2009-2010 NORTH CAROLINA EMPLOYMENT LAW UPDATE

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This paper summarizes employment law decisions from the North Carolina Supreme Court and Court of Appeals from January 1, 2009 to June 1, 2010.

North Carolina Supreme Court Decisions

Whistleblower Act

Helm v. Appalachian State University, 363 N.C. 366, 677 S.E.2d 454 (2009) (per curiam). *Reversing* Helm v. Appalachian State University, 194 N.C. App. 239, 670 S.E.2d 571 (2008), *and adopting the dissenting opinion. A state university vice chancellor's allegations were sufficient to support her claim that she engaged in a protected activity under the North Carolina Whistleblower Act where she refused and reported the chancellor's request that she pay a university trustee's friend $10,000 in university funds for an option to purchase land, which could not be exercised before it expired for lack of funds, so that the trustee's friend could pay his mortgage on the land.*

Jane Helm served as Vice Chancellor for Business Affairs at Appalachian State University (ASU) from 1994 to 2006. In 2005, Michael Cash approached James Deal, Jr., who served on the board of trustees for ASU, about getting ASU to purchase land he owned in Boone. Cash and Deal had a prior business or personal relationship and, in May 2006, either Cash or Deal told Chancellor Kenneth Peacock that Cash needed money to pay his mortgage on the land. Peacock then asked Helm to issue a $10,000 check from the university endowment fund made out to Michael Cash to obtain an option to purchase real property for $475,000 on or before September 1, 2006. Helm informed Peacock that the endowment fund did not, and would not, have enough money to exercise the option by September 1. Peacock told her to issue the check anyway, informing her that Cash needed the money to pay his mortgage. Helm refused to issue the check, explaining that it would be an inappropriate use of state funds. She immediately complained to a university attorney about the matter. Ultimately the endowment committee of the ASU board of trustees voted to approve the purchase of the option for $10,000. Helm abstained from the vote. Peacock asked her to resign that afternoon. She took early retirement instead of resigning. She then filed suit in state court asserting

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claims under North Carolina's Whistleblower Act and the State constitution. The trial court granted defendants' motion to dismiss.

The Court of Appeals majority (Judges Elmore and Tyson) affirmed the dismissal of Helm's claims. The Court held that Helm's allegations did not qualify as "protected activity" within the meaning of the Whistleblower Act. The court rejected Helm's characterization of the option as "worthless," noting that as a matter of law, an option to purchase land has "inherent, intrinsic value distinct from the purchaser's ability to exercise it." Because Peacock engaged in no misconduct, there was no protected activity.

Judge Calabria dissented in part, saying the allegations were sufficient to support Helm's claim that she engaged in a "protected activity." Judge Calabria noted that Helm alleged she was asked to resign because (1) she refused to issue a check for $10,000 from the endowment to purchase an option that she knew ASU had insufficient funds to exercise, and (2) she reported her objection to the transaction to a university attorney. Judge Calabria recognized that "while the enforceable right to purchase does have theoretical value, its value under the facts as alleged by the plaintiff does not justify the expenditure of $10,000 from the public funds." She also noted that Helm alleged facts tending to show that the option contract was not in consideration of obtaining the option, but rather a gift to Cash to enable him to pay his mortgage. Judge Calabria found that Helm's allegations, if accepted as true, were sufficient to show a violation of state law, including legislation governing endowment funds and the exclusive emoluments clause, a misappropriation of state resources, or a gross waste of public funds, and therefore the trial court erred by granting defendants' motion.

The Supreme Court reversed, for the reasons stated in Judge Calabria's dissent.

Unemployment Compensation

Carolina Power & Light Co. v. Employment Security Commission, 363 N.C. 562, 681 S.E.2d 776 (2009). *Reversing award of unemployment benefits, holding that an employee did not have good cause attributable to his employer to leave his job by accepting an early retirement benefits package, despite the fact that the employer was downsizing and did not answer the employee's questions about his job security.*

Carolina Power & Light Co. (CP&L) was downsizing its workforce, informed Herman Roberts his job was eliminated, and transferred him from Whiteville to a temporary position in Clinton. Roberts asked his supervisors if he would be transferred back to Whiteville or go to Wilmington, but he was never given an answer. CP&L offered several employees, including Roberts, a voluntary enhanced early retirement package. Roberts

asked his supervisors if he would still have a job if he did not accept early retirement. His question was never answered, so he accepted early retirement. After retiring, Roberts filed for and was awarded unemployment insurance benefits. CP&L appealed, and the trial court affirmed the award of benefits by the Employment Security Commission (ESC). The Court of Appeals, in a divided opinion, affirmed.

