

NORTH CAROLINA

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I. AT-WILL EMPLOYMENT

“In North Carolina, the employer-employee relationship is governed by the at-will employment doctrine, which states that ‘in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party.’” Whitings v. Wolfson Casing Corp., 618 S.E.2d 750, 752, 173 N.C. App. 218, 221 (2005) (quoting Kurtzman v. Applied Analytical Industries, Inc., 493 S.E.2d 420, 422, 347 N.C. 329, 331 (1997)).

A. Statute

The at-will employment doctrine in North Carolina was created judicially and not by statute. See Smith v. Ford Motor Co., 221 S.E.2d 282, 289 N.C. 71 (1976) (holding that where an employment contract does not fix a definite term, it is terminable by the will of either party, with or without cause, except in those instances in which the employee is protected by statute).

B. Case Law

North Carolina courts have repeatedly held that absent some form of contractual agreement between an employer and employee establishing a definite period of employment, the employment relationship is terminable at the will of either party. See Whitings, 618 S.E.2d 750; see also Sheafer v. County of Chatham, 337 F.Supp.2d 709 (2004); Disher v. Weaver, 308 F.Supp.2d 614 (2004); Brewer v. Jefferson-Pilot Standard Life Ins. Co., 333 F.Supp.2d 433 (2004).

If there is no definite period of employment stated in a contract, “just cause” is not required to discharge an employee. Guarascio v. New Hanover Health Network, Inc., 592 S.E.2d 612, 163 N.C. App. 160 (2004). Further, there is no requirement that the discharge of the employee be in “good faith,” as there is no “bad faith exception” to the employment at will doctrine. Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 331 N.C. 348 (1992). In Tompkins v. Allen, 421 S.E.2d 176, 107 N.C. App. 620 (1992), the court rejected a wrongful discharge claim in which the employee claimed that records had been altered in bad faith to justify discharge, because he could have been discharged for no reason.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In Walker v. Westinghouse Electric Corp., 335 S.E.2d 79, 77 N.C. App. 253 (1985), the court stated that “unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it.” See also Rosby v. The Gen. Baptist State Convention, 370 S.E.2d 605, 91 N.C. App. 77 (1988).

The only North Carolina case that has upheld a breach of contract claim based on an employee manual is Trought v. Richardson, 338 S.E.2d 617, 78 N.C. App. 758 (1986). In Trought, Plaintiff successfully overcame a motion to dismiss for failure to state a claim by showing that when she was hired, she was required to sign a statement that she had read the employer’s policy manual which provided that she could only be discharged for cause after certain procedures were followed. Trought at 619, 78 N.C. App. at 762. The court held that this evidence allowed Plaintiff’s claim for breach of employment contract, which allegedly included the manual, to proceed to trial. Id. at 620, 78 N.C. App. at 762. The lack of cases wherein a breach of contract claim has been upheld based on an employee manual is due to the North Carolina Supreme Court limiting “the rule in Trought to its narrow facts.” Harris v. Duke Power Co., 356 S.E.2d 357, 319 N.C. 627 (1987), overruled on other grounds, Kurtzman v. Applied Analytical Industries, Inc., 493 S.E.2d 420, 347 N.C. 329 (1997). In Harris, the court held that a plaintiff is required to prove that an employer’s procedure manual expressly represented that an employee could be discharged only for cause in order to survive a motion to dismiss. Id.

2. Provisions Regarding Fair Treatment

Historically, North Carolina courts have made it very difficult for oral statements regarding employment to overcome the presumption of at-will employment. Kurtzman v. Applied Analytical Industries Inc., 493 S.E.2d 420, 347 N.C. 329 (1997). In Kurtzman, the court gave examples of insufficient oral statements, including: “if you do your job, you’ll have a job;” “this is a long-term growth opportunity for you;” “this is a secure position;” and “we’re offering you a career position.” Id. at 421-22, 347 N.C. at 330-31. The court held that the combination of these assurances with the reliance by the Plaintiff employee in moving his residence to a new location was not adequate to overcome the at will presumption.

In Lockett v. Sister-2-Sister Solutions, Inc., 704 S.E.2d 299 (2011), defendant contracted with the plaintiff that he would “not be dismissed from [the company] unless [his] contract has been broken, or [for] not fulfilling his duty” The court construed Kurtzman, to mean that “an employment relationship that can be terminated by the employer only for cause would succeed in removing an employment contract from the presumption of at-will employment.”

3. Disclaimers

In Katsifos v. Pulte Home Corp., 592 S.E.2d 620, 163 N.C. App. 204 (2004), Plaintiff’s claim was premised upon a provision of the employee handbook, which the employer contended could not form the basis of a contract. The disclaimer the Defendant used to support this contention stated that nothing in the

handbook was intended to create an employment agreement. The court noted that under North Carolina law, employment handbooks and policies do not form or become part of an employment contract unless expressly stated to do so. See also Wen Chouh Lin v. Brodhead, No. 1:09CV882, 2012 WL 4793710, (M.D.N.C. Oct. 9, 2012).

4. Implied Covenants of Good Faith and Fair Dealing

North Carolina does not recognize a cause of action for wrongful discharge based on bad faith. Amos v. Oakdale Knitting Co., 331 N.C. at 350, 416 S.E. 2d 167 (1992). See also Horne v. Cumberland County Hosp. Sys., 2013 WL 3305378.

There may still be a few situations where “additional consideration” is sufficient to take a situation out of the employment at-will rule. For instance, older cases have held that where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer or assisting in breaking a strike, such a contract may be enforced. See discussion and cases cited in Sides v. Duke Hosp., 328 S.E.2d 818, 828, 74 N.C. App. 331, 345 (1985) (Kurtzman and other cases effectively overruled Sides on many points).

B. Public Policy Exceptions

1. General

Public policy exceptions to the at-will employment doctrine are sometimes based upon the North Carolina Equal Employment Practices Act, N.C. Gen. Stat. §§ 143-422.1 - 422.3 which states that it is the “public policy” of the state to protect employees from discrimination on account of “race, religion, color, national origin, age, sex, or handicap.” Id. § 143-422.2. Courts generally find that this statute is a basis for a wrongful discharge claim even though there is great overlap with Title VII and even though no cause of action or procedure is expressly created in the State statute.

The North Carolina Supreme Court in Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 325 N.C. 172 (1989), defined “public policy” as the principle of law that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.” Id. at 447, 325 N.C. at 175. Exceptions to the at-will doctrine should be adopted only with substantial justification grounded in compelling considerations of public policy. Id.; see also Amos, 416 S.E.2d 166. In Amos, the court held that the availability of alternative remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharged based on the public policy exception “absent federal preemption or the intent of the state legislature to supplant the common law with exclusive statutory remedies.” Amos at 171, 331 N.C. at 355. In Garner v. Rentenbach Contractors, Inc., 515 S.E.2d 438, 350 N.C. 567 (1999), the court found that more than a technical statutory violation is required and implies that the employer must have acted with some unlawful reason or purpose that contravenes public policy. In Kurtzman, the court observed that exceptions to employment at will have been grounded narrowly in considerations of public policy designed either to prohibit status based discrimination or to ensure the integrity of the judicial process or the enforcement of the law. Kurtzman at 423, 347 N.C. at 334.

“While there is not a specific list of what actions constitute a violation of public policy, the exception has applied where the employee is fired ‘(1) for refusing to violate the law at the employer’s request, (2)

for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy.” Tarrant v. Freeway Foods of Greensboro, Inc., 593 S.E.2d 808, 811, 163 N.C. App. 504, 508 (2004) (quoting Brackett v. SGL Carbon Corp., 580 S.E.2d 757, 761, 158 N.C.App. 252, 259 (2003)). As will be discussed below, there are numerous public policy cases in North Carolina, but the courts have not provided a coherent definition of what constitutes public policy in the employment context. Therefore, it can be difficult to pigeonhole the cases into categories because the cases are fact dependent.

2. Engaging in Legally Protected Activity

“Although the definition of ‘public policy’ approved by the court did not include a laundry list of what is or is not ‘injurious to the public or against the public good,’ the court stated that at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.” Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 169, 331 N.C. 348, 352 (1992). This was so even though there was a separate statute with remedies prohibiting the same conduct. Id. In Amos, Plaintiffs learned that their pay was being reduced to a level below the minimum wage and were told that they either had to work for the lower pay or look for new employment. Plaintiffs were terminated and filed suit alleging wrongful discharge in violation of public policy. The court held that firing an employee for refusing to work for wages less than those statutorily mandated is unlawful.

In Lenzer v. Flaherty, 418 S.E.2d 276, 106 N.C. App. 496 (1992), the court held that public policy is violated when a governmental employee is discharged in contravention of rights guaranteed in the state constitution, such as freedom of speech. However, in the private employment context an employee who wanted to display a Confederate flag on his tool box was not protected. Johnson v. Mayo Yarns, Inc., 484 S.E.2d 840, 126 N.C. App. 292 (1997).

Not every statutory violation gives rise to a public policy wrongful discharge claim. Where an employer violates the drug testing statutes by failing to use an approved laboratory to conduct drug testing, there is no actionable claim for wrongful discharge under a public policy exception to the doctrine of employment at will. Garner v. Rentenbach Constructors, Inc., 515 S.E.2d 438, 350 N.C. 567 (1999). In Garner, there was no showing that, at the time of the employee’s testing, the employer knew or even suspected that the laboratory did not qualify as an approved laboratory, or that the discharge of the employee based upon positive drug testing was for an unlawful reason or purpose that contravened public policy.

In Imes v. City of Asheville, 594 S.E.2d 397, 163 N.C. App. 668 (2004), an at-will employee was terminated after he was hospitalized for serious injuries sustained after his wife shot him. Plaintiff alleged that his supervisor informed him that he was being terminated due to being a victim of domestic violence. The court held that although Chapter 50B of the North Carolina General Statutes contains various protections for victims of domestic violence, it does not establish victims of domestic violence as a protected class of persons. Although it was agreed that domestic violence is a serious problem, the court found that it did not rise to the level of an exception to at-will employment under the public policy exception.

A violation of the Family and Medical Leave Act (FMLA) does not create a public policy exception to at-will employment. Brewer v. Jefferson-Pilot Life Ins. Co., 333 F.Supp.2d 433 (M.D.N.C. 2004). The employee in Brewer was terminated for dishonesty and insubordination in producing the required medical

certification forms to her employer to authorize her medical leave. The court held that a violation of the FMLA did not rise to the level of a public policy concern sufficient to invoke the public policy exception to employment at-will.

3. Refusing to Violate the Law

In Coman, 381 S.E.2d 445, a long-distance truck driver was required by his employer to violate the United States Department of Transportation regulations by driving for periods of time in excess of that allowed. He was also instructed to falsify the records to indicate compliance with the regulations and was told that if he did not drive the excess hours, he would lose his job. When he refused to violate the regulations, his pay was reduced by fifty percent which, in effect, constituted a discharge.

The employee filed suit claiming that his discharge violated a public policy exception to the at-will employment rule. The Supreme Court of North Carolina, citing language from the earlier Sides decision, 328 S.E.2d 818, found that a cause of action existed:

[W]hile there may be rights to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Id. at 826, 74 N.C. App. at 342.

In Roberts v. First Citizens' Bank and Trust Co., 478 S.E.2d 809, 124 N.C. App. 713 (1996), a bank employee was fired for disobeying a supervisor's instructions to foreclose on a customer's certificate of deposit without prior notice. After a lengthy discussion of detailed Uniform Commercial Code provisions, the court concluded that North Carolina "public policy" required the debtor to be given notice prior to foreclosure on collateral. The court then held that firing the employee for refusal to foreclose without notice was a discharge in contravention of public policy. The employee obtained a large jury award.

