

2013-2014 NORTH CAROLINA EMPLOYMENT LAW UPDATE

Jessica Leaven

*Grimes Teich Anderson LLP
Asheville, NC*

This paper summarizes published employment law decisions from the North Carolina Supreme Court and the North Carolina Court of Appeals from June 1, 2013 to June 1, 2014

NORTH CAROLINA SUPREME COURT

Wind v. City of Gastonia, 751 S.E.2d 611 (N.C. 2013) (per curiam). *Affirming the Court of Appeals decision in Wind v. City of Gastonia, 738 S.E.2d 780 (N.C. Ct. App. 2013) (Martin, C.J.). After investigating complaints against a police officer, the police chief made official personnel decisions to dismiss the complaints, so police officer has a statutory right to inspect the investigation files, including the names of the complainants, which were part of officer's personnel file.*

A citizen and a fellow police officer filed separate complaints against David Wind, a patrolman for Gastonia police department. Wind's supervisor investigated the citizen's complaint, and the officer's complaint was investigated by Gastonia Police Department's Office of Professional Standards unit, formerly its Internal Affairs (IA) unit. The police Chief reviewed the information collected in the investigation, found the citizen's complaint was not sustained and the officer's complaint was unfounded, closed the cases, and took no action against Wind. Wind requested access to the complete investigative files, but the Chief waited two years before providing to Plaintiff documents that redacted any information that could be used to identify the complainants. Plaintiff filed an action to obtain unredacted copies of the files. The Superior Court of Gaston County (Forrest Donald Bridges, J.) granted Wind's motion for summary judgment and ordered that the City of Gastonia disclose complete copies of the documents contained in the files to Wind.

The Court of Appeals majority (Judges Martin and Hunter) affirmed the trial court's order granting Wind's motion for summary judgment and ordering the disclosure of the files without redaction. Judge Dillon filed an opinion concurring in part and dissenting in part. Judge Dillon would have reversed the trial court's order and remanded this case for entry of summary judgment in Gastonia's favor.

The Supreme Court affirmed the decision of the majority, per curiam. The Court of Appeals analysis is set forth below.

According to N.C. Gen. Stat. § 160A-168(a), employee personnel files "maintained by a city are subject to inspection and may be disclosed only as provided by [N.C. Gen. Stat. § 160A-168]. Gastonia conceded during oral argument that the documents at issue are part

of Wind's employee personnel file under N.C. Gen. Stat. § 160A-168(a). Gastonia did not dispute that, with limited exceptions, a city employee has a statutory right to inspect "confidential" information in his own personnel file pursuant to N.C. Gen. Stat. § 160A-168(c)(1). However, as set out in N.C. Gen. Stat. § 160A-168(c1)(4), the statute also says, "[e]ven if considered part of an employee's personnel file," the city need not disclose to an employee: "Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials." Gastonia used this exception as the basis of its authority to deny Wind's request to inspect the documents at issue.

The court addressed two main issues in interpreting this provision: (1) whether the records regarding the complaints were "[n]otes, preliminary drafts, and internal communications," and (2) whether the decision to close the case without taking any further action was an "official personnel decision" triggering the employee's right to inspect the file.

The court first used a plain meaning approach to analyze the terms "notes, preliminary drafts, and internal communications," and concluded that the General Assembly appeared to have intended the provision to apply to "written materials that are informal or provisional in character." However, since the complete IA files were not in the record, and Gastonia had the burden of demonstrating to which records the exceptions applied, the court could not conclude that every part of the IA files were each a "note, preliminary draft or internal communication" about Wind.

Nevertheless, "assuming without deciding" that the IA records fell within the exception, the court went on to decide whether the decisions to not take action on the complaints were "official personnel decisions" triggering Wind's right to inspect the records. The General Assembly has not defined "official personnel decision." The court rejected Gastonia's argument that an "official personnel decision" is one that results in "some type of change or alteration in employment." Instead, turning to plain meaning, the court concluded that the right of access applies when the "informal, provisional or otherwise 'preliminary' or 'internal' communication, note, or draft concerning an employee included in his or her personal file...[is] used to make an authorized or authoritative judgment or conclusion with respect to that employee." The court concluded that the police Chief was authorized to, and did, use the IA files to finally adjudicate matters pertaining to Wind, even though he experienced no change in his employment. Therefore, because such materials were used by the Chief to make official personnel decisions with respect to Wind, he had a statutory right to inspect the requested files. Finally, the court held that there was no legal basis to support the dissent's public policy argument for redacting the names of the complainants.

NORTH CAROLINA COURT OF APPEALS

**WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY &
OTHER STATE TORT CLAIMS**

Blakeley v. Town of Taylortown, 756 S.E.2d 878 (N.C. Ct. App. 2014) (Robert C. Hunter, J.). *General compensatory damages for the tort of wrongful discharge include "emotional distress", i.e., pain and suffering, "future lost wages," and a plaintiff need not prove "severe emotional distress" or "outrageous behavior" by defendant in order to recover emotional distress damages for a wrongful discharge claim. Evidence that police chief was terminated because he refused requests to provide confidential information about drug cases and informants, which would have violated State law and public policy, was sufficient to support jury's verdict of wrongful discharge.*

Police Chief Timothy Blakeley was terminated from his at-will employment as Police Chief of the Town of Taylortown after a history of disputes with the Town that included confronting the Mayor about the Town's unlawful use of an ATV on the public streets, participating in an SBI investigation into alleged corruption within Town government that led to criminal charges against the Mayor which were later dropped, and his repeated refusal to provide Town Council members and the Mayor with confidential information about ongoing drug cases and confidential informants despite their repeated requests. He subsequently filed a complaint alleging several constitutional and common law claims, and there was a jury trial on the common law tort of wrongful discharge in violation of public policy. The jury returned a verdict for Blakely, finding that he had a total of \$291,000 in damages that was reduced by \$191,000 that he earned in other employment after his termination. Moore County Superior Court (James Webb, J.) issued an order that Blakely's motion for "front pay" as equitable relief, denied the Town's motions for judgment notwithstanding the verdict or, in the alternative, for amendment of the judgment and/or a new trial, and awarded Blakeley the amount of \$100,000, plus costs and fees.

The Court of Appeals affirmed in part the trial court's denial of the Town's pre-trial motions, but reversed the order denying the motion to amend the verdict and remanded for a correction of Blakeley's post-discharge earnings that were deducted from the jury's damage award to include the \$5,886.97 that Blakeley earned in unemployment benefits. As a matter of first impression, the court held that general compensatory damages for the tort of wrongful discharge include the traditional tort damages of emotional distress and future lost wages. The court distinguished the cases that defendant relied upon which were based on breach of contract claims as opposed to wrongful discharge claims, and noted that the majority of jurisdictions recognized that the common law tort of wrongful discharge allow for recovery of lost wages, future lost earnings, and emotional distress damages. The court also held that a plaintiff need not prove "severe emotional distress" or "extreme and outrageous conduct" by defendant to be awarded emotional distress (i.e., pain and suffering) damages for a wrongful discharge claim. The court recognized that there is a difference between situations where emotional distress is a required element of a claim, e.g., intentional or negligent infliction of emotional distress claims, and when

emotional distress is a type of damage. The court also held that Blakeley's evidence supported the jury award of \$291,000 damages, including approximately \$150,000 in future lost wages and/or emotional distress damages, and the damages award was not subject to any reduction for failure to mitigate damages.

