640.29C EMPLOYMENT RELATIONSHIP - ADVERSE EMPLOYMENT ACTION IN VIOLATION OF NORTH CAROLINA WHISTLEBLOWER ACT - PRETEXT CASE.

> *NOTE WELL: Prior to instructing a jury in a case under the North Carolina Whistleblower Act, carefully read N.C.P.I.-Civil 640.29A ("Employment Relationship- Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 et seq.- INTRODUCTION").*

The (*state number*) issue reads:

"Was there a causal connection between the plaintiff's [engaging in activity protected by law] [refusal to carry out an improper directive] and adverse employment action taken by the defendant against the plaintiff?"

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,[1] four things, also referred to as elements.[2]

The first element is that the plaintiff engaged in activity protected by law. I instruct you that

[[reporting verbally[3] or in writing] [planning to report verbally or in writing]

[a violation of State or Federal law, rule or regulation]

[fraud]

[misappropriation of State resources]

[a substantial and specific danger to the public health or safety]

[gross mismanagement, gross waste of monies or gross abuse of authority]][4]

[refusing to carry out a directive which in fact

[constitutes a violation of State or Federal law, rule or regulation]

[poses a substantial and specific danger to public safety]]

is activity protected by law under the North Carolina Whistleblower Act.[5]

The second element is that the defendant took adverse employment action against the plaintiff in *his* employment. I instruct you that adverse employment action against an employee in *his* employment includes retaliation, discharge, threat or other action[6] discriminating against the employee regarding *his* compensation, terms, conditions, location or privileges of employment.[7]

The third element is that there was a causal connection between the protected activity engaged in by the plaintiff and the adverse employment action taken by the defendant against the plaintiff.

The fourth element is that any lawful explanation proffered by the defendant for its adverse employment action against the plaintiff was a pretext.

A pretext is a reason put forth simply to conceal the actual or true retaliatory motivation behind the defendant's adverse employment action.[8] Therefore, when evidence has been introduced tending to show a

causal relationship between the plaintiff's protected activity and adverse employment action taken by the defendant against the plaintiff, and further, when evidence has been introduced tending to show that the defendant had a lawful reason for the employment action taken,[9] then the plaintiff must prove, by the greater weight of the evidence, that any lawful reason given by the defendant for the adverse employment action is a pretext.[10]

Finally, if you find by the greater weight of the evidence that the plaintiff engaged in activity protected by law, that the defendant took adverse employment action against the plaintiff in *his* employment, that there was a causal connection between the plaintiff's protected activity and the adverse employment action taken by the defendant against the plaintiff, and that any lawful reason given by the defendant for adverse employment action against the plaintiff is a pretext, 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. *See* N.C.P.I.-Civil 640.29A ("Employment Relationship-Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq*.-*Introduction*"), n.13.

2. [T]he [North Carolina Whistleblower] Act requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

Newberne v. Dep't of Crime Control and Pub. Safety, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005) (citations omitted).

In a pretext case,

> once a plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at

> issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. at 791, 618 S.E.2d at 207-08 (citations omitted).

3. Report of any activity under N.C. Gen. Stat. § 126-84 may be made "verbally or in writing." N.C. Gen. Stat. § 126-85(a)(2009).

4. N.C. Gen. Stat. § 126-84(a)(1)-(5)(2009).

5. *See Helm v. Appalachian State University*, 194 N.C. App. 239, 251, 670 S.E.2d 571, 579 (2008) (Calabria, J., dissenting), *rev'd for reasons stated in the dissenting opinion*, 363 N.C. 366, 677 S.E. 2d 454 (2009) (finding that "[P]laintiff's allegations [("that she was asked to resign [because] she refused to issue a check for $10,000 from the University Endowment Fund to purchase an option that she knew the University had insufficient funds to exercise, and she reported her objection to the transaction to David Larry, a University attorney")], if accepted as true, are sufficient to show a violation of state law, a misappropriation of state resources, or a gross waste of public funds," and thus are sufficient to state a claim under the Whistleblower Act).

6. [W]e cannot conclude that the important protections afforded to State employees . . . under the Whistleblower Act extend to the employment action taken in this case, where the only articulable adverse effect on this employee was that he might not have as many "moments" of personal satisfaction in the post to which he was reassigned.

Demurry v. N.C. Dep't of Corrections (sic), ___ N.C. App. ___, ___, 673 S.E.2d 374, 384 (2009).

7. N.C. Gen. Stat. § 126-85(b). Where there is an employment agreement, an employer may terminate an employee for breaching a provision of the employment agreement or for just cause.

Absent an agreement to the contrary, an employer may terminate an employee with or without cause, and even for an arbitrary or irrational reason. 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. United Carolina Bank*, 89 N.C. App. 693, 695, 366 S.E.2d 918, 920 (1988) (citation omitted).

However, statutes such as the North Carolina Whistleblower Act "may proscribe the discharge of an at-will employee in retaliation for certain protected activities[.]" *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446 (1989).

8. *See id*. at 791, 618 S.E.2d at 207-08.

9. *See Newberne*, 359 N.C. at 791, 618 S.E.2d at 207.

10. *See id*.

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