2011-2012 NORTH CAROLINA EMPLOYMENT LAW UPDATE

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This paper summarizes published employment law decisions from the North Carolina Supreme Court and the North Carolina Court of Appeals from June 7, 2011** to June 1, 2012.

EMPLOYMENT, NON-COMPETE, AND NON-SOLICITATION AGREEMENTS

Elliott v. Enka-Candler Fire & Rescue Department, Inc., 713 S.E.2d 132 (N.C.App. 2011) (Geer, J.). *Fire Chief's promise to give up employment at-will for an employment contract with specified term constituted sufficient consideration for the department's promise of continued salary and benefits.*

Steven Elliott worked as Fire Chief for Enka-Candler Fire and Rescue Department as an at-will employee for almost twenty years before entering into a new employment agreement for a definite term. The agreement provided that Elliott would remain Fire Chief with his current salary and benefits until 2013. It further provided that in the event the Department terminated his employment without cause, it would pay him the balance of his salary and provide all benefits through the end of the contract period. The Department terminated Elliott's employment in 2008 and failed to pay his salary and benefits following termination. On cross-motions for summary judgement, the trial court ruled in Elliott's favor.

The Court of Appeals affirmed. The court held that the employment contract was supported by consideration. The court reasoned that by entering into an employment contract for a term of years, Elliott gave up his right as an at-will employee to leave his employment at any time without notice and accept other work at higher wages. The court rejected the Department's argument there was no consideration because Elliott continued working with no change in duties, pay, or benefits and distinguished *Franco v. Liposcience, Inc.*, 197 N.C. App. 59 (2009) (finding "mere continued employment" is insufficient consideration). Instead, the court likened this case to *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579 (1981) (finding sufficient consideration where employee gave up union status).

The court also held that the contract did not violate public policy. The court concluded the contract did not contradict the constitutional limitation in N.C. Const. art. V, § 2 on contracts "for the accomplishment of public purposes only" because it served a public purpose of ensuring the Department would, for several years, have the service of a qualified fire chief without fear that he would leave for a better opportunity. The court also rejected the Department's proposition that it could avoid payment of severance pay or breach of contract damages because Buncombe County made no provision for payment to Elliott following his employment. The court also distinguished *Leete v. County of Warren*, 341 N.C. 116 (1995), which held a severance

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** This paper does not cover *Brown v. NCDENR*, 714 S.E.2d 154 (N.C. App. June 7, 2011), which covered during last year's state law update.

payment violated the exclusive emoluments clause of N.C. Const. art. I, § 32, on the grounds that there was no written contract in *Leete*.

McKinnon v. CV Industries, 713 S.E.2d 495 (N.C. App. 2011), rev. denied, 365 N.C. 353, 718 S.E.2d 376 (N.C. 2011) (Hunger, Jr., J.). *Employer who failed to pay severance benefits did not breach its contract with employee or engage in fraud or unfair and deceptive trade practices where severance agreement conditioned payment of benefits on former employer's stock price at the time employee ceased "competition."*

Bobby McKinnon, who was President and CEO of CV Industries ("CVI"), notified CVI that he intended to resign in order to pursue a position at Joan Fabrics Corp., a competitor. CVI is an Employee Stock Ownership Plan (ESOP) company that permits employees to take equity ownership interest in Century Furniture, LLC, which manufactures high-grade furniture, and Valdese Weavers, LLC, which manufactures jacquard fabric for use by furniture manufacturers. Prior to his resignation in 2000, McKinnon and CVI reached an agreement to modify his incentive plans into a severance agreement. The agreement's terms for the Plan A benefits provided he would receive shadow equity benefits once he is no longer "employed by any other competitor of and is not engaged in competition with CVI," as long as CVI's ESOP stock price exceeded the value of $9.90 per share. In February 2001, McKinnon resigned from his new job to become President and CEO of Doblin, with management responsibility for Joan Fabrics affiliates EBM and Circa, which all produced jacquard fabrics for sale to furniture manufacturers. In November 2001, McKinnon resigned to pursue a business opportunity with Frank Land, an inventor who was developing a fire-resistant yarn to be used in upholstery for furniture manufacturing, and they formed three companies. After McKinnon stopped working/consulting for one of the companies in 2008, he notified CVI of his withdrawal from continuous competition and demanded his Plan A benefits. CVI claimed it did not owe the benefits. McKinnon filed suit for breach of contract, fraud, and unfair and deceptive trade practices.

