Rel: October 6, 2023

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2023-2024

CL-2023-0050

Ex parte Cameron E. Whitlow

PETITION FOR WRIT OF CERTIORARI

(In re: Cameron E. Whitlow

v.

Madison County Board of Education, Allen Perkins, Sr., in his official capacity as superintendent of Madison County Schools; Nathan Curry, Brian Brooks, Dave Weis, Shere Rucker, and Angie Bates, in their official capacities as members of the Madison County Board of Education)

(Madison Circuit Court; CV-22-900379)

FRIDY, Judge.

Cameron E. Whitlow, who was formerly employed as a contract principal by the Madison County Board of Education ("the Board"), appeals from a judgment of the Madison Circuit Court ("the trial court") dismissing his three claims against the Board; board members Nathan Curry, Brian Brooks, Dave Weis, Shere Rucker, and Angie Bates (referred to collectively as "the Board members"), in their official capacities; and Allen Perkins, Sr. ("the Superintendent"), the superintendent of the Madison County Schools, in his official capacity. We affirm the trial court's judgment in part, reverse it in part, and remand the cause to the trial court.

Background

In 2019, Whitlow and the Board executed a contract in which the Board agreed to employ Whitlow as a contract principal[1] for a three-year period expiring on June 30, 2022. Section 16-24B-3(c), Ala. Code 1975, a part of the Teacher Accountability Act ("the Act"), §§ 16-24B-1 et seq., Ala. Code 1975, establishes a procedure for the nonrenewal of a contract

[1]Section 16-24B-2(2), Ala. Code 1975, provides that a contract principal "[i]ncludes only those persons hired on or after July 1, 2000, and certified for the position of principal as prescribed by the State Board of Education and who are employed by an employing board as the chief administrator of a school ...."

principal's contract. That procedure requires that the chief executive officer[2] of the employing board[3] recommend in writing the nonrenewal of the contract principal's contract and that a majority of the employing board's members vote in favor of that recommendation at least ninety days before the end of the contract. See § 16-24B-3(c).

On March 22, 2022, the Superintendent sent Whitlow a letter notifying him that, on March 21, 2022, which was more than ninety days before the expiration of Whitlow's contract, the Board had voted not to renew his employment contract when it expired on June 30, 2022. The Superintendent's letter stated that the Board had made that decision "as a result of concerns about the climate and culture, and decreased morale at the school."

On March 31, 2022, Whitlow sent the Superintendent and the Board letters notifying them that he was contesting the nonrenewal of

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[2]Section 16-24B-2(1), Ala. Code 1975, defines a chief executive officer as "[t]he chief administrative officer of the employing board, including the superintendent of any public county or city school system ...."

[3]Section 16-24B-2(5), Ala. Code 1975, provides that an employing board "[i]ncludes all local boards of education ...."

his contract and requesting an expedited evidentiary hearing in the trial court. On April 4, 2022, Whitlow filed in the trial court a complaint stating three claims against the defendants.

Count one of Whitlow's complaint asked the trial court, pursuant to § 16-24B-3, Ala. Code 1975, either to hold an expedited evidentiary hearing within forty-five days or to refer the parties to a mediator to conduct the expedited evidentiary hearing within forty-five days.[4] Counts

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[4]Section 16-24B-3(e)(2)(a), Ala. Code 1975, provides:

> "Within 10 days of the date of receipt of notice provided to a contract principal informing him or her of an action by the employing board to nonrenew the principal's contract at the end of its current term, the contract principal, by filing written notice with the chief executive officer, may request a nonjury, expedited evidentiary hearing to demonstrate that the chief executive officer's or supervisor's recommendation to nonrenew the contract was impermissibly based upon a personal or political reason, or the recommendation was approved based upon personal or political reasons of the chief executive officer, supervisor, or the employing board, which shall be the sole issues at any such hearing. The contract principal shall bear the burden of proof by a preponderance of the evidence. The hearing shall be before the circuit court in the judicial circuit of the county in which the employing board sits. The expedited evidentiary hearing shall be binding on all parties. Promptly after delivering a written request for such a hearing, the contract principal or his or her designee shall file with the appropriate circuit court a request for an expedited hearing and shall provide a copy of the request to the chief executive officer."