The Supreme Court reversed, holding Roberts was disqualified from receiving unemployment benefits under N.C. Gen. Stat. § 96-14(1) because he did not have "good cause attributable to his employer" to leave work by accepting early retirement. The Court defined "good cause" as "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work," and "attributable to the employer" as separation "produced, caused, created or as a result of actions by the employer." The Court concluded that none of the employer's actions constituted "good cause" for Roberts to leave his employment. First, downsizing the workforce does not automatically trigger layoffs, and nothing in that process suggests that Roberts was to be terminated. Second, failure to give job assurances to an at-will employee, who has no guarantee of a job, cannot be good cause because he has no legal basis to use the failure to give job assurances as good cause when he accepts early retirement. Finally, offering early retirement in order to downsize cannot be a good cause because the employee had to submit an application, and was not forced, to accept early retirement.

While recognizing that this was a case of first impression, the Court concluded that permitting an employee who has not been told that he or she will be terminated to leave and obtain unemployment benefits on the basis that the employee accepted enhanced early retirement would create an inconsistency and inequity in the law. The Court pointed to N.C. Gen. Stat. §96-14(1), which specifies that good cause attributable to the employer does not exist even when employee is told that he will lose his job on a certain date and then the employee quits before that date. The Court also pointed to other case law interpreting "good cause" to exist when an employee can no longer work because it is logistically impractical or the work environment is intolerable. In the case at hand, neither of those situations existed.

Employment Contract

Franco v. Liposcience, Inc., 363 N.C. 741, 686 S.E.2d 152 (2009) (per curiam). *Affirming* Franco v. Liposcience, Inc., 676 S.E.2d 500 (N.C. App. 2009). *Because a "no retaliation letter" from employer to employee was not supported by sufficient consideration to form a contract, and employee was not entitled to enforce the letter as a third-party beneficiary to a severance agreement between employer and employee's father, employer was not barred from terminating at-will employee.*

Richard Franco, Jr., was vice president of marketing at Liposcience, Inc., and his father, Richard Franco, Sr., was Chairman of the Board of Directors. Franco Sr. was removed as board chairman. At the time he was removed, Franco Sr. entered into a severance that included a merger clause incorporating the complete understanding of the parties. As part of the severance negotiations, the new board chairman sent a "no retaliation letter" to Franco Jr. stating that Liposcience would not take any adverse employment action against him based on his relationship with Franco Sr. Over a year later, Franco Jr. was terminated. Franco Jr. sued Liposcience, claiming that the no retaliation letter formed a binding agreement, which Liposcience breached when they fired him in retaliation for his father's actions. During the jury trial, the trial court granted directed verdict in favor of the defendant on the breach of contract claim.

The Court of Appeals majority (Judges Wynn and Hunter) affirmed, holding that the no retaliation letter did not form a valid contract. While recognizing that an employment-at-will contract may be supplemented by additional agreements which are enforceable, the court found that the no retaliation letter was not a binding agreement as there was insufficient consideration. When Franco Jr. received the retaliation letter, he was already employed, and the letter did not change any of his rights or duties. Mere continued employment was insufficient consideration to form a valid contract.

Franco Jr. argued that consideration was supplied by Franco Sr., who negotiated for the no retaliation letter in connection with his severance agreement, and Franco Jr. is entitled to enforce the letter as a third-party beneficiary. The court noted that the promises in the no retaliation letter were not incorporated or made binding in the severance agreement, which contained a merger clause but did not reference the no retaliation letter. The court further noted that no North Carolina case law supported the notion that consideration could be found through action or lack of action by a third party, and that Franco Sr. was not a party to the action and had not sought to enforce his rights in any other lawsuit.

Judge Ervin dissented, saying that a third party's forbearance can be consideration.

The Supreme Court affirmed per curiam.

North Carolina Court of Appeals Decisions

Whistleblower Act

DeMurry v. N.C. Department of Correction, 673 S.E.2d 374 (N.C. App. 2009).
Reversing the denial of summary judgment for defendants, the North Carolina Department of Correction and a corrections facility assistant superintendent in his official capacity, holding sovereign immunity barred former correctional officer's conversion claim, officer could not maintain a § 1983 claim for monetary damages, and reassignment was not an adverse action as required to maintain a Whistleblower Act claim.

Gavin DeMurry worked for the North Carolina Department of Correction (DOC), supervising inmates in Carteret Correctional's Community Work Program (CWP). He did not get along with two of his co-workers and all three employees were transferred out of the CWP. DeMurry was reassigned to a post on the same shift in the correctional officer unit rotation with no loss in pay. DeMurry complained about his reassignment, claimed his personal tools were damaged or not returned to him after his transfer, and alleged that the superintendent misappropriated public resources. DeMurry resigned.

DeMurry sued the DOC and representatives of the DOC and Carteret Correctional for conversion and violations of the North Carolina Whistleblower Act and 42 U.S.C. § 1983. Defendant DOC, the superintendent, and the assistant superintendent appealed the trial court's denial of summary judgment.

