IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 12, 2023 Session

HEATHER SMITH v. BLUECROSS BLUESHIELD OF TENNESSEE

Appeal from the Chancery Court for Hamilton County
No. 21-0938 Jeffrey M. Atherton, Chancellor

No. E2022-01058-COA-R3-CV

This appeal concerns a claim of retaliatory discharge. Heather Smith ("Smith"), then an at-will employee of BlueCross BlueShield of Tennessee, Inc. ("BlueCross"), declined to take a Covid-19 vaccine. Smith emailed members of the Tennessee General Assembly expressing her concerns and grievances about vaccine mandates. BlueCross fired Smith after it found out about her emails. Smith sued BlueCross for common law retaliatory discharge in the Chancery Court for Hamilton County ("the Trial Court"). For its part, BlueCross filed a motion to dismiss for failure to state a claim. After a hearing, the Trial Court granted BlueCross's motion to dismiss. Smith appeals. We hold that Article I, Section 23 of the Tennessee Constitution, which guarantees the right of citizens to petition the government, is a clear and unambiguous statement of public policy representing an exception to the doctrine of employment-at-will. Smith has alleged enough at this stage to withstand BlueCross's motion to dismiss for failure to state a claim. We reverse the Trial Court and remand for further proceedings consistent with this Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

Stephen S. Duggins and Colson Duggins, Chattanooga, Tennessee, for the appellant, Heather Smith.

Robert E. Boston, Joshua T. Wood, and David J. Zeitlin, Nashville, Tennessee, for the appellee, BlueCross BlueShield of Tennessee, Inc.

OPINION

Background

In December 2021, Smith sued BlueCross in the Trial Court for common law retaliatory discharge. As this matter was disposed of below on a motion to dismiss for failure to state a claim, we treat Smith's factual allegations as true. Therefore, we quote extensively from Smith's complaint. In her complaint, Smith alleged in significant part:

> 11. Ms. Smith became an employee of BlueCross on January 27, 2014.
>
> 12. Ms. Smith was a good employee who had not received any disciplinary actions or write-ups prior to the events from which this lawsuit arises.
>
> 13. On or about August 11, 2021, Ms. Smith was notified that BlueCross had instituted a policy which required all of its public-facing employees to obtain the Covid-19 vaccine.
>
> 14. Ms. Smith was not in a public-facing position.
>
> 15. Ms. Smith worked remotely from home and had minimal face-to-face interaction with fellow-workers or the public in her capacity as a BlueCross employee.
>
> 16. In August of 2021, Ms. Smith reported to Director Allison Scripps ("Ms. Scripps").
>
> 17. Despite Ms. Smith not being in a public-facing position, Ms. Scripps told Ms. Smith that "as leaders, we are expected to follow the mandate."
>
> 18. BlueCross vice-president Clay Phillips also asserted that "we now have a directive from our leadership team, and you need to accept it as such."
>
> 19. Ms. Smith sought to have her job position changed to avoid being considered— wrongfully—a public facing employee.
>
> 20. BlueCross denied this request, despite having granted similar requests for other employees.
>
> 21. On or about September 13, 2021, Ms. Smith was required to disclose her vaccination status and submit any requests for religious accommodations relating to the vaccine mandate that BlueCross was imposing.
>
> 22. Ms. Smith has sincerely held religious beliefs that prevent her from obtaining the vaccine.
>
> 23. Ms. Smith timely submitted her request for a religious accommodation that would allow her to continue working without obtaining the vaccine.

24. On or about September 27, 2021, BlueCross notified Ms. Smith that it could not substantiate her religious accommodation request and was rejecting her religious accommodation request except that she would be granted 30 additional days within which to obtain the vaccine.

25. The 30-day extension for obtaining the vaccine was not a legitimate accommodation of Ms. Smith's religious beliefs.

26. The 30-day extension was simply a short delay before requiring Ms. Smith to violate her religious beliefs in order to keep her job at BlueCross.

27. On September 29, 2021, Ms. Smith contacted BlueCross to ask what information BlueCross needed to substantiate her religious claim.

28. BlueCross responded that they did not need any more information and that they would give her the benefit of the doubt.

