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To North Carolina Governmental Employers: Heads-Up – 'Unreasonable Employee Discipline' Can Now Get You Sued

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No good deed goes unpunished.

Little did City of Durham Police Sergeant Michael Mole' know, in his first crack at negotiating on his own the surrender of an armed and barricaded suspect, that he would be fired because he had persuaded the suspect to surrender by promising to allow him – and then allowing him – to smoke a joint once the suspect was in custody, or that he would set in motion a series of events that, for the moment, would dramatically change North Carolina constitutional law.

But before we get to that, here's what happened to Sergeant Mole', whose case began in Durham County superior court in 2018. It then landed before and has resulted in a remarkable – and, for governmental employers in North Carolina, alarming – recent decision by the North Carolina Court of Appeals.

Sergeant Mole' started working for the Durham Police Department in 2007. He received hostage negotiation training in 2014 but never negotiated a barricaded-subject situation until 2016. In June of that year, the Durham P.D. sent officers to a local apartment to serve an arrest warrant on Julius Smoot. Mr. Smoot apparently didn't warm to that idea, so he barricaded himself in a bedroom and declared that he had a gun and would use it on himself in ten minutes unless he was allowed to see his wife and son. The officers retreated and quickly called on Sergeant Mole' for help.

He promptly arrived at the scene before Smoot's imminent deadline and began to negotiate. Mole's primary goals were to get Smoot to extend his "deadline" and keep Smoot from killing himself. Smoot then accidentally fired his weapon. That must have been stimulating for all concerned, especially Smoot, who told Mole' that he "planned to smoke a blunt." Mole' asked Smoot to hold off, perhaps surmising that Smoot's getting high might not improve the situation. But Mole' promised Smoot that, if he disarmed and peacefully surrendered, he would be allowed to toke-up.

Mole' must have been persuasive. Smoot then dropped the gun, handcuffed himself, and surrendered to Mole' in the apartment. While in handcuffs, Smoot asked for his cigarettes (the legal kind) and lighter from a nearby table. Mole' obliged him. Smoot then pulled the blunt from behind his ear, lit up, and began to smoke.

The Durham P.D. apparently choked on Mole's tactics, regardless of how effective they had been. It investigated his actions and, about four months after the incident, told Mole' that a "pre-disciplinary hearing" would be held. The city had issued a written policy requiring advance notice of such a hearing of at least

three days, but, for reasons unknown, told Mole' that the hearing "would take place the next day." The city held the hearing and fired him.

Mole' must have felt burned. He sued the city, claiming that it had violated his state constitutional rights to due process and equal protection and the right to enjoy the "fruits of his labor." The trial court tossed his complaint. He appealed.

The North Carolina Court of Appeals heard the case last June. Last week, on October 5, it did something that, in one sense, was not unusual. It published an opinion saying, in effect, that the trial court had made a mistake by dismissing Mole's complaint. Nothing remarkable about that – appellate courts find errors by trial courts and reverse their decisions all the time. But the opinion is remarkable – in fact groundbreaking – because of *why* the court did so.

Why? Because the court concluded, *for the first time*, that the North Carolina Constitution provides a basis on which a current or former government employee may sue the employer for "**unreasonable employee discipline**—including termination," such as when it "acts in an arbitrary and capricious manner toward one of its employees by failing to abide by" its "own disciplinary procedures." That may not sound surprising. But it could hardly be more so.

Why? Because, in North Carolina, as the *Mole'* court itself acknowledged, the law has observed a "general policy of at-will employment, long established in common law," based on which "an employment contract … is terminable at the will of either party." Little is more basic to North Carolina employment law than that, with exceptions to be sure, a contract of employment for an indefinite period of time is terminable by either party ***at will***. The court even says that it does *not* hold that the city "could not terminate" Mr. Mole's employment "without cause," but holds **"only"** that the city, in doing so, "must follow its own disciplinary procedures," which were "created to protect its legitimate governmental interest in treating city employees fairly."

"Only?" That hardly captures the momentous implication. Unilaterally promulgated employment policies and procedures – whether in the case of private or governmental employment – typically impose no *contractual* obligations on employers to their at-will North Carolina employees **unless** such procedures have been expressly included in and made part of an employment contract, and typically will not give rise to an action for breach of contract. *That's been the law for decades.* But the *Mole'* court has now said to governmental employers in North Carolina, in effect, that "That settled rule of contract law may be true, but, for you, it is *not* a 'Get out of Jail Free' card."

Why? The answer lies in the North Carolina Constitution, Section I of Article I of which ensures each person the right to "life, liberty, [and] *the enjoyment of the fruits of their own labor*." This guarantee, according to the court, has "no analogous federal constitutional clause" and was "added to our state constitution in 1868 … when formerly enslaved persons were newly able to work for their own benefit." Our courts have held that the guarantee does **not** apply to actions of private individuals but instead concerns only the actions of "State actors," such as but not limited to local governments.

The "fruits of their own labor" clause has been used against local governments before, such as in a case striking down a town ordinance that capped towing fees (held to violate tow truck drivers' rights to enjoy the fruits of their labor) and as recently as 2018 in a case involving the City of Wilmington, in which the municipal police department was found to have violated a public employee's constitutional right to enjoy the fruits of his labor when it failed to follow its **employee-promotion** procedures.

But the court of appeals has now gone much further than that. It concludes that the "fruits of their own labor" constitutional clause ensures public employees of "the right to pursue one's profession free from

unreasonable governmental action" and that its "protections" apply to mere **disciplinary procedures** of the kind encountered by Sergeant Mole'. The result: Any city, town, county or "state actor" of any kind in North Carolina, unless and until the state Supreme Court holds otherwise, can now be sued for disciplining or firing its employees in a way that ignores – or, worse, *allegedly* ignores – its "disciplinary procedures." Those in charge of running such governments and entities had therefore better know what their "disciplinary procedures" are and comply with them scrupulously – or be prepared, like the City of Durham, to litigate over whether they have.

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