

2014-2015 NORTH CAROLINA EMPLOYMENT LAW UPDATE

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This paper summarizes published employment law decisions and selected unpublished decisions from the North Carolina Supreme Court and the North Carolina Court of Appeals from June 1, 2014 to June 1, 2015

EMPLOYMENT, NON-COMPETE, AND NON-SOLICITATION AGREEMENTS

TSG Finishing, LLC v. Bollinger, 767 S.E.2d 870 (N.C. Ct. App. 2014) (Robert Hunter, J.)
Under Pennsylvania law, a two year covenant not to compete in the field of textile finishing in North America, which is subsequently assigned to a subsidiary pursuant to a bankruptcy court order, is enforceable. Reversed trial court's order denying preliminary injunction. Employee's knowledge of trade secrets and opportunity to use those in performing a similar job for a direct competitor with some of the same customers was sufficient "circumstantial evidence" of threatened misappropriation to support an injunction under the Trade Secrets Protection Act.

Keith Bollinger was a long-time employee of TSG, Inc. (and its predecessor), a fabric finishing company that applies chemical coatings to textiles to provide customers with desired color and textures. In Bollinger's position as Quality Control Manager, he regularly developed a finishing protocol and created a "style data card" for individualized customer preferences. The finishing process was complex and time-intensive, and TSG, Inc. took efforts to keep its customers and finishing information confidential. In 2007, Bollinger signed a non-compete and non-disclosure agreement in exchange for a \$1,300 salary increase and a \$3,500 signing bonus. The non-compete prohibited Bollinger from working in the textile finishing field for two years, in all of North America. In 2009, TSG, Inc. filed for bankruptcy. In 2011, the trustee in bankruptcy transferred its assets, including the non-compete and non-disclosure agreement, to a subsidiary corporation TSG Finishing, LLC. TSG Finishing became Bollinger's employer, and his job title and duties remained the same. In 2013, Bollinger resigned and accepted a similar position with American Custom Finishing, LLC (ACF), a direct competitor that shared customers with TSG Finishing and was located just 5 miles down the road. TSG Finishing sued for breach of the non-compete agreement, misappropriation of trade secrets, and unfair and deceptive trade practices, and moved for a preliminary injunction to enjoin him from breaching the non-compete and misappropriating trade secrets. The Catawba County Superior Court (Calvin Murphy, J.) denied the motion for a preliminary injunction, concluding that TSG Finishing had not presented a sufficient showing of trade secret misappropriation, and that the non-compete agreement was unenforceable, primarily because there was no explicit clause permitting assignment, there was no evidence the non-compete was assigned, and considering the broad geographic scope, a balancing of the equities weighed against enforcement. TSG Finishing appealed.

The Court of Appeals reversed the trial court's order and remanded with instructions to issue the preliminary injunction. The Court concluded that TSG Finishing had established that it was likely to succeed on its trade secret misappropriation claim under the North Carolina Trade Secrets Protection Act (NCTSPA). Contrary to the trial court's assessment, the Court concluded that it was not just the finishing process "as a whole," but the specific knowledge that Bollinger gained as to each discrete step in the process, that TSG Finishing sought to protect. Using the factors set forth in Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 225 (2003), for determining what information should receive trade secret protection, the Court concluded that TSG Finishing presented sufficient evidence on its specific trade secrets to warrant protection. TSG Finishing presented evidence that it spent \$500,000 a year on research and development to create unique applications for its customers; the results of Bollinger's experimentation at the company regarding specific process refinements were not known outside of TSG Finishing; Bollinger's work was not something that anyone else in the industry would know without years of trial and error by experienced technicians; security measures were in place such that only top-level employees were familiar with the proprietary information Bollinger was in charge of developing; Bollinger could help his new employer achieve its customers' desired results without spending the money on research and development that TSG Finishing; and Bollinger admitted in his deposition that he performs many of the same duties for his employer ACF for some of the same customers that he formerly served at TSG Finishing. The Court held that an injunction was appropriate under the NCTSPA based on "threatened" misappropriation, despite the absence of evidence of actual misappropriation. According to the Court, TSG Finishing presented prima facie evidence of misappropriation through "circumstantial evidence" that Bollinger would be performing similar job duties for ACF, that there was some overlap in customers, that he was working with some of the same customers for ACF, that he had done research and experimentation for TSG Finishing on the finishing process for at least one customer at ACF, and that he was responsible for performing some of the same tasks as he had performed at TSG. Citing N.C. Gen. Stat. § 66-154(a) ("[A]ctual or threatened misappropriation of a trade secret may be preliminary enjoined . . . ") and Horner Int'l Co. v. McKoy, 754 S.E.2d 852, 859 (N.C. Ct. App. 2014), the Court held that "[t]his is precisely the type of threatened misappropriation, if not actual misappropriation, that North Carolina's Trade Secrets Protection Act aims to prevent through issuance of a preliminary injunction."

Applying Pennsylvania law, the Court held that the non-compete was enforceable. The Court disagreed with the trial court's reasoning that an assignability clause was necessary to enforce the non-compete. The Court explained that the case relied on by the trial court, Hess v. Gebhard & Co., 808 A.2d 912 (P.A. 2002), was distinguishable because the non-compete in that case was included in the sale of assets between two companies at arms' length, while the assignment in this case was part of a bankruptcy reorganization, where the subsidiary maintained the same policies and management. The Court also concluded that the non-compete had been properly assigned to TSG Finishing as an "executory contract" in the prior bankruptcy proceeding. The Court ultimately held that the two-year restriction applying to the textile finishing field in North America was reasonable and enforceable. Under Pennsylvania law, the burden is on the employee to show how a non-compete is unreasonable in order to prevent its enforcement. The Court noted that Pennsylvania courts have upheld similar time and geographic restrictions. The Court also found that the equities weighed in favor of enforcing the non-compete, specifically noting Bollinger's expertise in the field of textile finishing developed during his 27 year tenure,

the salary increase and signing bonus, the fact that he voluntarily left his employment to work for a direct competitor, and the risk that his employment with ACF posed to TSG Finishing's competitive advantage and employees. The Court concluded that the restriction on Bollinger's employment opportunities in the textile-finishing field did not render him unemployable for two years, despite the fact that he had spent his entire career in that field. Because TSG Finishing was at risk of losing its long-held customers and whatever competitive advantage it may have had, TSG Finishing demonstrated that it is likely to suffer irreparable loss unless the injunction is issued. Accordingly, the Court ordered the issuance of a preliminary injunction to prevent the breach of the non-compete.

Premier Resources of North Carolina, Inc. v. Kelly, 768 S.E.2d 201 (N.C. Ct. App. 2014) (Unpub.) (Eric Levinson, J.). *Two year covenant not to compete in business development for staffing agency in nine counties in NC and SC is enforceable, where the trial court blue-penciled the non-compete provision to remove one county where employer did not do business.*

Crystal Kelly was employed by Premier Resources of North Carolina, Inc. ("Premier"), a staffing agency, for three years. Kelly's position involved managing client accounts and developing accounts, which required direct client interaction. When Kelly began employment, she signed a non-compete agreement, and she later signed a second non-compete agreement in exchange for an increase in her hourly rate of pay. The second non-compete agreement prevented Kelly from performing similar duties for a competitor for two years in the "Restricted Territory" which was separately defined as nine counties listed A through I. The agreement further included a two-year prohibition on solicitation of clients of Kelly or her direct reports during the year preceding her termination. When Kelly was approached by Beacon Hill Staffing Group, Inc. ("Beacon Hill"), a competitor, and explained that she believed that she was a party to a non-compete with Premier, Beacon Hill told her they had experience with non-competes and would provide legal representation if needed. After Kelly accepted the job with Beacon Hill, she waited a month before she resigned from Premier in order to receive her commission checks. Prior to her resignation, Kelly collected customer contact information, and, soon after resigning, she contacted those customers to advise them of her new position so she could continue providing them with her services. The Mecklenburg County Superior Court (Lisa Bell, J.) entered an order granting Premier a preliminary injunction enjoining Kelly from violating the provisions of the non-compete. Kelly appealed.

