I. AT-WILL EMPLOYMENT

A. Statute

The at-will employment doctrine is alive and well in North Dakota. The North Dakota Century Code codifies the at-will doctrine in § 34-03-01: “An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title.”

B. Case law

The Supreme Court of North Dakota has extended the at-will employment doctrine to public employees. In one case, the court affirmed the dismissal of a public employee's claim for wrongful termination. The employee produced solid evidence at trial to suggest that the employer did not inform her about the terms of her probationary period. She also produced evidence to show that she honestly believed the State Industrial School could only fire her for cause. Nonetheless, the court concluded that such evidence was insufficient to overcome the at-will presumption. Knight v. N.D. State Indus. Sch., 540 N.W.2d 387 (N.D. 1995).


The court presumes terms such as “permanent employment,” “life employment,” and “as long as the employee chooses” to mean “steady employment.” Using such terms generally does
not overcome the at-will presumption. *Aaland v. Lake Region Grain Coop.*, 511 N.W.2d 244, 246 (N.D. 1994). An employer’s promise to allow an employee to continue working “until he found another job” does not overcome the at-will presumption and create an employment contract. The employer must continue employment only for a “reasonable time” to allow the employee to look for a job. *Id.*

North Dakota does not allow extrinsic evidence to explain the terms of an employment agreement unless the terms of a written contract are ambiguous. *Olander v. State Farm Mut. Auto. Ins. Co.*, 317 F.3d 807, 809 (8th Cir. 2003). If the terms are ambiguous within the four corners of the document, then extrinsic evidence may be used to show the intent of the parties to contract. *Id.* North Dakota’s general rule, however, is that an agreement’s silence as to its intended duration is an unambiguous declaration that employment is terminable at will by either party. *Id.* at 810-11.

**II. EXCEPTIONS TO AT-WILL EMPLOYMENT**

A. **Implied Contracts**

1. **Employee Handbooks/Personnel Materials**

   In *Good Bird v. Twin Buttes School District*, 733 N.W.2d 601 (N.D. 2007), Cheryle Good Bird was hired by the Twin Buttes School District to be head cook for the 2001-2002 school year, and the 2002-2003 school year. Good Bird was not hired for the 2003-2004 school year. Good Bird filed a complaint against the school district alleging breach of contract and that the district violated her due process rights by discharging her without notice or hearing.

   The school district’s business manager stated that, in 2001, she sent Good Bird a letter indicating Good Bird’s employment was for the 2001-2002 school year. A similar letter was sent to Good Bird in 2002. In April 2003, Good Bird was sent a letter informing her that the head cook position would be advertised for the 2003-2004 school year because of numerous absences and that Good Bird could re-apply for the position. Good Bird asserted she did not receive the letter. Good Bird re-applied for the position but was not hired. Good Bird alleged that she did not receive an explanation for her termination and was not provided a hearing. In upholding the dismissal of Good Bird’s claim, the North Dakota Supreme Court found that the school district’s personnel policies and procedures handbook did not constitute a contract and concluded that Good Bird had otherwise failed to prove a contract entitling her to continued employment.

   In *Hunt v. Banner Health Sys.*, 720 N.W.2d 49 (N.D. 2006), Loretta Hunt sued her employer, Banner Health System, for wrongful termination and breach of contract. The North Dakota Supreme Court reversed the district court's grant of summary judgment in favor of the employer. The Supreme Court found summary judgment was improper because the district court focused almost entirely on the handbook’s disclaimer language and did not take the broader approach of interpreting the handbook as a whole to determine what the parties intended by the handbook. But see *Yahna v. Altru Health Sys.*, 871 N.W.2d 580 (N.D. 2015) (distinguishing *Hunt* and holding Altru’s policies, when read as a whole, unambiguously indicated Altru preserved the at-will employment status due to the disciplinary process procedure, ethical code,
In **Heng v. Rotech Medical Corp.**, 688 N.W.2d 389 (N.D. 2004) (Heng I), Deborah Heng claimed a breach of contract by her employer, Arrowhealth, due to its failure to follow the progressive discipline procedure outlined in the employee manual. The court found the policy manual's introductory section provided that it did not create a contract, the manual contained an entire section entitled “Employment at Will,” a section entitled “Separation from Employment” stated that either an employee or the employer could “end the employment relationship at any time,” the manual’s final page contained a disclaimer stating that employment status was at-will, and Heng had signed an acknowledgment that stated she was at-will. Thus, the supreme court affirmed a summary judgment ruling in favor of the employer.

In **Dahlberg v. Lutheran Social Services of North Dakota**, 625 N.W.2d 241 (N.D. 2001), Lutheran Social Services (LSS) terminated Joyce Dahlberg’s employment. The employee handbook and Dahlberg’s signature on the handbook receipt made it clear that Dahlberg was an at-will employee. However, after writing the handbook, LSS promulgated a progressive discipline policy. LSS failed to incorporate the discipline policy into the handbook specifically. Dahlberg sued LSS for breach of contract, alleging that the discipline policy contractually modified the handbook’s at-will presumption.

The trial court granted summary judgment in LSS’s favor. Dahlberg appealed. The Supreme Court of North Dakota held that LSS did not intend the handbook to be a contract, and that LSS could “terminate the employee for any reason or no reason.” The handbook also specifically stated that LSS reserved the right to change the handbook without notice. The court held that because the handbook specifically stated that LSS reserved the right to change the handbook without notice, the discipline policy was within the handbook. Thus, the discipline policy did not destroy the at-will presumption. LSS, therefore, was not bound to follow the discipline policy and the trial court did not err in granting summary judgment.


The trial court found that Olson’s termination violated the employee handbook provision because SRT fired him with no advance warning. The Supreme Court of North Dakota reversed, however, concluding that the express disclaimer in the employer’s handbook belied any intent to contract. The disclaimer read, in part:

This written policy statement is not a contract. It is a statement of personnel policies that have been established by management. These policies are subject to change in the sole discretion of management.

*Olson*, 558 N.W. 2d at 335. Based on this language, the court concluded that Olson had not overcome the presumption of at-will employment found in N.D. CENT. CODE § 34-03-01.
In *Osterman-Levitt v. MedQuest, Inc.*, 513 N.W.2d 70 (N.D. 1994), MedQuest terminated Osterman-Levitt because corporate restructuring eliminated her position as marketing director. Subsequently, MedQuest reopened the position and hired an outside employee to assume it. MedQuest’s employment handbook established a complicated set of procedures and stated that this booklet “serves to tell you what your responsibilities are to the hospital, patients and fellow employees. It also tells what the hospital's responsibilities are to you as an employee.” Among the hospital’s responsibilities listed included the following statement: “[I]n situations where the qualifications of applicants are equal, seniority is utilized as the only determining factor for hiring.” MedQuest’s employment handbook also indicated that in-house applicants would have preference over the applicants from the outside, and former employees are eligible for reemployment. Moreover, no explicit disclaimer existed in the handbook, only a description of at-will employment.

Osterman-Levitt argued that the employer's personnel policies and comments created a contract for continuing employment with the company. The Supreme Court of North Dakota agreed that there was a material issue of fact as to whether these policies and procedures were contractually binding to the employer. The court held that, although the opposing contract interpretations were equally sound, courts should resolve ambiguity in the employee’s favor because any disclaimer must be specific and conspicuous.


Pratt claimed Heartview failed to follow the employee handbook during both the general reduction in workforce and her personal termination. Heartview asserted that the handbook included a disclaimer advising employees that it was informational only and granted no rights or privileges to its employees. In response, Pratt argued that the disclaimer did not apply to her because Heartview adopted the disclaimer after they hired her.

The Supreme Court of North Dakota held that the statements included in the handbook were not sufficiently specific or definite to create a contractual promise. The court stated the following:

In the absence of clear, promissory language and no description of specific disciplinary procedures, the language of the [handbook provision] does not create enforceable employment contract rights sufficient to overcome the presumption of an employment relationship terminable at will.

*Pratt*, 512 N.W.2d at 678. The court found the handbook only granted the administrator the authority to implement a “reduction in workforce” policy.

In *Bykonen v. United Hospital*, 479 N.W.2d 140 (N.D. 1992), United Hospital fired Bykonen for insubordination. Bykonen sued, asserting the employee's manual and personnel handbook created enforceable contract rights that required specific discipline and termination procedures. The handbook, however, contained express language indicating that United Hospital
did not intend the handbook to create an employment contract:

This handbook is not, nor should it be construed as a contract of employment but is rather a source of information concerning personnel related matters for the employees of United Hospital, who are covered equally by the policies stated herein.

*Bykonen*, 479 N.W.2d at 142. The Supreme Court of North Dakota held the language was a sufficient disclaimer. Thus, the discipline and termination terms did not form an employment contract.

