IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-935

Filed: 21 April 2015

Mecklenburg County, No. 13 CVS 14121

JUSTIN LLOYD, Plaintiff,

v.

DANIEL BAILEY, in his individual, and official capacity as Sheriff of Mecklenburg County, and OHIO CASUALTY INSURANCE COMPANY, Defendants.

Appeal by defendants from order entered 21 May 2014 by Judge Calvin Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 February 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellee.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellants.

STEELMAN, Judge.

Plaintiff, a deputy sheriff, was not a county employee as defined in N.C. Gen. Stat. § 153A-99. As a deputy sheriff, plaintiff could be discharged based upon political conduct without violating his state constitutional free speech rights. The trial court erred by denying defendants' motion for summary judgment.

I. Factual and Procedural History

Justin Lloyd (plaintiff) was a deputy sheriff employed by former Mecklenburg County Sheriff Daniel Bailey (defendant, with Ohio Casualty Insurance Company, collectively, defendants). Plaintiff was hired as a detention officer in 2000, and was promoted to the position of a sworn deputy sheriff in 2007. In June 2009 defendant sent a letter to his employees, announcing his candidacy for reelection and asking for campaign contributions. Plaintiff did not contribute to defendant's reelection campaign or volunteer for his campaign. Defendant was reelected in November 2010 and on 30 November 2010 plaintiff was terminated from his position.

On 13 August 2013 plaintiff filed a complaint, asserting claims against defendants for wrongful termination of employment in violation of the public policy enunciated in N.C. Gen. Stat. § 153A-99 and for violation of his right to freedom of speech under the Constitution of North Carolina, Article 1, § § 14 and 36. Plaintiff alleged that he was "an able and competent employee" who had been terminated "for refusing to make contributions to [defendant's] re-election campaign and for refusing to volunteer to work on his campaign." Defendants filed an answer denying the material allegations of plaintiff's complaint and asserting the defense of sovereign immunity. On 17 March 2014 defendants filed a motion for summary judgment, asserting that there were no genuine issues of material fact regarding plaintiff's claim for wrongful discharge in violation of N.C. Gen. Stat. § 153A-99; that defendant was entitled to sovereign immunity on the wrongful discharge claim up to the amount of

the surety bond; and that defendant was entitled to dismissal of plaintiff's claims against him in his individual capacity. On 21 May 2014 the trial court granted summary judgment for defendants on plaintiff's claims against defendant in his individual capacity, and denied defendants' motion for summary judgment on plaintiff's claims against defendant in his official capacity.

Defendants appeal.

II. Interlocutory Appeal

A "judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a). " 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Hill v. StubHub, Inc.*, __ N.C. App. __ , __, 727 S.E.2d 550, 553-54 (2012) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)), *disc. review denied*, 366 N.C. 424, 736 S.E.2d 757 (2013). In this case defendants have appealed from an interlocutory order.

"As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "The rule prohibiting interlocutory appeals 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 omitted). "Furthermore, the routine allowance of interlocutory appeals would have a tendency to delay, rather than advance, the ultimate resolution of matters in litigation." *Newcomb v. County of Carteret*, 207 N.C. App. 527, 554, 701 S.E.2d 325, 344 (2010) (citing *Veazey*).

"Despite this general rule, '[i]mmediate appeal of interlocutory orders and judgments is available . . . from an interlocutory order or judgment which affects a substantial right.' " *Peters v. Peters*, __ N.C. App. __, __, 754 S.E.2d 437, 439 (2014) (quoting *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999)). In North Carolina, "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *McClennahan v. N.C. Sch. of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 443 (2007). Because defendants' summary judgment motion asserted the defense of sovereign immunity, that issue is properly before us on appeal.