The Court of Appeals affirmed the entry of a preliminary injunction that prevented Kelly from breaching the non-compete. Kelly argued that the geographic scope of the non-compete was excessively broad. First, Kelly claimed that the restricted territory included five counties where she had not worked, pointing to a commission report from the last 12 months of her employment. The Court rejected this argument because the commission report did not include counties where Kelly performed other job responsibilities that did not result in a commission, and an affidavit stated that she worked in the restricted counties during her employment. Second, Kelly argued that the trial court impermissibly blue-penciled the "Davidson County" restriction out of the non-compete after Premier admitted to not doing business there and that the restriction was intended to be the "Town of Davidson." The Court rejected that argument because the trial court did not "rewrite" the contract when it struck "Davidson County" from the territorial restrictions of the non-compete. The Court concluded that the trial court "did not err when it blue-penciled a

distinct, separable provision that, when removed, left the remainder of the non-compete intact and reasonable." In response to Kelly's argument that an injunction was improper because she was the sole wage earner in her family and her husband was awaiting a Kidney transplant, and Premier had not shown damage, the Court explained that Premier was not required to prove that it already had suffered damage, just that the threat of irreparable harm in the absence of an injunction was likely.

Northern Star Management of America, LLC v. Sedlacek, 762 S.E.2d 357 (N.C. Ct. App. 2014) (Chris Dillon, J.) *New Jersey law governs covenant not to compete contained in asset purchase and consulting agreements, despite consent to North Carolina jurisdiction provision in subsequent severance agreement. Under New Jersey law, trial court should have determined whether the scope of the covenants prohibiting employee from engaging in certain insurance-related business activities within the 50 states, the District of Columbia, and Puerto Rico was overly broad and, of so, should have rewritten the unreasonable restriction and tailored the preliminary injunction.*

Mark Sedlacek was an officer and part-owner of AEON Insurance, Group., Inc., when it was purchased by Northern Star Management of America, LLC ("Northern Star"). Sedlacek worked for Northern Star, on and off, for over three years. Sedlacek and Northern Star entered into three agreements with non-compete and confidentiality provisions; an asset purchase agreement and a consulting agreement entered into around the time of Northern Star's purchase of AEON, and a severance agreement entered into when Sedlacek temporarily separated from his employment. The severance agreement contained a provision designating North Carolina law as governing that agreement, but recognized that Sedlacek's obligations under the prior agreement would continue in accordance with their terms. Within two months after Sedlacek's resignation, Northern Star sought a preliminary injunction prohibiting violation of the covenants. The Guilford County Superior Court (David Hall, J.) concluded that New Jersey law applied with respect to interpreting the covenants and granted the preliminary injunction enjoining Sedlacek from continued violations of the covenants in the consulting agreement. Sedlacek appealed.

The Court of Appeals vacated the trial court's preliminary injunction order and remanded for further proceedings. The Court held that New Jersey law governed the covenants not to compete in the parties' asset purchase and consulting agreements because the parties' severance agreement did not override the choice-of-law provisions in those previous agreements. The severance agreement contained a choice-of-law provision that stated "this agreement" is subject to North Carolina law and included a consent-to-jurisdiction and venue in North Carolina for "any and all actions between or among any of the parties." The Court interpreted this provision to mean that any action may be brought in North Carolina, but not that every such action be governed by North Carolina law. Moreover, the severance agreement contained a provision that Sedlacek's non-disclosure, non-solicitation, and non-competition obligations would continue pursuant to the terms of those agreements, both of which designated New Jersey law as governing.

The Court remanded to the trial court for entry of findings and conclusions with respect to the reasonableness of the scope of the covenant's geographic and activity restrictions, and as permitted by New Jersey law, to rewrite scope of the restrictions to be reasonable under the

circumstances. Here, the trial court enjoined Sedlacek from engaging in essentially any capacity in any entity engaged in certain insurance-related business activities within the areas described in the consulting agreement, namely, the 50 states, the District of Columbia, and Puerto Rico. However, the Court noted that trial court made no findings with respect to the geographic regions where Northern Star competes for business. The Court also concluded that the scope of enjoined activity appeared overly broad, in that, for example, it prohibited Sedlacek from owning stock as a passive investor in a publicly traded company that engages in any of the insurance businesses described in the consulting agreement. The Court noted that the ten-year duration of the covenant would be unreasonable under North Carolina law, but that under New Jersey law, the reasonableness of duration would not be addressed until a permanent injunction is sought in the trial court.

Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC, 762 S.E.2d 316 (N.C. Ct. App. 2014) (Robert C. Hunter, J.). *The North Carolina courts' longstanding prohibition on blue-penciling of non-compete agreements was waived by express contractual provisions in the context of a sale of business covenant, which gave the trial court the express authority to rewrite a non-compete given by the seller to reduce its unreasonable geographic scope of North and South Carolina to make it reasonable and enforceable.*

Beverage Systems of the Carolinas, LLC ("Beverage Systems") entered into an asset purchase agreement with two other beverage companies and their owners, Thomas, Kathleen, and Ludine Dotoli. As part of the agreement, and for additional consideration, the Dotolis agreed to sign a non-compete agreement, which prohibited them competing, owning, managing, operating or controlling, or being connected to someone who has a financial interest in any business involved in the beverage dispensing or servicing industry in North and South Carolina. The non-compete included the following provision: "If, at the time of enforcement . . . a court holds that the restrictions stated herein are unreasonable under the circumstances then existing, the parties hereto agree that . . . the court shall be allowed to revise the restrictions contained . . . to cover the maximum period, scope and area permitted by law." Ludine's wife Cheryl Dotoli later created Associated Beverage Repair, LLC ("Associated Beverage"), and Ludine was the manager of Associated Beverage and allegedly solicited business from Beverage Systems' existing customers. Beverage Systems sued to enforce the non-compete agreement, and the Iredell County District Court (A. Robinson Hassell, J.) granted summary judgment in Associated Beverage's favor based on the overly-broad scope of the non-compete. Beverage Systems appealed.

The Court of Appeals reversed the grant of summary judgment and remanded. With regard to the non-compete agreement, the Court held that the scope of prohibited employment activities was reasonably necessary to protect Beverage System's legitimate business interest, and the five-year duration of the non-compete was reasonable in time, but the territory restriction in the non-compete to include all of North and South Carolina was overbroad and unreasonable. The Court held that because the trial court had express authority to revise unreasonable restrictions of the non-compete agreement, the trial court was required to revise the overly-broad geographic scope of the agreement after determining where in Carolinas it would be reasonable to enforce the agreement. The Court recognized that the right of a trial court to revise the provisions of a non-compete based on the express language of a contract for the sale of a business was a matter of

first impression. The Court held that the “blue pencil doctrine”—the rule applicable in North Carolina prohibiting a trial court from revising unreasonable non-compete agreements—did not apply where the non-compete agreement itself allowed a court to make such revision. The language of the Court's opinion suggests that it's ruling may be limited to allowing enforcement of revised non-compete agreements only outside the employment context when parties contract for the right to revise a non-compete to make it reasonable. The Court further reversed the trial court's grant of summary judgment on the related claims of tortious interference, unfair and deceptive trade practices, and injunctive relief.

