NO. COA09-1043

NORTH CAROLINA COURT OF APPEALS

Filed: 18 May 2010

DEBBIE H. BEARD,
Plaintiff,

v. Cumberland County
No. 08 CVS 11075

CUMBERLAND COUNTY
HOSPITAL SYSTEM, INC.,
d/b/a CAPE FEAR VALLEY
HEALTH SYSTEM, a/k/a
CAPE FEAR VALLEY MEDICAL
CENTER,
Defendant.

Appeal by Plaintiff from order entered 24 March 2009 by Judge James Gregory Bell in Cumberland County Superior Court. Heard in the Court of Appeals 9 December 2009.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for Plaintiff.

K&L Gates LLP, by Amie Flowers Carmack and Daniel J. Palmieri, for Defendant.

STEPHENS, Judge.

I. Procedural History and Factual Background

On 3 November 2008, Debbie H. Beard ("Plaintiff") filed an amended complaint in Cumberland County Superior Court against Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System, a/k/a Cape Fear Valley Medical Center ("Defendant"), alleging that Defendant had taken retaliatory actions against her

within the meaning of the Retaliatory Discrimination Employment Act ("REDA").

In her complaint, Plaintiff alleged the following: Plaintiff was initially employed by Defendant on 8 January 2007 as a housekeeping assistant. On or about 8 February 2007, Plaintiff sustained an injury to her back when she hit her back on a doorknob. Plaintiff filed a workers' compensation claim, and Defendants accepted the claim pursuant to an Industrial Commission Form 60. As a result of this injury, Plaintiff was disabled from 8 February through 19 February 2007.

On or about 18 May 2007, Plaintiff strained her lower back while attempting to move a pixel machine in the emergency room. Plaintiff filed a workers' compensation claim, and Defendants accepted this claim for medical payments only, also pursuant to a Form 60. Plaintiff did not work from 18 May through 25 May 2007.

On or about 23 June 2007, Plaintiff allegedly sustained an injury to her back while lifting linen bags. Plaintiff filed a workers' compensation claim, and Defendants denied this claim pursuant to a Form 61.

On or about 1 August 2007, Plaintiff injured her back throwing linens into a large bin outside the emergency room. Plaintiff filed a workers' compensation claim, and Defendants accepted this claim pursuant to a Form 60. Defendants paid, and continue to pay, indemnity compensation to Plaintiff for this claim.

On or about 2 July 2008, Plaintiff filed an employment discrimination complaint with the North Carolina Department of

Labor ("NCDOL"). On 6 August 2008, the NCDOL sent Plaintiff a "right-to-sue" letter. Within 60 days of receiving the letter, Plaintiff filed the complaint in Superior Court.

Plaintiff alleges in the complaint that

> Defendant's decision to refuse [Plaintiff] appropriate medical treatment with a board certified neurosurgeon of her choice[,] Dr. Mark Roy, and the decision to refusal [sic] to return [Plaintiff] to alternative light duty work with [D]efendant was an adverse employment action against [Plaintiff] while she was out of work and receiving medical treatment for her back claim under the Workers' Compensation Act and while she was exercising her rights protected under the North Carolina Workers' Compensation Act.

On 2 January 2009, Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. On 24 March 2008, the trial court ordered Plaintiff's complaint dismissed because "[t]he claims asserted in the Amended Complaint are exclusively and properly before the Industrial Commission and outside this Court's subject matter jurisdiction."

From the trial court's dismissal of Plaintiff's complaint, Plaintiff appeals.

II. Discussion

Plaintiff first argues extensively that the trial court erred in dismissing Plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. However, the trial court dismissed Plaintiff's claims because they were "exclusively and properly before the Industrial Commission and outside this Court's subject matter jurisdiction," pursuant to N.C. Gen. Stat. § 1A-1,

Rule 12(b)(1) ("[l]ack of jurisdiction over the subject matter"), and not for "[f]ailure to state a claim upon which relief can be granted," pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Accordingly, Plaintiff's argument based on Rule 12(b)(6) is without merit.

We construe Plaintiff's remaining argument liberally in determining that Plaintiff contends that the trial court erred in dismissing her complaint for lack of subject matter jurisdiction.