However, the court held that the trial court abused its discretion in denying Town's motion to amend the verdict to properly reduce the amount of damages awarded by the amount Blakeley earned from other employers after his termination and unemployment benefits. The court reversed and remanded to the trial court to reduce the verdict by \$5,886.97—the difference between \$191,000 (the amount the jury reduced its award by) and \$196,886.97 (the amount that included earnings and unemployment benefits).

The court held that the evidence was sufficient to support the jury's finding of wrongful discharge in violation of public policy. Blakeley presented sufficient evidence that he was discharged based on his refusal to provide confidential information on the status of ongoing drug cases and confidential informants. The court concluded that by asking Blakeley to provide this information, the Town was asking him to violate N.C. Gen. Stat. § 14-230, which prohibits a public official from refusing to discharge his duties, and asking him to violate public policy which protects the safety of confidential informants.

The court held that the trial court did not err in denying defendant's motion for a new trial based on plaintiff counsel's inflammatory and prejudicial remarks during closing argument. Although the court agreed that the statements that "characterized the Town and at-will employment in an unflattering way" and the "highly inflammatory remarks" regarding Mayor Barrett, among others, were improper, the argument did not rise to the level of gross impropriety, which was the proper standard because defendant did not object to these remarks in closing.

Johnson v. Crossroads Ford, Inc., 749 S.E.2d 102 (N.C. Ct. App. 2013)
(McCullough, J.). *Reversing summary judgment in favor of a car dealership and dismissal of former manager's wrongful discharge claim based on age discrimination, where former manager was repeatedly referred to as "old man," demoted and replaced by a 35 year old, and terminated at the age of 60 for selling his wife's car at the dealership. The trial court erred in disregarding the affidavit from the younger new manager that was timely, did not contradict any sworn statement by the new manager, and supported the age discrimination claim. The trial court did not err in applying the McDonald Douglas evidentiary standards, and placing the burden on former manager to disprove dealership's affirmative defense.*

Arnold Floyd Johnson was hired as a salesman at Crossroads Ford ("Crossroads") in 2000. Crossroad's President, Glenn Boyd, stated that this was "a young man's business." Johnson was promoted four times over the years, finally becoming Crossroads' General Manager in 2007. After Johnson became General Manager, Crossroads' Vice President, Allen Boyd repeatedly referred to Johnson as an "old man" in a "derogatory manner" up to six times a day, and claimed that he could not hear the phone ringing because of his age. In 2009, Crossroads hired Noah Woods, a 35-year old man who was much younger

than Johnson, to replace Johnson as the General Manager, and demoted Johnson to Director of Sales and Service. In April 2010, through one of Crossroads' salesman, Johnson sold his wife's car to a customer. The customer's check was made to Johnson personally, but the car was not tendered to the customer because Johnson wanted to talk to Vice-President Allen Boyd first about the transaction. Vice-President Boyd then terminated Johnson for stealing a corporate opportunity.

Johnson filed suit against Crossroads claiming that he was wrongfully discharged based on his age in violation of the North Carolina Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.1 *et seq.* (NCEEPA). In opposition to Crossroad's motion for summary judgment, Johnson filed numerous documents, including an affidavit from Woods. Woods's affidavit stated that Vice-President Boyd "appeared to give [Johnson] a hard time" and referred to him as "old man"; that Woods was fully aware, and approved, of the sale of Johnson's wife's car; that Johnson did not try to deceive anyone or hide the sale of the car; that Johnson planned to let Vice-President Boyd know about the sale and was willing to pay Crossroads a commission; that Woods disagreed with Vice-President Boyd's instruction to terminate Johnson; and that Vice-President Boyd "used the sale of [the] car as a pretext to fire him" and terminate him because of his age. Wake County Superior Court (Howard E. Manning, J.) granted summary judgment for Crossroads and disregarded the Woods' affidavit on the grounds that it was filed at the "11th hour," "inherently incredible," and "inconsistent" with the Complaint, which had not alleged that Woods approved the sale.

The Court of Appeals reversed. The court held that the trial court abused its discretion in disregarding Woods's affidavit. First, the trial court erred by finding that Woods's affidavit was presented at the "11th hour" and, therefore, inherently incredible. The Woods affidavit was filed and served five days prior to the hearing, in compliance with Rule of Civil Procedure 6(d), which requires service at least two days before a hearing. While recognizing the well-established case law cited by the trial court that an affidavit which contradicts the affiant's prior, sworn testimony should be disregarded (aka the "Sham Affidavit" Doctrine), the court noted that Woods' affidavit did not contradict any previous sworn testimony of Woods; therefore, the trial court abused its discretion in finding it inherently incredible. The court also determined that it was an abuse of discretion for the trial court to disregard the affidavit as inherently incredible because it was inconsistent with the Complaint. Instead, the court concluded that the content of Woods's affidavit was not contradictory to Johnson's complaint, but instead supported his claim that he was wrongfully terminated based on his age.

The court then addressed the proper evidentiary standards and principles in an age discrimination case, alleging wrongful discharge in violation of the public policy set forth in NCEEPA. The court first observed that the North Carolina Supreme Court "has directed that we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discriminations cases" under NCEEPA. The court then located those standards set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973). The court held that a plaintiff carries the initial burden of establishing a prima facie case of discrimination. Once the plaintiff does that, the burden of proof shifts

to the defendant to articulate a legitimate, nondiscriminatory reason for its action. If a legitimate nondiscriminatory reason is articulated, the plaintiff then carries the burden of proving that the stated reason was merely a pretext. Relying on previous North Carolina cases applying McDonnell Douglas, the court held that the trial court did not err by utilizing the McDonnell Douglas evidentiary standards.

Looking at the forecast of evidence, the court cited evidence that President Boyd had told Johnson upon his initial hiring that car sales was a “young man’s business”; that Vice-President Boyd had repeatedly made derogatory comments to Johnson about his age, such as calling him "old man," poking him with a cane, and teasing him about not hearing well; that Johnson was demoted and replaced with a younger man; and that Johnson had made no effort to hide the sale of his wife’s car and had waited for instructions before delivering it to the customer, as a sufficient evidentiary forecast that he was terminated due to his age. The court noted that Crossroads had then articulated a legitimate, nondiscriminatory basis for the termination, claiming that Johnson knew it was a violation of company policy to sell a personal vehicle to a customer without express authorization, thereby stealing a corporate opportunity. This then shifted the burden back to Johnson to show that the stated reason was merely a pretext. The court held that the statements in Woods’ affidavit created a genuine issue of material fact about whether the stated reason was a pretext.