Judge Elmore dissented. Judge Elmore would have affirmed the trial court's order granting Associated Beverage's motion for summary judgment. The dissent noted that the provision in the non-compete expressly limited the trial court's ability to rewrite unreasonable restrictions as "permitted by law." Thus, the provision itself made the "blue pencil" doctrine, which prohibited such revisions, applicable. Alternatively, the dissent claimed that this contractual provision is unenforceable as it violates North Carolina's "blue pencil" doctrine on its face.

A&D Environmental Services, Inc. v. Miller, 770 S.E.2d 755 (N.C. Ct. App. 2015) (Chris Dillon, J.) *Non-compete agreement's forum selection clause, which required actions to be maintained in a county in which neither party was a resident, was unenforceable because venue was only proper in a county in which a party resides.*

Joel Miller, a resident of Orange County, NC, signed a non-compete, non-solicitation, and confidentiality agreement at the time he was hired by A&D Environmental Services, Inc. ("A&D"), a North Carolina corporation with its principle place of business in Guilford County. The agreement contained forum selection provision that provided that "any litigation under this Agreement shall be brought by either party exclusively in Mecklenburg County . . . the Parties irrevocably consent to the jurisdiction of the courts of Mecklenburg County . . . for all disputes related to this Agreement." After Miller resigned and announced he was going to work for a direct competitor, A&D filed suit in Guilford County to enforce the non-compete agreement. Miller moved to dismiss the action pursuant to Rule 12(b)(3) for improper venue, arguing that the agreement required any action to be in Mecklenburg County. The Guilford County Superior Court (Richard Doughton, J.) denied the motion. Miller appealed.

The Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss for improper venue. The Court held that even though the parties' agreement provided any related litigation must be brought in Mecklenburg County, venue was proper in Guilford County. The Court relied on the Supreme Court's opinion in Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 109 S.E. 362 (1921), as distinguished in Perkins v. CCH Computax, Inc., 333 N.C. 140, 143, 423 S.E.2d 780, 782 (1992), to recognize that parties to a contract may not strip the North Carolina legislature of its power to determine in which county or counties actions maintained in North Carolina must be prosecuted. Thus, the Court held that a forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable "only if our legislature has provided that said North Carolina county is a proper venue." In this contract dispute, the case "must be tried in the county in which the [plaintiff] or [defendant] . . . reside[s]." N.C. Gen. Stat. § 1-82. In this case, since Miller lived in Orange County, A&D maintained its principal place of business in Guilford County, and there was no evidence that A&D maintained

a place of business in Mecklenburg County to qualify as a resident for venue purposes, Guilford County was a proper venue.

STATE TORT CLAIMS: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Fox v. Sara Lee Corp., 764 S.E.2d 624 (N.C. Ct. App. 2014) (Donna Stroud, J.) *Affirming dismissal of intentional infliction of emotional distress claim against employer where employee lacked sufficient evidence that employer ratified a co-workers sexual assault against employee.*

Penny Fox was an employee of Sara Lee Corporation ("Sara Lee"). Fox contended that her co-worker, John Ziekle, cornered her in her cubicle and sexually assaulted her by putting his arm around her neck, and fondling her breast against her will. After Fox got home from work, she called Prudy Yates, a manager in her department, and reported Ziekle's assault. According to Fox, Yates told her not to report the incident, and if she did report it, she should not provide names. The day after the Ziekle assault, Fox called her HR Director, and met with her on two occasions to report the assault. The HR Director initiated an investigation, and when Ziekle did not deny the allegation, he was suspended that same day and later terminated. As a result of the incident, Fox suffered severe mental health problems, only returned to work for a few days, and was ultimately terminated after she was out work on medical leave for one year. Fox initially filed a lawsuit against her employer alleging assault, battery, false imprisonment, and negligent and intentional infliction of emotional distress. However, that filing was more than four years after the fact, and defendant firm moved to dismiss on statute of limitation grounds.

The trial court initially dismissed all claims, but Fox appealed her emotional distress claims, and the Court of Appeals reversed the claims for emotional distress on the grounds that Fox, as result of presumed mental distress, became an incompetent adult for purposes of tolling the statue of limitations. The case was remanded. The trial court entered a default judgment against Ziekle ordering him to pay \$752,492. Fox voluntarily dismissed her negligent infliction of emotional distress claim against Sara Lee, and the only remaining claim against Sara Lee was for Forsyth County Superior Court (David Hall, J.) granted Sara Lee motion for summary judgment on Fox's only remaining claim for intentional infliction of emotional distress, based upon ratification of Ziekle's conduct.

The Court of Appeals affirmed the trial court's order granting summary judgment and dismissing Fox's intentional infliction of emotional distress claim against Sara Lee. The Court held that Fox failed to forecast sufficient evidence to show that Sara Lee ratified the Ziekle assault or any other basis for *respondeat superior* liability. The Court concluded that even if Fox's supervisor, Yates, told Fox not to report the sexual assault, Fox nevertheless called the Human Resources Director and reported the assault the following day. Instead of ratifying, or even briefly tolerating Ziekle's conduct, Sara Lee immediately investigated, and then suspended and fired Ziekle. The Court did not address Sara Lee's remaining arguments based on the expiration of the statute of limitations and the exclusivity provision of the workers' compensation act.

UNEMPLOYMENT BENEFITS

Isenberg v. NC Department of Commerce, Division of Employment Security, 2015 WL 2087017 (N.C. Ct. App. May 5, 2015) (Douglas McCullough, J.) *Actual delivery of petition for judicial review of Division of Employment Security decision, within 10 days after petition is filed, was required for service of petition to former employer.*

On January 21, 2014, Erin Isenberg filed a petition for judicial review in Guilford County Superior Court seeking review of the Division of Employment Security's decision that she was disqualified from receiving unemployment insurance benefits. Isenberg's affidavit of service showed that a copy of the petition was mailed to the former employer via certified mail on January 31, 2014. US Postal service attempted delivery and left notice because there was no authorized recipient available. The mailing was returned to Isenberg unclaimed. Guilford County Superior Court (A. Robinson Hassell, J.) granted DES's motion to dismiss, concluding that it did not obtain jurisdiction to review the petition because Isenberg failed to comply with the statutory requirements of N.C. Gen. Stat. § 96-15(h), which requires service of the petition on the former employer within 10 days of the filing of the petition.

The Court of Appeals affirmed the dismissal of the petition for judicial review. The Court held that since Isenberg failed to serve her former employer with process within the 10 days provided by N.C. Gen. Stat. § 96-15(h), the superior court did not obtain jurisdiction to review DES's decision that petitioner was disqualified from receiving unemployment insurance benefits. While acknowledging the short time period allowed for service of the petition provided little room for mistakes in service, the Court concluded it was bound by the language of the statute, which supports the superior court's determination that *actual delivery*, as required in N.C. R. Civ. P. 4 for service of process, is required for service of the petition under § 96-15(h). The Court reasoned that when a statute requires "certified mail, return receipt requested," the emphasis is on actual delivery. Because the language in § 96-15(h) closely mirror the language in Rule 4(j), actual delivery is required to accomplish service of the petition. The Court recognized that its holding guaranteed that all parties to the Division proceedings have notice that a petition for judicial review of a final decision of the Division has been filed in superior court.