two and three alleged that the Superintendent had not evaluated Whitlow annually as required by § 16-24B-3(i)(1), Ala. Code 1975,[5] and that, pursuant to § 16-24B-3(m), Ala. Code 1975,[6] Whitlow was entitled to an extension of his contract by one year for each year the Superintendent had not evaluated Whitlow up to a maximum of three years. As relief, count two sought a judgment declaring that Whitlow was

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Section 16-24B-3(e)(3) provides:

> "All contract principals shall be entitled to an expedited evidentiary hearing process, which shall occur within 45 days of the chief executive officer's or the contract principal's request, as the case may be, for an expedited hearing pursuant to subdivision (3) of this subsection. If the circuit court determines that it is not able to complete the expedited evidentiary hearing within the 45-day period, the court shall refer the parties to a mediator to conduct the expedited evidentiary hearing within 45 days of the chief executive officer's or the contract principal's request for the expedited hearing. The written decision of the mediator shall be binding on the parties."

[5]Section 16-24B-3(i)(1) provides: "The chief executive officer, or his or her designee, shall at least annually evaluate the performance of each contract principal. The evaluation shall be performed in a manner prescribed by the State Board of Education."

[6]Section 16-24B-3(m) provides: "If a contract principal is not evaluated as required by this section, his or her contract shall be extended one additional contract year for each contract year not evaluated up to three years."

entitled to an extension of his contract as provided in § 16-24B-3(m) and an injunction ordering the Board, the Board members in their official capacities, and the Superintendent in his official capacity to extend his contract pursuant to § 16-24B-3(m). As relief, count three sought a writ of mandamus directing the Board, the Board members in their official capacities, and the Superintendent in his official capacity to extend Whitlow's contract pursuant to § 16-24B-3(m).

The case action summary for Whitlow's action indicates that, on April 11, 2022, the trial court set the action for hearing on August 11, 2022, long after the forty-five-day period for the trial court to act pursuant to § 16-24B-3(e)(3) would have expired on May 19, 2022. It appears that the trial-court clerk did not notify the trial-court judge that Whitlow's complaint asked for an expedited evidentiary hearing within forty-five days.

On May 20, 2022, the day after the expiration of the forty-five-day period within which § 16-24B-3(e)(3) required that the expedited evidentiary hearing Whitlow had requested be held, the Board, the Board members, and the Superintendent filed a motion to dismiss Whitlow's claims against them. The motion asserted that, pursuant to Article 1, §

14, Ala. Const. 2022 ("Section 14"),[7] all the defendants were immune from Whitlow's claims. It also asserted that counts two and three could not be adjudicated in an action requesting an expedited evidentiary hearing pursuant to §§ 16-24B-3(e)(2)(a) and 16-24B-3(e)(3). On June 16, 2022, Whitlow filed a response to the defendants' motion to dismiss in which he asserted that the defendants were not immune from his claims and that Alabama law allowed him to include the claims he had stated in counts two and three with the claim he had stated in count one.

The trial court held a hearing regarding the defendants' motion to dismiss on July 26, 2022. On January 19, 2023, the trial court entered a judgment dismissing count one on the ground that § 16-24B-3 did not confer jurisdiction on the trial court either to hold an evidentiary hearing or to refer the matter to a mediator after the expiration of the forty-five-day period specified in § 16-24B-3(e)(3). The judgment dismissed counts two and three without prejudice based on the trial court's determination that it lacked jurisdiction over those counts in an action seeking an expedited evidentiary hearing pursuant to § 16-24B-3. The judgment did

[7]Article 1, § 14, Ala. Const. 2022 provides that "the State of Alabama shall never be made a defendant in any court of law or equity."

not address the issue whether Section 14 immunized the defendants from Whitlow's claims. Whitlow timely appealed without filing a postjudgment motion.