The Court of Appeals considered the appeals of the DOC and assistant superintendent in his official capacity, but dismissed the superintendent's appeal as not immediately appealable because he failed to assert immunity as an affirmative defense to the complaint. The court held that the trial court erred by denying summary judgment on DeMurry's claims. The court held that the conversion claim was barred by sovereign immunity because even though the State has waived its sovereign immunity as to some torts, it has not waived sovereign immunity for intentional torts, including conversion. The court held that the § 1983 claim seeking only monetary damages failed, as the defendants were not "persons" under the statute for purposes of a claim for money damages. The court held that that there was no genuine issue of material fact on the "adverse action" element of a Whistleblower Act claim. The court found that DeMurry's resignation was not an adverse action since the people affiliated with DOC who knew about his intent to resign tried to talk him out of it. The court also held that DeMurry's reassignment was not a demotion. Looking to internal DOC policy, his reassignment was excluded from further review as a non-appealable, non-disciplinary action. DeMurry was

assigned to work the same shift and suffered no pay loss, and the only evidence that his reassignment was "adverse" was his statement that he experienced "many satisfied moments of accomplishment" at CWP, and that he may not have that same feeling of accomplishment in the correctional facility.

Wrongful Discharge

McDonnell v. Tradewind Airlines, Inc., 194 N.C. App. 674, 670 S.E.2d 302 (N.C. App. 2009). *Federal aviation regulations that establish requirements for air traffic safety do not establish North Carolina public policy. Although a State statute mentions air safety, its application is limited to airspace within North Carolina's sovereignty. Employer did not violate North Carolina public policy when it fired a flight engineer for refusing to fly a plane.*

John McDonnell, a flight engineer for Tradewind Airlines, Inc. (Tradewind), refused to fly a non-revenue flight without passengers back to North Carolina. McDonnell said he was too tired to execute his duties safely because he had been on duty for seven days and was in flight more than eight of the previous twenty-four hours. Tradewind fired McDonnell, and he brought a wrongful discharge suit. At the close of McDonnell's evidence, the trial court entered a directed verdict in favor of Tradewind.

The Court of Appeals affirmed directed verdict on McDonnell's wrongful discharge claim, holding that termination based on his refusal to fly a non-revenue flight back to North Carolina was not in contravention of North Carolina public policy. The court held that the public policy exception to the at-will employment doctrine is applicable where (1) the public policy of North Carolina is clearly expressed within North Carolina's general statutes or constitution, or (2) potential harm to the public is created by defendant's unlawful actions. The court held that a Federal Aviation Administration (FAA) regulation prohibiting careless or reckless operation of aircraft, 14 C.F.R. 91.13, in and of itself, is not sufficient to constitute an express statement of public policy in North Carolina. The court also held that N.C. Gen. Stat. § 63-13, which defines lawful flight, was not applicable to the facts of this case because to the extent the statute mentions air safety, the General Assembly has limited its application to airspace within our State's sovereignty. The court also rejected McDonnell's reliance on N.C. Gen. Stat. § 63-20, which requires pilots to be federally licensed, and *Mann v. Henderson*, 261 N.C. 338, 134 S.E.2d 626 (1964), which says applicable federal aviation regulations are binding on our state courts, because they address licensing to operate aircraft and do not speak to declarations of public policy or a public policy exception to the law governing at-will employment.

Kranz v. Hendrick Automotive Group, Inc., 674 S.E.2d 771 (N.C. App. 2009). *Affirming summary judgment on wrongful discharge claim where plaintiff suggested changes to ensure the protection of private customer information and to comply with tax laws, but failed to show that the defendant-employer was violating any laws or that it fired plaintiff for making the suggested changes.*

Gregory Kranz worked for Hendrick Automotive Group (HAG) as vice president of information technology. In 2005 and 2006, Kranz made multiple recommendations regarding third-party access to internal databases of customer information and classification of certain fixed assets for the purpose of calculating depreciation. In May 2006, Kranz was fired for failing to meet certain deadlines. Kranz brought suit for wrongful discharge and breach of contract. The trial court granted defendants' motion for summary judgment.

The Court of Appeals affirmed summary judgment on both claims. In his wrongful discharge claim, Kranz asserted he was fired for insisting that HAG abide by state and federal laws requiring (1) the security of sensitive client information maintained in computer databases and (2) proper classification and depreciation of fixed assets for tax and banking purposes. With respect to the customer privacy contentions, the court held although that Kranz presented evidence that HAG violated its own policies and was not in sync with what similar companies' were doing, he did not present evidence that HAG violated any state or federal law or that he was ever asked to violate those laws. The court also recognized that a violation of state or federal law, standing alone, is not sufficient for a wrongful discharge claim; rather, there must be a degree of intent or willfulness on the part of the employer. The court found that even if there was evidence of a violation of privacy laws, Kranz failed to show that HAG knew of the violations. With respect to the fixed assets contentions, the court similarly held that there was no evidence of a violation of the law, only violations of internal policies and inconsistencies with other companies that could possibly result in improper tax reporting. The court held summary judgment was proper on the breach of contract claim because by the terms of his compensation plan, which stated "[y]ou must be an employee on each payment date in order to receive the bonuses," Kranz was not entitled to a bonus that was payable at the end of 2006.

