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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-243

Filed: 3 October 2017

Wake County, No. 16 CVS 005407

JASON H. PERRY, Plaintiff,

v.

WEST MARINE, INC. (also known as WEST MARINE PRODUCTS, INC.),
Defendant.

Appeal by plaintiff from order entered 16 November 2016 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 6 September 2017.

Abraham P. Jones for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Regina W. Calabro and Brodie D. Erwin, for defendant-appellee.

TYSON, Judge.

Jason Perry (“Plaintiff”) appeals from the trial court’s order dismissing his complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

We affirm.

I. Background

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West Marine, Inc. (“Defendant”), a California-based company, sells boats, boat parts, and other boating-related items at retail. In March 2014, Plaintiff was hired as a sales associate in Defendant’s Raleigh, North Carolina store. Plaintiff suffers from a medical condition in his ears, which causes the reduced ability to hear, impaired equilibrium, and susceptibility to ear infections.

Plaintiff’s duties included stocking shelves, assisting customers, unloading equipment, selling boats and equipment, and operating the payment register. On 25 April 2014, Plaintiff’s supervisor informed him that he was required to wear headphones, and would be terminated if he refused to wear them.

Plaintiff informed his supervisor about a letter from his doctor, which explained his ear condition and asserted he needed an “accommodation,” so that he would not be required to wear the headphones. Plaintiff proposed to establish a plan to meet Defendant’s needs without requiring Plaintiff to wear the headphones.

Plaintiff alleges the supervisor pushed the headphones towards him and insisted in a loud voice that he take them. Plaintiff’s supervisor “stepped very close to Plaintiff and was talking very loudly” and made Plaintiff uncomfortable. Plaintiff backed up against the wall.

Plaintiff again refused to wear the headphones, and stated his medical condition and that he had a letter from his doctor. His supervisor stated, “[t]his just isn’t going to work out,” and asked Plaintiff to log out of the computer. While Plaintiff

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was logging out of the computer, he alleges his supervisor “was looking directly over Plaintiff’s right shoulder in close range, and in an angry and threatening manner, making Plaintiff uncomfortable.”

Plaintiff also alleges he sent complaints to Defendant’s district manager on two occasions in May 2014 regarding the headphone incident, but was denied the opportunity to discuss his concerns with management.

On 19 April 2016, Plaintiff filed a complaint against West Marine, Inc. which alleged claims for wrongful discharge from his employment, negligent infliction of emotional distress (“NIED”), civil assault, and violation of the provisions of the Persons with Disabilities Act.

On 18 May 2016, Defendant filed a motion to dismiss Plaintiff’s complaint pursuant to Rule 12(b)(6). N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). The trial court granted Defendant’s motion and dismissed Plaintiff’s complaint in its entirety and with prejudice. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Issues

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Plaintiff argues the trial court erred by: (1) dismissing his complaint in its entirety pursuant to Rule 12(b)(6) of the Rules of Civil Procedure; and (2) not allowing Plaintiff to amend his complaint pursuant to Rule 15 of the Rules of Civil Procedure.

IV. Dismissal of Plaintiff's Complaint

Plaintiff argues the trial court erred by granting Defendant's motion and dismissing all claims in Plaintiff's complaint under Rule 12(b)(6). We disagree.

A. Standard of Review

"On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* 'whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]'" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009).

This Court has repeatedly held:

In order to overcome such a motion, a plaintiff is not required to "conclusively establish" *any* factual issue in the case. Rather, the only question properly before a court reviewing a Rule 12(b)(6) motion is whether "the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true."

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Feltman v. City of Wilson, 238 N.C. App. 246, 256, 767 S.E.2d 615, 622 (2014) (quoting *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007)) (emphasis in original).

B. Wrongful Discharge

“In North Carolina, absent an employment contract for a definite period of time, both employer and employee are generally free to terminate their association at any time and without reason. An exception to the employment-at-will doctrine exists when an employee is discharged in contravention of public policy.” *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 321-22, 528 S.E.2d 368, 370 (2000) (internal citations and quotation marks omitted). Plaintiff’s complaint alleges Defendant wrongfully discharged him from his employment pursuant to N.C. Gen. Stat. § 143-422.2. This statute, entitled “Legislative declaration,” provides:

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, biological sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen. Stat. § 143-422.2(a) (2015).

