IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-196

Filed: 6 December 2016

Wake County, No. 15 CVS 4792

DAVID MCADAMS, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, and DALE FOLWELL, in his Official Capacity as ASSISTANT SECRETARY, DIVISION OF EMPLOYMENT SECURITY, and DALE FOLWELL, in his Individual Capacity, and SECRETARY OF COMMERCE, in their [sic] Official Capacity, and MAURICE ANTWON KEITH, in his Official Capacity as UNEMPLOYMENT INSURANCE BENEFITS ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, and MAURICE ANTWON KEITH, in his Individual Capacity, Defendants.

Appeal by Plaintiff from order entered 2 October 2015 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 September 2016.

Hopler & Wilms, LLP, by Christopher C. Wilms, Jr., Esq., for Plaintiff.

Chief Counsel A. John Hoomani, by R. Glen Peterson, for Defendant North Carolina Department of Commerce, Division of Employment Security.

STEPHENS, Judge.

This case arises from Plaintiff's termination from employment, allegedly in retaliation for comments and testimony in support of two co-workers which were allegedly adverse to his employer's interest. Plaintiff appeals from the trial court's

dismissal pursuant to Rule of Civil Procedure 12(b)(6) of his claims under our State's Whistleblower Act and for common law wrongful discharge in violation of public policy. Because we agree with the trial court's ruling that Plaintiff failed to state claims for which relief may be granted, we affirm.

Factual and Procedural Background

Plaintiff David McAdams was employed in a position exempt from the State Personnel Act in the Division of Employment Security ("DES") of the North Carolina Department of Commerce. In 2012, McAdams' direct supervisor was Defendant Maurice Antwon Keith, and Keith, in turn, was supervised by Defendant Dale Folwell, then Assistant Secretary of DES. During his employment with DES, McAdams gave testimony unfavorable to DES in two matters: (1) an unemployment appeal hearing for a terminated employee named Margaret Johnson and (2) a hearing in the Office of Administrative Hearings ("OAH") regarding the related demotion of an employee named Mary Chapman Knight. As McAdams alleged,

> the events that led to . . . Knight's demotion began on August 21, 2012 when . . . Johnson . . ., a Claims Analyst for . . . DES, approached . . . Knight and told her that she was looking for a 500AB, a DES form which contained an employer's written response to the unemployment claim a particular applicant for unemployment insurance benefits had filed. . . . Knight sought the information needed from the 500AB for . . . Johnson. After . . . Knight obtained and provided the information requested, she heard . . . Johnson state that this was for . . . Johnson's sister-in-law. . . . Knight later learned that . . . Johnson had filed the claim for her sister-in-law, which was a violation of policy, and

> reported it to Assistant Director Dorian McCoy and [McAdams]. Following a preliminary inquiry with the appropriate individuals to determine whether it was appropriate to refer the incident to DES Internal Audit, [McAdams] determined there were substantial reasons to refer the case. After the investigation by DES Internal Audit, [McAdams] was instructed by . . . Keith to conduct a pre-disciplinary conference for . . . Knight. [McAdams] conducted the required pre-disciplinary conference for . . . Knight.
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> [McAdams] concluded that discipline was inappropriate for . . . Knight, given that (1) she was unaware of the wrongdoing on the part of another employee when she provided 500AB information to the other employee, (2) the interaction between . . . Knight and the other employee was not unusual given their individual position responsibilities, (3) the case in question continued through the normal adjudication process and as a result of due diligence additional separation pay was uncovered, and (4) an inquiry call after hours by . . . Knight to another Adjudication employee checking on the status of the case was reasonable and understandable given the claim was in pay status. [McAdams] reported in writing to . . . Keith, his direct supervisor, that it would be improper to demote . . . Knight. Except for redacted portions, a true and correct copy of the written report is attached hereto as an exhibit and is incorporated by reference as if completely set forth herein. . . . Despite [McAdams'] conclusion that it was improper to take disciplinary action against . . . Knight, DES by and through . . . Keith chose to take disciplinary action against . . . Knight by demoting her.

