NO. COA14-585

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

FRANCES L. FELTMAN,
Plaintiff,

v. Wilson County
No. 13-CVS-1294

CITY OF WILSON, a North Carolina Municipal Corporation; GRANT GOINGS, in his official Capacity as the City Manager of the City of Wilson and in his individual capacity; HARRY TYSON, in his individual capacity as the Deputy City Manager of the City of Wilson and in his individual capacity; AGNES SPEIGHT, in her official capacity as the Assistant City Manager of the City of Wilson and in her individual capacity; DATHAN SHOWS, in his official capacity as the Assistant City Manager of the City of Wilson and in his individual capacity; and, SUZANNE ALLEN, in her individual capacity;
Defendants.

Appeal by plaintiff from order entered 14 January 2014 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 21 October 2014.

The Leon Law Firm, P.C., by Mary-Ann Leon, for plaintiff-appellant.

Cauley Pridgen, P.A., by James P. Cauley, III and Timothy P. Carraway, for defendants-appellees.

DAVIS, Judge.

Frances L. Feltman ("Plaintiff") appeals from the trial court's order granting the motion to dismiss of Defendants City of Wilson ("the City"), Grant Goings, Harry Tyson ("Tyson"), Agnes Speight ("Speight"), Dathan Shows, and Suzanne Allen ("Allen") (collectively "Defendants") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure as to two of the claims for relief asserted by Plaintiff. On appeal, Plaintiff contends that the trial court failed to apply the proper standard of review under Rule 12(b)(6) in granting Defendants' motion. After careful review, we reverse the trial court's order and remand for further proceedings.

Factual Background

We have summarized the pertinent facts below using Plaintiff's own statements from her amended complaint, which we treat as true in reviewing the trial court's order granting a motion to dismiss under Rule 12(b)(6). *See, e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

Plaintiff was employed as a Benefits Administrator with the City's Human Resources and Risk Services Department. Throughout her tenure as an employee, Plaintiff met and often exceeded the

job-related expectations of her employer. In 2009, Allen became Plaintiff's supervisor. In December 2011, Plaintiff and several other employees became aware that Allen was improperly assigning certain City employees to babysit her children at her home during their regular working hours for the City. In late 2011, Plaintiff also learned that Allen had terminated another employee, Shannon Davis, while Davis was on leave pursuant to the Family Medical Leave Act, and had hired a personal friend of Allen's to replace Davis.

Plaintiff informed Tyson, the Deputy City Manager, about Allen's actions. Tyson investigated Plaintiff's allegations along with Speight, the Assistant City Manager, and determined that Plaintiff's accusations against Allen were false.

Plaintiff then procured and presented to "city administrators" date-stamped photographs of an automobile belonging to one of her fellow employees, Bonnie Fulgham ("Fulgham"), parked in front of Allen's house at a time of day when Fulgham's attendance records indicated she was at work for the City. At some point thereafter, Allen learned that Plaintiff — along with another employee, Jessica Cervantes — had been responsible for reporting Allen's improper actions.

Allen then began a "campaign of retaliation" against Plaintiff. Specifically, Allen (1) isolated Plaintiff from employee meetings in the department; (2) generally refused to

speak with Plaintiff; (3) told other employees that she was determined to get rid of employees that she described as "old school," making specific reference to Plaintiff; and (4) applied different standards to Plaintiff than those used for other similarly situated employees concerning absences from work for medical appointments.

Plaintiff complained about Allen's treatment of her to other City officials and, in response, Speight assigned Fulgham to be Plaintiff's immediate supervisor. Plaintiff soon discovered, however, that Allen was, in fact, continuing to supervise Plaintiff's job performance and had directed Fulgham to demand that Plaintiff record every action she took during the day, which other similarly situated employees were not required to do.

In May 2012, Plaintiff voiced her concerns regarding Allen to "other citizens of the City[.]" Plaintiff also participated in writing and transmitting a letter concerning Allen's improper conduct to the mayor, the members of the city council, and to candidates seeking elected office within the City. Shortly thereafter, Allen's employment with the City was terminated.