Horne v. Cumberland County Hospital Systems, Inc., 746 S.E.2d 13 (N.C. Ct. App. 2013) (Mark Davis, J.). *Affirming dismissal of the following claims made by former employee: (1) breach of contract claim based on termination and grievance procedures set forth in employer's employee handbook where there were no allegations that the employee could be discharged only for cause; (2) wrongful discharge claim based on (a) violations of due process rights, (b) internal grievance procedures, (c) covenant of good faith in employment relationship, and (d) various other statutory expressions of public policy; (3) untimely defamation claims, and (4) negligent infliction of emotional distress claim that failed to allege a duty that employer owed employee, was based on allegations of intentional conduct, and did not make specific factual allegations of severe emotional distress.*

Amy Horne was a registered radiologic technologist for Cumberland County Hospital System, Inc. (CCHS). CCHS's employee handbook provided certain grievance procedures for employees. After several written warnings, Horne was terminated for four incidents of scanning exams incorrectly, delay in patient care, scanning the wrong anatomy, a complaint on a patient survey, peer reviews, and co-worker complaints. Horne filed a complaint against CCHS alleging breach of contract, wrongful discharge in violation of public policy, negligent infliction of emotional distress (NIED), and defamation. Horne also sought punitive damages. The Cumberland County Superior Court (Douglas B. Sasser, J.) granted CCHS's motion to dismiss for failure to state a claim.

The Court of Appeals affirmed the dismissal of Horne's complaint. Although Horne was an at-will employee, she claimed certain contractual rights regarding termination and

grievance procedures arose out of the employee handbook, and that CCHS's failure to follow those procedures in terminating her employment constituted breach of contract. Horne relied on Trought v. Richardson, 78 N.C. App. 758, 338 S.E.2d 617 (1986), reversing dismissal of a wrongful discharge claim premised on the argument that an employer's policy manual provided that its employees could be terminated only "for cause." The court recognized that Trought is "the only North Carolina case that has upheld a breach of contract claim based on an employee manual," and the North Carolina Supreme Court has "limited the rule in Trought to its narrow facts." Because the Complaint did not allege that the employee handbook says an employee can be terminated only for cause, the court held that the trial court properly dismissed her breach of contract claim.

Explaining that notice pleading is insufficient to withstand a motion to dismiss with respect to claims for wrongful termination in violation of public policy, the court held that an employee must allege "*specific conduct* by a defendant that violated a *specific expression* of North Carolina policy." The court then addressed Horne's allegations of public policy. First, the court held that as an at-will employee, Horne had no constitutionally protected right to continued employment, and could not rely upon procedural due process principles. Second, Horne's assertion that CCHS failed to follow its own internal grievance procedures set out in its employee handbook was not an allegation that she was terminated for a reason that violates N.C. public policy. Third, North Carolina does not recognize a separate claim for wrongful discharge in "bad faith." Fourth, Horne's general reference to various topics addressed in the General Statutes ("unemployment compensation laws," "labor relations laws," "blacklisting" and "job reference" laws, and the "compliance and good business practices laws embodied within the corporate laws"), without citing any specific statutory provisions, was insufficient.

The court also held that the complaint failed to state a valid NIED claim. The Complaint did not refer to any duty owed to her by CCHS. The NIED claim was premised on allegations of intentional – rather than negligent – conduct. The Complaint failed to specify what "severe emotional distress" Horne suffered, as defined in Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A., 327 N.C. 283, 395 S.E.2d 85 (1990), as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals."

The court recognized that the Complaint's failure to identify the allegedly defamatory remarks, or to specify when they were made, was sufficient to support the dismissal of Horne's defamation claims. However, assuming that Horne's claim referred to the three write-ups by her supervisor on March 21, 22, and 29, 2011, and assuming without deciding that the write-ups could be the subject of a defamation claim, all three write-ups occurred more than a year before Horne filed her complaint. Therefore, the court held that her defamation claim was time-barred.

As the trial court properly dismissed all of Horne's substantive claims, the court held that her claim for punitive damages was properly dismissed as well.

**NORTH CAROLINA WAGE AND HOUR ACT (NCWHA) &
RETALIATORY EMPLOYMENT DISCRIMINATION ACT (REDA)**

Morris v. Scenera Research, LLC, 747 S.E.2d 362 (N.C. Ct. App. 2013) (Linda Stephens, J.) *Where an oral patent-bonus contract provided for both a patent application bonus and patent issuance bonus, whether an employee "earned" issuance bonuses under the NCWHA for patent applications filed during employment but issued after employment was a question for the jury. Employee's issuance bonuses were "calculable" under the NCWHA where employee submitted a formula for estimating the bonus based on his 90% issuance success rate during employment. Employer's failure to provide written notice of the change in its application bonus plan, in violation of the NCWHA, justified the court's liquidated damages award. Liquidated damages under the NCWHA are not warranted where employer's failure to pay issuance bonuses was based on its good faith belief that employee had to be employed at the time of issuance to receive the bonus. A violation of REDA is willful when employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited; here, treble damages under REDA are not warranted based on evidence of employer's belief that employee was not going to do his job after a breakdown in bonus negotiations. Where claims and counterclaims arise from a common nucleus of operative fact, attorneys' fees should not be allocated among the claims. Failure to pay a bonus was a material breach of contract and entitled an employee to chose between damages or the rescission of patent assignments.*

Robert Paul Morris was a prolific inventor for Scenera Research, LLC. There was no written employment agreement and Morris testified that inventing was not part of his regular employment duties. Morris was promised a \$5,000 bonus for every patent application and another \$5,000 bonus for every patent issuance. Morris proved to be a prolific inventor. He voluntarily suspended his bonus payments in 2007 with the understanding that Scenera was developing a new bonus plan, but Morris continued to assign his patents to Scenera. The new bonus plan never materialized, and negotiations over past-due bonuses broke down. When Morris's attorney suggested negotiating a severance package, Scenera accepted his "resignation." Morris filed a complaint in Wake County Superior Court against Scenera and its CEO (Defendants) alleging claims that included violations of the NCWHA and REDA, and Defendants filed counterclaims alleging patent ownership and breaches of fiduciary duty and patent assignment obligations. A jury awarded Morris (1) \$210,000 in patent bonuses for patent applications filed or patents issued between January 1, 2008 and June 17, 2009 (the date Scenera advised in writing that it was canceling the bonus program); (2) \$675,000 in patent bonuses for patent applications pending as of June 17, 2009; and (3) \$390,000 under REDA after a reduction for plaintiff's failure to mitigate damages. The trial court (James L. Gale, J.) awarded Morris \$450,000 in partial attorneys' fees and \$210,000 in liquidated damages under the NCWHA, but declined to treble Morris's damages under REDA. Morris had prayed that he be allowed to elect between rescission of the patent assignments and damages, but the court held that Scenera owned the patents and ordered Morris to assign all unassigned patent rights to Scenara. Both parties appealed.

The Court of Appeals affirmed the judgment for Morris, reversed the partial award of attorneys' fees and remanded for consideration of whether Morris was entitled to all of his attorney's fees, and reversed summary judgment for defendants on the issue of rescission of patent assignments and remanded to allow Morris to elect between the remedies of money damages or rescinding the patent assignments to Scenera and taking back ownership of the patents.