Combs v. City Electric Supply Co., 690 S.E.2d 719 (N.C. App. 2010). *Reversing directed verdict on wrongful discharge and tortious interference with contract claims, where plaintiff presented evidence that defendant electric company transferred the sums from negative account balances on customer accounts to its own account and then billed the customers, concealing their negative account balances. Affirming directed verdict on plaintiff's unfair-trade-practices claim.*

David Combs was an accounts receivable manager for City Electric Supply Company from August 2001 until July 2003. In January 2003, Combs' supervisor told him not to mail statements to customers who had negative account balances. Plaintiff disagreed with this practice. He met with the head supervisor in his office, and asserted that it constituted stealing money from customers. After this meeting, the head supervisor gave him a negative performance evaluation, and his salary was reduced. Two months after the negative evaluation, Combs was fired. Combs filed suit against City Electric and the head supervisor alleging wrongful discharge, tortious interference with his contractual rights, and unfair and deceptive trade practices. At the conclusion of Combs' evidence at trial, the trial court granted directed verdict for defendants on all of the claims.

The Court of Appeals reversed directed verdict on plaintiff's wrongful discharge and tortious interference claims. The court held that with regard to Combs' wrongful discharge claim, the evidence created an issue for the jury as to whether he was discharged in retaliation for reporting alleged false pretenses violations to management. The court concluded that the evidence presented at trial tended to show that City Electric had obtained property by false pretenses in violation of N.C. Gen. Stat. § 14-100 by purposely withholding customers' negative balance statements, transferring these monies to the company's own bank account, and then sent out subsequent statements that did not show the negative balance, inducing customers to make payments that were not owed. In reviewing the tortious interference with contract claim, the court recognized that while "non-outsiders" to employment contracts, who were not a party but have a legitimate business interest in the contract, "often enjoy qualified immunity from liability" for interference, the "qualified privilege . . . is lost if exercised for motives other than reasonable, good faith attempts to protect the non-outsider's interests." The court held that the issue of whether Combs was terminated for wrongful purpose rather than for poor performance, which would defeat the head supervisor's qualified privilege to interfere with his contract as a non-outsider, was for the jury in Combs' tortious interference claim against the head supervisor. Evidence that after Combs met with the head supervisor and alleged that City Electric was stealing from its customers, his work environment changed, and he was on the head supervisor's "hit list," and the head supervisor began to rummage through his desk, was "more than a scintilla of evidence." The court affirmed the trial court's directed verdict on the issue of unfair and deceptive trade practices, holding that the Unfair and Deceptive Trade Practices Act is not applicable to a simple employment dispute between an employer and employee, involving conduct not "affecting commerce."

Non-compete Agreements

Medical Staffing Network, Inc. v. Ridgway, 194 N.C. App. 649, 670 S.E.2d 321 (N.C. App. 2009). *A non-compete agreement trying to prevent employees from going to work for competitors, not only of the employer, but also any affiliate of the employer, was overly broad and did not protect a legitimate business interest of the employer.*

In 2001, when Thomas Ridgway went to work as a manager for Medical Staffing Network (MSN), a healthcare staffing network, he signed an employment agreement, which included confidentiality, non-compete, and non-solicitation clauses. The agreement was between Ridgway, MSN, and "any parent, division, subsidiary, affiliate, predecessor, successor or assignee hereof[.]" In 2001, he entered into another contract with MSN that involved a stock purchase program and also included confidentiality and non-complete clauses. In June of 2005, Ridgway was approached about coming to work for Trinity Healthcare Staffing Group (Trinity), which he did in July. Around the time he was approached by Trinity, Ridgway accessed MSN strategy documents with unusual frequency. After Ridgeway joined Trinity, MSN's profits dropped while Trinity's profits increased. Ridgway also began soliciting MSN's clients. The trial court found for MSN on its claims for breach of contract, misappropriation of trade secrets, unfair and deceptive trade practices, and tortious interference with a contract.

The Court of Appeals reversed and remanded in part and affirmed in part. The court held that the 2001 agreement did not supersede the 2000 agreement because they were executed for two distinct purposes and could be enforced consistently. The court reversed the trial court on MSN's breach of contract and tortious interference with a contract claims, holding that that the restrictive covenants in the 2000 agreement were unenforceable because it included an unrestricted and undefined set of MSN's affiliated companies and extended beyond MSN's legitimate business interest. The court affirmed the trial court on the claims of misappropriation of trade secrets and unfair and deceptive trade practices, holding they could be shown through circumstantial evidence, such as Ridgway's access of strategy documents and the increase in Trinity's profits as MSN's declined.

Hejl v. Hood, Hargett & Associates, Inc., 674 S.E.2d 425 (N.C. App. 2009). *A non-compete agreement's three-year time restriction was not excessive, but because the territory restrictions were overly broad and not reasonably restricted to protect the employer's legitimate business interests, the agreement was invalid and unenforceable.*

In 2005, after fourteen years of working for Hood, Hargett & Associates (Hood), an insurance company, Phillip Hejl signed a non-compete agreement in exchange for

$500.00. The agreement restricted competition for a total of three years; two years following termination of employment and a one-year look back period. The agreement precluded Hejl from competing in Charlotte and any other city in North Carolina or South Carolina where Hood was providing its goods or services. The agreement also stated that Hejl could not provide insurance to anyone Hood had sold or quoted any product or service. When Hejl was terminated in 2007, he sought declaratory relief based on the rights under the agreement, claiming the agreement lacked valid consideration and was overly broad. The trial court declared the agreement void for lack of consideration.

