

NO. COA14-757

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

SIVARAMALINGAM MANICKAVASAGAR,
M.D.

Plaintiff-Appellant,

v.

Wake County
No. 13 CVS 03447

NORTH CAROLINA DEPARTMENT OF
PUBLIC SAFETY, DR. ARMAYNE
DUNSTON (in her official
capacity and in her individual
capacity), and BIANCA HARRIS
(in her official capacity and
in her individual capacity),
Defendants-Appellees.

Appeal by Plaintiff from order entered 25 March 2014 by
Judge Donald W. Stephens in Superior Court, Wake County. Heard
in the Court of Appeals 17 November 2014.

*Monteith & Rice, PLLC, by Charles E. Monteith, Jr. and
Shelli Henderson Rice, for Plaintiff-Appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General
Tamika L. Henderson, for Defendants-Appellees.*

McGEE, Chief Judge.

Dr. Sivaramalingam Manickavasagar ("Plaintiff") was hired
by the North Carolina Correctional Institution for Women
("NCCIW") as a Physician III-A, and was fired from that position
while still on "probationary/trainee" status. Plaintiff then

filed a complaint against the North Carolina Department of Public Safety, NCCIW's medical director, Dr. Armayne Dunston ("Dr. Dunston"), and NCCIW's warden, Bianca Harris ("Warden Harris") (together, "Defendants"). Plaintiff sued Dr. Dunston and Warden Harris in both their official and individual capacities. Plaintiff's complaint alleged that he was fired in retaliation for reporting (1) racial discrimination and (2) fraud, misappropriation of state resources, and gross institutional mismanagement at NCCIW. Defendants moved for summary judgment, which was granted by the trial court. We affirm.

I. Background

Plaintiff was born in Sri Lanka, but is a naturalized American citizen and has been practicing medicine since 1959. Plaintiff began employment with NCCIW as a Physician III-A on 30 January 2012. Plaintiff was to be on "probationary/trainee" status for the first nine months of his employment with NCCIW.

During NCCIW's "new hire orientation," Dr. Dunston received a report from a doctor hired at the same time as Plaintiff, Dr. Stanley Wilson ("Dr. Wilson"). Dr. Wilson stated that Plaintiff often arrived late to their training. On 21 February 2012, less than a month into his employment with NCCIW, Plaintiff reported to Dr. Dunston that Dr. Wilson had recently greeted him by

saying "Namasthay," [sic] which Plaintiff felt was insulting because Plaintiff was "an American and . . . speak[s] only English." Plaintiff also reported he felt that Dr. Wilson was second-guessing him and telling him what to do. Subsequently, Dr. Dunston spoke with Dr. Wilson about his greeting, and Dr. Wilson never said "Namasthay" [sic] to Plaintiff again. Dr. Dunston also spoke with Plaintiff about the "very collaborative approach to medicine" at NCCIW and told Plaintiff he would need to be able to "welcome feedback" from his colleagues.

Throughout the next several months, Dr. Dunston received numerous reports from NCCIW medical personnel that Plaintiff was combative and refused to follow NCCIW protocol. When other doctors or medical staff attempted to inform Plaintiff about proper NCCIW protocol, Plaintiff's reported "response to everyone" was simply to dismiss them and state that he had been practicing medicine for over fifty years.

NCCIW's nurse supervisor, Pamela Freeman-Caviness, reported to Dr. Dunston on 25 June 2012 that Plaintiff was asleep in the front Provider Office of the prison ("the 25 June sleeping incident"). Dr. Dunston went to the front Provider Office and saw another doctor enter and bump into Plaintiff; Plaintiff then opened his eyes. Dr. Dunston told Plaintiff that he had been sleeping and asked Plaintiff to come to her office. Dr. Dunston

later explained to Plaintiff that "sleeping was inappropriate in the prison setting" and that it was a safety and security breach. Plaintiff did not deny that he was sleeping and instead stated: "No one was going to hurt me, I know the housekeeper, she is a patient of mine and I ask her how she is doing."

Plaintiff later "admit[ted] to" the 25 June sleeping incident in a letter to Warden Harris dated 25 September 2012 ("the 25 September letter"). However, during deposition, Plaintiff clarified his statement by saying: "I admit the allegation, but not [the] description of that as sleeping on the job." To say that he was "sleeping," Plaintiff argued, would require a "differential diagnosis" from a doctor. Plaintiff further stated that he actually could not "remember . . . [the] [e]vents surrounding [the 25 June sleeping] incident and what happened after that, a few days after even," because he was on numerous medications that may have affected his cognitive state and also because he was not eating at the time in order to "remain alert."