In addition, defendants argue that the denial of their motion for summary judgment on the wrongful discharge claim "based on grounds other than sovereign immunity, and on the state Constitutional claim, also affects the Defendants' substantial rights and is immediately appealable[.]" However, instead of analyzing the merits of defendants' arguments regarding their substantial rights, we base our decision to review the merits of defendants' other appellate issues on the fact that the

parties, appellate counsel, issues raised on appeal, and appellate arguments are essentially identical to another case recently decided by this Court, *McLaughlin v. Bailey*, __ N.C. App. __, __ S.E.2d __ (2015), and to *Young v. Bailey*, __ N.C. App. __, __ S.E.2d __ (2015), also decided today. Indeed, plaintiff notes in his appellate brief that "[t]he issues in this case have been previously briefed and argued before the Court of Appeals in [*McLaughlin v. Bailey*]." In *McLaughlin,* the plaintiffs were a deputy and another employee of the Mecklenburg County Sheriff who is the defendant in the present case. The plaintiffs were discharged by defendant following his reelection in November 2010, and filed a complaint against the same defendants as in the present case, asserting the same claims for wrongful termination in violation of N.C. Gen. Stat. § 153A-99 and violation of their state constitutional rights. The *McLaughlin* plaintiffs were represented by the same counsel and raised the same appellate arguments. *McLaughlin* is controlling on the substantive issues raised by the parties in this appeal. Moreover, the parties have devoted the vast majority of their appellate briefs to arguments on these substantive issues. Therefore, " 'because the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition for a writ of *certiorari* and consider the order on its merits.' " *NRC Golf Course, LLC v. JMR Golf, LLC*, 222 N.C. App. 482, 497-98, 731 S.E.2d 474, 477-78 (2012) (quoting *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 388-

89, (2007) (other citation omitted). *See* N.C. R. App. P. 21(a)(1) (providing in relevant part that "[t]he writ of *certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists[.]"

III. Legal Analysis

A. Termination in Violation of Public Policy

In plaintiff's claim for wrongful termination he alleges that he is a "county employee" as defined in § 153A-99 and that his termination from employment violated this statute. On appeal, defendants argue that the trial court erred by denying their motion for summary judgment because plaintiff is not a county employee. We agree with defendants.

N.C. Gen. Stat. § 153A-99 states in relevant part that:

> (a) The purpose of this section is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.] . . .
>
> (b) Definitions. For the purposes of this section: (1) "County employee" or "employee" means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.] . . .

"The express purpose of N.C. Gen. Stat. § 153A-99 is 'to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.]' " *Venable v. Vernon*, 162 N.C. App. 702, 705-06, 592 S.E.2d 256, 258 (2004) (quoting *Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996)

(internal citations omitted)). However, N.C. Gen. Stat. § 153A-99 applies only to county employees, defined as "any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]"

Plaintiff's contention that he is a county employee is based primarily on a 1998 advisory opinion of the North Carolina Attorney General, and on a case cited in the advisory opinion, *Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *reversed and remanded*, 145 F.3d 1323 (4th Cir. N.C. 1998) (unpublished). Plaintiff also asserts that analysis of the word "thereof" in the statute tends to show that he was a county employee. We addressed the identical arguments in *McLaughlin v. Bailey*, and held:

> The employees of a county sheriff, including deputies and others hired by the sheriff, are directly employed by the sheriff and not by the county or by a county department. Sheriff's employees are not "county employees" as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute.

McLaughlin, __ N.C. App. at __, __ S.E.2d at __. In addition, the scope of N.C. Gen. Stat. § 153A-99 was recently addressed by this Court in *Sims-Campbell v. Welch*, __ N.C. App. __, __, __ S.E.2d __, __ (3 March 2015), in which the plaintiff, an assistant register of deeds, argued that her firing violated N.C. Gen. Stat. § 153A-99:

> Sims-Campbell also argues that [her firing] . . . violated Section 153A-99 of the General Statutes[.] . . . This argument fails because an assistant register of deeds is not a county employee. . . . We again find guidance in our cases dealing with the office of sheriff. In a series of cases, this court has held that sheriff's deputies . . . are not county employees, but rather employees of the sheriff. . . . In light

> of the statute's plain language and our analogous case law concerning deputy sheriffs, we conclude that an assistant register of deeds . . . is not a "county employee" within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __ (emphasis added). *McLaughlin* is indistinguishable from the present case and controls the outcome. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We hold that, as a deputy sheriff, plaintiff was not a county employee and cannot claim the protections of N.C. Gen. Stat. § 153A-99.

