NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0737-20

HEATHER J. MCVEY,

Plaintiff-Appellant,

v.

ATLANTICARE MEDICAL SYSTEM INCORPORATED, and GEISINGER HEALTH SYSTEM INCORPORATED,

Defendants-Respondents.

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APPROVED FOR PUBLICATION

May 20, 2022

APPELLATE DIVISION

Argued May 9, 2022 – Decided May 20, 2022

Before Judges Haas, Mitterhoff and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-3186-20.

Louis M. Barbone argued the cause for appellant (Jacobs & Barbone, PA, attorneys; Louis M. Barbone, on the brief).

Jennifer B. Barr argued the cause for respondents (Cooper Levenson, PA, attorneys; Russell L. Lichtenstein and Jennifer B. Barr, on the brief).

The opinion of the court was delivered by

HAAS, P.J.A.D.

The issue raised in this appeal is whether the First Amendment or Article I, Paragraph 6 of the New Jersey Constitution prevents a private employer from terminating one of its at-will employees for posting racially insensitive comments about the Black Lives Matter movement on her personal Facebook account. Defendants AtlantiCare Medical System Incorporated and Geisinger Health System Incorporated (AtlantiCare) employed plaintiff Heather J. McVey as a Corporate Director of Customer Service. During the height of the nationwide protests concerning the murder of George Floyd by police in Minnesota, McVey posted that she found the phrase "Black Lives Matter" to be "racist," believed the Black Lives Matter movement "causes segregation," and asserted that Black citizens were "killing themselves." McVey's Facebook profile prominently stated she was an AtlantiCare Corporate Director. After it discovered the comments, AtlantiCare fired McVey and she filed a complaint alleging wrongful discharge. The trial court concluded that the First Amendment and Article I, Paragraph 6 of the New Jersey Constitution did not bar a private employer from terminating an at-will employee and dismissed McVey's complaint. For the following reasons, we affirm.

I.

McVey began working as a nurse at AtlantiCare in 2005. She was an at-will employee. AtlantiCare promoted McVey several times during her career

and eventually she assumed the position of Corporate Director of Customer Service.

AtlantiCare had a written social media policy that covered its employees' use of social media controlled by AtlantiCare, as well as the employees' personal social media platforms. The policy stated:

> While AtlantiCare encourages physicians and staff to participate in communication through online social media, it is important for those who choose to do so to understand what is recommended, expected[,] and required when they discuss AtlantiCare-related topics, whether at work or, under certain circumstances, on their own time. AtlantiCare employee use of social media [a]ctivities, inside or outside of the workplace, has the potential to affect AtlantiCare employee job performance, the performance of others, AtlantiCare's brand and/or reputation, and AtlantiCare's business interests.

The policy further explained that each employee was "personally responsible" for the content they posted on social media.

The policy advised employees:

> Be aware of your association with AtlantiCare. When you identify yourself publicly as being employed by/and or affiliated with AtlantiCare, ensure your profile and related content is consistent with how you wish to present yourself with colleagues and clients. Proper identification includes your name and, when relevant, your role at AtlantiCare.

The policy also stated:

> When using social media to publicly post a communication[,] respect your audience and your coworkers. AtlantiCare physicians, staff, volunteers, vendors, customers[,] and partners reflect a diverse set of customs, values[,] and points of view. Do not be afraid to be yourself, but do so respectfully. This includes the obvious (no ethnic slurs, personal insults, obscenity[,] etc.) but also proper consideration of privacy and of topics that may be considered objectionable or inflammatory—such as politics and religion. . . .

McVey was a member of Facebook, a social networking website, and maintained a personal account. McVey's profile listed her name as "Jayne Heather," but included her photograph. The profile prominently stated she was a "Corporate Director at Atlanti[C]are Regional Medical Center," and also listed her former position as an AtlantiCare nurse.

On May 25, 2020, a police officer killed George Floyd, a Black man, while taking him into custody in Minneapolis, Minnesota. In demonstrations that drew millions of participants in cities across the country and abroad, protestors mourned the death of Floyd and other victims of police violence and called for law enforcement reform.

In the midst of these protests, McVey participated in a Facebook discussion of the Black Lives Matter movement. This movement was "founded in 2013 to end white supremacy and support Black communities. . . . The name BLACK LIVES MATTER functions as a declaration that Black

people's lives have as much value as white people's lives, and as a call to end systems and practices that challenge this fact." BLACK LIVES MATTER, MERRIAM-WEBSTER (2022), https://www.merriam-webster.com/dictionary/Black%20Lives%20Matter.