29. BlueCross still only extended a 30-day extension to Ms. Smith for her to obtain the vaccine.

30. BlueCross referred to the 30-day extension as an accommodation, but it did not make any genuine attempt to provide Ms. Smith with an opportunity to continue working at BlueCross without violating her religious beliefs.

31. Ms. Smith suggested another alternative for accommodation, but BlueCross rejected that suggestion.

32. Ms. Smith requested an appeal, but Human Resources informed her that there was no right of appeal.

33. Ms. Smith was given 4 days to decide whether to accept the extension which BlueCross referred to as an accommodation.

34. Ms. Smith accepted the 30-day extension while lodging her complaints with the framework and on the condition that it would not interfere with her right to take legal action.

35. Ms. Smith then applied for and obtained a new position from BlueCross which was not subject to the vaccination requirement.

36. On or about October 29, 2021, Human Resources guaranteed Ms. Smith that her new position was intentionally left off the list of positions which were subject to the vaccination policy.

37. In the meantime, the Tennessee General Assembly convened a special session on October 27, 2021 for the purpose of addressing Covid-related issues.

38. On October 27, 2021, Ms. Smith emailed Tennessee state legislators with her concerns and grievances regarding vaccine mandates.

39. Ms. Smith's email to the General Assembly members conveyed her thoughts and requests for legislative action.

40. On or about October 28, 2021, Tennessee State Representative John Ragan read Ms. Smith's email to the Covid-19 Committee of the Tennessee Legislature.

41. Upon information and belief, a member of the Tennessee General Assembly forwarded Ms. Smith's email to BlueCross.

42. On November 3, 2021, BlueCross informed Ms. Smith that her emails to the lawmakers violated BlueCross's social media policy.

43. On November 4, 2021, BlueCross instituted a new vaccine policy which required all of its employees to obtain the Covid-19 vaccine.

44. On November 4, 2021, Ms. Smith again emailed General Assembly members to seek legislative protection for her individual liberties and rights relating to vaccine mandates.

45. Ms. Smith's email to the General Assembly specifically noted that "the words and opinions expressed within this email are my own and they do not reflect the opinion/views of BlueCross BlueShield of Tennessee (BCBST)."

46. Upon information and belief, a member of the General Assembly again forwarded Ms. Smith's email to BlueCross.

47. On November 5, 2021, BlueCross terminated Ms. Smith's employment.

48. BlueCross terminated Ms. Smith's employment because she had written to members of the General Assembly.

49. BlueCross's termination of Ms. Smith's employment was in retaliation for Ms. Smith exercising her constitutional right to contact her legislators.

50. BlueCross specifically advised Ms. Smith that it was terminating her employment because of her email to General Assembly members.

51. BlueCross claimed that Ms. Smith's email to the legislators violated BlueCross's social media policy.

Smith asserted then as she does now that her termination violated Tennessee's public policy based on the right to petition set out in Article I, Section 23 of the Tennessee Constitution. In March 2022, BlueCross filed a motion to dismiss Smith's complaint for failure to state a claim. In its memorandum of law filed in support of its motion to dismiss, BlueCross argued as follows, in part:

> Plaintiff's claim reflects a fundamental misunderstanding of — *first* — the public policy exception to the employment at-will doctrine and — *second*— the free speech privileges of the state and federal constitutions. Plaintiff's communication of her views to state legislators does not prohibit BCBST from ending their employment relationship. As a matter of law, state

> or federal constitutional free speech guarantees cannot be the basis of a public policy exception in wrongful discharge claims against private employers. A holding otherwise would create law not heretofore recognized and improperly expand the public policy exception in Tennessee. It also would ignore long-standing precedent holding that constitutional free speech principles are inapplicable to private employers. Even if free speech principles do apply to private employers — and they do not, under Tennessee case law — the cause of action advanced by Plaintiff would penalize a company for discharging an at-will employee when the employment relationship has completely soured.
>
> BCBST is not required to retain employees who publicly express views that are untrue, disparaging, defamatory, and that contradict its core values (especially after BCBST provides warning that such conduct violates Company policy). Dismissal of Plaintiff's Complaint is required as a matter of law.

