MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-CA-00357

FRANK LEE GADDY

APPELLANT

VERSUS

ITT INDUSTRIES, INC.

APPELLEE

APPELLANT'S MOTION FOR REHEARING

JIM WAIDE
MISSISSIPPI BAR NUMBER [redacted]

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STATEMENT OF THE ISSUE

Whether the trial court gave an overly restrictive interpretation to the public policy exception to the employment at-will doctrine announced in *McArn v. Allied-Bruce Terminix, Inc.*, 626 So.2d 603 (Miss. 1993).

STATEMENT OF THE CASE

On February 12, 2004, Frank Gaddy filed his complaint alleging he had been fired from his position as a plant foreman because he gave truthful deposition testimony on behalf of an injured worker in a Workers' Compensation case. R. 8-12.

On February 8, 2007, following the close of Gaddy's proof, the circuit court granted Defendant's motion for directed verdict. T. 204-05. Final Judgment, R. 21-22.

On appeal, this Court affirmed per curiam. Appendix 1.

STATEMENT OF THE FACTS

Accepting as true all evidence favorable to the non-moving party and all inferences flowing therefrom, *Lynch v. State*, 877 So.2d 1254 (Miss. 2004), the facts are:

While working as a supervisor on the night shift, Plaintiff/Appellant Frank Gaddy ("hereinafter "Gaddy") supervised Johnny Walden (hereinafter "Walden"). Tr. 52-53. On January 14, 2003, Walden reported to Gaddy that he had injured his back lifting some gates. Tr. 57. According to Gaddy, when Walden finished his shift, he (Gaddy) observed Walden appearing to be in physical discomfort. R. 58-59.

Gaddy reported the injury to Kathy Ray (hereinafter "Ray"), ITT's director of human resources. Tr. 59-60. Ray responded to Gaddy that Walden had refused to go

to the doctor because he knew that if he did he would fail a drug test and be fired. Ray further told Gaddy that Walden was not hurt at work, and that Gaddy should not talk with Walden. Tr. 88. Thereafter, Ray continued to say Walden "didn't get hurt on the job, that he was faking ..." Tr. 65.

Gaddy was called into a meeting with Ray and the employer's attorney, Taylor B. Smith, in order to prepare for an upcoming deposition. In the meeting, Gaddy perceived that he was being pressured to testify in accordance with Ray's beliefs that Walden did not get hurt on the job, Tr. 65-66, Gaddy refused to agree with this opinion, and told the personnel director and the company attorney that "[a]ll [Walden] was asking for is to get fixed and get back to work." Tr. 66.

Five days after this meeting, Gaddy gave his deposition. In the deposition, Gaddy reaffirmed that the worker had reported being injured on the job. Tr. 73. During his testimony, Gaddy observed Ray having adverse facial reactions to what he was saying. Gaddy described Ray as "rolling her eyes up, making faces, and shaking her head ... she didn't believe I was answering the questions that way ..." *Id.* Her gestures caused Gaddy to believe that "the answers that [Gaddy] was giving was not what [Ray] was wanting him to say." Tr. 16.

After Gaddy gave his deposition, Gaddy "really felt like [he] was going to lose [his] job over [his testimony]." Tr. 74. When Gaddy told Ray that he hoped "what

I said today don't (sic) cost me my job," Id., Ray did not disagree with that opinion but only told him that Gaddy "had his opinion" about the worker and she (the human resources manager) "had her opinion." *Id.*

Gaddy also talked with the plant manager (Steele) about his belief that he was about to be fired because of his deposition. Steele replied that "he couldn't say for sure it wouldn't" cause him to be fired. Tr. 75.

On November 10, 2003, less than two weeks after Gaddy gave his deposition, he was called into a meeting with the plant manager (Steele) and human resources manager (Ray). Gaddy was told that things were slow and he would be laid off. However, Steele also commented that the termination "had nothing to do with [Gaddy's] work." Tr. 77. Additionally, Ray told Gaddy that he was being fired because he was "at the wrong place at the wrong time." *Id.*

ARGUMENT

THE TRIAL COURT AND THE PANEL OF THIS COURT GAVE AN OVERLY RESTRICTIVE INTERPRETATION TO THE PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT AT-WILL DOCTRINE ANNOUNCED IN *McARN V. ALLIED-BRUCE TERMINIX, INC.*, 626 SO.2D 603 (MISS. 1993).