The Court of Appeals affirmed the grant of summary judgment for CVI. Rejecting McKinnon's broad definition of "indirect competition," the court defined "competition" to entail "more than mutual existence in a common industry or marketplace; rather, it requires an endeavor among business entities to seek out similar commercial transactions with a similar clientele." The court concluded that McKinnon ceased continuous competition with CVI when he began his business venture with Land in 2001, at which time CVI's ESOP stock price was below its designated value. Thus, he was not entitled to Plan A benefits under the contract.

The court concluded that the fraud claim failed without specific evidence of CVI's "intent to deceive during contract formation," and CVI's partial performance of the severance agreement through its payment of other benefits was evidence of intent to fulfill the provisions when the agreement was formed. The court also rejected McKinnon's argument that CVI had a continuing duty to notify him if it determined he became ineligible for Plan A benefits.

The court also rejected McKinnon's contention that the severance agreement represented an unfair and deceptive trade practice because it restrained his ability to engage in future business ventures. N.C. Gen. Stat. § 75-2 ("Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is

hereby declared to be in violation of G.S. 75-1"). The court concluded that the severance agreement, like covenants not to compete, did not violate principles of common law.

Meehan v. American Media International, LLC 712 S.E.2d 904 (N.C. App. 2011) (Hunger, Jr., J.). *Employer had just cause to terminate employment where employment contract allowed termination for just cause, including "substandard performance," and employee admittedly made an "error" when he wrote a report that obscured DNA test results that exonerated Duke Lacrosse players.*

Brian Meehan conducted DNA testing and prepared a report analyzing DNA samples in connection with the Durham police department's investigation of sexual assault allegations against the Duke University lacrosse players. The report obscured findings that none of the charged players' DNA matched the DNA from specimens found on their accuser. At trial, Meehan stated that he knowingly violated his company's protocol and procedures. Meehan later admitted on national television that he was not directed by then-DA Mike Nifong to obscure the results and that he made the "error." The revenues of his employer, DNA Security, Inc. ("DSI"), declined following this controversy, and DSI terminated him for just cause pursuant to their employment agreement. The agreement defined "just cause" to include "any violation of policies and procedures listed in the [DSI] employee handbook," and the employee handbook provided, "Substandard performance on the job" is a ground for termination. Meehan brought suit against DSI for breach of contract, tortious interference with contract, and violation of the North Carolina Wage and Hour Act. The trial court granted summary judgment for defendants on all claims.

The Court of Appeals affirmed summary judgment on the breach of contract and tortious interference claims. The court recognized that without an employment agreement, the issue of whether there was just cause for termination would be a jury question, but concluded that the issue could be resolved as a matter of law since the employment agreement specifically defined just cause. Because Meehan admitted his conduct was "error" and hence "substandard," the court concluded that this constitutes just cause for termination. Furthermore, the court reasoned that public policy supported the conclusion that intentionally obscuring evidence and submitting an incomplete report in court when a clear explanation of the results would have exculpated the charged players is grounds for just cause termination of employment. In doing so, the court relied upon "the inverse proposition" of the public policy exception to the at-will employment doctrine recognized in *Sides v. Duke Univ.*, 74 N.C. App. 331 (1985), concluding "that providing false or incomplete testimony may constitute just cause for termination, as a matter of public policy." The court also concluded that the tortious interference claim failed because there was no breach of contract claim.

However, the court reversed summary judgment as to the wage and hour claim. The employment agreement called for annual salary adjustments to "reflect any percentage increase in the Consumer Price Index," but did not specify which CPI the parties intended to use. The court concluded that this provision was not too vague to be enforceable and the parties are entitled to offer a formulation of the CPI they contend should be used to calculate the supplementary wage adjustments.

Inland American Winston Hotels, Inc. v. Crockett, 712 S.E.2d 366 (N.C. App. 2011) (Stroud, J.). *Former employees who hired their former employer's employees after they*

resigned did not violate non-compete agreements' prohibition against soliciting, recruiting, or inducing of employees.

Inland American Winston Hotels, Inc. filed a complaint against two former employees, Crockett and Winston, alleging that each had breached their non-compete agreements by hiring two of its former employees after they willingly and voluntarily resigned from their positions. The court granted summary judgment for the employees.