PUBLIC EMPLOYEES

CONSTITUTIONAL CLAIMS - WRONGFUL DISCHARGE

Sims-Campbell v. Welch, 769 S.E.2d 643 (N.C. Ct. App. Mar. 3, 2015) (Richard Dietz, J.) *Given the broad authority vested in assistant registers of deeds, and since the General Assembly has expressly provided that assistant registers of deeds serve "at the pleasure" of their elected superiors, a register of deeds may fire an assistant register of deeds for political reasons (such as announcing her intention to run against him) without violating the federal or state constitution. Since an assistant register of deeds is not a "county employee" under the county employee political activity statute, N.C. Gen. Stat. § 153A-99, the statute does not prevent them from termination for political reasons. Termination of an assistant register of deeds is not "extreme and outrageous" conduct to support intentional infliction of emotional distress claim.*

Harry Welch, Rowan County Register of Deeds, fired his second-in-command, Assistant Register of Deeds Sandra Sims-Campbell, the day after she announced that she planned to run against Welch in the upcoming election. Sims-Campbell filed a complaint and motion for a preliminary injunction, asserting claims for wrongful discharge in violation of public policy and intentional infliction of emotional distress. The Rowan County Superior Court (Mark Klass, J.) denied Sims-Campbell's motion for a preliminary injunction and granted Welch's motion to dismiss for failure to state a claim. Sims-Campbell appealed.

The Court of Appeals affirmed the trial court's dismissal of the claims. The Court held that termination of an assistant register of deeds for political reasons did not violate the free speech provisions of the United States and North Carolina Constitutions and state public policy. While recognizing that in the First Amendment and the analogous provision in the North Carolina Constitution prohibit the termination of public employees for engaging in political speech and activity, the Court relied upon cases from the federal courts and North Carolina Court of Appeals recognizing an exception to the prohibition that applies to deputy sheriffs and deputy clerks of court. The court held that because the General Assembly has given assistant registers of deeds the authority to act on behalf of, and bind, their elected superiors, and assistant registers of deeds serve "at the pleasure" of their elected superiors, county registers of deeds may fire their assistant registers of deeds for political reasons without violating the federal or state constitutions.

The Court held that an assistant register of deeds is not a "county employee" within the meaning of N.C. Gen. Stat. § 153A-99, which states that "county employees . . . are not restricted from political activities." Section 153A-99 provides that "'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 Court reasoned that side from fixing the number of salaried employees in the office of register of deeds, a county lacks any authority to supervise or control the details of the work performed by employees in that office; thus, an employer-employee relationship cannot exist between a county and employees of the register of deeds where the county has no authority to hire, fire, supervise, or control those employees. The Court distinguished a 1998 advisory opinion of the North Carolina Attorney General and the opinion in Venable v. Vernon, 162 N.C. App. 702, 592 S.E.2d 256 (N.C. Ct. App. 2004), which Sims-Campbell relied upon.

The Court also held that Welch's termination of Sims-Campbell was not "extreme and outrageous" conduct as required to support a claim for intentional infliction of emotional distress. The Court recognized its opinions have consistently held that the mere firing of an employee can never be "extreme and outrageous" conduct.

McLaughlin v. Bailey, ___ S.E.2d ___, 2015 WL 1529483, No. COA14-446 (N.C. Ct. App. Apr. 7, 2015) (Sanford Steelman Jr., J.). *Since sheriff's employees are not "county employees" as defined in the county employee political activity statute, N.C. Gen. Stat. § 153A-99, that statute does not protect them from dismissal for partisan purposes. A deputy sheriff, as a sworn law enforcement officer, can be terminated for political reasons without violating his rights under the state constitution.*

Ivan McLaughlin, a detention counselor, and Timothy Stanley, a deputy sheriff, were both employed by the Mecklenburg County Sheriff's Department. Sheriff Daniel Bailey, a Democrat, sent a letter to his employees announcing his candidacy for reelection and requesting campaign contributions. McLaughlin and Stanley, who were Republicans, did not contribute or attend a fundraiser. Bailey was reelected. Stanley was terminated for being disruptive during a meeting by talking in the back of the room and making remarks expressing a preference for Bailey's opponent in the election. McLaughlin was terminated for violating the Sheriff's Department rules. McLaughlin and Stanley ("Plaintiffs") filed claims of wrongful discharge in violation of public policy, namely, in violation of N.C. Gen. Stat. § 153A-99, which protects county employees' right to political association and belief, and violation of their rights under the North Carolina Constitution. They claimed that they were terminated for failing to support Bailey's campaign and for having "Republican beliefs." The Mecklenburg County Superior Court (Robert Ervin, J.) granted summary judgment in favor of Bailey. Plaintiffs appealed.

The Court of Appeals affirmed the trial court's grant of summary judgment dismissing Plaintiffs' claims. Plaintiffs first argued that they were "county employees" as defined in N.C. Gen. Stat. §153A-99, and that they were wrongfully terminated in violation of the public policy set forth in this statute. The 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. Section 153A-99(b) provides, "Definitions. For 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 Court held that the trial court properly dismissed Plaintiffs' wrongful discharge claim because they were not "county employees" for the purposes of N.C. Gen. Stat. §153A-99, and were instead employees of the sheriff individually. The Court noted that common law unequivocally establishes that sheriff's deputies are employees of the sheriff, and are not county employees. The Court found that the fact that the county is the source of funding to pay deputies and other employees of the sheriff's department did not change their status as employees of the sheriff. Reviewing the language of Section 153A-99, the Court concluded that the reference to "'county employee' or 'employee'" did not create two separate classifications of employees, but simply clarifies that definition applies to all provisions of the statute, regardless of whether or not the word "employee" is modified by "county." The Court also concluded that employees of a county sheriff are not "employed by a county or any department or program thereof."

The Court found that the trial court correctly dismissed the Plaintiffs' claims that their termination violated their rights to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution. With respect to Stanley's claim as a sheriff's deputy, the Court cited Carter v. Marion, 183 N.C. App. 449, 645 S.E.2d 129 (2007) (deputy clerks) in support of its conclusion that political affiliation is an appropriate job requirement for a sheriff's deputy, and that deputies may be lawfully terminated based on political considerations. Although Stanley worked mainly as a bailiff and may not have been consulted on policy matters, Stanley was a deputy sheriff and sworn law enforcement officer. With respect to McLaughlin's claim as a detention counselor, who was a civilian employee, as opposed to a sworn law enforcement officer, the Court assumed, without deciding, that he could not lawfully be terminated for his exercise of his free speech rights. The Court found that McLaughlin failed to produce sufficient

evidence to rebut Bailey's objectively reasonable showing that McLaughlin was fired for violations of sheriff's department rules, or demonstrate that he would not have been fired "but for" his political affiliation.