With respect to the \$675,000 in issuance bonuses for patent applications pending as of June 17, 2009, Defendants asserted that there was "no evidence" that Morris "earned" the issuance bonuses under the bonus policy. The court found that testimony from Morris and a former co-worker regarding the bonus policy was sufficient evidence that whatever bonuses were earned were due upon the filing of the patent application and the bonuses were not conditioned on continued employment. Defendants argued in the alternative that even if the issuance bonuses were earned, the bonuses were not "calculable" under the NCWHA at the time of trial. N.C. Gen. Stat. § 95-25.7 of the NCWHA regarding payment to separated employees, requires payment of bonuses to be "paid on the first regularly payday after the amount becomes calculable." First, the court held that the issue of whether a bonus is "calculable" under the NCAWA is a question of fact that requires the decision-making entity to evaluate the evidence presented at trial, apply its logical reasoning, and, in doing so, determine if such evidence is sufficient to characterize the amount of earned bonuses as "presently calculable." Accordingly, the question of calculability was properly presented to the jury for review. Second, the court held that the formula that Morris presented to the jury for the issuance bonuses he would likely be owed (150 outstanding patents x \$5000 for issued patent x 90% prior patent issuance rate = \$675,000 owed) was sufficient to make the bonuses "calculable" under the NCWHA. The court relied on the dictionary definition of "calculable" as "[t]hat [which] can be calculated *or estimated*." The court concluded that this formula was at least one reasonable way to calculate those bonuses, and the evidence relied on for that formula was supported in the record. Accordingly, the business court did not err in submitting the question of calculability to the jury.

The court concluded that the trial court properly awarded liquidated damages under the NCWHA in the amount of \$210,000, the amount awarded for bonuses for patent applications filed and patents issued between January 1, 2008 and June 17, 2009, for the employer's failure to act in good faith or with objective reasonableness. The court cited Scenera's failure to provide written notice of the change in the bonus plan, in violation of the NCWHA requirement to "[n]otify employees, in writing or through posted notice . . . prior to any changes in promised wages," as evidence to support the finding that defendants did not act in good faith or with objective reasonableness. Because defendants made a proper showing of good faith and objective reasonableness with respect to their belief that employment at the time of patent issuance was a condition to the payment of issuance bonuses, the trial court properly declined to award liquidated damages under the NCWHA on the \$675,000 damages award for issuance bonuses.

The court held that the trial court did not err in declining to treble Morris's \$390,000 award of damages for "willful violation" under REDA. The court first recognized that the definition of "willful" and the standard for reviewing a trial court's finding of willfulness under N.C. Gen. Stat. § 95-243 were issues of first impression. Adopting the U.S. Supreme Court's definition of a willful violation of FLSA, as set forth in McLaughlin v. Richland Shoe Co., 486 U.S. 128 (2010), the court held that a "willful" violation of REDA occurs when the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." Second, relying on the Eleventh Circuit's holding that the issue of "willfulness" under the ADEA is a question of fact for the jury, Formby v. Farms & Merchants Bank, 904 F.2d 627 (11th Cir. 1990), the court held that the determination of "willfulness" under REDA is a finding of fact for the jury to decide. Although the trial court decided this issue, the court concluded that Morris waived his right by agreeing to let the trial court decide the issue of willfulness. Finally, the court concluded that there was competent evidence to support the conclusion that the employer did not willfully violate REDA. Although the jury rejected Defendants' argument that Morris "effectively resigned," the jury made no statement regarding their belief regarding Morris's employment status, and Defendants offered evidence of a good faith belief that there was not a violation of REDA.

The court reversed the award of \$450,000 in attorneys' fees and remanded for further findings of fact and conclusions of law regarding whether plaintiff's claims and defendants' counterclaims arose from a common nucleus of operative fact that should not be allocated and, thus, whether he is entitled to the total amount of \$800,000 in attorneys' fees.

The court remanded the damages awarded under the NCWHA for Morris to elect between money damages and rescission of the patent assignments. While recognizing that the "hired to invent" doctrine vests employers with intellectual property rights in those inventions made by their employees when those employees were hired to invent and compensated for their work, the court noted that Morris was not paid for his patents. The court held that Defendants' failure to pay Morris's bonuses constituted a material breach of the parties' oral patent-bonus contract and entitled Morris to sue for either rescission or damages.

UNEMPLOYMENT COMPENSATION

King v. North Carolina Department of Commerce, 743 S.E.2d 83 (N.C. Ct. App. 2013) (R. Christopher Dillon, J.). *Where claimant resigned because his employer stopped providing company vehicles to its employees and instead started paying for gas plus \$60 per week for wear and tear to the employees' personal vehicles, filed a claim for unemployment benefits, and testified that his family had only one vehicle and he did not believe \$60 per week was enough to compensate him for the wear and tear caused by a 212 mile daily commute to work, evidence supported Division of Employment Security's conclusion that Claimant was disqualified from receiving unemployment benefits because he failed to show he had good cause to resign.*

In February 2010, Stephen King was hired as a field tech supervisor by Mastec Services Company, Inc. Mastec provided King with a company vehicle, which he used to commute to and from work, a total roundtrip distance of 212 miles. Mastec announced on September 14, 2011, that it would no longer let employees use company vehicles for personal use, but instead, it would give each employee a gas card and \$60 per week to compensate for vehicle “wear and tear.” On September 15, 2011, King submitted his resignation to his supervisor, stating that the new policy would “greatly create a financial hardship on me and my family.” King filed a claim with the Division of Employment Security (formerly known as the Employment Security Commission) for unemployment insurance benefits. His claim was referred to the Division’s Adjudication Unit, which concluded that he was disqualified for benefits under N.C. Gen. Stat. § 96-14(1) because he had “left work without good cause attributable to the employer.” A Division Hearing Officer affirmed the Adjudicator’s denial of benefits, and the Division affirmed the Hearing Officer’s ruling. Northampton County Superior Court (Gary E. Trawick, J.) reversed, saying “the Division’s findings of fact do not support the conclusion of law that [King] left work without good cause attributable to the employer.”

The Court of Appeals reversed, agreeing with the Division that King was disqualified from receiving unemployment benefits. The court held that based on King's testimony, the evidence was sufficient to support the Division's finding that King had access to "a personal vehicle that he could use to commute to work." King testified that his family had only one vehicle, "[s]o, therefore, [he] could not go out and purchase another vehicle for \$60 a week to commute back and forth 106 miles one way." He contended on appeal that he and his wife owned only one vehicle, which his wife needed to use for her job while he worked. However, King did not specifically testify that his vehicle was not available for his commute to work. He did not produce any evidence that someone else in his family used the vehicle while he was at work.

The court also held that the Division's findings were sufficient to support its conclusion that King was disqualified from benefits because he "left work without good cause attributable to the employer." The court explained that to prevail in this case, King had to show that he quit his job for "good cause,"—i.e., that continued employment would have been "logistically impractical"—as a result of Mastec’s new vehicle policy.” King did not present any evidence demonstrating the extent to which he suffered financial injury. The Division did not find that \$60 per week was insufficient consideration for wear and tear to King’s vehicle; rather, the only finding was that King “did not believe that \$60.00 per week was sufficient consideration for wear-and-tear.”