The Court of Appeals affirmed, holding that Crockett and Winston did not "solicit, recruit or induce" the two former employees in violation of the non-compete agreements. Affidavits from the former employees sufficiently convinced the court that they honored their non-compete agreements. Dissatisfied in working for Inland, the former employees resigned from their respective jobs and approached Crockett and Winston about potential employment opportunities. The court emphasized that the terms of the non-compete did not prohibit "hiring," but only "solicit[ing], recruit[ing] or induc[ing] for employment." The court noted that if Inland wished to have such a provision prohibiting the hiring of its former employee, it could have included a limitation on employing or hiring former employees in the non-compete agreement.

RETALIATORY EMPLOYMENT DISCRIMINATION ACT (REDA)

Fatta v. M & M Properties Management, Inc., No. 11-1397, 2012 WL 1307096 (N.C. App. Apr. 17, 2012) (Bryant, J.). *Threatening to file a workers' compensation claim is fully protected under REDA; however, close temporal proximity alone is insufficient to establish a causal connection between the protected activity and the adverse employment action.*

Shannon Fatta was employed by M&M Properties Management, Inc. from January 18, 2010, through February 7, 2010. On January 21, he was injured while cleaning a room. On February 2, he notified the director of operations, Tony Cuomo, that "before reporting the injury to workers' compensation I wanted to make sure it was not simply a pulled muscle that would go away," and said he would "file the appropriate paperwork to initiate a claim once I confirm the nature of the injury." On February 3, he received a first and final written warning from M&M, and he was terminated on February 7. On February 12, he was diagnosed with a hernia and, that same day, filed a workers' compensation claim. He subsequently filed a complaint alleging violations of REDA and wrongful discharge in violation of public policy. The trial court granted summary judgment in favor of M&M.

The Court of Appeals affirmed. The court held that Fatta's evidence could support a finding that he engaged in protected activity under REDA by threatening to file a workers' compensation claim. N.C. Gen. Stat. § 95-241(a) ("threatens to . . . [f]ile a claim or complaint"). The court distinguished *Whitings v. Wolfson Casing Corp.*, 193 N.C. App. 218 (2005), which held that an employee's request for a medical evaluation of a work-related injury did not constitute protected activity under REDA, on the grounds that the employee in that case failed "to allege the filing of a workers compensation claim *at any time*." However, the court concluded that Fatta could not establish a causal connection between his protected activity and termination by merely presenting evidence of close temporal proximity between informing employer of his work-related injury and intent to file a workers' compensation claim and his termination five days later. While recognizing that "a plaintiff may present evidence of close temporal proximity between the protected activity and the adverse employment action, *or* a pattern of conduct," the

court stated that reliance "on temporal proximity *alone* [was insufficient] to establish pretext." Fatta failed to provide sufficient evidence that retaliatory motive was a substantial factor in the termination, where his written warning explained that he had been late to work, taken excessive breaks, failed to learn workplace standards, and that leadership was a concern, and his termination letter cited a lack of demonstrated leadership.

Pierce v. Atlantic Group, Inc., No. 11-494, 2012 WL 540096 (N.C. App. 2012) (Thigpen, J.). *Supervisor, who claimed his employer did not respond to his proposal to prepare for new certification requirements for crane operators and riggers and then terminated him for continuing to express his concerns, did not allege sufficient REDA, wrongful termination, defamation, or infliction of emotional distress.*

Howard Pierce was hired by The Atlantic Group, Inc., an engineering, construction, and maintenance contractor providing services to Duke Energy Carolinas, LLC, and eventually promoted to a supervisory position. After receiving a Duke Energy memorandum stating new regulations would require crane operators and riggers to be certified, Pierce proposed a process for training and certifying the operators that would not interfere with plant operations during its busiest times. He continued to raise the issue of certification on a weekly basis but received no response. Pierce agreed to take a vacation break from his position at McGuire Duke Energy Nuclear Plant after being assured that he could return to the same position at the same pay rate. During his vacation, Atlantic contacted him and asked whether he would staff a fueling outage at a different plant, and he agreed to do so at a temporary pay cut. Atlantic then asked Pierce to accept a temporary demotion and return to McGuire as an advanced rigger at a pay cut. When he continued to express concerns about the new certification requirements, he was told that since he was no longer a supervisor, "certification was not his to address." Pierce then called Duke Energy's "ethics hotline" and reported alleged "retaliatory treatment." His employment was subsequently terminated due to alleged "falsification of a time card." Duke Energy reported him to the Nuclear Regulatory Commission. Pierce filed suit alleging termination in violation of REDA, wrongful discharge in violation of public policy, negligent and intentional infliction of emotional distress, and defamation. The trial court dismissed his complaint for failure to state a claim.

