

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1618

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

LOUIS G. ANTONELLIS,

Plaintiff,

v.

Cumberland County

No. 09 CVS 3727

CUMBERLAND COUNTY SCHOOLS
BOARD OF EDUCATION, DR. WILLIAM
C. HARRISON, SUPERINTENDENT,
DONNA WEEKS, HUMAN RESOURCES,
JEFF JERNIGAN, PRINCIPAL,

Defendants.

Appeal by plaintiff from order entered 24 August 2009 by Judge
Ola Lewis in Cumberland County Superior Court. Heard in the Court
of Appeals 26 April 2010.

Louis G. Antonellis, pro se, plaintiff-appellant.

*Womble Carlyle Sandridge & Rice, PLLC, by Theresa M. Sprain
and K. Curry Gaskins, for defendants-appellees.*

JACKSON, Judge.

Louis G. Antonellis ("plaintiff") appeals the 24 August 2009
order granting defendants' motion to dismiss. For the reasons
stated herein, we affirm.

In April 2006, plaintiff was employed by the Cumberland County
Schools Board of Education ("the Board") as a criminal justice

teacher at Cape Fear High School ("Cape Fear"). At that time, Jeff Jernigan ("Jernigan") was principal of Cape Fear, Donna Weeks ("Weeks") was Associate Superintendent of Cumberland County Schools, and William C. Harrison ("Harrison") was Superintendent of Cumberland County Schools (collectively with the Board, "defendants"). Plaintiff was finishing his fourth year of teaching at Cape Fear.

Plaintiff alleges that, in his end-of-the-year evaluation meeting with Jernigan on 21 April 2006, Jernigan told him that he would not rehire plaintiff at Cape Fear; however, according to plaintiff, Jernigan said that he would give him a good recommendation for another position with the school system. Plaintiff was not notified prior to this meeting of Jernigan's intention to recommend non-renewal of his teaching contract. Plaintiff further alleges that he filed a formal grievance against Jernigan for non-renewal of his expiring contract and unfair treatment of an employee on 4 May 2006. Plaintiff bases part of his grievance upon comments he made at a 16 May 2006 staff meeting, for which he contends Jernigan retaliated by terminating his employment.

On 22 May 2006, Weeks sent a letter to plaintiff and carbon-copied both Jernigan and Harrison. Weeks acknowledged that plaintiff had attempted to file a grievance but emphasized to him that his teaching contract provided that the "decision not to offer another contract is not subject to appeal under the grievance procedures of Cumberland County Schools[.]"

Jernigan signed a final verification form for plaintiff on 12 June 2006. The form included in the record on appeal shows that significant changes were made to the form. A check mark that appeared beside "Recommend for continued employment" has been marked out. Although the form indicates that plaintiff's performance was "'at' or 'above' standard[,]" the phrase "Expiring Contract/ Non-renewal" is handwritten above the signatures. Nothing in the record indicates whether these changes were made prior or subsequent to Jernigan's signature.

According to plaintiff, he was offered a position at another high school in Cumberland County on 14 August 2006. However, he later was contacted by the school and told that he had been blocked from further employment with the school system. Nothing in the record indicates that plaintiff was notified by the Board at any point about the non-renewal of his teaching contract.

Plaintiff filed this lawsuit on 15 April 2009, more than two and a half years after the last event upon which the suit is based. In his complaint, plaintiff expressly alleges four claims: (1) "Wrongful Termination and Discriminatory Hiring Practices[,]" (2) "Defamation of Character (Slander/Libel)[,]" (3) "Negligent Conduct[,]" and (4) "Negligent Infliction of Emotional Distress[.]" He also discusses statutory violations and a violation of his right to due process.

On 15 May 2009, defendants moved to dismiss plaintiff's lawsuit. The trial court granted defendants' motion to dismiss on 24 August 2009. Plaintiff appeals.

Plaintiff's sole argument is that the trial court erred by granting defendants' motion to dismiss because he stated several claims upon which relief may be granted. We disagree.

We review the grant or denial of a Rule 12(b)(6) motion to dismiss *de novo*. *Laster v. Francis*, __ N.C. App. __, __, 681 S.E.2d 858, 861 (2009) (citing *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006)).

A motion to dismiss should be denied if, "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (quoting *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000)). "Dismissal is proper when: '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.'" *Id.* (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

Plaintiff's complaint expressly alleges four causes of action – defamation, negligence, negligent infliction of emotional distress, and wrongful termination and discriminatory hiring practices. Within its text, it also discusses violations of due process and of various state statutes. We will address these claims in three segments: (1) the three tort claims, (2) the due process and wrongful termination claims, and (3) the various statutes.