Plaintiff’s complaint alleges a wrongful discharge claim under this statute, and asserts “[t]he manner in which [he] was terminated from his employment, notwithstanding his medical conditions, is a violation state public policy and constitutes a wrongful discharge in violation of the law, N.C. Gen. Stat. § 143-422.”

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Plaintiff's complaint excludes allegations of disability discrimination as the basis of his public policy wrongful discharge claim. The complaint does not contain any allegations of other forms of unlawful discrimination.

Additionally, our Court has held that no duty exists upon an employer to provide reasonable accommodations under N.C. Gen. Stat. § 143-422.2. In *Simmons*, the plaintiff filed a wrongful discharge claim against his former employer and alleged he was terminated in violation of N.C. Gen. Stat. § 143-422.2 due to a respiratory condition, which rendered him unable to perform his job duties. *Simmons*, 137 N.C. App. at 319-20, 528 S.E.2d at 369.

The employer moved for summary judgment and asserted the plaintiff was discharged because of his poor job performance and not because of his medical condition. *Id.* at 320-21, 528 S.E.2d at 369. The plaintiff asserted the employer failed to make reasonable accommodations for his respiratory condition. *Id.* at 320, 528 S.E.2d at 369.

This Court affirmed the trial court's entry of summary judgment in favor of the employer and held:

[The] plaintiff's concern with the defendant's alleged failure to provide reasonable accommodations to the plaintiff is misplaced. Had plaintiff filed a claim under N.C. Gen. Stat. § 168A-11, which provides a civil cause of action under the NCHPPA, such a discussion may have been appropriate. However, since plaintiff's claim is based on wrongful discharge in violation of public policy under N.C. Gen. Stat. § 143-422.2, a discussion of reasonable

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accommodations . . . is irrelevant.

Id. at 323, 528 S.E.2d at 371.

Plaintiff's complaint alleges he was discharged from his employment for reasons "notwithstanding his medical conditions," but does not assert the reasons that form the basis of the wrongful termination allegation. Plaintiff's complaint fails to provide Defendant with notice of the public policy he claims was violated by his at will termination. "With respect to claims for wrongful termination in violation of public policy, this Court has explained that 'notice pleading is not sufficient to withstand a motion to dismiss; instead a claim must be pled with specificity.'" *Horne v. Cumberland County Hosp. Sys.*, 228 N.C. App. 142, 146, 746 S.E.2d 13, 17-18 (2013) (quoting *Gillis v. Montgomery County Sheriff's Dep't*, 191 N.C. App. 377, 379, 663 S.E.2d 447, 449 (2008)).

In order to maintain such a claim, therefore, the plaintiff must allege "specific conduct by defendant that violated this same specific expression of our state's public policy." *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 321, 551 S.E.2d 179, 184, *aff'd per curiam*, 354 N.C. 568, 557 S.E.2d 528 (2001). Even if Plaintiff's complaint is construed to include a claim for failure to reasonably accommodate Plaintiff's disability, the trial court properly dismissed the wrongful termination claim under Rule 12(b)(6). *Simmons*, 137 N.C. App. at 321-22, 528 S.E.2d at 370. Plaintiff's argument is overruled.

C. Negligent Infliction of Emotional Distress

An actionable claim for NIED requires a showing that Defendant *negligently* engaged in conduct, which was reasonably foreseeable to cause, and did in fact cause, Plaintiff to suffer severe emotional distress. *Fields v. Dery*, 131 N.C. App. 525, 526, 509 S.E.2d 790, 791 (1998), *disc. review denied*, 350 N.C. 308, 534 S.E.2d 590 (1999).

For allegations to establish the essential element of extreme and outrageous conduct, “the conduct must go beyond all possible bounds of decency and be regarded as atrocious, and utterly intolerable in a civilized community. The liability clearly does not extend to mere insults, indignities, [or] threats[.]” *Wagoner v. Elkin City Schools’ Bd. of Education*, 113 N.C. App. 579, 586, 440 S.E.2d 119, 123 (citations and internal quotation marks omitted), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

Plaintiff alleges his supervisor committed NIED by “speaking to him in a very loud voice, embarrassing him in front of his colleagues, and confronting him in a closed, small space in a threatening manner.” Plaintiff’s claims are premised upon intentional acts, rather than negligent conduct by his supervisor. “Allegations of intentional conduct, such as these, even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim.” *Horne*, 228 N.C. App. at 149, 746 S.E.2d at 19 (citing *Sheaffer v. Cty. of Chatham*, 337 F. Supp. 2d 709, 734 (M.D.N.C. 2004) (“Even taking all these allegations as true, they demonstrate

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intentional acts for which Plaintiff has made other claims; they do not show negligent acts required for a claim of negligent infliction of emotional distress.”)). Plaintiff has failed to plead the negligence element of his NIED claim.

