640.03 EMPLOYMENT RELATIONSHIP - TERMINATION/RESIGNATION.[1]

The (*state number*) issue reads:

"Did the defendant terminate the plaintiff's employment?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant terminated the plaintiff's employment, that is, that the cessation of the plaintiff's employment with the defendant was not the result of some voluntary act on the part of the plaintiff.

An employer may terminate an employee's employment by laying off, discharging or firing the employee. An employee may voluntarily terminate the employment relationship on *his* own accord by resigning or quitting.

[However, an employee's termination of the employment relationship by resigning or quitting is not voluntary when, under the totality of the circumstances, the employee was denied the opportunity to make a free choice to resign or quit.[2] Denial of an opportunity for a free choice occurs

[Alternative A:

when the employee's decision to terminate the employment relationship has been obtained either by the employer's deception or by the employee's reasonable reliance upon the employer's misrepresentation of a material fact concerning the employee's termination of the employment relationship.[3] A fact is material if it concerns either a consequence of, or an alternative to, the employee's termination of the employment relationship.[4]]

[Alternative B:

when the employee's termination of the employment relationship has been forced by the employer's duress or coercion.[5] Whether the termination has been forced by the employer's duress or coercion must be determined from the objective point of view of a reasonably careful and prudent person rather than from the employee's purely subjective point of view.[6]

Factors that may be considered under the totality of all the circumstances include (1) whether the employee was given some alternative to termination of the employment relationship; (2) whether the employee understood the nature of the choice *he* was given; (3) whether the employee was given a reasonable time within which to choose whether to terminate the employment relationship; and (4) whether the employee was permitted to select the effective date for termination of the employment relationship.[7]

[The mere fact that the employee's choice may have been between basically equal unpleasant alternatives, such as between termination of the employment relationship or facing disciplinary charges, does not of itself establish that the employee's termination decision was induced by duress or coercion.[8] This is so even if the employee's only alternative to terminating the employment relationship was facing possible firing for cause, unless the employer actually lacked good cause to believe that grounds for firing existed.[9]]]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant terminated the employment of the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. *NOTE WELL: Although North Carolina remains an employment-at-will state, certain "federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer."* Ridenhour v. IBM Corp*., 132 N.C. App. 563, 568–69, 512 S.E.2d 774, 778 (1999) (citations omitted). In addition, North Carolina courts have "recognized a public-policy exception to the employment-at-will rule,"* id*. (citation and internal quotations omitted), in circumstances "where the employee was discharged (1) for refusing to violate the law at the employer['s] request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy,"* id*. (citations omitted). Finally, "parties can remove the at-will presumption by specifying a definite period of employment contractually."* Kurtzman v. Applied Analytical Indus., Inc. *347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997).*

This instruction should be used in a case involving the preliminary issue of whether the plaintiff was terminated or "fired" or whether he *voluntarily left employment on* his *own accord either by "quitting" or resigning. See,* e.g.*,* Salter v. E & J Healthcare, Inc*., 155 N.C. App. 685, 689–90, 575 S.E.2d 46, 49 (2003) (holding that plaintiff employee was terminated from her employment and did not voluntarily resign by failing to sign a letter giving her the option of either (1) signing and taking a leave of absence to allow her injured foot to heal with the hope, but without any express assurance, that her job would be kept open, or (2) not signing the letter and being terminated).*

Obviously, if the jury determines that the plaintiff voluntarily left employment on his *own accord, then submission of the issue regarding whether* he *was terminated in violation of one of the recognized exceptions to the employment-at-will principle would be inappropriate. See,* e.g.*,* id. *at 689–90, 575 S.E.2d at 49 (in which the Court resolved the issue of "whether plaintiff voluntarily resigned or was in fact terminated" in favor of the plaintiff and therefore "address[ed] the balance of [her] appeal" based upon claims of retaliatory discharge).*

2. *See Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

3. *See id*.

4. *See id*.

5. *See id*.; *In re Poteat*, 319 N.C. 201, 205, 353 S.E.2d 219, 222 (1987) ("[A]n employee has not left his job voluntarily when events beyond the employee's control or the wishes of the employer cause the termination." (citation and internal quotations omitted)).

6. *See Stone*, 855 F.2d at 174 ("[T]hat the employee may perceive his only option to be resignation-for example, because of concerns about his reputation- is irrelevant." (citation omitted)).

7. *See id*.

In the context of an Employment Security Commission claim for unemployment benefits, *see* N.C. Gen. Stat. § 96-14(1)(b) (2009):

Where an employee is notified by the employer that such employee will be separated from employment on some future date and the employee leaves work prior to this date because of the impending separation, the employee shall be deemed to have left work voluntarily and the leaving shall be without good cause attributable to the employer.

See also Carolina Power & Light Co. v. Employment Sec. Comm'n of N.C. and Herman D. Roberts, 363 N.C. 562, 565, 681 S.E.2d 776, 778 (2009) ("A separation is attributable to the employer if it was 'produced, caused, created or as a result of actions by the employer.'" (citation omitted)); *White v. Weyerhause*r, 167 N.C. App. 658, 668, 606 S.E.2d 389, 397 (2005) ("If an employee resigns his job in the face of an imminent dismissal, then the [Employment Security] Commission *may* reasonably find that the resignation is involuntary[.] . . . It is not, however, required to do so if it does not believe that the resignation was in fact forced by the employer's termination decision.").

Other cases which address the issue of voluntary termination of the employment relationship in the context of an Employment Security Commission claim include *Seaberry v. W. T. Bridges Contract Labor*, 91 N.C. App. 499, 504, 372 S.E. 2d 348, 351 (1988) and *Celis v. N.C. Employment Sec. Comm'n*, 97 N.C. App. 636, 638–39, 389 S.E.2d 434, 434–36 (1990).

8. *See Stone*, 855 F.2d at 174.

9. *See id*.