No. 139A02

SUPREME COURT OF NORTH CAROLINA

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TINA KELLY,	)	
	)	
Plaintiff,	)	
	)	From the N.C. Court of Appeals
v.	)	(COA01-468)
	)	From Carteret County
CARTERET COUNTY BOARD OF	)	
EDUCATION, DAVID LENKER, JR.,	)	
RENEE NEWMAN, and JOHN WELMERS,	)	
	)	
Defendants.	)	

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BRIEF AMICUS CURIAE OF
NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

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BRIEF AMICUS CURIAE OF
NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

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The North Carolina Academy of Trial Lawyers submits this brief in support of the plaintiff. In the course of deciding this case, the Court of Appeals inappropriately circumscribed North Carolina's cause of action for wrongful discharge in violation of public policy. Based on Coman v. Thomas Manufacturing Co., Inc., 325 N.C. 172, 381 S.E.2d 445 (1989), Amos v. Oakdale Knitting Company, 331 N.C. 348, 416 S.E.2d 166 (1992), and their progeny, this Court should clarify that the public policy exception is not limited to claims of wrongful termination resulting from an employee's refusal to commit an unlawful act or an act in violation of public policy. The Court should reconfirm that a wrongful discharge in violation of public policy occurs "at the very least" whenever "an employee is fired in contravention of express public policy declarations". Amos v. Oakdale Knitting Company, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992). Because of the danger of misapplication of this case by trial courts and other panels

of the Court of Appeals, it is critical that this Court correct the decision below's erroneously narrow definition of the wrongful discharge cause of action.

ARGUMENT

In assessing the plaintiff's claim for wrongful discharge in violation of public policy, the majority opinion held that "in the context of a claim for wrongful termination in violation of public policy, the injury specially complained of is that an employee was terminated for refusing to perform an act which would violate public policy after being requested to do so." Kelly v. Carteret County, __ N.C. App. __, 560 S.E.2d 390, 391 (2002). The opinion cited Coman v. Thomas Manufacturing Co., Inc., 325 N.C. 172, 381 S.E.2d 445 (1989), as support for this definition of a claim for wrongful discharge. Id.

This Court first adopted the public policy exception to the employment-at-will doctrine in Coman, a case in which the Court allowed an employee to proceed on a wrongful discharge claim when the employee was terminated for refusing to violate state and federal transportation laws. Since Coman, however, the North Carolina appellate courts have consistently recognized that the public policy exception exceeds the scope of the particular facts of Coman.

This Court has never limited the application of the public policy exception to terminations resulting from an employee's refusal to perform an act contrary to public policy. Instead, "wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer's request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy." Ridenhour v. International Business Machines, 132 N.C. App. 563, 568-69, 512 S.E.2d 774, 778 (1999). Even this list, the Court of Appeals has recognized, may be incomplete, as "[t]here is no specific list of what actions constitute a violation of public policy." Id. See also,

Amos, 331 N.C. at 353, 416 S.E.2d at 169 (the Court's definition of public policy "does not include a laundry list of what is or is not injurious to the public or against public good").

Since Coman, the courts have recognized the public policy exception in a host of other factual scenarios. The public policy exception has been applied, for example, to claims resulting from the termination of employees who refused to work for minimum wage, Amos v. Oakdale Knitting Company, 331 N.C. 348, 416 S.E.2d 166 (1992) (public policy set forth in North Carolina's Wage and Hour Act); a employee who was terminated for complaining of illegal behavior of other employees, Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276, disc. rev. denied, 332 N.C. 345, 421 S.E.2d 438 (1992) (public policy based on constitutional free speech rights and employee's compliance with statutory reporting requirements); an employee terminated due to political affiliation, Vereen v. Holden, 121 N.C. App. 779, 468 S.E.2d 471 (1996) (constitutional rights); a nurse who was terminated for recommending a change of treating physicians to a patient's family, Deerman v. Beverly California Corporation, 125 N.C. App. 1, 518 S.E.2d 804 (1999) (public policy based on nursing regulations); and employees who claimed they were fired because of a disability, McCullough v. Branch Banking & Trust Co., 136 N.C. App. 340, 524 S.E.2d 569 (2000) (approving the jury instruction stating, "defendant was not entitled to terminate plaintiff if to do so violated public policy. A public policy violation would occur if a person is terminated from employment substantially because of a qualifying handicap when the person is capable of performing the essential functions of the job, with or without reasonable accommodation."); Simmons v. Chemol Corporation, 137 N.C. App. 319, 528 S.E.2d 368 (2000) (public policy set forth in NCEEPA).

