2015-2016 NORTH CAROLINA EMPLOYMENT LAW UPDATE

Jessica Leaven
Grimes Teich Anderson LLP
Asheville, NC

Faith Herndon
Law Office of Faith Herndon
Durham, NC

This paper summarizes published employment law decisions from the North Carolina Supreme Court and the North Carolina Court of Appeals from June 1, 2015 to June 1, 2016

NON-COMPETITION AGREEMENTS

N.C. Supreme Court

Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC, et al., 2016 N.C. LEXIS 177 (N.C. App. March 18, 2016) (Edmunds, J.). *In dispute over non-compete arising as part of an asset purchase agreement, Supreme Court reversed Court of Appeals and held that "blue-penciling" paragraph contained in an otherwise overly-broad non-compete agreement, which expressly directed the trial court to revise the non-compete so as to render it valid, was contrary to the law; because the non-compete's overly-broad geographic terms did not contain geographic divisions that could be struck under North Carolina's limited blue-penciling doctrine, non-compete was unenforceable and summary judgment for defendant was proper.*

The factual and procedural history of this case was covered in more detail in the 2014-2015 update. To briefly recapitulate, Beverage Systems of the Carolinas, LLC ("Beverage Systems") entered into an asset purchase agreement with two other beverage companies and their individual owners. As part of the agreement, and for additional consideration, the owners agreed to sign a non-compete agreement with plaintiff Beverage Systems which prohibited them from competing, owning, managing, operating or controlling, or being connected to someone who has a financial interest in any business involved in the beverage dispensing or servicing industry in North and South Carolina. The non-compete included a blue-penciling provision in its paragraph 6: "If, at the time of enforcement . . . a court holds that the restrictions stated herein are unreasonable under the circumstances then existing, the parties hereto agree that . . . the court shall be allowed to revise the restrictions contained . . . to cover the maximum period, scope and area permitted by law." The two owners signatories subsequently created and managed Associated Beverage Repair, LLC ("Associated Beverage"), the defendant in this case, and allegedly solicited business from plaintiff Beverage Systems' existing customers. Beverage Systems sued to enforce the non-compete agreement. The trial judge granted summary judgment in defendant's favor,

holding that the non-compete was overly-broad and unenforceable.

Plaintiff appealed, and the Court of Appeals held that while the territorial restriction was overbroad and unreasonable, the blue-penciling clause gave the trial court express authority to revise unreasonable restrictions and thus the court was required to do so after determining where in Carolinas it would be reasonable to enforce the agreement. In a decision of first impression, the Court of Appeals held that the "blue pencil doctrine"—the rule applicable in North Carolina prohibiting a trial court from revising unreasonable non-compete agreements—did not apply where the non-compete agreement itself allowed a court to make such revision. The Court further reversed the trial court's grant of summary judgment on the related claims of tortious interference, unfair and deceptive trade practices, and injunctive relief. Judge Elmore dissented.

The Supreme Court reversed and reinstated the decision of the trial court. The Court first looked at the geographic restrictions of the non-compete and agreed with the Court of Appeals that they were overly broad. The Court noted that at the time the agreement had been executed plaintiff Beverage Systems had no operations or business in "large swaths" of the territory identified. The Court then turned to whether the agreement could be "rewritten, blue-penciled, or revised."

As to "rewriting," the Court adhere to prior decisions holding that when an agreement not to compete is found to be unreasonable, the court is powerless unilaterally to amend the terms of the contract and may not reasonable subdivisions of an otherwise unreasonable territory. Regarding permissible "blue-penciling," the Court reiterated its approval of a narrow doctrine as expressed in Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961), in which it held that "a court of equity will take notice of the divisions the parties themselves have made [in a covenant not to compete], and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." Looking at the case before it, the Supreme Court held that "doctrine is unavailable here. The Agreement's territorial limits cannot be blue-penciled unless the Agreement can be interpreted so that it sets out both reasonable and unreasonable restricted territories. We found above that the restrictions to all of North Carolina and South Carolina, the only territorial restrictions in the Agreement, are unreasonable. Striking the unreasonable portions leaves no territory left within which to enforce the covenant not to compete. As a result, blue-penciling cannot save the Agreement."