Plaintiff wrote Dr. Dunston a letter on 2 July 2012 ("the 2 July letter"), which contained a number of grievances against Dr. Dunston. The 2 July letter generally outlined what Plaintiff saw as mismanagement of NCCIW by Dr. Dunston. It also alleged that Dr. Dunston "engaged in discriminatory activity

against" Plaintiff by not assigning him to certain duties at the prison. Dr. Dunston forwarded Plaintiff's 2 July letter up the chain of command to the Equal Employment Opportunity office of the North Carolina Department of Correction ("EEO") because it "contained allegations [that] could be perceived as [racial] discrimination" by Dr. Dunston.

Nonetheless, during the EEO's subsequent investigation into the allegations in the 2 July letter, Dr. Dunston explained that she did not assign Plaintiff to certain duties because she was concerned about what she saw as Plaintiff's clashes with staff members and refusal to follow NCCIW protocol. Moreover, Plaintiff expressly stated to EEO investigators that he had "never faced discrimination [based on] race[] [or] religion" at NCCIW. As such, the EEO report concluded that any intimation of racial "discrimination" in Plaintiff's 2 July letter was unsubstantiated. If anything, the report noted, Plaintiff "communicated [his own] biases of a racial nature and generalized stereotypes of African-Americans as he referenced Dr. Dunston and her health" during the investigation.

Dr. Dunston continued to receive reports of Plaintiff clashing with staff members and not following NCCIW protocol through July of 2012. Dr. Dunston also received a second report of Plaintiff sleeping on the job, this time from Dr. Wilson, on

18 July 2012 ("the 18 July sleeping incident"). Dr. Dunston and NCCIW's deputy warden, John Habuda, met with Plaintiff and Dr. Wilson the following day to discuss the 18 July sleeping incident ("the 19 July conference"). Plaintiff reportedly did not deny that he was asleep, and instead stated: "[A]fter eight hours, I can do what I want[.] [If] there is no work I can sleep, snooze, I can do whatever I want until the telephone rings and I pick it up."

They also discussed a recent argument between Plaintiff and Dr. Wilson, and Plaintiff stated that Dr. Wilson generally acted with an attitude of "white supremacy." Plaintiff also said of Dr. Dunston, his direct supervisor:

Why should I get any advice from her[.]
[S]he is an administrator, she is not a
practicing physician. I am the man with the
boots on the ground[.] I practice medicine,
I do not need to get advice from her. . . .
I will not take any clinical advice from
her; I am not going to do that[.]"

After receiving a report concerning the 19 July Conference, Warden Harris ordered an internal investigation of Plaintiff due to reports that Plaintiff was still sleeping on the job and after "becoming aware of other worrisome behavior" by Plaintiff.

While the investigation of Plaintiff was pending, Plaintiff sent Dr. Dunston another letter, dated 23 July 2012. In that letter, Plaintiff accused Dr. Wilson of having "the audacity and

courage to act out as a Master towards a 'Slave' only as a result of the treatment I had received from this administration since I joined the Department of Corrections about [six] months ago." Dr. Dunston also forwarded this letter up the chain of command to the EEO, which was received while the EEO was conducting its investigation into the 2 July letter.

Warden Harris informed Plaintiff, in writing, that Plaintiff was being placed on "investigatory status" effective 9 August 2012. As a result, Plaintiff would receive pay while he was being investigated, but he was not to report for duty. Plaintiff subsequently delivered another letter to the EEO on 4 September 2012. This letter reportedly documented seventeen instances where Plaintiff felt inmates had received "substandard clinical care" at NCCIW.