Smith filed a response to BlueCross's motion to dismiss, asserting among other things that BlueCross wrongly relied upon facts beyond those alleged in her complaint. In June 2022, the Trial Court heard BlueCross's motion. In July 2022, the Trial Court entered an order granting BlueCross's motion to dismiss. In its order, the Trial Court stated, in relevant part:

> The Court is guided in its decision by the opinion of the Tennessee Court of Appeals of the eastern section in *City of Morristown, et al. v. Michael W. Ball*, *et al*, Civil Case No. [E2020]-01567-COA-R3-CV (Tenn. Ct. App. 2021), in setting up the proper approach to telling its findings and conclusions. In that regard, a portion of the matters before the Court included references by the parties to certain e-mail communications, internal policies, and perhaps other documents or discussions thereof. However, consistent with Rule 12.02, the Court has not considered in its ruling the effect of those materials and has made its determination in light of the Complaint, as read most favorably to the pleading party.
>
> This matter presents, as recognized by both parties, a dispute of first impression in Tennessee. There is a recognized "public policy" exception to Tennessee's doctrine of employment at will, and Plaintiff seeks to have this Court recognize the right of citizens to communicate with legislators, as set forth in Article I, Section 23 of the Tennessee Constitution, as one of the clearly established public policies for which there is an exception to the doctrine of at will employment. Neither the parties nor the Court have found and presented a case that presents Plaintiff's specific theory although the

general principles of a public policy exception to at-will employment have long been established.

The Court is cognizant of Rule 1 of the Tennessee Rules of Civil Procedure, recognizing that the rules should be interpreted and construed to secure "the just, speedy and inexpensive determination of every action." Here, the Court has determined that the issue presented in the Motion to Dismiss, and contested in the Response thereto, presents primarily a legal issue for the Court.

As such, the Court has determined that it will grant Defendant's Motion to Dismiss. In its review, the Court has considered whether Section 23 of Article I of the Tennessee Constitution articulates a right to communicate and interact with elected representatives, and whether that right should be impeded by employers. This Court concludes that the right to communicate with elected representatives is a fundamental and clearly established public policy and that the public policy exception to at-will employment should include protection against employers terminating or otherwise retaliating against employees for exercising that right. At the same time, however, the Court concludes that it, as a trial court, does not have the authority to recognize a public policy exception to the doctrine of employment at will if such specific public policy exception has not already been expressly recognized by the Tennessee Court of Appeals or Tennessee Supreme Court. Accordingly, while this Court would be inclined to recognize the right and cause of action advocated by Plaintiff, this Court does not view itself as having the authority to do so. The Tennessee appellate courts have not yet had an opportunity to consider whether the right to communicate with legislators falls within the public policy exception to at-will employment. This case may provide the vehicle for the appellate courts to make such a determination, but this Court is not the venue by which that determination can be made.

Smith timely appealed to this Court.

Discussion

We restate and consolidate Smith's issues into the following dispositive issue: whether the Trial Court erred in granting BlueCross's motion to dismiss on grounds that Tennessee does not recognize a public policy exception to the doctrine of employment-at-will based on the right to petition found in Article I, Section 23 of the Tennessee Constitution.

Regarding our standard of review for motions to dismiss pursuant to Tenn. R. Civ. P. 12.02(6), the Tennessee Supreme Court has instructed:

> A motion to dismiss a complaint for failure to state a claim for which relief may be granted tests the legal sufficiency of the plaintiff's complaint. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011); *cf. Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 406 (Tenn. 2002). The motion requires the court to review the complaint alone. *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief, *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011), or when the complaint is totally lacking in clarity and specificity, *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992) (citing *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn. 1986)).
>
> A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010); *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d at 700. Accordingly, in reviewing a trial court's dismissal of a complaint under Tenn. R. Civ. P. 12.02(6), we must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d at 894; *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d at 426; Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5-6(g), at 5-111 (3d ed. 2009). We review the trial court's legal conclusions regarding the adequacy of the complaint de novo without a presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d at 895; *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d at 700.

SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 472 (Tenn. 2012).

This case implicates the doctrine of employment-at-will. Under this doctrine, "employment for an indefinite period of time may be terminated by either the employer or the employee at any time, for any reason, or for no reason at all." *Williams v. City of Burns*, 465 S.W.3d 96, 108 (Tenn. 2015) (citations omitted). It is undisputed that Smith was an at-will employee of BlueCross when she was fired. However, there are certain exceptions to the doctrine, and an employee may bring a retaliatory discharge action if she is fired in violation of public policy. *Id.* at 108-09 (citations omitted). Here, Smith alleged just that.

