EMPLOYMENT RELATIONSHIP—ADVERSE EMPLOYMENT ACTION IN VIOLATION OF THE NORTH CAROLINA WHISTLEBLOWER ACT, N.C. Gen. Stat. § 126-84 *et seq.*— INTRODUCTION

NOTE WELL: *The North Carolina Whistleblower Act (hereinafter, "the Act")*[1] *creates a cause of action "for damages, an injunction or other remedies"*[2] *by "any State employee"*[3] *who has been "discharge[d], threaten[ed] or otherwise discriminate[d] against,"*[4] *or "retaliate[d] against"*[5] *by the "head of any State department, agency or institution or other State employee exercising supervisory authority."*[6] *Hence the Act does not create a private cause of action, but rather is applicable only to actions brought by state employees against state agencies and/or other state employees.*[7]

The Act protects a State employee who [either directly or through "a person acting on behalf of the employee"][8] *"reports or is about to report, verbally or in writing,"*[9] *"to [his] supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:*

A violation of State or federal law, rule or regulation;

Fraud;

Misappropriation of State resources;

Substantial and specific danger to the public health and safety; or

Gross mismanagement, a gross waste of monies, or gross abuse of authority."[10]

The Act also protects a "State employee [who] has refused to carry out a directive which in fact constitutes a violation of State or federal law, rule or regulation, or which poses a substantial and specific danger to public safety."[11]

In Newberne v. Department of Crime Control and Public Safety,[12] *the North Carolina Supreme Court held that "the Act requires plaintiffs to prove, by a preponderance of the*

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1. N.C. Gen. Stat. §§ 126-84 to -88.

2. *Id.* at § 126-86.

3. *Id.*

4. *Id.* at § 126-85(a).

5. *Id*. at § 126-85(a1).

6. *Id.* at § 126-85(a).

7. For instructions on common law discriminatory employment claims, *see* N.C.P.I—Civil 640.27 ("Employment Discrimination—Pretext Case") and N.C.P.I.—Civil 640.28 ("Employment Discrimination—Mixed Motive Case"). For instructions on common law wrongful termination claims, *see* N.C.P.I.—Civil 640.20 ("Employment Relationship—Wrongful (Tortious) Termination") and N.C.P.I.—Civil 640.22 ("Employment Relationship—Employer's Defense to Wrongful (Tortious) Termination").

8. N.C. Gen. Stat. § 126-85(a).

9. *Id.*

10. *Id.* at § 126-84(a).

11. *Id.* at § 126-85(b).

12. *Newberne v. Dept. of Crime Control and Public Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

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evidence,[13] *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."*[14]

According to Newberne, the "causal connection" element may be approached by plaintiffs in three different ways:[15] *1) reliance "on the 'employer's admission that it took adverse action against the plaintiff solely because of the plaintiff's protected activity,'"*[16] *otherwise known as a DIRECT ADMISSION case; 2) presentation of "circumstantial evidence that the adverse employment action was retaliatory and that the proffered explanation for the action was pretextual . . . , commonly referred to as [a] PRETEXT CASE[];"*[17] *and 3) showing, in instances "when 'the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive,'" that, "even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken," usually called a MIXED MOTIVE case.*[18]

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13. Although the *Newberne* decision and the federal cases upon which it relies employ the terminology "by a preponderance of the evidence," note that "proof by a preponderance of the evidence and proof by the greater weight of the evidence are synonymous burdens of proof." *Brooks v. Austin Berryhill Fabricators, Inc.*, 102 N.C. App. 212, 219, 401 S.E.2d 795, 800 (1991). Consistent with the practice throughout the North Carolina Pattern Jury Instructions, the latter terminology has been utilized in the instructions based upon the *Newberne* decision and the North Carolina Whistleblower Act.

14. *Newberne*, 359 N.C. at 788, 618 S.E.2d at 206.

15. *Id.* at 790, 618 S.E.2d at 207.

16. *Id.* at 790, 618 S.E.2d at 207 (quoting Michael Delikat, et al., *Retaliation and Whistleblower Claims*, Employment Law Yearbook, § 14:3, at 806-07 (Timothy J. Long ed. 2005)). The *Newberne* court, however, notes further that "[s]uch 'smoking gun' evidence is rare, . . . as 'few employers openly state that they are terminating employees [solely] because of their whistleblowing activities.'" *Id.* (quoting Daniel P. Westman & Nancy M. Modesitt, *Whistleblowing: The Law of Retaliatory Discharge*, Ch. 9 § III, at 232 (2d ed. 2004).