In *Eldridge v. Evangelical Lutheran Good Samaritan Society*, 417 N.W.2d 797 (N.D. 1987), Rosemary Eldridge was a nurse at the Good Samaritan Society (GSS) beginning in 1978. Three months after she began, she also assumed the “in-service director” position. In 1982, Eldridge’s supervisor suspended her in-service duties so that Eldridge could devote more time to her nursing position.

Eldridge claimed breach of employment contract, relying on a personnel policy handbook GSS distributed. However, the handbook explicitly mentioned that “no policy, benefit, or procedure implies or may be construed to imply this Handbook to be an employment contract for any period of time.” The Supreme Court of North Dakota found this disclaimer was sufficient.

In *Sadler v. Basin Electric Power Cooperative*, 409 N.W.2d 87 (N.D. 1987), Basin dismissed Sadler because corporate reorganization eliminated his position. He based his wrongful termination claim on Basin's employee handbook, claiming it was an employment contract. The 1980 employee handbook stated that “[p]ermanent employees cannot be terminated without a just cause.” Basin did not define the term “just cause” in the handbook. In 1982, Sadler received another employee handbook that contained a similar “just cause” provision. In 1983, Sadler received a third employee handbook. That handbook contained the following provisions:

Basin Electric’s policy on disciplinary action provides that employees of the Cooperative may be disciplined for incompetence, tardiness, insubordination, unjustified absence, sick-leave abuse, safety violations, or similar breach of Cooperative policies and practices.

The employee may be discharged following a third offense.

Basin Electric reserves the right to dismiss an employee at any time with cause. Theft from the Cooperative, sale or use of alcohol or drugs during working hours, assault or harassment of another person on the job, destruction of Cooperative property, unauthorized use or falsification of records, or disclosure of confidential information will result in dismissal unless there are extenuating circumstances.

The contents of this handbook are not intended to imply any contractual arrangement between you and the Cooperative. In addition, management reserves
the right to modify, suspend or revoke any of the policies or benefits presented here.

Sadler, 409 N.W.2d at 89. In 1985, Sadler received yet another employee handbook. The 1985 handbook contained a “reduction-in-force provision.” The handbook also added “[e]limination of a position due to lack of work or a continued need for the position” as a cause for dismissal.

The trial court granted summary judgment in favor of Basin. The supreme court remanded, holding that Sadler raised genuine issues of fact: (1) regarding whether Basin intended handbook changes to apply to existing employees at the time of revision; and, (2) regarding the intended meaning of the term “just cause” in the 1980 employee handbook.

On remand, the jury returned a verdict in favor of Basin. On appeal after remand, the Supreme Court of North Dakota found that substantial evidence existed to support the jury’s verdict. See Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988).

In Peterson v. North Dakota University System, 678 N.W.2d 163 (N.D. 2004), Peterson was a tenured faculty member at Bismarck State College. She was terminated for cause for violating certain regulations in the State Board of Higher Education’s policy manual. Peterson sued, claiming a breach of her employment contract, wrongful discharge, and civil conspiracy.

The North Dakota Supreme Court held “regulations adopted by the Board as part of its policy manual govern termination of faculty members and ‘are part of the employment contract between the institution and faculty member.’”

The court reviewed the decision of the Board as it reviews administrative decisions. Therefore, the court only determined “whether a reasoning mind reasonably could have determined that the factual considerations reached were proved by the weight of the evidence.”

2. Provisions Regarding Fair Treatment

In Kortum v. Johnson, 755 N.W.2d 432 (N.D. 2008), the North Dakota Supreme Court found that the doctrine of employment-based shareholder oppression is distinct from the wrongful termination doctrine of at-will employees. The Court indicated that it must conduct an inquiry into whether the majority shareholders “acted in a manner unfairly prejudicial toward . . . shareholders” in the context of an employee-shareholder in a closely held corporation.

In Thompson v. Associated Potato Growers, Inc., 610 N.W.2d 53 (N.D. 2000), the court found that parties can contract around at-will employment. In Thompson, the parties added a clause to the employment contract limiting Associated from terminating Thompson for less than “good cause.”

The court followed California in applying an objective good faith standard when reviewing the employer’s decision to terminate for cause. The court stated the objective good faith standard means:

An employer is justified in terminating an employee for good cause for fair and
honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

*Thompson*, 610 N.W.2d at 59 (citation omitted). Furthermore, an adequate investigation by an employer can be satisfied by a variety of flexible procedures so long as these procedures afford employees a fair opportunity to present their position.

3. **Disclaimers**

See discussion of “Employee Handbooks/Personnel Materials” above.

4. **Implied Covenants of Good Faith and Fair Dealing**

North Dakota follows the majority of states in declining to recognize an implied covenant of good faith and fair dealing in employment at-will situations. *Erickson v. Brown*, 747 N.W.2d 34, 51 (N.D. 2008) (declining to extend UCC concept of good faith requirements into the employment context in a closely-held corporation); *Jose v. Norwest Bank N.D., N.A.*, 599 N.W.2d 293, 297 (N.D. 1999). The court has stated that, “[w]e refuse to recognize a cause of action for breach of an implied covenant of good faith and fair dealing where, as in this case, the claimant relies upon an employment contract which contains no express term specifying the duration of employment.” *Hillesland v. Fed. Land Bank Ass’n of Grand Forks*, 407 N.W.2d 206, 215 (N.D. 1987).

In *Hillesland v. Federal Land Bank Association of Grand Forks*, 407 N.W.2d 206 (N.D. 1987), the Federal Land Bank fired Hillesland because he became involved in a transaction that arguably was a conflict of interest prohibited by Federal Land Bank’s policies and procedures. Hillesland challenged his discharge, claiming breach of implied covenant of good faith and fair dealing in employment contracts.

The Supreme Court of North Dakota rejected the claim because North Dakota does not recognize an implied covenant when the contract does not contain express terms specifying the employment’s duration. The court held that to imply into each employment contract a duty to terminate in good faith would subject each discharge to judicial incursions into the amorphous concept of bad faith.

B. **Public Policy Exceptions**

1. **General**

See discussion below.

2. **Exercising a Legal Right**
In *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987), Marian Manor employed Krein as a nurse’s aide. Eventually, Marian Manor discharged Krein, allegedly for filing a workers’ compensation claim. The Supreme Court of North Dakota held that this type of retaliatory discharge violated public policy and was a valid cause of action. The court stated:

We agree that the retaliatory discharge of an employee for seeking workmen’s compensation violates public policy in North Dakota. That public policy was expressed by our legislature in the Workmen's Compensation Act.

... We hold that an employee can sue an employer for a wrongful discharge in retaliation for seeking workmen’s compensation. Since the trial court erred in dismissing Krein’s suit on this ground, the case is remanded for a trial of her claim for retaliatory discharge.

*Krein*, 415 N.W.2d at 795.

3. Refusing to Violate the Law

See discussion below regarding “Exposing Illegal Activity.”

4. Exposing Illegal Activity (Whistleblowers)

The North Dakota Century Code prohibits employers from retaliating against employees who report violations or suspected violations of law; participate in investigations at the request of public bodies or official; or refuse employer’s orders when the employee reasonably believes the orders to violate local, state, or federal law. N.D. CENT. CODE § 34-01-20 reads as follows in relevant part:

Employer retaliation prohibited - Civil action for relief - Penalty.

1. An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee’s compensation, conditions, location, or privileges of employment because:

   a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.

   b. The employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.

   c. The employee refuses an employer’s order to perform an action that the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee
must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason.

To prove retaliatory discharge under the statute, the plaintiff must prove (1) he/she engaged in protected activity; (2) the employer took an adverse employment action against him/her; and (3) a causal link between the two. *Dahlberg v. Lutheran Soc. Servs. of N.D.*, 625 N.W.2d 241, 252 (N.D. 2001). With regard to the first subsection, the statute requires that a “report” be made for the purpose of blowing the whistle to expose an illegality. *Jacob v. Nodak Mut. Ins. Co.*, 693 N.W.2d 604, 611 (N.D. 2005). The reporter’s purpose is assessed at the time the report is made. *Id.*

In *Ramirez v. Walmart*, 915 N.W.2d 674 (N.D. 2018), the Supreme Court of North Dakota affirmed the district court’s dismissal of the complaint of an employee, who failed to identify any law or regulation violated by his employer. There, the employee alleged he was fired for complaining to supervisors that the terminations of numerous co-workers were “unfair.” *Id.* at 676. The Court held that this was not enough to state a claim for relief under N.D. CENT. CODE § 34-01-20. *Id.* “Unfair” conduct is not the same as “illegal” conduct by an employer. *Id.* An employee must identify in his complaint what law or regulation was violated by the employer. *Id.*

Employers who violate N.D. CENT. CODE § 34-01-20 are potentially liable for reinstatement of the employee, up to two years back pay, reinstatement of fringe benefits, and attorney fees.