Martha Geer, J., concurred in part and dissented in part. Judge Geer dissented from the majority's conclusion that Section 153A-99(b) does not cover employees of a county sheriff's office, and, therefore, Plaintiffs cannot pursue a wrongful discharge in violation of public policy claim based on that statute. She would hold that employees of sheriff's departments fall within the definition of "county employee" and "employee" set out in § 153A-99(b). Recognizing that the Court has previously refused to incorporate common law definitions when the statute itself contains a definition, the dissent faults the majority opinion for failing to apply statutory construction principles, and instead construing the phrase "county employee" in accordance with the common law. The dissent notes that North Carolina statutes give the county substantial control over sheriff departments, for example, the county fixes the number of sheriff's department salaried employees and pays their compensation. Because a sheriff's department is funded in whole or in part by county funds, it arguably is a "department [of the county] that is supported . . . by county funds." Thus, Section 153A-99(b) can reasonably be construed as encompassing employees of a sheriff's department. The dissent would affirm the entry of judgment on McLaughlin's wrongful discharge claim based on the majority's analysis of his constitutional claim. However, after reviewing Stanley's evidence to support his wrongful discharge claim, she concludes that because Stanley presented sufficient evidence to give rise to a genuine issue of material fact regarding whether his employment was terminated in violation of public policy, she would reverse that portion of the trial court's order. Because the wrongful discharge claim is an adequate alternative state law remedy, she would not address the state constitutional claims. Judge Geer did concur in the majority's analysis of both constitutional claims.

Young v. Bailey, __ S.E.2d __, 2015 WL 1788730, No. COA14-966 (N.C. App. Apr. 21, 2015) (Sanford Steelman Jr., J.) *Since a deputy sheriff is not "county employee" as defined in the county employee political activity statute, N.C. Gen. Stat. § 153A-99, that statute does not support a wrongful discharge in violation of public policy claim alleging dismissal for political purposes. A deputy sheriff, as a sworn law enforcement officer, can be terminated for political reasons without violating her rights under the state constitution.*

Terry Young was a deputy sheriff employed by the Mecklenburg County Sheriff Daniel Bailey. Bailey sent a letter to his employees announcing his candidacy for reelection and requesting campaign contributions. Terry did not contribute or volunteer for his campaign. Terry was terminated shortly after Bailey's reelection. Terry filed claims of wrongful discharge in violation of public policy under N.C. Gen. Stat. § 153A-99, which protects county employees' right to political association and belief, and violation her free speech rights under the North Carolina Constitution. The Mecklenburg County Superior Court (W. Robert Bell, J.) granted summary judgment for Bailey. Terry appealed.

The Court of Appeals affirmed summary judgment for defendants. The Court concluded that Young's arguments were foreclosed by its previous decisions in McLaughlin v. Bailey and Sims-Campbell. The Court held that a sheriff's deputy is not a "county employee" within the meaning

of Section 153A-99, and she could not assert a claim for wrongful termination in violation of public policy alleging violation of that statute. The Court also held that even assuming Young was terminated for her political views, this did not violate her free speech rights under the North Carolina Constitution.

Lloyd v. Bailey, 2015 WL 1800477, No. COA14-935 (Apr. 21, 2015 N.C. Ct. App.) (Unpub) (Sanford Steelman Jr., J.) *See holding above in Young v. Bailey.*

Justin Lloyd was a deputy sheriff employed by the Mecklenburg County Sheriff Daniel Bailey. Bailey sent a letter to his employees announcing his candidacy for reelection and requesting campaign contributions. Lloyd did not contribute or volunteer for his campaign. Lloyd was terminated shortly after Bailey's reelection. Lloyd filed claims of wrongful discharge in violation of public policy under N.C. Gen. Stat. § 153A-99, which protects county employees' right to political association and belief, and violation his free speech rights under the North Carolina Constitution. The Mecklenburg County Superior Court (Calvin Murphy, J) granted summary judgment for Bailey in his individual capacity, but denied the motion on Lloyd's claims against Bailey in his official capacity. Bailey appealed.

The Court of Appeals reversed the trial court's denial of summary judgment and remanded for entry of an order dismissing the complaint. The Court allowed Bailey's interlocutory appeal of all issues raised on the grounds of judicial economy, as the arguments raised on appeal were essentially identical to its previous decisions in McLaughlin v. Bailey and Young v. Bailey. The Court held that a sheriff's deputy is not a "county employee" within the meaning of Section 153A-99, and he could be discharged based upon political conduct without violating his state constitutional free speech rights.

Feltman v. City of Wilson, 767 S.E.2d 615 (N.C. Ct. App. Dec. 31, 2014) (Mark Davis, J.) *Under notice pleading, employee is not required to plead that her exercise of her right to free speech and freedom of assembly was the "but for" cause of her termination, or establish that her employer knew about her protected activity, in order to state a claim for violation of those constitutional rights.*

Frances Feltman was employed as a Benefits Administrator with City of Wilson. Feltman reported her supervisor for assigning City employees to babysit her children during their regular working hours, among other improper conduct, which resulted in her supervisor's termination. Feltman's new supervisor engaged in retaliatory activity towards her and she was terminated as part of an alleged reduction in force. After Feltman's termination, co-workers assumed some of her duties and a full-time employee was later hired for a new position that was substantially the same as Feltman's previous position. Feltman filed a complaint alleging violation of her right to free speech and right to assemble under the North Carolina Constitution, civil conspiracy, and wrongful discharge in violation of public policy. The Wilson County Superior (Quentin Sumner, J.) dismissed Feltman's constitutional claims pursuant to Rule 12(b)(6) on the grounds that she failed to affirmatively plead the "but for" causation element of her constitutional claims, i.e., that her speaking out about her supervisor's misconduct was the "but for" cause of her termination.

The Court of Appeals reversed the trial court's dismissal of Feltman's constitutional claims that had the effect of imposing a heightened pleading requirement as to these claims. The Court held that on a Rule 12(b)(6) motion, the only question is whether the complaint states a claim for relief when the complaint is liberally construed and all allegations taken as true and based on the doctrine of notice pleading set out in Rule 8(a)(1). In order to establish the causation element of her constitutional claims, she was required to show that her protected activity was the "motivating" or "but for" cause of her termination. Recognizing that Feltman was not required to use the magic words, "but for," the Court found that the following allegations in the complaint adequately plead the causation element:

1. Because Plaintiff spoke out against [unlawful] practices, she was terminated[.]

35. Plaintiff's protected speech was a substantial factor in Defendants' decision to take adverse action against her.

39. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by ... Article I, Section 14 of the North Carolina Constitution.

45. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by ... Article I, Section 12 of the North Carolina Constitution.

The Court also held that Plaintiff did not have to allege facts conclusively establishing that despite her efforts at anonymity, Defendants knew that she made the complaints against her supervisor.

BREACH OF CONTRACT CLAIMS

Sanders v. State Personnel Commission, 762 S.E.2d 850 (N.C. Ct. App. Sept. 2, 2014)
(Chris Dillon, J.) *State agencies, which employed temporary workers for more than 12 months, in violation of state personnel regulation, did not breach employment contract with employees. Appeal of attorneys' fee award is interlocutory if the trial court has not set the amount to be awarded.*

Plaintiffs Lula Sanders, *et al.*, are temporary employees of the State of North Carolina who, the State admits, worked in temporary positions for more than year. Pursuant to the State Personnel Act, the State Personnel Commission promulgated regulations that stipulate that a person may not be employed as a temporary employee for a period "exceed[ing] 12 consecutive months" ("Twelve-Month Rule"), 25 N.C. A.C. 1C.0405(a). Plaintiffs filed suit in 2005 alleging that because they were employed in violation of the Twelve-Month Rule, they were entitled to the rights, benefits, and status of permanent state employees. Plaintiffs alleged claims for violation of the North Carolina Administrative Code, violations of the North Carolina Constitution, and breach of contract, and sought monetary damages and costs, including attorneys' fees, in addition to declaratory relief. Plaintiffs also sought class certification for inclusion of all similarly-situated individuals.

