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Personnel; State Constitutional Claim-Fruits of Labor Clause; Due Process; Equal Protection

Mole' v. City of Durham, 2021-NCCOA-527 (No. COA19-683, Durham— 10/5/21)

***Holding*— Court of Appeals holds trial court erred in dismissing plaintiff's claim for violation of right to the fruits of his labor, N.C. Const. Art. 1, § 1, and reverses that portion of trial court's order. Dismissal of remaining claims affirmed. Trial court did not err by dismissing due process claim, as City's policies did not give rise to a protected property interest because the complaint did not allege that the personnel policies had been codified in an ordinance. Matter remanded for further proceedings not inconsistent with this opinion.**

***Key Excerpt*—** The Court began its opinion, "In his first experience negotiating the surrender of an armed and barricaded suspect, without another negotiator backing him up, Durham Police Sergeant Michael Mole' [(plaintiff)] might have given up when the suspect's gun discharged at close range. He didn't, and two hours later he had persuaded the suspect to drop his weapon and surrender. The suspect, other citizens, and law enforcement officers were safe. But [plaintiff] was fired because he had secured the suspect's surrender by promising to allow him to smoke a marijuana cigarette once in custody, and he made good on the promise immediately following the arrest." Plaintiff alleged *inter alia* that defendant-City violated his rights under the state constitution. The trial court dismissed. The Court stated that because the complaint alleged a colorable violation of Art. I, § 1, which protects each person's right to enjoy the fruits of their own labor, the trial court erred in dismissing that claim. The Court otherwise affirmed, because binding precedent precluded a holding that plaintiff had a constitutionally protected interest in continued employment under theories of due process or equal protection.

The Court observed that N.C. Const. Article I, § 1 was recently applied by the Supreme Court in Tully v. City of Wilmington, 370 N.C. 527, 810 S.E.2d 208 (2018). Initially, the Court had to determine whether the disciplinary procedure at issue here fell within the ambit of Tully; namely, the Court had to preliminarily resolve whether this state constitutional claim was limited to the

"employment promotional process" language used in Tully. "…. Tully detailed the underlying constitutional injury in that case in terms broader than the promotional process, and the logic employed in that decision applies with equal force to the disciplinary action taken against [plaintiff]. Our understanding of Tully and its rationale, combined with its instruction to 'give our [state] Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property,' *id.* at 533, 810 S.E.2d at 214 (citation and quotation marks omitted), leads us to hold that Article I, Section 1 applies to the disciplinary action taken against [plaintiff]…. It is undeniable that unreasonable employee discipline—including termination—by a government employer implicates this same right and raises the same concerns. *See* Presnell [v. Pell], 298 N.C. [715] at 724, 260 S.E.2d [611] at 617 [(1979)]." The Court observed in a footnote that, "The Supreme Court declined to decide the form of remedy to which a successful Tully plaintiff is entitled, leaving that to the trial court to determine based on the facts of the case. *Id.* at 538, 810 S.E.2d at 216."

The Court concluded its analysis by observing that Tully relied on the reasoning in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 98 L. Ed. 681 (1954) [('Accardi)'], and lower court decisions applying same. "According to Tully, Accardi and the cases applying it 'recognize[] the impropriety of government agencies ignoring their own regulations, albeit in other contexts.' 370 N.C. at 536, 810 S.E.2d at 215 (citing Accardi, 347 U.S. at 268, 98 L. Ed. at 687; then citing United States v. Heffner, 420 F.2d 809, 811-12 (4th Cir. 1969); and then citing Farlow v. N.C. State Bd. of Chiropractic Exam'rs, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1985))."

"Decisions recognizing the impropriety of government agencies ignoring their own rules in 'other contexts,' though not directly cited in Tully, include the termination of public employees in violation of internal disciplinary procedures. *See* Service v. Dulles, 354 U.S. 363, 388-89, 1 L. Ed. 2d 1403, 1418 (1957) (applying Accardi to reinstate a foreign service officer fired by the Secretary of State despite a federal statute allowing at-will discharge because the agency violated its own procedures); Vitarelli v. Seaton, 359 U.S. 535, 545-46, 3 L. Ed. 2d 1012, 1020-21 (1959) (reinstating employment of a federal security guard under Accardi because the agency violated its own procedural rules at his termination hearing). These decisions do not interpret North Carolina law. But just as Tully found other decisions applying Accardi pertinent, we find the analysis in Dulles and Vitarelli instructive in our review of Tully and, for the reasons above, hold that Tully's articulation of Article I, Section 1's protections extends to the discipline of [plaintiff]." In a footnote, the Court observed, "Tully cites Accardi, Heffner, and Farlow by way of a '*See, e.g.*,' signal. 370 N.C. at 536, 810 S.E.2d at 215. Courts, practitioners, and legal academics use the signal '*E.g.*,' to show that the '[c]ited authority states the proposition; other authorities also state the proposition, but citation to them would not be helpful or is not necessary.' *The Bluebook: A Uniform System of Citation* R. 1.2(a) (Colum. L. Rev. Ass'n et al. eds., 21st ed. 2020). In other words, Tully acknowledges Accardi's application beyond the other two decisions cited."