In *Heng v. Rotech Medical Corp.*, 688 N.W.2d 389 (N.D. 2004) (Heng I), the Supreme Court reversed a summary judgment ruling on Deborah Heng’s action for retaliatory discharge based on the state whistleblower statute, N.D. CENT. CODE § 34-01-20. The court held there were genuine issues of material fact as to whether Heng’s reports to her supervisors regarding her suspicion that her employer’s practice of allowing service technicians to assemble oxygen delivery systems and instruct patients on their use violated state regulations caused her termination.

In *Heng v. Rotech Medical Corp.*, 720 N.W.2d 54 (N.D. 2006) (Heng II), the Supreme Court affirmed the district court’s determination that Rotech retaliated against Ms. Heng in violation of N.D. CENT. CODE 34-01-20(1)(a) and awarded $35,195 in damages for her retaliatory discharge claim and $207,147 for her attorney’s fees.

In *Ressler v. Humane Society of Grand Forks*, 480 N.W.2d 429 (N.D. 1992), the Humane Society hired Ressler as an at-will employee in 1989. In October 1990, the Humane Society asked Ressler to evaluate a dog for signs of abuse. Ressler concluded that no signs of abuse existed. Subsequently, Ressler was subpoenaed to testify at the owner’s criminal trial. The Board of Directors told Ressler that her testimony on behalf of an alleged dog abuser put the Humane Society in an awkward position. Although Ressler was never called to testify at trial, the Humane Society terminated her. Ressler sued for wrongful discharge in retaliation for her refusal to agree to testify falsely at the trial. The Supreme Court of North Dakota agreed that
Ressler’s claim was valid. Nonetheless, the court reversed her summary judgment because a genuine issue of material fact existed regarding whether the Humane Society actually discharged her for refusing to lie. The court specifically concluded, however, that North Dakota’s public policy prohibits an employer from discharging an employee for honoring a subpoena and for testifying truthfully, stating:

In this case we agree with Ressler that a retaliatory discharge of an employee for honoring a subpoena and testifying truthfully would violate public policy in North Dakota. That public policy is expressed by our Legislature in our criminal statutes prohibiting the failure to obey a subpoena, the refusal to testify, and the making of a false statement. Those statutes evidence a clear and compelling public policy which goes to the very heart of our judicial system.

Id. at 432.

In Vandall v. Trinity Hospitals, 676 N.W.2d 88 (N.D. 2004), the North Dakota Supreme Court barred Vandall’s action for retaliatory discharge because the 180 day statute of limitations within N.D. CENT. CODE § 34-01-20 had expired. Vandall argued his claim was a common law claim subject to the six-year statute of limitations and not a statutory claim under the whistleblower statute. Therefore, Vandall argued the 180 day period of § 34-01-20 did not govern.

The court cited N.D. CENT. CODE § 1-01-06 to hold that there is no common law in any case where the law is declared by the code. Furthermore, statutory enactments take precedence over and govern conflicting common law doctrines. The court stated the common law and statutory claim for retaliatory discharge were essentially the same. The only difference is the statute of limitations, so the court felt § 1-01-06 applied, leaving Vandall with no cause of action for retaliatory discharge since the statutory period to initiate a civil action had expired.

III. CONSTRUCTIVE DISCHARGE

In Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73 (N.D. 1991), Quain & Ramstad (Q & R) hired Soentgen as a neonatologist in 1982. Her contract was for a five-year term, terminable at will. She was to perform the contract at MedCenter. In 1986, the MedCenter nursing staff reported concerns about Soentgen's patient care. Ultimately, the administrator told her that she needed to take a four to six week leave-of-absence for further training. On June 30, 1987, Soentgen sued Q & R alleging wrongful discharge. Q & R held a hearing on August 12, 1987, after which they ended Soentgen’s contract.

Soentgen raised several issues on appeal, including a claim for constructive discharge. The Supreme Court of North Dakota rejected the argument because Q & R had not made working conditions so intolerable that Soentgen had no choice but to quit. The court explained in the following passage:

A party seeking to recover on a claim of constructive discharge must show that a reasonable person in that party’s position would not have returned to work. The
focus is not how the plaintiff felt but whether a reasonable person in that position would not have returned to work.

*Soentgen*, 467 N.W.2d at 83 (citation omitted). Furthermore, the court held that Soentgen’s failure to exhaust her internal remedies precluded a finding for her.

**IV. WRITTEN AGREEMENTS**

**A. Standard “For Cause” Termination**

In *Thompson v. Associated Potato Growers, Inc.*, 610 N.W.2d 53 (N.D. 2000), Thompson was employed by Associated as a general manager. It was discovered that Thompson altered grades of potatoes and changed growers’ records. Thompson admitted to the accusations, but stated it was within his right to make the changes. Associated decided to terminate Thompson for cause because under the employment contract Thompson signed there was a “Termination for Cause” paragraph. The paragraph stated “[t]he EMPLOYER may terminate this Agreement immediately for material violation of the EMPLOYER’S policies or material breach of the provisions of this Agreement, including specifically failing to perform his duties as required hereunder.” Thompson sued Association for wrongful termination. The trial court ruled Thompson did not commit a material violation of the employer’s policies or a material breach of the provisions of the employment agreement and Thompson’s actions were not dishonest but were intended to insure fair compensation for potato growers.

On appeal, the supreme court adopted the objective good-faith standard under which an employer is justified in terminating an employee for cause for fair and honest reasons, regulated by good faith on the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. An adequate investigation by an employer into an employee’s conduct may be satisfied by a variety of flexible procedures which afford employees a fair opportunity to present their position. The supreme court reversed the trial court’s ruling and remanded for further proceedings consistent with its holding.

**B. Status of Arbitration Clauses**

North Dakota has enacted the Uniform Arbitration Act. N.D. CENT. CODE ch. 32-29.3.

**V. ORAL AGREEMENTS**

In *Forster v. West Dakota Veterinary Clinic, Inc.*, 689 N.W.2d 366 (N.D. 2004), overruled on other grounds in *Minto Grain, LLC v. Tibert*, 776 N.W.2d 549 (N.D. 2009), the parties had a two-year employment agreement that expired and the employee claimed an oral agreement extended the written contract for an additional year. The employment contract required that any modifications be made in writing and signed by both parties. The court stated that a prior written contract requiring that any modifications be made in writing did not prohibit the parties from entering into a new oral agreement; however, the fact that there was no additional writing was further evidence that no oral contract to extend the employment relationship existed.

Fronteer asserted that the agreement was unenforceable because of the statute of frauds. However, disputes arose about the existence of the contract and its terms. Maley argued that the employment arrangement incorporated a written wage summary sheet, which they had referred to in their discussion. The court ruled that since contracts can be partly oral and partly written, the contract’s terms were a question of fact.

**A. Promissory Estoppel**

An employee alleging promissory estoppel is required to show: (1) a promise that the promissor should reasonably expect to cause a change of position by the promissee, (2) a substantial change in the promisee’s position through action or forbearance, (3) justifiable reliance on the promise, and (4) injustice which can only be avoided by enforcing the promise. *Dalan v. Paracelsus Healthcare Corp. of N. Dakota, Inc.*, 640 N.W.2d 726 (N.D. 2002).

In *Dalan v. Paracelsus Healthcare Corp. of North Dakota, Inc.*, 640 N.W.2d 726 (N.D. 2002), a physician failed to state claim of promissory estoppel against the hospital-employer for its alleged failure to pay him promised additional compensation, where physician continued to work for hospital, although he had the right to terminate the at-will employment contract.

**B. Fraud**

In North Dakota, fraud is classified as either “actual fraud” or “constructive fraud.” N.D. CENT. CODE § 9-03-07. Actual fraud is defined as:

[A]ny of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract:

1. The suggestion of fact of that which is not true by one who does not believe it to be true;

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true;

3. The suppression of that which is true by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or

5. Any other act fitted to deceive.
N.D. CENT. CODE § 9-03-08.

Constructive fraud consists of:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him; or

2. In any such act or omission as the law specially declares to be fraudulent without respect to actual fraud.

N.D. CENT. CODE § 9-03-09.

C. Statute of Frauds

North Dakota’s Statute of Frauds provides:

The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party’s agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof . . . .

N.D. CENT. CODE § 9-06-04.

In Fronteer Directory Co., Inc. v. Maley, 567 N.W.2d 826 (N.D. 1997), Gerald Maley discussed potential employment with Fronteer Personnel Service, a wholly owned subsidiary of his previous employer, Fronteer Directory. The parties reached an oral employment agreement.

Fronteer asserted that the agreement was unenforceable because of the statute of frauds. However, disputes arose about the existence of the contract and its terms. Maley argued that the employment arrangement incorporated a written wage summary sheet, which they had referred to in their discussion. The court ruled that since contracts can be partly oral and partly written, the contract’s terms were a question of fact.

VI. DEFAMATION

A. General Rule

1. Libel

North Dakota's libel statute provides:

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or
other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

N.D. CENT. CODE 14-02-03.