After Allen's termination, Speight became the head of Plaintiff's department and subjected Plaintiff's work to increased scrutiny. Plaintiff was prohibited from opening any mail that was directed to her or her office, her computer files

were searched, records of all telephone calls made from her office were reviewed, her personnel file was scrutinized, and she was never permitted to be alone in the office. In addition, at a meeting of department employees, Speight stated that "some people will be here to work as a team and some of you will not." Speight looked directly at Plaintiff when she stated the words "some of you will not."

Approximately three weeks later, Plaintiff was terminated from her employment with the City as part of an alleged reduction in force, which Plaintiff asserts was a pretext designed to prevent her from appealing her termination through the City's grievance procedure. Plaintiff was told that her job was being eliminated and that reemployment with the City was not an option for her. However, almost immediately after her departure, her former job duties were assumed by one new employee and one existing employee. Also, a new full-time employee was later hired for a newly created position that was substantially the same as Plaintiff's former position. Plaintiff's attempts to obtain alternative employment with the City have been unsuccessful, and the City has hired less qualified candidates than Plaintiff for positions to which she has applied.

On 3 September 2013, Plaintiff filed a complaint against Defendants in Wilson County Superior Court and subsequently

filed an amended complaint. In her amended complaint, Plaintiff asserted claims for (1) violation of her right to freedom of speech under the North Carolina Constitution; (2) violation of her right to assemble under the North Carolina Constitution; (3) civil conspiracy; and (4) wrongful discharge in violation of North Carolina public policy. On 15 October 2013, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6).

On 6 January 2014, the motion to dismiss was heard by the Honorable Quentin T. Sumner in Wilson County Superior Court. On 14 January 2014, Judge Sumner entered an order granting the motion as to Plaintiff's first and second causes of action alleging violations of her constitutional right to freedom of speech and freedom of assembly.[1] Plaintiff filed a notice of appeal to this Court.

Analysis

I. Appellate Jurisdiction

As an initial matter, we note that the present appeal is interlocutory. "[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*,

[1] While Defendants' motion to dismiss appears to have been intended to encompass all of the claims asserted by Plaintiff, the trial court's order does not specifically mention any of Plaintiff's remaining claims and apparently treated the motion as a partial motion to dismiss that was addressed solely to Plaintiff's first and second claims for relief.

186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, internal quotation marks, and brackets omitted). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, __ N.C. App. __, __, 745 S.E.2d 69, 72 (2013). The prohibition against appeals from interlocutory orders "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C

> .Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted). Rule 54(b) of the North Carolina Rules of Civil Procedure provides that

> [w]hen more than one claim for relief is presented in an action . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C.R. Civ. P. 54(b).

In the present case, the trial court's order contains the following certification:

> Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the Court finds that there is no just reason for delay of entry as to the final Judgment as to Plaintiff's First and Second Claims for Relief and therefore enters FINAL JUDGMENT as to Plaintiff's First and Second Claims for Relief.

Based on this certification and the fact that the trial court's order serves as an adjudication of two of the claims asserted in the amended complaint, we are satisfied that we possess jurisdiction over the present appeal. *See Raybon v. Kidd*, 147 N.C. App. 509, 511, 555 S.E.2d 656, 658 (2001) ("The trial court in the instant case entered a final judgment on

fewer than all of the claims and certified [the case for immediate appeal under Rule 54(b)]. . . . We may therefore properly review the instant case on its merits.").

II. Motion to Dismiss

Plaintiff's sole argument on appeal is that the trial court erred in granting Defendants' motion to dismiss.

> The standard of review of an order granting 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. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Gilmore v. Gilmore, __ N.C. App. __, __, 748 S.E.2d 42, 45 (2013) (internal citations, quotation marks, and brackets omitted).

"The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. The function of a motion to dismiss is to test the law of a claim, not the facts which support it. This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Warren v. New Hanover Cty. Bd. of Educ.*, 104 N.C. App. 522, 525, 410 S.E.2d 232, 234 (1991) (internal citations, quotation marks, and ellipses omitted).

In its order, the trial court stated the basis for its ruling:

> As to Plaintiff's First and Second Claims for Relief, the Court specifically determines that Plaintiff's Complaint and Amended Complaint have failed to affirmatively plead the requisite "but for" standard necessary to state a claim for violation of Plaintiff's constitutional rights and, therefore, Plaintiff has failed to state a claim upon which relief can be granted.