As to the sufficiency of plaintiff's complaint, the Court determined that the first eight policy violations alleged did not state a claim under Tully. The Court clarified, "Tully protects public employees from unreasonable violations of *employment* policies, not field operating or training procedures that do not bear upon internal processes governing the employer-employee relationship." (Emphasis in original; citation omitted.)

However, the Court found the remaining allegation sufficient to survive a motion to dismiss. "… [Plaintiff's] allegation that he was given improper and inadequate notice of his pre-disciplinary hearing does fall within Article I, Section 1's protections. This shortened notice period violated Durham's own employment disciplinary procedures. [Plaintiff] further alleges that these pre-disciplinary procedures were designed to further a legitimate government interest, namely that its employees be treated fairly in the administration of discipline. *Cf. id.* (recognizing 'the legitimate governmental interest of providing a fair procedure that ensures qualified candidates move to the next stage of the promotional process'). [Plaintiff] has thus pled a redressable violation of his employer's disciplinary procedures designed to further a legitimate governmental interest, in satisfaction of the first two elements from Tully." The Court determined, based on liberal construction of the complaint, that plaintiff satisfied the final element of injury. "[Plaintiff] specifically alleges that '[h]ad [he] been afforded his opportunity ... to prepare at a minimum of three days instead of less than 24 hours, [plaintiff] would have had reasonable notice and could have better prepared and provided a more comprehensive response.' From there, he asserts Durham 'failed to comply with mandatory conditions precedent before proceeding with dismissal ... [and] did not comply with its own stated [disciplinary] policies,' before alleging Durham's 'conduct including actions and omissions in its treatment of [plaintiff] w[as] arbitrary, capricious, irrational and predicated upon selective enforcement of personnel and law enforcement policies and disparate treatment in discipline and thereby deprived [plaintiff] of the fruits of [his] labors.' These allegations are similar to those held adequate to demonstrate a claim in Tully, 370 N.C. at 536-37, 810 S.E.2d at 215-16, and we … hold [plaintiff] has sufficiently alleged he 'was injured as a result of [Durham's procedural] violation[s].' *Id.* at 537, 810 S.E.2d at 216."

The Court emphasized, "We acknowledge North Carolina's general policy of at-will employment, long established in common law. *See, e.g.,* Presnell, 298 N.C. at 723-24, 260 S.E.2d at 616 ('Nothing else appearing, an employment contract in North Carolina is terminable at the will of either party.'). We do not hold that Durham could not terminate [plaintiff] based on the conduct at issue, or that Durham could not terminate [plaintiff] without cause. Given the stage of proceedings, 'we express no opinion on the ultimate viability of [plaintiff]'s claim.' *Id.* at 537, 810 S.E.2d at 216. Like the Supreme Court in Tully, 'we [do] not speculate regarding whether [plaintiff] would [not have been terminated] had [Durham] followed its own [disciplinary] policy.' *Id.* at 537-38, 810 S.E.2d at 216. At this early stage of litigation, we do not address whether [plaintiff] must be reinstated or what relief must be afforded to him should he prevail, as '[i]t will be a matter for the trial judge to craft the necessary relief.' *Id.* at 538, 810 S.E.2d at 216 (quoting Corum v. Univ. of N.C., 330 N.C. 761, 784, 413 S.E.2d 276, 290-91 (1992)). We only hold that Durham must follow its own disciplinary procedures—created to protect its legitimate governmental interest in treating city employees fairly—in discharging [plaintiff]. If the evidence shows that Durham failed to do so and that [plaintiff] was harmed by that failure, Article I, Section 1 of our Constitution provides a remedy." As to the remaining constitutional claims (due process and equal protection) the Court, based upon precedent, affirmed the trial court's dismissal of those claims.

Synopsis— Appeal by plaintiff from May 2019 order. Affirmed in part; Reversed in part and remanded. Judge Inman wrote the opinion, joined by Judge Zachary and Judge Carpenter.