Allegedly defamatory matter communicated to a third party is a “publication,” which is required for libel to be actionable. Jose v. Norwest Bank N.D., N.A., 599 N.W.2d 293, 300 (N.D. 1999).

North Dakota courts have noted that falsity is an essential element of a libel claim. See Jose, 599 N.W.2d at 299; Eli v. Griggs County Hosp. & Nursing Home, 385 N.W.2d 99 (N.D. 1986); Meier v. Novak, 338 N.W.2d 631, 635 (N.D. 1983). Statements that are “technically true” on their face, however, may constitute civil libel if they use innuendo, insinuation, or sarcasm to convey an untrue and defamatory meaning. Schmitt v. MeritCare Health Sys., 834 N.W.2d 627, 632 (N.D. 2013). In determining whether words are libelous and actionable, the relevant words must be construed in the context of the entire document, and the sense or meaning of the document must be determined by construing the words according to the natural and ordinary meaning a reasonable person of ordinary intelligence would give them. Id. at 633. A communication is not libelous if the language used is not fairly susceptible of a defamatory meaning. Id.

2. Slander

North Dakota’s slander statute provides:

Slander is a false and unprivileged publication other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

2. Imputes to the person the present existence of an infectious, contagious, or loathsome disease;

3. Tends directly to injure the person in respect to the person’s office, profession, trade, or business, either by imputing to the person general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to the person’s office, profession, trade, or business that has a natural tendency to lessen its profits;

4. Imputes to the person impotence or want of chastity; or

5. By natural consequence causes actual damage.

N.D. CENT. CODE § 14-02-04.
Ordinarily, publication in a slander case is accomplished by communication of allegedly defamatory matter to a third party by spoken words, by transitory gestures, or by any form of communication other than such form as would make it a libel. *Gowin v. Hazen Mem’l Hosp.*, 311 N.W.2d 554, 558 (N.D. 1981). Again, falsity is a necessary element for a claim of slander. *Eli v. Griggs County Hosp. & Nursing Home*, 385 N.W.2d 99 (N.D. 1986).

**B. References**

A limited immunity for providing an employment reference is set forth in N.D. CENT. CODE § 34-02-18. It provides:

1. An employer, or an employer’s agent, who truthfully discloses date of employment, pay level, job description and duties, and wage history about a current or former employee to a prospective employer of the employee is immune from civil liability for the disclosure and the consequences of the disclosure of that information.

2. An employer, or an employer’s agent, who discloses information about a current or former employee’s job performance to a prospective employer of the employee is presumed to be acting in good faith. Unless lack of good faith is shown, the employer or employer’s agent is immune from civil liability for the disclosure and the consequences of providing that information. The presumption of good faith may be rebutted by a preponderance of the evidence that the information disclosed was:

   a. Knowingly false;
   
   b. Disclosed with reckless disregard for the truth;
   
   c. Deliberately misleading; or
   
   d. Rendered with malicious purpose.

3. The immunity provided by subsection 2 does not apply if the information provided is in violation of a nondisclosure agreement or was otherwise confidential according to applicable law.

In *Vanover v. Kansas City Life Insurance Co.*, 438 N.W.2d 524 (N.D. 1996), Kansas City Life’s general counsel sent a letter to Vanover’s current employer stating that Kansas City Life fired Vanover for cause. Vanover’s new employer terminated him shortly afterwards. Subsequently, Vanover sued Kansas City Life for defamation, alleging that Kansas City Life’s general counsel had made unprivileged and false statements when he stated Kansas City Life had terminated Vanover “for cause.” *Vanover*, 553 N.W.2d at 194. The trial court granted summary judgment for Kansas City Life. On remand, the jury found that Kansas City Life did defame
Vanover and awarded him $1,900,250 in damages with interest. The court modified the judgment and awarded Vanover $1,400,250 in damages.

The legislature passed a limited immunity law for references effective August 1, 1997. This law provides immunity for employers who act in good faith when disclosing information about a current or former employee's job performance. N.D. CENT. CODE § 34-02-18.

In Forster v. West Dakota Veterinary Clinic, Inc., 689 N.W.2d 366 (N.D. 2004), overruled on other grounds in Minto Grain, LLC v. Tibert, 776 N.W.2d 549 (N.D. 2009), the supreme court affirmed the district court’s ruling that the owner of a veterinarian clinic (former employer) was not entitled to a qualified privilege under N.D. CENT. CODE § 34-02-18. Even if a qualified privilege existed with respect to job references, the record showed that the owner was not requested by the prospective new employers to provide job references for former veterinarian employee.

C. Privileges

Under North Dakota law, a privileged communication is one made: (1) in the proper discharge of an official duty; (2) in any legislative or judicial proceeding, or in any other proceeding the law authorizes; (3) in a communication, without malice, to an interested person by one who also is interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or by one who is requested by the interested person to give the information; or (4) in a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof. N.D. CENT. CODE § 14-02-05.

1. Absolute Privilege

The Supreme Court of North Dakota has stated that subsections (1) and (2) above create an absolute privilege. The free exchange of information is so important that even defamatory statements made with actual malice are privileged. Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73, 78 (N.D. 1991).

In Rykowsky v. Dickinson Public School District No. 1, 508 N.W.2d 348 (N.D. 1993), someone at a school board meeting accused the superintendent of using the buses irresponsibly and wasting taxpayer money. The trial court concluded, and the Supreme Court affirmed, that the statements were privileged and therefore not actionable. The court stated that similar statutes recognized school board meetings as official proceedings authorized by law. Id. at 351. The communication, even if covered by the absolute privilege, must still be pertinent to be free of liability, however. Id.

2. Qualified Privileges

The Supreme Court of North Dakota considers subsections (3) and (4) to constitute a qualified privilege. A qualified privilege can be abused and does not provide absolute immunity from liability for defamation. See Soentgen, 508 N.W.2d at 78. The Supreme Court of North
Dakota uses a two-step analysis for qualified privilege adapted from Prosser & Keeton on Torts to determine (1) if the attending circumstances of communication occasion a qualified privilege, and (2) if so, whether the privilege was abused.

The court in Soentgen further delineated the court’s authority and the jury’s authority. Where the circumstances surrounding the communication are not in dispute, the court must determine whether a qualified privilege exists. However, whether that qualified privilege is abused is generally a question of fact for the jury. A qualified privilege is abused if statements are made with actual malice, without reasonable grounds for believing them to be true, and on a subject matter irrelevant to the common interest or duty. If the occasion is one of qualified privilege, actual malice is not inferred from the communication or publication, even if statements are slander per se. Id. at 79.

In Soentgen, the court found that statements made regarding the plaintiff’s alleged alcohol and drug dependencies were covered by qualified privilege and that the privilege was not abused. The court explained its ruling by stating that, generally, communications by an employer concerning the conduct of an employee are, when necessary to protect the employer's interests, qualifiedly privileged. Id.

D. Other Defenses

1. Truth

The essential element in a defamation claim is falsity of the communication. Consequently, truth is the best defense. In Eli v. Griggs County Hospital & Nursing Home, 385 N.W.2d 99 (N.D. 1980), the nursing home fired an employee for breach of confidentiality when she made inappropriate remarks about her supervisor and employer in general. Management placed a summary outlining the remarks and the misconduct in her personnel file. The plaintiff alleged that the summary was defamation. Because the summary was true, however, the court found the summary was not defamation.

2. No Publication

Allegedly defamatory matter communicated to a third party is a “publication,” which is required for libel or slander to be actionable. Jose v. Norwest Bank N.D., N.A., 599 N.W.2d 293, 300 (N.D. 1999).

3. Self-Publication

Former employees failed to present evidence to support a claim that they were compelled to self-publish employer's allegedly defamatory statements that they were terminated for “breach of trust” and “breach of the code of ethics”; one employee did not communicate alleged defamatory reasons for termination to prospective employers and other employee was hired by the prospective employer to whom disclosure was made, precluding claim that employee was damaged by the communication. Jose v. Norwest Bank N.D., N.A., 599 N.W.2d 293, 300 (N.D. 1999).
4. Invited Libel

No North Dakota case law exists on this topic.

5. Opinion

Under N.D. Const. art. I, § 4, every person “may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege.”

E. Blacklisting Statutes

Every person who maliciously interferes or hinders, in any way, any person from obtaining employment or from enjoying employment already obtained from any other person, is guilty of a class A misdemeanor. N.D. CENT. CODE § 34-01-06.

No employee may be denied the right to be a member of an organization of employees or be intimidated or coerced in a decision to communicate or affiliate with an organization. Public employees have the right to request payroll deduction of dues for membership in an organization of employees. N.D. CENT. CODE § 34-11.1-03.