Knight sought a contested case hearing in the OAH, at which McAdams testified unfavorably to DES, giving his opinion that Knight should have received no discipline at all. The Administrative Law Judge in the OAH proceeding relied heavily upon McAdams' testimony in rendering his decision that Knight was demoted

without just cause and to support his order reversing her demotion and awarding her costs and attorney fees in the matter. As the OAH proceeding drew to a close,

> [i]n March of 2014, [McAdams] participated in an Unemployment Appeals Hearing held pursuant to Chapter 96 of the [North Carolina] General Statutes. The hearing was held to determine . . . Johnson's qualification for Unemployment Insurance Benefits.
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> [] In substance, [McAdams] testified unfavorably for DES, insofar as he testified that he had recommended lesser discipline for . . . Johnson which would not have included termination.
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> [] Approximately one day prior to the first day of hearing on the Unemployment Appeals Hearing for . . . Johnson, . . . Keith met with [McAdams]. During that meeting, . . . Keith expressed that [McAdams] was not looked upon favorably by the Assistant Secretary[, Folwell,] and that the Assistant Secretary could replace him. [McAdams] reasonably understood this to be a threat that his employment was to be terminated and that this was an attempt by . . . Keith to intimidate him into giving favorable testimony during the Appeals Hearing for . . . Johnson.

Effective 30 April 2014, McAdams was terminated with the reason given as a desire for a change in leadership. On 14 April 2015, McAdams filed a complaint in Wake County Superior Court against DES and the Secretary of the Department of Commerce, as well as Folwell and Keith in both their official and individual capacities. McAdams alleged that his firing was retaliatory such that Defendants violated section 126-85 ("the Whistleblower Act") and section 96-15.1 ("the Employment Security Act"). McAdams also brought a claim of common law wrongful

discharge against Keith and Folwell, in their individual capacities. On 1 July 2015, Defendants filed a partial motion to dismiss McAdams' Whistleblower Act and common law wrongful discharge claims pursuant to Rule of Civil Procedure 12(b)(6). Specifically, Defendants moved to dismiss McAdams' claim for violation of the Whistleblower Act

> because, as a matter of law, [the] allegations in his Complaint do not constitute 'protected activity' within the meaning of the Whistleblower Act. . . . [and] Folwell and Keith in their individual capacities move[d] to dismiss [the claim] for Common Law Wrongful Discharge . . . because [McAdams had] alternative state remedies for such a claim.

By order entered 2 October 2015, the Honorable G. Bryan Collins, Jr., Judge presiding, granted Defendants' motion ("the dismissal order"). On 26 January 2016, McAdams filed a voluntary dismissal of his remaining claims under the Employment Security Act, as well as a notice of appeal from the dismissal order.

Discussion

On appeal, McAdams argues that the superior court erred in dismissing his claims for (1) alleged violations of the Whistleblower Act and (2) the common law tort of wrongful discharge in violation of public policy. We disagree.

I. Standard of review

> [A] motion to dismiss under [Rule of Civil Procedure] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must

> determine as a matter of law whether the allegations state a claim for which relief may be granted. . . . As a general rule, a complaint should not be dismissed for insufficiency unless it appears to a certainty that [the] plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations, internal quotation marks, and emphasis omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

II. Claims under the Whistleblower Act

McAdams first argues that the trial court erred in dismissing his claim under section 126-85. We disagree.

> The North Carolina Whistleblower Act, N.C. Gen. Stat. §§ 126-84 to 88 . . . requires a plaintiff to prove the following three essential elements by a preponderance of the evidence in order to establish a *prima facie* case: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.
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> . . . . To be protected, *the whistleblowing activity must constitute a report about matters affecting general public policy*. The Whistleblower Act establishes a state policy to encourage its employees to report violations of state or federal law, rules or regulation; fraud; misappropriation of

> state resources; substantial and specific danger to the public health and safety; or gross mismanagement, a gross waste of monies, or gross abuse of authority; and it further protects State employees from intimidation or harassment when they report on matters of public concern. . . .

