination for cause without notice and the right to retain employment for the notice period after receiving notice of termination without cause.”¹⁰⁴ The court disagreed stating “[t]he employee with a notice provision is in the same position as an at-will employee with the only difference being that the

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 224-25, 516 S.E.2d at 450 (Toal, J., concurring) (citations omitted).

100. *Id.* at 227, 516 S.E.2d at 451 (citing *Ludwick*, 287 S.C. at 221-22, 337 S.E.2d at 214).

101. See *Small v. Springs Indus., Inc.*, 300 S.C. 481, 388 S.E.2d 808 (1990).

102. See *Ludwick*, 287 S.C. 219, 337 S.E.2d 213 (1985).

103. *Stiles*, 335 S.C. at 225, 516 S.E.2d at 451.

104. *Id.*

employer is required to give the employee notice prior to terminating employment.”¹⁰⁵ Finding that the extra notice was not a remedy for termination, the court felt that employees at-will and employees at-will with notice provisions were essentially the same in terms of the application of the public policy exception.¹⁰⁶ Accordingly, the court extended the public policy exception to at-will employees with a contractual notice provision, claiming that to hold otherwise would “violate[] the spirit of the public policy exception.”¹⁰⁷

Justice Toal went on to articulate the two goals behind *Ludwick*'s public policy exception: “(1) the vindication of the state’s interest by prohibiting termination in violation of the clear mandate of public policy; and (2) the protection of at-will employees who are often without a remedy when terminated in violation of public policy.”¹⁰⁸ Justice Toal agreed with the majority that the plaintiff’s lack of an alternate remedy was the key to the decision.¹⁰⁹ Justice Toal stated:

If an employer can avoid the possibility of damages associated with a public policy violation by simply giving the employee a written contract with a stated notice period before termination, the public policy exception would become ineffectual at achieving its policy goals In situations where the only protection from termination for reasons which violate public policy is a notice provision, the purposes served by *Ludwick* cannot be achieved through any other means than the application of the public policy exception allowing a suit in tort.¹¹⁰

The *Stiles* court demonstrated its willingness to create new remedies for plaintiffs where none previously existed by the extension of the public policy exception to at-will contracts with notice provisions. In *Ludwick*, the court looked to other jurisdictions before adopting the public policy exception.¹¹¹ Similarly, in *Stiles*, the district court provided cases from other jurisdictions that considered this situation. However, those decisions were split, and the supreme court did not have a clear trend to follow.¹¹² By extending the application of the public policy exception when both sides presented strong

105. *Id.* at 226, 516 S.E.2d at 451.

106. *Id.*

107. *Id.*

108. *Id.* at 228, 516 S.E.2d at 452 (Toal, J., concurring).

109. *Id.* at 226, 516 S.E.2d at 451 (Toal, J., concurring).

110. *Id.* at 229, 516 S.E.2d at 453 (Toal, J., concurring).

111. See *Ludwick*, 287 S.C. at 222, 337 S.E.2d at 214 (listing other jurisdictions not strictly adhering to the at-will doctrine).

112. See *Stiles v. American Gen. Life Ins.*, 994 F. Supp. 712, 715 (D.S.C. 1988).

arguments, the court sent the message that employee's rights and protection are of utmost concern.

V. CONCLUSION

A new trend has developed in the past year in South Carolina courts that signals a broadening of the public policy exception to the at-will employment doctrine. This trend is evidenced through: (1) the denial of 12(b)(6) motions resulting in more jury decisions on the exception; (2) the application of the exception to civil statutory law as well as criminal law; and (3) the exception's use where notice provisions are entered into an essentially at-will employment contract. In short, South Carolina courts may hold employers liable for wrongful discharge in more situations. This, in turn, will spawn more public policy claims. No one can predict with certainty what the courts will do in the future; however, if this trend continues, employers beware!

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