F. Non-Disparagement Clauses

No North Dakota caselaw exists on this topic.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

The North Dakota Supreme Court recognizes a cause of action for the intentional infliction of emotional distress as set forth by the Restatement (Second) of Torts § 46 (1965). This claim requires proof of (1) extreme and outrageous conduct that is (2) intentional or reckless and that causes (3) severe emotional distress. Hysjulien v. Hill Top Home of Comfort, 827 N.W.2d 533 (N.D. 2013). The “extreme and outrageous” threshold is narrowly limited to conduct that exceeds “all possible bounds of decency” and which would arouse resentment against the actor and lead to an exclamation of “outrageous” by an average member of the community, which is a strenuously high standard. Id.

Whether the threshold of extreme and outrageous conduct has been met is a question of law for the court to decide. Botteicher v. Becker, 910 N.W.2d 861, 866 (N.D. 2018).

In Swenson v. Northern Crop Insurance, Inc., 498 N.W.2d 174 (N.D. 1993), Swenson, a former employee, sued Northern Crop Insurance. She alleged gender discrimination and intentional infliction of emotional distress. Swenson was undergoing treatment for alcoholism and emotional problems. She asserted that while she was Northern’s employee, her supervisor made derogatory and sexist comments and paid Swenson at a rate lower than that of her male counterparts. Swenson argued that her supervisor was aware that she was experiencing emotional problems because she requested additional time to attend Alcoholics Anonymous meetings.
Among Swenson’s claims against her employer was one alleging intentional infliction of emotional distress. Reviewing a dismissal of the claim on summary judgment, the court held that the gender biased behavior and comments could be considered extreme and outrageous and therefore actionable. Specifically important to the court’s ruling was the fact that the offending supervisor had knowledge of the plaintiff’s deteriorated mental condition. See also Hysjulien, 827 N.W.2d at 549 (holding the district court erred in granting summary judgment in favor of an employer because genuine issues of material fact existed as to whether the alleged sexual assault of the employee by the employer’s CEO was sufficiently extreme and outrageous as to result in liability, whether the conduct was sufficiently intentional or reckless, and whether it caused severe emotional distress).

B. Negligent Infliction of Emotional Distress


Chaplain, who was observed by department store employee while allegedly masturbating in an enclosed stall in the store’s public restroom, failed to raise a reasonable inference of bodily harm necessary for a claim for negligent infliction of emotional distress against store and employee; Chaplain cited no evidence to show his alleged shock, embarrassment, and depression was anything other than transitory phenomena. Hougum, 574 N.W.2d at 819; see also Hysjulien, v. Hill Top Home of Comfort, 827 N.W.2d 533, 550 (N.D. 2013) (holding an employee failed to present evidence that she suffered bodily harm as a result of allegedly being sexually assaulted by her employer’s CEO, as necessary to support claim for negligent infliction of emotional distress; the employee identified no evidence that her alleged symptoms, including anxiety, fear, frequent and severe headaches, short-temperedness, and diminished sex life, were anything other than transitory phenomena).

VIII. PRIVACY RIGHTS

A. Generally

In Hougum v. Valley Memorial Homes, 574 N.W.2d 812 (N.D. 1998), Hougum sued Valley Memorial Homes (VMH) after VMH terminated him following his arrest in a Sears store. A Sears employee briefly observed him masturbating in a rest room stall. Hougum sued VMH for breach of contract. He also sued Sears for invasion of privacy.

The Supreme Court of North Dakota first acknowledged that North Dakota had not recognized an invasion of privacy tort in North Dakota. However, without deciding whether such a claim exists, the court determined that Hougum had not stated a claim for invasion of privacy because the employee’s observation of him was inadvertent. The court affirmed summary judgment for VMH on the breach of contract claim.

B. New Hire Processing
1. Eligibility Verification & Reporting Procedures

There are no specific laws relating to employment eligibility verification in North Dakota.

However, the state department of human services maintains a directory of new hires. Generally, each employer is required to furnish to the directory of new hires a report that contains the name, address, and social security number of each employee newly hired for work within the state, the date of hire, whether the employer offers health insurance to the employee, and the employer's name and address and its IRS employer identification number. N.D. Cent. Code § 34-15-03. Each employer report must be made, to the extent practicable, on a W-4 form or an equivalent form prescribed by the state directory of new hires. Id. § 34-15-04. Information derived from employer reports is confidential, but it must be made available for use by certain state agencies to conduct those agencies’ duties. Id. § 34-15-08.

2. Background Checks

There are no North Dakota laws prohibiting an employer’s collection or use of arrest or conviction records.

C. Other Specific Issues

1. Workplace Searches

No North Dakota caselaw exists on this topic.

2. Electronic Monitoring

It is a Class B misdemeanor if an individual intrudes on or interferes with another’s privacy by surreptitiously gazing, staring or peeping into a tanning booth, hotel room, or other place where an individual has an expectation of privacy, with or without a device, to observe or record events. This law affects all employers with onsite restrooms, locker rooms, changing areas, and the like. N.D. Cent. Code § 12.1-31-14.

3. Social Media

No North Dakota statutes or caselaw exist on this topic.

4. Taping of Employees

A person is guilty of a class C felony if he (1) intentionally intercepts any wire or oral communication by use of any electronic, mechanical, or other device; or (2) intentionally discloses to any other person or intentionally uses the contents of any wire or oral communication, knowing that the information was obtained through the interception of a wire or oral communication. N.D. Cent. Code § 12.1-15-02.
It is a defense to prosecution that (1) the actor was authorized by law to intercept, disclose, or use, as the case may be, the wire or oral communication, (2) the actor was acting under color of law to intercept the communication and was a party to the communication or one of the parties to the communication had given prior consent to such interception, or (3) the actor was a party to the communication or one of the parties to the communication had given prior consent to such interception, and such communication was not intercepted for the purpose of committing a crime or other unlawful harm. *Id.*

5. Release of Personal Information on Employees

North Dakota open records laws provide that “personal information” on public employees is “exempt” information. N.D. CENT. CODE § 44-04-18.1. “Exempt” refers to a record that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity who receives an open records request. *Id.* § 44-04-17.1(5). “Personal information” includes a person's home address; home telephone number or personal cell phone number; photograph; medical information; motor vehicle operator’s identification number; public employee identification number; payroll deduction information; the name, address, telephone number, and date of birth of any dependent or emergency contact; any credit, debit, or electronic fund transfer card number; and any account number at a bank or other financial institution. *Id.* § 44-04-18.1.

6. Medical Information

Medical history obtained through an investigation as to the person’s medical history for the purpose of determining the person’s capability to perform the job must be collected and maintained separate from nonmedical information and must be kept confidential. N.D. CENT. CODE § 14-02.4-10(4).

IX. WORKPLACE SAFETY

A. Negligent Hiring

See *infra* Section IX.B.

B. Negligent Supervision/Retention

It is “negligent supervision” when the employer fails to exercise ordinary care in supervising the employment relationship, so as to prevent foreseeable misconduct of an employee from causing harm to other employees or third persons. *Koehler v. County of Grand Forks*, 658 N.W.2d 741, 749 (N.D. 2003); *Nelson v. Gillette*, 571 N.W.2d 332, 340 (N.D. 1997).

C. Interplay with Worker’s Comp. Bar

Under North Dakota’s Workers’ Compensation Act, if an employer contributes premiums to the Workers’ Compensation Fund to secure payment of compensation to his or her employees,
a worker injured in the course of his or her employment has no right of action against a contributing employer or any employee of such employer for personal injury damages. N.D. CENT. CODE ch. 65-01; Zimmerman by Zimmerman v. Valdak Corp., 570 N.W.2d 204, 206 (N.D. 1997). The sole exception to an employer’s immunity from civil liability is an action for an injury to an employee caused by an employer’s intentional act done with the conscious purpose of inflicting the injury. N.D. CENT. CODE § 65-01-01.1; see, e.g., Zimmerman, 570 N.W.2d at 209-10 (holding an employer did not intend to injure an employee when his arm was caught in a laundry machine because the employer had warned employees about the risk, employer had no previous OSHA violations, and no one had previously been injured while using the machine).

D. Firearms in the Workplace

No employer (public or private) may prohibit lawful possession of a firearm when the firearm is locked inside a vehicle in the employer’s parking lot, inquire about a firearm or search a private vehicle; take action against an employee in lawful possession of a firearm; condition employment on the fact that an employee or prospective employee holds a concealed weapons permit or any agreement restricting the lawful possession of weapons in a private vehicle during work hours; or terminate or discriminate against an employee for exercising the constitutional right to keep and bear arms or for exercising the right of self defense as long as a firearm is never exhibited on company property for any reason other than a lawful defensive purpose. N.D. CENT. CODE ch. 62.1-02.

E. Use of Mobile Devices

There are no specific laws on use of mobile devices in the workplace. However, any operator of a motor vehicle that is part of traffic, which may include an employee acting within the scope of employment, is prohibited from using a wireless communications device to compose, read, or send an electronic message. See N.D. CENT. CODE § 39-08-23.