The Court of Appeals affirmed on other grounds. The court found that the agreement was not void due to a lack of consideration. Because the parties dealt at arms length, and Hejl received $500.00 as consideration for signing the agreement, the consideration was valuable and that this state's courts should not pass judgment on the adequacy of the value. The court then turned to the scope of the agreement. Citing *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961), where the Supreme Court held that non-compete agreement that lasted for five years was reasonable, the court here held that the three year scope of the agreement was reasonable. With regard to the geographic scope of the agreement, the court noted that non-compete agreements may be directed at protected a legitimate business interest, but found that "Defendant's attempt to prevent Plaintiff from obtaining clients where Defendant had failed to do so, is an impermissible restraint on Plaintiff." The court held that the agreement was invalid and unenforceable because the territory and customers encompassed were overly broad and not reasonably restricted to protect MSN's legitimate business interests.

MSC Industrial Direct Co. v. Steele, 682 S.E.2d 248, 2009 WL 2501762 (N.C. App. 2009) (unpublished opinion). *Employer's grant of restricted shares of stock with none of the rights of ownership and that would be revoked if employee was fired did not constitute consideration for a non-compete agreement.*

James Scott had worked for MSC Industrial Direct Co., Inc. (MSC) for twelve years when he signed a confidentiality, non-solicitation, and non-competition agreement in February 2006. The stated consideration for the agreement was a grant of restricted shares of stock that would become vested in the future by a schedule, the earliest of which was in January 2009; Smith's continued employment; his compensation; and confidential business information. After MSC terminated Scott for alleged violations of the agreement, he began working for one of MSC's competitors. MSC filed a complaint seeking a temporary restraining order (TRO) and preliminary injunction. The trial court initially granted the TRO, and subsequently denied the injunction and dissolved the TRO.

The North Court of Appeals affirmed, holding that MSC was not likely to succeed on the merits because the agreement was not enforceable for lack of valuable consideration. The manner in which the stocks were to be transferred gave Smith no rights to them upon his signing the agreement, thus they had illusory value and were not valuable consideration. The grant of stocks was made more than 30 days before the agreement was signed. Until they vested, Scott had not rights relating to the shares. If his employment terminated by any means other than death, disability, or retirement, any unvested shares were to be redelivered to MSC. The court held that the last three attempts at consideration (the continued employment, compensation, and information) failed because they stayed the same both before and after the contract was signed. Smith received no greater job security, no more salary, and no more confidential information after the agreement was signed.

Wage and Hour Act

Panos v. Timco Engine Center, Inc., 677 S.E.2d 868 (N.C. App. 2009). *Daily conference calls with North Carolina employer and a choice of law clause in employment contract requiring the application of North Carolina law are not enough to make the North Carolina Wage and Hour Act apply to a non-resident employee who rarely worked in North Carolina.*

Ross Panos worked for Timco Engine Center (Timco), a company based in North Carolina. He lived in California and worked primarily in Michigan. Panos spent at most 18 days working in North Carolina, but he called the North Carolina office on a nearly daily basis. His employment contract included a choice of law clause that specified that North Carolina law should apply to disputes arising from his employment. Panos was hired in January 2005, and terminated in December 2005. Panos filed a lawsuit against Timco that included a North Carolina Wage and Hour Act claim, and Timco filed a counterclaim for misappropriation of trade secrets. The trial court granted partial summary judgment for each party.

The Court of Appeals affirmed the trial court's grant of summary judgment for Timco on Panos' Wage and Hour Act claim, and the trial court's grant of summary judgment for Panos on Timco's trade secrets claim. The court reiterated its decision in *Sawyer v. Market America, Inc.*, 190 N.C. App. 791, 661 S.E.2d 750 (2008), that the Wage and Hour Act could not be applied outside of the borders of North Carolina to an employee who did not live in North Carolina and rarely worked in North Carolina. The court held that daily conference calls to North Carolina were insufficient to bring Panos within the protections of the Wage and Hour Act. Although the employment contract required the application of North Carolina law, the provision did not change the limits or requirements

of the Wage and Hour Act. The court also held that defendant produced no evidence that Panos misappropriated any trade secrets and no evidence of any damages incurred.

Retaliatory Employment Discrimination Act

Beard v. Cumberland County Hospital System, __ S.E.2d __, 2010 WL 1960850 (N.C. App. 2010) (unpublished opinion). *An employee's complaints that her employer would not allow her to work in a light-duty position after her on-the-job injury or to choose her own physician, did not constitute "retaliatory actions" by her employer under the Retaliatory Employment Discrimination Act, and her claims were within the exclusive jurisdiction of the Industrial Commission.*

Debbie Beard began working for the Cumberland County Hospital System ("the Hospital") in January 2007. She filed workers' compensation claims in February, May, June, and August of that year. Beard filed a lawsuit claiming that the Hospital retaliated against her in violation of the Retaliatory Employment Discrimination Act (REDA) by not allowing her to seek medical treatment from the doctor of her choice and not allowing her to return to light-duty work while recovering from her injuries. The trial court dismissed Beard's claims for lack of subject matter jurisdiction.