An employee may not be discharged for refusing to perjure himself, Sides, 328 S.E.2d 818, or for having testified truthfully, Williams v. Hillhaven Corp., 370 S.E.2d 423, 91 N.C. App. 35 (1988). These cases should be distinguished from Daniel v. Carolina Sunrock Corp., 436 S.E.2d 835, 335 N.C. 233 (1993), which held that the public policy exception to the employment at-will doctrine does not apply to an employee who was discharged for expressing her willingness to testify honestly about her employer, when she was never called upon to do so. Further, in Rush v. Living Centers – Southeast Inc., 521 S.E.2d 145, 135 N.C. App. 509 (1999), an employee was asked by her employer to testify regarding a dispute over an unpaid account. The employee refused to do so, claiming that lack of preparation time might have caused her to perjure herself. However, there was no evidence that the employer requested the employee to testify untruthfully. Thus, the court found that the termination did not violate public policy. See Section XII, "State Anti-Discrimination Statute(s)," for a discussion on the protections covering employees who are asked to testify in various proceedings such as OSHA and workers compensation.

In Deerman v. Beverly California Corp., 518 S.E.2d 804, 135 N.C. App. 1 (1999), the court found that an employee could bring a claim for wrongful discharge in violation of public policy where she was

discharged for complying with fairly nebulous state-mandated requirements for her profession. Plaintiff, who was employed by a nursing home as a registered nurse, alleged that she had been fired for advising a patient's family to reconsider its choice of physicians and for questioning the treating physician's care. Plaintiff maintained that her actions constituted assessing the patient's health, providing accurate guidance to the patient's family, and counseling and teaching the patient and his family, all of which are required of nurses by state nursing statutes and regulations. The court deemed these allegations sufficient to state a claim for wrongful discharge in violation of public policy.

4. Exposing Illegal Activity (Whistleblowers)

The Court of Appeals has afforded whistleblower protection to public employees who bring suit alleging sexual harassment, retaliation after cooperating in investigations regarding misconduct by their supervisors, police misconduct, and misappropriation of governmental resources. Hodge v. N.C. Dept. of Transp., 622 S.E.2d 702, 706, 175 N.C. App. 110, 116-17 (2005). "The North Carolina Whistleblower Act, requires a Plaintiff to prove the following elements in order to establish a *prima facie* case: "(1) that the Plaintiff engaged in a protected activity, (2) that the Defendant took adverse action against the Plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the Plaintiff." Newberne v. Department of Crime Control and Public Safety, 618 S.E.2d 201, 206, 359 N.C. 782, 788 (2005); see also N.C. Gen. Stat. § 126-84. However, to be protected under the Whistleblower Act, the activity must "constitute a report about matters affecting general public policy." Holt v. Albemarle Regional Health Services Bd., 655 S.E.2d 729, 732 (N.C. App. 2008).

In Newberne, a highway trooper was discharged for providing information concerning another officer's use of force during an arrest. Newberne at 205, 359 N.C. at 786. The Supreme Court found that the trooper stated a claim for relief under N.C. Gen. Stat. § 126-84(a), and the doctrine of administrative exhaustion did not prevent the trooper from filing the whistleblower claim in the superior court under N.C. Gen. Stat. § 126-86. Therefore, the decision was reversed, and the case was remanded for consideration of the officer's remaining assignment of error. Newberne at 210, 359 N.C. at 795.

Additionally, in Brookshire v. N.C. Dept. of Transp., Div. of Motor Vehicles, 637 S.E.2d 902, 180 N.C. App. 670 (2006), a former employee brought action against the Department of Transportation, Division of Motor Vehicles (DMV) and Department of Crime Control and Public Safety, alleging that he was terminated in violation of whistleblower statute when he cooperated with the State Bureau of Investigation's (SBI) investigation into corruption in the Division of Motor Vehicles. The denial of Defendants' motion for directed verdict was affirmed. Id. at 905, 180 N.C. App. at 674.

In Gibbons v. Sells, 2010 WL 4695516 (E.D.N.C.), the Plaintiff, a landscape architect, sued his employer on the grounds of wrongful retaliatory discharge in violation of public policy, claiming that he was fired in retaliation for lodging complaints against his employer for violating the licensing statutes. Because the Plaintiff specifically pled that he was engaged in an activity protected under the public policy exception, the court denied the Defendant's motion to dismiss.

In contrast, in Hines v. Yates, 614 S.E.2d 385, 171 N.C. App. 150 (2005), a former investigative assistant at the district attorney's office claimed he was wrongfully discharged after he ran against and lost to the incumbent in the local sheriff's election. The Plaintiff made derogatory statements about a deputy and the district attorney. Id. at 390, 171 N.C. App. at 150. The court held that Plaintiff's critical statements

and the disruption of the working relationship with the law enforcement agencies were sufficient reasons to terminate Plaintiff's at-will employment. Id. at 393, 171 N.C. App. at 163. Further, "Plaintiff's termination was not injurious to the public or 'against the public good.'" Id.

In Whitings v. Wolfson Casing Corp., 618 S.E.2d 750, 173 N.C. App. 218 (2005), the Defendant refused to pay the Plaintiff's disability benefits arising from her lost time from work. However, the Plaintiff failed to allege that she had filed a workers' compensation claim and demand relief on that basis. Consequently, the court concluded that the Plaintiff failed to plead that she was engaged in a legally protected activity, and the public policy exception to the at-will employment doctrine was confined to the express statements contained within the General Statutes or the Constitution.

In contrast, in Fatta v. M&M Props. Mgmt., 727 S.E.2d 595 (2012), the court affirmed the trial court's grant of summary judgment after finding that although the Plaintiff had established a *prima facie* case under REDA, he failed to overcome the employer's evidence that it was his poor job performance that led to his termination.

5. Statute of Limitations

The North Carolina General Assembly recently changed the statute of limitations for claims of wrongful discharge under N.C. Gen. Stat. § 143-422.2 from three years to one. See N.C. Gen. Stat. § 1-54(12).

III. CONSTRUCTIVE DISCHARGE

"Constructive discharge is recognized as grounds for jurisdiction over an employee's claim where an employee alleges his or her choices are limited to working under conditions in violation of the law or be deemed to have resigned." Corbett v. N.C. Div. of Motor Vehicles, 660 S.E.2d 233, 237 (2008). "Although evidence of retaliation in a case . . . may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." Venable v. Vernon, 592 S.E.2d 256, 259, 162 N.C. App. 702, 706 (2004) (quoting Lenzer at 284, 106 N.C. App. at 510). If causation is merely speculation then "it is insufficient to present a question of causation to the jury." Venable at 259, 162 N.C. App. at 707 (quoting Ellington v. Hester, 487 S.E.2d 843, 845, 127 N.C. App. 172, 175 (1997)).

In Wagoner v. Elkin City Schools Board of Education, 440 S.E.2d 119, 113 N.C. App. 579 (1994), the court stated that constructive wrongful discharge arises only in the context of employees-at-will. Breach of contract is the proper claim for a wrongfully discharged employee who is employed for a definite term or an employee subject to discharge only for "just cause." In Whitt v. Harris Teeter, Inc., 614 S.E.2d 531, 359 N.C. 625 (2005), the North Carolina Supreme Court, through its adoption of a dissenting opinion in a Court of Appeals case, held that North Carolina did not recognize a claim for wrongful discharge in violation of public policy based on hostile work environment or retaliation where the termination was a constructive termination. Id.; see also Efird v. Riley, 342 F. Supp. 2d 413 (M.D.N.C. 2004).

In Corbett, Plaintiff presented evidence showing that as an African-American, he was treated differently while running as a candidate for a political office at his workplace. Corbett at 239. Plaintiff alleged he was forced to either withdraw from his campaign or resign from his position while his Caucasian

counterparts were treated differently. Id. at 236. Accordingly, the court held that the “petitioner met his ultimate burden in establishing . . . that his resignation was the result of racial discrimination.” Id. at 239.

In Coman, 381 S.E.2d 445, a fifty percent reduction in pay amounted to a constructive discharge. In Graham v. Hardee’s Food Systems, 465 S.E.2d 558, 121 N.C. App. 382 (1996), the Court of Appeals, while not formally approving the concept of constructive discharge, stated that to prove constructive discharge “the plaintiff ‘must demonstrate that the employer deliberately made working conditions intolerable and thereby forced [the employee] to quit.’” Graham at 560, 121 N.C. App. at 385 (quoting EEOC v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992)). Additionally, the Plaintiff would have to prove discharge was in contravention of North Carolina public policy or statute.

In Littell v. Diversified Clinical Servs., 2013 WL 1951912, the court explained that the majority of both North Carolina courts and federal district courts have not recognized a claim of wrongful discharge in violation of public policy where termination is constructive.

IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

Parties are free to place whatever termination provisions they agree upon in an employment contract. In McKnight v. Simpson’s Beauty Supply, Inc., 358 S.E.2d 107, 86 N.C. App. 451 (1987), the court held that an employment contract by which employee agreed to perform duties to the reasonable satisfaction of employer did not require employee to satisfy employer’s unreasonable demands. Id. at 108, 86 N.C. App. at 452-53. The employer could terminate the employee only if dissatisfaction with employee was reasonable. Id. at 109, 86 N.C. App. at 453; see also Dalton v. Camp,

Where the employment contract is silent as to grounds for termination, there is an implied condition that the contract can be terminated at any time “for cause.” Wilson v. McClenny, 136 S.E.2d 569, 262 N.C. 121 (1964). Termination “for cause” is an affirmative defense; therefore, the employer raising the defense generally bears the burden of proof, as with other affirmative defenses. Id.

While the parties can agree to a different standard for termination than that implied by law, the implied “for cause” standard means that the employee must perform his duties “with reasonable care, diligence and attention.” Id. at 577, 262 N.C. at 131. For instance, the use of alcohol on the job would constitute sufficient cause if it “interfered with the proper discharge of his duties.” Id.

In Haynes v. Winston-Salem Southbound Railroad Co., 113 S.E.2d 906, 252 N.C. 391 (1960), the court stated that contracts of employment could be terminated by insanity, sickness, disability or conviction of a felony if the employee is unable to perform the contract, unless the parties have contracted to the contrary. The court stated further that there is an implied obligation on the part of the employee to serve the employer diligently and faithfully and to perform all duties honestly and with ordinary care. Id. at 911, 252 N.C. at 398. In addition, the court stated that there is an implied representation by the employee that he is competent to discharge the duties of his position and is possessed with the requisite skill that will enable him to do so. Id.

In Re Burris, 140 S.E.2d 408, 263 N.C. 793 (1965), the court held that where an employee deliberately acquires an interest which is adverse to his employer, such that he becomes a rival, he is disloyal, and his discharge pursuant to the terms of an employment contract would be justified.

B. Status of Arbitration Clauses

North Carolina's Uniform Arbitration Act governs the enforceability of most arbitration agreements and arbitration procedure. N.C. Gen. Stat. §§ 1-569.1, et seq. However, arbitration agreements between employers and employees are exempt from the Act unless the employment agreement provides that the Act will apply. Crutchley v. Crutchley, 293 S.E.2d 793, 306 N.C. 518 (1982).

A special statute governs voluntary arbitration of labor disputes. See Art. 4A, Chapt. 95, N. C. Gen. Stat. §§ 95-36.1 et seq. Article 4A enunciates state public policy that voluntary arbitration of labor disputes will tend to promote industrial peace and the health, welfare, comfort and safety of the people. The methods of arbitration set out in the statute are cumulative and concurrent rather than exclusive procedural remedies. Lammonds v. Aleo Mfg. Co., 92 S.E.2d 143, 243 N.C. 749 (1956).

Article 4A only applies to voluntary agreements to arbitrate labor disputes. N.C. Gen. Stat. § 95-36.2. Written arbitration agreements are valid, enforceable and irrevocable, except upon such grounds as exist in law or equity for the rescission or revocation of any contract. Arbitration awards are final and binding upon the parties to an arbitration proceeding. N.C. Gen. Stat. § 95-36.8.

The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The North Carolina Court of Appeals has suggested that an agreement to arbitrate contained in a contract covering other topics must be independently negotiated. Blow v. Shaughnessy, 313 S.E.2d 868, 68 N.C. App. 1 (1984). In Routh v. Snap-On Tools Corp., 423 S.E.2d 791, 108 N.C. App. 268 (1992), the employee signed a "Termination Agreement" at the end of his employment, which contained added language setting out terms by which he was to reimburse the employer for damaged inventory. The employee signed below the added language, but did not sign on the line designated for his signature. The court allowed parole evidence that the employee did not intend to agree to arbitration and found the arbitration agreement unenforceable.