Amos, the first such case this Court decided after Coman, is critical because it established unequivocally that Coman type claims are not limited to terminations resulting from an

employee's refusal to engage in unlawful activity or activity that violates public policy. In Amos, the plaintiffs were fired because they refused to work for less than minimum wage. It goes without saying that it is the employer's legal duty to provide a minimum wage and not the employee's legal duty to earn one. Therefore, it is the employer who violated public policy by insisting on the employees' acceptance of less than minimum wage and not the employees who would have violated the policy by accepting less than minimum wage. The issue to be decided in Amos, therefore, was not whether the employee was required to violate public policy or be terminated, but "whether defendants' alleged decision to fire plaintiffs for refusing to work for less than the statutory minimum wage is injurious to the public or against public policy." Id. at 352, 416 S.E.2d at 168 (emphasis added).

More recently, in Garner v. Retenbach, 350 N.C. 567, 515 S.E.2d 438 (1999), this Court held that a wrongful discharge claim could be based on an employer's violation of this state's Controlled Substance Examination Regulation. The legislature's purpose in enacting that law was to provide procedural requirements for the administration of controlled substances in order to protect individuals "from unreliable and inadequate examinations and screening for controlled substances." Id. According to the ruling in Retenbach, an employer who terminates an employee because of a positive drug test knowingly procured in violation of those regulations would be liable for the employee's wrongful discharge in violation of public policy. Id. at 571-72, 515 S.E.2d at 441. As in Amos, it would be the employer who fails to comply with drug testing requirements and who violates public policy in connection with the employee's termination.

The Court of Appeals' characterization, in this case, of this Court's holding in Coman is simply incorrect because it narrows the scope of Coman in a manner that this Court has never

embraced. The idea that no public policy violation exists unless an employee is terminated for refusing to do something unlawful or in violation of public policy is both unfounded and inconsistent with Amos, Retenbach, and every other case where courts have addressed the issue since Amos. In cases where the employee has been able to point to a statutory or constitutional provision that the employer violated or disregarded with some degree of willfulness by terminating the employee, the exception is always applied. See, e.g., Lorbacher v. Housing Authority of City of Raleigh, 127 N.C. App. 663, 493 S.E.2d 74 (1997) (an employee terminated for exercising free speech rights by making comments to the media). And, even if no specific statutory or constitutional provision applies, an employee can proceed on a claim of wrongful termination if some generally understood public policy of the state is violated by her termination. See, e.g., Caudill v. Dellinger, 129 N.C. App. 649, 656-57, 501 S.E.2d 99, 104 (1998) (recognizing public policy of the state to cooperate with law enforcement investigation).

Should there be any doubt, this Court has already considered and rejected an interpretation of Coman identical to that of the Court of Appeals in this case. In Amos, the defendants argued that, "in order to state a valid claim for wrongful discharge in violation of public policy an employee must either be required to engage in unlawful conduct or the employer's conduct must threaten public safety. 331 N.C. at 353, 416 S.E.2d at 169. The Court of Appeals had agreed that the plaintiffs should have been limited to a statutory remedy because they "had not been required to engage in unlawful conduct and the employer's statutory violation does not threaten the public safety." Amos v. Oakdale Knitting Company, 102 N.C. App. 782, 403 S.E.2d 565 (1991). Admonishing defendants for "read[ing] Coman too narrowly," this Court held that, "at the very least public policy is violated when an employee is fired in contravention of express public policy declarations contained in the North Carolina General

Statutes." Id.

The dissent in this case, although correctly disagreeing with the impossible factual burden the majority placed on the plaintiff, did nothing to clarify the misperception created by the majority that the public policy exception applies only to terminations resulting from employees' refusals to commit behavior that would violate public policy. In fact, the dissent seems to implicitly agree with the majority's narrow reading of Coman but would allow the plaintiff in this case to proceed under that narrow reading. Any holding that limits the application of Coman in this manner is inconsistent with prior case law, is likely to create confusion among trial courts and the Court of Appeals, and should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals.

Dated: May 16, 2002

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF AMICUS CURIAE OF NORTH CAROLINA ACADEMY OF TRIAL LAWYERS on counsel by mailing a copy of the same, by first-class mail, postage prepaid, addressed as follows:

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