Holt v. Albemarle Reg'l Health Servs. Bd., 188 N.C. App. 111, 115-16, 655 S.E.2d 729, 732 (emphasis added), *disc. review denied*, 362 N.C. 357, 661 S.E.2d 246 (2008). In *Hodge v. N.C. DOT*, this Court considered some specific examples that have been held to constitute matters of public concern:

> This Court has applied Whistleblower [Act] protection to employees who bring suit alleging sex discrimination, who allege retaliation after cooperating in investigations regarding misconduct by their supervisors, and who allege police misconduct.
>
> The Act has also been raised when alleged whistleblowing related to misappropriation of governmental resources.
>
> In all of these cases, the protected activities concerned reports of matters affecting general public policy.

175 N.C. App. 110, 116-17, 622 S.E.2d 702, 706-07 (2005) (citations and internal quotation marks omitted), *disc. review denied*, 360 N.C. 533, 633 S.E.2d 816 (2006). The *Hodge* Court contrasted those circumstances with the report of the plaintiff in that appeal, a "lawsuit seeking reinstatement to his former position. The central allegations of the . . . lawsuit related only tangentially at best to a potential violation of the North Carolina Administrative Code." *Id.* at 117, 622 S.E.2d at 707. As a result, the Court "decline[d] to extend the definition of a protected activity to

individual employment actions that do not implicate broader matters of public concern[,]" reasoning that our General Assembly did not intend the Whistleblower Act "to protect a State employee's right to institute a civil action concerning employee grievance matters." *Id.*

Here, the reports that McAdams alleges led to his termination consisted of his testimony in Knight's OAH hearing and Johnson's Unemployment Appeals hearing that McAdams believed lesser disciplinary actions were appropriate in each employee's case than those eventually imposed, and that he recommended lesser disciplinary actions. McAdams asserts in his complaint that he believed that the disciplinary actions imposed violated the North Carolina Human Resources Act, which provides, *inter alia*, that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2015). Knight specifically relied upon this provision in bringing her contested case before the OAH. However, our review of the record reveals that McAdams did not "report" that the disciplinary actions taken by DES were illegal or in violation of section 126-35 or any other statutory provision at either Johnson's unemployment hearing or Knight's OAH hearing. McAdams did not raise *any* issues of public policy or make *any* claims of illegal activity in violation of the Whistleblower Act at the unemployment and OAH hearings. Rather, he simply expressed his opinion that a

different disciplinary action—or no action at all—would have been more appropriate in each employee's specific case. Thus, McAdams' testimony at the hearings was part of "individual employment actions" and in regard to "employee grievance matters[,]" and is easily distinguishable from employee reports alleging explicit violations of law, such as those "alleging sex discrimination," "police misconduct," or "misappropriation of governmental resources." *See id.* at 116-17, 622 S.E.2d at 706. In reaching our holding, we do not discount the sincerity of McAdams' belief that different disciplinary actions against Johnson and Knight were appropriate or his courage in so testifying at their hearings, even knowing that such testimony could be perceived as adversarial to his supervisors at DES. However, precedent reveals that such circumstances, even if laudatory and noble, simply do not "constitute . . . report[s] about matters affecting general public policy[,]" and, accordingly, McAdams did not state a claim under the Whistleblower Act. *See Holt*, 188 N.C. App. at 115, 655 S.E.2d at 732. This argument is overruled, and we affirm the trial court's dismissal of this claim.

III. Common law tort of wrongful discharge in violation of public policy

McAdams next argues that the trial court erred in dismissing his common law tort claims for wrongful discharge in violation of public policy. Specifically, McAdams contends that his firing violated public policy, to wit, the Employment Security Act; that his claim is not barred by the availability of alternative remedies; and that he

brought his common law claims against proper parties. Because established North Carolina law does not permit a wrongful discharge claim against an employer's agents, such as supervisors, we affirm the dismissal of McAdam's tort claims.

> [W]hile there may be a right to terminate [an employment] contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Amos v. Oakdale Knitting Co., 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992) (citation and internal quotation marks omitted). Thus, "an employee who has been fired in violation of public policy has a claim for wrongful discharge notwithstanding this [S]tate's allegiance to the employment-at-will doctrine." *Id.* at 355, 416 S.E.2d at 170.

