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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-687

No. COA20-905

Filed 7 December 2021

Macon County, No. 20-CVS-2

ROBERT STEVENSON, Plaintiff,

v.

ANC HIGHLANDS CASHIERS HOSPITAL, INC., Defendant.

Appeal by plaintiff from order entered 29 July 2020 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 7 September 2021.

The Kirby G. Smith Law Firm, LLC, by Alexander C. Kelly, for plaintiff-appellant.

Constangy, Brooks, Smith & Prophete, LLP, by Jonathan W. Yarbrough, for defendant-appellee.

GORE, Judge.

¶ 1 The employment of Robert Stevenson was terminated by ANC Highlands Cashiers Hospital, Inc. ("ANC"). Mr. Stevenson filed a complaint alleging the following: In terminating Mr. Stevenson's employment, ANC violated public policy found in N.C. Gen. Stat. § 95-126, which governs the occupational health and safety of North Carolina employees, and in N.C. Gen. Stat. § 95-241(a). On appeal, we must

determine whether the trial court erred by dismissing Mr. Stevenson's complaint pursuant to ANC's Rule 12(b)(6) motion. We affirm the trial court's order.

I. Factual and Procedural Background

¶ 2 On 3 January 2020, Mr. Stevenson filed a complaint against ANC alleging he was wrongfully discharged for reporting a policy violation. Mr. Stevenson's complaint alleges the following: Mr. Stevenson worked for ANC as a registered nurse ("RN") in the emergency department ("ED"). On 11 December 2016, Mr. Stevenson was working in the ED when his supervisor, Cindy Pierson, transferred an on-duty nursing assistant from the ED to another department, leaving Mr. Stevenson to work the ED without assistance. ANC has a policy stating the ED should not be staffed by a single RN.

¶ 3 Mr. Stevenson sent an email to Kathy Guyette, Senior Vice President of Patient Care Services, and Bob Bednarek, then CEO of the Hospital, reporting the violation of ANC policy. Ms. Guyette notified Ms. Pierson of Mr. Stevenson's email.

¶ 4 In January 2017, Ms. Pierson confronted Mr. Stevenson for reporting the policy violation. Approximately two weeks after this incident, Ms. Pierson informed Mr. Stevenson that his name came up in a random audit and was required to submit to a mandatory drug test. Mr. Stevenson refused to submit to the random drug test. Ms. Pierson informed Mr. Stevenson he would be terminated if he did not take the drug

test immediately. Mr. Stevenson was terminated by ANC on 2 February 2017 for refusing to submit to a drug test.

¶ 5 On 22 April 2020, ANC filed their answer to Mr. Stevenson's complaint, along with a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. ANC's motion to dismiss alleged Mr. Stevenson failed to plead his claim for wrongful discharge in violation of North Carolina public policy, because he failed to identify a specific North Carolina public policy that was violated.

¶ 6 The trial court held a hearing on the matter on 27 July 2020. The trial court concluded Mr. Stevenson's complaint fails to state a claim upon which relief can be granted and granted ANC's motion to dismiss. Mr. Stevenson timely filed notice of appeal.

II. Standard of Review

¶ 7 "The motion to dismiss under N.C.R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). The essential question in reviewing the grant of a motion to dismiss pursuant to Rule 12(b)(6) is whether, "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991) (citation omitted).

¶ 8 "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).

III. Motion to Dismiss

¶ 9 In Mr. Stevenson's argument on appeal, he contends the trial court erred by dismissing his wrongful discharge complaint against ANC pursuant to ANC's Rule 12(b)(6) motion. Specifically, Mr. Stevenson argues that the allegations in his complaint are sufficient to state claim upon which relief may be granted.

¶ 10 North Carolina is an employment-at-will state. Thus, "in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Indus.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). "However, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer's request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy." *Pierce v. Atlantic Grp., Inc.*, 219 N.C. App. 19, 29, 724 S.E.2d 568, 576, *disc. review denied*, 366 N.C. 235, 731 S.E.2d 413 (2012) (cleaned up).

¶ 11 When an at-will employee brings a wrongful discharge claim upon the theory of a violation of public policy, notice pleading is insufficient. *Gillis v. Montgomery Cnty. Sheriff's Dep't*, 191 N.C. App. 377, 379, 663 S.E.2d 447, 449, *disc. review denied*, 362 N.C. 508, 668 S.E.2d 26 (2008). Instead, such a claim must be pled with specificity. *Id.* A plaintiff's complaint must "allege that defendant's conduct violated any explicit statutory or constitutional provision" or "allege defendant encouraged plaintiff to violate any law that might result in potential harm to the public." *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 321, 551 S.E.2d 179, 184, *aff'd*, 354 N.C. 568, 557 S.E.2d 528 (2001).