Our Supreme Court set out the elements of a common law retaliatory discharge claim thusly:

> In Tennessee, the elements of a typical common-law retaliatory discharge claim are as follows: (1) that an employment-at-will relationship existed; (2) that the employee was discharged, (3) that the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and (4) that a substantial factor in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with clear public policy.

Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 862 (Tenn. 2002) (citations omitted).[1]

As to when public policy will sustain a common law retaliatory discharge claim, the Tennessee Supreme Court has cautioned that "the exception cannot be permitted to consume or eliminate the general rule." *Chism v. Mid–South Milling Co., Inc.*, 762 S.W.2d 552, 556 (Tenn. 1988), *superseded by statute on other grounds*. To be liable, the employer must have violated a clear public policy, which usually is "evidenced by an unambiguous constitutional, statutory or regulatory provision." *Id*. In addition, "the violation must be a substantial factor in the termination of an at-will employee, agent or officer." *Id*.

Smith argues that a public policy exception to the doctrine of employment-at-will exists here, the Right to Petition provision in the Tennessee Constitution. Article I, Section 23 of the Tennessee Constitution reads: "That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance."[2] According to Smith, this language constitutes a clear, unambiguous, well-defined, and constitutionally-established public policy. Smith points out an example of the Tennessee Supreme Court finding a public

---

[1] Effective July 1, 2014, the Tennessee Public Protection Act ("the TPPA") was amended to "abrogate[ ] and supersede[ ] the common law with respect to any claim that could have been brought under this section." *See Williams*, 465 S.W.3d at 110 n.11; Tenn. Code Ann. § 50-1-304(g). "[U]nder the statute as amended, in cases in which the plaintiff alleges retaliatory discharge for refusing to participate in illegal activities or for refusing to remain silent about illegal activities, the TPPA is the exclusive basis for relief." *Williams*, 465 S.W.3d at 110 n.11. The amendment applies to actions accruing on or after July 1, 2014. *See* 2014 Tenn. Laws Pub. Ch. 995 (S.B. 2126). As Smith did not allege that she was fired for refusing to participate in illegal activities or refusing to be silent about illegal activities, her claim was not one that had to be brought under the TPPA.

[2] While Article I, Section 23 of the Tennessee Constitution does not use the term "petition," it is evident that it concerns the right to petition.

policy exception where none previously had been recognized. In *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984), the Tennessee Supreme Court held that firing workers for filing workers' compensation claims undermined the statutory right of workers to be compensated for injuries sustained on their jobs. *Id*. at 444-45. Smith argues that if public policy can be found in a statute, it surely can be found in the Tennessee Constitution.

In response to Smith's arguments, BlueCross asserts that Tennessee courts have consistently declined to find public policy exceptions to employment-at-will in constitutional provisions. BlueCross cites among other cases *Rigsby v. Murray Ohio Mfg. Co.*, No. 01-A-019012CV00457, 1991 WL 95710 (Tenn. Ct. App. June 7, 1991), *no appl. perm. appeal filed*, a case in which an at-will employee burned a hole in his cap at work to express his opinion, for the proposition that there is no private employment exception on freedom of speech constitutional grounds. *Id*. at *2 ("We do not think firing an at will employee for exercising his right to free speech on his employer's premises during working hours violates the public policy of this state. Public policy does not require that an employee be given a cause of action when he is terminated for doing what the employer could prohibit."). BlueCross also cites a federal case, *Deiters v. Home Depot U.S.A., Inc.*, 842 F. Supp. 1023 (M.D. Tenn. 1993), for the proposition that the Tennessee Constitution restricts the actions of the state, not private entities. *Id*. at 1029. There, the District Judge said: "Article I, § 17 [the Open Courts clause] does not clearly and unambiguously create a public policy which would prevent the discharge of at-will employees who sue their employers." *Id*. The District Judge continued: "Litigation between an employer and employee tends to result in an acrimonious and noncooperative working relationship. When such a relationship threatens the effectiveness of an organization, an employer must be free to remedy the situation through termination." *Id*. BlueCross states that similarly, the right to petition found in the Tennessee Constitution does not create an exception to employment-at-will.