Another Facebook member posted a question: "Do you believe the phrase 'Black Lives Matter' is racist, or does it bother you in any way? If so, why? (Feel free to D[irect] M[essage] me, not tryin[g] to argue[,] just seeking to understand)[.]" In response, McVey wrote: "Yes, I find it racist. Yes[,] it bothers me. 'Black lives' matter causes segregation. Have you ever hear[d] of 'white lives' matter or '[J]ewish' lives matter[?] No. Equal opportunity."

The other Facebook member posted "that '[B]lack [L]ives [M]atter' is bringing attention to the plight of [B]lack folks in America. That they're dying. And they'd like support, not at the exclusion of the other groups you mentioned, but simply to include them in the respect and dignity supposedly afforded to everybody in this country." McVey responded: "[T]hey are not dying . . . they are killing themselves." McVey later wrote that she "support[ed] all lives . . . as a nurse they all matter[,] and [she] d[id] not discriminate." McVey added she did "not condone the rioting that ha[d] occurred in response to 'this specific [B]lack man[']s death.'"

An AtlantiCare administrator discovered McVey's Facebook posts. On June 17, 2020, an AtlantiCare Vice President called McVey to discuss her remarks. McVey acknowledged the posts and discussed some of their content. The Vice President told her, "[it] was bad[,]" and AtlantiCare suspended McVey that same day pending an investigation.

On June 23, 2020, AtlantiCare's Senior Vice President of Administrative Services and the Chief Administrative Officer met with McVey. After McVey revealed she was recording the conversation, "the meeting ended and plaintiff was terminated." AtlantiCare told McVey the firing was due to her "repeated instances of poor management judgment – a failure to uphold AtlantiCare values."[1]

McVey later filed a one-count complaint against AtlantiCare and alleged her "termination . . . was punishment for [her] exercise of those rights protected by the free speech amendment and the equivalent entitlement under the New Jersey Constitution." Based upon her allegation that she was wrongfully discharged from her position "in direct violation of a clear mandate of New Jersey [p]ublic [p]olicy[,]" McVey sought "compensatory,

[1] At oral argument on its motion to dismiss McVey's complaint, AtlantiCare's attorney stated that AtlantiCare terminated McVey "because she posted on her social media a clearly racist dog whistle post, which was inconsistent with the vision and the mission and the core values of AtlantiCare."

consequential, and punitive damages[,]" and reinstatement to her former position.

AtlantiCare filed a motion to dismiss, arguing that a wrongful termination complaint against a private employer cannot be based on a constitutional free speech claim in cases where, as here, there is no state action. Following argument, the trial court rendered an oral decision, accepting AtlantiCare's contention and dismissing McVey's complaint.

In support of its decision, the court relied upon multiple out-of-state precedents, as there are no New Jersey cases directly on point. See Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893, 896, 899 (Ct. App. 2004) (finding there was no state action where a private employer fired an employee for participating in what the employer believed was an illegal pyramid scheme); Edmondson v. Shearer Lumber Prod., 75 P.3d 733, 739 (Idaho 2003) ("[A]n employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's constitutional right of free speech"); Petrovski v. Fed. Express Corp., 210 F. Supp. 2d 943, 948 (N.D. Ohio 2002) (holding that without state action, a state or federal constitutional provision guaranteeing free speech cannot be the basis of a public policy exception for a wrongful discharge claim); Prysak v. R.L. Polk Co., 483 N.W.2d 629, 634 (Mich. Ct. App. 1992)

(concluding that a private discharge was not state action because private actors are not bound by constitutional provisions guaranteeing free speech). The court also noted that the New Jersey Legislature had not created a cause of action that subjects private employers to liability for discharging an employee for the exercise of protected First Amendment speech, as the Connecticut Legislature had in Conn. Gen. Stat. Ann. § 31-51q (West 2022). Under these circumstances, the court found that McVey could not assert a wrongful discharge claim against her private employer.

II.

On appeal, McVey argues the trial court erred by dismissing her appeal because her discharge was contrary to a clear mandate of public policy set forth in the First Amendment of the United States Constitution[2] and its counterpart in the New Jersey Constitution.[3] We review de novo a trial court's decision to dismiss a complaint for failure to state a claim. Teamsters Local 97 v. State, 434 N.J. Super. 393, 413 (App. Div. 2014). We owe no deference

[2] The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

[3] This provision states: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, ¶ 6.

to the trial court's conclusions of law. Rezem Fam. Assocs. L.P. v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011). Our decision is governed by the same standards as applied by the trial court. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005).