Analysis

In Ex parte Johnson, 332 So. 3d 910, 913-14 (Ala. Civ. App. 2020), this court held that the Act does not authorize an appeal from a judgment dismissing a contract principal's request for a nonjury expedited evidentiary hearing pursuant to § 16-24B-3(e)(3) and treated an attempted appeal from such a judgment as a petition for a common-law writ of certiorari. Based on our holding in Johnson, Whitlow cannot obtain appellate review by appeal of the trial court's judgment dismissing his claims; however, he can obtain appellate review of the dismissal of those claims by common-law writ of certiorari. Id. Consequently, we have treated Whitlow's appeal as a petition for a common-law writ of certiorari, we have granted that petition, and we have reviewed the trial court's judgment pursuant to the writ. Our review pursuant to a writ of certiorari is limited to the issues whether the trial court properly applied the law and whether the trial court's judgment is supported by any legal evidence. Id. at 914.

As one of the grounds of their motion to dismiss, the Board, the Board members, and the Superintendent asserted that Section 14 immunized them from Whitlow's claims. Section 14 provides that "the State of Alabama shall never be made a defendant in any court of law or equity." The immunity afforded by Section 14 has sometimes been referred to as "§ 14 immunity," "sovereign immunity," or "State-sovereign immunity"; however, our supreme court's most recent decisions have preferred the term "State immunity." See Ex parte Pinkard, [Ms. 1200658, May 27, 2022] ___ So. 3d ___, ___ n.3 (Ala. 2022). Therefore, we will refer to the immunity the defendants assert in this case as "State immunity."

State immunity is not an affirmative defense but a jurisdictional bar that strips courts of the power to adjudicate claims against the State, even if the State has not raised its immunity as a defense. Id., ___ So. 3d at ___ (footnote omitted). Thus, State immunity precludes a court from exercising subject-matter jurisdiction over the State or a State agency. See Alabama Dep't of Corr. v. Montgomery Cnty. Comm'n, 11 So. 3d 189,191-92 (Ala. 2008). Whether the trial court had subject-matter jurisdiction over the Board, the Board members, and the Superintendent

is a threshold issue that we must consider before reaching the other issues the parties have raised. See Ryals v. Lathan Co., 77 So. 3d 1175, 1178-79 (Ala. 2011).

State immunity is absolute and extends to agencies of the state. See Ex parte Bessemer Bd. of Educ., 68 So. 3d 782, 789 (2011). County school boards are agencies of the State; they are not agencies of the counties they serve. See Ex parte Jackson Cnty. Bd. of Educ., 4 So. 3d 1099, 1102 (Ala. 2008). Because county boards of education are agencies of the State, State immunity precludes courts from exercising subject-matter jurisdiction over them with respect to state-law claims. See Ex parte Hale Cnty. Bd. of Educ., 14 So. 3d 844, 848 (Ala. 2009). Therefore, in the present case, the Board, which is a State agency, is entitled to State immunity. Accordingly, based on that immunity, we affirm the trial court's judgment insofar as it dismissed Whitlow's claims against the Board.

Claimants cannot sue the State indirectly by suing a State official in his or her official capacity. See Ex parte Hampton, 189 So. 3d 14, 17 (Ala. 2015). However, there are six general categories of actions against State officials that are not barred by the general rule of State immunity.

Id. at 17-18. Those categories are: (1) actions brought to compel State officials to perform their legal duties; (2) actions brought to enjoin State officials from enforcing an unconstitutional law; (3) actions to compel State officials to perform ministerial acts; (4) actions brought against State officials under the Declaratory Judgment Act, § 6-6-220 et seq., Ala. Code 1975, seeking construction of a statute and its application in a given situation; (5) valid inverse condemnation actions brought against State officials in their representative capacity; and (6) actions for injunction or damages brought against State officials in their representative capacity and individually when it has been alleged that they acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law. Id.

