An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-328

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

PATRICIA ANN GIBBS,
Plaintiff,

v.

Guilford County
No. 00 CvS 5926

GUILFORD TECHNICAL
COMMUNITY COLLEGE,
Defendant.

Appeal by defendant from order entered 21 September 2000 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 22 January 2002.

Hicks McDonald LLP, by David W. McDonald, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by Julie C. Theall and Shannon J. Adcock, for defendant-appellant.

EAGLES, Chief Judge.

Patricia Ann Gibbs, ("plaintiff"), initiated this action against her employer, Guilford Technical Community College ("defendant"), alleging wrongful termination, breach of contract and infliction of emotional distress. Defendant appeals from the denial of defendant's motion to dismiss for prior action pending. After careful consideration of the briefs and record, we affirm.

Plaintiff was born with cerebral palsy, "a potentially disabling neurological condition." Plaintiff earned a Bachelor of

Arts degree in Elementary Education from Guilford College in 1969, a Master of Library Science degree from the University of North Carolina at Greensboro in 1976, and a Master's Degree in Special Education from George Washington University in 1982.

Plaintiff began working for defendant in 1982 as a Library Assistant at defendant's Washington Street campus. In March 1987, defendant transferred plaintiff to the library at the Jamestown campus. Plaintiff's new position required her to handle paperwork. Defendant provided plaintiff with a typewriter after receiving a request from plaintiff. In August 1987, defendant transferred plaintiff to the Literacy Department at the Greensboro campus. Plaintiff was responsible for teaching a class of "mentally challenged adults." In 1990, plaintiff taught at an off-campus site in Greensboro and was provided enlarged attendance forms by defendant. Plaintiff assisted with the testing of students in 1992. In December 1996, defendant assigned plaintiff to teach "high functioning mentally retarded adults 10 hours per week" which increased to 25 hours per week in early 1997. Defendant sent plaintiff a "Notice of Suspension and Nonrenewal" on 7 April 1997. The reasons for this action stated in the notice were: "inappropriate interaction with the students in [plaintiff's] class" and "inappropriate to have [plaintiff's sister-in-law] work with those student records without proper authorization."

Plaintiff filed a complaint *pro se* in the United States District Court for the Middle District of North Carolina on 13 March 1998. Initially, plaintiff alleged violations of the

Rehabilitation Act of 1973 and the Americans with Disabilities Act as well as alleging sexual harassment and wrongful dismissal. An amended complaint filed 2 June 2000 alleged that the "action is brought under the American[s] with Disabilities Act (ADA) 42 U.S.C. 12101, *et. seq.*, in that it is a lawsuit for damages for wrongful termination and failure to accommodate the disabilities of the plaintiff."

Plaintiff then commenced a state action against defendant on 6 April 2000. Plaintiff alleged wrongful termination, breach of contract, and infliction of emotional distress. Defendant filed to remove the action to Federal District Court. Plaintiff moved to remand the matter to Guilford County Superior Court which was unopposed by defendant.

On 17 August 2000, defendant moved to dismiss this action pursuant to Rule 12(b)(6) and based on the fact that there was a prior action pending. The motion to dismiss was heard at the 18 September 2000 civil session of Guilford County Superior Court before Judge Michael E. Helms. By written order filed 21 September 2000, Judge Helms denied defendant's motion to dismiss for prior action pending, denied defendant's motion for a stay, and noted that defendant's Rule 12(b)(6) motion had been withdrawn. Defendant appeals.

Defendant raises two issues on appeal: whether the trial court's denial of defendant's motion to dismiss affected a substantial right to support an interlocutory appeal, and whether the trial court erred in denying defendant's motion to dismiss on

the basis of prior action pending. After careful review, we affirm.

First, defendant contends that the trial court's denial of defendant's motion to dismiss affected a substantial right which in turn would support an interlocutory appeal. On this record, we agree.

"A denial of a motion to dismiss on the ground that there is a prior pending action is immediately appealable." *Stevens v. Henry*, 121 N.C. App. 150, 154, 464 S.E.2d 704, 707 (1995). *See also Winston-Salem Joint Venture v. Cathy's Boutique*, 72 N.C. App. 673, 674, 325 S.E.2d 286, 287 (1985); *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983). *But see Allen v. Trust Co.*, 35 N.C. App. 267, 268-69, 241 S.E.2d 123, 124 (1978); *Acorn v. Knitting Corp.*, 12 N.C. App. 266, 267-68, 182 S.E.2d 862, 863, *cert. denied*, 279 N.C. 511, 183 S.E.2d 686 (1971).

Second, defendant contends the trial court erred in denying defendant's motion to dismiss based on the defense of prior action pending. We disagree.