The Court finally addressed plaintiff's argument that the agreement could be "revised" under the express permission given to courts in its paragraph 6. The Court strongly rejected the argument: "Parties cannot contract to give a court power that it does not have. . . . Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure. Accordingly, the parties' Agreement is unenforceable at law and cannot be saved." The Court also reversed the Court of Appeals' holding that summary judgment as to the tortious interference claims was improper, holding that the trial court had properly granted summary judgment to defendants on

all claims.

N.C. Court of Appeals

A&D Environmental Svcs. v. Miller, 776 S.E.2d 732 (N.C. App. Sept. 15, 2015) (Dillon, J.). *Defendant employee's interlocutory appeal of preliminary injunction order was denied where employee did not allege the impact of the order would do more than limit his ability to work in a narrow range of jobs and no substantial right was affected. Interlocutory appeal of trial court order pertaining to venue was allowed as affecting a substantial right. However, because Defendant had previously asserted an objection to venue, which the trial court had ruled on and which was pending on appeal at the time Defendant raised the second objection to venue, the trial court was correct in refusing to address the second venue argument.*

This decision deals with procedural issues arising from a non-compete dispute. Defendant employee signed a non-compete / non-solicitation agreement when he began working for A&D, an environmental services provider, in he which promised for 24 months not to solicit business from or provide services to certain A&D customers. Defendant employee resigned in early 2014 and began working for a competitor. In June 2014, A&D filed an action seeking to enforce its non-compete. Defendant employee contested whether venue was proper, and then after the trial judge denied the motion pursued an interlocutory appeal of the trial court's order. (That decision was reported in last year's update, A&D Environ. Svcs, Inc. v. Miller, 770 S.E.2d 755 (Ct. App. 2015), which held that venue was proper in Guilford County.) While this first venue issue was on appeal, A&D filed a motion for a preliminary injunction seeking to prohibit the defendant from providing services or soliciting business from a defined group of customers. At the preliminary injunction hearing, defendant raised a second argument that venue was improper - different from the arguments made on the appeal, which was still pending - and also opposed the preliminary injunction on the merits. The trial court judge held that it was improper to rule on the second improper venue argument while the appeal of the first improper venue argument was still pending on appeal; and enjoined the employee defendant from selling to or servicing the defined group of customers. Defendant appealed, raising as issues that the trial court improperly declined to address the new improper venue argument and did not have jurisdiction to address the motion for preliminary injunction.

The Court of Appeals addressed the threshold issue of whether defendant's appeal, which was interlocutory, would be allowed as affecting a substantial right. The Court followed precedent and ruled that the granting or denial or a motion affecting venue was a substantial right, and was immediately appealable. With regard to the preliminary injunction, however, the Court held that "[n]ot every order which affects a person's right to earn a living is deemed to affect a substantial right. Rather, whether such an order affects a substantial right depends on the extent that a person's right to earn a living is affected." The Court distinguished the facts before it, where defendant was only limited from working with a specific list of customers, from the circumstances that arose in cases such as .Masterclean v. Guy, 82 N.C. App. 45, 345 S.E.2d 692 (1986), and Precision Walls, Inc. v. Servie,152 N.C. App. 630, 568 S.E.2d 267 (2002), in which the Court of Appeals had held that the non-competes at issue prevented or effectively prohibited

the defendant from earning a living. The Court thus held that defendant's statement - that the preliminary injunction affected his ability to earn a living - did not affect a substantial right. The Court also held that defendant's argument, that the trial court did not have jurisdiction to consider the preliminary injunction motion while the first improper venue issue was still on appeal, was also interlocutory and not affecting a substantial right.

