

640.20 EMPLOYMENT RELATIONSHIP - WRONGFUL (TORTIOUS)
TERMINATION.

The (*state number*) issue reads:

"Was the plaintiff's [participation in conduct protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy] a substantial factor in the defendant's decision to terminate the plaintiff's employment?"¹

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, two things:

First, that the plaintiff [participated in conduct protected by law] [refused to participate in unlawful conduct] [refused to participate in conduct which would violate public policy]. I instruct you that

[(*state protected conduct*) is conduct protected by law]²

[(*state unlawful conduct*) would be unlawful]

[(*state conduct which violated public policy*) would violate public policy].³

And Second, that the plaintiff's [participation in conduct protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy] was a substantial factor in the defendant's decision to terminate the plaintiff.⁴ (Absent an agreement to the contrary,⁵ an employer may terminate an employee with or without cause, and even for an arbitrary or irrational reason. Where there is an employment agreement, an employer may terminate an employee [for breaching a provision of the employment agreement] [for just cause⁶]. Even so, no employee may be terminated because of *his* [participation in conduct protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy].⁷

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the [participation in conduct protected by law] [refusal to participate in unlawful conduct] [refusal to participate in conduct which violated public policy] was a substantial factor in the defendant's decision to terminate 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.

¹ *Johnson v. Friends of Weymouth, Inc.*, 120 N.C. App. 255, 255-59, 461 S.E.2d 801, 804 (1995), *review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996); *see also Abels v. Renfro Corp.*, 126 N.C. App. 800, 805, 486 S.E.2d 735, 738-39, *review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

² *See, e.g.*, N.C. Gen. Stat. § 95-81 and § 95-83 (prohibiting termination of employment by reason of labor union membership); N.C. Gen. Stat. § 96-15.1 (prohibiting discharge in retaliation for testimony at an Employment Security Hearing); N.C. Gen. Stat. § 95-241 (listing conduct protected under the North Carolina Retaliatory Employment Discrimination Act (REDA)); *see also Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987) (listing "well-defined exceptions" to the employee-at-will rule, including activity protected by statute), overruled on the "moving residence exception" by *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997); *Rosby v. Gen. Baptist State Convention*, 91 N.C. App. 77, 79, 370 S.E.2d 605, 607, *cert. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988) (discussing protection for terminable-at-will employees who engage in protected activities).

REDA prohibits discrimination or retaliation against an employee who files a complaint or initiates an investigation or other proceeding pursuant to the Worker's Compensation Act, Wage and Hour Act, OSHA, the Mine Safety & Health Act, as well as other specified statutes. N.C. Gen. Stat. § 95-241. For a discussion of the basis of a REDA claim and circumstances where burden-shifting is appropriate, *see Wiley v. UPS*, 164 N.C. App. 183, 186-87, 594 S.E.2d 809, 811 (2004); *Lilly v. Mastec N. Am., Inc.*, 302 F. Supp. 2d 471, 480-81 (M.D.N.C. 2004). *See also Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 510, 593 S.E.2d 808, 812 (2004) (determining that a lack of a close temporal connection between the filing of a claim and the alleged retaliatory act does not warrant dismissal of a REDA claim where there is other evidence of causation).

An employee who proves a willful violation of REDA is entitled to treble the amount awarded. N.C. Gen. Stat. § 95-243(c). "Proving a willful violation of [REDA] requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute." *Morris v. Scenera Research, LLC*, 368 N.C. 857, 867, 788 S.E.2d 154, 161 (2016). Note that N.C. Gen. Stat. § 95-243(c) requires the trial court to determine whether the violation was willful.

³ Public policy may include federal as well as state public policy. *Coman v. Thomas*

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Mfg. Co., 325 N.C. 172, 178, 381 S.E.2d 445, 449 (1989) (citations omitted).

4 *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 230, 382 S.E.2d 874, 878, *disc. review denied*, 325 N.C. 704, 388 S.E.2d 449 (1989).

5 Generally, an "at will" employment contract is one which "does not fix a definite term, [and] it is terminable at the will of either party, with or without cause, except in those instances where the employee is protected from discharge by statute." *Buffaloe v. UCB*, 89 N.C. App. 693, 695, 366 S.E.2d 918, 920 (1988).

6 For a definition of just cause, see N.C.P.I.-Civil 640.14.

7 *Coman*, 325 N.C. at 175, 381 S.E.2d at 447.