¶ 12 In this case, Mr. Stevenson cites to the Occupational Safety and Health Act of North Carolina ("OSHANC"), N.C. Gen. Stat. § 95-126, and the Retaliatory Employment Discrimination Act ("REDA"), N.C. Gen. Stat. § 95-241, in support of his wrongful discharge claim. On appeal, Mr. Stevenson claims ANC implemented their policy that the ED should not be staffed by a single RN in compliance with OSHANC's general safety provision that requires employers to "furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees." N.C. Gen. Stat. § 95-129(1). Further, Mr. Stevenson claims his email to ANC's Senior Vice President of Patient Care Services and CEO notifying them of the violation of ANC's policy constituted a protected action under § 95-241(a).

¶ 13 REDA provides that:

> (a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:
> (1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
> . . .
> (b) [OSHANC].

N.C. Gen. Stat. § 95-241(a) (2020). Thus, assuming Mr. Stevenson's email constituted a protected activity under § 95-241(a)(1), his wrongful discharge claim would fall within the public policy stated in §§ 95-126 and 95-241 if he was terminated for reporting a specific violation of OSHANC.

¶ 14 However, Mr. Stevenson does not allege in his complaint, or provide any evidence, that ANC implemented its ED staffing policy to comply with a specific provision of OSHANC. Mr. Stevenson's complaint does allege that "[a]dequate staffing in the ED is mandated by [OSHANC]," but nowhere does OSHANC provide any staffing requirements within the workplace. Mr. Stevenson's complaint fails to make any allegations that his safety was placed at risk due to ANC's actions, and merely alleges that "Defendant terminated Plaintiff for reporting an occupation safety and health hazard, which contravenes the public policies expressed in [OSHANC], N.C. Gen. Stat. § 95-126."

¶ 15 Compare Mr. Stevenson's allegation in the present case to those in *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 745 S.E.2d 316, *review denied & stay dissolved*, 367 N.C. 223, 747 S.E.2d 543 (2013). In *Bigelow*, the plaintiffs sued for wrongful discharge, alleging that their discharge was the result of, among other things, filing discrimination grievances against the defendants. *Id.* at 13, 754 S.E.2d at 318–19. The plaintiff also initiated a claim for wrongful discharge against the defendants with the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 5, 754 S.E.2d at 320. This Court found that the existence of the plaintiff's EEOC claim was indicative that the plaintiffs stated a claim for wrongful discharge in violation of public policy under REDA because the EEOC complaint was based on violations of OSHANC and plaintiffs alleged their employment was terminated in retaliation for filing the claim. In contrast, Mr. Stevenson, did not and could not file a complaint with an administrative agency such as the EEOC, because his alleged report did not report any violations of specific North Carolina statutory law, but instead reported a violation of an internal company policy that Mr. Stevenson claims is loosely based on a general policy found within OSHANC.

¶ 16 Mr. Stevenson's contention that he has alleged a claim for common law wrongful discharge must fail. Mr. Stevenson's complaint does not allege that ANC's conduct violated a specific statutory provision or a recognized exception to this State's employment-at-will doctrine. Mr. Stevenson has failed to identify any specific North

Carolina public policy that was violated by ANC in discharging him. The complaint does not allege that defendant's conduct violated any explicit statutory or constitutional provision, nor does it allege defendant encouraged plaintiff to violate any law that might result in potential harm to the public.

¶ 17 Here, Mr. Stevenson's complaint indicates a reported violation of internal company policy to ANC's Vice President of Patient Care Services and CEO. Although Mr. Stevenson does allege that he was discharged for making this report, he does not allege a specific statutory violation by ANC, nor does he indicate that ANC terminated his employment for filing a complaint of a violation of North Carolina law. Mr. Stevenson's allegations wholly fail to show that ANC ever violated their OSHANC obligations. Mr. Stevenson fails to point to an "explicit statutory or constitutional provision" violated by ANC, instead basing his allegations on general statutory provisions. We do not believe that public policy required ANC impose or follow a minimum staffing policy. Thus, Mr. Stevenson has failed to "identify a specified North Carolina public policy that was *violated* by an employer in discharging the employee." *Pierce*, 219 N.C. App. at 31, 724 S.E.2d at 577 (cleaned up) (emphasis added). We conclude the trial court did not err by dismissing plaintiff's claim for wrongful discharge and affirm the trial court's order.

AFFIRMED.

Judges HAMPSON and WOOD concur.

Report per Rule 30(e).