Plaintiff was notified by Warden Harris of his pre-disciplinary conference through a letter dated 20 September 2012. The pre-disciplinary conference was held on 24 September 2012. During the conference, Plaintiff was given the opportunity to submit a written response to the allegations against him, and he responded in the 25 September letter to Warden Harris, discussed previously. Again, Plaintiff "admit[ted] to" the 25 June sleeping incident in the 25 September letter. Plaintiff also stated he "became alert" when

Dr. Dunston approached him to speak about his allegedly sleeping on the job. Plaintiff did not address the 18 July sleeping incident and stated that: "No other allegations of similar incidents have been brought to my attention[.]" Plaintiff acknowledged that he had an "adversarial relationship" with Dr. Wilson and declined to comment further except to note that he felt the issue "remain[ed] largely unresolved because of the lack of any efforts to resolve it by Dr. Dunston or anyone else in the chain of command." In a subsequent affidavit filed by Plaintiff, he took issue with the incidents involving Plaintiff and other NCCIW staff members being characterized as "confrontations" and stated that he "did not engage in 'confrontations'" with staff members at NCCIW. Instead, Plaintiff averred, "[a]ny disagreements that occurred between Dr. Stanley Wilson and I were initiated by [Dr Wilson]."

Warden Harris mailed Plaintiff written notice of Plaintiff's termination from NCCIW on 24 October 2012 ("the termination letter"). The termination letter briefly summarized many of the reports that Dr. Dunston received from NCCIW staff regarding Plaintiff's general conduct. The termination letter then set out several categories of "unacceptable personal conduct" as provided in the Department of Correction Personnel Manual ("DOC manual"), specifically,

4. Participating in any action that would in any way seriously disrupt or disturb the normal operation of the agency, or any sub-unit of the Department of Correction or State government.

. . . .

16. . . . intimidation of fellow employees

. . . .

20. . . . engaging in undue familiarity with inmates

. . . .

28. Knowingly making false or malicious statements with intent to harm or destroy the reputation, authority, or official standing of an individual or the Department.

. . . .

33. Willful failure to complete reports[or to] accurately reflect information on reports . . . where such failure could result in harm to employees, inmates, probationers, parolees, property, or other individuals.

The termination letter continued by stating that

[t]he incidents outlined above clearly indicate an ongoing pattern of behavior that cannot be tolerated. This behavior includes your unwillingness and/or inability to accept direction or training in facility procedures from your supervisor or your colleagues; your inappropriate hostility and aggression in your interactions with other employees and in front of inmates, which disrupts the normal operations of the unit; your failure to recognize and accept such basic security protocols as the requirement

to remain alert while on duty; and your unwillingness and/or inability to change your behavior despite numerous counseling attempts.

Plaintiff filed a complaint against the North Carolina Department of Public Safety, Dr. Dunston, and Warden Harris, alleging that he was fired in retaliation for reporting (1) racial discrimination and (2) fraud, misappropriation of state resources, and gross institutional mismanagement at NCCIW. Plaintiff's claims were based entirely on his reporting the contents of the 2 July letter.¹ Defendants filed a motion for summary judgment as to all of Plaintiff's claims, which was granted by order filed 25 March 2014. Plaintiff appeals.

II. Standard of Review

The North Carolina Supreme Court has stated clearly that

[s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party

¹ On appeal, Plaintiff argues that he was also fired in retaliation for reporting what he viewed as substandard medical care of some NCCIW inmates. **[Appellant Br. pp. 19-20, 23]** However, this issue is waived because Plaintiff did not raise it at trial. See N.C. R. App. P. 10(a)(1).

opposing the motion. The standard of review for summary judgment is *de novo*.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations and internal quotation marks omitted).

III. Analysis

North Carolina's Whistleblower Act ("the Act"), codified at N.C. Gen. Stat. §§ 126-84 *et seq.* (2013), provides that

State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

- (1) A violation of State or federal law, rule or regulation;
- (2) Fraud;
- (3) Misappropriation of State resources;
- (4) Substantial and specific danger to the public health and safety; or
- (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C.G.S. § 126-84(a). Section 126-85 states that

[n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or

in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C.G.S. § 126-85. In order to succeed on a claim for retaliatory termination,

the Act requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (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.

Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005). However, complaints merely "concerning employee grievance matters" are not protected by the Act. *Hodge v. N.C. Dep't of Transp.*, 175 N.C. App. 110, 117, 622 S.E.2d 702, 707 (2005). Moreover,

[a] party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56(e), showing that there is a genuine issue of material fact for trial.

Strickland v. Doe, 156 N.C. App. 292, 294-95, 577 S.E.2d 124, 128 (2003) (citation omitted).

