

NORTH CAROLINA COURT OF APPEALS

\* \* \* \* \*

MARY ADKINS, )  
 )  
 Plaintiff-Appellant )

v. )

STANLY COUNTY BOARD OF )  
 EDUCATION, NELSON TALLY, in )  
 his individual and official )  
 capacity, MELVIN POOLE, in )  
 his individual and official )  
 capacity, MITCHELL EDWARDS, )  
 in his individual and )  
 official capacity, DAN )  
 McSWAIN, in his individual )  
 and official capacity, and )  
 CHRISTOPHER WHITLEY, in his )  
 individual and official )  
 capacity, )  
 Defendants-Appellees. )

From Stanly County

No. 07 CVS 637

\* \* \* \* \*

**REVISED BRIEF OF AMICI CURIAE**  
**North Carolina Advocates for Justice**  
**ACLU of North Carolina Legal Foundation**  
**North Carolina Association of Educators**  
**North Carolina Troopers Association**

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QUESTION PRESENTED

**DOES THE OPEN COURTS PROVISION OF THE NORTH CAROLINA CONSTITUTION BAR A PUBLIC EMPLOYER FROM TERMINATING AN EMPLOYEE BECAUSE SHE FILED A LAWSUIT IN STATE COURT?**

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Advocates for Justice, ACLU of North Carolina Legal Foundation, North Carolina Association of Educators, and North Carolina Troopers Association jointly submit this brief as amici curiae in support of plaintiff-appellant.

### ARGUMENT

For the reasons stated in plaintiff-appellant's brief, the trial court's grant of summary judgment should be reversed because Judge Beale was without authority to overrule Judge Spainhour, and because plaintiff's lawsuit in 2000 raised an issue of public concern under the First Amendment of the United States Constitution.

For the reasons stated below, the grant of summary judgment must also be reversed with regard to plaintiff's state constitutional claim under Article I, § 18 of the North Carolina Constitution. Article I, § 18, the Open Courts provision, guarantees the right of North Carolina citizens to seek remedies under the law in North Carolina state courts. If units of state and local government are permitted to retaliate against their employees for filing a lawsuit in state court, the threat of official retaliation would effectively deny employees their

constitutionally protected right to pursue legal remedies. By firing plaintiff because she filed a lawsuit in state court against the Board and defendant Talley, defendants infringed upon her right of access to the courts, in violation of the Open Courts provision of the State Constitution.

**THE OPEN COURTS PROVISION OF THE NORTH CAROLINA CONSTITUTION BARS A PUBLIC EMPLOYER FROM TERMINATING AN EMPLOYEE BECAUSE SHE FILED A LAWSUIT IN STATE COURT.**

Article I, § 18 of the North Carolina Constitution provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. This section of the Declaration of Rights, added to the North Carolina Constitution in 1868, has its roots in the Magna Carta. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 638-40, 493 S.E.2d 310, 316-18 (1997), aff'd in part and rev'd in part by 350 N.C. 449, 515 S.E.2d 675 (1999).

As a guarantee of access to legal remedies in the courts, the Open Courts provision "clearly forbid[s]" state action that "impairs" the right of any person to recover for an injury to her person, property, or reputation. Osborn v. Leach, 135 N.C. 628, 631, 47 S.E. 811, 812 (1904). The General Assembly is permitted, however, under the "due course of law" language of

section 18, to "define the circumstances under which a remedy is legally cognizable and those under which it is not." Lamb v. Wedgewood South Corp., 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983).

Thus, for example, the General Assembly is permitted to abolish or modify a claim if it has not vested, Pinkham v. Unborn Children of Jather Pinkham, 227 N.C. 72, 78, 40 S.E.2d 690, 694-95 (1946), establish a statute of limitations, Bolick v. American Barmag Corp., 54 N.C. App. 589, 593, 284 S.E.2d 188, 191 (1981), modified on other grounds by 306 N.C. 364, 293 S.E.2d 415 (1982), establish a statute of repose, Lamb, 308 N.C. at 444, 302 S.E.2d at 882, or establish limited immunities for some claims, Pangburn v. Saad, 73 N.C. App. 336, 347, 326 S.E.2d 365, 372 (1985).

On the other hand, the government may not deny a person, the "opportunity to be heard before being deprived of property, liberty[,] or reputation, or having been deprived of either," deny that person "a like opportunity [for] showing the extent of his injury" or deny that person an "adequate remedy." Osborn, 135 N.C. at 636-37, 47 S.E. at 814. "[A]rticle I, section 18 guarantees to those who suffer injury to their persons, property, or reputation, the right to seek redress therefore in the courts of this state." Bolick, 54 N.C. App. at 593, 284 S.E.2d at 191.