The Court of Appeals affirmed. First, the court held that Pierce did not show that he had engaged in protected activity. The court found that Pierce did not "initiate an inquiry" about potential OSHA violations under N.C. Gen. Stat. § 95-241(a), reasoning that Pierce "spoke only to his supervisors about his concerns regarding the certification of riggers" and called Duke Energy's ethics hotline to report retaliatory treatment—*not* a concern about occupational health and safety. The court was persuaded by several federal court decisions. In *Jurrissen v. Keystone Foods, LLC*, No. 1:08CV128, 2008 WL 3925086 (M.D.N.C. Aug. 20, 2008), the court found a complaint to an internal auditor about an ongoing investigation into defendant's health and safety practices was a protected activity. By contrast, in *Delon v. McLaurin Parking Co.*, 367 F.Supp.2d 893 (M.D.N.C. 2005), the plaintiff merely kept a notebook of complaints and complained about his supervisor's management, but he did not accuse his supervisor of illegal activity or mention the notebook, and the court found this to be insufficient to constitute protected activity. The court affirmed the dismissal of the complaint on the grounds that the allegations were more closely aligned with *Delon* than *Jurrissen*

With regard to the wrongful discharge claim, the court noted that the regulatory requirements were not yet in effect at the time of Pierce's termination, and he did not identify a specific law or public policy that was violated. Pierce's emotional distress claim failed because the stress he experienced was not severe enough to state such a claim. Moreover, the court held that the alleged false contention that Pierce falsified his time card, and the report to the Nuclear Regulatory Commission, did not constitute libel *per se* because he did not allege the statements instigated "public hatred, contempt, or ridicule," or cause him to be "shunned and avoided," and false statements calling a plaintiff "dishonest" or an "untruthful and an unreliable employee" are not actionable *per se*. The complaint neither alleged that the publications were "susceptible of two meanings," nor did it allege economic damages qualify as "special damages" for libel *per quod*.

White v. Cochran, 716 S.E.2d 420 (N.C. App. 2011) (Geer, J.). *REDA suit can be brought against sheriff in his official capacity based upon right-to-sue letter that named sheriff department as respondent.*

Rebecca White was terminated after filing workers' compensation claim and missing work for a period of temporary total disability. After receiving a right-to-sue letter from the North Carolina Department of Labor naming the "County of Swain" and the "Swain County Sheriff's Department" as respondents, White filed a complaint against the Sheriff of Swain County, Curtis Cochran, alleging violations of REDA and wrongful discharge in violation of public policy. The trial court dismissed the action for lack of subject matter jurisdiction.

The Court of Appeals reversed, holding that the court had subject matter jurisdiction over the REDA claim. Although the complaint did not specifically identify whether the Sheriff was sued in his official or individual capacity, after reviewing the complaint, which sought only monetary damages and repeatedly referred to employment for Defendant, the court concluded that the Sheriff was sued in his official capacity. Because White attached to her complaint a right-to-sue letter that named the Sheriff's Department, she satisfied REDA's pleading requirements and invoked the trial court's jurisdiction. Moreover, the court held that dismissal of White's wrongful discharge claim was improper because a plaintiff may pursue both a statutory claim under REDA and a common law wrongful discharge claim based on a violation of REDA. The court recognized that the defense of sovereign immunity was not before the court.

DEFAMATION

White v. Trew, 720 S.E.2d 713 (N.C. App. 2012), petition for discretionary review allowed, 722 S.E.2d 594 (N.C. 2012) (Elmore, J.). *Intra-office communications can constitute "publication" for defamation if the individual who reads the communications is independent of the process by which the communications were produced.*

Mark White was a tenured associate professor in the Department of Electrical and Computer Engineering at North Carolina State University. Department head Robert Trew wrote an "annual review" of White stating that he was not meeting the expectations of the department and provided accounts of instances that led to this conclusion. Trew then provided the annual review to the Dean of Engineering and in-house counsel at NCSU. Since the "annual review" was a job evaluation, it became part of White's personnel file at NCSU. White filed a libel suit against

Trew. The trial court denied Trew's motion to dismiss based on sovereign immunity and Trew brought an interlocutory appeal.