A. Reporting Racial Discrimination

Plaintiff first contends that he was discharged from NCCIW "because he had [reported] that he was being discriminated against on account of his race and national origin" in violation of N.C.G.S. § 126-85. Although Plaintiff's complaint states that he was reporting racial discrimination in the 2 July letter, we find no evidence in the record to support this claim. With the exception of his complaint, Plaintiff has never stated that he was actually discriminated against because of his race, religion, or national origin, or that he was reporting as such. During the EEO's investigation into the 2 July letter, Plaintiff told EEO investigators that he had "never faced discrimination [based on] race[] [or] religion" at NCCIW. In the affidavit Plaintiff submitted to the trial court, Plaintiff never stated he felt he was discriminated against because of his race, religion, or national origin, and instead stated that he had "used the word 'discrimination' because [he] was not able to determine any other explanation for the disparate treatment that [he] received." During deposition, Plaintiff repeatedly refused to state that there was any racial motivation behind this alleged "discrimination," as seen through the following exchanges:

A: The statistics are startling because it clearly shows a pattern of conduct by your clients. There was something that I

couldn't explain except to use the word "discrimination." Now, is it based on race or religion, sex or -- I don't know.

. . . .

A: I have explained to you I don't know whether it was discrimination based on the religion or some -- but I know there was discrimination or disparate treatment. . . . But whether it is based on race, this and that, I don't know.

. . . .

Q: [During a particular argument with Dr. Wilson], did [Dr. Wilson] make any reference to your race or national origin?

A: I don't think so.

Q: Okay. So do you think that interaction regarding the time sheet was motivated by your race or national origin?

A: I never said that.

Q: Okay.

A: I never said that. I don't know why he reacted that way.

. . . .

Q: And at any time during that interaction [involving another argument with Dr. Wilson,] did he reference your race or your national origin?

A: No.

Q: Okay.

A: But he told me . . . "Maybe you have done too much of this, too much of this work

before."

Q: You took that to be a reference to your race or national origin?

A: I don't think so. . . . I mean I don't know. This -- as I said, I haven't understood racism in the United States, ma'am. . . . You may have a better idea of racism than I do. . . . But I haven't understood racism here. . . . [N]ever in my life, never during [my time at] the NCCIW that I ever thought Dr. Dunston would do a thing like that to me, because she -- her ancestors probably were slaves here, who were treated by the whites with unusual cruelty.

. . . .

Q: Is it your position that Dr. Dunston didn't assign you to be on call because of your race and national origin?

A: You know, I told you before at the beginning, I don't understand racism in the United States. I only recognize disparate or discriminatory treatment. And I had enough evidence to show it was discriminatory treatment.

. . . .

Q: [] I'm asking you about your allegations that [Dr. Dunston] discriminated against you based on your . . . race and national origin.

A: I cannot -- I don't understand the meaning of discrimination, how it is interpreted in the legal circles. You cannot put that word -- because I don't understand that. . . . What is discrimination? Discrimination can take many forms. . . . It may not be on race,

this, that, and so on. . . . I am only saying discrimination. Did I say race -- this is on July 2nd letter? I may have said that. . . . I don't know. . . . I don't know what is discrimination.

Q: Well, answer the question based on your understanding . . . of what discrimination is.

A: The -- my understanding of discrimination is that if between physicians you have -- you are not treated -- if you have six physicians and you single out one, like me, I am different, and give shifts that point to a differential treatment, not fair and equitable, then I would say I have no other word to use . . . than discrimination. . . .

Q: [W]hen you say you're different, you're referring to your race and national origin, I assume; is that correct?

A: I'm not sure of that, but -- difference [maybe] -- [maybe] some other things, ma'am.

Q: Like what?

A: Maybe I'm intellectually superior[.]

. . . .

Q: Dr. Manick, you've made the very serious allegation that [Dr. Dunston] discriminated against you [based on race or national origin.]

A: (interposing) I didn't make that allegation. I only said discrimination. . . . For lack of a better word, I called it discrimination[.]

At one point, after opposing counsel again specifically asked Plaintiff about the allegation in his complaint that he was discriminated against based on race or national origin, Plaintiff stated that he could not respond, pointed to his lawyer, and stated "[t]hat's what he wrote."

Based on these statements by Plaintiff, it is clear Plaintiff did not believe, even leading up to trial, that he was ever discriminated against because of his race or national origin at NCCIW. As such, Plaintiff's 2 July letter did not involve his reporting racial discrimination at NCCIW, and instead constituted an employee grievance matter, which was not protected by the Act. See *Hodge*, 175 N.C. App. at 117, 622 S.E.2d at 707. Therefore, Plaintiff's claim that he was fired from NCCIW in retaliation for reporting discrimination based on race or national origin is without merit and was properly dismissed by the trial court.