In her appeal, Plaintiff argues that the trial court's order is inconsistent with the concept of notice pleading embodied in Rule 8(a) of the North Carolina Rules of Civil Procedure, which requires only that a pleading contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C.R. Civ. P. 8(a)(1).

> By enacting section 1A–1, Rule 8(a), our General Assembly adopted the concept of notice pleading. Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to

> define more narrowly the disputed facts and issues. Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim.

Wake Cty. v. Hotels.com, L.P., __ N.C. App. __, __, 762 S.E.2d 477, 486 (2014) (internal citations and quotation marks omitted).

It is well settled that "one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision." *Bigelow v. Town of Chapel Hill*, __ N.C. App. __, __, 745 S.E.2d 316, 326 (citation omitted), *disc. review denied*, 367 N.C. 223, 747 S.E.2d 543 (2013). With regard to Plaintiff's first claim for relief, we have held that

> [t]o establish a cause of action for wrongful discharge or demotion in violation of [her] right to freedom of speech, [a] plaintiff must forecast sufficient evidence that the speech complained of qualified as protected speech or activity[2] and that such

[2] In the public employment context, "speech is constitutionally protected only if it relates to matters of public concern and if the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace." *Warren*, 104 N.C. App. at 526, 410 S.E.2d at 234 (citation, internal quotation marks, and brackets omitted). In the present case, Defendants do not argue that the speech at issue failed to involve a matter of public concern. Instead, Defendants limit their argument to the contention that "[Plaintiff's] Complaint fails to set forth facts sufficient to establish 'but for' causation between her alleged 'speech' and 'assembly' and the adverse employment action." Therefore, we do not address the issue of whether the speech at issue in this

> protected speech or activity was the motivating or but for cause for [her] discharge or demotion. The resolution of these two critical issues is a matter of law and not of fact.

Swain v. Elfland, 145 N.C. App. 383, 386-87, 550 S.E.2d 530, 533 (internal citations, quotation marks, and brackets omitted), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001).

Plaintiff's second claim for relief was based on Article I, section 12 of the North Carolina Constitution, which states, in pertinent part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" N.C. Const. art. I, § 12. The right to freedom of assembly is similar to the right to freedom of association embodied within our federal Constitution. *See Libertarian Party of N.C. v. State*, 365 N.C. 41, 48, 707 S.E.2d 199, 204 (2011) (noting that free speech and assembly provisions of North Carolina Constitution protect associational rights). The United States Court of Appeals for the Fourth Circuit has discussed the link between freedom of speech and freedom of association.

> [Plaintiff's] freedom of association claim parallels his free speech claim. Indeed, we have recognized the right to associate in order to express one's views is inseparable

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case related to matters of public concern.

> from the right to speak freely. . . . An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Edwards v. City of Goldsboro, 178 F.3d 231, 249 (4th Cir. 1999).

Defendants concede in their brief that they "do not dispute that the Complaint alleged facts sufficient to put Defendants on notice that Plaintiff was advancing constitutional claims of violation of freedom of speech and violation of right of assembly[.]" They likewise concede that "Plaintiff is correct that she was not required to use 'magic words' such as 'but for' in setting forth her claims for relief[.]"

We rejected in an analogous context the notion that any such "magic language" was necessary in order to adequately plead causation. In *Sides v. Duke Univ.*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), *overruled on other grounds by Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997), the plaintiff, a nurse anesthetist, brought an action against Duke University Hospital and several of her supervisors based on her

allegations that she was discharged for refusing to testify falsely or incompletely in a malpractice lawsuit. The trial court granted the defendants' motion to dismiss pursuant to Rule 12(b)(6) based, in part, on their argument that the plaintiff had failed to allege that her damages would not have occurred "but for" their actions and that her complaint was therefore fatally defective. *Id.* at 346, 328 S.E.2d at 829.

We reversed that portion of the trial court's ruling, holding that our caselaw contained

> no mandate for the use of the magic words "but for[]" . . . . Rather, we read those cases to say that the complaint . . . must clearly allege that the actions of the defendant were the cause of the plaintiff's damages . . . [Our caselaw] requires only that the [defendant's] act *caused* the plaintiff actual damages. . . . While the words "but for" are in wide usage and undoubtedly meet the requirements for sufficiently pleading this cause of action, they are not the exclusive means of doing so. Plaintiff's complaint clearly alleges that [defendants] maliciously undertook to have her discharged from her job because she would not be intimidated into testifying favorably to them . . . and leaves no ground for supposing that she was fired for any other reason. If plaintiff can prove her allegations the defendants should not be allowed to escape liability because plaintiff's attorneys did not say "but for." To hold otherwise would be to return to the type of hypertechnical pleading that our Rules of Civil Procedure, G.S. 1A-1, and Rule 1 *et seq.* replaced.