EMPLOYMENT, NON-COMPETE, AND NON-SOLICITATION AGREEMENTS

CopyPro, Inc. v. Musgrove, 754 S.E.2d 188 (N.C. Ct. App. 2014) (Sam Ervin IV, J.).

Where the covenant not to compete in the parties’ employment agreement bars the defendant-sales representative from working for any of plaintiff’s competitors in any capacity – even as a custodian – the covenant is too broad to be enforced.

Joseph Edward Musgrove signed a non-disclosure agreement and a non-compete agreement before beginning employment for CopyPro as an office equipment salesperson engaged in business in several eastern North Carolina counties. Musgrove spent almost all of his time with CopyPro working with customers and potential customers in only two counties. Within a year after leaving CopyPro, Musgrove went to work with Coastal Document Systems, a direct competitor of CopyPro, but he engaged in sales only in three counties outside his previously assigned territory, he did not call upon any of CopyPro's customers, and when he learned that a potential client had already retained CopyPro's services, he made no further effort to solicit their business. CopyPro learned that Musgrove was still working in Eastern North Carolina, and directly competing, and sued Musgrove for breach of the nondisclosure and noncompetition agreement. Pitt County Superior Court (Thomas D. Haigwood, J.) granted a preliminary injunction against Musgrove, prohibiting him from working in any capacity for a competitor, including his then-current employer, and prohibiting him from disclosing CopyPro's confidential information.

The Court of Appeals affirmed the part of the preliminary injunction prohibiting disclosure of confidential information, which was not challenged on appeal, and reversed the part of the preliminary injunction enforcing the covenant not to compete on the ground that it was overly broad.

While recognizing that a preliminary injunction is an interlocutory order that is not ordinarily immediately appealable, the court stated that when such an order destroys a party's livelihood, the order affects a substantial right and is therefore immediately appealable. The court concluded that here, the challenged order prohibited Musgrove from working for his current employer for three years, and, therefore, Musgrove's interlocutory appeal was properly before the court.

The court held that the trial court erred in enforcing the overbroad covenant not to compete. The non-compete provided that, for a period of three years after the termination of his employment, "the Employee will not, within the geographical limits of [the 33 eastern North Carolina counties in which CopyPro conducted business] or within a sixty (60) mile radius of Greenville and Wilmington] *directly or indirectly*, own, manage, operate, join, control, be employed or participate in the ownership, management, operation or control of, or *be connected in any manner with any business of the type and character of the business engaged in by the Employer* at the time of such termination."

First, the court cited several North Carolina cases for the proposition that "covenants restricting an employee from working in a capacity unrelated to that in which he worked for the employer are generally overbroad and unenforceable." Here, the non-compete at issue was intended to and actually did prohibit Musgrove from working for CopyPro's competitor Coastal in any capacity, including as a custodian. The court observed that "such overly broad restrictions are generally not enforceable in the employer-employee context on the grounds that the scope of the restrictions contained in such agreements far exceeds those necessary to protect an employer's legitimate business interests."

CopyPro relied on Precision Walls, Inc. v. Servie, 152 N.C. App. 630, 568 S.E.2d 267 (2002); however, the court distinguished that case on several grounds. First, the non-compete in Precision Walls was for only one year, while this non-compete was for three years. Second, the defendant in Precision Walls was a project manager with a much higher level of responsibility and more access to competitively sensitive information than Musgrove had in the present case. Musgrove had no responsibility for developing client-specific pricing proposals or price adjustments for competitive reasons or involvement in the development and operation of CopyPro's bidding or pricing strategies. Although CopyPro gave Musgrove access to a comprehensive database, Musgrove claimed that his failure to access the database prevented him from knowing the identify of CopyPro's customers. Thus, the court found the covenant overbroad in prohibiting Musgrove from any type of work with a competitor and reversed the trial court's issuance of the preliminary injunction in regard to the non-compete.

GE Betz, Inc. v. Conrad, 752 S.E.2d 634 (N.C. Ct. App. 2013) (Robert Hunter, J). *Non-solicitation agreement prohibiting "indirect solicitation" of customers with whom employees had any contact or "supervisory responsibility" for 18 months after employment was valid. Trade secret misappropriation and unfair trade practices were found when former employer alleged misappropriation of pricing information, customer proposals, product formulas, and sales data with sufficient particularity and former employees could not provide evidence of properly acquiring the information. Punitive damages must be awarded for each plaintiff, rather than against each defendant individually. When awarding attorneys' fees at the much higher rate charged by plaintiff's out-of-state counsel, the trial court must make additional findings which demonstrate why awarding such unusually high fees is reasonable in the community where the litigation took place.*

Former employees of GE Betz, Inc. ("GE") had signed employment agreements that included non-solicitation and confidentiality clauses. After several previous GE employees accepted new employment with a competing company, Zee Company, Inc. ("Zee"), GE brought suit against the former employees ("individual defendants") and Zee for misappropriation of trade secrets and breach of the non-solicitation clause of their employment agreements. Zee brought a counterclaim against GE for tortious interference with contracts or prospective economic advantages and violation of the Unfair and Deceptive Trade Practices Act. The New Hanover County Superior Court (Phyllis M. Gorham, J.) found that all former employees violated their employment agreements by indirectly or directly soliciting the former employer's customers and breaching confidentiality terms; and all employees were held liable for misappropriating trade secrets and unfair and deceptive trade practices. Zee was individually held liable for tortiously interfering with individual employment contracts. The court awarded GE compensatory and punitive damages and attorneys' fees and costs, and entered judgment for over \$10.6 million. The trial court also revoked the pro hac vice admissions of defense counsel Almy and Dombroff, and the court held Almy in criminal contempt.

The Court of Appeals affirmed in part, reversed in part, and remanded. In a 64 page opinion, the court affirmed judgment for GE as to compensatory damages, but remanded

as to punitive damages and attorneys' fees. The court reversed the order holding defense counsel Almy in criminal contempt. The court affirmed the revocation of defense counsel Dombroff's pro hac vice admission, but remanded the order revoking Almy's pro hac vice admission. The court also reversed the award of attorneys' fees against Almy.

Employment Agreements

The individual defendants' employment contracts restricted them from "directly or indirectly . . . call[ing] upon, communicat[ing] or attempting to communicate with any customer, representative, or prospective customer with whom the employees had "any contact, communication or . . . supervisor responsibility" for "the purpose of selling" competing products, services, or equipment for eighteen months after their employment with GE ended. The court held that the term "indirect solicitation" was not ambiguous under Pennsylvania law, and allowing the individual defendants to solicit each other's former customers would nullify the word "indirectly" out of the contract. The court also concluded that there was competent evidence supported the trial court's findings that each individual, in concert, solicited former customers through the other individual defendants as proxy. Zee engaged in a concerted effort to exclusively hire GE's former employees; GE's share of the water treatment market was only 3% leaving Zee with 97% of the market to solicit; and the indirect solicitation provision of the employment contracts only lasted for eighteen months after employment. The court held that the "indirect solicitation" clause did not violate North Carolina public policy because it did not exceed the scope necessary to protect GE's business.

