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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1031

Filed: 5 July 2017

Washington County, No. 15 CVS 201

CRYSTAL JENNINGS, Plaintiff

v.

THE UNIVERSITY OF NORTH CAROLINA and ELIZABETH CITY STATE
UNIVERSITY, Defendants

Appeal by plaintiff from order entered 28 April 2016 by Judge J. Carlton Cole
in Washington County Superior Court. Heard in the Court of Appeals 5 April 2017.

*Hairston Lane, PA, by Donald Glenn Huggins, Jr., and James E. Hairston, Jr.,
for plaintiff-appellant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Catherine F.
Jordan, for the State.*

CALABRIA, Judge.

Where plaintiff failed to allege that she had exhausted administrative remedies, or that administrative remedies would have been futile, the trial court did not err in dismissing plaintiff's complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Where plaintiff failed to demonstrate that her employer interfered with her FMLA leave, the trial court did not err in dismissing

plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

I. Factual and Procedural Background

On 29 January 2010, Crystal Jennings (“plaintiff”) was hired by Elizabeth City State University (“ECSU”) as a temporary part-time employee in its Department of Institutional Research. ECSU is a constituent university of the University of North Carolina (“UNC”). On 1 April 2010, plaintiff's temporary position terminated; she was re-hired by ECSU for another temporary part-time position in ECSU's Department of Information Technology (“IT Department”) on 1 June 2010. On 21 July 2010, plaintiff was hired to a permanent position in the IT Department. On 2 May 2011, plaintiff became a permanent State employee. On 28 May 2014, plaintiff was terminated due to unacceptable personal conduct, as a result of a disciplinary conference conducted on 22 May 2014 in plaintiff's absence.

On 7 January 2015, plaintiff filed the complaint in the instant case against ECSU and UNC (collectively, “defendants”), alleging wrongful termination, violation of North Carolina whistleblower protections, and violation of the Family Medical Leave Act (“FMLA”). Specifically, plaintiff alleged that she had discovered that a co-worker, Walter Seaman (“Seaman”) was involved in multiple breaches of a faculty computer; that Seaman was subsequently promoted to become plaintiff's immediate supervisor; and that Seaman harassed plaintiff in retaliation for her exposure of his

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breaches. Plaintiff further alleged that she had applied for FMLA leave due to her ongoing battle with cancer; that during her leave, a disciplinary conference was scheduled, which she alleged was in retaliation for her exposure of Seaman's breaches; that the disciplinary conference notice alleged that plaintiff had "abused her privileges as a network, server, and Microsoft Exchange administrator[.]" and that plaintiff had "accessed, copied, and stored emails and confidential information . . . without proper authority or a legitimate business need[.]" and that plaintiff was ultimately terminated at a conference held in her absence. Plaintiff further alleged that she had filed a charge of retaliation and a grievance for wrongful termination, and that the grievance proceeding had reached an impasse in mediation. On 7 May 2015, plaintiff filed an amended complaint containing substantially similar factual allegations. This complaint included the same claims for wrongful termination and violation of whistleblower protections, but separated the FMLA claim into two separate claims, one for interference with FMLA benefits, and one for termination of employment based upon exercise of the FMLA.

On 11 August 2015, defendants filed an answer to plaintiff's amended complaint, and a motion to dismiss. In their motion to dismiss, defendants cited Rules 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and 12(b)(6) (failure to state a claim upon which relief can be granted) of the North Carolina Rules of Civil Procedure. Defendants further raised the

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defenses of the statute of limitations; the allegation that defendants' employment practices comported with the law; plaintiff's failure to exhaust administrative remedies; plaintiff's failure to mitigate damages; and defendants' sovereign immunity.

In support of their motion to dismiss, defendants submitted the affidavit of Paula Bowe ("Bowe"), Interim Chief Human Resources Officer at ECSU. In her affidavit, Bowe averred that a grievance process existed which plaintiff could have utilized to contest her termination, but that "[a]t no point has Plaintiff utilized any on-campus grievance procedure to grieve the termination of her employment at ECSU or raise any of the issues included in her complaint." Further, Bowe averred that "Plaintiff has also not served on the University a petition for judicial review in civil superior court appealing any administrative decision by ECSU." In addition to Bowe's affidavit, defendants submitted a copy of the employee grievance policy of UNC and its subsidiary colleges, and a copy of ECSU's grievance policy.

On 29 April 2016, the trial court entered an order on defendants' motion to dismiss. The order recognized that the motion was premised upon "failure to exhaust administrative and statutory remedies, lack of [waiver] of sovereign immunity, lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted." The trial court, in its order, granted defendants' motion to dismiss "under Rules 12(b)(1), 12(b)(2) and 12(b)(6)[.]"

Plaintiff appeals.

II. Motion to Dismiss

Through two separate arguments, plaintiff contends that the trial court erred in granting defendants' motion to dismiss. We disagree.