The Court of Appeals affirmed, holding that Beard failed to allege sufficient facts to support a REDA claim because the Hospital's actions were not "retaliatory actions" within the meaning of REDA. The court held that a dispute over which physician should treat allegedly work-related injuries is not a "retaliatory action" under N.C. Gen. Stat. § 95-240(2) because it is in no way connected to "the terms, conditions, privileges, and benefits of employment." The court also held that "a failure to return an employee to work in a position other than her own has never been held to be violative of the REDA." In so holding, the court cited *Wiley v. UPS*, 164 N.C. App. 183, 594 S.E.2d 809 (2004), which explicitly did not decide this issue. The court also reasoned that REDA does not require an employer to make an accommodation for an employee, so if no position exists that the employee could perform, no adverse employment action has occurred. The court went on to hold that Beard's claims were exclusively within the jurisdiction of the Industrial Commission because they were related to her compensable injuries and ancillary to her workers' compensation claims.

Public Employees

Jailall v. N.C. Dep't of Public Instruction, 675 S.E.2d 79 (N.C. App. 2009). *The Office of Administrative Hearings (OAH) does not have jurisdiction over a petition for a contested case hearing brought by a former career sate employee who lost his job as part of a reduction in force, even though he alleged procedural violations and a lack of just cause, because the OAH's jurisdiction is derived from the State Personnel Act, which provides that a state employee can file in OAH a contested case only as to dismissal, demotion, or suspension without pay.*

In August 2007, the North Carolina Department of Public Instruction (DPI) sent Mahatam Jailall notice that his position had been discontinued due to a loss of federal funding and a reduction in force (RIF). The notice said that he had a right to appeal. In October 2007, Jailall filed a petition for a contested case with the Office of Administrative Hearings (OAH), alleging he was selected for the RIF because of his race and national origin. After his RIF was upheld, he filed a second petition, claiming his involuntary separation due to a RIF was without just cause. Both the OAH and the trial court concluded that *University of North Carolina at Chapel Hill v. Feinstein*, 161 N.C. App. 700, 590 S.E.2d 401 (2003), required that the contested case be dismissed because OAH lacked subject matter jurisdiction over the petition.

The Court of Appeals affirmed the dismissal of the claimant's contested case petition for lack of subject-matter jurisdiction. The court reviewed its holding in *Feinstein* in detail, and found this case to be indistinguishable from that one. In *Feinstein*, the court held that three university system employees were unable to appeal their dismissal under a RIF on grounds of lack of just cause and procedural violations because the State Personnel Act, N.C. Gen. Stat. § 126-34.1, created an exclusive list of issues appealable to the OAH that includes dismissal, demotion, or suspension without pay. Just cause and procedural challenges to a RIF are not included on the list. The court noted that the OAH's subject matter jurisdiction originated from the same statute for both Jailall and the petitioners in *Feinstein*, despite the fact that Jailall was subject to the Administrative Procedures Act and the *Feinstein* petitioners were not. The court held that it was bound by the prior decision of the court and upheld the dismissal of Jailall's just cause and procedural claims.

Jones v. Graham County Board of Education, 677 S.E.2d 171 (N.C. App. 2009). *A change in school board policy to random, suspicionless drug and alcohol testing of all board employees, with no stated purpose for the change, violated the North Carolina Constitution's guarantee against unreasonable searches.*

Graham County School Board enacted a policy of random, suspicionless drug and alcohol testing that allowed analysis of the "urine, blood, breath, saliva, hair, tissue, and other specimens of the human body" of all school board employees, including bookkeepers and support staff. The policy also provided that any employee who is found to have "a detectable amount of an illegal drug or of alcohol" will be suspended. Plaintiffs Susan Jones, a teacher at Graham County's Robbinsville High School, and the North Carolina Association of Educators filed a complaint seeking to have the policy declared a violation of the North Carolina Constitution's prohibitions against general warrants and unreasonable searches and seizures. The trial court granted the school board's motion for summary judgment.

The Court of Appeals reversed, holding that the policy violated the State Constitution's guarantee against unreasonable searches. The court found the policy to be "remarkably intrusive." Relying on U.S. Supreme Court case law on the Fourth Amendment to the U.S. Constitution, the court reasoned that "some quantum of individualized suspicion is usually a prerequisite" for a search, unless there is a reduced expectation of privacy or the government alleges "special needs" justifying the intrusion. The court found that the employees did not have a reduced expectation of privacy by virtue of their employment with a public school system. Public employees may have reduced expectations of privacy if their employment is heavily regulated due to safety concerns, but there was no evidence that the board's employees are regulated for safety. The court also found the school board showed no evidence that the previous, more limited policy was in any way insufficient to satisfy the board's stated needs. There was no evidence of a drug or alcohol problem among its employees and no evidence that any student or employee had been harmed. The need to promote an anti-drug message is "symbolic" as opposed to a "special" need. While the court noted its inclination to agree that the policy also violated the prohibition against general warrants, the court did not reach this question.