B. Violation of State Constitutional Rights

Defendants also argue that they were entitled to summary judgment on plaintiff's claim that his termination violated his right to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution. We agree and again conclude that plaintiff's arguments on this issue are foreclosed by our decision in *McLaughlin*.

"[T]he First Amendment generally bars the firing of public employees 'solely for the reason that they were not affiliated with a particular political party or candidate,' as such firings can impose restraints 'on freedoms of belief and association[.]' " *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (quoting *Knight v. Vernon*, 214 F.3d 544, 548 (4th Cir. 2000) (internal quotation marks omitted), and

Elrod v. Burns, 427 U.S. 347, 355, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)). However, "the Supreme Court in *Elrod* created a narrow exception 'to give effect to the democratic process' by allowing patronage dismissals of those public employees occupying policymaking positions." *Id.* (quoting *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997) (*en banc*).

> In *Jenkins* we analyzed the First Amendment claims of several North Carolina sheriff's deputies who alleged that the sheriff fired them for failing to support his election bid and for supporting other candidates. In so doing, we considered the political role of a sheriff, the specific duties performed by sheriff's deputies, and the relationship between a sheriff and his deputies as it affects the execution of the sheriff's policies. . . . [We] concluded "that in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally[,]" . . . [and] determined "that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations."

Bland, 730 F.3d at 376 (quoting *Jenkins*, 119 F.3d at 1164). "In [*Jenkins*] the majority explained that it was the deputies' role as sworn law enforcement officers that was dispositive[.]" *Bland* at 377. In *McLaughlin*, we noted that the "reasoning of *Jenkins* and *Bland* was adopted by this Court in *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007), *review denied, appeal dismissed*, 362 N.C. 175, 658 S.E.2d 271 (2008), and explained that:

> The plaintiffs in *Carter* were former deputy clerks of court who claimed that they had been terminated from their employment for political reasons, in violation of their

> rights to free speech under the North Carolina Constitution. On appeal, [the *Carter* opinion] . . . discussed the holding of *Jenkins* that "deputies actually sworn to engage in law enforcement activities on behalf of the sheriff" could be lawfully terminated for political reasons, and noted that *Jenkins* based its holding on the facts that:
>
> "[D]eputy sheriffs (1) implement the sheriff's policies; (2) are likely part of the sheriff's core group of advisors; (3) exercise significant discretion; (4) foster public confidence in law enforcement; (5) are expected to provide the sheriff with truthful and accurate information; and (6) are general agents of the sheriff, and the sheriff is civilly liable for the acts of his deputy."

McLaughlin, __ N.C. App. at __, __ S.E.2d at __. (quoting *Carter* at 454, 654 S.E.2d at 131 (citing *Jenkins* at 1162-63)). The issue was also discussed in *Sims-Campbell*:

> Government employees generally are protected from termination because of their political viewpoints. <u>But this Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons</u> such as supporting their elected boss's opponents during an election.

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __ (emphasis added) (citing *Carter*, *Jenkins*, *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989)). In *McLaughlin* we held that *Carter* was "controlling on the issue of whether [plaintiff] could lawfully be fired based on political considerations" and that the plaintiff's "termination did not violate his free speech rights under the North Carolina Constitution." *McLaughlin* at __, __ S.E.2d at __.

Based upon *McLaughlin*, *Sims-Campbell*, and *Carter*, we hold that plaintiff could be terminated based on his political views without violating his right to free speech under the North Carolina Constitution.

Having concluded that plaintiff's substantive arguments lack merit, we do not reach the parties' arguments regarding sovereign immunity.

IV. Conclusion

The trial court erred in denying defendants' motion for summary judgment. We reverse the trial court and remand this case to the Superior Court of Mecklenburg County for entry of an order dismissing plaintiff's complaint.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).