A. Standard of Review

"We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

The motion to dismiss under N.C.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint, and 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." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 269-70, 333 S.E.2d 236, 238 (1985) (citations and quotations 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).

B. Rule 12(b)(1)

The trial court granted defendants' motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Rule

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12(b)(1) concerns motions to dismiss based upon a lack of subject matter jurisdiction. Plaintiff first contends that the trial court had subject matter jurisdiction over plaintiff's whistleblower claim.

In their motion to dismiss, defendants alleged that plaintiff had failed to exhaust the administrative remedies available to her. We have previously held that “ ‘An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies.’ ” *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (quoting *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999)).

The grievance procedures for a State employee are established in Chapter 126, Article 8, of the North Carolina General Statutes. Specifically, N.C. Gen. Stat. § 126-34.01 (2015) provides that a State employee having a grievance arising from employment must first seek remedy through his or her supervisor, then via the grievance procedure established by the State Human Resources Commission, which will ultimately issue a final agency decision (“FAD”). N.C. Gen. Stat. § 126-34.02 (2015) then establishes the procedure by which an aggrieved State employee may appeal from a FAD.¹

¹ Defendant's reliance on prior decisions of our Supreme Court and this Court is misplaced, as those decisions interpreted a prior version of N.C. Gen. Stat. § 126-5, which was subsequently amended in 2013.

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Neither plaintiff's complaint nor her amended complaint included allegations that she followed this procedure. She does not even allege that she is challenging a FAD. Her amended complaint alleges, simply, that she "filed a charge of retaliation with the EEOC[,]" that she "filed a grievance for wrongful termination[,]" and that her "grievance proceeded to mediation and resulted in an impasse." Nor did plaintiff allege that the administrative remedies available to her were inadequate.

This Court has consistently held that "a trial court lacks subject matter jurisdiction to hear an action challenging a final decision by the University unless the plaintiff has exhausted all available administrative remedies, including seeking judicial review pursuant to section 150B-43, or his complaint alleges the administrative remedies available to him are inadequate." *Frazier v. N.C. Cent. Univ., ex rel. Univ. of N.C.*, ___ N.C. App. ___, ___, 779 S.E.2d 515, 519 (2015). Plaintiff has not alleged that she has exhausted all administrative remedies, nor that such remedies would be inadequate. As such, we hold that the trial court lacked subject matter jurisdiction to hear plaintiff's whistleblower claim, and did not err in dismissing this claim pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

C. Rule 12(b)(6)

Plaintiff next contends that her complaint stated a claim pursuant to the FMLA, and that the trial court therefore erred in dismissing it.

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“To make out an ‘interference’ claim under the FMLA, an employee must thus demonstrate that (1) he is entitled to an FMLA benefit; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm.” *Adams v. Anne Arundel Cty. Pub. Sch.*, 789 F.3d 422, 427 (4th Cir. 2015) (citing *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 152 L.Ed.2d 167, 176-77 (2002)). Further, such a claim offers no relief “unless the employee has been prejudiced by the violation.” *Ragsdale*, 535 U.S. at 82, 152 L. Ed. 2d at 172. Lastly, “[a]n employer has discretion to discipline or terminate the employment of an at-will employee for poor performance regardless of whether the employer's reason for terminating the employment was discovered while the employee is taking FMLA leave.” *Mercer v. Arc of Prince Georges Cty., Inc.*, 532 F. App'x 392, 396 (4th Cir. 2013).

In the instant case, plaintiff alleges that on 10 January 2014 she began approved leave pursuant to the FMLA; that during her leave, she was contacted regarding pre-disciplinary conferences; that on 9 April 2014, the date that her leave expired, she took unpaid leave; and that she was ultimately terminated. Plaintiff contends that her employer contacting her regarding a pre-disciplinary hearing during her FMLA leave constituted a violation of the FMLA.

As we have cited above, however, an employer has the discretion to discipline or terminate the employment of an employee even during FMLA leave. Plaintiff does not contend that the purported interference or retaliation was in response to her use

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of FMLA leave; rather, she merely contends that the scheduling of her disciplinary proceedings *at all* while she was on FMLA leave constituted a violation. As stated above, however, the mere fact that discipline is enacted during an employee's FMLA leave does not constitute a violation.

Plaintiff was required to allege both defendants' interference with her FMLA leave and their retaliation resulting therefrom, along with prejudice to her that resulted. We hold that plaintiff failed to make sufficient allegations to support this cause of action, and therefore that she failed to state a claim for violation of the FMLA. When read contextually, plaintiff's cursory references to retaliation under the FMLA in the amended complaint are not sufficient to state a valid claim for relief under this theory. Accordingly, the trial court did not err in dismissing plaintiff's FMLA claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

AFFIRMED.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).