Sanders v. State Personnel Commission, 677 S.E.2d 182 (N.C. App. 2009). *The State Personnel Commission's regulations governing the treatment of temporary employees formed a valid employment contract between the Commission and temporary state employees, which plaintiffs sufficiently alleged was breached by defendants. The Commission's regulated employment scheme, delineating state employees and their appointments, does not violate the equal protection clause or the fruits of their labor clause because a rational basis exists for the regulations.*

Plaintiffs worked for the State of North Carolina as temporary employees through a temporary agency for periods exceeding 12 months. They brought suit against the State and many of its agencies and representatives, claiming they were wrongfully denied employment compensation, benefits, and status under state regulations promulgated by

the State Personnel Commission. The Commission is given lawmaking power by the State legislature to establish regulations governing job classification and compensation. Commission regulations provide that temporary employment may not exceed 12 months and that any employee who stays in a "time-limited" position for more than three years must be considered a permanent employee. The trial court granted the defendants' motion to dismiss plaintiffs' claims for breach of contract and constitutional violations.

The Court of Appeals reversed dismissal of plaintiffs' breach of contract claim, and affirmed dismissal of the constitutional claims. The court held that a valid employment contract existed between the plaintiffs and the Commission, reasoning that the Commission regulations must be read into an employment contract between plaintiffs and the temporary agency, as must applicable statutes and provisions of the State constitution. Here, the regulation allowed temporary employees a maximum term of twelve months, and plaintiffs were employed for longer. Therefore, the court held plaintiffs' complaint sufficiently alleged a breach of the rules under which the contract was formed. However, because plaintiffs did not point to any regulation that entitled them to the benefits of permanent employees, the court remanded for a determination of their rights under the rules and the terms of the employment contract.

The court held that plaintiffs failed to state valid claims under the equal protection and fruits of their labor clauses of the North Carolina Constitution. The court found that a rational basis existed for the Commission's regulatory framework authorizing differential employee appointments, such as temporary and permanent. The court also found that a rational basis existed for the Commission's regulation of the State's own employees. The court reasoned that the "fruits of their own labor" clause in Article 1, Section 1 is intended to be a check against excessive regulation of business affairs. Here, the legislature was not interfering with an ordinary and simple occupation, nor was the employment scheme intended to be free from government regulation.

Granger v. University of North Carolina at Chapel Hill, 678 S.E.2d 715 (N.C. App. 2009). *A state university employee's actions constituted unacceptable personal conduct, and thus just cause for dismissal without warning existed, where employee referred to a subordinate using a racial slur, interfered with the investigation of her remark, said she would not hire another black person, and disposed of her subordinate's notebook.*

Pamela Granger was employed by the University of North Carolina at Chapel Hill (UNC). UNC investigated allegations that Granger subjected her subordinate to "racism, harassment, and workplace hostility." The investigation revealed that Granger referred to her subordinate as a "nigger" on one occasion, stated that she would never hire another black person, destroyed her subordinate's Black History notebook, and tried to coach

other employees on answering the investigator's questions, thus obstructing the investigation. UNC fired Granger. After an unsuccessful internal grievance, Granger filed a petition for a contested case with the Office of Administrative Hearings and the administrative law judge concluded Granger was improperly dismissed. The State Personnel Commission and the superior court upheld the dismissal.

The Court of Appeals affirmed, holding that substantial evidence supported the trial court's finding that Granger's actions constituted "unacceptable personal conduct" that provided UNC with just cause for termination without any prior warning or lesser punishment. The court found that using the racial slur in the workplace, where she was overheard by a subordinate, undermined Granger's authority and exposed UNC to embarrassment and potential legal liability. The court also found that attempting to obstruct the investigation constituted insubordination. Considering all of Granger's actions, the trial court did not err in finding Granger was properly dismissed.

Follum v. North Carolina State University, 679 S.E.2d 420 (N.C. App. 2009). *Under the Administrative Procedure Act, a university employee seeking judicial review of an agency decision was required to serve his petition for judicial review upon parties to the administrative proceeding within 10 days of filing the petition, and his service of notice to the university's counsel was not sufficient.*

Warren Follum, a North Carolina State University (NCSU) employee, filed a petition for a contested case with the Office of Administrative Hearings (OAH), asserting that NCSU demoted him without just cause, improperly posted two employment positions, and discriminated against him based on his age and sex. The OAH dismissed Follum's claims. On March 11, 2008, he filed a petition for judicial review and served notice of the petition on NCSU's attorney. NCSU filed a motion to dismiss for lack of sufficient process on April 1, 2008. The next day, Follum served NCSU's process agent with a general summons and civil action cover sheet. The trial court granted NCSU's motion to dismiss based upon Follum's failure to properly serve his petition for judicial review.