However, an employee may only bring a common law wrongful discharge claim against his employer, and claims made against an employer's agents, such as co-workers and supervisors, will be dismissed. *See Lorbacher v. Hous. Auth. of the City of Raleigh*, 127 N.C. App. 663, 671, 493 S.E.2d 74, 79 (1997) (finding proper the dismissal of the plaintiff's wrongful discharge claims against his supervisors because "the individual defendants . . . were not plaintiff's employers for the purposes of a wrongful discharge claim"); *see also Johnson v. North Carolina*, 905 F. Supp. 2d 712, 726 (2012) (noting that, "[p]ursuant to established North Carolina law, a plaintiff

may only bring a wrongful discharge action against the plaintiff's employer, not against the employer's agents") (citations and internal quotation marks omitted).

McAdams cites *Lenzer v. Flaherty* in support of his contention that his common law wrongful discharge claims were properly brought against Keith and Folwell in their individual capacities, specifically noting the following language: "[t]he [trial] court . . . erred in dismissing the wrongful discharge claim against [the] defendant employees *in their individual capacit*[*ies*] . . . ." 106 N.C. App. 496, 506, 418 S.E.2d 276, 282, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). McAdams takes this quote out of context. A careful reading of that opinion reveals that the trial court did not consider or rule on the question of whether the defendant employees were proper parties against whom to bring a common law wrongful discharge claim. Rather, the trial court dismissed the plaintiff's wrongful discharge claim because "the court found that the allegations did not fall within any exception to the employment-at-will doctrine, including the public policy exception urged by [the] plaintiff." *Id.* at 505, 418 S.E.2d at 282. Unsurprisingly, on appeal the plaintiff argued the existence of a public policy exception, and this Court addressed only that argument:[1]

[1] This Court neither creates appeals for appellants nor, beyond a few jurisdictional matters, does it raise and consider issues not brought forward by the appellant. *See, e.g.*, *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (*per curiam*) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."); *see also Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."), *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005).

> As to [the] plaintiff's claim for wrongful discharge, the facts of this case fit within the public policy exception to the employment-at-will doctrine as that exception has recently been delineated by our Supreme Court. In *Amos v. Oakdale Knitting Co.*, . . . the Court declared that "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." That observation, in our view, applies with equal force to rights guaranteed by the State Constitution such as [the] plaintiff's free speech claim. Similarly, discharge resulting from a report made pursuant to [section] 122C-66 would give rise to a cause of action for wrongful discharge under the public policy exception to the at-will doctrine. Therefore, we reverse the dismissal of the wrongful discharge claim.

Id. at 514-15, 418 S.E.2d at 287 (citation partially omitted). In sum, the case simply did not address the issue of whether the plaintiff could properly bring an action for common law wrongful discharge in violation of public policy against his supervisors in their individual capacities. For that reason, *Lenzer* is inapposite to McAdams' arguments on appeal.

Here, as noted *supra*, McAdams's common law wrongful discharge claims were brought only against Keith and Folwell, in their individual capacities, and not against his employer, DES. Keith and Folwell were plainly McAdams' supervisors and agents of his employer,[2] DES, and therefore were not proper parties against whom to bring

[2] On appeal, McAdams does not contend otherwise.

wrongful discharge claims. Because McAdams' brought his common law wrongful discharge claim against his supervisors rather than against his employer, he failed to state a claim upon which relief could be granted.[3] Our resolution of this issue renders it unnecessary to address McAdams' additional arguments regarding his wrongful discharge claims.

Conclusion

The activity that McAdams alleges led to his firing was not a matter affecting general public policy, and McAdams' Whistleblower claim was therefore properly dismissed. Moreover, McAdams brought his wrongful discharge claim against his supervisors rather than his employer, so his common law tort claims were also properly dismissed. The dismissal order is

AFFIRMED.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).

[3] We note that the apparent harshness dictated by this precedent is mitigated by the fact that our Employment Security Act provides a possible means of recourse in the circumstances alleged by McAdams. "No person may discharge, demote, or threaten any person because that person has testified or has been summoned to testify in any proceeding under the Employment Security Act." N.C. Gen. Stat. § 96-15.1(a) (2015). "Any person who violates the provisions of this section shall be liable in a civil action for reasonable damages suffered by any person as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position." § 96-15.1(b). Indeed, as noted *supra*, McAdams brought a claim under section 95-15.1 and that claim was not dismissed in the dismissal order. However, McAdams voluntarily dismissed that claim on 26 January 2016, and it is not part of this appeal.