The trial court's Rule 12(b)(6) dismissal of Plaintiff's claims based on violations of the North Carolina Administrative Code and Constitution was affirmed by the Court of Appeals in two separate appeals, Sanders I and Sanders II; however, the dismissal of the breach of contract claim was reversed and remanded for a declaratory judgment. In analyzing Plaintiff's breach of contract claim in Sanders II, the Court determined that the Twelve-Month Rule and the other "relevant regulations" are part of Plaintiffs' employment contract. The Court instructed the trial

court on remand to determine the legal relationship between the parties, including the terms of Plaintiffs' employment as of the "twelve month and one day mark and beyond." On remand, following extensive discovery, the Wake County Superior Court (Kenneth Titus, J.) declared that Plaintiffs did not convert to permanent employees after twelve months and they were only entitled to wages they received for the period they worked as temporary employees beyond the twelve-month period. The trial court granted Defendants' motion for summary judgment on the breach of contract claim, and denied the Plaintiffs' motions for partial summary judgment and class action certification. The trial court did enjoin the State from future violation of the Twelve-Month Rule; direct the State to present a comprehensive plan to assure compliance; and taxed the State with costs including attorneys' fees. On the case's third trip to the Court of Appeals, Plaintiffs appealed the trial court's grant of summary judgment in favor of Defendants and denial of their motions for partial summary judgment and for class certification, while Defendants cross-appealed the trial court's award of costs, including attorneys' fees.

The Court of Appeals determined that the trial court did not err in granting summary judgment to the State on Plaintiffs' breach of contract claim. The Court held that by allowing the Plaintiffs, who originally hired as temporary State employees, to remain employed beyond one year, the State did not breach a contract with the employees. According to the Court, there was no evidence presented to suggest that Defendants made promises or inducements to cause Plaintiffs to continue their employment beyond 12 months, or that Defendants had represented that Plaintiff's employment status would convert to that of a permanent employee after 12 months. Furthermore, the Court concluded that nothing in the State Personnel Commission's rules or the relevant law contractually obligated Defendants to treat Plaintiffs as permanent employees after 12 months. The Court acknowledged that Defendants violated the 12-Month Rule, which was incorporated into the Court concluded that this; however, this was insufficient to support a breach of contract claim. The Court concluded that since Plaintiffs continued to receive their agreed-upon wages and no law required Defendants to confer any other benefit or status after 12 months, Defendants did not violate Plaintiffs' employment contracts.

Given the circumstances and the procedural posture of this case, the Court held that the trial court did not abuse its discretion in denying plaintiffs' motion for class certification.

The Court affirmed in part and dismissed in part Defendants' cross-appeal of the attorneys' fee award. Since the trial court had not determined the amount of attorneys' fees to be awarded, the Court held that the attorneys' fee order was interlocutory. However, the Court concluded that Defendants were entitled to immediately appeal the order as to the issue of sovereign immunity, which affects a substantial right. The order taxes Defendants with "attorney fees as provided by law." Because the State has, in certain instances, waived sovereign immunity with respect to attorneys' fees claims, the Court could not at this point conclude that the trial court erred based on the sovereign immunity defense.

Robert N. Hunter Jr., J., dissented. Judge Hunter asserted that the majority should have granted Plaintiff's partial summary judgment on their breach of contract claim and remanded for an award of nominal damages in recognition of the technical injury resulting from defendants' breach of the 12-Month Rule. Where Plaintiffs and thousands of other State employees were placed in temporary appointments for more than 12 consecutive months with no change in

employment status in violation of the 12-Month Rule, Defendants breached an implied term of the temporary employment contract. The dissent would have held that the trial court abused its discretion in denying Plaintiffs' motion for class certification. The trial court acknowledged, "The claims of the Plaintiffs and the putative class members have an interest in the same issue of law and fact," yet the court improperly denied class certification because of the possibility of individual damage calculations. Finally, the dissent asserted that the majority opinion should have dismissed the defendants' appeal of the attorneys' fee award outright because of his finding that the State had waived sovereign immunity.

NORTH CAROLINA WHISTLEBLOWER ACT

Manickavasagar v. North Carolina Department of Public Safety, 767 S.E.2d 652 (N.C. Ct. App. Dec. 31, 2014) (Linda McGee, Ch. J.) *Affirming summary judgment on employee's North Carolina Whistleblower Act claims alleging that he was terminated in retaliation for reporting race and national origin discrimination, and fraud, misappropriation of state resources, and gross mismanagement. Employee failed to show that he reported discrimination based on a protected category; instead, his complaints instead concerned employee grievance matters. Employee failed to establish that the legitimate, non-retaliatory reasons for terminating employee based on his unacceptable personal conduct were a pretext and that he was actually fired for reporting fraud and mismanagement.*

Sivaramalingam Manickavasagar, who was born in Sri Lanka, but is an American citizen, was hired by the North Carolina Correctional Institution for Women ("NCCIW") as a physician. During his first month of employment, NCCIW's medical director and warden greeted him by saying Namasthay, which Manickavasagar felt was insulting. The medical director received several complaints about Manickavasagar, including a report that he was asleep in a prison office. Manickavasagar wrote a letter to the medical director, which contained multiple complaints about the director, including what he saw as mismanagement of the NCCIW and allegations that the director engaged in discriminatory activity against him. The director forwarded the letter to the Equal Employment Opportunity office because it "contained allegations [that] could be perceived as [racial] discrimination." During the investigation, Manickavasagar told EEO investigators that he had never faced discrimination based on race or religion at NCCIW, and the EEO concluded that any race discrimination was unsubstantiated. The director received continued reports of Manickavasagar clashing with staff members, not following protocol, and sleeping on the job again. After these reports, the warden initiated an investigation against Manickavasagar. While under investigation, Manickavasagar sent a letter to the director accusing the warden of acting towards him "as a Master towards a Slave." After this second letter was sent to the EEO, Manickavasagar sent a letter to the EEO listing 17 incidents where inmates received substandard clinical care. The warden subsequently terminated Manickavasagar for unacceptable personal conduct. Manickavasagar filed a complaint against NCCIW, the warden, and the medical director in their official and individual capacities alleging that he was terminated in retaliation for reporting (1) race and national origin discrimination and (2) fraud, misappropriation of state resources, and gross mismanagement at NCCIW, in violation of North Carolina's Whistleblower Act. Defendants filed a motion for summary judgment as to all claims which was granted by the Wake County Superior Court (Donald Stephens, J.).

The Court of Appeals affirmed the trial court's dismissal of all of Plaintiff's claims. Under the Whistleblower Act, the discharged employee must show: (1) that he engaged in a protected activity; (2) that the state took adverse action against the employee in his employment; and (3) that there was a causal connection between the protected activity and the adverse action. However, mere complaints regarding "employee grievance matters" are not protected under the Act. The Court determined that Plaintiff failed to establish he was terminated after reporting that he was discriminated against on account of his race and national origin. During the EEO's investigation as well as the Plaintiff's deposition, Plaintiff never claimed he was being discriminated against for a protected reason, or that he was reporting such discrimination. Since the Plaintiff's letter did not involve a report of racial discrimination, it only constituted an employee grievance matter, which was not protected by the Act. The Court also held that the Defendants had articulated legitimate, non-retaliatory reasons for terminating Plaintiff as he was confrontational and refused to follow protocol. Because Plaintiff did not dispute the validity of most of the stated reasons for his termination, he has failed in his burden of proving that the stated reasons for his termination were a pretext and that he was actually fired for reporting fraud and mismanagement at the prison.