First, plaintiff alleges three tort claims in his complaint: defamation, negligence, and negligent infliction of emotional distress. Because both the Board and Harrison, Weeks, and Jernigan in their official capacities are immune from tort liability and because plaintiff did not allege waiver of that immunity, plaintiff has failed to state a tort claim upon which relief can be granted.

A school board is immune from tort liability unless it has waived such immunity. *Fields v. Board of Education*, 251 N.C. 699, 700, 111 S.E.2d 910, 911 (1960) (citations omitted).

[I]n the absence of an allegation in the complaint in a tort action against a city board of education, to the effect that such board has waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such board has waived its immunity as authorized in [North Carolina General Statutes, section] 115-53, such complaint does not state a cause of action.

Id. at 701, 111 S.E.2d at 912.

"Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function[.]" *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993) (citing *Herndon v. Barrett*, 101 N.C. App. 636, 640, 400 S.E.2d 767, 769 (1991); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985)). "Governmental immunity protects the governmental entity and its officers or employees sued in their 'official capacity.'" *Id.* at 607, 436 S.E.2d at 279 (citing *Whitaker v. Clark*, 109 N.C. App. 379, 382, 427 S.E.2d 142, 144,

disc. rev. denied and cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993)).

"Although a plaintiff generally designates in the caption of his or her complaint in what capacity a defendant is being sued, this caption is not determinative on whether or not a defendant is actually being sued in his or her individual or official capacity." *Id.* (citation omitted).

If the plaintiff fails to advance any allegations in his or her complaint other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead, is treated as a claim against defendant in his official capacity.

Id. at 607-08, 436 S.E.2d at 279 (citing *Whitaker v. Clark*, 109 N.C. App. 379, 383-84, 427 S.E.2d 142, 145, *disc. rev. denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993)).

Here, plaintiff's complaint does not include an allegation that the Board had waived its immunity. Therefore, plaintiff did not state a cause of action as to any of his tort claims against the Board, and the trial court properly dismissed those claims.

Furthermore, the caption of plaintiff's complaint names Harrison, Weeks, and Jernigan, followed by their respective titles as employees of the Board. Although the "caption is not determinative" as to whether plaintiff intended to sue Harrison, Weeks, and Jernigan in their individual or official capacities, *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 279 (citation omitted), plaintiff's allegations within the complaint relate only to their official duties – decisions and actions concerning the non-renewal

of plaintiff's employment contract. In addition, the bulk of the relief plaintiff seeks – reinstatement to his teaching position, a monetary award in the amount of his teaching salary, a \$500,000.00 monetary recovery for his negligent infliction of emotional distress claim, removal of a letter from his personnel file, and the ability to compete for a teaching position within the Cumberland County School System – cannot be provided by Harrison, Weeks, or Jernigan in their individual capacities. Therefore, it is clear that plaintiff sued Harrison, Weeks, and Jernigan in their official capacities only, and his tort claims against them, therefore, are barred by governmental immunity.

Second, plaintiff's claims for wrongful termination and his allegations of due process violations are intertwined. However, the facts of plaintiff's case and allegations within his complaint are not sufficient to state a claim pursuant to either of these theories.

At the time of the events at issue, plaintiff was a probationary teacher, according to both the statutory definition and by his own admission, because he had taught for only four years. See N.C. Gen. Stat. § 115C-325(a)(5) (2005) ("Probationary teacher' means a certificated person, other than a superintendent, associate superintendent, or assistant superintendent, who has not obtained career-teacher status and whose major responsibility is to teach or to supervise teaching."); N.C. Gen. Stat. § 115C-325(c)(1) (2005) (After four consecutive years of employment in a State

public school system, a board of education shall vote as to whether that teacher should be granted career status.) .

North Carolina General Statutes, section 115C-325(c)(1) provides:

[W]hen a teacher has been employed by a North Carolina public school system for four consecutive years, the board, near the end of the fourth year, shall vote upon whether to grant the teacher career status. The board shall give the teacher written notice of that decision by June 15.

N.C. Gen. Stat. § 115C-325(c)(1) .

The board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons.

N.C. Gen. Stat. § 115C-325(m)(2) (2005). "[A]ny probationary teacher whose contract is not renewed under G.S. 115C-325(m)(2) shall have the right to appeal from the decision of the board to the superior court This appeal shall be filed within a period of 30 days after notification of the decision of the board."

N.C. Gen. Stat. § 115C-325(n) (2005) .

This Court has held that

the statutes applicable to probationary teachers are devoid of any expression of an intent to attach hearing rights to the decisions to not renew probationary teachers' contracts. The explicit grant of advance notice and hearing rights to other classes of school employees — but not to probationary teachers — makes this conclusion inescapable.