However, a valid arbitration agreement will be held to bind an employee to an arbitrator's award. An arbitrator's decision, made pursuant to a valid arbitration agreement, that an employee was discharged for "just cause" was binding on Plaintiff, barring his civil claim for wrongful or retaliatory discharge. Shreve v. Duke Power Co., 354 S.E.2d 357, 85 N.C. App. 253 (1987); see also Tucker v. Gen. Tel. Co., 50 N.C. App. 112, 272 S.E.2d 911 (1980).

In Brooks v. Stroh Brewery Co., 382 S.E.2d 874, 95 N.C. App. 226 (1989), the Commissioner of Labor brought suit against the employer for retaliatory discharge, after the employee had accepted an award issued through the employer's grievance procedures. The court held that suit was barred by the employee's acceptance of the grievance award since it was brought simply to enforce the employee's private right to back pay. The court also held that Article 4A did not apply, as the grievance process in place between the employer and employee was not arbitration as contemplated by N.C. Gen. Stat. § 95-36.8.

In Futrelle v. Duke University, 488 S.E.2d 635, 127 N.C. App. 244 (1997), the court found that the employee's acceptance of payment from the employer, made pursuant to an arbitration award, constituted accord and satisfaction of the underlying dispute and barred any future claims arising out of the employee's termination.

The issue of jurisdiction to determine arbitrability has been resolved in favor of the courts rather than arbitrators. Charlotte City Coach Lines, Inc. v. Bhd. of R.R. Trainmen, 118 S.E.2d 37, 254 N.C. 60 (1961).

While N.C. Gen. Stat. § 95-36.6 provides that the arbitrator "shall have such powers and duties as are conferred by the voluntary agreement of the parties, and, if there is no agreement to the contrary, shall have the power to decide the arbitrability as well as the merits of the dispute," a party to an arbitration may apply to a superior court judge for a stay of arbitration, thus giving superior court judges the power to decide arbitrability. N.C. Gen. Stat. § 95-36.9. The Charlotte court held that it, not the arbitrator, determined whether a party agreed to the arbitration.

In Bennish v. North Carolina Dance Theater, 422 S.E.2d 335, 108 N.C. App. 42 (1992), the court held that appeal of an order denying arbitration is interlocutory, but immediately appealable, because it involves a substantial right which might be lost if the appeal is delayed. The court also held that since the parties contemplated substantial interstate activity in the employment contract, the agreement was enforceable under the Federal Arbitration Act.

The Bennish Court also held that an arbitration panel where two of the three arbitrators were directly tied to the defendants was inherently unfair. Id. at 337, 108 N.C. App. at 45-46. However, in Carteret Co. v. United Contractors of Kinston, Inc., 462 S.E.2d 816, 821, 120 N.C. App. 336, 344 (1995), the Court distinguished Bennish from their case by disagreeing with a plaintiff arguing an arbitration panel consisting unanimously of contractors was inherently unfair. In Bennish, the two arbitrators in question were a staff member and a trustee of the defendant corporation. In Carteret Co., the only link between the arbitrators and the defendant was that they had the same occupation. Id.

V. ORAL AGREEMENTS

Oral employment agreements are enforceable in North Carolina. Alligood v. Henning, 226 S.E.2d 171, 30 N.C. App. 126 (1976). "Furthermore, where the evidence is sufficient to support Plaintiff's contention that a definite oral agreement was made by the parties, the contract is complete even though the parties contemplated that they would ultimately reduce the agreement to writing." Cole v. Champion Enterprises, Inc., 496 F.Supp.2d 613, 621 (M.D.N.C., 2007). However, if the parties are only negotiating, and "the writing is to be a contract, then there is no contract until the writing is executed." Id. at 622; See also Elks v. North State Life Ins. Co., 75 S.E. 808, 811, 159 N.C. 619, 624 (1912). Evidencing tending to show that the parties are only negotiating can include, but is not limited to: (1) the need for corporate approval of any employment contract, (2) all previous employment contracts between the parties had been reduced to writing, and (3) evidence that a "meeting of the minds" was not reached between the parties regarding the terms of the contract. Cole v. Champion Enters., Inc., 305 F. App'x. 122, 129 (4th Cir. 2008).

A. Promissory Estoppel

In Tatum v. Brown, 224 S.E.2d 698, 29 N.C. App. 504 (1976), Plaintiff alleged that she resigned her current employment in reliance on Defendant's offer of future employment. Thereafter, Defendant revoked the offer after Plaintiff had accepted it but before she began work. Id. The court held simply that "the doctrine of promissory estoppel does not apply in this action for breach of contract." Id. at 699, 29 N.C. App. at 505.

In a later case, the North Carolina Court of Appeals acknowledged that while North Carolina courts "have recognized the doctrine of promissory estoppel to some extent," they have specifically rejected application of the theory in an action for breach of an employment contract. Lee v. Paragon Group Contractors, Inc., 337 S.E.2d 132, 136, 78 N.C. App. 334, 340 (1985); see also Forstmann v. Culp, 648 F. Supp. 1379 (M.D.N.C. 1986); Section II.A. on "Implied Contracts."

B. Fraud

North Carolina Court of Appeals cases have held that if fraud is properly alleged, the at-will doctrine will not bar the employee's claim. An action for fraud in the employment context is not barred because it is based upon a promissory representation so long as all of the elements of fraud are established with regard to the promise. Liggett Group v. Sunas, 437 S.E.2d 674, 113 N.C. App. 19 (1993); Walton v. Carolina Tel. & Tel. Co., 378 S.E.2d 427, 93 N.C. App. 368 (1989). Fraud generally requires proof that an employer made a promise of continued employment to the employee with reckless indifference to the truth of the statement and intent to deceive, and that the employee reasonably relied on that promise. Brandis v. Lightmotive Fatman, 443 S.E.2d 887, 115 N.C. App. 59 (1994).

C. Statute of Frauds

There is no statute of frauds relating specifically to employment contracts, nor has North Carolina adopted the statute of fraud provision common in most states relating to contracts that cannot be performed within one year. To the extent that an employment agreement limits a person's "right to do business" (i.e., restrictive covenants) in the state, it is required to be in writing by N.C. Gen. Stat. § 75-4. Employment contracts, whether written or oral, must be definite as to the nature and extent of the services to be performed, the compensation to be paid and the place where the services are to be rendered. Kirby v. Stokes County Bd. of Educ., 55 S.E.2d 322, 230 N.C. 619 (1949).

To the extent that an employment agreement is in writing, the parole evidence rule applies to preclude evidence of oral statements inconsistent with written provisions. Oak Island Southwind Realty, Inc. v. Pruitt, 366 S.E.2d 489, 89 N.C. App. 471 (1988); see also Ingersoll v. Smith, 647 S.E.2d 141, 143, 184 N.C. App. 753, 755. However, where written provisions are ambiguous or where there are no written provisions at all as to elements of agreement, testimony is admissible as to the elements that have been agreed to orally. Hall v. Hotel L'Europe, Inc., 318 S.E.2d 99, 69 N.C. App. 664 (1984).

In Jarvis v. Stewart, 613 S.E.2d 293, 170 N.C. App. 638 (2005), the evidence showed that the employer promised to provide a disability policy paying two-thirds of his income but in fact the policy only covered sixty percent. The court held that ERISA did not preempt the claim for the difference and the employee could recover based on the promises.

In Arndt v. First Union National Bank, 613 S.E.2d 274, 170 N.C. App. 518 (2005), the court found that an oral contract as to a bonus had been breached. The court further found that the Defendant violated portions of the state wage payment statutes, N.C. Gen. Stat. § 95-25.1 et seq., by not honoring promises as to wages and by not giving prior notice of a change in compensation. With regard to state wage payment statutes, the plaintiff in Arndt was able to show that her bonus and compensation structure was unique to him and different from the generic bonus plans applicable to the defendants other employees. This showing allowed him to successfully argue that the forfeiture notices defendants asserted were provided in accordance with the N.C. Wage and Hour Act did not apply to plaintiff. Id.

In contrast, in Church v. Wachovia Securities, Inc., 2008 WL 5429604 (W.D.N.C.), the Plaintiff also filed suit on the grounds that the Defendant breached an employment contract regarding bonus payouts. However, the court found that the Plaintiff acquiesced to the changes in the bonus payments by continuing to work. In Arndt, the Plaintiff immediately quit after receiving a bonus that was not in accordance with the contract. Arndt, 613 S.E.2d at 277, 170 N.C.App. at 520-21. Thus, the fact that the Plaintiff knew of the changes and did not complain about them for five years demonstrated “acquiesce[ence] to the modified incentive compensation plans . . . [and] effectively waived his breach of contract claims.” Id. at 13.

VI. DEFAMATION

A. General Rule

1. Libel

North Carolina recognizes two distinct torts of defamation, libel and slander. See Smith-Price v. Charter Behavioral Health Sys., 595 S.E.2d 778, 164 N.C. App. 349 (2004). Generally, the tort of libel relates to written defamation. See Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 450 S.E.2d 753, 117 N.C. App. 274 (1994).

In order to recover on a defamation claim, a plaintiff must allege and prove that (1) the defendant made false, defamatory statements about the plaintiff; (2) those statements were published to a third person; and (3) the statements caused injury to the plaintiff’s reputation. Griffin v. Holden, 636 S.E.2d 298, 302, 180 N.C. App. 129, 133 (2006) (quoting Smith-Price v. Charter Behavioral Health Sys., 595 S.E.2d 778, 783, 164 N.C. App. 349, 356 (2004); see also Tyson v. L’Eggs Products, Inc., 351 S.E.2d 834, 84 N.C. App. 1 (1987)). In addition, the plaintiff may have to prove the defendant’s fault in the matter, according to the standard dictated by the circumstances.

Generally, libel is divided into three classes: “(1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod*.” Griffin v. Holden, 636 S.E.2d 298, 302, 180 N.C. App. 129, 133-34 (2006).

In Exclaim Mktg., LLC v. DIRECTV, Inc., 2012 WL 3023429, the court found that where allegations are sufficient to support a claim for defamation per se, the issue of whether there are sufficient allegations to reach a claim for defamation per quod need not be discussed.

Additionally, in Janis v. Wefald, 2011 WL 5902603, the court notes that North Carolina recognizes the defense of common interest privilege. In order for a statement to qualify under this privilege it must be made: (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. Id.

2. Slander

The tort of slander generally applies to oral communications. See Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 450 S.E.2d 753, 117 N.C. App. 274 (1994). The elements necessary to prove an action for defamation are the same for slander as for libel. Id.

Alleged false statements made by employer calling an employee dishonest or charging that an employee was untruthful and unreliable are not actionable per se. Gibson v. Mut. Life Ins. Co., 465 S.E.2d 56, 121 N.C. App. 284 (1996). The employee must show that he suffered special damages as a result of the communication. Donovan v. Fumara, 442 S.E.2d 572, 114 N.C. App. 524 (1994).

On the other hand, in Eli Research, Inc. v. United Communications Group, LLC, 312 F.Supp.2d 748 (M.D.N.C. 2004), statements that Plaintiff “mismanaged its company,” that it “engaged in unethical and morally repugnant dealings with its employees and contractors,” and that its work was “shoddy and faulty” were legally sufficient to reach the level of slander *per se*. Id. at 762, 763.

B. References

A communication made by an employer to an employee or to a third person regarding references for the employee, cannot form the basis of a libel or slander claim. Friel v. Angell Care, Inc., 440 S.E.2d 111, 113 N.C. App. 505 (1994).

Note that under N.C. Gen. Stat. § 1-539.12 and N.C. Gen. Stat. § 14-355 employers are provided limited immunity for giving job references, but are prohibited from engaging in blacklisting.

C. Privileges

A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. Kinesis Advertising, Inc. v. Hill, 652 S.E.2d 284, 297. A communication made under circumstances which otherwise support a finding of conditional or qualified privilege is nevertheless actionable upon a showing of express or actual malice or excessive publication. See Presnell v. Pell, 260 S.E.2d 611, 298 N.C. 715 (1979); see also N.C. Gen. Stat. § 1-539.12.