The Court of Appeals affirmed. First, the court held that sovereign immunity did not bar the libel claim. The court rejected Trew's argument that the suit was filed against him in his official capacity and therefore barred by sovereign immunity, which bars intentional tort claims brought against the State and its employees in their official capacities. The court concluded that even though the phrase "individual capacity" was not used, White's intent to sue Trew in his individual capacity was clear from the pleadings, which sought monetary damages from Trew. Moreover, the court held that the allegations that Trew carried out his duties in a malicious manner precluded dismissal based on sovereign immunity, which only protects public officials from liability when they act without "malice or correction."

Second, the court held that because the monetary damages sought was different the statutory remedy under N.C. Gen. Stat. § 126-25 for seeking removal of the information from his personnel file, White's failure to fully exhaust the administrative remedy did not bar libel suit.

Finally, the court rejected Trew's argument that because the annual review was only made available to faculty and administrators of NCSU, it was not "published" to a third person as required to pursue an action for libel. The court interpreted *Satterfield v. McLellan Stores*, 215 N.C. 582 (1939), to say that intra-office communications can be published if the individual who reads the communications is independent of the process by which the communications were produced. Since Trew produced the annual review on his own, the Dean of Engineering and in-house counsel were "distinct and independent of the process by which the statements were produced." Thus, the court concluded that giving the review to them constituted publication.

The Supreme Court accepted Trew's petition for discretionary review on the issue of intra-office publication.

WHISTLEBLOWER ACT

Wang v. UNC School of Medicine, 716 S.E.2d 646 (N.C. App. 2011) (Ervin, J.). *Although temporary university research employee was exempt from the majority of the State Personnel Act, she was covered by the North Carolina Whistleblower Act.*

Dr. Yan-Min Wang, a 48-year old Chinese woman, was a part-time research scientist at the UNC-Chapel Hill School of Medicine's Neuroscience Center. The Center's director, Dr. Snider, applied for a NIH grant to fund Wang's position as a full-time research assistant professor. After Wang raised issues about the genetic typing of laboratory mice, Snider notified her that he was not going to recommend her for the full-time position. Wang wrote a letter to various university figures complaining about Snider's decision and raising concerns about mouse genotyping in the lab. After learning that Wang sent the letter to one of his colleagues, Snider rejected the funding from the NIH grant for the full-time position, instructed Wang to work at an off-campus site, and did not renew her contract.

Wang pursued the grievance process, claiming that she was subjected to retaliation and terminated in violation of the Whistleblower Act and discriminated against because of her age, sex, and national origin. The Board of Governors (BOG) ultimately concluded that as an EPA

Non-Faculty employee, she was not protected by the Whistleblower Act or the First Amendment, and that she was not discriminated against. The BOG also concluded that Wang and her supervisor "simply could not get along." The trial court reversed, finding that Wang was protected by the Whistleblower Act, her termination violated the Whistleblower Act, and the grievance procedures violated Wang's due process and equal protection rights.

The Court of Appeals affirmed in part, reversed and remanded in part. The court held that EPA Non-Faculty employees such as Wang are protected by the Whistleblower Act, N.C. Gen. Stat. Chapter 126, Article 14, §§ 126-84-88. The court reasoned that although N.C. Gen. Stat. § 126-5(c1)(8) specifically exempts research staff at UNC, N.C. Gen. Stat. § 126-5(c5) states, "Notwithstanding any other provision of this Chapter, Article 14 of this chapter shall apply to all State employees, public school employees, and community college employees." However, the court concluded that the trial court erred by proceeding to determine that Wang had been retaliated against because of her protected activities based upon the administrative record and remanded the Whistleblower and First Amendment claims to the BOG for further factual development.

With regard to the discrimination claims, the court held that the BOG's finding that Snider had not discriminated against Wang on the basis of her gender, age, and national origin had sufficient evidentiary support in the record and the trial court erred by reaching a contrary conclusion. The court also concluded that Wang was not entitled to relief on her constitutional claims. Because Wang was exempt from the State Personnel Act, she lacked a property interest in continued employment sufficient to trigger the protections of the due process clause. Wang did not properly allege the existence of an equal protection violation because she did not meet her burden of showing she was treated differently that similarly situated individuals in some relevant way. While career state employees have more extensive procedural and substantive rights than other state employees, Wang did not articulate the ways in which career state employees and non-career state employees who file a grievance are similarly situated.

