

640.70 PUBLIC EMPLOYEE—DIRECT NORTH CAROLINA CONSTITUTIONAL
CLAIM—ENJOYMENT OF FRUITS OF LABOR.

NOTE WELL: This instruction should be used when a public employee shows that no other state law remedy is available to address the unconstitutional burden on the employee's right to the enjoyment of the fruits of the employee's labor.¹

This (*state number*) issue reads:

"Was the plaintiff (*state name*) damaged as a result of the defendant's (*state name*) arbitrary and capricious action?"

The North Carolina Constitution guarantees for citizens of North Carolina the inalienable right to "the enjoyment of the fruits of their own labor."² This right may not be unconstitutionally burdened by the arbitrary and capricious action of a governmental employer.³

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 the following three things:

First, that a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest.⁴ Providing a fair procedure that ensures qualified candidates move to the next stage of a promotional process is a legitimate governmental interest.⁵

Second, that the defendant violated the rule or policy. A governmental entity's violation of its own rule or policy is inherently arbitrary.⁶

And Third, that the defendant's violation proximately caused damage to the plaintiff.⁷ Proximate cause is a cause which in a natural and continuous sequence produces a person's damage, and is a cause which a reasonable and prudent person could have foreseen would probably produce such damage or a similar injurious result.⁸

There may be more than one proximate cause of damage. Therefore, the plaintiff need not prove that the defendant's violation was the sole proximate cause of the plaintiff's damage. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's violation was a proximate cause.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was damaged as a result of the defendant's arbitrary and capricious action, 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. *Tully v. City of Wilmington*, 370 N.C. 527, 537, 810 S.E.2d 208, 216 (2018) (recognizing that the plaintiff pled adequately a direct constitutional claim, but neither expressing an opinion regarding the ultimate viability of the plaintiff's claim nor establishing the remedy to which the plaintiff would be entitled were he to prevail).

2. *Id.* at 534, 810 S.E.2d at 214 (quoting *State v. Warren*, 252 N.C. 690, 692-93, 114 S.E.2d 660, 663 (1960)).

3. *Id.* at 535, 810 S.E.2d at 215.

4. *Id.* at 536-37, 810 S.E.2d at 216.

5. *Id.*

6. *Id.* at 536, 810 S.E.2d at 215.

7. *Id.* at 537, 810 S.E.2d at 216.

8. *Id.*, citing *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979), in support of the conclusion that, in addition to missing out on promotion within the employee's current employment track, an employee passed over for promotion in violation of a promotional process suffers a "stigma or disability" that impacts the freedom to take advantage of other employment opportunities.