D. Other Defenses

1. Truth

A prima facie case of defamation in North Carolina requires a plaintiff to prove the falsity of the statement in question. See Tyson, 351 S.E.2d 834. Accordingly, the traditional common law defense of truth is recognized in North Carolina. See Friel, 440 S.E.2d 111, 113 N.C. App. 505 (1994) (upholding summary judgment for Defendant because Plaintiff failed to establish the falsity of the allegedly defamatory statements and all evidence suggested the statements were true).

2. No Publication

An unpublished statement cannot constitute defamation in North Carolina. See Tyson v. L'Eggs Prods, Inc., 351 S.E.2d 834, 84 N.C. App. 1 (1987). With respect to slander, the statement must be shown to have been heard by a third party. The mere possibility the statement could have been overheard is not sufficient to survive a motion for summary judgment. See Tyler v. Leggett, 99 S.E.2d 779, 246 N.C. 638 (1957).

3. Self-Publication

The North Carolina courts have not addressed the issue of whether self-publication will give rise to a claim of defamation.

4. Invited Libel

Section 1-539.12 of the North Carolina General Statutes provides that an employer who discloses information about a current or former employee to a prospective employer at the request of either the employee or the prospective employer is immune from civil liability for such disclosure and the consequences thereof, unless the information disclosed is false and the disclosing employer knows or reasonably should know that such information is false.

In Friel, a former employee could not state a claim for defamation based on any statement made by former employer to the employee's friend, who called the employer to ask for a reference at the former employee's behest. Friel, 440 S.E.2d 111.

In addition, a publication of a libel procured or invited by a plaintiff is not sufficient to support an action for defamation. See Pressley v. Cont'l Can Co., 250 S.E.2d 676, 678, 39 N.C. App. 467, 469 (1979).

5. Opinion

A prima facie case of defamation requires that the statements be provable as false. An opinion that does not contain a provably false factual connotation cannot provide the basis for a defamation claim. See, e.g., Friel, 440 S.E.2d 111.

E. Job References and Blacklisting Statutes

Section 14-355 of the North Carolina General Statutes prohibits employers from preventing or attempting to prevent a discharged employee from obtaining employment with other employers. However, “[t]he purpose of the blacklisting statute is not to prohibit employers from communicating truthful information as to the nature and character of former employees.” Holroyd v. Montgomery County, 606 S.E.2d 353, 358, 167 N.C. App. 539, 545 (2004). In Friel, the court determined that “[w]hen truthful oral statements were made by the Defendant in response to an inquiry from a prospective employer as to whether they would rehire a former employee, the Friel court held that § 14-355 did not apply as a matter of law.” Friel at 115, 113 N.C. App. at 511. However, in Holroyd, when the employer was contacted by Plaintiff’s prospective employers, truthful statements mentioning plaintiff’s pending worker’s compensation claim were privileged under § 14-355. Holroyd at 358, 167 N.C. App. at 545.

F. Non-Disparagement Clauses

The North Carolina courts have not discussed non-disparagement clauses in the context of defamation.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress (IIED)

The tort of intentional infliction of emotional distress occurs when a defendant’s conduct exceeds all bounds usually tolerated by decent society and causes mental distress of a very serious kind. Elements of the tort are: (1) extreme and outrageous conduct, (2) which is intended to cause (or proceeds from reckless indifference to the likelihood that it will cause), and which does cause, (3) severe emotional distress. See Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 79 N.C. App. 483 (1986). In claiming an action for IIED, Plaintiff must “allege acts ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” Hooper v. North Carolina, 379 F.Supp.2d 804, 815 (2005). “North Carolina courts have been extremely reluctant to find actionable IIED claims in the employment context.” Bratcher v. Pharmaceutical Product Development, Inc., 545 F.Supp.2d 533, 544-45 (2008) (quoting Efird v. Riley, 342 F.Supp.2d 413, 427 (2004)).

The standard for the “severe emotional distress” element is “any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional mental condition which may be generally recognized and diagnosed by professionals trained to do so.” Waddle v. Sparks, 414 S.E.2d 22, 27, 331 N.C. 73, 83 (1992).

Plaintiff’s evidence in Johnson v. Colonial Life & Acc. Ins. Co., 618 S.E.2d 867, 873, 173 N.C. App. 365, 373 (2005) showed that over a course of time Plaintiff was threatened with being fired and losing his health insurance. The comments did not constitute IIED. Id.

In Hogan, Plaintiff, who alleged that a co-worker repeatedly made suggestive remarks and engaged in non-consensual sexual touching, satisfied the “extreme and outrageous conduct” requirement. Hogan at 121, 79 N.C. App. at 491. The court determined that the employer ratified the outrageous conduct. Id.

at 122, 79 N.C. App. at 492. However, a second Plaintiff alleging that her co-worker screamed at her, called her names, interfered with her supervision of other workers, and threw menus at her did not allege conduct that rose to the level of “extreme and outrageous.” Id.

In Denning Boyles v. WCES, Inc., 473 S.E.2d 38, 123 N.C. App. 409 (1996), Plaintiff’s supervisor made numerous offensive sexual propositions to Plaintiff, which caused Plaintiff to suffer severe, extreme, and disabling emotional distress. The court determined that Plaintiff could proceed with an intentional infliction of emotional distress claim against her employer, on the basis of respondeat superior. Id. at 41, 123 N.C. App. at 414, compare with Fox v. Sara Lee Corp., 764 S.E.2d 624, 630, 237 N.C. App. 7, 15-16 (2014) (concluding that the plaintiff did not demonstrate “any course of conduct on the part of [defendant Sara Lee] which reasonably tends to show an intention on [its] part to ratify [defendant-employee]’s unauthorized acts,” given that “[d]efendant Sara Lee immediate initiated an investigation, which was completed quickly and resulted in [defendant-employee]’s termination”).

Where a defendant’s alleged pattern of egregious sexual and non-sexual harassment of a plaintiff culminated in the plaintiff hyperventilating, passing out, and being placed in a psychiatrist’s care, the plaintiff could proceed with an intentional infliction of emotional distress claim. Ruff v. Reeves Bros., Inc., 468 S.E.2d 592, 122 N.C. App. 221 (1996). Once the court determined that the conduct at issue could reasonably be found to be sufficiently outrageous as to permit a recovery, the question of defendant’s liability for intentional infliction of emotional distress was a matter for the jury to decide. Id. at 595, 122 N.C. App. at 225.

However, not all actions of a sexual nature are sufficient to constitute extreme and outrageous conduct. See Guthrie v. Conroy, 567 S.E.2d 403, 152 N.C. App. 15 (2002). In Guthrie, Plaintiff’s evidence showing Defendant engaged in the following behavior did not support claim for IIED:

- (1) held plaintiff from behind, and touched or rubbed her neck and shoulders;
- (2) “irritated” her by placing a lampshade on her head when she fell asleep with her head on her desk;
- (3) threw potting soil and water on plaintiff while she was planting flowers at work, remarking when he threw a cup of water on plaintiff that he’d “always wanted to see [her] in a wet T shirt”; and
- (4) placed a Styrofoam “peanut” and other small objects between the legs of a “naked man” statuette that plaintiff displayed on her windowsill at work and asked her “how she liked it” with the addition.

Id. at 410, 152 N.C. App. at 23-4.

Changes in responsibilities, transfers, demotions, and terminations will not generally support a claim for intentional infliction of emotional distress unless the employer’s actions exceed all bounds usually tolerated by decent society. See generally Daniel v. Carolina Sunrock Corp., 430 S.E.2d 306, 110 N.C. App. 376, rev’d on other grounds, 436 S.E.2d 835, 335 N.C. 233 (1993); Mullis v. Pantry, Inc., 378 S.E.2d 578, 93 N.C. App. 591 (1989); McKnight v. Simpson’s Beauty Supply, Inc., 358 S.E.2d 107, 86 N.C. App. 451 (1987); Trought, 338 S.E.2d 617.

Courts have considered whether or not IIED claims are subject to the exclusive jurisdiction of the workers’ compensation system. The Hogan case held that intentional infliction of emotional distress claims in the nature of sexual harassment were not barred by the workers’ compensation exclusivity doctrine.

Hogan at 120, 79 N.C. App. at 488. Decisions have stated that “[i]t is well settled in this jurisdiction that the North Carolina Workers’ Compensation Act is the exclusive remedy when an employee is injured by accident arising out of and in the course and scope of employment.” Christopher v. North Carolina State University, 661 S.E.2d 36, 38 (N.C. App. 2008); *see also* Riley v. Debaer, 562 S.E.2d 69, 149 N.C. App. 520, *aff’d per curiam*, 571 S.E.2d 587, 356 N.C. 426 (2002) and Sisk v. Tar Heel Capital Corp., 603 S.E.2d 564, 166 N.C. App. 631 (2004) (holding that sexual harassment is not covered by the Workers’ Compensation Act).

In Stec v. Fuzion Inv. Capital, LLC, 2012 NCBC 24, the court held that an employer’s method of termination cannot rise to the level of extreme and outrageous conduct. Additionally, in Ortiz v. Big Bear Events, LLC, 2012 WL 6923665, the court emphasized that “North Carolina courts have stated that it is extremely rare to find conduct in the employment context that will give rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.” Additionally, the court noted that a claim was misleading or incomplete where it did not present any medical documentation to support a finding that difficulties were symptoms of a recognized emotional or mental condition. *Id.*

B. Negligent Infliction of Emotional Distress

Elements of a claim for negligent infliction of emotional distress are: “(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as ‘mental anguish’), and (3) the conduct did in fact cause the plaintiff severe emotional distress.” Williams v. HomEq Servicing Corp., 646 S.E.2d 381, 385, 184 N.C. App. 413, 418-19 (quoting Johnson v. Ruark Obstetrics, 395 S.E.2d 85, 97, 327 N.C. 283, 304 (1990)). No physical impact, physical injury, or physical manifestation of emotional distress must be shown by a plaintiff in order to succeed on a claim for negligent infliction of emotional distress. Johnson, 327 N.C. 283; *see also* Fields v. Dery, 509 S.E.2d 790, 131 N.C. App. 525 (1998). There must be some breach of a duty of care owed by defendant to plaintiff. Guthrie, 567 S.E.2d 403.

A cause of action for negligent infliction of emotional distress based on plaintiff’s concern for another person arises if the plaintiff can show that he or she suffered severe emotional distress as a proximate and foreseeable result of the defendant’s negligence. Wrenn v. Byrd, 464 S.E.2d 89, 92, 120 N.C. App. 761, 765 (1995). Factors to be considered in determining whether emotional distress was foreseeable include, but are not limited to: (1) the plaintiff’s proximity to the negligent act causing injury to the other person; (2) the relationship between the plaintiff and the other person; and (3) whether the plaintiff personally observed the negligent act. *Id.*

While a cause of action exists for intentional infliction of emotional distress only where the defendant’s conduct is extreme and outrageous, a claim for negligent infliction of emotional distress requires only “ordinary negligence.” Accordingly, if the court finds that the defendant’s conduct is not sufficiently outrageous or extreme to establish an intentional infliction of emotional distress claim, then such a finding does not preclude the plaintiff from proceeding on a negligent infliction of emotional distress theory. McAllister v. Ha, 496 S.E.2d 577, 347 N.C. 638 (1998).

However, in Graham, 465 S.E.2d 558, the court granted summary judgment to defendant employer for an negligent infliction of emotional distress claim, where the forecast of evidence showed only that the employer sanctioned, condoned and ratified a plaintiff’s supervisor’s alleged sexual advances, untoward

comments, and uninvited touching. In the absence of evidence of extreme and outrageous independent acts by the employer, the court held Plaintiff was not entitled to pursue a negligent infliction of emotional distress claim against that entity. This decision did not address the issue of whether an employer may ever be held liable for negligent infliction of emotional distress based on the extreme and outrageous acts of its employees.