X. TORT LIABILITY

A. Respondeat Superior Liability

Vicarious liability, or the doctrine of respondeat superior, refers to an employer being liable for tortious acts of its employees committed while they are acting within the scope of employment. Nelson v. Gillette, 571 N.W.2d 332, 334 (N.D. 1997).

B. Tortious Interference with Business/Contractual Relations

In Hennum v. Medina, 402 N.W.2d 327 (N.D. 1987), former city employee sued the city for breach of contract and sued the mayor for tortious contract interference and termination of employment without due process. The court held that whether the mayor acted in good faith and in the city’s best interests was relevant to the determination of tortious interference with contractual relations even though the mayor acted intentionally. The court identified four elements necessary to establish a claim for tortious interference with contractual relations:
(1) a contract existed;
(2) the contract was breached;
(3) the defendant instigated the breach; and
(4) the defendant did so without justification.

See also Hilton v. N.D. Educ. Ass’n, 655 N.W.2d 60 (N.D. 2002) (citing four elements necessary to establish a claim for tortious interference with contractual relations).

By contrast, a plaintiff asserting a claim for unlawful interference with business relations must prove:

(1) the existence of a valid business relationship or expectancy;
(2) knowledge by the interferer of the relationship or expectancy;
(3) an independently tortious or otherwise unlawful act of interference by the interferer;
(4) proof that the interference caused the harm sustained; and
(5) actual damages to the party whose relationship or expectancy was disrupted.

Service Oil, Inc. v. Gjestvang, 861 N.W.2d 490 (N.D. 2015); see Schmitt v. MeritCare Health Sys., 834 N.W.2d 627, 634 (N.D. 2013).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

North Dakota statutes prohibit contracts that restrict the free exercise of a lawful profession or a business. Any contract that restrains anyone from exercising a lawful profession, trade, or business of any kind is void. N.D. CENT. CODE § 9-08-06. An employer may not contract around this restriction via a forum selection clause. See Osborne v. Brown & Saenger, Inc., 904 N.W.2d 34, 38–39 (N.D. 2017) (“Simply put, one may not contract for application of another state’s law or forum if the natural result is to allow enforcement of a non-compete agreement in violation of North Dakota’s longstanding and strong public policy against non-compete agreements”).

In Spectrum Emergency Care v. St. Joseph’s Hospital & Health Center, 479 N.W.2d 848 (N.D. 1992), the court examined a restrictive covenant between doctors and a hospital. The contract specified that St. Joseph’s hired the physicians as independent contractors to work in the hospital’s emergency room. Following the contract’s expiration, the restrictive covenant said that the physicians could not work for a competing hospital until one year had past. The court held
that the non-compete provision was void as a violation of N.D. CENT. CODE § 9-08-06. Additionally, the court agreed that a person may negotiate and contract for future employment while under a contract that attempts to prohibit such conduct because the ability to do so is central to one's ability to exercise a lawful profession, trade, or business.

In *Warner & Co. v. Solberg*, 634 N.W.2d 65 (N.D. 2001), the North Dakota Supreme Court restated that the black letter of N.D. CENT. CODE § 9-08-06 prohibits any restraint on trade subject only to two exceptions. The two exceptions include:

1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part of either, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.

2. Partners, upon or in anticipation of a dissolution of the partnership, may agree that all or any number of them will not carry on a similar business within the same city where the partnership business has been transacted, or within a specified part thereof.

The court, in interpreting the goodwill exception, stated “the sale of only a small amount of stock may not be sufficient to qualify for the goodwill exception to N.D. CENT. CODE § 9-08-06.” The court determined that Solberg’s sale of 500 shares of Warner stock was not enough to qualify where the company consisted of 100,000 total shares.

The court further held N.D. CENT. CODE § 9-08-06 did not apply to a provision prohibiting Solberg from soliciting employees from Warner. The court felt that prohibiting Solberg from soliciting or seeking to influence any employee of Warner was narrowly drawn only to punish Solberg’s actions, which does not constitute a restraint on trade.

B. **Blue Penciling**

Not applicable to North Dakota law.

C. **Confidentiality Agreements**

In *SolarBee, Inc. v. Walker*, 833 N.W.2d 422 (N.D. 2013), the North Dakota Supreme Court upheld the district court’s determination that employees breached a proprietary information agreement entered into with their employer. The employees breached their agreements by exchanging emails with various other companies, some of them the employer’s competitors, which contained proposals to provide information to other companies regarding the employer’s proprietary information. The employees’ actions were all without the employer’s knowledge or consent. Due to the employees’ breach, they were responsible for damages to the employer.

D. **Trade Secrets Statute**
North Dakota follows the Uniform Trade Secrets Act. N.D. CENT. CODE ch. 47-25.1. A “trade secret” can constitute any form of “information, including a formula, pattern, compilation, program, device, method, technique, or process.” N.D. CENT. CODE § 47-25.1-01(4). The act of “misappropriation,” involves the acquisition, disclosure, or use of a trade secret through improper means, including by way of breach or inducement of a breach of a duty to maintain secrecy. Id. § 47-25.1-01(2).

E. Fiduciary Duty and their Considerations

There is no caselaw addressing this topic within North Dakota.

XI. DRUG TESTING LAWS

A. Public Employees

No North Dakota caselaw exists on this topic.

B. Private Employers

North Dakota does not have specific statutory provisions dealing with drug testing mechanics. The Supreme Court of North Dakota has held, in Stalcup v. Job Serv. N.D., 592 N.W.2d 549 (N.D. 1999), that failing a random drug test in violation of an employer’s drug policy is sufficient misconduct to deny an employee unemployment benefits. The North Dakota legislature also passed legislation that requires employers to pay for any medical examination that tests for the presence of drugs or alcohol. N.D. CENT. CODE § 34-01-15.

XII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

An employer is deemed to be “a person within the state who employs one or more employees for more than one quarter of the year and a person wherever situated who employs one or more employees whose services are to be partially or wholly performed in the state.” N.D. CENT. CODE § 14-02.4-02(8).

An employee is:

a person who performs services for an employer, who employs one or more individuals, for compensation, whether in the form of wages, salaries, commission, or otherwise. “Employee” does not include a person elected to public office in the state or political subdivision by the qualified voters thereof, or a person chosen by the officer to be on the officer’s political staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. Provided, “employee” does include a person subject to the civil service or merit system or civil service laws of the state government, governmental agency, or a political subdivision.
B. Types of Conduct Prohibited

N.D. CENT. CODE §§ 14-02.4-01 and 14-02.4-03, as part of the North Dakota Human Rights Act (NDHRA), prohibit discharging or discriminating against employees based on race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer’s premises during non-working hours which is not in direct conflict with the essential business-related interests of the employer.

The Act defines a discriminatory practice to include any act that results in the unequal treatment of persons, or denies, prevents, limits, or adversely affects the benefit or enjoyment by any person of employment because of the victim’s membership in one of the above-mentioned protected classes.

It is also a discriminatory practice to threaten or retaliate against an employee for filing a complaint, testifying, or otherwise assisting in filing a charge of discrimination because of one of the above-mentioned protected classes. N.D. CENT. CODE § 14-02.4-18.

An employer may not discharge an employee based on age. N.D. CENT. CODE § 34-01-17.

The North Dakota Supreme Court in Koehler v. County of Grand Forks, 658 N.W.2d 741 (N.D. 2003), a disability discrimination case, explained what a plaintiff needed to show to prove a prima facie case under the Act. *Id.* at 746. “To establish a prima facie case of discrimination a plaintiff must show (1) [he/she] was a member of a protected class under the Act; (2) [he/she] was satisfactorily performing the duties of his/her position; (3) [he/she] suffered an adverse employment decision; and (4) others not in the protected class were treated more favorably.” *Id.* (citing Anderson v. Meyer Broad. Co., 630 N.W.2d 46 (N.D. 2001)).

The court in Koehler further laid out the elements a plaintiff needs to prove to be successful in a failure-to-promote case. *Id.* “To establish a prima facie case a plaintiff must show: (1) that [he/she] was a member of a protected group; (2) that [he/she] was qualified and applied for a promotion to an available position; (3) that [he/she] was rejected; and (4) that a similarly qualified employee, not part of a protected group, was promoted instead. *Id.* (citing Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 1109 (8th Cir. 1998)).


In Schumacher, the trial court entered a judgment in favor of two former employees of the North Dakota Hospital Association and its wholly owned subsidiary, Hospital Services. The size of this verdict pushed these otherwise healthy organizations into Chapter 11 bankruptcy.
The Supreme Court of North Dakota reversed the judgments and sent the matter back to the trial court with instructions to admit certain crucial defense evidence. The Supreme Court also instructed the trial court to include in the jury instructions a statement that the employees were at-will employees. Before retrial, the parties settled the matter in mediation.