The remainder of the Court's decision addressed the issue of whether the trial court properly declined to rule on the second venue argument. Defense counsel argued it was based on the discovery of additional facts of which defendant had not been aware; the Court of Appeals relied on N.C. Gen. Stat. §1-294, which states that an appeal "stays all further proceedings in the court below upon the judgment appealed from, or upon *the matter embraced therein,"* and ruled that the second improper venue argument was a "matter embraced" in the first appeal. The fact that new factual allegations were made in the second venue argument was irrelevant. The trial court's decision not to address the second venue objection was affirmed.

Employment Staffing Group, Inc. v. Little, **777 S.E.2d 309 (N.C. App. Oct. 6, 2015) (Inman, J.).** *Non-compete covenant was binding and enforceable, and preliminary injunction against employee upheld; even though agreement was silent as to consideration, parties agreed that employee had been paid $100 at the time of signing and parol evidence of this payment was admissible so that consideration was not illusory; further, the payment was sufficient consideration to support the non-compete covenant.*

This decision addresses whether non-compete agreements will be enforceable where the terms of the agreement are not fully documented - in this case, the consideration to be provided was nowhere referenced in the agreement. The defendant employee also challenged the consideration provided on the basis of inadequacy. Defendant employee was hired in 2001 and in June 2014, thirteen years into his employment, was asked to sign a well-crafted non-compete prohibiting him from performing the duties he had performed for his employer, ESG, with any competitor within a 50-mile radius and over a one-year period. The NCA also prohibited defendant employee from soliciting ESG's customers for a two-year period. The NCA, however, was completely silent as to what consideration was being offered. The parties nonetheless agreed that ESG's human resources director offered the employee $100 to sign the agreement and that after he signed that amount was deposited in his bank account. Having signed the NCA, employee quickly found another job and began working for a competitor in the same geographic territory, soliciting ESG customers. In November 2014 ESG moved for a preliminary injunction, which was granted days later. Defendant employee appealed. Although it was interlocutory, the Court of Appeals accepted the appeal to address the important issues raised.

The Court of Appeals first addressed the employee's argument that the non-compete agreement was invalid because the required consideration was illusory. The agreement actually contained a merger clause, but the Court pointed to prior holdings that merger clauses only prohibit prior or contemporaneous inconsistent evidence of the parties' intent, if there is a complete contract. Where the writing does not totally integrate all of the terms of the contract, parol evidence can be allowed. The Court also relied on two appellate cases, holding that the material terms of an

employment contract can be derived from a combination of written agreement and parol evidence, and extended that logic the this non-compete dispute before it: "Here, since the Employment Agreement is *silent* as to consideration, an element necessary to form a binding non-compete agreement is absent—but that element is not precluded by any provision in the written agreement. Furthermore, both parties admitted that Plaintiff offered Defendant $100 to sign the non-compete covenant, and it is undisputed that Plaintiff actually paid Defendant $100. Consequently, . . . the written non-compete covenant is not fully integrated, and the merger clause and parol evidence rule do not prohibit the trial court from considering the evidence showing the missing essential term of consideration—that Plaintiff paid Defendant $100 for signing the Employment Agreement."

The Court then summarily rejected defendant employee's second argument, that the $100 consideration was inadequate because he was an employee a the time the agreement was offered and was under duress, and affirmed the preliminary injunction order.

Hertzberg v. Fur Specialists, Inc., 781 S.E.2d 533 (N.C. App. Jan. 5, 2016) (Robert Hunter, J.) (unpublished). *Issuance of cease-and-desist letters sufficient to raise actual controversy for purposes of Declaratory Judgment Act; non-compete prohibiting a former employee of a store from working within a sixty-mile radius of that store is unenforceable after the store's closure. Trial court decision (by Inman, J.) affirmed.*

This unpublished decision addresses two issues arising from competition within the eastern North Carolina fur sales business. The plaintiff is the descendent of one Sol Hertzberg, founder of the eponymous Hertzberg Furs of Rocky Mount which was well known in the eastern part of the state beginning in the 1950s. Plaintiff eventually took over Sol's fur business and expanded the empire to include stores in Raleigh and Wilson, which he sold in 2007 and 2010 respectively. As part of the asset purchase agreement covering the Wilson store sale, Plaintiff entered into a three-year non-compete agreement with the acquiring company, defendant Fur Specialists, prohibiting certain activity within 60 miles of the Wilson store's physical address. Defendant closed the Wilson store a year later, but when plaintiff subsequently engaged in marketing in the restricted territory, defendant began sending cease and desist letters. Plaintiff filed a Declaratory Judgment Action to have the NCA held unenforceable.