VIII. PRIVACY RIGHTS

A. Generally

North Carolina courts have recognized few fact situations sufficient to give rise to the tort of invasion of privacy. The Restatement (Second) of Torts recognizes separate invasion of privacy causes of action in the following circumstances: (1) appropriation of the defendant's name or likeness for the defendant's advantage; (2) intrusion upon plaintiff's seclusion or solitude; (3) public disclosure of embarrassing private facts; and (4) publicity which places a plaintiff in a false light in the public eye. Generally, North Carolina courts have expressed skepticism towards such causes of action and have expressly declined to recognize the "false light" invasion of privacy, Renwick v. The News and Observer Pub. Co., 312 S.E.2d 405, 310 N.C. 312 (1984), and public disclosure of private facts. Hall v. Post, 372 S.E.2d 711, 323 N.C. 259 (1988); see also Broughton v. McClatchy Newspapers, Inc., 588 S.E.2d 20, 161 N.C. App. 20 (2003) (holding there is no cause of action based on the use of public records as to which a plaintiff had no expectation of privacy).

However, the court in Flake v. Greensboro News Co., 195 S.E. 55, 212 N.C. 780 (1938), recognized the existence of a cause of action for appropriation of Plaintiff's photographic likeness as a part of an advertisement for Defendant's advantage.

"The tort of invasion of privacy by intrusion into seclusion has been recognized in North Carolina and is defined as the intentional intrusion physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person." Keyzer v. Amerlink, Ltd. 618 S.E.2d 768, 771, 173 N.C. App. 284, 288 (2005) (internal quotations omitted). The types of intrusions that have been recognized under this tort include "physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." Id. In Miller v. Brooks, 472 S.E.2d 350, 123 N.C. App. 20 (1996), the "highly offensive" standard was met where defendants invaded plaintiff's home, opened his personal mail, and placed a hidden video camera in his bedroom which recorded images of him undressing, showering, and going to bed. Id. at 353, 123 N.C. App. at 24.

In Tillet v. Onslow Mem. Hosp. Inc., 715 S.E.2d 538, the court stated that there cannot be an intrusion upon seclusion claim based upon the accessing of items which are either in the public record or required to be made available for public inspection. In this case the viewing of autopsy photographs could not be considered an intrusion when by statute the photographs are readily accessible. Id. at 541.

In Geller v. Provident Life and Accident Ins. Co., 2011 WL 1239835 (W.D.N.C.), the court upheld the Plaintiff's cause of action for invasion of privacy when an employer hired a surveillance company to videotape the Plaintiff. The Plaintiff had previously filed a disability claim with her employer after being

diagnosed with Lyme disease. The surveillance company taped the Plaintiff playing with her family at the lake in efforts to debunk Plaintiff's disability claims. The court determined that the behavior of the employer was not as "outrageous as what occurred in Miller . . . [but there was] more of an invasion of privacy than what occurred in Broughton." Id. at 4. Thus, the Plaintiff's complaint was actionable.

In Smith v. Spence & Spence, 343 S.E.2d 256, 80 N.C. App. 636 (1986), a law firm discharged a legal secretary upon learning that her creditors were firm clients and after those clients complained and the sheriff called regarding execution of judgments. Plaintiff argued that the firm's decision to terminate her employment violated her right to privacy in her personal financial affairs. The court rejected this argument, indicating that it was reasonable for a law firm to require employees to handle personal affairs in a manner that would avoid sully the firm's reputation and integrity. The court also observed that Plaintiff's own actions directly caused her financial problems to come to Defendant's attention in the first place.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

North Carolina employers must use E-Verify to verify the work authorization for the employee to work in the United States. N.C. Gen. Stat. § 64-26.

Congress has created a federal system by which employers must verify the work authorization status of new hires. Chamber of Commerce of U.S. v. Whiting, 131 S.Ct. 1968, 2001. (2011). "An employer must attest under penalty of perjury on a form designated by the Attorney General (the I-9 form) that it has examined enumerated identification documents to verify that a new hire is not an unauthorized alien. Id. The I-9 form is a mechanism to ensure that workers are authorized to work. See U.S. v. Mora, 15 Fed.Appx. 98 (4th Cir. 2001). Employment Eligibility Verification Forms are also known as I-9 forms. See Walters v. McMahan, 684 F.3d 485 (4th Cir. 2012).

2. Background Checks

Employers are typically under no duty to conduct a background check when hiring employees. See Moricle v. Pilkington, 120 N.C. App. 383, 387, 462 S.E.2d 531, 534 (1995). "Further, there is a presumption which exists that an employer uses due care in hiring its employees." Id.

C. Other Specific Issues

1. Workplace Searches

There are no North Carolina statutes that specifically govern workplace searches, but in general, it is considered likely that employees have no expectation of privacy in terms of their use of their employers' computer technology, voice mail and e-mail. Employers may reserve the right to access, search, inspect and disclose any message, communication or file on a voice mail or computer system owned or operated by the company, at any time and for any reason.

In Hall v. Post, 355 S.E.2d 819, 85 N.C. App. 610 (1987), rev'd on other grounds, 372 S.E.2d 711, 323 N.C. 259 (1988), the North Carolina Court of Appeals noted in dicta that the tort of intrusion could

potentially be based on such acts as “physically invading a person’s home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.” Id. In addition, although there are apparently no North Carolina cases concerning searches of an employee’s person in the context of an intrusion claim, other general tort and property claims such as conversion, trespass, and false imprisonment have been found to provide limitations on employer action.

2. Electronic Monitoring

Section 15A-287 of the North Carolina General Statutes makes it a Class H felony for any person to willfully intercept, disclose, use, endeavor to intercept, or procure any other person to intercept, the contents of any wire, oral or electronic communication, unless at least one party to the communication consents. The statute further prohibits the use or attempted use of any electronic, mechanical or other device to intercept any oral communication when: (1) the device is affixed to or otherwise transmits a signal through a wire, cable or other like connection, or (2) the device transmits communications by video or interferes with the transmission of such communications. N.C. Gen. Stat. § 15A-287(a)(2) . In addition, Section 14-155 of the North Carolina General Statutes makes it unlawful for any person to “tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this State, except such connection as may be authorized by the person or corporation operating such wire or apparatus.” Id.

No business or entity may install or use a pen register or a trap and trace device without first obtaining a court order, except that a provider of wire or electronic communication service may use such devices in certain circumstances. N.C. Gen. Stat. § 15A-261.

3. Social Media

North Carolina courts have not yet addressed the use of social media in the employment context. However numerous other states, such as Illinois and Maryland, have adopted social media privacy laws. See H.B. 3782, 97th Gen. Assemb. (Ill. 2012). See also Maryland S.B. 433. Notably there has been a proliferation of National Labor Relations Board filings by aggrieved employees or former employees related to adverse employment actions resulting from social media activity. As a result, employers need to ensure that their handbooks and policies related to social media do not contain language that the NLRB could use to find an unfair labor practice.

4. Surveillance of Employees

There are no North Carolina statutes that directly address the taping, surveillance and/or photographing of employees or other individuals. Sections 74C-1 to 74C-33 of the North Carolina General Statutes do, however, require “private protective services professionals” to be licensed, which include “any person, firm, association, or corporation which discovers, locates, or disengages by electronic, electrical, or mechanical means any listening or other monitoring equipment surreptitiously placed to gather information concerning any individual, firm, association, or corporation for a fee or other valuable consideration.” N.C. Gen. Stat. § 74C-3(a)(5a). Any “person who works regularly and exclusively as an employee of an employer in connection with the business affairs of that employer” and any “employee of

a security department of a private business that conducts investigations exclusively on matters internal to the business affairs of the business" are expressly exempt. N.C. Gen. Stat. §§ 74C-3(b)(13); 74C-3(b)(14).

5. Release of Personal Information on Employees

North Carolina Courts have not yet addressed the issue of releasing an employee's personal information. However, section 126-22 allows personnel files and records of former state employees who have been separated from State employment for at least ten years to be open for examination. N.C. Gen. Stat. § 126-22.

6. Medical Information

Section 14-357.1 of the North Carolina General Statutes provides that it is unlawful for an employer with 25 or more employees to require an applicant to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of hiring. In addition, no person or entity may deny or refuse employment to any person or discharge any employee from employment on account of such individual's "having requested genetic testing or counseling services, or on the basis of genetic information obtained concerning the person or a member of the person's family." N.C. Gen. Stat. § 95-28.1.

All information and records that identify a person as having or possibly having the AIDS virus or any other reportable communicable disease must be kept strictly confidential, except in certain narrow circumstances. N.C. Gen. Stat. § 130A-148.

IX. WORKPLACE SAFETY

A. Negligent Hiring

In addition to respondeat superior liability of the employer for the acts of its employee, the employer may be held liable for negligent hiring and retention of an employee who had a foreseeable propensity to commit and did commit tortious misconduct. The case of Hogan, 340 S.E.2d 116, adopted this principle in the harassment context. In addition, Hogan held that an employer can be found to have ratified an employee's misconduct after the fact even if the conduct, when committed, was not in the course and scope of employment.

B. Negligent Supervision/Retention

A claim for negligent supervision and retention is recognized in North Carolina when the plaintiff proves: "(1) the specific negligent act on which the action is founded; (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision; and (4) that the injury complained of resulted from the incompetency proved." Moricle v. Pilkington, 386 462 S.E.2d 531, 533, 120 N.C.App. 383 (1995).

In Taft v. Brinley's Grading Services, Inc., 738 S.E.2d 741, the court failed to uphold a claim for negligent supervision where the employee driving the truck that caused the accident was not licensed to drive the truck, was made aware of policies prohibiting him to drive the truck, and there was no showing that the defendant company should have reasonably foreseen the need for more supervision to prevent violation of the policies.

C. Interplay with Worker's Compensation

The North Carolina Workers' Compensation Act contains exclusivity provisions to limit benefits to an employee who is injured during the course of his employment regardless of negligence or other fault of the employer. Pender v. Lambert, 737 S.E.2d 778 (N.C.App. 2013). The North Carolina Supreme Court recognized an exception to the exclusivity provision "whereby an employee may pursue a civil action against his employer if the employer 'intentionally engaged in misconduct knowing it is substantially certain to cause serious injury or death to employee and an employee is injured or killed by that misconduct.'" Woodson v. Rowland, 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991).

In Woodson, the exception applied where the employer intentionally disregarded known safety regulations and made the decedent-employee enter into a dangerously deep trench. Id. at 557-558, 597 S.E.2d at 668. In Pender, the fact that Wal-Mart had implemented a policy prohibiting the type of conduct that caused the death of an employee removed the presence of intentional misconduct and the exception did not apply. Pender v. Lambert, 737 S.E.2d 778, 782 (N.C. App. 2013). Notably, North Carolina courts have not applied the Woodson rationale in any case since it was decided in 1991.

D. Firearms in the Workplace

North Carolina courts have not yet addressed the issue of firearms in the workplace in the context of workplace safety.

E. Use of Mobile Devices

North Carolina courts have not yet addressed the issue of the use of mobile devices in the workplace in the context of workplace safety.

X. TORT LIABILITY

A. Respondeat Superior Liability

Employers are liable for torts committed by their employees under a respondeat superior theory when the employee's act is: (1) expressly authorized; (2) committed within the scope of the employee's employment and in furtherance of his master's business when the act comes within his implied authority; or (3) when ratified by the principal. Taft v. Brinley's Grading Services, Inc., 738 S.E.2d 741, 748 (2013). When the actions of an employee are not expressly authorized or subsequently ratified, the employer is liable only if the act is committed within the scope and in furtherance of the employer's business. Id.

An employee is acting within the scope of his employment when the act was a means or method of doing that which he was employed to do. Id. If an employee departs from the purpose of accomplishing

the duties of his employment to accomplish a private purpose, the employer is not liable. Matthews v. Food Lion, LLC, 205 N.C.App. 279, 282-83, 695 S.E.2d 828, 831 (2010).

B. Tortious Interference with Business/Contractual Relations

A defendant's actions in hiring a competitor's employee who has an employment contract or who is subject to a valid covenant not to compete may be tortious interference with contract; however, the courts do not want to prevent fair competition. See Peoples Sec. Life Ins. Co. v. Hooks, 367 S.E.2d 647, 322 N.C. 216 (1988); see also United Labs. v. Kuykendall, 370 S.E.2d 375, 322 N.C. 643 (1988); Sunbelt Rentals, Inc. v. Head & Engquist Equip, L.L.C., 620 S.E.2d 222, 174 N.C. App. 49 (2004).