COUNTY BOARD OF ELECTIONS DIRECTOR'S SALARY

Gilbert v. Guilford County, 767 S.E.2d 93 (N.C. Ct. App. 2014) (Chris Dillon, J.). *Although a county is afforded some measure of discretion to set the compensation of its director of elections, it must pay its elections director a salary that is commensurate with that paid to elections directors in counties that have a similar population and number of registered voters and are "similarly situated" considering factors related to the size and complexity of elections and the experience and skill of the director.*

George Gilbert served as the director of elections for Guilford County from 1988 until 2013. After retiring, he filed suit against Guilford County claiming that the county breached his employment contract because his salary had not complied with N.C. Gen. Stat. § 163-35(c), which requires that the salary of a county director of elections "be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." At a bench trial, Gilbert presented evidence about the salaries paid to directors in the seven most populous counties in the state, including Guilford County, which was ranked third in population and voter registration. Gilbert claimed that only a subset of these counties also was "similarly situated" in other respects for purposes of Section 163-35(c). Gilbert also introduced evidence that he had received the highest rating in his performance reviews from 2008-2012. Evidence showed that Gilbert was paid at the midpoint of his salary range and that 5 other directors were paid above the midpoint salary range. The former Executive Director for the North Carolina State Board of Elections testified that Gilbert was the "best county director" in the state. He opined that Guilford County was similar in complexity to Wake and Mecklenburg Counties. He also testified that, in his opinion, Gilbert's salary was much lower than it should have been. The county did not present any evidence at the trial. The Guilford County Superior Court (William Wood Jr., J.) ruled in favor of Gilbert and awarded him back pay of \$38,503 plus interest, for FY2010- FY2012 (recovery was limited to this three-year period because of the statute of limitations). Guilford County appealed.

The Court of Appeals affirmed the trial court's order, holding that the trial court did not err in concluding that Gilbert's salary was not in accord with N.C. Gen. Stat. §163-35(c). As a matter of first impression, the Court interpreted the salary requirements of Section 165-35(c). Although the court purported to give effect to the plain meaning of the relevant provisions, after deeming that subsection (c) was "clear and unambiguous," it actually analyzed the legislative intent behind the phrase "similarly situated" to discern the meaning. The Court agreed with the trial court's finding that the "purpose of N.C.G.S. § 163-35(c) is to ensure the integrity of elections in North Carolina" by preventing fluctuations in salaries based on political reasons. In determining the meaning of "similarly situated," the court used factors that had been articulated in a 1987 Attorney General's opinion letter. The Court concluded that a county board should consider the county population, registered voters, and additional factors where appropriate, including: 1) the percentage of population registered; 2) the unusual degree of transience of population; 3) the relative strength of political parties and the level of dissention between or among them; 4) the complexity of the electoral districts for state, county, and municipal offices; 5) the comparable sophistication, politically and otherwise, of population; and 6) the degree of experience, effectiveness of work, and level of dedication exhibited of the directors. The Court noted that the trial court did not making specific findings of fact related to these factors; however, the Court did not remand this case, though, because the Defendants had not presented any conflicting evidence. Applying the relevant factors to the evidence presented by Gilbert, the Court determined that this was sufficient evidence to support the trial court's judgment and award of back pay to Gilbert. The Court rejected Defendants' argument that they were only required to pay Plaintiff the statutory minimum \$12.00 per hour as there was no sufficiently similar county for comparison, as the requirement for a similar county did not mean identical. This Court also held that although the County had discretion when determining how much to pay its director of elections, it was still bound by Section 163-55(c) requiring a county director of election's salary to be commensurate with other directors' salaries in similar counties.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Tucker v. Fayetteville State University, 767 S.E.2d 60 (N.C. Ct. App. 2014) (Ann Marie Calabria, J.) *Affirming dismissal of breach of employment contract claim for lack of subject matter jurisdiction where university basketball coach, who elected not to pursue any of his available administrative remedies because the grievance procedure would cause damage to the basketball team, failed to meet his burden of showing that the administrative remedies were inadequate, and failed to exhaust his administrative remedies.*

Eric Tucker had a written employment contract and had been the head coach of Fayetteville State University's women's basketball team for over 16 years. In April 2009, FSU police investigated allegations regarding Tucker's inappropriate language towards team members, assault on a team member, and threats to terminate team members' athletic scholarships. FSU subsequently informed Tucker that he could either resign or FSU would begin the process of terminating his employment. Tucker decided to retire, even though another year remained on his employment contract. He elected not to pursue any of the grievance procedures available to him. Instead, Tucker filed a complaint against FSU and its chancellor (collectively "FSU") for breach of his employment contract because FSU lacked just cause to terminate him and forced him to resign. Tucker alleged that "the grievance system set up by the Defendants does not allow for the

Plaintiff to receive the compensatory damages to which he is entitled based upon the alleged breach of contract and the resulting damage to the Plaintiff's ability to engage in his profession." FSU filed a motion to dismiss on the grounds that Tucker failed to exhaust his administrative remedies and sovereign immunity as well as a motion for summary judgment. The Cumberland County Superior Court (Lucy Inman, J.) dismissed the complaint with prejudice and, alternatively, granted FSU's motion for summary judgment. Tucker appealed.

The Court of Appeals affirmed dismissal of the complaint because Tucker failed to exhaust his administrative remedies and, therefore, the trial court lacked subject matter jurisdiction. Dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction is proper where the plaintiff failed to exhaust administrative remedies. FSU is a constituent institution of the University of North Carolina, and "those who have grievances with the University have available only those administrative remedies provided by the rules and regulations of the University and must exhaust those remedies before having access to the courts." Huang v. N.C. State University, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992). Tucker elected not to pursue any of the administrative remedies available. Relying on Huang, Tucker argued that he was not required to exhaust his administrative remedies because the remedies provided by FSU were so inadequate that he essentially had no effective administrative remedies. The Court determined that although Tucker worried that filing a grievance would cause damage to the basketball team, this did not excuse him from exhausting his administrative remedies before filing a lawsuit to contest his allegedly forced retirement. The Court concluded that since Tucker submitted a letter indicating his decision to retire rather than requesting a hearing, then filed a complaint, he failed to meet his burden of showing that the administrative remedies were inadequate, and therefore failed to exhaust his administrative remedies. Since the trial court lacked subject matter jurisdiction, the Court did not reach the issues of sovereign immunity or summary judgment.

SOVEREIGN IMMUNITY

Lake v. State Health Plan for Teachers & State Employees, 760 S.E.2d 268 (N.C. Ct. App. 2014) (Chris Dillon, J.) *State retirees complaint alleging breach of contract, stemming from state health plan's decision to stop providing retirement plan, sufficiently pled valid employment contract to waive defense of sovereign immunity.*

Plaintiffs I. Beverly Lake, *et. al.*, are former employees and current retirees with the State of North Carolina with at least 5 years of contributory service. As part of their employment, they were offered benefits including a health benefit plan after retirement; they had vested by working at least 5 years and were eligible upon retirement to receive these health benefits; and the Defendants State Health Plan for Teachers and State Employees, *et al.*, stopped providing the plan for retirees. Plaintiffs filed a complaint against Defendants alleging breach of contract. Defendants filed a motion to dismiss, arguing the trial court lacked jurisdiction based, in part, on Defendants' sovereign immunity defense and that the allegations failed to state a claim upon which relief could be granted. The Gaston County Superior Court (Edwin Wilson Jr., J.) denied Defendants' motion to dismiss. Defendants appealed.