17. *Id.* The *Newberne* court states that such "pretexts" cases "are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). *Id.* The *Newberne* court further explains that "[u]nder the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful retaliation [by circumstantial evidence], the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. (Citation omitted). If the plaintiff meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. (Citation omitted). The ultimate burden of persuasion rests at all times with the plaintiff." *Id.* at 791, 618 S.E.2d at 207-08.

18. *Id.* at 791, 618 S.E.2d at 208. This category of "cases [is] governed by the proof scheme endorsed by the United States Supreme Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977), *superceded by statute on other grounds as stated in Rivera v. United States*, 924 F.2d 948, 954 n.7 (9th Cir. 1991), and extended to Title VII actions in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989). *Id.* The *Newberne* court explains that "[u]nder the *Mt. Healthy/Price Waterhouse* analysis, once a plaintiff has carried his or her burden to show that protected conduct was a 'substantial' or 'motivating' factor for the adverse employment action, the defendant must prove 'by a preponderance of the evidence' that it would have reached the same decision as to the employment action at issue even in the absence of the protected conduct. (Citations omitted). In contrast to the 'pretext' analysis described in *McDonnell Douglas* and *Burdine*, the ultimate burden of persuasion in a 'mixed motive' case may be allocated to the defendant once a plaintiff has established a prima facie case." *Id.* at 791-92, 618 S.E.2d at 208 (citation omitted).

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Depending upon the evidence presented, an individual case may fall into one of the three foregoing categories.[19] *Designation of the approach under which the plaintiff's case falls affects the burden of proof as to the causal issue.*

For example, in a DIRECT ADMISSION case or a PRETEXT CASE, the burden of proof remains at all times with the plaintiff.[20] In a *MIXED MOTIVE CASE, however, if the employee demonstrates by direct evidence that the plaintiff's protected activity was a substantial or motivating factor in the adverse employment action, the burden then shifts to the defendant to prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of the plaintiff's protected activity.*[21]

According to Newberne, claims brought under the Act should be adjudicated according to the following procedures:[22]

The plaintiff must endeavor to establish a prima facie case of retaliation under the Act, and should include any available direct evidence that the adverse employment action was retaliatory along with circumstantial evidence to that effect.

Although Newberne does not address the point, if the plaintiff fails in establishing

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The *Newberne* court goes on to note that "[i]n order to shift the burden to the defendant, however, the plaintiff must first demonstrate 'by *direct evidence* that an illegitimate criterion was a substantial factor in the decision.' (Citations omitted). 'Direct evidence' has been defined as 'evidence of conduct or statements that both reflect directly the alleged [retaliatory] attitude and that bear directly on the contested employment decision.' (Citation omitted). In the context of the *Price Waterhouse* proof scheme, direct evidence does not include 'stray remarks in the workplace, ... statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself.' (Citation omitted). Once the plaintiff establishes a prima facie case including 'direct evidence' on the causation element, the *defendant* carries the burden 'to show that its legitimate reason, standing alone, would have induced it to make the same decision.'" (Citation omitted) (emphasis in original). *Id.* at 792-93, 618 S.E.2d at 208-09.

19. *See id.* at 793, 618 S.E.2d at 209 (stating that "the essential differences between 'pretext' and 'mixed motive' cases necessitate application of different proof schemes, and therefore . . . claims under the North Carolina Whistleblower Act may be subject to either form of analysis, depending on the evidence present in each individual case."). As indicated in n.16 *supra,* a "direct admission" case will rarely come before the court.

20. *See id.* at 791, 618 S.E.2d at 208.

21. *See id.* The *Newberne* court notes, in citing *Price Waterhouse*, that the "'very premise of a mixed-motives case' is that the defendant possessed both legitimate *and* unlawful motives for the adverse employment action taken. (Citation omitted) (emphasis in original). 'Where a decision was the product of a mixture of legitimate and illegitimate motives, . . . it simply makes no sense to ask whether the legitimate reason was "the 'true reason'" for the decision—which is the question asked by *Burdine*.' (Citation omitted). Thus, rather than require a plaintiff to 'squeeze [his or] her proof into *Burdine's* framework,' it is appropriate, once a plaintiff has established that an unlawful motive was present, to require the *defendant* to prove by a preponderance of the evidence that the unlawful motive was not a but for cause of the adverse employment action. (Citation omitted) (emphasis in original). Shifting the burden of persuasion to the defendant is justified only when the plaintiff presents *direct evidence* of an impermissible motive, however, because (1) the defendant is not 'entitled to . . . [a] presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is [statutorily] forbidden,' and (2) '[a]s an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation, the factfinder is entitled to presume that the employer's [retaliatory] animus made a difference to the outcome, absent proof to the contrary from the employer.' (Citation omitted) (emphasis in original). Thus, only when such 'direct evidence' is presented do plaintiffs 'qualify for the more advantageous standards of liability applicable in mixed motive cases.'" (Citation omitted).