Judge Elmore dissented from the majority's holding that EPA Non-Faculty employees are entitled to the protections of the Whistleblower Act, reasoning that N.C. Gen. Stat. § 126-5(c5) was a "catch-all" provision that is only applicable when the statute does not otherwise provide to the contrary.

PUBLIC EMPLOYEES

Beatty v. Jones, 721 S.E.2d 765 (N.C. App. 2012) (unpublished) (Steelman, J.). *State trooper's harsh discipline of his canine partner did not constitute just cause for his dismissal on the grounds of "unacceptable personal conduct" where the discipline was consistent with the Highway Patrol's training and compliance techniques for canine handlers.*

While highway patrolman Charles Jones and his canine partner Ricoh were participating in a routine narcotics training session, Ricoh refused to release a piece of fire hose he received as a reward. After Jones unsuccessfully commanded Ricoh to release the reward, Jones disciplined Ricoh by directing him to the ground, stringing him up by his lead with his hind legs touching the ground, and kicking him five times. Word of the incident leaked to the media. The incident was investigated and Jones was terminated.

Jones petitioned for a contested case hearing in the Office of Administrative hearings. The ALJ recommended reinstatement and the State Personnel Commission adopted the ALJ's decision but found that the Highway Patrol had just cause to issue appropriate discipline for "unacceptable job performance." Secretary Beatty and the Patrol sought judicial review and the trial court ordered that Jones be reinstated with back pay.

The Court of Appeals affirmed the trial court's order of reinstatement. The court found substantial evidence in the record supporting the trial court's findings of fact even though the quoted language in the trial court's finding that handlers were taught "when youor [sic] dog is not performing, bust his ass" did not appear in the record and the entire incident likely took longer than "26 seconds" as found by the trial court. The court also held that the Patrol did not meet its burden of showing that Jones was terminated for just cause: "One isolated incident, consistent with practices sanctioned by the Patrol, does not constitute just cause for termination on the grounds of 'unacceptable person conduct.' " *Id.* at 8.

Ginsberg v. Board of Governors of UNC, 718 S.E.2d 714 (N.C. App. 2011) (Elmore, J.). *Affirming summary judgment in favor of University where Teaching Assistant Professor failed to establish beyond mere speculation that University's decision not to hire her for a tenure-track position was based on controversial remarks, in violation of her constitutional rights, and University articulated specific reasons why she was not hired for the position.*

Terri Ginsberg was hired for a one-year term as a Teaching Assistant Professor with the Film Studies Department of NC State University. In November 2007, while introducing a film at the University's annual Middle Eastern Film Series, Ginsberg stated that the audience's presence "showed support for the airing of Palestinian cultural perspectives, especially those which promote Palestinian liberation." Directors of both the Film Studies and Middle East Studies Programs met with Ginsberg to express their concerns about her comments.

Around this time, the Director of the Film Studies Program was the chair of the search committee seeking candidates for a tenure-track Assistant Professor in film studies position. The Director of the Middle East Studies Program had previously encouraged Ginsburg to apply for this position. Although Ginsberg remained on the list of potential interviewees through November 2007, she was ultimately not screened for an interview and another candidate was hired. Ginsburg filed suit alleging a violation of her rights to freedom of speech, religious liberty, and equal protection and the trial court granted summary judgment for the University.

The Court of Appeals affirmed, holding that Ginsburg failed to establish beyond mere speculation that her comments were a motivating factor in the University's decision not to hire her for the tenure-track position. Ginsburg's negative interactions with faculty following her comments were insufficient to create a genuine issue of material fact. The court reasoned that the committee articulated specific reasons for not hiring Ginsburg that did not concern her remarks; specifically, (1) Ginsburg's expertise was in a different area than the department desired for the position and (2) that she was overqualified for the position. The court also noted that Ginsburg remained on the list of applicants for weeks following her comments. Moreover, the court concluded, assuming Ginsburg was able to establish a prima facie case, the University met its burden of showing that the adverse decision would have been made in the absence of the protected activity because the University conducted "an extensive and thorough search" for the best candidate and ultimately hired a candidate with different qualifications.