In order to have a claim for tortious interference with contract there must be: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff. See Austin Maintenance & Const., Inc. v. Crowder Const. Co., 742 S.E.2d 535 (N.C.App. 2012).

In Friel, it was held that, under the facts of that case, statements by Plaintiff's former employer that prevented Plaintiff from obtaining a new job were not actionable because they were not malicious, i.e., they were not made to injure Plaintiff or obtain some advantage at her expense. Friel, 440 S.E.2d 111.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

In Sonotone Corp. v. Baldwin, 42 S.E.2d 352, 355, 227 N.C. 387, 390 (1947), the court held that:

While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests [for it is] as much a matter of public concern to see that valid [covenants] are observed as it is to frustrate oppressive ones.

Id.

North Carolina courts recognize that protection of (1) confidential information and (2) customer relationships and goodwill are two separate legitimate business interests on which enforcement of a covenant not to compete may be founded. United Labs. v. Kuykendall, 370 S.E.2d 375, 322 N.C. 643 (1988).¹

To be valid and enforceable, a covenant not to compete must be: (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory;

¹ North Carolina law regarding the enforceability of covenants not to compete may be impacted by new rulemaking recently proposed by the Federal Trade Commission that would generally prohibit most non-competition agreements as a matter of federal law. The rule has not been made law as of the date of this 2024 compendium update.

and (5) designed to protect a legitimate business interest of the employer. Cole, 496 F.Supp.2d at 632; see also Triangle Leasing Co. v. McMahon, 393 S.E.2d 854, 327 N.C. 224 (1990); VisionAIR, Inc. v. James, 606 S.E.2d 359, 167 N.C. App. 504 (2004) (addressing scope). The "time and territory restrictions are two parts of one inquiry" to determine if a restriction is reasonable. Farr Assoc., Inc. v. Baskin, 530 S.E.2d 878, 138 N.C. App. 276 (2000). "Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable." Okuma America Corp. v. Bowers, 638 S.E.2d 617, 620, 181 N.C. App. 85, 89 (quoting Jewel Box Stores Corp. v. Morrow, 158 S.E.2d 840, 272 N.C. 659 (1968)).

When considering the time and geographic limits outlined in a covenant not to compete, [the courts] look to six overlapping factors:

(1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Okuma at 620, 181 N.C. App. at 89; see also Kinesis Advertising, Inc., 652 S.E.2d at 294.

B. Blue Penciling

In Hartman v. W. H. Odell & Associates, 450 S.E.2d 912, 117 N.C. App. 307 (1994), the court held that:

When the language of a covenant not to compete is overly broad, North Carolina's "blue pencil" rule severely limits what the court may do to alter the covenant. A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or overwrite the covenant.

Id. at 920, 117 N.C. App. at 317.

In Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC, 368 N.C. 693, 784 S.E.2d 457 (2016), the Supreme Court held that parties cannot by contract give the courts the ability to revise non-compete agreements, because "parties cannot contract to give a court power that it does not have." This opinion re-affirmed that North Carolina is a "strict blue pencil" state. Id. at 696, 784 S.E.2d at 460.

C. Confidentiality Agreements

A finding that confidential information is a legitimate business interest of the employer can be established where the employee acknowledges in a nondisclosure/nonuse covenant that composition, technology, and processes of the employer are confidential information. ChemiMetals Processing, Inc. v. McEneny, 476 S.E.2d 374, 124 N.C. App. 194 (1996).

To state a claim for breach of a nondisclosure covenant under North Carolina law, the complaint must allege, as in any other breach of contract case, the facts constituting the breach. VisionAIR, Inc. v.

James, 606 S.E.2d 359, 167 N.C. App. 504 (2004). Conclusory statements are insufficient to state a claim for breach of nondisclosure covenant.²

D. Trade Secrets Statute

North Carolina's Trade Secrets Protection Act (TSPA), N.C. Gen. Stat. §§ 66-152, et seq., provides a remedy for actual or threatened misappropriation of trade secrets. " 'Misappropriation' means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. § 66- 152(1); see Washburn v. Yadkin Valley Bank and Trust Co., 660 S.E.2d 577, 585 (2008). Civil actions under the TSPA must be commenced within three years after the misappropriation was or reasonably should have been discovered. N.C. Gen. Stat. § 66-157.

The TSPA places upon trade secret owners an affirmative duty to take reasonable measures to maintain the information's secrecy. Glaxo, Inc. v. Novopharm, Ltd., 931 F. Supp. 1280, 1299 (E.D.N.C. 1996), aff'd, 110 F.3d 1562 (Fed. Cir. 1997).

A trade secret need not be comprised of positive information, such as specific formula, but can include negative, inconclusive, or sufficiently suggestive research data that would give a person skilled in the art a competitive advantage one might not otherwise enjoy but for the knowledge gleaned from the owner's research investment. Id.

The factors that should be considered when determining whether an item is a trade secret are as follows:

(1) the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Sunbelt Rentals, Inc. v. Head & Engquist Equipment, L.L.C., 620 S.E.2d 222, 226, 174 N.C. App. 49, 53 (2005).

When applying these factors, North Carolina courts have found that cost history information, price lists, confidential customer lists, pricing formulas and bidding formulas constitute a trade secrets. Id.; see also Griffith v. Glen Wood Co., Inc., 646 S.E.2d 550 (holding re-engineered racing car part was not a "trade secret" because racing car part was "readily ascertainable through reverse engineering").

² Although the scope of this compendium is limited to North Carolina law, the reader should note that recent changes to federal law may impact the enforceability of North Carolina law regarding non-disclosure agreements in employment contracts. The NLRB recently held that a severance agreement containing broad confidentiality and non-disparagement clauses violated employees' rights to engage in concerted activity under section 7 of the NLRA. McLaren Macomb, 372 NLRB 58 (2023).

To establish a prima facie case under the TSPA, a plaintiff must introduce substantial evidence that the defendant: (a) knew or should have known of the plaintiff's trade secret and (b) acquired, disclosed or used the trade secret or had a specific opportunity to do same without the plaintiff's consent or authority. N.C. Gen. Stat. § 66-155. The defendant then bears the burden of establishing that the information comprising the trade secret was obtained through independent development, reverse engineering, or through a person with a right to disclose the trade secret. See Byrd's Lawn & Landscaping, Inc. v. Smith, 542 S.E.2d 689, 142 N.C. App. 371 (2001) (holding that an employer's historical cost information could qualify as a "trade secret").

The North Carolina Business Court recently clarified this standard and held that "[e]vidence that a former employee had access to, and therefore an 'opportunity to acquire,' an employer's trade secrets, without more, is not sufficient to establish a prima facie case of misappropriation. Rather, the employer must establish that either the former employee accessed its trade secrets without authorization or provide other sufficient evidence of misappropriation to raise an inference of *actual* acquisition or use of its trade secrets." American Air Filter Co., Inc. v. Price, 2017 WL 485517, at *8 (N.C. Super. Ct. Feb. 3, 2017).

A prevailing plaintiff on a TSPA claim may be entitled to a permanent injunction enjoining the defendant from using the trade secret, as well as an award of actual damages (the greater of economic loss or unjust enrichment). See Potter v. Hileman Laboratories, Inc., 564 S.E.2d 259, 150 N.C. App. 326 (2002). Moreover, where the misappropriation is found to be willful and malicious, the TSPA authorizes awards of punitive damages and reasonable attorneys' fees. N.C. Gen. Stat. § 66-154.

In Washburn v. Yadkin Valley Bank and Trust Co., 660 S.E.2d 577 (2008), employer alleged that former employees acquired knowledge of employer's business methods, clients, and other confidential information pertaining to employer's business and used the information on behalf of new employer. However, employer's allegations were insufficient to state a claim for misappropriation of trade secrets under the Trade Secret Protection Act because the allegations did not identify with sufficient specificity either the trade secrets employees allegedly misappropriated or the acts by which the alleged misappropriations were accomplished.

In ACS Partners, LLC v. Americon Group, Inc., 2010 WL 883663 (W.D.N.C.), the plaintiff employer adequately identified the trade secrets that the Defendant misappropriated. The defendant stole the plaintiff's pricing methodology, which is recognized as a trade secret in North Carolina, and thus the court distinguished ACS from Washburn, finding the plaintiff's claims to be actionable.

E. Fiduciary Duty and Other Considerations

The North Carolina Unfair Trade Practices Act (UTPA), N.C. Gen. Stat. § 75-16, et seq., declares conduct in or affecting commerce that is unfair or deceptive to be unlawful. Establishing a prima facie claim for unfair trade practices requires the following elements: "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." Nucor Corp. v. Prudential Equity Group, LLC, 659 S.E.2d 483, 488 (2008); see also Carter v. West American Ins. Co., 661 S.E.2d 264 (2008); S.N.R. Management Corp. v. Danube Partners, 141, LLC, 659 S.E.2d 442 (2008); Crouse v. Mineo, 658 S.E.2d 33 (2008); Burrell v. Sparkkles Reconstruction Co., 657 S.E.2d 712 (2008); Kirschbaum v. McLaurin Parking Co., 656 S.E.2d 683 (2008); Craven v. Cope, 656 S.E.2d 729 (2008).

A person injured by such unfair or deceptive conduct may recover treble damages and attorneys' fees. See Hardy v. Toler, 211 S.E.2d 809, 24 N.C. App. 625 (1975).

In general, North Carolina courts have held that the UTPA does not apply to employer-employee relationships. See, e.g., Gress v. Rowboat Co., Inc., 661 S.E.2d 278 (2008) (stating UTPA did not apply where purchaser worked under a fictitious employment relationship); see also Buie v. Daniel Int'l Corp., 289 S.E.2d 118, 56 N.C. App. 445 (1982) (finding that "employer-employee relationships do not fall within the scope of [UTPA]"); and Dalton v. Camp, 548 S.E. 2d 704, 353 N.C. App. 647 (2001) (finding that the employee-employer relationship lacked a fiduciary duty and did not fall within the purview of Chapter 75); Seigel v. Patel, 513 S.E.2d 602, 132 N.C. App. 783 (1999) ("It is the law of this state that an employee cannot bring [a UTPA] action against her employer."). However, the North Carolina Supreme Court has held that a Defendant's mere status as an employee does not safeguard him from liability under the UTPA where he was engaging in self-dealing conduct and fraudulent business activities directed against his employer. See Sara Lee Corp. v. Carter, 519 S.E.2d 308, 351 N.C. 27 (1999).

Moreover, the UTPA has been held to apply to situations involving covenants not to compete or tortious interference with contract. United Labs. v. Kuykendall, 370 S.E.2d 375, 322 N.C. 643 (1988); see also Eli Research, Inc. v. United Communications Group, LLC, 312 F. Supp. 2d 748 (M.D.N.C. 2004).

Although a mere breach of contract does not constitute an unfair or deceptive trade practice, a party may violate UTPA by breaching a covenant not to compete through immoral, unethical, oppressive, unscrupulous, or substantially injurious activities, or by engaging in conduct that amounts to an inequitable assertion of its power or position. S. Bldg. Maint. v. Osborne, 489 S.E.2d 892, 127 N.C. App. 327 (1997). Treble damages under UTPA were held appropriate in this case where Defendant signed a covenant not to compete, then contacted several of Plaintiff's current clients and urged them to terminate Plaintiff's services. Because Defendant took advantage of his position in competing with Plaintiff, Defendant's actions both breached the covenant not to compete and constituted unfair and deceptive trade practices.

XII. DRUG TESTING LAWS

A. Public Employers

N.C. Gen. Stat. § 95-230 et seq., establishes procedural requirements for the administration of controlled substance examinations by both public and private employers and other entities. An employer who requests or requires an employee or applicant to submit to a drug test must comply with the following procedures:

1. Collection of samples "under reasonable and sanitary conditions . . . reasonably calculated to prevent substitution of samples and interference with the collection, examination, or screening of samples;"
2. A second examination of all samples yielding positive results by an approved laboratory utilizing "gas chromatography with mass spectrometry or an equivalent scientifically accepted method;"
3. Laboratory retention of a portion of every sample yielding a confirmed positive result for at least 90 days;

4. Establishment of chain of custody procedures; and
5. Upon written request, release of a confirmed positive sample for retesting at an approved laboratory of the employee or applicant's choosing and at his or her expense.