22. *See id.* at 794, 618 S.E.2d at 209-10 (for ease of reading and comprehension, the language in the text slightly paraphrases that set out in the Court's opinion, and direct quotations and internal citations have been omitted).

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prima facie evidence of retaliation under the Act, the case presumably would conclude by directed verdict disposition.[23]

Once the plaintiff has established a prima facie case, the burden of production would then shift to the defendant which should present its case, including any evidence as to legitimate reasons for the employment decision.

Although Newberne again does not address the point, it would seem that the plaintiff would then have an opportunity to present rebuttal evidence, both direct and circumstantial, on the retaliation question.

Upon receipt of all the evidence,[24] *the trial court should determine whether the "mixed motive" or the "pretext" framework is applicable:*

If the plaintiff has presented a prima facie case that he engaged in a protected activity and that the defendant took adverse action against the plaintiff in his or her employment, and if the plaintiff has further presented direct evidence[25] *that the protected conduct was a substantial or motivating factor in the adverse employment action, then the "mixed motive" analysis would apply, requiring the submission of two issues to the jury.*[26] *The plaintiff would bear the burden of proof on the first issue to establish the three foregoing elements to the satisfaction of the jury.*[27]

If the plaintiff is successful, then the burden on the second issue would shift to the defendant to prove that its legitimate reason(s), standing alone, would have induced it to make the same adverse employment decision regarding the plaintiff.[28]

If the plaintiff has presented a prima facie case that he engaged in a protected activity and that the defendant took adverse action against the plaintiff in his or her employment, but the plaintiff has failed to present direct evidence that the protected conduct was a substantial or motivating factor in the adverse employment action, then the "pretext" analysis would apply and the overall burden of proof would remain with the

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23. *See Williams v. W.P. Sports, N.M., Inc.*, 497 F.3d 1079, 1086 (10th Cir. 2007) (stating that "[i]f a plaintiff is unable to make out a *prima facie* case, judgment as a matter of law is appropriate.").

24. *See Newberne*, at 793, 618 S.E.2d at 210 (noting that "[a]s the trial court's choice between [the 'pretext' model or the 'mixed motive' analysis] depends on the nature of both the plaintiff's and the defendant's evidence, a trial court may not make a final determination as to which of these two proof schemes applies until 'all the evidence has been received.'" (Citation omitted)).

25. *See* n.18 *supra* (defining "direct evidence"); *see also Newberne*, 793, 618 S.E.2d at 210 n.4 ("acknowledg[ing] that, subsequent to the United States Supreme Court's decision in *Price Waterhouse*, 'Congress codified a new evidentiary rule for mixed motive cases arising under Title VII' of the Civil Rights Act of 1964 that . . . permits plaintiffs to avail themselves of the mixed-motive standard in Title VII actions without direct evidence of unlawful discrimination. (Citation omitted). This statutory amendment, however, applies only to claims brought under Title VII of the Civil Rights Act of l964."

26. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 245, 1788, 104 L.Ed.2d 268, 285 (1989) (explaining that "the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.").

27. *See* N.C.P.I.—Civil 640.29E ("Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.*—Mixed Motive Case (Defendant)").

28. *See* N.C.P.I.—Civil 640.29D ("Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.*—Mixed Motive Case (Plaintiff)").

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plaintiff at all times, including demonstrating that any proffered legitimate reasons for its action by the defendant were pretextual.[29]

If there are multiple claims of discriminatory acts, a separate issue should be submitted to the jury for each claim (e.g., one issue for violation of the North Carolina Whistleblower Act, one for race discrimination, etc.).[30]

29. *See* N.C.P.I.—Civil 640.29C ("Employment Relationship—Adverse Employment Action in Violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.*—Pretext Case").

30. *See Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 87, 551 S.E.2d 902, 906 (2001), *rev'd on other grounds*, 357 N.C. 149, 579 S.E.2d 249 (2003), *Edwards v. Hardin*, 113 N.C. App. 613, 616, 439 S.E.2d 808, 811 (1994), and *Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1991).

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