In directing a verdict, Lee Circuit Judge Paul Funderburk stated:

> The Court, having heard all the evidence offered on behalf of the Plaintiff, is of the opinion that the Plaintiff has established beyond any and all doubt that Mr. Gaddy was a good, decent man, and that he was

> an outstanding supervisor at ITT. I don't think anyone at ITT would, or even attempt to, dispute that fact...However, there is not a scintilla of direct or circumstantial evidence, in the Court's opinion, 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. 204-05.

This opinion gives an overly restrictive view both of the evidence in this case and of the public policy exception to the employment at-will doctrine, announced in *McArn v. Allied-Bruce Terminix, Inc.*, 626 So.2d 603 (Miss. 1993).[1] In the first place, the circuit judge's opinion conflicts with settled law on the evidence sufficient to prove an employment discrimination case. It was not necessary that ITT admit it was firing Gaddy because he gave a truthful deposition. As the United States Court of Appeals for the Fifth Circuit explained in *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985). "Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped

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[1] *McArn* holds:

> We are of the opinion that there should be in at least two circumstances, a narrow public policy exception to the employment at will doctrine and this should be so whether there is a written contract or not: (1) an employee who refuses to participate in an illegal act as in *Laws* shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; ...

626 So.2d at 607.

down the cherry tree." *Id.* at 638. Accordingly, a jury may base its verdict in an employment discrimination case on circumstantial evidence. There is no requirement that an employer actually admit that an illegal motivation caused the discharge. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Indeed, "[c]ircumstantial evidence is not only sufficient, but may be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). In deciding whether there is sufficient evidence, the court must give the non-moving party "benefit of all favorable inferences that reasonably may be drawn." *Tharp v. Bunge Corp.*, 641 So.2d 20, 23 (Miss. 1994).

A rational jury could might well infer that because of Gaddy's outstanding work record, he would not have been the supervisor chosen for a "lay off." Because of the comments made by the human resource manager and plant manager, a jury may find the real reason Gaddy was fired was that he gave a truthful deposition with which the employer did not agree.

The circuit court apparently believed that this case did not come within the *McArn* Doctrine since there was no evidence that Gaddy was ever actually told that he should lie in his deposition.[2] The circuit judge was of the view that firing Gaddy merely because he gave truthful testimony is not a violation of *McArn*. This is

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[2] Presumably, everyone would agree that directing Frank Gaddy to lie in his deposition would be within the public policy exception since public policy forbids firing an employee because he refuses to commit a criminal act. See *McArn v. Allied Bruce Terminix Co.*, 626 So.2d 603, 607 (Miss. 1993).

inconsistent with *Drake v. Advance Const., Inc.*, 117 F.3d 203 (5th Cir. 1997). *Drake* held that it violates public policy to fire an employee because he "filed accurate reports describing the deficiencies" in certain government work. The court said that had he filed false statements, this would have violated federal criminal statutes[3] which prohibit the giving of false statements in a material matter to a government agent. Similarly, giving false testimony would violate the Mississippi perjury statute.[4] To hold that a person may be fired for giving truthful deposition testimony is not consistent with *McArn*, as interpreted in *Drake*.

Our entire justice system depends upon truthful testimony. What is the point of having courts if witnesses who appear before them may be coerced into giving false testimony? Firing an employee because he gives a truthful deposition poses a similar threat to the judicial system, as does actually telling a witness to lie. If citizens learn that they will be fired if they give truthful testimony at depositions, perjury is encouraged. See *Petermann v. International Broth. of Teamsters*, 174 Ca.App.2d 184, 189 (Ca. App. 1959) ("The public policy of this state ... would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury");*DeRose v. Putnam Management Company*, 398 Mass.

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[3] 18 U.S.C. § 1001, et seq.

[4] Miss. Code Ann. § 97-9-59.

205, 210, 496 N.E.2d 428 (Mass. 1986) (affirming jury verdict that employer wrongfully discharged employee in violation of public policy for failing to implicate another employee at a criminal trial as directed by employer).

CONCLUSION

The motion for rehearing should be granted and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a WP 3.5 disk to the following:

John Hill, Esq.
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P. O. Box 7120
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Honorable Paul Funderburk
Circuit Court Judge
P.O. Box 1100
Tupelo, MS 38802-1100

THIS the 1st day of May, 2008.

JIM WAIDE

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-CA-00357

FRANK LEE GADDY

APPELLANT

VERSUS

ITT INDUSTRIES, INC.

APPELLEE

APPENDIX I

ORAL ARGUMENT REQUESTED

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April 17, 2008

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 17th day of April, 2008.

Supreme Court Case # 2007-CA-00357-SCT
Trial Court Case # CV-04-069-PFM

Frank Lee Gaddy v. ITT Industries, Inc.

Per Curiam Affirmance. Appellant taxed with costs of appeal.

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