The employment agreement included a prohibition on disclosure of GE's confidential information and trade secrets, including sales data, formulas, costs, treatment techniques, and customer information. The court also concluded that there was competent evidence in the record to support the trial court's findings that the individual defendants worked for GE and were exposed to confidential information as part of their employment, and that the individual defendants used GE's pricing formulas and proposals to create the same for Zee in soliciting carve-out customers (i.e., companies with which Zee had already obtained contracts). Because GE introduced sufficient evidence for the trial court to reasonably find that each individual defendant acquired confidential information during their employment with GE, and that such information was used by Zee in its customer proposals, the court affirmed the trial court's conclusion that the individual defendants breached the confidentiality clauses of the employment agreements.

The non-solicitation clauses in the individual defendants' employment contracts forbade communication with any customer, representative, or prospective customer with whom the employee had "had supervisory responsibility." Even though defendants Owings and Lukowski became area managers, the court concluded that they exercised "supervisory responsibility" in those positions and before they became area managers. Moreover, the court held that their restrictive covenants did not require new consideration when they became area managers and the restrictive covenant was greatly expanded.

The court held that although GE was initially unable to locate a copy of Lukowski's employment contract, GE was not estopped from penalizing Lukowski for breaching his employment agreement. GE's inability to locate a copy of Lukowski's employment agreement was not the "false representation or concealment of material facts" that equitable estoppel was designed to protect against.

Even if GE might have lost customers for reasons other than the individual defendants' conduct, the court concluded that such evidence would not negate the fact that the individual defendants improperly solicited and unjustly profited from the carve-out customers, thus causing some amount of injury to GE and therefore meeting the element of causation in plaintiff's claims. Therefore, the court held that exclusion of evidence pertaining to other reasons GE's customers may have moved their business was not an abuse of discretion.

Trade Secrets

The court affirmed the trial court's conclusion that the individual defendants misappropriated GE's trade secrets. The North Carolina definition of a trade secret is any business or technical information that derives independent commercial value from not being generally known and is the subject of reasonable efforts to maintain its secrecy. In order to establish a *prima facie* case for violations of the North Carolina Trade Secrets Protection Act (TSPA), a plaintiff must show that a defendant: "(1) [k]nows or should have known of the trade secret; and (2) *had a specific opportunity to acquire it for disclosure or use* or has acquired, disclosed, or used it without the express or implied consent or authority of the owner," N.C. Gen. Stat. § 66-155. First, the court found that GE had alleged the documents in question (pricing information, customer proposals, product formulas, and sales data) with sufficient particularity to constitute trade secrets. Second, the court also found that the documents were analogous to cost history records, customer lists, and financial projections previously found to be trade secrets. Third, the court concluded that GE's transmission of information to Lukowski after they determined he might be likely to leave for another company did not invalidate the claim that the information was a trade secret. Finally, the court concluded that, because there was no evidence of the individual defendants acquiring the information properly through some independent development, reverse engineering, or from someone who had the right to disclose it, GE had proved its claim of misappropriation.

Unfair or Deceptive Trade Practices

The court affirmed the trial court's conclusion that individual defendants' misappropriation of GE's trade secrets also constituted a violation of the Unfair or Deceptive Trade Practices Act (UDTPA), N.C. Gen. Stat. § 75-1.1. In addition, the individual defendants had ongoing "employment duties" to comply with the terms of their employment contracts, and by willfully violating the terms of those contracts, the individual defendants committed egregious activities outside the scope of those duties. Such activity was sufficient to find the individual defendants liable for violating § 75-1.1. Further, the court found ample evidence in the record to support the court's finding that

each individual furthered a single concerted plan with Zee to solicit GE's customers for Zee's enrichment. Because the trial court properly found that the individual defendants acted in concert to harm plaintiff, joint and several liability was appropriate.

Punitive Damages

The court held that the entry of punitive damages against each defendant individually was impermissible given the Supreme Court's interpretation of N.C. Gen. Stat. § 1D-25(b) in Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (2004). The trial court made findings pursuant to Chapter 1D as to each individual defendant in analyzing whether punitive damages should be awarded, then concluded that each defendant had engaged in conduct sufficient to warrant punitive damages and entered \$864,891 (three times the compensatory damages amount of \$288,297) against each defendant individually. Based on Rhyne, this was an erroneous application of § 1D-25(b) because the trial court considered factors not as to "each plaintiff's cause of action" but as to each defendant. Accordingly, the court reverse and remand for reentry of punitive damages.

Attorneys' Fees

With regard to the \$5.77 million award in attorneys' fees, the court affirmed the award of attorneys' fees based on Zee's counterclaims, but remanded for new findings as to the reasonableness of the award. Defendant Zee counterclaimed that GE tortiously interfered with contracts or prospective economic advantages it may have had with two carve-outs, and by doing so violated the UDTPA. Because Zee persisted in litigating the case after a point where it should reasonably have become aware that the pleading Zee filed no longer contained a justiciable issue, due to the lack of credible evidence implicating GE, the court affirmed the fee awards under N.C. Gen. Stat. § 6-21.5 for attorneys' fees in nonjusticiable cases.

With regard to the reasonableness of the fees, the court recognized that the question of whether local attorney rates should be a benchmark for reasonableness was one of first impression. Over \$3 million of the fees were billed by GE's New York-based law firm Paul Hastings, at the hourly rate of \$633.25 to \$675.75, while Ward & Smith in North Carolina charged between \$270 and \$390 an hour. In assessing the reasonableness of the fees awarded, the court found no relevant statute defining "customary fees for like work," United Laboratories, Inc. v. Kuykendall, 335 N.C. 183, 437 S.E.2d 374 (1993), and noted that the courts have not decided whether fees must be awarded in light of the rates typically charged in the geographic region where the litigation takes place. However, the court recognized the general principle that community rates in the geographic area of the litigation are relevant to the reasonableness determination.

The court acknowledged that "parties, including GE, are free to hire as counsel whomever they wish at whatever rates they are willing to pay." However, the court observed, "it appears that much of the work performed by Paul Hastings LLC's attorneys could have just as effectively been performed by local counsel at local rates." The court found it unreasonable to force Zee to pay a fee that includes rates double those billed in

the community where the litigation took place for work that seemingly did not require such a premium. The court held that the trial court abused its discretion by awarding the entire fee billed by Paul Hastings without conducting any inquiry as to which of the services rendered by Paul Hastings' attorneys truly could not have been performed by local counsel at reasonable rates within the community in which the litigation took place. The court remanded for additional findings.