The Court of Appeals affirmed the trial judge's ruling that the NCA was unenforceable. The Court held that it was clear from the face of the NCA provisions that the parties' intent was to protect the Wilson store from competition. Once that store was closed and that business discontinued, the NCA was overly broad and existed beyond its original purpose, and so was unenforceable. The Court also ruled that the trial court properly rendered a judgment under the DJA, since the cease-and-desist letters were sufficient to establish an actual controversy. The Court also addressed other issues arising from the asset purchase agreement, unrelated to the non-compete dispute.

WRONGFUL DISCHARGE

Head v. Adams Farm Living, Inc. 775 S.E.2d 905 (N.C. App. Aug. 18, 2015) (Mark Davis, J.). *In claims for wrongful discharge in violation of public policy against religious discrimination as set forth in N.C. Gen. Stat. §143-422.2, summary judgment against plaintiff upheld, where plaintiff, a nursing home employee, refused to get a flu vaccine during a flu outbreak and was terminated. Plaintiff's claim of failure to accommodate her religious beliefs is not actionable under the public policy exception, and while plaintiff established a prima facie case of discrimination, she was unable to rebut defendant's nondiscriminatory reason for terminating her.*

Plaintiff worked as a Activities Director for a skilled nursing home facility with a majority elderly patients. During a serious flu outbreak, the Guilford County Health Department issued a recommendation that facility employees all get flu vaccines. Defendant issued a notice requiring employees get the vaccine, indicating it was not a live vaccine and that it would not harm them unless they had an allergy to eggs. Employees were told to obtain a physician's note stating their specific medical objection if they wished not to get the vaccine, and that failure to comply would result in their removal from the schedule. Plaintiff, a Seventh Day Adventist, had her father, who was a chiropractor and not a physician, submit a note indicating that plaintiff was declining to get the vaccine because she had had an unspecified childhood autoimmune disease and the father did not want her to take the risk of any compromise to her immune system. Plaintiff also verbally objected, stating she did not want to take a vaccine that had "swine stuff" in it because of her religion. Plaintiff then was told the vaccine only had eggs, and she acknowledged she did not have an egg allergy. Defendant's consulting physician actually recommended that the vaccine would be beneficial if she had the autoimmune disease, and defendant also obtained literature indicating that Seventh Day Adventists did not take a position on whether vaccines were proper under church doctrine. Defendant informed plaintiff that the letter from her chiropractor father was insufficient and invited her to submit another medical opinion, but when she failed to do so she was terminated. Three other employees declined to get the vaccine, brought in medical notes indicating they had allergies or a prior adverse reaction, and were excused and not terminated.

Plaintiff asserted state law claims of wrongful discharge against state public policy against religious discrimination, as set forth in N.C. Gen. Stat. §143-422.2, as well as public policy protecting the doctor-patient relationship. No federal discrimination claims were asserted. Defendant filed a motion for summary judgment based on the facts set forth above, which was granted by the trial court, and plaintiff appealed only dismissal of the wrongful discharge claims based on §143-422.2.

While Plaintiff's action was for wrongful discharge, Plaintiff first argued that the state prohibition against religious discrimination in §143-422.2 should be read to contain an obligation to accommodate an employee's religion. Plaintiff pointed to the religious accommodation provisions contained in Title VII, 42 U.S.C. §§2000e-2a(1) and 2000e-j. The Court of Appeals disagreed, relying upon and extending its decision in Simmons v. Chemol Corp., 137 N.C. App. 319, 528 S.E.2d 368 (2000), which held that a disabled employee's claim

that he was terminated as a result of his employer's failure to accommodate his disability was "irrelevant" to his public policy wrongful discharge claim, and that the accommodation claim should have been filed instead under the N.C. Persons With Disabilities Protection Act, N.C. Gen. Stat. §168A-1 *et seq*. The Court held that "[w]hile *Simmons* concerned a claim of discrimination based on disability rather than religion, this distinction is irrelevant given that the articulation of public policy set out in N.C. Gen. Stat. § 143-422.2 prohibits discrimination in employment based on both disability and religion."