See N.C. Gen. Stat. §§ 95 -230 et seq.

Violations of these procedures may be investigated by the Commissioner of Labor, who is authorized to enforce this provision by bringing civil actions to recover penalties of up to \$250 per examinee or \$1,000 per investigation. N.C. Gen. Stat. § 95-234.

B. Private Employers

The North Carolina drug testing laws, set forth at N.C. Gen. Stat. §§ 95-230 et seq., govern both public and private employers.

In Garner v. Rentenbach Constructors, Inc., 515 S.E.2d 438, 350 N.C. 567 (1999), an employer's decision to fire an employee based on a positive drug test result did not constitute a wrongful discharge in violation of public policy, even though the drug test was conducted in a manner that violated the statute requiring employers to use only approved laboratories. The court opined that violation of a procedural requirement of the state drug-testing statutes did not automatically give rise to a claim for wrongful discharge. There was no evidence that the employer knew that the laboratory was not approved or that the employee was discharged for an unlawful purpose.

XIII. STATE ANTI-DISCRIMINATION STATUTES

A. Employers/Employees Covered

The employers and employees covered under the various North Carolina anti-discrimination statutes are set forth in the discussion of each statute in Section XII.B.

B. Types of Conduct Prohibited

The North Carolina Equal Employment Practices Act (EEPA), N.C. Gen. Stat. §§143-422.2, et seq., provides as follows:

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

No express statutory cause of action or remedy lies under the EEPA. See Smith v. First Union Nat'l Bank, 202 F.3d 234 (4th Cir. 2000) (holding that the EEPA provides no private right of action for sexual harassment); Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995) (noting that the EEPA provides no

statutory remedy); Ridenhour v. Concord Screen Printers, Inc., 40 F. Supp. 2d 744 (M.D.N.C. 1999) (stating that no separate cause of action for sexual harassment exists under the Act, which does not create a freestanding cause of action but merely serves as a springboard for common-law wrongful discharge claims and other specific statutory claims); DeWitt v. Mecklenburg County, 73 F. Supp. 2d 589 (W.D.N.C. 1999) (finding the EEPA does not provide a private right of action for disparate treatment, hostile work environment or retaliatory discharge); Emmons v. Rose's Stores, Inc., 5 F. Supp. 2d 358 (E.D.N.C. 1997), aff'd, 141 F.3d 1158 (4th Cir. 1998) (ruling that an action for sexual discrimination should not be brought under the North Carolina Constitution in federal court since a remedy was available in state court for wrongful discharge in violation of public policy under the EEPA).

The question of whether a violation of the EEPA can support a common-law wrongful discharge claim for violation of public policy has been at issue, but in most contexts, the courts have held that the statute does provide the basis for a claim. In Jarman v. Deason, 618 S.E.2d 776, 779, 173 N.C. App. 297, 301 (2005), the court stated that North Carolina has "repeatedly recognized that the EEPA may form the basis for a wrongful discharge claim." In Brewer v. Cabarrus Plastics, Inc., 504 S.E.2d 580, 130 N.C. App. 681 (1998), the court found that Plaintiff was entitled to have his discrimination claims (including a state-law wrongful discharge claim based on the EEPA) decided by a jury. In so doing, the court noted that Plaintiff's federal claim under 42 U.S.C. § 1981 encompassed his claim for wrongful discharge and that evidentiary standards under state law were the same as those under Title VII. See also Simmons v. Chemol Corp., 528 S.E.2d 368, 370, 137 N.C. App. 319, 322 (2000) (wrongful discharge claim for handicap discrimination based upon N.C. Gen.Stat. § 143-422.2); McCullough v. Branch Banking & Trust Co., 524 S.E.2d 569, 574, 136 N.C. App. 340, 346 (2000) (holding that the plaintiff had asserted a claim by alleging that his termination was "in violation of this State's public policy prohibiting discrimination on account of a person's handicap or disability," (citing N.C. Gen.Stat. § 143-422.2)).

In addition to wrongful discharge claims based upon the public policy set forth in the EEPA, the state Human Relations Commission in the Department of Administration has authority to receive charges under the EEPA from the EEOC by agreement and may investigate and conciliate charges of discrimination that are under its jurisdiction. N.C. Gen. Stat. § 143-422.3.

Section 130A-148(i) of the North Carolina General Statutes outlaws employment discrimination on the basis of AIDS/HIV status. By its terms, however, this statute does not prohibit employers from:

1. Requiring job applicants to submit to AIDS testing in pre-employment medical examinations;
2. Denying employment to a job applicant based solely on a confirmed positive test for AIDS virus infection;
3. Requiring all employees to submit to AIDS testing in the course of routine annual medical examinations; and
4. Reassigning, discharging or taking other appropriate action with respect to any AIDS or HIV-infected employee who is unable to perform his or her normally assigned duties or who poses a significant health risk.

The North Carolina Persons With Disabilities Protection Act, N.C. Gen. Stat. §§ 168A-1 et seq., prohibits employers with 15 or more employees from discriminating against qualified disabled persons with respect to terms, conditions, and privileges of employment. If a qualified disabled person requests a reasonable accommodation, or if a potential accommodation is obvious to an employer, the employer is obliged to provide such an accommodation unless doing so would pose an undue hardship. The statute also prohibits employers from retaliating against any person who opposes practices made unlawful by the statute or who cooperates in proceedings under the statute.

A person aggrieved by his or her employer's conduct under Section 168A may bring a non-jury civil action seeking back pay, declaratory relief, and/or injunctive relief. If a plaintiff seeks relief under both Section 168A and federal disability discrimination law, the state court may not maintain jurisdiction over the matter, but must dismiss it forthwith. Any action under Section 168A must be brought within 180 days after the date on which the plaintiff learned or should have learned of the allegedly discriminatory practices.

N.C. Gen. Stat. § 95-28.1 prohibits employment discrimination on the basis of a person's sickle cell trait or hemoglobin C trait. By its terms, however, the statute does not confer employment, promotion or layoff preference to persons with these traits, nor does it preclude employers from discharging such persons for cause.

North Carolina employers are prohibited from discriminating against any applicant or employee because that person requested genetic testing or counseling services, or because of genetic information concerning the person or the person's family. N.C. Gen. Stat. § 95-28.1A. A "genetic test" is a test determining the presence or absence of genetic characteristics in a person or family in order to diagnose a genetic condition or to ascertain susceptibility to such a condition. The statute states that it does not prevent protected persons from being discharged for cause.

Private employers with three or more regular employees are prohibited from imposing discriminatory terms, conditions, and privileges of employment with respect to any employee based on that employee's lawful use of lawful products (e.g., cigarettes) during non-working hours, so long as such use does not adversely affect job performance, ability to perform job responsibilities or safety of other employees. N.C. Gen. Stat. § 95-28.2. However, this law does not prohibit employers from taking the following actions: (a) restricting lawful use of lawful products in non-working hours when such restrictions relate to a bona fide occupational requirement reasonably related to employment activities; (b) restricting such use when the restrictions relate to an organization's fundamental objectives; (c) taking adverse action against an employee who contravenes the requirements or recommendations of the employer's substance abuse prevention program; or (d) using differential coverage or pricing for health, disability or life insurance policies based on employees' use or nonuse of lawful products, as long as the differences are actuarially justified and the employer provides written notice of the differential rates and contributes equally on behalf of each employee. See id.

An employee or applicant who is discriminated against in violation of this law may institute a civil action for lost wages and benefits, reinstatement (or employment if the person is an applicant), and attorneys' fees. Any such action must be brought within one year after the alleged violation.

Under the Retaliatory Employment Discharge Act (REDA), N.C. Gen. Stat. §§ 95-240 et seq., employers are prohibited from taking retaliatory action against an employee who (for his/her own benefit or on behalf of another employee) in good faith does or threatens to file a claim, initiate proceedings, or provide testimony or information with respect to any of the following laws:

1. Workers' Compensation Act, N.C. Gen. Stat. §§ 97-1 et seq.;
2. The Wage and Hour Act, N.C. Gen. Stat. §§ 95-25.1 et seq., or the Occupational Safety and Health Act of North Carolina ("OSHANC"), N.C. Gen. Stat. §§ 95-126 et seq.;
3. The Mine Safety and Health Act of North Carolina ("MSHANC"), N.C. Gen. Stat. §§ 74-24.1 et seq.;
4. N.C. Gen. Stat. § 95-28.1, prohibiting discrimination on the basis of an individual's Sickle Cell Trait or Hemoglobin C Trait;
5. N.C. Gen. Stat. §§ 127A-201 et seq., providing reemployment rights for individuals serving in the National Guard;
6. N.C. Gen. Stat. § 95-28.1A, prohibiting discrimination on the basis of genetic testing or genetic information;
7. The North Carolina Pesticide Law of 1971, N.C. Gen. Stat. §§ 143-434, et seq.
8. Drug Paraphernalia Control Act of 2009, adding new section 90-113.80 et seq., (S.L. 2009-205, effective Dec. 1, 2009).

An employee wishing to bring a claim under REDA must file a written complaint with the Commissioner of Labor within 180 days of the alleged violation. Thereafter, the Commissioner will investigate the matter and make a reasonable cause determination within ninety days. If the Commissioner finds no reasonable cause to believe REDA has been violated, then the employee is issued a right-to-sue letter. It is an affirmative defense against a REDA claim to assert that Defendant would have terminated Plaintiff's employment even if the complaint had not been made. Delon, 367 F.Supp.2d at 902.

If, however, reasonable cause is found, then the Commission uses conference, conciliation and persuasion to attempt to eliminate the alleged violation. If such methods are unsuccessful, the Commissioner either files a civil action on the employee's behalf or issues the employee a right-to-sue letter. Upon receipt of a right-to-sue letter, the employee has 90 days in which to commence a civil action. See, e.g., Comm'r. of Labor of N.C. v. Dillard's, Inc., 83 F. Supp. 2d 622 (M.D.N.C. 2000) (Commissioner of Labor brings civil action under REDA on behalf of terminated employee).

Parties to a civil action brought under REDA by the Commissioner or by an employee have the right to a jury trial. The following relief may be awarded: (a) injunctive relief to prevent further violations;

(b) reinstatement (including restoration of benefits and seniority rights); and (c) compensatory damages for economic losses proximately caused by the retaliatory activity. If the court finds a willful violation of REDA, any compensatory damages award will be trebled. A prevailing plaintiff may recover attorneys' fees and other reasonable costs and expenses. However, if a plaintiff's REDA claim is frivolous, then the defendant may recover its reasonable costs and expenses, including attorneys' fees.

C. Administrative Requirements

There is no state family and medical leave act in North Carolina. Administrative requirements under the various North Carolina anti-discrimination statutes are set forth in the discussion of each statute in Section XII. B.

D. Remedies Available

The remedies available under the various North Carolina anti-discrimination statutes are set forth in the discussion of each statute in Section XII. B.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employer may discharge or demote any employee because the employee has been called for jury duty or is serving as a grand or petit juror. N.C. Gen. Stat. § 9-32(a)-(c).

B. Voting

Employers are prohibited from discharging or threatening to discharge an employee because such employee exercised the right to vote. N.C. Gen. Stat. § 163-274(6).

C. Family Medical Leave

There is no comprehensive state FMLA-type act. Employers are required to grant four hours per year of unpaid leave to employees for involvement at their children's schools, subject to certain procedural requirements. Employers may not discharge, demote, or otherwise take adverse action against employees who request or take parental leave under the statute. N.C. Gen. Stat. § 95-28.3.

D. Pregnancy/Maternity/Paternity Leave

The North Carolina courts have not addressed the issue of pregnancy, maternity leave, or paternity leave in the employment context. These issues are governed pursuant to the Family and Medical Leave Act of 1993. 29 U.S.C.S § 2611(2)(A). The Act is a federal law that requires employers to provide job-protected and unpaid leave to employees for qualified medical reasons, including pregnancy.

E. Day of Rest Statutes

There are no state-wide day-of-rest statutes prohibiting employers from requiring employees to work on certain days. Pursuant to N.C. Gen. Stat. § 160A-174, cities may pass ordinances requiring a day of rest, provided that the ordinance is a constitutional exercise of the city's general police power. See State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973).