B. Reporting Fraud, Misappropriation, and Mismanagement

Plaintiff next argues he was fired for reporting fraud, misappropriation of state resources, and gross mismanagement of NCCIW in the 2 July letter. Again, to establish a *prima facie* claim for retaliatory termination, a plaintiff must establish

- (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.

Newberne, 359 N.C. at 788, 618 S.E.2d at 206. Regarding this third element for establishing a *prima facie* claim,

[t]here are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act. First, a plaintiff may rely on the employer's admission that it took adverse action against [the plaintiff] [solely] because of the [plaintiff's] protected activity.

. . . .

Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual. Cases in this category are commonly referred to as "pretext" cases.

. . . .

Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken.

Id. at 790-91, 618 S.E.2d at 207-08 (citations and internal quotations omitted). Plaintiff's complaint alleges that Defendants' stated reasons for firing him were pretextual and,

thus, his claim falls within the second category of cases described above.

["Pretext" cases] are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981). . . . Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a *prima facie* case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. at 790-91, 618 S.E.2d at 207-08 (citations omitted).

Even if we were to assume *arguendo* that Plaintiff has established a *prima facie* claim, his suit against Defendants was still properly disposed of through summary judgment. Defendants have articulated some legitimate, non-retaliatory reasons for terminating Plaintiff's employment with NCCIW, specifically his reported clashes with NCCIW personnel and ongoing refusal to follow NCCIW protocol. Therefore, under the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, Plaintiff would have to raise a factual issue regarding whether these proffered reasons for

firing Plaintiff were pretextual. "To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive." *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 317, 567 S.E.2d 803, 811 (2002).

Although Plaintiff argues at length in his brief that he has established a *prima facie* claim against Defendants, Plaintiff has provided this Court with no express argument that the Defendants' stated reasons for firing him were pretextual, nor has he even directly attacked the validity of most of Defendants' articulated reasons for firing him. Plaintiff does not refute the documented instances of his sleeping on the job; instead, he has stated that he either did not remember whether he was asleep or he challenges the characterization of his "non-alert[ness]" as "sleeping." Plaintiff does not dispute the repeated occurrences of his clashing with NCCIW staff; he either does not remember these occurrences or challenges their being characterized as "confrontations."

Instead, Plaintiff argues on appeal that the trial court should not have even considered the numerous reports from NCCIW staff regarding Plaintiff's conduct at NCCIW -- i.e., all of the legitimate articulated bases for firing Plaintiff -- because

those reports constituted hearsay. Plaintiff has waived this argument on appeal, as he did not raise it with the trial court. See N.C.R. App. P. 10(a)(1). In any event, Plaintiff's claim is without merit; "[s]tatements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990) (citation and internal quotation marks omitted).

Plaintiff does provide this Court with another argument that could be interpreted as an argument that Defendants' articulated reasons for firing him were pretextual. Plaintiff points to a part of the dismissal letter that cites several of the DOC Manual's enumerated forms of "unacceptable personal conduct." Specifically, Plaintiff's dismissal letter notes that the conduct of "[k]nowingly making false or malicious statements with intent to harm or destroy the reputation, authority, or official standing of an individual or the Department" may have been relevant in NCCIW's determination to fire Plaintiff. Plaintiff argues that "a reasonable juror could infer that Warden Harris was referring to Plaintiff's reports of . . . waste and mismanagement of state resources . . . when she referenced false and malicious statements in Plaintiff's dismissal letter."

Notwithstanding the fact that the termination letter documents a number of inflammatory statements made by Plaintiff about other NCCIW staff members,² Plaintiff's own characterization that this is something that a juror "could infer," acknowledges that this is not a non-speculative fact that might establish pretext by Defendants. Because Plaintiff has not provided this Court with any further reviewable arguments that Defendants' articulated reasons for firing him were pretextual, we find that Plaintiff's claim was properly dismissed by the trial court.

Affirmed.

Judges HUNTER, Robert C. and BELL concur.

² Dr. Dunston's deposition also revealed that Plaintiff had previously made an unfounded report to Dr. Dunston that Dr. Wilson was only giving out narcotics to white inmates, although this instance is not documented in the dismissal letter.