McAdams v. North Carolina Department of Transportation, 716 S.E.2d 77 (N.C. App. 2011) (Ervin, J.). *State Personnel Commission had jurisdiction over career state employee's racial harassment and retaliation claim, where employee filed a timely petition and, in conjunction past race discrimination claim, employee's request that employer remove retaliatory written warning from personnel file sufficiently put employer on notice. Evidence was sufficient to support finding that employee subject to race retaliation.*

Captain Charles W. McAdams (black male) filed a contested case proceeding with the Office of Administrative Hearings alleging racial discrimination, and the ALJ ultimately determined that the Department of Transportation had discriminated against McAdams by hiring a less-qualified white candidate and recommended that McAdams be placed in the position for which he applied. Following the DOT's failure to comply with the ALJ's recommendation and his receipt of a written warning for "unsatisfactory job performance," McAdams initiated another contested case proceeding and obtained an injunction requiring the DOT to place him in the proper position and barring the DOT from treating McAdams differently than white senior officers. Less than three months after the Commission upheld the ALJ's order, McAdams received a written warning for "unacceptable personal conduct," allegedly for copying his attorney on an email to his superiors disclosing confidential information about the discipline of a co-worker. McAdams submitted two memorandums requesting that the DOT remove the written warning from his personnel file, and his second request suggested that the written warning violated the provisions of the earlier injunction prohibiting treating him differently from white senior officers.

Again, McAdams initiated a contested case proceeding alleging that his personnel file contained inaccurate and misleading information and that he had been the victim of racially-based harassment or retaliation. An ALJ granted the DOT's motion to dismiss on the grounds that McAdams had failed to file a timely petition for a contested case proceeding, failed to submit his complaint to the agency prior to initiating a contested case proceeding, and failed to allege sufficient facts to establish harassment or retaliation.

Superior Court Judge Thigpen upheld the dismissal of McAdams's request for removal of the written warning on the grounds that he failed to challenge the written warning in a timely fashion, but he remanded the harassment and retaliation claims, which were based in part on the written warning. On remand, the ALJ rejected the harassment or retaliation claim and his decision was adopted by the State Personnel Commission, which concluded that it lacked jurisdiction over the harassment and retaliation claims, but also made an Alternative Order with findings of retaliation. The trial court concluded that the Commission had jurisdiction and adopted the Commission's alternative determination ordering relief to McAdams.

The Court of Appeals affirmed. The court held that the trial court did not err by determining that McAdams sufficiently complied with N.C. Gen. Stat. § 126-34 to vest the Commission with jurisdiction over his racial harassment or retaliation claim. The court rejected the DOT's assertion that McAdams filed an untimely petition, holding that his claim was not an appeal from a "decision or action" and, therefore, was not subject to the 30-day limitation in N.C. Gen. Stat. § 126-38. Similarly, McAdams was not required to complain to the DOT within 30 days because N.C. Gen. Stat. § 126-34 contains no time limit. Moreover, the court concluded that the memorandum complaining about disparate treatment, coupled with the prior history between the parties, provided adequate notice to the DOT that McAdams was complaining of race-based retaliation.

The Court also held that the trial court's dismissal of McAdams's challenge to the accuracy of the written warning in his personnel file did not preclude consideration of the written warning when considering the merits of his racial harassment or retaliation claim. The Court concluded that given the history of the case and the reference to McAdams's complaint that he had been treated differently from white officers, the Commission's alternative decision, which was adopted by the trial court, adequately addressed the issue of race-based retaliation even though the alternative conclusions of law did not specifically refer to the races of the participants. Finally, the Court held that there was adequate support in the record to support the trial court's determination that the DOT failed to produce sufficient evidence of a legitimate, non-retaliatory reason for issuing the written warning to McAdams.

Coomer v. Lee County Board of Education, 723 S.E.2d 802 (N.C. App. 2012) (Elmore, J.). *Petition for judicial review of school board decision was subject to 30-day time limit in Administrative Procedure Act.*

After determining that she was "medically unable to drive a school bus and thus could not fulfill all of the essential functions of her job," the Lee County Superintendent dismissed Elizabeth Coomer from her position as an instructional assistant/bus driver. Coomer appealed to the Lee County Board of Education, which ratified the decision on January 13, 2010. On October 1, 2010, Coomer filed a complaint and petition for judicial review. The trial court dismissed the petition as untimely.