Moore v. Charlotte-Mecklenburg Bd. of Educ., 185 N.C. App. 566, 578, 649 S.E.2d 410, 418 (2007), *cert. denied*, 362 N.C. 360, 661 S.E.2d 735 (2008). Plaintiff's rights to due process, therefore, do not include a hearing before the Board, but are limited to judicial review of the Board's decision.¹

In the case *sub judice*, plaintiff was protected by our statutes from termination based upon "arbitrary, capricious, discriminatory or . . . personal or political reasons." N.C. Gen. Stat. § 115C-325(m)(2). However, he did not avail himself of the appeals process within the statutorily allotted thirty days,² and therefore, he forfeited his right to pursue his claim for wrongful termination or violation of due process. Accordingly, the trial court did not err in dismissing plaintiff's claims for wrongful termination and violation of his right to due process.

Third, plaintiff cites numerous statutes in his complaint: North Carolina General Statutes, sections 115C-317, -288, -47,

¹ Our current statutes provide specific procedural protections for probationary teachers, including the right to both notice and a hearing. However, the earliest effective date for any of these sections was 31 August 2009, see 2009 N.C. Sess. Laws 326 § 2, and therefore, they do not apply to plaintiff's claims.

² Defendant argues that plaintiff was notified of the Board's decision by 22 May 2006 at the latest and that plaintiff's thirty days within which to appeal the decision, therefore, expired well before he filed his suit on 15 April 2009. However, nothing in the record indicates that plaintiff was notified of the Board's decision. The 22 May 2006 letter from Weeks simply informs plaintiff that "Jernigan has notified you that he will not submit a recommendation for your re-employment with Cumberland County Schools." The principal's recommendation is not synonymous with the Board's decision. Nonetheless, plaintiff had actual notice of the Board's decision not to renew his contract because he was no longer employed with the Cumberland County Schools beginning in the 2006-07 school year. Because plaintiff failed to appeal the decision until 15 April 2009, he waived his right to challenge the Board's decision.

-301.1, -326, -57, -142, -45, and -325. None of these statutes, however, provides a basis for a suit against defendants.

"Generally, a statute allows for a private cause of action 'only where the legislature has expressly provided a private cause of action within the statute.'" *Willett v. Chatham Cty. Bd. of Educ.*, 176 N.C. App. 268, 272-73, 625 S.E.2d 900, 903 (2006) (quoting *Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003)).

In the instant case, plaintiff cites to no statute upon which he can base a claim for relief. Neither North Carolina General Statutes, section 115C-317 (penalty for making false reports or records), -288 (powers and duties of a principal), -47 (powers and duties of a local board of education), nor -301.1 (duty-free instructional planning time) expressly provides a private right of action. N.C. Gen. Stat. §§ 115C-317, -288, -47, -301.1 (2005). North Carolina General Statutes, sections 115C-326, -57, and -142³ are ineffective as a basis for plaintiff's claims, because they all have been repealed. 1998 N.C. Sess. Laws 5 § 3; 1985 N.C. Sess. Laws 975 § 1; 2006 N.C. Sess. Laws 69 § 1. Therefore, only North Carolina General Statutes, sections 115C-45 and -325 potentially could provide a basis for plaintiff's claims.

North Carolina General Statutes, section 115C-45 governs the judicial functions of a local board of education. See N.C. Gen.

³ North Carolina General Statutes, section 115C-142 was in effect when the events that gave rise to this action occurred. However, it was repealed in 2006, and prior to 2006, it was part of the article relating to special education. Therefore, even when it was in effect, it was inapplicable to plaintiff's case.

Stat. § 115C-45 (2005). As discussed *supra*, plaintiff's claim as to the Board's violation of North Carolina General Statutes, section 115C-45 is without merit, because at the time this action accrued, plaintiff was not entitled to notice and a hearing prior to the Board's decision. See *Moore*, 185 N.C. App. at 578, 649 S.E.2d at 418. Accordingly, any claims pursuant to North Carolina General Statutes, section 115C-45 were without merit.

Also as discussed *supra*, plaintiff cannot assert any claims pursuant to section 115C-325. The sections of the statute that provide significant procedural protections had not been enacted at the time of plaintiff's non-renewal. Therefore, none of the statutes cited in plaintiff's complaint provide him with a claim upon which relief may be granted.

We hold that the trial court properly granted defendants' motion to dismiss, because plaintiff's complaint did not state a claim upon which relief could be granted, whether based upon tort, due process, wrongful termination, or statute.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).