

EMPLOYMENT RELATIONSHIP--EMPLOYER'S DEFENSE TO WRONGFUL
(TORTIOUS) TERMINATION.

This issue reads:

"Would the defendant have terminated the plaintiff even if the plaintiff had not [participated in conduct protected by law] [refused to participate in unlawful conduct] [refused to participate in conduct which violated public policy]?"¹

You will answer this issue only if you have answered the (state number) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the defendant would have terminated the plaintiff even if the plaintiff had not [participated in conduct protected by law] [refused to participate in unlawful conduct] [refused to participate in conduct which violated public policy].

Even if the employee'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 employer's decision to terminate, that termination is not wrongful if the employer's decision to terminate would have been the same regardless of the employee's [conduct] [refusal].

¹*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); *Johnson v. Friends of Weymouth, Inc.*, 120 N.C. App. 255, 258-59, 461 S.E.2d 801, 804 (1995), *review denied*, 342 N.C. 895, 467 S.E.2d 903, (1996). (If both N.C.P.I.--Civil 640.20 and this instruction are answered in the affirmative, the claim must end in favor of the defendant). See also *Abels v. Renfro Corp.*, 126 N.C. App. 800, 805, 486 S.E.2d 735, 739 (1997).

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Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant would have terminated the plaintiff even if the plaintiff had not [participated in conduct protected by law] [refused to participate in unlawful conduct] [refused to participate in conduct which violated public policy], then it would be your duty to answer this issue "Yes" in favor of the defendant.

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 plaintiff.