The Court of Appeals affirmed. The court held that where no other statute provided guidance for a time limit judicial review of school board decisions, the trial court, following *Overton v. Board of Education*, 304 N.C. 312 (1981), properly looked to Article 4 of the Administrative Procedure Act to determine the correct time limit for appealing from school boards to the courts. The court concluded that the petition was untimely filed nine months after the decision, well outside the thirty-day time limit, and Coomer did not show good cause for the court to accept her untimely petition.

In re Release of the Silk Plant Forest Citizens Review Committee's Report & Appendices, 719 S.E.2d 54 (N.C. App. 2011) (Hunter, J.). *Trial court has no authority to release portions of city employees confidential personnel files to the general public.*

The City of Winston-Salem City Council adopted a resolution establishing a citizen review committee to conduct a review of the Winston-Salem Police Department's investigation into a 1995 assault and robbery that led to the indictment and conviction of Kalvin Michael Smith. During the inquiry, police officers were interviewed about their role in the 1995 investigation and notified that the interviews were part of an "official investigation by the Winston-Salem Police Department" and refusal to cooperate could result in dismissal. The committee found no credible evidence that Smith was at the location where the victim was robbed and assaulted. The City petitioned the trial court for release the officers' transcribed interviews to the general public as part of their personnel files. Pursuant to N.C. Gen. Stat. § 160A-168, the trial court granted the City's request.

As a matter of first impression, the Court of Appeals held that § 160A-168 did not grant the trial court the authority to release portions of a city employee's confidential personnel file to the general public. The court interpreted the plain language of the statute to grant the trial court

limited authority to allow "examination" by "any person" of a relevant "portion" of the city employee's personnel file. The court concluded that the statutory language indicates a clear legislative intent to keep personnel files confidential except under limited circumstances.

FEDERAL PREEMPTION

Fisher v. Communication Workers of America, 716 S.E.2d 396 (N.C. App. 2011), rev. denied, 721 S.E.2d 231 (N.C. 2012), rev. denied, 721 S.E.2d 232 (N.C. 2012) (Stroud, J.). *The National Labor Relations Act (NLRA) preempted non-union employees' claims against union that posted their social security numbers at work after they left the union, alleging violations of the Identity Theft Protection Act, unfair and deceptive trade practices, and invasion of privacy.*

John Glenn, President of CWA Local 3602, attended a meeting of union presidents where he received a spreadsheet identifying employees of Bellsouth who had revoked their union dues deduction, effectively withdrawing their union membership. The spreadsheet identified each by name and national ID number which is the employees' social security number. After the meeting, Glenn returned to the Bellsouth work center and posted the spreadsheet on the union's bulletin board. Within approximately one hour, one of the named plaintiffs complained and removed the list from the bulletin board.

Employees filed complaints with the NLRB against the local union contending that the posting of the spreadsheet containing their social security numbers exposed them to identity theft and violated the NLRA by causing them to feel coerced in the exercise of their right to refrain from collective bargaining activities. The NLRB approved a "voluntary settlement agreement" that included a letter of apology but no admission by the union that it violated the NLRA. Plaintiffs then filed a complaint alleging violations of the Identity Theft Protection Act, unfair and deceptive trade practices, and invasion of privacy. The business court granted summary judgment for the union defendants on the grounds of federal preemption and lack of subject matter jurisdiction.

The Court of Appeals affirmed. The court held that the union's alleged posting of social security numbers on a workplace bulletin board shortly after employees opted out of union membership was arguably prohibited by Section 7 of the NLRA (punishment for exercising their right to withdraw their union membership) as to preclude the state claims by operation of *Garmon* preemption, which prohibits state and local regulation of activities that the NLRA arguably protects or prohibits. The court also concluded that the *Garmon* exceptions did not apply. First, the court reasoned that the "peripheral to national labor policy" exception raised in defamation claims applies only if the plaintiff alleges and proves actual malice and actual damage, and even assuming the union's conduct was malicious, the plaintiffs had not alleged actual damages. The court also reasoned that the NLRB did not have a "lack of concern" with the union's actions as they approved a settlement agreement. Second, the court determined that the union's conduct did not meet the "outrageous" standard which would make preemption inappropriate based on North Carolina's significant local interests. The court also recognized that the NLRB's interest outweighed the State's interests because of the danger that state claims would interfere with the NLRB's ability to adjudicate the controversy.