F. Military Leave

Under North Carolina law, a person shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment because of membership, application for membership, or service in the National Guard. N.C. Gen. Stat. §§ 127A-201 et seq. Furthermore, the statutes provide that upon written application from an employee within five days after release from duty in the National Guard, an employer must restore that employee to his or her previous position, or one of similar seniority, status, and salary, unless employer's circumstances render such restoration unreasonable. Id. If the employee is no longer qualified for his or her previous position, the employer must place the employee in another position for which he or she is qualified unless employer's circumstances make such placement unreasonable. Id.

G. Sick Leave

The North Carolina General Assembly has addressed sick leave in the context of Secondary and Elementary Education Employment Benefits. Specifically, section 115C-336 of the North Carolina General Statutes provides that “[a]ll public school employees shall be permitted a minimum of five days per school term of sick leave, pursuant to the rules and regulations promulgated by the State Board of Education as provided in G.S. 115C-12(8).”

The North Carolina Administrative Code provides that sick leave credits must be provided to all full-time or prorated for part-time State employees “with a permanent, trainee, probationary or time-limited appointment who is in pay status for one-half of the regularly scheduled workdays and holidays in a pay period. 25 N.C.A.C. 1E .0301.

H. Domestic Violence Leave

Pursuant to Section 95-270 of the North Carolina General Statutes “[n]o employer shall discharge, demote, deny a promotion, or discipline an employee because the employee took reasonable time off from work to obtain or attempt to obtain relief under Chapter 50B or Chapter 50C.” N.C.G.S. § 95-270(a). The employee, however, must follow the employer's usual time-off policy or procedure.

I. Other Leave Laws1. Leave for Parents' Involvement in Schools

Section 95-28.3 of the North Carolina General Statutes provides that “employers shall grant four hours per year leave to any employee who is a parent, guardian, or person standing in loco parentis of a

school-aged child so that the employee may attend or otherwise be involved at that child's school." N.C.G.S. § 95-28.3(a).

2. Community Service Leave

"A full time State employee with a permanent, probationary, trainee or time-limited appointment may be granted 24 hours of community services leave each calendar year." 25 N.C.A.C. 1E.1603.

3. Family Illness Leave

In addition to the 12 weeks of leave per year provided pursuant to the Family Medical Leave Act, a State employee is also entitled to up to 52 weeks of leave without pay during a five-year period in order to care for the employee's child, spouse, or parent with a serious health condition. 25 N.C.A.C. 1E.1412.

4. Vacation Leave

Vacation leave shall be provided to State employees who are full-time or part-time and have a permanent, trainee, time-limited or probationary appointment and who are in pay status for one-half of the regularly scheduled workdays and holidays in a pay period. 25 NCAC 1E.0203.

5. Workers' Compensation Leave

State employees shall go on workers' compensation leave and receive the weekly workers' compensation benefit after the required waiting period when the employee is injured. 25 N.C.A.C. 1E.0707.

XV. STATE WAGE AND HOUR LAWS

North Carolina addresses a variety of wage and hour issues, including minimum wage, overtime, child labor, payment of wages, withholding, and vacation pay. See N.C. Gen. Stat. § 95-25.1 et seq. North Carolina generally follows the federal minimum wage and overtime provisions. Id. The statutes require employers to advise employees in writing of their "wages" (broadly defined to include bonuses and other compensation) and vacation policies. Employees may obtain attorney's fees in actions where employers do not live up to their promises.

A. Current Minimum Wage in State

North Carolina minimum wage rates are governed by the North Carolina Wage and Hour Act and federal wage provisions. See N.C. Gen. Stat. § 95-25.3. See also 29 U.S.C. § 206. The current minimum wage in North Carolina is \$7.25 an hour. The North Carolina Wage and Hour Act does not apply to the wage payment claims of a nonresident who neither lives nor works in North Carolina. Sawyer v. Market America, Inc., 190 N.C. App. 791, 661 S.E.2d 750 (2008). Employers must notify employees in writing at the time of hiring of the promised wages and the day and place for payment. N. C. Gen. Stat. § 95-25.13(1). Employers must make available to employees the employment practices and policies related to promised wages, either in writing or through a posted notice in a place accessible to its employees. N. C. Gen. Stat. § 95-25.13(2). Employers must notify employees in writing at least one pay period before any decreases in wages or benefits. See N.C. Gen. Stat. § 95-25.13(3).

B. Deductions from Pay

The North Carolina Wage and Hour Act also governs deductions and withholdings from pay. See N.C. Gen. Stat. § 95-25.8. An employer may withhold or deduct a portion of an employee's wages when empowered by state or federal law, when the amount or rate of deduction is known and agreed upon in advance, or if it is not known and agreed upon in advance, upon written authorization from the employee. See N.C. Gen. Stat. § 95-25.8. See also 13 NC ADC § 12.0305. An itemized statement of deductions made from employee's wages must be furnished to employee for each pay period such deductions are made. N.C. Gen. Stat. § 95-25.13.

C. Overtime Rules

The North Carolina Wage and Hour Act also addresses overtime pay for North Carolina employees. Every employer shall pay each employee who works longer than 40 hours in a work week at a rate of not less than time and a half of the regular rate of pay for the hours in excess of 40 per week. N.C. Gen. Stat. § 95-25.4.

D. Time for payment upon separation

Employers shall pay employees whose employment has been discontinued for any reason all wages due on or before the next regular payday either through regular channels or by trackable mail if requested in writing by the employee. N.C. Gen. Stat. § 95-25.7. Such wages may not be forfeited unless the employee has been notified in accordance with N.C. Gen. Stat. § 95-25.13 of the employer's policy or practice which results in forfeiture. Kornegay v. Aspen Asset Group, LLC 204 N.C. App. 213, 693 S.E.2d 723 (2010).

E. Breaks and Meal Periods

For North Carolina employees, the standard workday includes a meal period. 25 N.C.A.C. 1C.0501. State agencies may adopt a variable work schedule, which allows State employees to choose their daily work schedule and meal period. 25 N.C.A.C. 1C.0502.

F. Employee Scheduling Laws

For North Carolina employees, the standard workweek is 40 hours per week, five days per week, eight hours per day plus a meal period. 25 N.C.A.C. 1C.0501. Agencies are responsible for determining the appropriate schedules for State employees, given that some positions require a workweek other than five days. *Id.* State agencies may adopt a variable work schedule, which allows State employees to choose their daily work schedule and meal period. 25 N.C.A.C. 1C.0502. The State employee and his/her supervisor must agree upon the schedule to be followed, consistent with the needs of the agency. 25 N.C.A.C. 1C.0503. A State employee who arrives later or leaves earlier than scheduled, may be permitted by his or her supervisor to make up the deficit time or the time can be charged to the employee's leave credits. 25 N.C.A.C. 1C.0504(a) and (c). Likewise, if an employee reports to work early, he or she may leave at a correspondingly early hour, consistent with the needs of the agency. 25 N.C.A.C. 1C.0504 (b).

XVI. MISCELLANEOUS OTHER STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

North Carolina has implemented laws to prohibit smoking in certain public places and certain places of employment. See Liebes v. Guilford County Dept. of Public Health, 713 S.E.2d 546 (N.C. App. 2011). Smoking is prohibited inside state government buildings and state vehicles. N.C. Gen. Stat. § 130A-493. Smoking is also prohibited in restaurants and bars with the exception of a designated smoking guest room in a lodging establishment, a cigar bar, and a private club. N.C. Gen. Stat. § 130A-496. The intent of the General Assembly is to protect the health of individuals in public places and places of employment. N.C. Gen. Stat. § 130A-491. Local governments may also restrict smoking in public places. N.C. Gen. Stat. § 130A-498.

B. Health Benefit Mandates for Employers

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North Carolina has a State Health Plan for the benefit of eligible employees, eligible retired employees, and certain eligible dependents. See N.C. Gen. Stat. § 135-48.2. Pursuant to the Plan, there shall be one or more available group health plans that are comprehensive in coverage. N.C. Gen. Stat. § 135-48.2.

Health benefit mandates for employers in North Carolina are also governed by the Employee Retirement Income Security Act (ERISA). While ERISA does not require an employer to provide health insurance to its employees, it regulates the operation of a health benefit plan if an employer chooses to establish one. See 29 U.S.C. §§ 1001-1461.

C. Immigration Laws

Employers must use E-Verify to verify that each employee hired is eligible to work in the United States. N.C. Gen. Stat. § 64-26. Failure to verify work eligibility by using E-Verify may result in civil penalty of \$2,000 for each employee verification the employer failed to make. N.C. Gen. Stat. § 64-33.

D. Right to Work Laws

Employers are prohibited from denying or abridging the right of persons to work on account of membership or non-membership in any labor union or labor organization or association. N.C. Gen. Stat. §§ 95-78 et seq.

E. Lawful Off-Duty Conduct (Including lawful marijuana use)

1. Lawful Use of Lawful Products

Under North Carolina law, an employer is prohibited from refusing to hire a prospective employee, or discharging or otherwise discriminating against any employee with respect to compensation terms, conditions, or privileges of employment because the employee or prospective employee lawfully uses lawful products off the employer's premises during nonworking hours and such use does not adversely

affect the employee's job performance or the person's ability to properly fulfill the responsibilities of his position or the safety of other employees. See N.C. Gen. Stat. § 95-28.2.

However, an employer may restrict the use of lawful products by employees while they are off duty if: the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities. An employer may also restrict the use of lawful products by off-duty employees if the restriction relates to the fundamental objectives of the organization. See N.C. Gen. Stat. § 95-28.2(c)(1)-(2). Finally, an employer is allowed to offer, impose, or have in effect a health, disability, or life insurance policy distinguishing between employees for the type or price of coverage based on the use or nonuse of lawful products. Id. § 95-28.2(d). Lastly, the statute provides a private cause of action for aggrieved employees and prospective employees who are entitled to seek lost wages and benefits, as well as reinstatement or hiring. The prevailing party may also be entitled to reasonable costs and attorneys' fees. See § 95-28.2(e)(1)-(3), (f).

2. Firearm Ownership

Private employers are conclusively given the authority to regulate or restrict an employee's ability to carry a gun onto the employer's premises, even when the employee has a valid concealed carry permit when and where the private employer conspicuously posts a notice or statement stating that concealed carry is prohibited. See N.C. Gen. Stat. § 14-415.11(c)(8). While the statute does not address open carry, employers presumably have the right to restrict or prohibit guns on company premises.

3. Marijuana Use

Currently, possession of marijuana in North Carolina is illegal. No exception has been created for the use of marijuana for medicinal purposes.

F. Gender/Transgender Expression

Currently, North Carolina law does not specifically recognize transgender expression as a status protected under the public policy exceptions for terminations under the employment-at-will doctrine. See N.C. Gen. Stat. §§143-422.1-422.3 (the E.E.P.A.). However, North Carolina law does prohibit harassment of school employees "motivated by an actual or perceived differentiating characteristic," including gender identity. See N.C. Gen. Stat. § 115C-407.15.

G. Other Key State Statutes

1. Safe Working Environment

Employers are required to furnish employees with conditions of employment and a place of employment free from recognized hazards that cause or are likely to cause death or serious injury. N.C. Gen. Stat. § 95-129 (N.C. OSHA).

2. Personnel Records

Employers are required to keep true and accurate employment records containing wage and hour information as prescribed by the Employment Security Commission. N.C. Gen. Stat. § 96-4(g)(1). These records must be maintained for at least three years. 13 N.C.A.C. § 12.0801.

3. Employment Security Proceedings

No person may be discharged, demoted, or threatened because that person has testified or has been summoned to testify in any proceeding under the Employment Security Act. N.C. Gen. Stat. § 96-15.1(a)-(d).

4. Bribery, Blacklisting and Medical Exams

North Carolina has criminal prohibitions against bribing employees, blacklisting employees and requiring employees to pay for medical exams as a condition of employment. N.C. Gen. Stat. §§ 14-353 et seq.

5. Hazardous Chemicals

Employees are protected from discharge for assisting investigations or testifying regarding hazardous chemicals. N.C. Gen. Stat. § 95-196.