Id. at 346-47, 328 S.E.2d at 829 (internal citations and

quotation mark omitted). The same reasoning applies here.

In *Warren*, the plaintiff was a teacher who alleged, in part, that he was denied a promotion based on a violation of his constitutional right to free speech after he publicized the results of a survey conducted by the North Carolina Association of Educators to the Board of Education. *Warren*, 104 N.C. App. at 525, 410 S.E.2d at 234. The defendants filed a motion to dismiss under Rule 12(b)(6), and the trial court granted the motion. *Id.*

On appeal, we recognized that in order to establish the causation element of his free speech claim, the plaintiff was required to show that the speech he engaged in "was the 'motivating' or 'but for' cause" of the adverse employment action he suffered. *Id.* (citation omitted). We noted that in his complaint the plaintiff had alleged that before he disclosed the results of the survey he had consistently received positive evaluations, the school principal had warned him not to give his report to the Board of Education, and the plaintiff was shortly thereafter given a substandard evaluation preventing him from receiving a promotion. *Id.* at 527, 410 S.E.2d at 235. Therefore, we held that "[t]aking plaintiff's allegations as true, we conclude that the complaint was sufficient to withstand defendants' Rule 12(b)(6) motion to dismiss." *Id.*

In the present case, Plaintiff's amended complaint included

the following allegations that, as in *Warren*, were sufficient to satisfy the pleading requirements regarding the causation elements of her constitutional claims:

> 1. . . . Because Plaintiff spoke out against [unlawful] practices, she was terminated from her employment position[.]
>
> . . . .
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> 35. Plaintiff's protected speech was a substantial factor in Defendants' decision to take adverse action against her.
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> . . . .
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> 39. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by . . . Article I, Section 14 of the North Carolina Constitution.
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> . . . .
>
> 45. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by . . . Article I, Section 12 of the North Carolina Constitution.

We cannot agree with Defendants that Plaintiff's allegations were insufficient to adequately plead freedom of speech or freedom of assembly claims under the North Carolina Constitution so as to survive Defendants' motion to dismiss. The trial court's order had the effect of imposing a heightened pleading requirement as to these claims that is not recognized by North Carolina courts and is inconsistent with the concept of

notice pleading as provided for in our Rules of Civil Procedure. The trial court therefore erred in granting Defendants' motion on the theory that she did not adequately plead the causation element of her constitutional claims.

Finally, Defendants also assert that their motion to dismiss was properly granted because Plaintiff did not

> conclusively establish that *despite* [her] efforts to maintain anonymity [while engaging in the speech described in her amended complaint], the defendant[s] nevertheless knew that the plaintiff was the author of said speech. To fail to establish that connection is to fail to establish the necessary causal connection between the speech and the alleged retaliation.

Defendants' argument reflects a misunderstanding both of notice pleading and the appropriate standard of review applicable to a motion to dismiss pursuant to Rule 12(b)(6). 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." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428, *appeal dismissed and disc. review denied*, 361 N.C. 425, 647 S.E.2d 98 (2007).

The detailed fact-based arguments Defendants make in their brief as to the weight that should be accorded to the evidence in this case are inappropriate at this early stage of the litigation. For purposes of Defendants' motion to dismiss, all that matters is whether Plaintiff has adequately pled claims for violation of the freedom of speech and freedom of assembly provisions of the North Carolina Constitution based on the doctrine of notice pleading as set out in Rule 8(a)(1). Based on our review of the amended complaint, we are satisfied that Plaintiff's allegations in support of these claims were legally sufficient. Thus, because this case is before us on appeal from a ruling on a Rule 12(b)(6) motion, our inquiry ends there. As such, the trial court's order must be reversed.

Conclusion

For the reasons stated above, the order of the trial court is reversed, and we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges HUNTER, Robert C., and DILLON concur.