"Under the common law, in the absence of an employment contract, employers or employees [were] free to terminate the employment relationship with or without cause." Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 65-66 (1980). "However, starting in 1959, courts across the country began to hold that firing an employee for 'bad cause' might be actionable." Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 88 (1992). In Pierce, the Court held that wrongful discharge cases "must balance the interests of the employee, the employer, and the public." 84 N.J. at 71. "Employees have an interest in knowing they will not be discharged for exercising their legal rights[,]" while "[e]mployers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy." Ibid. For its part, "[t]he public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees." Ibid.

As the law in this area has developed, "[i]n most cases of wrongful discharge, the employee must show retaliation that directly relates to an employee's resistance to or disclosure of an employer's illicit conduct."

MacDougall v. Weichert, 144 N.J. 380, 393 (1996). See, e.g., Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 190-92 (1988) (sustaining the plaintiff's claim she was terminated due to either employment discrimination or retaliatory discharge, either of which would "violate[ ] clearly mandated public policy[,]" where plaintiff "was passed over for promotion in favor of less-qualified male candidates and . . . was fired because she sought to examine her personnel records to establish a gender discrimination claim"). "In some cases, however, the employee may show that the retaliation is based on the employee's exercise of certain established rights, violating a clear mandate of public policy." MacDougall, 144 N.J. at 393. See also Lally v. Copygraphics, 85 N.J. 668, 670 (1981) ("[A] plaintiff has a common law right of action for wrongful discharge based upon an alleged retaliatory firing attributable to the filing of a workers' compensation claim").

However, "more is needed than simply the breach of public policy affecting a single person's rights to constitute the breach of a 'clear mandate' of public policy that Pierce requires[,]" because "[d]etermining public policy is a matter of weighing competing interests." Hennessey, 129 N.J. at 99. "[T]he mandate of public policy [must] be clearly identified and firmly grounded[,]" MacDougall, 144 N.J. at 391, and "must be one that on balance is beneficial to the public." Hennessey, 129 N.J. at 100. "A vague, controversial, unsettled,

and otherwise problematic public policy does not constitute a clear mandate[,]" and "[i]ts alleged violation will not sustain a wrongful discharge cause of action." MacDougall, 144 N.J. at 392.

Sources of public policy include "legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy." Pierce, 84 N.J. at 72. In Hennessey, the Court found that although the New Jersey Constitution "may" constitute public policy, it did not do so in that case, where the employee was fired for failing a random drug test. 129 N.J. at 100-02. The Court found that the employee's constitutional right to privacy was not violated when the company required the employee to take a random drug test. Id. at 94-96, 107. Balancing the employee's right to privacy against the public policy of keeping the public safe when the employment involved working on a dangerous oil rig, the Court found that public safety outweighed the employee's constitutional right to privacy in that case. Id. at 104-07.

McVey argues that she had the right to make her remarks about the Black Lives Matter movement under the United States and New Jersey Constitutions. Even though this right was not absolute in light of our Supreme Court's decision in Hennessey, she asserts that, on balance, her right to speak

her mind outweighed AtlantiCare's right to promote an inclusive, non-divisive environment for its clients and employees. We disagree.

The question posed here is whether the First Amendment of the United States Constitution or Article I, Paragraph 6 of the New Jersey Constitution reflects a clear mandate of public policy that prohibits McVey's termination. "Because our State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide [our] analysis." E & J Equities, Ltd. Liab. Co. v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 568 (2016) (quoting Twp. of Pennsauken v. Schad, 160 N.J. 156, 176 (1999)).[4]

Under federal law, constitutional rights can be violated only if there is state action. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n., 192 N.J. 344, 356 (citing Marsh v. Alabama, 326 U.S. 501 (1946)).[5] There is no state action present in this case. AtlantiCare is a private employer

[4] Nevertheless, the Supreme Court has acknowledged that New Jersey's right to free speech is "more sweeping in scope than the language of the First Amendment." Ramos v. Flowers, 429 N.J. Super. 13, 25 (App. Div. 2012) (quoting State v. Schmid, 84 N.J. 535, 557 (1980)).