Horner International Co. v. McKoy, 754 S.E.2d 852 (N.C. Ct. App. 2014) (Linda Stephens, J.). *A covenant not to compete is overbroad when it would prevent former employee from doing wholly unrelated work for any firm that sells "flavor materials," even if that firm's products did not compete with those of former employer. Employee's knowledge of trade secrets and opportunity to use those in his work for new employer created a threat of misappropriation under the Trade Secrets Protection Act.*

Bill McKoy was employed by Horner International Company (HIC), which manufactures flavor materials for use in tobacco and food products. McKoy signed a non-compete agreement and an agreement not to disclose trade secrets. McKoy resigned and began work with Teawolf, LLC ("Teawolf"), installing, maintaining, and optimizing equipment used in the production of new flavor products. Both HIC and Teawolf sell flavor materials derived from cocoa, chocolate, coffee, tea, fenugreek, ginseng, and chamomile. HIC sued McKoy for breach of the non-compete agreement and trade secrets agreement. The Wake County Superior Court (G. Bryan Collins, J.) enjoined McKoy from disclosing HIC's confidential information and trade secrets, but denied the motion as to the non-compete. Both parties appealed.

The Court of Appeals affirmed the trial court's order. With regard to HIC's appeal, the court held that the parties' non-compete agreement was overbroad and, thus, unenforceable, and consequently, HIC could not demonstrate likely success on the merits in order to obtain a preliminary injunction. The non-compete prohibited McKoy from "directly or indirectly" being employed by or acting "as an advisor, consultant, or salesperson for, *or becom[ing] financially interested, directly or indirectly*, in any person, proprietorship, partnership, firm, or corporation engaged in, or about to become engaged in, the business of selling flavor materials" for a period of 18 months after his employment with plaintiff ended. First, the court noted that the non-compete contained no geographical limitation. Second, and "more importantly," the non-compete purported to bar McKoy from doing wholly unrelated work for any firm that sells "flavor materials," even if that firm's products do not compete with those of HIC. Finally, the non-compete purported to bar McKoy from having even an indirect financial interest in such a business, a condition specifically rejected by VisionAIR, Inc. v. James, 167 N.C. App. 504, 606 S.E.2d 359 (2004). Thus the trial court did not err in denying HIC's motion for a preliminary injunction as to the non-compete agreement.

With regard to McKoy's cross-appeal, the court rejected his first argument that HIC failed to show a likelihood of success on the merits of its claim for violations of the North Carolina Trade Secrets Protection Act (TSPA). First, the court held that, despite McKoy's argument the contrary, HIC properly plead its claim under the TSPA because

the Complaint alleged with great detail and specificity the information McCoy allegedly provided to Teawolf, describing, various raw materials and raw material treatments; extraction, filtration, separation, and distillation techniques; and methods for compounding of flavors, packaging, and plant utility. Further, the Complaint alleged that these processes and methods were used in the production of flavor materials derived from seven specifically identified substances, such as cocoa, ginseng, and chamomile. With regard to McCoy's claim that HIC alleged only the "opportunity" to misappropriate trade secrets, the court noted several cases upholding grants of a preliminary injunction where plaintiffs have presented some evidence that former employees have or necessarily will use trade secrets. The TSPA permits preliminary injunctions where a *prima facie* case for "actual or *threatened* misappropriation of a trade secret is established," N.C. Gen. Stat. § 66-154(a), and a *prima facie* case includes a showing that a defendant "[h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner," N.C. Gen. Stat. § 66-155. Because McKoy's knowledge of trade secrets and opportunity to use them in his work for his new employer created a threat of misappropriation, the court held that the grant of a preliminary injunction was proper. The court also rejected McCoy's second argument that the trial court's injunction was too broad and nebulous. The court held that enjoining McKoy from "using, disclosing, or transmitting for any purpose any confidential information obtained by [McKoy] from [HCI]" plainly applied to the methods, processes, and techniques described as trade secrets in the preliminary injunction's findings of fact and conclusions of law. Those trade secrets are described with sufficient specificity that McKoy would not be prevented from working with any "standard processes" with his new employer.

PUBLIC EMPLOYEES

City of Asheville v. Aly, __ S.E.2d __, 2014 WL 1797517 (N.C. Ct. App. May 6, 2014) (Mark Davis, J.). *City of Asheville was not "justified" under the Asheville Civil Service Act in firing a police officer who (1) rented a personal computer; (2) backed up his Blackberry on it, including offensive emailed images sent unsolicited by friends; and (3) tried, but failed, to erase everything from the computer before he returned it.*

Roger Aly was a Senior Asheville Police Department (APD) Officer who worked as a patrol officer. Aly rented a laptop computer for his personal use from a rental store on a "rent to own basis" and used the computer to access his personal email, download photographs, and back up his Blackberry cell phone. Before he returned the computer to the rental store six months later because he could not afford payments, he attempted to remove downloaded files by placing them in the "recycling bin," and selecting "empty." When another individual rented the computer and discovered pictures of nude women and racially offensive images, the individual provided the computer to law enforcement. The APD computer crimes investigator retrieved 360 images and found 16 to be offensive. During the investigation, Aly admitted the images were his, and explained the nudes and racial photographs were sent to him unsolicited on his Blackberry by friends. The Chief of Police concluded that Aly violated the APD personnel policy, code of conduct, and ethics policy because he "neglectfully" failed to prevent the inappropriate

images from becoming public and, therefore, terminated Aly's employment. Aly appealed pursuant to his rights under the Asheville Civil Service Act, 2009 N.C. Sess. Laws ch. 401, § 8. Buncombe County Superior Court (James Downs, J.) upheld the Asheville Civil Service Board's finding that the termination was not justified and ordered full reinstatement and back pay.

The Court of Appeals affirmed the trial court's order. The Asheville Civil Service Act allows for a review of an employee's termination to determine whether the termination was "justified." However, the Act does not define "justified." In interpreting the term "justified," the court declined to apply the "just cause" standard under the State Personnel Act or a deferential interpretation prohibiting termination for "an arbitrary reason based on politics or membership in a protected class." Instead, the court applied the dictionary's definition of "justify," and concluded that the City was required to demonstrate or prove the termination was "just, right, or valid." First, the court held that Aly's testimony that he backed up his Blackberry on the computer and was unaware that the offensive images were being copied to his rental computer as a result of the backup supported the superior court's finding that the inappropriate images were stored on the computer as a result of negligence rather than intent. Second, the court held that the trial court's ultimate conclusion that Aly's termination was not justified was supported by its findings of fact, from which a fact finder could rationally have found that he was discharged for conduct amounting to mere negligence in failing to "wipe" his rented computer before its return. Third, the court concluded that the trial court acted within its authority in ordering reinstatement and back pay.

Hershner v. NC Department of Administration, 754 S.E.2d 847 (N.C. Ct. App. 2014) (Sanford Steelman Jr., J.). *Human Relations Committee (HRC) staff attorney's termination, based upon disclosure of information which HRC failed to prove was confidential, violation of a rule which HRC failed to prove was in effect, and disobedience of an instruction which was not, in fact, disobeyed, was not supported by "just cause" on the grounds of job performance.*

Mille Hershner was employed by the NC Department of Administration, Human Relations Committee (HRC) as a staff attorney. Richard Boulden, a former HRC investigator, became Hershner's supervisor. He instigated Hershner's termination for unacceptable personal conduct, including conduct unbecoming a state employee, violation of a work rule, and insubordination.