While BlueCross argues strenuously against finding a public policy exception to the doctrine of employment-at-will in the Tennessee Constitution, our Supreme Court stated explicitly that clear public policy may be "evidenced by an unambiguous constitutional, statutory or regulatory provision." *Chism*, 762 S.W.2d at 556 (emphasis added). The Tennessee Constitution is unambiguous on this point: citizens have a right "to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance." Tenn. Const. Art. I, § 23. This Court, quoting a scholarly piece, noted that "[t]he right of petition is … 'an ancient right' and 'the cornerstone of the Anglo-American constitutional system.'" *Gentry v. Former Speaker of the House Glen Casada*, No. M2019-02230-COA-R3-CV, 2020 WL 5587720, at *2 (Tenn. Ct. App. Sept. 17, 2020), *R. 11 appl. perm. appeal denied Jan. 13, 2021*, *cert. denied*, 141 S. Ct. 2804 (June 21, 2021) (quoting Norman B. Smith, *"Shall Make No Law Abridging …": An Analysis of the Neglected, But Nearly*

Absolute, Right of Petition, 54 U. CIN. L. REV. 1153 (1986)). "Parliament used the Petition of Right to 'gain popular rights from the king,' and the people eventually 'used petitioning as the means to secure their own rights against parliament.'" *Gentry*, 2020 WL 5587720, at *3 (quoting Smith, at 1153). Indeed, "'[t]he development of petitioning is inextricably linked to the emergence of popular sovereignty.'" *Id*. (quoting Smith, at 1153).

We also note the case of *Little v. Eastgate of Jackson, LLC*, No. W2006-01846-COA-R9-CV, 2007 WL 1202431 (Tenn. Ct. App. Apr. 24, 2007), *no appl. perm. appeal filed*, a case in which an at-will employee was fired who had, while on the clock, rescued someone who was being assaulted across the street. *Id*. at *1. The employee sued his employer, and the employer subsequently filed a motion to dismiss. *Id*. The trial court denied the employer's motion to dismiss, which this Court affirmed on appeal. *Id*. We recognized "that, in limited circumstances, certain well-defined, unambiguous principles of public policy confer upon employees implicit rights which must not be circumscribed or chilled by the potential of termination." *Id*. at *3 (quoting *Crews*, 78 S.W.3d at 858) (internal quotation marks and additional citation omitted). We also clarified that "[d]etermining what constitutes a clear public policy is a question of law, reviewed *de novo* with no presumption of correctness." *Little*, 2007 WL 1202431, at *3. In affirming the trial court, this Court cited the Washington case of *Gardner v. Loomis Armored*, 913 P.2d 377 (Wash. 1996) (*en banc*), which contained the following framework for analysis: "(1) [W]hether the plaintiff has proven the existence of a clear public policy; (2) whether discouraging the conduct in which the plaintiff engaged would jeopardize the public policy; (3) whether the 'public-policy-linked conduct' in fact caused the dismissal; and (4) whether the defendant employer has an 'overriding justification' for the termination of the plaintiff's employment." *Little*, 2007 WL 1202431, at *6 (citations omitted).[3]

In the end, having considered certain Tennessee statutes dealing with various exigent circumstances, we found that "[t]hese statutes evidence the unambiguous legislative intent to pronounce the Tennessee public policy of encouraging citizens to rescue a person reasonably believed to be in imminent danger of death or serious bodily harm, and to protect a citizen who undertakes such heroic action from negative repercussions." *Little*, 2007 WL 1202431, at *9. In concluding, we "agree[d] with the trial court's recognition of a clearly-mandated public policy in favor of encouraging citizens to rescue others reasonably believed to be in imminent danger of death or serious bodily harm, and find that this public policy may be the basis for an exception to the at-will employment

[3] Smith requests that we adopt a test articulated by the Supreme Court of Utah in *Ray v. Wal-Mart Stores, Inc.*, 359 P.3d 614 (Utah 2015) ("(1) [W]hether the policy at issue is reflected in authoritative sources of state public policy, (2) whether the policy affects the public generally as opposed to the private interests of the employee and the employer, and (3) whether countervailing policies outweigh the policy at issue." *Id*. at 620 (footnotes omitted)). We consider existing Tennessee law sufficient and controlling without recourse to this Utah approach, which we decline to adopt.

doctrine in Tennessee." *Id*. at *10.[4] We further found that the complaint in that case "state[d] a claim as to the other elements, namely, whether discouraging the employee's conduct would jeopardize this public policy, and whether the employee's protected conduct caused the dismissal." *Id*. Finally, we stated that "[t]he employer may assert applicable defenses, such as whether it had an overriding justification for discharging the employee." *Id*.