Appellate review of a trial court's ruling on a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*. *Stacy v. Merrill*, 191 N.C. App. 131, 134, 664 S.E.2d 565, 567 (2008). Under *de novo* review, this Court considers the matter anew and may freely substitute its own judgment for that of the trial court. *Id.*

The REDA prohibits discrimination or retaliation against an employee for, *inter alia*, filing a workers' compensation claim. N.C. Gen. Stat. § 95-241(a)(1) (2007). In order to state a claim under the REDA, a plaintiff must show the following: (1) that she exercised her rights under N.C. Gen. Stat. § 95-241(a); (2) that she suffered a retaliatory action; and (3) that the alleged retaliatory action was taken because she exercised her rights under N.C. Gen. Stat. § 95-241(a). *Wiley v. UPS, Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004). A "'[r]etaliatory action' means the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of

employment." N.C. Gen. Stat. § 95-240(2) (2007). An employee who has been issued a right-to-sue letter may commence a civil action alleging a violation of the REDA in the superior court of the county where the violation occurred, where the complainant resides, or where the respondent resides or has his principal place of business. N.C. Gen. Stat. § 95-243(a) (2007).

Plaintiff argues that the following actions by Defendant in connection with her workers' compensation claim[1] were "retaliatory actions" within the meaning of the REDA: (1) Defendant refused to allow Plaintiff to be treated by her preferred neurosurgeon, Dr. Mark Roy, and (2) Defendant refused to allow Plaintiff to return to work in a light duty position. We disagree.

First, the dispute over which physician should treat Plaintiff's allegedly work-related injuries is in no way connected to "the terms, conditions, privileges, and benefits of [Plaintiff's] employment." N.C. Gen. Stat. § 95-240(2). Accordingly, refusing to allow Plaintiff to choose her physician cannot be considered a "retaliatory action" against Plaintiff's employment. Furthermore, a failure to return an employee to work in a position other than her own has never been held to be violative of the REDA. *See Wiley*, 164 N.C. App. at 187, 594 S.E.2d at 812 ("[P]laintiff has not cited any authority suggesting that a failure to return an employee to work in a position other than his own violates the REDA."). As this Court has noted, "[u]nlike the

[1] Plaintiff does not indicate which workers' compensation claim or claims these alleged "retaliatory actions" related to.

Americans with Disabilities Act, 42 U.S.C. § 12101 to -12213, the REDA does not require an employer to make an accommodation for an employee. If no position currently exists that [P]laintiff could perform, necessarily no adverse employment action has occurred." *Id.* Thus, Defendant's actions were not "retaliatory actions" within the meaning of the REDA and Plaintiff has failed to allege sufficient facts to support a REDA claim.

We agree with Defendant that Plaintiff's claims seek "collateral review of matters related to pending workers' compensation claims" and, thus, the claims are exclusively within the jurisdiction of the Industrial Commission.

"Through the Workers' Compensation Act, North Carolina has set up a comprehensive system to provide for employees who suffer work-related illness or injury." *Johnson v. First Union Corp.*, 131 N.C. App. 142, 144, 504 S.E.2d 808, 808 (1998). "The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured work[er], but also to insure [sic] a limited and determinate liability for employers." *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966). Accordingly, "the North Carolina Industrial Commission [has] exclusive jurisdiction over workers' compensation claims and all related matters," *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 808, and "collateral attacks are inappropriate." *Id.* at 145, 504 S.E.2d at 808 (dismissing civil action brought by injured employees against employer alleging fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress, and civil

conspiracy in connection with the employees' workers' compensation claims as the Workers' Compensation Act ("the Act") gave the Industrial Commission exclusive jurisdiction over workers' compensation claims and all related matters, including the issues raised in that case); *see also Riley v. DeBaer*, 149 N.C. App. 520, 526, 562 S.E.2d 69, 72 (remanding for dismissal of civil action alleging negligent infliction of emotional distress in the handling of plaintiff's workers' compensation claim as the action was "ancillary to the original [workers' compensation] claim" and the Act provides the "sole remedy" for plaintiff's claim), *aff'd per curiam*, 356 N.C. 426, 571 S.E.2d 587 (2002); *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.*, 142 N.C. App. 472, 543 S.E.2d 209 (dismissing injured employee's civil claims against his employer for alleged fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress, and civil conspiracy arising out of the handling of his workers' compensation claim because the claims were ancillary to his original compensable injury and, thus, were covered under the Act), *disc. rev. denied*, 354 N.C. 216, 553 S.E.2d 911 (2001). Thus, "[b]y statute[,] the Superior Court is divested of original jurisdiction of all actions which come within the provisions of the [Workers'] Compensation Act." *Morse v. Curtis*, 276 N.C. 371, 375, 172 S.E.2d 495, 498 (1970).

As in *Johnson*, *Riley*, and *Deem*, Plaintiff's claims in this case are related to her original compensable injuries and ancillary to her original workers' compensation claims for those injuries.

Accordingly, the present claims are exclusively within the jurisdiction of the Industrial Commission.

We affirm the trial court's order dismissing Plaintiff's complaint for lack of subject matter jurisdiction.

AFFIRMED.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).