The court also noted that an employee could not prove the replacement element of a prima facie merely by showing that employer distributed the former employees' duties among younger employees. Nor could the jury base its finding of age discrimination solely on a determination that the employer paid former employees more than younger retained or replacement employees. The fact that the employer paid younger employees more may be admissible evidence, but the evidence is not sufficient to shift the burden of proof to the employer.

This ruling makes North Dakota’s discrimination law more akin to federal law in actual practice, making it more difficult for an employment discrimination plaintiff to prove his/her case.

An additional element of a successful age discrimination claim is proof that the employee was satisfactorily performing the duties of his position. See Hummel v. Mid Dakota Clinic, 526 N.W.2d 704 (N.D. 1995). Mid Dakota fired Hummel because he overpaid himself by $40,000 because he failed to deduct full automobile lease payments from his salary. The court held this was a justifiable reason for his dismissal and his action constituted failure to perform his employment duties satisfactorily.

However, an employee’s claim of age discrimination that relies solely on the assertion that the former employee was more than forty years old when the employee was terminated is insufficient to withstand summary judgment. See Jacob v. Nodak Mut. Ins. Co., 693 N.W.2d 604 (N.D. 2005); Spratt v. MDU Resources Group, Inc., 797 N.W.2d 328 (N.D. 2011) (age alone, without any other evidence, is insufficient to survive a motion for summary judgment in an age discrimination case).

The North Dakota Supreme Court has further declined to construe the North Dakota Human Rights Act “to preclude an entity from restructuring its business and altering employee job responsibilities,” even if the affected employee is over forty years old. In Yahna v. Altru Health Systems, 871 N.W.2d 580 (N.D. 2015), an employee was involved in a restructuring at Altru in the ultrasound department, which required her to take on-call responsibilities. She refused and was subsequently fired. She sued Altru, claiming age discrimination, but the North Dakota Supreme Court upheld the dismissal of her claim. Although the employee alleged she believed her job duties would not include on-call responsibilities, she did not produce any evidence that disputed she refused to do so, after being instructed by Altru.

Sexual harassment is also actionable under the Human Rights Act. To establish a prima facie case, a plaintiff must establish that (1) he/she was subjected to unwelcome sexual harassment, (2) the harassment was based on sex, (3) the harassment affected a term, condition, or privilege of employment, and (4) the employer knew or should have known of the harassment
and failed to take proper remedial action. *Opp v. Source Mgmt.*, 591 N.W.2d 101, 106 (N.D. 1999) (citing cases). To meet the third requirement, a plaintiff must show that the conduct was pervasive and objectively hostile or offensive. *Id.* at 107.

The Supreme Court of North Dakota has stated that isolated incidents of simple teasing, offhand comments, gender-related jokes, or vulgar language lack sufficient severity to alter the conditions of a victim’s employment and create a hostile work environment under the NDHRA. *Id.* On the other hand, the court found that verbal and physical actions constituted sexual harassment where an employee’s supervisor asked her to go down in the basement and fool around, asked her to go fishing and golfing without her husband, and touched her inappropriately on her leg. *Jones v. Meyer*, 605 N.W.2d 705 (N.D. 1999) (unpublished decision).

In *Esselman v. Job Service of North Dakota*, 548 N.W.2d 400 (N.D. 1996), a woman sought unemployment compensation after she voluntarily quit her job. She claimed that (non-sexual) harassment and incompatibility with her co-workers constituted good cause entitling her to quit. At trial, testimony indicated that Esselman herself played a role in the harassment, or that the harassment was reciprocal. The Supreme Court of North Dakota upheld the trial court decision because a reasonable person could have found that the plaintiff failed to prove that the employer’s actions gave her good cause to quit.

Similar to the ADA, the NDHRA prohibits an employer from discriminating against a person because of a physical or mental disability. N.D. CENT. CODE §§ 14-02.4-01 and 14-02.4-03. To assert a prima facie case of discrimination under the NDHRA, a plaintiff must show: (1) that he is “disabled”; (2) that he is an “otherwise qualified person” who can perform the essential functions of the position; and (3) that he was subject to an adverse employment action, such as termination or failure to hire or promote, because of his “disability.” *See Zimmerman v. Minot Pub. Sch. Dist. No. 1*, 574 N.W.2d 797, 799 (N.D. 1998).

Under the NDHRA, “[d]isability’ means a physical or mental impairment that substantially limits one or more major life activities, a record of impairment, or being regarded as having this impairment.” N.D. CENT. CODE § 14-02.4-02(3). Mere assertions of a disability are not adequate to make a claim for relief under the NDHRA. *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 796 (N.D. 1987).

Under North Dakota Law, an “otherwise qualified” person means “a person who is capable of performing the essential functions of the particular employment in question.” N.D. CENT. CODE § 14-02.4-02 (10). The Supreme Court of North Dakota has held that summary judgment may be appropriate when a claimant cannot show that he or she is "otherwise qualified." *Engel v. Montana Dakota Utils.*, 595 N.W.2d. 319 (N.D. 1999).

In *Engel*, the Supreme Court of North Dakota held an employee, who applied unsuccessfully for a dispatch position four times before his open heart surgery, was not otherwise qualified for the position following the surgery. Thus, he did not meet his prima facie burden of establishing the employer discriminated against him in violation of NDHRA when it failed to hire him for the position. *Engel*, 595 N.W.2d at 323.
Similar to the burden-shifting analysis employed under federal law, an employer may avoid liability under the NDHRA by proving that legitimate, nondiscriminatory reasons motivated its action. See Zimmerman, 574 N.W.2d at 797. In Zimmerman, the Supreme Court of North Dakota affirmed summary judgment for a school district that failed to hire a hearing-impaired physical education instructor. The court concluded that the school district stated a legitimate, nondiscriminatory reason for its action, based on the superior GPA and minor in physical education held by the successful applicant. Id. at 800.

To prove employment discrimination, the Supreme Court of North Dakota has held that an employee must establish that his or her work performance and behavior were satisfactory to the employer. Thompson v. Watford, 568 N.W.2d 736, 740 (N.D. 1997) (citing Schumacher, 528 N.W.2d at 378). In Thompson, the Supreme Court of North Dakota rejected a disability discrimination claim from a garbage collector after the city terminated him because of unacceptable behavior and poor job performance. The court concluded that Watford fired Thompson “for unacceptable job behavior, not his mental disability.” Id. In explaining its decision affirming summary judgment for the city, the court stated:

The evidence in this case proved Thompson had not been performing satisfactorily. He worked more slowly, walked off the job without permission, and tried to hit a co-worker. He went fishing when directed to return to the shop to “cool off,” and he rejected a meeting with his supervisor and the mayor about keeping his job despite these job failings. The trial court found Thompson’s job-related conduct gave the City legitimate and non-discriminatory reasons for his discharge. Id.

C. Administrative Requirements

Any person claiming to be aggrieved by any discriminatory practice other than public services or public accommodations in violation of the NDHRA may file a complaint of discriminatory practice with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed, in the district in which the records relevant to the practice are maintained and administered, or in the district in which the person would have worked were it not for the alleged discriminatory act within three hundred days of the alleged act of wrongdoing. N.D. CENT. CODE § 14-02.4-19(2). If the complaint is first filed with the Department of Labor, then the period of limitations for bringing an action in the district court is ninety days from the date the Department dismisses the complaint or issues a written probable cause determination. Id. § 14-02.4-19(3).

Certain types of employees may be required to exhaust other administrative remedies, as well. Long v. Samson, 568 N.W.2d 602 (N.D. 1997); see also Schuck v. Montefiore Pub. Sch. Dist. No. 1, 626 N.W.2d 698 (N.D. 2001). In Long, the University of North Dakota (UND) did not renew Long’s employment as a physiology professor. He claimed UND did not renew his contract because of his age. The court held that to make a contract-based claim, the plaintiff must exhaust all available administrative remedies. The exhaustion requirement eliminates or mitigates damages, recognizes the expertise of the organization’s quasi-judicial tribunal, and
promotes judicial efficiency for tort claims arising out of the termination of an employment relationship. *Id.* at 605.

In *Cooke v. University of North Dakota*, 603 N.W.2d 504 (N.D. 1999), Cooke sued UND when UND did not appoint her to the Director of Aerospace position. She claimed UND failed to appoint her because of her marriage status. The trial court dismissed her claim because she failed to satisfy N.D. CENT. CODE § 32-12.2-04(1), which mandates “a person bringing a claim against the state must give notice of the claim within 180 days after discovery of the alleged injury.” *Cook*, 603 N.W.2d at 505. The Supreme Court of North Dakota held that an employee must pursue available administrative remedies prior to suing for damages. The court found the requirements under N.D. CENT. CODE § 32-12.2-04(1) are consistent with the exhaustion requirement. The court may require a party to comply with both § 32-12.2-04(1) and any administrative remedies. *Id.* at 507.