Even still, BlueCross is correct in that Tennessee courts have generally declined to find public policy exceptions to employment-at-will in constitutional provisions. Tennessee law is clear that public policy exceptions are to be carefully drawn so as not to eliminate the general rule. For one example, BlueCross cites the interference in the employer-employee relationship that would result if the constitutional right of free speech were found to be a public policy exception to at-will employment. In such a scenario, an at-will employee could publicly denigrate her employer all she wished and her employer would face liability for firing her on that basis. Of course, Tennessee law does not restrict an employer in that way.

In the appeal at bar, however, we are addressing a right of a somewhat different character. Constitutional free speech restrictions are directed at the government. That is, the government may not enact laws abridging free speech. The right to petition, while no more or less important than the right to free speech, makes sense only as an affirmative undertaking by a citizen. The State of Tennessee would not need to pass a law to restrict its ability to hear petitions if it were inclined to do so. It could just decline to consider them. *See Gentry*, 2020 WL 5587720, at *5 ("Mr. Gentry does not have a clearly established right to have his petition heard or considered by either house of the General Assembly."). In any event, it would not need to ban them. It therefore stands to reason that clear public policy is violated when an entity, even a private entity, tries to block a citizen from petitioning the government. Otherwise, the right to petition—the "'cornerstone of the Anglo-American constitutional system'"—is hollow. *See Gentry*, 2020 WL 5587720, at *2 (quoting Smith, at 1153). While under the doctrine of employment-at-will, employers may fire at-will employees for almost any reason or none, the doctrine is not absolute. Firing an at-will employee merely for writing to the Tennessee General Assembly is a bridge too far. It unduly interferes with the employee as citizen. Unlike other examples of constitutional provisions which as BlueCross rightly points out are not extended to private employers, the right to petition goes to a cornerstone of how employees, as citizens, can reach their government. While an at-will employee may not

[4] In *Little*, this Court was "convinced of the wisdom of adopting the analytical framework adopted by the *Gardner* court for applying such a public policy exception, as helping to ensure that the exception is narrowly applied and recognizing an employer's legitimate need for latitude in making personal decisions." 2007 WL 1202431, at *9.

reasonably expect the full panoply of constitutional rights from a private employer, she must have recourse to the very people who make law.

At oral arguments, counsel for BlueCross stated that Smith was fired for the substance of what she wrote to the General Assembly, as opposed to the fact that she wrote. However, this statement by counsel is not dispositive of the issue before us, which is whether there is a public policy exception to employment-at-will based on the right to petition found in the Tennessee Constitution. This case was decided below on a motion to dismiss for failure to state a claim. We are limited to the facts alleged by Smith. In her complaint, Smith alleged that she emailed the General Assembly to convey "her concerns and grievances regarding vaccine mandates" and "to seek legislative protection for her individual liberties and rights relating to vaccine mandates." She alleged that she was fired for having written to members of the General Assembly. In its brief, BlueCross says that Smith, in her emails, disseminated misinformation; insulted her employer; divulged confidential BlueCross business information; and made untruthful statements. None of those facts are alleged in Smith's complaint.[5] The Trial Court expressly declined to consider, at the motion to dismiss stage, any facts beyond those alleged in Smith's complaint. We, too, confine ourselves to the complaint.

Moreover, adopting BlueCross's position would mean that an employer could fire an at-will employee for any communication to the legislature, whatever the content. While Smith's grievances happened to concern vaccine mandates, any number of scenarios can be visualized. An at-will employee could write the General Assembly about workplace safety issues, wages, or other labor conditions. An at-will employee could write the General Assembly on a matter totally unrelated to her employment. Under BlueCross's stance, no matter the scenario, there is no public policy protection from termination for an at-will employee for exercising her constitutional right to petition. That is contrary to the unambiguous public policy expressed in Article I, Section 23 of the Tennessee Constitution.