Count one of Whitlow's complaint sought an expedited evidentiary hearing to determine whether the nonrenewal of his contract was impermissibly based on personal or political reasons of the Superintendent or the Board members. Section 16-24B-3(e)(4), Ala. Code 1975, provides that a contract principal may request reinstatement at the expedited evidentiary hearing and that, if a contract principal initiates an action for an expedited evidentiary hearing, the pay and benefits of

the contract principal shall be discontinued only upon a final order denying reinstatement by the circuit court or mediator. Thus, if the trial court determined that the nonrenewal of Whitlow's contract had been impermissibly based on personal or political reasons and that he was entitled to reinstatement, the Board members would have an implied statutory duty to reinstate him to his position as a contract principal. See §§ 16-24B-3(e)(4) and 16-8-23, Ala. Code 1975. An action brought to compel State officials to perform their legal duties is one of the six categories of actions against State officials that State immunity does not bar. See Ex parte Hampton, 189 So. 3d at 17. Therefore, we conclude that State immunity did not bar count one against the Board members in their official capacities. Cf. Ex parte Bessemer Bd. of Educ., 68 So. 3d 782, 790 (Ala. 2011) (holding that members of a local school board in their official capacities were not immune from an action because they had a statutory duty to pay a teacher the appropriate salary increase under § 16-22-13.1, Ala. Code 1975).

Counts two and three of Whitlow's complaint sought a determination that the Superintendent had not evaluated Whitlow annually as required by § 16-24B-3(i)(1) and the extension of his contract

pursuant to § 16-24B-3(m). If Whitlow prevailed on those counts, the Board members in their official capacities would have a statutory duty pursuant to § 16-24B-3(m) to extend Whitlow's contract for one year for each year the Superintendent failed to evaluate Whitlow up to a maximum of three years. Therefore, because actions brought to compel State officers to perform their legal duties are one of the categories of actions that State immunity does not bar, we conclude that the Board members in their official capacities were not immune from counts two and three of Whitlow's complaint.

The Superintendent, however, can only make recommendations regarding the hiring, the nonrenewal, the termination, and the reinstatement of employees; he does not have the power to hire, to not renew, to terminate, or to reinstate a contract principal. See § 16-8-23 and Board of Sch. Comm'rs of Mobile Cnty. v. Weaver, 99 So. 3d 1210, 1221 (Ala. 2012). Therefore, we conclude that none of Whitlow's claims against the Superintendent in his official capacity fall within the categories of actions against State officials that State immunity does not bar and that, consequently, the Superintendent in his official capacity is immune from all Whitlow's claims. Accordingly, based on State

immunity, we affirm the trial court's judgment insofar as it dismissed Whitlow's claims against the Superintendent in his official capacity.

We will now consider whether the trial court erred in dismissing Whitlow's claims against the Board members on grounds other than State immunity. As to the dismissal of count one, Whitlow argues that the trial court erred in dismissing his request for an expedited evidentiary hearing because, he says: (1) the forty-five-day period for the trial court to act specified in § 16-24B-3(e)(3) is not jurisdictional; (2) the forty-five-day period is directory rather than mandatory and, therefore, the trial court's failure to act within forty-five days did not deprive it of the power to act; (3) the doctrine of equitable tolling applies to the forty-five-day period; and (4) this court's decision in Ex parte Guin, 267 So. 3d 335 (Ala. Civ. App. 2018), implies that the expiration of the forty-five-day period does not deprive a circuit court of either jurisdiction or the power to act on a request for an expedited evidentiary hearing. We cannot consider any of these arguments because Whitlow did not present them to the trial court. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) (holding that an appellate court cannot consider arguments raised for the first time on appeal and that an appellate court's review is