Official retaliation against public employees who file colorable lawsuits in state court is unconstitutional under the Open Courts provision because it unduly impairs the rights of individuals to seek legal redress. As courts have recognized in a variety of contexts, employer retaliation against employees for asserting their legal rights effectively nullifies the right. The United States Supreme Court has declared that the goal of ending discriminatory practices "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 180 (2005); see also Crawford v. Metro. Gov't of Nashville & Davidson Cty., 129 S. Ct. 846, 852 (2009) (noting the evidence that "fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."). Similarly, the constitutional promise of access to legal remedies becomes meaningless if government actors are allowed to retaliate against public employees who seek redress from the courts.

North Carolina courts "give our 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." Corum v. Univ. of North Carolina, 330 N.C. 761, 783, 413 S.E.2d

276, 290 (1992). Consistent with that broad mandate, the Open Courts provision must be interpreted to prohibit official retaliation against employees who file colorable claims in state court.<sup>1</sup>

In this case, plaintiff has presented evidence that defendants terminated her employment because she filed her lawsuit in state court in 2000. In effect, defendants have imposed a prohibitive cost on plaintiff for filing a lawsuit. Conditioning the right to seek legal redress on the payment of significant costs has been found unconstitutional under open courts provisions in other states. The Texas Supreme Court has held that one of the protections afforded by its state constitutional guarantee of "open courts" is the right of citizens to have "access to those courts unimpeded by unreasonable financial barriers." Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 448, 450 (Tex. 1993) (striking down a prepayment/bond requirement). The Utah Supreme Court has stated that, under the open courts provision in its

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<sup>1</sup> The Open Courts provision does not license employees to file frivolous claims. See Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) ("Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions."). In this case, the record shows that plaintiff's claim was not frivolous. After filing her claim for violation of her statutory privacy rights, she and her co-plaintiff obtained a settlement from defendant Talley as well as restoration of their original salaries and a new contract from the defendant Board of Education.

constitution, costs cannot be imposed on a litigant if they act as "an absolute bar to the commencement of an action." Zamora v. Draper, 635 P.2d 78, 81 (Utah 1981).

The government imposes an unreasonable financial barrier when it makes the loss of an employee's job the price of her pursuing a legal claim. The threat of termination would effectively bar employees from seeking redress in court. No employee, when faced with the prospect of losing her job, could file suit to enforce a privacy right such as that protected by N.C. Gen. Stat. §§ 115C-319 and 115C-321. As the Supreme Court has stated with regard to constitutional claims, "an adequate remedy must provide the possibility of relief under the circumstances." Craig v. New Hanover County Bd. of Educ., 678 S.E.2d 351, 2009 N.C. LEXIS 613, at \*13 (June 18, 2009); see Osborn, 135 N.C. at 637, 47 S.E. at 814 (holding that the Open Courts provision requires the state to provide an "adequate remedy"). Under the Open Courts provision, therefore, public employers cannot be permitted to terminate employees in retaliation for having filed a lawsuit in state court.

Such retaliatory discharges also violate employees' rights to substantive due process under the State Constitution. "An employment discharge violates substantive due process rights if it is based upon constitutionally impermissible grounds, regardless of whether the employee had a property interest in

continued employment." Privette v. Univ. of North Carolina, 96 N.C. App. 124, 135, 385 S.E.2d 185, 191 (1989) (discussing 42 U.S.C. § 1983 and citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). "[T]he level of substantive due process protection provided by the North Carolina Constitution is at least as broad as that of the United States Constitution." Toomer v. Garrett, 155 N.C. App. 462, 472, 574 S.E.2d 76, 85 (2002). Therefore, the "law of the land" clause of Article I, § 19 also bars public employers from terminating employees in retaliation for having filed a lawsuit in state court.

The North Carolina Supreme Court recently reaffirmed the importance of the individual rights in the state constitution:

"The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action. . . . The fundamental purpose for the adoption of the Declaration of Rights was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State."

Craig, 678 S.E.2d 351, 2009 N.C. LEXIS 613, at \*9-10 (quoting Corum, 330 N.C. at 782-83, 413 S.E.2d at 289-90) (alterations omitted). Defendants, as public officials "invested under the Constitution with the powers of the State," violated plaintiff's right to seek redress in state courts by terminating her

employment in retaliation for her lawsuit. Plaintiff's constitutional claim under the Open Courts provision should be allowed to proceed to trial, and the trial court's decision on summary judgment should be reversed.

### CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment should be reversed and the case should be remanded for trial.

Respectfully submitted, this the 27<sup>th</sup> of August, 2009.

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