MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

CASE NO. 2007-C-00357

FRANK LEE GADDY — APPELLANT

VS.

ITT INDUSTRIES, INC. — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
MONROE COUNTY, MISSISSIPPI
CAUSE NO. CV-04-069-PFM

BRIEF OF THE APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Frank Lee Gaddy, Appellant;
2. Jim Waide, Esq., Attorney for Appellant;
3. Kimla C. Johnson, Esq., Attorney for Appellant;

4. Waide & Associates, P.A., Attorneys for Appellant;

5. ITT Industries, Inc., Appellee;

6. John S. Hill, Esq., Attorney for Appellee;

7. Berkley N. Huskison, Esq., Attorney for Appellee; and

8. Mitchell, McNutt & Sams, P.A., Attorneys for Appellee.

DATED: October 8, 2007.

ITT INDUSTRIES, INC.,
APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the trial judge properly directed a verdict in favor of ITT on the grounds that there was not a scintilla of direct or circumstantial evidence that ITT requested, encouraged or expected the plaintiff to perjure himself in deposition testimony and terminated his employment for his refusal to provide perjured deposition testimony.

STATEMENT REGARDING ORAL ARGUMENT

The determinative issue is clear cut and addressed fully by memoranda of authorities. The appellee submits accordingly that oral argument would not be of benefit.

STATEMENT OF THE CASE

A. Statement of the Proceedings.

On February 17, 2004, Frank Lee Gaddy ("Gaddy") filed a complaint in the Circuit Court of Monroe County, Mississippi seeking actual and punitive damages against ITT Industries, Inc. ("ITT") and Kathy Ray ("Ray"). The claim lodged against ITT was that Gaddy was terminated because he, ". . . had testified truthfully at his deposition and refused to commit perjury for the Defendant ITT." Complaint, Par. XIV, R. 11. The claim lodged against Ray was based on alleged malicious interference with employment relations. Complaint, Par. XVII, R. 11.

By order entered on August 24, 2006, the Circuit Court dismissed Ray from this action with prejudice by summary judgment. R. 20. The court denied ITT's summary judgment motion and the case went forward to trial beginning January 29, 2007. At the close of Gaddy's case in chief the Circuit Court granted ITT's motion for directed verdict, T. 204-05, and final judgment in favor of ITT was filed on February 15, 2007. R. 21-22. Gaddy timely filed a notice of appeal of the final judgment entered in favor of ITT. R. 23.

B. Statement of the Facts.

In 2003 Gaddy was employed at ITT as the night shift supervisor at ITT's Amory, Mississippi plant. T. 48. In the last quarter of 2002 and throughout 2003 ITT's Amory plant was in a contingency mode, with hirings on hold and reduction

in force layoffs ongoing. Gaddy was well aware of these circumstances. T. 127-30. In late October of 2003 ITT's Amory plant was advised that additional reductions in force were necessary. Pursuant to that directive additional terminations were effectuated at ITT's Amory plant including Gaddy on November 10, 2003.[1]

Gaddy nonetheless claims that his termination was because he refused to provide perjured deposition testimony in regard to a workers' compensation claim filed by ITT employee Johnny Walden ("Walden"). The lynchpin of Gaddy's lawsuit against ITT accordingly is that he was terminated because he refused to testify falsely at his deposition that Walden had not reported an on the job injury to him on January 14, 2003. Complaint, Par. XIV, R.11.

On January 14, 2003, Walden was a night shift employee at ITT's Amory, Mississippi plant. Gaddy was his supervisor. Sometime that evening Walden advised Gaddy and other night shift employees that he had injured his back in the course and scope of his employment but that he did not desire medical attention that evening. T. 58-59, 109-10. Gaddy did not see the accident occur. T-110, 122.

Gaddy testified that the following day, January 15, 2003, Walden called and advised Gaddy that he wanted to take a couple of vacation days. Gaddy reported

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[1] While not part of the appeal record because of the directed verdict, ITT's proof would have shown that at a facility with less than one hundred employees in 2002 five employees were laid off at its Amory plant and in 2003 six more were laid off as part of a reduction in force.

all of this to Ray, ITT's human resource manager. T. 110. Gaddy testified further that Ray then asked him whether Walden wanted to be off work because of his back injury that he had suffered at work the night before or for something else, and Gaddy advised her that he did not know. In Gaddy's presence Ray then called Walden and, according to Gaddy, asked Walden whether he was missing work because of a work related injury. And while Gaddy did not hear Walden's response, he admitted that he has no reason to challenge Ray's statement that Walden advised her that he did not at that time want to pursue a workers' compensation claim. T. 110-15.

Gaddy testified further that Ray questioned other second shift employees who also advised her that Walden reported to them that he had injured his back at work on the evening of January 14, 2003. T. 110-11.

Walden later filed a workers' compensation claim alleging a lower back injury which was subsequently amended to assert a cervical claim. Gaddy testified that between January 15, 2003, and giving deposition testimony in Walden's workers' compensation matter on October 29, 2003, he had only a few conversations pertinent to Walden's claim with Ray. He testified that Ray advised him that she thought the reason Walden had not sought medical attention on the night of his injury at ITT was that he likely would have tested positive for drugs

and been subject to termination[2] and that she questioned the severity of Walden's injuries. T. 115-17.