restricted to the evidence and arguments considered by the trial court). Although a trial court's lack of subject-matter jurisdiction can be raised at any time, see C.H. v. Lamar Cnty. Dep't of Hum. Res., 324 So. 3d 391, 394 (Ala. Civ. App. 2020) (stating that, because a defect in subject-matter jurisdiction cannot be waived, a trial court's lack of subject-matter jurisdiction may be raised at any time by any party and may even be raised by a court ex mero motu), that principle does not apply to Whitlow's assertions here that the trial court did have subject-matter jurisdiction and erroneously determined that it did not. Accordingly, we affirm the trial court's judgment insofar as it dismissed count one of Whitlow's complaint against the Board members in their official capacities.

Whitlow also argues that the trial court erred in dismissing counts two and three of his complaint without prejudice based on its determination that it did not have subject-matter jurisdiction over those counts because they were included in an action seeking an expedited evidentiary hearing. Whitlow presented this argument to the trial court in his response to the defendants' motion to dismiss. Therefore, we will consider it.

The Board members argue that the dismissal of counts two and three is not ripe for appellate review because, they say, a dismissal without prejudice is not a final judgment. They are correct that the general rule is that a judgment dismissing claims without prejudice does not constitute a ruling on the merits and does not bar the plaintiff from prosecuting the dismissed claims in a new lawsuit. See Palughi v. Dow, 659 So.2d 112, 113 (Ala. 1995). Whitlow, however, argues that this general rule does not apply in this case because, he says, the trial court dismissed counts two and three based on its determination that it lacked subject-matter jurisdiction and that such a dismissal is a final judgment regardless of whether the dismissal was with prejudice or without prejudice. See Roginski v. Estate of Jackson, 362 So. 3d 1250, 1254-55 (Ala. Civ. App. 2022). We agree with Whitlow that the trial court's dismissal of the claims he pleaded in counts two and three amounted to an adjudication on the merits regarding those claim because the trial court dismissed those claims based on its determination that it lacked subject-matter jurisdiction over them.

In Yance v. Dothan City Board of Education, 163 So. 3d 1070, 1075 (Ala. Civ. App. 2014) ("Yance II"), this court considered the issue whether

claims comparable to Whitlow's claims in counts two and three were barred by the doctrine of res judicata based on a judgment entered in an earlier action that Yance had brought against the Dothan City Board of Education ("Yance I"). In Yance I, Yance, whose employment contract as a principal had been nonrenewed, had stated a claim seeking an expedited evidentiary hearing pursuant to § 16-24B-3. The circuit court designated a mediator to hold the expedited hearing. Yance then attempted to add a claim that was comparable to Whitlow's counts two and three, but the mediator ruled that he did not have jurisdiction to hear that claim. Thereafter, the mediator ruled against Yance on his request for an expedited evidentiary hearing in Yance I. Yance subsequently brought another action, Yance II, stating claims comparable to Whitlow's counts two and three. The circuit court dismissed that action based on the doctrine of res judicata because, the circuit court determined, Yance could have prosecuted those claims in Yance I. On appeal, this court affirmed the circuit court's judgment, holding:

> "that Yance had the right to assert his contract-extension claim in Yance I. Although that right could not have been enforced in the expedited evidentiary hearing before the mediator, see Curry[v. Russell Cnty. Bd. of Educ.], 125 So. 3d [711,] 715-16 [Ala. Civ. App. 2013)] (construing § 16-24B-3(e)(2)a. to preclude expedited evidentiary hearing on

> contract-extension claim), it could have been tried separately before the judge in Yance I, as the trial court in Yance II found and as counsel for the parties agreed at the hearing on the motion to dismiss."

163 So. 3d at 1075. Based on our holding in Yance II, we reverse the trial court's judgment insofar as it dismissed counts two and three of Whitlow's complaint against the Board members in their official capacities and remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.