The Court affirmed the trial court's denial of Defendants' Rule 12(b)(2) motion to dismiss on the basis of sovereign immunity. The Court dismissed as interlocutory Defendants' appeal as to any

issues related to the trial court's Rule 12(b)(6) ruling regarding the validity of the alleged contracts. When the State enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. The Court held that since the Plaintiffs alleged valid contracts with the State, like in Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 644 S.E.2d 10 (2007) (12-Month Rule), the State was not entitled to a dismissal based on sovereign immunity. Here, the Plaintiffs alleged a valid contract of employment with the State based upon (1) their acceptance of state employment based, in part, on health plans offered, that would vest if they worked 5 years and be irrevocable upon retirement, (2) their working the set amount of time so that those health plans would vest or be irrevocable, and (3) Defendants has breached the parties' employment contracts by discontinuing the health plans.

MUNICIPAL EMPLOYEES

Mazzeo v. City of Charlotte, 762 S.E.2d 278 (N.C. Ct. App. 2014) (Mark Davis, J.) *Although Civil Service Board review is only available to members of Charlotte's police and fire departments who have been employed for longer than 12 months, and although employee was an Airport Safety Officer from 2007 until 2011 when his department was consolidated with the Charlotte-Mecklenburg Police Department, when employee was fired six months after the consolidation, he was entitled to Civil Service Board review of his termination.*

Dominick Mazzeo was hired by the City of Charlotte in 2007, and was assigned to the Charlotte Douglas International Airport where he worked as an Airport Safety Officer from 2007 until 2011 when his department was consolidated with the Charlotte-Mecklenburg Police Department ("CMPD"). Effective December 15, 2012, the City Manager ordered the consolidation of all airport safety officers into the CMPD. When Mazzeo was transferred to the CMPD, he had to take a new oath of office as an officer with the CMPD. On June 14, 2013, Mazzeo received a letter from the CMPD terminating his employment for a "work rule violation." The Charlotte City Charter provides members of the City's police and fire departments who have been employed for longer than 12 months with the right to have the Civil Service Board ("Board") review terminations. Mazzeo appealed his termination to CMPD's Chief of Police, which was denied, and then attempted to appeal to the Board. Mazzeo was told that he did qualify for Civil Service Protection because he was a probationary CMPD employee at the time he was terminated because he did not become a sworn officer of CMPD until December 2012 and was still within the 12-month probationary period. Mazzeo filed a complaint seeking a declaration that he was entitled to a hearing before the Board regarding his termination. The case was heard without a jury, and the Mecklenburg County Superior Court (James Morgan, J.) entered an order finding that Mazzeo was entitled to a Civil Service Board hearing in connection with the termination of his employment.

The Court affirmed the trial court's determination that Mazzeo was entitled to a hearing before the Civil Service Board with regard to his termination. The Court held that the trial court's findings of facts, which were supported by competent evidence, established that when the Airport Safety Officers were consolidated into the CMPD in 2011, Mazzeo retained the same rank, badge number, employee identification number, and salary; he took the same oath of office as a member of the CMPD that he had taken when he was hired in 2007; his performance evaluations as an Airport Safety Officer had been reviewed and signed by CMPD supervising

officers; and the City contributed to his law enforcement 401k account in the same amount both before and after the consolidation. The Court held that these facts support the trial court's conclusion that any changes in Mazzeo's employment as a result of the departmental consolidation were insufficient to classify plaintiff as a "probationary" employee for purposes of the Charlotte City Charter.

NON-RENEWAL OF SCHOOL ADMINISTRATOR CONTRACT

Tobe-Williams v. New Hanover County Board of Education, 759 S.E.2d 680 (N.C. Ct. App. 2014) (Martha Geer, J.) *If a superintendent recommends an administrator's contract be renewed, the school board is limited to reviewing the recommendation and the administrator's personnel file; the board may only look at other documents or question witnesses if it provides the administrator (1) notice of the board's concerns and of the information being considered and (2) an opportunity to respond to that information.*

Assistant principal Tiffany Tobe-Williams was employed under a four-year contract with the New Hanover County School District. During the first academic year, her relationship with principal Robin Meiers deteriorated due, in large part, to Tobe-Williams' concerns about financial practices of the school treasurer; she filed a formal grievance, which she agreed to drop after she was granted a transfer. During her third academic year, Tobe-Williams suffered allergic reactions while participating in a school cleanup, which she believed were related to uncleanliness and black mold, and was dissatisfied with the administration's response to her concerns. She filed a grievance after she was temporarily transferred due to her concerns, and after she returned following inspections and cleaning, she continued to raise complaints about the conditions. Due to a reduction in funding, she was transferred for the fourth academic year. The superintendent recommended renewal of Tobe-Williams contract; however the Board of Education requested additional time to review her personnel file and other records "because [the Board [was aware of serious concerns" about her. During its review, the Board considered information outside her personnel file, including witness interviews and a memorandum submitted by principal Meiers about her performance during the first academic year, and did not contact Tobe-Williams during the review. The Board voted not to renew Tobe-Williams' contract. Tobe-Williams appealed the non-renewal decision, and the New Hanover County Superior Court (W. Allen Cobb Jr., J.) entered an order reversing the Board's decision on the grounds that it was not supported by substantial evidence in the record, was arbitrary and capricious, and was based upon unlawful procedure in violation of N.C. Gen. Stat. § 115C-287.1, and ordered reinstatement.

The Court affirmed in part, reversed in part, and remanded. As a preliminary matter, the Court held that even though Tobe-Williams' service of process on the Board was defective because the Board was served with the petition more than 10 days after the petition was filed with the trial court, by failing to raise the issue of jurisdiction at the hearing and by arguing the merits of the case, the Board submitted to the jurisdiction of the trial court and waived its personal jurisdiction defense. The Court affirmed the trial court's conclusion that the Board's decision was made upon unlawful procedure. Under N.C. Gen. Stat. § 115C-287.1(d), when a school superintendent recommends nonrenewal of a school administrator's contract, the school administrator is entitled to notice and a hearing before the school board. However, when the superintendent recommends

renewal, but the board decides otherwise, the statute is silent as to the procedure and as to the school administrator's right to notice and a hearing. The Court declined to decide, in this case, whether a board must conduct a full-blown hearing, but concluded that the procedure followed in this case – in which the board conducted its own investigation, solicited the creation of documentation, reviewed documentation not contained in the personnel file, and interviewed witnesses, effectively conducting a hearing without notice or participation of Tobe-Williams – is not authorized by the statute and is not consistent with Chapter 115C as a whole. The Court held that, if a superintendent recommends that an administrator's contract be renewed, the board is limited to reviewing the administrator's personnel file as it exists at that time and the superintendent's recommendation, and may not consider outside documentation or question witnesses – effectively holding a hearing – without providing (1) notice of the board's concerns and of the information that the board is considering and (2) an opportunity to the administrator to respond to that information. Accordingly, the Court held that the Board violated Tobe-Williams statutory procedural rights. However, the Court concluded the record contains evidence that would support the Board's ultimate findings, which articulated grounds for nonrenewal that are not arbitrary, capricious, discriminatory, persona, or political. Therefore, the Court reversed the trial court's order of reinstatement and remanded to the Board for reconsideration after giving Tobe-Williams notice of the information the Board intends to consider in making its decision and an opportunity to respond to that evidence.