Furthermore, “in order to plead a valid NIED claim, a plaintiff must allege severe emotional distress, which has been defined as any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.” *Id.* at 149, 746 S.E.2d at 19-20 (citation and quotation marks omitted).

Here, Plaintiff’s complaint merely asserts his supervisor’s actions made him “uncomfortable.” Plaintiff does not allege his discomfort continued beyond his brief interaction with his supervisor. Plaintiff’s allegations are insufficient to state a claim for NIED. *Id.* Plaintiff’s argument is overruled.

D. Civil Assault

“The elements of [civil] assault are intent, offer of injury, reasonable apprehension, apparent ability, and imminent threat of injury.” *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991) *aff’d*, 331 N.C. 743, 417 S.E.2d 447 (1992) (citation omitted). “The gist of an action for assault is apprehension of harmful or offensive contact.” *Morrow v. Kings Department Stores, Inc.*, 57 N.C. App. 13, 19, 290 S.E.2d 732, 736, *disc. review denied*, 306 N.C. 385, 294 S.E.2d 210 (1982).

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To state an actionable claim for civil assault, Plaintiff must plead an “overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some *immediate* physical injury to the person of another.” *Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E.2d 325, 331 (1981) (emphasis in original, citation and quotation marks omitted). “The display of force or menace of violence must be such to cause the reasonable apprehension of *immediate* bodily harm.” *Id.* (emphasis in original, citation and quotation marks omitted).

Plaintiff’s complaint alleges his supervisor’s “action of verbally attacking him in a threatening manner in a small, confined space, including backing him into a wall, was unprofessional and demeaning and constituted an assault[.]” The complaint contains no allegations that Plaintiff’s supervisor’s actions were coupled with a threat to harm him, or that her actions or statements caused Plaintiff a reasonable apprehension of immediate bodily harm. These allegations are insufficient to state claim for civil assault. The trial court properly dismissed Plaintiff’s claim of civil assault.

V. Motion to Amend Complaint

Plaintiff argues the trial court erred by not allowing him to amend his complaint. We dismiss Plaintiff’s arguments.

Plaintiff filed a motion to amend his complaint five months prior to the hearing on Defendant’s motion to dismiss, but he had failed to request the trial court calendar,

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hear, and rule upon his motion to amend prior to hearing and ruling upon Defendant's motion to dismiss. The trial court ruled upon Defendant's motion to dismiss, but entered no final order upon Plaintiff's motion to amend his complaint. "[A] plaintiff cannot appeal from, and this Court cannot consider, an order which has not yet been entered." *Dafford v. JP Steakhouse LLC*, 210 N.C. App. 678, 683, 709 S.E.2d 402, 406 (2011). Plaintiff's motion to amend was never heard before the trial court, and no final order was entered from which Plaintiff can appeal.

Furthermore, "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]" N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). Defendant did not serve a responsive pleading.

Plaintiff could have amended his complaint at any time prior to the hearing without leave of court. *Id.* Plaintiff also could have dismissed his complaint without prejudice prior to the hearing. N.C. Gen. Stat. § 1A-1, Rule 41 (2015). Plaintiff's purported argument is dismissed.

VI. Conclusion

Plaintiff's complaint fails to state essential elements to support his claims for wrongful termination in violation of public policy under N.C. Gen. Stat. § 143-422.2, NIED, and civil assault. Plaintiff makes no argument pertaining to the trial court's dismissal of his claim that Defendant violated the provisions of the Persons with Disabilities Act. The trial court properly dismissed his complaint pursuant to Rule

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12(b)(6).

We dismiss Plaintiff's argument that the trial court erred by not allowing him to amend his complaint. Plaintiff failed to obtain a ruling on his motion to amend prior to the hearing on Defendant's motion to dismiss and the trial court's dismissal of his complaint. No order was entered upon Plaintiff's motion to amend, and we are without jurisdiction to consider this argument. *See id.*

The trial court's order dismissing Plaintiff's complaint is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).