D. Remedies Available

If the employer is determined to have engaged in a discriminatory practice, the department or the court may enjoin the employer from engaging in the unlawful practice and order temporary or permanent injunctions, equitable relief, and backpay limited to no more than two years from the date a minimally sufficient complaint was filed with the department or the court. Neither the department nor an administrative hearing officer may order compensatory or punitive damages. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against reduce the backpay otherwise allowable. In any action or proceeding under this chapter, the court may grant the prevailing party a reasonable attorney’s fee as part of the costs. If the court finds that the allegation of a discriminatory practice is false and not made in good faith, the court shall order the complainant to pay court costs and reasonable attorney's fees incurred by the employer in responding to the allegation. N.D. CENT. CODE § 14-02.4-20.

XIII. STATE LEAVE LAW

A. Jury/Witness Duty

Under N.D. CENT. CODE § 27-09.1-17, it is a misdemeanor to discharge an employee for serving on jury duty or giving testimony pursuant to a subpoena.

B. Voting

Under North Dakota law, an employer is encouraged to establish a policy granting employees time to vote during work hours if the employee cannot vote during non-work hours, but it is not required. N.D. CENT. CODE § 16.1-01-02.1.

C. Family/Medical Leave

A state employee may take not more than four hundred eighty hours of leave to care for a parent, spouse, or child with a serious health condition under state leave law in any twelve-month period. N.D. CENT. CODE § 54-52.4-03. The state shall compensate the employee for
leave used by the employee under this section on the same basis as the employee would be compensated if the leave had been taken due to the employee's own illness. *Id.*

D. Pregnancy/Maternity/Paternity Leave

A state employee may be granted family leave of absence to care for the employee’s child by birth, if the leave concludes within twelve months of the child’s birth. N.D. Cent. Code § 54-52.4-02. This leave may not be more than twelve workweeks. *Id.* The leave further need not be granted with pay unless otherwise specified by agreement between the employer and employee, by collective bargaining agreement, or by employer policy. *Id.*

E. Day of Rest Statutes

An employer may not require an employee to work seven consecutive days in a business that sells merchandise at retail. An employer may not deny an employee at least one period of twenty-four consecutive hours of time off for rest or worship in each seven-day period. N.D. Cent. Code § 34-06-05.1.

F. Military Leave

In general, officers and employees of state or political subdivisions in the national guard or federal service are entitled to a leave of absence for military service. See N.D. Cent. Code § 37-01-25.

G. Sick Leave

Sick leave must be provided for state employees in accordance with N.D. Cent. Code § 54-06-14. State employers that provide leave for its employees’ illnesses or other medical reasons must also grant an employee leave to care for the employee’s child, spouse, or parent if that person has a serious health condition. N.D. Cent. Code § 54-52.4-03. An employee may take 480 hours of leave under this section in any twelve-month period. *Id.* The employer must further compensate the employee for leave used under § 54-52.4-03 on the same basis as the employee would be compensated if the leave had been taken due to the employee’s own illness.

Private employers are not required to provide sick leave to its employees.

H. Domestic Violence Leave

State employers must grant an employee’s request to use sick leave to obtain services or assist immediate family members to obtain services relating to domestic violence, sex offense, stalking, or terrorizing situations. N.D. Cent. Code § 54-06-14.6. Immediate family member includes spouse, parent, child, or sibling. *Id.* There is no similar right provided to private employees.

I. Other Leave Laws
Vacation Leave. While an employer is not required to provide its employees with vacation benefits, an employer may cap the vacation leave an employee can accrue over time and may implement a “use-it-or-lose-it” policy, provided that the employee is given a reasonable opportunity to take the vacation. See N.D. ADMIN. CODE § 46-02-07.

Holiday Leave. North Dakota does not require private employers to provide employees with either paid or unpaid holiday leave nor does a private employer have to pay an employee premium pay for working holidays.

Bereavement Leave. North Dakota does not require employers to provide employees with bereavement leave.

XIV. STATE WAGE AND HOUR LAWS

A. Minimum Wage

The current minimum wage in the state is $7.25. N.D. CENT. CODE § 34-06-22.

B. Deductions from Pay

Except for amounts that are required under state or federal law to be withheld from employee compensation or where a court has ordered the employer to withhold compensation, an employer only may withhold from the compensation due employees:

1. Advances paid to employees, other than undocumented cash.
2. A recurring deduction authorized in writing.
3. A nonrecurring deduction authorized in writing, when the source of the deduction is cited specifically.
4. A nonrecurring deduction for damage, breakage, shortage, or negligence must be authorized by the employee at the time of the deduction.

N.D. CENT. CODE § 34-14-04.1.

C. Overtime rules

Overtime pay must be paid at one and one-half times the employee’s regular rate of pay for hours worked over forty in any work week. N.D. ADMIN. CODE § 46-02-07-02(4). A work week is a seven consecutive-day period defined by the employer. *Id.* Overtime is computed on a weekly basis, regardless of the length of the pay period. *Id.*

Overtime is based only on hours worked. Paid holidays, paid time off, or sick leave need not be counted in computing overtime hours. *Id.* No private employer may “bank” overtime
hours to use for time off in another week. *Id.* Employees working more than one job under the control of the same employer must have all hours worked counted toward overtime. *Id.*

D. **Time for Payment Upon Termination**

Whenever an employee is discharged or terminated from employment by an employer or separates from employment voluntarily, the employee’s unpaid wages or compensation becomes due and payable at the regular paydays established in advance by the employer for the periods worked by the employee. N.D. CENT. CODE § 34-14-03.

E. **Breaks and Meal Periods**

Employers must provide employees with at least a thirty-minute meal break for each shift exceeding five hours when two or more employees are on duty. N.D. ADMIN. CODE § 46-02-07-02(5). This meal period may be unpaid unless the employees are not completely relieved of their work duties. Employees may also waive their right to a meal break. *Id.*

F. **Employee Scheduling Laws**

North Dakota does not have any scheduling laws beyond its day of rest laws. See *supra* XIII. E.

**XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

A. **Smoking in Workplace**

Smoking is prohibited in all enclosed areas of places of employment, as well as twenty feet from all entrances, exits, operable windows, air intakes, and ventilation systems of enclosed areas in which smoking is prohibited. “Places of employment” is defined as an area under the control of a public or private employer, including work areas, auditoriums, classrooms, conference rooms, elevators, employee cafeterias, employee lounges, hallways, meeting rooms, private offices, restrooms, temporary offices, vehicles, and stairs. N.D. CENT. CODE § 23-12-10.

B. **Health Benefit Mandates for Employers**

There are no state-specific laws addressing this topic in North Dakota.

C. **Immigration Laws**

No North Dakota statutes address this topic.

D. **Right to Work Laws**

The right to work may not be abridged by membership or nonmembership in a labor union. In North Dakota, no employee may be compelled to join a union, even in a workplace in
which the workforce or a part thereof is represented by a union and covered by a collective bargaining agreement. N.D. CENT. CODE § 34-01-14.

E. Lawful Off-Duty Conduct

North Dakota prohibits discrimination on the basis of employee’s or applicant’s participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer. N.D. CENT. CODE § 14-02.4-03. An employee is not protected under this statute if he drives a company vehicle with a blood alcohol level above a .04 limit imposed by the employer’s company policies, though state law prohibits a level of .08 or above, as the employee’s actions conflict with the essential business-related interests of the employer. Clausnitzer v. Tesoro Refining & Mktg. Co., 820 N.W.2d 665, 668 (N.D. 2012).

In November 2016, a citizen-initiated measure called the North Dakota Compassionate Care Act passed, legalizing medical marijuana. See N.D. CENT. CODE ch. 19-24. Recreational use has not been legalized. N.D. CENT. CODE ch. 19-03.1. The Compassionate Care Act, however, does not provide any additional protections to employees for use or being under the influence of medical marijuana in the workplace.

F. Gender/Transgender Expression

North Dakota has no statutes relating to gender/transgender expression.

G. Other Key State Statutes

1. An employer may not discharge an employee for refusing to participate in an abortion. N.D. CENT. CODE § 23-16-14.

2. A person who discovers images of child sexual activity on a workplace computer and suspects or knows a child is being abused or neglected must report the circumstances to the North Dakota Department of Human Services or its designee. N.D. CENT. CODE § 50-25.1-03(3).

3. If an employee separates from employment voluntarily, a private employer may withhold payment for accrued paid time off if (1) at the time of hiring, the employer provided the employee written notice of the limitation on payment of accrued paid time off; (2) the employee has been employed by the employer for less than one year; and (3) the employee gave the employer less than five days’ written or verbal notice. N.D. CENT. CODE § 34-14-09.2. If an employee separates from employment, a private employer may also withhold payment for paid time off if (1) the paid time off was awarded by the employer but not yet earned by the employee; and (2) before awarding the paid time off, the employer provided the employee written notice of the limitation on payment of awarded paid time off. Id.