Defendant argues that the trial court should have dismissed this action because an action arising out of the same events had already been brought by plaintiff in federal court more than two years earlier. "The authorities are legion in North Carolina that the pending of a prior action between the same parties for the same cause of action in a court of competent jurisdiction works an abatement of a subsequent action either in the same court or another court of the same state having jurisdiction." *Shore v.*

Brown, 324 N.C. 427, 429, 378 S.E.2d 778, 779 (1989). "[A] prior action pending in a federal court within the territorial limits of the state constitutes grounds for abatement of a subsequent state action on substantially similar grounds between the same parties." *Eways v. Governor's Island*, 326 N.C. 552, 561, 391 S.E.2d 182, 187 (1990). Defendant contends that the parties, subject matter, issues and relief sought are substantially identical in both actions so a motion to dismiss was proper. *See Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 21, 387 S.E.2d 168, 172 (1990). We are not persuaded.

"In determining whether the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior actions, the ordinary test is this: 'Do the two actions present a substantial identity as to parties, subject matter, issues involved and relief demanded.'" *State ex rel. Onslow County v. Mercer*, 128 N.C. App. 371, 375, 496 S.E.2d 585, 588 (1998) (citations omitted).

Here, there is no dispute that the parties and relief sought are substantially similar. The issues and subject matter in plaintiff's state claim are not identical or substantially similar to those in her federal action.

The subject matter of the two actions are not substantially similar. Plaintiff alleged wrongful termination and failure to accommodate the disabilities of plaintiff under the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 *et seq.*, in her federal claim. While in her state claim, plaintiff alleged wrongful termination in violation of public policy, breach of contract and

infliction of emotional distress. The wrongful termination allegation in plaintiff's state action provides: "[d]efendant terminated plaintiff's employment in violation of the public policy of the State of North Carolina, because of plaintiff's age and because of plaintiff's handicap." Plaintiff further alleges that the public policy violated by defendant is provided in North Carolina's "Equal Employment Practices Act," which states:

> 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, sex or handicap by employers which regularly employ 15 or more employees.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

G.S. § 143-422.2.

G.S. Chapter 168A, the "North Carolina Persons With Disabilities Protection Act," has been found to be analogous with the ADA. *See Stroud v. Harrison*, 131 N.C. App. 480, 508 S.E.2d 527 (1998), *disc. review denied*, 350 N.C. 107, 534 S.E.2d 212 (1999). Plaintiff makes no claim under G.S. Chapter 168A in her state action. The ADA is the subject matter for plaintiff's claim in her federal action while her state action is based on a provision of North Carolina's "Equal Employment Practices Act," G.S. § 143-422.1 *et seq.* This claim is distinguishable from a claim under G.S.

Chapter 168A. *See Simmons v. Chemol Corp.*, 137 N.C. App. 319, 323, 528 S.E.2d 368, 371 (2000).

For similar reasons, the federal and state actions differ with respect to the issues presented. The issues in the federal action involve whether defendant violated the ADA in dismissing plaintiff from employment and failing to accommodate plaintiff's condition. Whereas the issues in the state action involve whether, in dismissing plaintiff, defendant violated the public policy of North Carolina, breached a contract, and inflicted emotional distress.

We conclude that the trial court properly denied defendant's motion to dismiss on the basis of prior action pending. While we are aware of this Court's recent decision in *Kelly v. Carteret County Board of Education*, __ N.C. App. __, __ S.E.2d __ (Mar. 5, 2002) (No. COA01-468), we do not find it controlling here. In *Kelly*, the issue before this Court was "whether 'all the allegations forming the gravamen of Plaintiff's complaint fall' within the scope of a disability discrimination claim." *Id.* at __, __ S.E.2d at __. The plaintiff in *Kelly* alleged that "she was wrongfully terminated in violation of the public policy of North Carolina that 'all people . . . hold employment without discrimination on the bases of handicap or disability' and 'that the safety of persons and property on or near the public highways be protected.'" *Id.* at __, __ S.E.2d at __. *Kelly* held that "as the 'gravamen' of Plaintiff's complaint is based on her disabling condition, and not on her refusal to violate public policy, Plaintiff's complaint only sets forth an injury based on a

discrimination claim." *Id.* at __, __ S.E.2d at __. However, the scope of *Kelly* was limited to a review of "the trial court's dismissal of [plaintiff's] claim for wrongful termination in violation of the public policy of North Carolina to protect the safety of persons and property." *Id.* at __ n.1, __ S.E.2d at __. *Kelly* did not discuss nor involve G.S. § 143-422.2 as the basis for a public policy violation.

Our Supreme Court held in *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992), that:

> [a]lthough the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good," at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Id. at 353, 416 S.E.2d at 169 (footnote omitted). Here, plaintiff alleged she was "fired in contravention of express policy declarations contained in the North Carolina General Statutes." *Id.* This express declaration is in the "Equal Employment Practices Act," G.S. § 143-422.1 *et seq.*

Since we uphold the trial court's decision in favor of plaintiff, we need not address plaintiff's cross-assignments of error.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).