[5] However, in limited circumstances not applicable here, New Jersey courts have held that constitutional rights can be enforced against private entities. Two exceptions to this general rule "are political expressions at privately-owned-and-operated shopping malls, New Jersey Coal. v. J.M.B., 138 N.J. 326[, 357] (1994), and defamation, Sisler v. Gannett Co., 104 N.J. 256, 271[] (1986)." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 265 (1998).

and terminated McVey, who was an at-will, private employee. No New Jersey court has held that a private entity that encroaches upon a private individual's constitutional rights to free speech has violated a clear mandate of public policy within the intendment of the Pierce and Hennessey paradigm.

In addition, the majority of courts that have examined this issue in other jurisdictions have precluded a private employee's Pierce claim based on a private employer's alleged infringement of free speech. Petrovski, 210 F. Supp. 2d at 948 (observing that the "prevailing view among the majority of courts addressing the issue is that state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims."). As already noted, the trial court cited a number of these decisions in support of its determination that McVey's claim could not proceed. There are numerous other decisions from around the country similarly holding that, absent specific statutory employee protection or state action, an employer does not violate a clear mandate of public policy by terminating an employee for the employee's speech.[6] Indeed, McVey does not point to any contrary legal authority.

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[6] See, e.g., Sharp Corp. v. Hisense USA Corp., 292 F. Supp. 3d 157, 179 (D.D.C. 2017); Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356-57 (Ill. 1985); Bleich v. Florence Crittenton Servs. of Baltimore, Inc., 632 A.2d 463, 469 (Md. Ct. Spec. App. 1993); Johnson v. Mayo Yarns, Inc., 484 S.E.2d 840,

Under these circumstances, we affirm the trial court's determination that because McVey is a private employee who was terminated by her private employer, she cannot rely upon the freedom of speech provisions of the United States and New Jersey Constitutions to support a Pierce claim. Therefore, we affirm the court's dismissal of McVey's complaint.

III.

This result would not change even if we balanced McVey's freedom of speech protections against AtlantiCare's business interests under the circumstances of this case. In a case involving a public employee and a public employer, our Supreme Court held over twenty years ago that racist remarks are not protected by the First Amendment or Article I, Paragraph 6 of the New Jersey Constitution. Karins v. Atl. City, 152 N.J. 532, 563 (1998). McVey's comments in this case likewise crossed that line. She stated that the phrase "Black Lives Matter" was "racist"; the movement "causes segregation"; and Black citizens were "not dying . . . they are killing themselves." Because a public employee can be terminated for such comments under Karins, a private company like AtlantiCare clearly had the authority to fire McVey for making

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843 (N.C. Ct. App. 1997); Bushko v. Miller Brewing Co., 396 N.W.2d 167, 172 (Wis. 1986); McGarvey v. Key Prop. Mgmt. LLC, 211 P.3d 503, 507-09 (Wyo. 2009).

these remarks in a public forum while identifying herself as an AtlantiCare employee.

Even if we could consider McVey's statements to be merely insensitive, we would still hold under Hennessey that AtlantiCare properly terminated her employment. McVey's interest in publicly posting her remarks was minimal. Another Facebook user solicited comments on the Black Lives Matter movement and specifically stated that anyone who responded could do so by sending a private, direct message. Instead of pursuing that route, McVey uploaded her remarks to her public Facebook page, which prominently identified her as the "Corporate Director at Atlanti[C]are Regional Medical Center."

AtlantiCare had previously given McVey a copy of its social media policy, which warned her to avoid posting about "any topics that may be considered objectionable or inflammatory—such as politics and religion." The policy also stated that an employee's use of social media had "the potential to affect AtlantiCare employee job performance, the performance of others, AtlantiCare's brand and/or reputation, and AtlantiCare's business interests."

McVey posted her remarks at the height of the Floyd protest demonstrations and AtlantiCare appropriately considered that the comments, and her public identification as an AtlantiCare "Corporate Director," opened

its business up to the possibility of unwanted and adverse publicity and criticism. As the AtlantiCare Vice President told McVey at the June 17, 2020 meeting, "[it] was bad."

We have balanced McVey's slight interest in publicly making her position on the Black Lives Matter movement known against AtlantiCare's strong interest in protecting and fostering the "diverse set of customs, values[,] and points of view of its physicians, staff, volunteers, vendors, customers[,] and partners[.]" Under the circumstances presented in this case, AtlantiCare did not violate a clear mandate of public policy when it terminated McVey's employment.

Affirmed.