NO. COA01-1196

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

LISHA F. BELL,
Plaintiff,

v. Transylvania County
No. 01 CVD 290

TRANSAMERICAN MEDICAL, INC.,
Defendant.

Appeal by defendant from order entered 20 July 2001 by Judge C. Dawn Skerrett in Transylvania County District Court. Heard in the Court of Appeals 5 June 2002.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for plaintiff appellee.

Roberts & Stevens, P.A., by Jacqueline D. Grant, for defendant appellant.

McCULLOUGH, Judge.

This is an appeal from the trial court's grant of a preliminary injunction requiring defendant Transamerican Medical, Inc. (Transamerican) to: (1) reinstate plaintiff; and (2) enjoin Transamerican from filling plaintiff's position or duties during the pendency of this litigation. The pertinent facts are as follows: Transamerican, a North Carolina corporation located in Brevard, North Carolina, is in the business of refurbishing medical equipment and supplies. In July 1995, Transamerican hired plaintiff

as its Chief Financial Officer (CFO). In her affidavit, plaintiff stated she "was empowered to issue check[s] and attend to liabilities of Defendant at [her] sound discretion." Plaintiff was able to participate in Transamerican's automobile leasing policy, whereby the company provided employees with vehicles to use during their employment. In April 1998, Transamerican leased a Pontiac Firebird for plaintiff's use.

On 27 February 2001, plaintiff filed charges with the Equal Employment Opportunity Commission (EEOC) alleging sexual harassment and sex discrimination under Title VII of the Civil Rights Act of 1964. Transamerican was served with the charges on 5 March 2001. In April 2001, plaintiff expressed a desire to trade her Firebird for a Dodge Durango. Transamerican's president and chief operations officer told plaintiff the vehicle policy was put on hold in October 2000 pending changes to the policy, but offered to extend plaintiff's Firebird lease until a new policy was in place. Plaintiff then expressed her desire to purchase the Firebird pursuant to the company's vehicle agreement. Throughout the course of the vehicle discussions, Transamerican discovered plaintiff made over $12,000.00 in overpayments on the Firebird. As a result, Transamerican launched an investigation into plaintiff's actions as CFO. Transamerican suspended plaintiff on 3 May 2001 after noting "irregularities" in her work. Plaintiff was terminated on 10 May 2001.

On 24 May 2001, plaintiff filed a complaint alleging wrongful termination, defamation and breach of contract. On 1 June 2001,

plaintiff filed an amended complaint and a motion for preliminary injunction. On 29 June 2001, Transamerican objected to the district court's jurisdiction based on the amount of damages plaintiff requested. On 20 July 2001, the district court granted plaintiff's motion for preliminary injunction and ordered plaintiff's reinstatement until 6 September 2001, the expiration of the 180-day conciliation period from the filing of plaintiff's charge with the EEOC on 27 February 2001. The district court also enjoined Transamerican from filling plaintiff's position or duties. Transamerican appealed.

On appeal, Transamerican argues the district court (I) erred by granting plaintiff's motion for preliminary injunction; and (II) did not have subject matter jurisdiction to hear plaintiff's motion for preliminary injunction. For the reasons set forth herein, we conclude the appeal is interlocutory and should be dismissed.

The trial court's 20 July 2001 preliminary injunction consisted of two distinct portions. The first portion required Transamerican to reinstate plaintiff until 6 September 2001. Generally, an appeal is subject to dismissal when a question presented has become moot, unless the question involves a matter of public interest. *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). After careful examination of the case, we hold the question of plaintiff's reinstatement is not a matter of public interest. As the period for reinstating plaintiff under the preliminary injunction has expired and is void

by its own terms, we hold the question of plaintiff's reinstatement has become moot.

Defendant also argues the trial court erred with respect to the second portion of the preliminary injunction, whereby Transamerican was enjoined from filling plaintiff's position or duties while the litigation was pending. Plaintiff concedes, and we agree, that this question is not moot. We must therefore determine whether this appeal is interlocutory and subject to dismissal.

"An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995); *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). "There is generally no right to appeal an interlocutory order." *Page*, 119 N.C. App. at 733, 460 S.E.2d at 334. However,

> [t]here are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review."

Turner v. Norfolk S. Corp., 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (quoting *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (quoting *Page*, 119 N.C. App. at 734, 460 S.E.2d

at 334)). *See also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (2001). In the present case, defendant appeals from an order issuing a preliminary injunction. Preliminary injunctions are interlocutory. *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). Therefore, we consider whether a substantial right was affected.

The inability to do business has been held to be a substantial right. *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 433 S.E.2d 811 (1993). In *Milner Airco*, an employer sought temporary and permanent injunctions against two former employees who allegedly violated a covenant not to compete, and against the heating and air conditioning business that employed them. *Id.* at 867, 433 S.E.2d at 812. The trial court issued a preliminary injunction, and the employees and their current employer appealed. *Id.* at 868, 433 S.E.2d at 812-13. This Court concluded that, although the appeal was from an interlocutory order, the inability to do business, particularly seasonal business, affected a substantial right. *Id.* at 869, 433 S.E.2d at 813. Furthermore, in *Masterclean of North Carolina v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986), this Court held that the right to work and earn a living was a substantial right where there were only two other businesses in North Carolina in the same business as the party seeking an injunction enforcing a covenant not to compete.

These cases are distinguishable from the case before us. Here, the district court enjoined Transamerican from filling plaintiff's position or the duties she performed during the

pendency of this action. As CFO, plaintiff issued checks for the company and exercised her sound discretion to make financial decisions. Despite plaintiff's broad financial power, there is no evidence in the record that Transamerican has been unable to conduct business since it terminated plaintiff. Since plaintiff's termination, Transamerican admitted that it hired an outside accounting firm to manage its payroll, had company officers (other than plaintiff) write checks, and has generally been able to conduct its business.

Although Transamerican believes allowing anyone to perform plaintiff's job functions is a violation of the preliminary injunction which subjects it to possible court action at any time, we do not find this argument persuasive. Even if being called into court affects a substantial right, this event has not yet occurred. Careful examination of the trial court's order indicates a degree of flexibility regarding the performance of plaintiff's duties, and we do not believe Transamerican's interpretation of the order is correct. With respect to plaintiff's duties, the trial court stated:

> 4. The Court will permit Defendant to take whatever security backstops for Plaintiff's work in financial areas that it sees fit, with the clear proviso that Defendant may not take such steps in a manner demeaning or embarrassing to Plaintiff, such as posting a guard or having an employee continuously watch Plaintiff. What is contemplated by this provision, rather, are such matters as refusing to permit Plaintiff to incur or pay liabilities or obligations of Defendant without the signature of a designated officer,

> etc., etc. Nor may Defendant demote Plaintiff from her former position or impose additional duties or obligations, but may limit her duties in that former position in such a manner as to satisfy its own and reasonable security concerns.

Based on the foregoing, we conclude the issue of plaintiff's reinstatement is moot. The remainder of Transamerican's appeal is interlocutory, because the trial court's preliminary injunction does not affect a substantial right. Because of our disposition, we need not address Transamerican's second assignment of error. The appeal is hereby

Dismissed.

Judges WALKER and HUDSON concur.

Report per Rule 30(e).