Continuing with its arguments, BlueCross contends that even if we believe that the Right to Petition provision in the Tennessee Constitution forms a basis for a public policy exception, this Court should decline to make that determination as a matter of first impression. BlueCross cites a case, *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981), for the proposition that, if there is any doubt, only the Tennessee Supreme Court or the General Assembly may identify a new public policy exception to the doctrine of at-will employment. *Id*. at 396 ("It is not the province of this court to change the law as plaintiffs assert. That prerogative lies with the supreme court or the legislature."). In this

[5] BlueCross could, of course, potentially substantiate its characterizations of Smith's actions through a properly-supported motion for summary judgment or at trial.

vein, the Trial Court stated that the "right to communicate with elected representatives is a fundamental and clearly established public policy[,]" but concluded that it lacked authority to find a new public policy exception.

We disagree with BlueCross's reasoning. The Tennessee Supreme Court in *Chism* has already identified sources of public policy exceptions; they may be "evidenced by an unambiguous constitutional, statutory or regulatory provision." 762 S.W.2d at 556 (emphasis added). We are not devising a new category of public policy exceptions. Instead, we are applying the law as articulated by our Supreme Court in *Chism* within the bounds of an already existing category of exceptions. If clear public policy can be found in statutes and the common law, so too can it be found in an unambiguous constitutional provision as so held by our Supreme Court. We hold that the right of petition enshrined in Article 1, Section 23 of the Tennessee Constitution represents the unambiguous public policy of the State of Tennessee that citizens may petition their government.

We emphasize, however, that the doctrine of employment-at-will remains firmly established in this state, and this matter concerns only a very narrow area, the right to petition. In the majority of circumstances, employers in Tennessee can terminate at-will employees for good reasons, bad reasons, or no reasons at all, and face no liability for retaliatory discharge. We also take no position on the underlying merits of Smith's grievances.

Finally, BlueCross warns of harmful societal consequences stemming from a public policy exception for the right to petition. BlueCross argues that an employee could simply tag in a legislator on an email or letter to invoke the protection of the right to petition, and thereby make a mockery of the exception. That concern is not well-founded. An at-will employee who, for instance, writes a scathing letter to the editor about her employer and merely tags in a legislator as a token bid toward that end does not enjoy the protection of the public policy exception for the right to petition. The public policy expressed in Article 1, Section 23 of the Tennessee Constitution extends only to communications to the government. If an at-will employee addresses non-governmental people or entities, she cannot benefit from the public policy exception for the right to petition. Notwithstanding this, BlueCross argues that recognizing a public policy exception for the right to petition will create a "flood of litigation." Respectfully, this is the least persuasive of BlueCross's arguments. It is exceedingly unlikely that courthouses in Tennessee will overflow with litigants suing their former employers for firing them for writing to the General Assembly. Such an effusion of civic-mindedness, were it to occur, would in any event be grounds for commendation, not scorn.

In sum, Smith has proven the existence of a clear public policy—the right to petition. Under the facts alleged in Smith's complaint, discouraging the conduct that she engaged

in—i.e., writing to the General Assembly to express her concerns on a matter—jeopardizes the clear public policy of the right to petition. Smith was, based again on the allegations in her complaint, fired for engaging in public-policy-linked conduct, namely exercising her right to petition. Whether BlueCross can establish an overriding justification or other defense including BlueCross's attempt to argue on appeal that Smith's email contained untrue statements and misinformation is not before us. We take no position on the merits of Smith's case or any other potential defenses of BlueCross, but Smith has alleged enough at this stage to withstand BlueCross's motion to dismiss for failure to state a claim. Upon our *de novo* review, we conclude that the Trial Court erred in granting BlueCross's motion to dismiss. We reverse the Trial Court and remand for further proceedings consistent with this Opinion.

Conclusion

The judgment of the Trial Court is reversed, and this cause is remanded to the Trial Court for collection of the costs below and further proceedings consistent with this Opinion. The costs on appeal are assessed against the Appellee, BlueCross BlueShield of Tennessee, Inc.

_____

D. MICHAEL SWINEY, CHIEF JUDGE