

EMPLOYMENT RELATIONSHIP—ADVERSE EMPLOYMENT ACTION IN VIOLATION OF NORTH CAROLINA WHISTLEBLOWER ACT, N.C. GEN. STAT. § 126-84 *ET SEQ.*—*MIXED MOTIVE CASE.*

NOTE WELL: Prior to instructing a jury in a case under the North Carolina Whistleblower Act, read carefully 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 two things, also referred to as elements:²

First, that the plaintiff engaged in activity protected by law; and second, that the defendant took adverse employment action against the plaintiff in *his* employment. I will now explain these terms to you.

As to the first thing, whether the plaintiff engaged in an activity protected by law, I instruct you that

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).

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(Continued)

[[reporting verbally³ 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 in the North Carolina Whistleblower Act.⁵

With respect to the second element, I instruct you that adverse employment action against an employee in *his* employment includes retaliation, discharge, threat or other action⁶

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 Helms 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).

EMPLOYMENT RELATIONSHIP—ADVERSE EMPLOYMENT ACTION IN VIOLATION OF NORTH CAROLINA WHISTLEBLOWER ACT, N.C. GEN. STAT. § 126-84 *ET SEQ.*—*MIXED MOTIVE CASE.*
(Continued)

discriminating against the employee regarding *his* compensation, terms, conditions, location or privileges of employment.⁷

On this issue the plaintiff must also prove, by direct evidence, that even if there was a lawful reason for the adverse employment action, the plaintiff's protected activity was a substantial or motivating factor behind the adverse employment action taken against *him*.⁸

Direct evidence is evidence of conduct or statements that both reflect directly on the alleged retaliatory attitude and bear directly on the contested employment decision.⁹ Direct evidence does not include stray remarks in the workplace, statements by employees uninvolved in the employment decision, or statements by decision makers unrelated to the process of making the employment decision itself.¹⁰

Finally, if you find by the greater weight of the evidence that the plaintiff engaged in activity protected by law, and that the defendant took adverse employment action against the

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 Newberne*, 359 N.C. at 792, 618 S.E.2d at 208 (citation omitted).

9. *Id.* at 792, 618 S.E.2d at 209 (citation omitted).

10. *Id.* at 792–93, 618 S.E.2d at 209 (citation omitted).

EMPLOYMENT RELATIONSHIP—ADVERSE EMPLOYMENT ACTION IN VIOLATION OF NORTH CAROLINA WHISTLEBLOWER ACT, N.C. GEN. STAT. § 126-84 *ET SEQ.*—*MIXED MOTIVE CASE.*
(Continued)

plaintiff in *his* employment, and if you further find by direct evidence that the plaintiff’s protected activity was a substantial or motivating factor behind the adverse employment action taken against *him*, 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.