Hershner petitioned for a contested case hearing in the Office of Administrative Hearings. First, HRC claimed that Hershner's conduct was "unbecoming a state employee" with two letters, written by Hershner to a complainant, containing allegedly confidential information about cases and derogatory remarks about Boulden and HRC. The ALJ concluded, "[HRC] failed to meet its burden to establish that any information released by [Hershner] was confidential to anyone other than [Hershner], who is free to waive that confidentiality as she chooses." The ALJ also concluded, "[HRC] failed to meet its burden to establish that the release of information by Ms. Hershner was detrimental to state service simply because it may have been negative regarding one

Supervisor....” Second, HRC claimed that Hersher "violated a known work rule" by alleged disclosure of case status to another complainant. However, there was evidence that this rule applied to HRC attorneys. The evidence indicated that this rule applied to the non-attorney investigators who regularly disregarded this rule. The ALJ concluded that the state had not met its burden of establishing that this policy existed, or that such a policy was enforced prior to being used as a basis to terminate Hershner. Finally, HRC claimed that Hershner was "insubordinate," in that she willfully refused to carry out a reasonable order from her supervisor. HRC contended that Hershner was directed to work on nothing but an appellate brief for one specific case. The ALJ concluded that Hershner was not insubordinate because she was directed to make the brief her "top priority," not to cease all other work. The ALJ held that the dismissal was unwarranted and should be reversed. The State Personnel Commission (SPC) adopted the ALJ's decision. Wake County Superior Court (Paul Ridgeway, J.) affirmed the SPC and ordered reinstatement with back pay and benefits.

The Court of Appeals affirmed the trial court's order of reinstatement upholding the decision of the ALJ and SPC. The court found substantial evidence in the 115 unchallenged findings of fact to support the decisions of the ALJ and SPC, and held the trial court did not err in adopting their findings of fact and conclusions of law. The court also held that the trial court did not err in affirming the decisions of the ALJ and SPC that HRC lacked "just cause" to terminate Hershner's employment based on "job performance," where HRC failed to present evidence to support its alleged three bases for Hershner's termination, and HRC did not give her a warning for the alleged infractions. The court also held that where the SPC had a quorum at the time it commenced business (seven members, exceeding the six required), it was authorized to issue a decision in the case even after the recusal of two of its members.

Joyner v. Perquimans County Board of Education, 752 S.E.2d 517 (N.C. Ct. App. 2013) (Chris Dillon, J.). *Superior court had jurisdiction over probationary teacher's appeal of school board's decision to deny career status. School board's decision to deny career status based on vague concerns about teacher's proficiency, in the face of tenure recommendations from the principal and superintendant, was arbitrary and capricious.*

Vanessa Joyner taught first grade at Perquimans Central School (PCS) for two years, and spent the following two years as an Exceptional Children's teacher. She became eligible for "career status," i.e., tenure, at the close of the 2011-2012 school year. The Perquimans County Board of Education ("the Board") met in closed session to determine whether to grant career status to 13 probationary teachers, including Joyner. The superintendant and principal recommended Joyner for career status. However, school board member Ralph Hollowell told the Board that "he had heard from teachers, teacher assistants, parents and grandparents questionable information about [petitioner]" and that "from the accounts he had heard, he was not sure if [EC] students ... were getting what they needed." Hollowell did not elaborate as to his sources or the nature of the "questionable information." Hollowell also described an incident in which he "substituted" at PCS and saw Joyner meet with three EC students for less than 10 minutes each and thus he "questioned the quality of services the students were receiving in such a

short length of time.” The Board denied tenure to Joyner, but granted tenure to the other teachers. Joyner was granted a formal hearing, where she presented positive evaluations and favorable recommendations, and questioned Hollowell's motive in opposing her career status. Shortly before Hollowell "substituted" at the school, Joyner had reported Hollowell's wife, who was also a teacher at PCS, for misadministration of a writing test. The Board upheld the tenure denial. Upon judicial review, the Perquimans County Superior Court (William Pittman, J.) ordered Joyner reinstated with tenure.

The Court of Appeals affirmed the trial court's order that Joyner be reinstated with career status. Since N.C. Gen. Stat. § 115C-325(n) does not expressly prohibit a probationary teacher from seeking judicial review of a board's decision to deny tenure, the court concluded that a probationary teacher who has been denied tenure has the right to seek judicial review of the board's decision in accordance with N.C. Gen. Stat. § 150B-51. The court held that the trial court correctly and properly applied the "whole record test" in its review of the Board's decision. The court concluded, after examining all the competent evidence of record, that there was no rational basis in the evidence for the Board's decision. Both the superintendent and the principal recommended that Joyner be granted tenure, and Joyner's evaluations consistently designated her performance as at least equal to that of her peers. While the principal noted some past problems with Joyner's lesson plans, she noted improvement, and reiterated that she recommended tenure. The court concluded that only "findings" articulated by the board for denying tenure -- unsubstantiated "concerns" about Joyner's performance and that the Board could find a teacher "to do a better job" than Joyner -- bolstered the trial court's conclusion that the Board's decision was arbitrary and capricious.

Krueger v. NC Criminal Justice & Training Standards Commission, 750 S.E.2d 33 (N.C. Ct. App. 2013) (Donna Stroud, J.) *180-day suspension of a police officer's law enforcement certification for knowingly and willfully falsifying training records of other officers did not violate his substantive due process and equal protection rights.*

Jay Krueger, a police officer with the Raleigh Police Department, was suspended for submitting falsified radar training records for officers showing that they had completed radar training with him when they had not done so. Krueger was suspended without pay for 20 days and then the North Carolina Criminal Justice Education and Training Standards Commission ("the Commission") suspended his law enforcement certification for 180 days. He won his first appeal before the North Carolina Court of Appeals in 2009, when the court found that summary judgment had been granted in error where genuine issues of material fact existed as to whether the Commission's decision violated his constitutional rights. On remand, an administrative law judge found that the suspended officer had not been treated unlike other officers who had violated the Commission's standards and his constitutional rights had not been violated. Wake County Superior Court (Shannon Joseph, J.) affirmed the ALJ's ruling.

The Court of Appeals affirmed the trial court's order that the Commission's decision to suspend Krueger's law enforcement certification for 180 days did not violate his constitutional rights. On his second appeal, Krueger argued that he should have been

given a "consent agreement" and lesser penalty as permitted by the Commission's policy. The court initially held that due process principles did not require the Commission to make findings as to why it declined to offer Krueger a consent agreement. The court also found that the regulations permitting reduction or suspension of sanctions for certain violations of standards, including Krueger's, did not give the Commission unfettered discretion or render the regulations unconstitutional. The court held that Krueger's substantive due process rights were not violated by the Commission's failure to offer him a consent agreement because a 180-day suspension for knowingly and willfully falsifying training records did not "shock the conscience." The court also held that the fact that two other officers had not been suspended for falsification of training records did not establish a violation of Krueger's equal protection rights, reasoning that the misdeeds were not alike in "all relevant respects," and there was a rational relation between the Commission's decision to distinguish between Krueger and the other officers, and the "substantial" government interest in maintaining the credibility of law enforcement training and certification.