Gaddy testified further that Ray never told him that she thought Walden had not been injured on the job and in fact testified, ". . . that she [Ray] felt that he [Walden] got hurt on the job." T. 119.

Gaddy related a meeting with Taylor Smith ("Smith"), the attorney representing ITT in Walden's workers' compensation claim, and Ray prior to his deposition in the Walden matter and that he advised Smith and Ray that the only thing he knew was that Walden had reported the accident to him and that he had reported it to Ray. T. 121-22. He testified that neither Smith, Ray nor anyone else at ITT asked him to testify any differently than this or otherwise suggested that this testimony would be inappropriate. T. 120-21.

Based on all of this Gaddy agreed that Ray could not have been surprised when he testified at his deposition that Walden had reported a work related injury to him on the evening of January 14, 2003, and agreed that in fact Ray would have been stunned had he testified any differently. T. 122-23.

Ray also gave deposition testimony in Walden's workers' compensation case and testified in response to examination by Walden's attorney that Gaddy had indeed reported Walden's work related injury of the preceding evening to her on

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[2] Walden had a history of drug abuse, a fact known by both Gaddy and Ray. T. 53, 115.

January 15, 2003. T. 139-42. Ray therefore corroborated the testimony that Gaddy claims resulted in his termination and Gaddy himself agreed as follows:

> Q. . . . . But twice she [Ray] was asked pointblank whether you had reported Johnny Walden's accident to her, and she said yes. Correct?
> A. Right.
> Q. So they didn't even need your testimony. They had hers that you had made the report to her. Correct?
> A. Right.
> Q. So the thing that you were supposedly terminated about, i.e., saying that you had reported the accident to Kathy Ray, she admitted. Correct?
> A. Right.

T. 142, L. 8-21.

SUMMARY OF THE ARGUMENT

The sole basis on which Gaddy seeks recovery against ITT is his claim to have been terminated for refusing to give perjured deposition testimony in contravention of *McArn v. Allied Bruce-Terminix Co. Inc.*, 626 So. 2d 603 (Miss. 1993). He alleges specifically that he was terminated because he refused to deny that Walden reported a work related injury to him on the evening of January 14, 2003.

There is not a scintilla of evidence to support his claim in this respect. Gaddy himself admitted that Ray corroborated his testimony that Walden reported the January 14, 2003, accident to Gaddy at her deposition in Walden's workers' compensation case. Ray testified unequivocally in response to questions by Walden's counsel that Gaddy had in fact advised her on January 15, 2003, that Walden had reported injuring himself the preceding evening.

Gaddy's entire case then rests on his assertion that he was terminated for giving precisely the same testimony given by one of the original party defendants to this action. His claim defies logic and as recognized by the circuit judge, ". . . there is not a scintilla of direct or circumstantial evidence, . . . , to support Mr. Gaddy's claim that he -- that the defendant, ITT, requested, encouraged or expected him to perjure himself in his deposition testimony." T. 205.

The trial judge therefore properly granted ITT's motion for a directed verdict.

STANDARD OF REVIEW

The Appellant notes correctly that in considering the propriety of a directed verdict the Court should consider the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all favorable inferences. But the law also provides that this is true unless the evidence is so lacking that a reasonable jury could not find for the plaintiff. *See, Zinn v. City of Ocean Springs*, 928 So.2d 915 (Miss. App. 2006).

ARGUMENT

THERE IS NO EVIDENCE TO SUPPORT GADDY'S CLAIM THAT HIS ALLEGED REFUSAL TO PROVIDE PERJURED TESTIMONY AT HIS DEPOSITION RESULTED IN HIS TERMINATION. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF ITT.

Gaddy did not have a written employment contract with ITT and therefore under long and well-established Mississippi law was an employee at will. *See, Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086, 1088 (Miss. 1987). His employment accordingly could be terminated by either party at any time, "for any reason or no reason at all," so long as the reason has not been declared legally

impermissible.[3] *See, e.g. Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So.2d 25, 26 (Miss. 2003); *Shaw v. Burchfield*, 481 So.2d 247, 254 (Miss. 1985).

Gaddy seeks to travel here under the illegal act exception which states that an employee may recover civilly for wrongful termination when he or she refuses to participate in an illegal act or reports an illegal act, and this forms the basis for the employee's termination. *McArn v. Allied Bruce-Terminix Co. Inc.*, 626 So. 2d 603 (Miss. 1993). Assuming arguendo that alleged refusal to provide perjured testimony in a civil action falls within this exception,[4] Gaddy offers nothing to support his claim that his deposition testimony in the Walden workers' compensation matter led to his termination.