The Court of Appeals affirmed, holding that service of the petition for judicial review upon NCSU's counsel of record did not comply with the Administrative Procedure Act. According to N.C. Gen. Stat. § 150B-46, a petitioner seeking judicial review of a state agency's decision must serve his petition for judicial review on all "parties of record to the administrative proceedings" with 10 days of filing said petition with the superior court. Here, Fullon failed to comply with § 150B-46 because during the 10-day window, he only NCSU's counsel, an employee of the NC Department of Justice, not NCSU. He did not serve NCSU or its process agent.

Keyes v. N.C. Department of Transportation, 684 S.E.2d 65 (N.C. App. 2009). *Remanding for further proceedings on whether a state agency employee's refusal to take a random drug test was willful, and holding that even though employee was working as a "flagger" on the day he was chosen for the drug, he was subject to agency's drug test policy because his job required a commercial driver's license and he was available to operate commercial equipment that day.*

James Albert Keyes worked for the North Carolina Department of Transportation (DOT) as a transportation worker, a position that required a commercial driver's license (CDL). On a day he worked as a "flagger," he was selected for a random drug and alcohol test according to DOT policy requiring random tests on employees who perform "safety sensitive" or "CDL related" job functions. Keyes' wife had called to say their water heater was leaking, and he chose to leave work rather than wait to take the drug test. Keyes was fired for a "willful violation" of work rules by not taking the test.

At the contested case hearing, the administrative law judge (ALJ) granted Keyes' motion to dismiss on the grounds that Keyes was not subject to the drug test policy because he was not performing "safety sensitive" or "CDL related" job functions on that day, but did not reach the issue of willfulness. The State Personnel Commission rejected the ALJ's decision, and concluded Keyes was terminated for just cause because he acted willfully. The superior court upheld the Commission.

The Court of Appeals affirmed in part and remanded in part. The court held that Keyes' position fell within the DOT's interpretation of "safety sensitive" and "CDL related" such that he was required to take the drug test pursuant to DOT policy. The court looked to federal regulations for guidance, which define performance of a "safety-sensitive function" to include times when a driver is "ready to perform, or immediately available to perform." Although Keyes was assigned to "flagging" on that day, his job required a CDL, he could be required to operate commercial equipment on any work day, he had operated such equipment in the past and could be required to do so in the future, and he was immediately available to operate such equipment. The court remanded to the ALJ for further hearing on the issue of whether Keyes' refusal to take the test was willful, given his family emergency, because the ALJ did not reach and Keyes did not present evidence on the willfulness issue.

Woodard v. North Carolina Department of Transportation, 684 S.E.2d 906 (N.C. App. 2009). *Just cause existed for termination of a state employee, who violated a departmental rule requiring audits to be conducted on-site and embarrassed and intimidated a subordinate co-worker,*

Gail Woodard worked for the Motor Vehicle Division of the North Carolina Department of Transportation (DOT) as a Lieutenant and Assistant District Supervisor. In 2006, she was dismissed for (1) conducting audits of automobile dealerships from her office, (2) falsifying her records by recording that she visited the dealership premises as required by the rules, and (3) engaging in "conduct unbecoming of a State employee" by behaving in an "embarrassing and intimidating manner" towards a subordinate employee. The DOT upheld her dismissal, the administrative law judge granted DOT's summary judgment motion, and the State Personnel Commission affirmed. The trial court affirmed the summary judgment order.

The Court of Appeals affirmed, holding there was no dispute of material fact that DOT had just cause to dismiss Woodard because she violated policy by conducting audits from her office, falsifying audit records, and engaging in unacceptable conduct The fact that Woodard believed that other employees also conducted audits from their desks and then falsified their records did not mitigate Woodard's behavior or create an issue of material fact.

Johnson v. University of North Carolina, 688 S.E.2d 546 (N.C. App. 2010). *Since an assistant university professor failed to exhaust the administrative remedies provided by the UNC system, the superior court lacked subject matter jurisdiction to consider whether defendants wrongfully discharged plaintiff.*

Henry Johnson was employed as an assistant professor with Winston-Salem State University (WSSU), which is part of the UNC system. His two year employment contract incorporated by reference WSSU's tenure policies and the UNC system's code. A year and a half into his contract, he was notified that WSSU intended to discharge him for neglect of duty and misconduct. Johnson requested an internal hearing on the matter, and the committee upheld the decision to discharge. Johnson did not appeal this decision. Instead, he filed a complaint for breach of contract in superior court. After a hearing, the trial court dismissed the complaint for lack of subject matter jurisdiction because Johnson did not exhaust his administrative remedies.

The Court of Appeals affirmed, holding Johnson's claims were properly dismissed for lack of subject matter jurisdiction. After confirming that UNC system employees are not subject to the North Carolina Administrative Procedure Act, the court held that the administrative remedies offered by the UNC system must be exhausted before judicial review of that agency's decision is appropriate. Here, Johnson did not appeal the committee's decision to the Board of Trustees and, therefore, did not exhaust his administrative remedies.