Gaddy's deposition in the Walden matter lasted 13 minutes. T. 127. He testified repeatedly at the trial of this action that the only thing he knew was that Walden had reported the work related accident to him and that he had reported it to Ray. T. 121-22. He now claims that he was terminated for refusing to refute this in deposition testimony despite his recognition that other second shift employees

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[3] While not part of the appeal record because of the directed verdict, ITT personnel testified extensively in deposition that as night shift supervisor over only eight employees Gaddy's position was thought to be the most expendable and despite considering other potential options it became apparent that Gaddy was the supervisor to be laid off in the continuing reduction in force.

[4] Gaddy offers no authority to support this position, instead citing authority that refusal to testify could have resulted in Gaddy being held in contempt of court which might be construed as an illegal act falling within the *McArn* exemption. ITT will not address that issue since there is no proof that Gaddy's alleged refusal to provide perjured deposition testimony led to his termination.

also told Ray that Walden had reported a work related incident on the evening of January 14, 2003, T. 110-11, and Ray's own deposition testimony in the Walden matter in which she readily admitted that Gaddy told her on January 15, 2003, of Walden's reported injury the preceding evening. T. 139-42.

Gaddy himself testified that not only did neither Taylor Smith, Ray or anyone else at ITT ask him to give perjured testimony, no one at ITT suggested that his testimony should be any different or took any coercive action. T. 120-21.

Gaddy's attempt to insert innuendo as credible circumstantial evidence to support his position is weak and ineffectual. He argues first that ITT expressed "an adverse opinion about the worker." Appellant's Brief, p. 12. The only testimony Gaddy gave in that respect was his statement that Ray felt that Walden was not injured as seriously as he claimed. T. 116-17. This is likely true of nearly every controverted workers' compensation claim and falls far short of corroborating circumstantial evidence that Gaddy was fired for giving testimony consistent with Ray's own testimony that Walden had reported a work related injury.

Gaddy next seeks to make much of Ray "shaking her head during Gaddy's deposition." Appellant's Brief, p. 12. But as pointed out during Gaddy's cross-examination, Walden had testified in his deposition that the January 15, 2003, telephone conversation between Walden and Ray had not occurred. Gaddy could have corroborated Ray's testimony in this respect. T. 125-27. Assuming arguendo

that Ray was disappointed with any of Gaddy's testimony, it logically can be assumed that it was his failure to corroborate the occurrence of the January 15, 2003, telephone conference between Ray and Walden as opposed to his giving testimony that Ray herself verified.

The other circumstantial proof on which Gaddy seeks to rely is a statement by someone at ITT that Gaddy was "at the wrong place at the wrong time" and that his job performance was not the reason for his discharge. Appellant's Brief, p. 12. As noted in footnote 3, Gaddy's job performance was not the reason for his discharge and as night supervisor over approximately eight employees during an ongoing reduction in force, he likely was "at the wrong place at the wrong time."

Finally, Gaddy seeks to rely on a temporal link between the dates of his deposition testimony and termination by citing two decisions involving Title VII retaliation claims where there was evidence that the employee/plaintiff had engaged in protected activity and had suffered an adverse employment action. With those two elements established, those decisions provide only that a close temporal connection between the protected activity and the adverse employment action can be considered to be indirect evidence of a causal link, but to go forward the plaintiff must show further that the legitimate, non-discriminatory explanation for the adverse action offered by the employer was merely a pretext. *See, Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993).

Absent even a colorable *McArn* exception to Mississippi's at will doctrine there is no protected activity and Gaddy's proof of a *McArn* exception is wholly non-existent. Absent the protected activity the temporal link sought to be established by Gaddy is irrelevant.

Gaddy's own testimony eviscerates his claim against ITT. Gaddy himself admitted that the very matter on which he allegedly refused to commit perjury was admitted by Kathy Ray who was originally named as a party defendant to this action. He wholly fails to explain the dichotomy of his claim to have been terminated for giving the same testimony that an original party defendant gave in her deposition and he fails in this respect because it cannot be explained.

The trial judge was absolutely correct in directing a verdict for ITT. There is nothing whatsoever on which a jury could have based a verdict in favor of Gaddy against ITT.

CONCLUSION

Gaddy was an at will employee of a company in a contingency mode. Along with other employees at the ITT Amory plant he lost his job in 2003. Gaddy claims that he was terminated in retaliation for refusing to commit perjury regarding a matter that was admitted to by ITT's personnel manager -- whether Walden reported a work related claim to Gaddy on the evening of January 14, 2003.

That consideration being a non-issue in the Walden matter, Gaddy's present claim defies all logic and is wholly unsupported by the evidence.

DATED: October 8, 2007.

ITT INDUSTRIES, INC., APPELLEE

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CERTIFICATE OF SERVICE

This is to certify that I, John S. Hill, one of the attorneys for the Appellee ITT Industries, Inc., have this day filed with the Clerk of the Court a true and correct copy of the above and foregoing Brief for Appellee, as well as a Portable Document Format (PDF) file on a 3.5 inch disk containing same, via United States Mail, to the following parties at their usual addresses:

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Honorable Paul S. Funderburk
Circuit Judge
Post Office Drawer 1100
Tupelo, MS 38802-1100

DATED: October 8, 2007.

JOHN S. HILL