The Court then analyzed the evidence before the trial court under the McDonnell Douglas v Green analysis. It properly noted that the burden of establishing a prima facie case is not onerous, and held that plaintiff met her obligation to establish a prima facie case simply by showing that she was a member of a protected group, Seventh Day Adventists, that she was qualified to do her job and had been doing it satisfactorily and that the three individuals who were exempted from the vaccine requirement were not Seventh Day Adventists. However, the Court then held that defendant's evidence was sufficient to establish a legitimate non-discriminatory reason for a variety of factors, including the seriousness of the flu outbreak, the nexus between the vaccine and patient safety, and substantial evidence that plaintiff was discharged because of her failure to obtain a medical release rather than because of her religion. The Court rejected plaintiff's argument of pretext, accepting the employer's justification for distinguishing between the insufficient chiropractor's note as compared to a physician assistant's note provided by one of the other employees: "[W]e cannot say that it was illogical under these circumstances for Defendant to accept a note from a physician assistant while refusing to accept the letter from Dr. Hollar. Thus, we believe that Defendant's actions in this regard were neither objectively unreasonable nor suggestive of an impermissible motive to discriminate against Plaintiff's religious beliefs." The Court also held that a physician letter Plaintiff obtained months after her termination, and never provided her employer, was insufficient to establish pretext.

Green-Hayes v. Handcrafted Homes, LLC, 775 S.E.2d 695 (N.C. App. June 16, 2015) (Bryant, J.), cert. denied 368 N.C. 426 (2015) (unpublished). *Plaintiff's complaint alleging wrongful discharge in violation of public policy against race and sex discrimination, as set forth in N.C. Gen. Stat. §143-422.1, was properly dismissed under Rule 12(b)(6); complaint failed to allege plaintiff had filed a charge of discrimination with the EEOC but only that she had complained internally to her employer about discrimination affecting other workers, so that in the absence of a statutorily protected activity no public policy was implicated.*

Plaintiff in her complaint alleged that she observed the defendant's plant manager making inappropriate comments to other female employees at her facility, and that after she reported the inappropriate comments to the plant manager and a consultant for defendant, she was terminated. Plaintiff, an African-American female, also alleged that she was paid less than her male predecessor. Plaintiff did not file any type of EEOC or other administrative charge relating to the inappropriate remarks or discrimination. Plaintiff asserted a claim for wrongful discharge in violation of public policy set forth in N.C. Gen. Stat. 143-422.1. Defendant filed a Rule 12(b)(b) motion to dismiss, based on the argument that the complaint failed properly to allege a wrongful discharge claim based on retaliation because plaintiff had not made any statutorily-protected

agency complaint and had only complained internally. The motion to dismiss was granted by Judge Inman. Plaintiff appealed.

Plaintiff on appeal argued that she had properly asserted a common law cause of action for retaliatory discharge based on allegations that she was terminated in retaliation for complaining internally about discrimination of others in the workplace. The Court disagreed, distinguishing the facts from those in Brewer v Cabarrus Plastics, 138 N.C. App. 681, 504 S.E.2d 580 (1998) and Bigelow v Town of Chapel Hill, 227 N.C. App. 1, 745 S.E.2d 316 (2013). The Court pointed out that while both Brewer and Bigelow allowed wrongful discharge claims on the grounds of retaliation, in both cases the plaintiff employees had identified specific statutes under which they had actually asserted administrative complaints of statutory violations. The Court interpreted Brewer as holding that filing an EEOC charge of discrimination constituted a statutorily-protected activity under the anti-discrimination provisions of the N.C. Equal Employment Practices Act, and held that because plaintiff here had not filed a charge with the EEOC (as the plaintiff in Brewer had done), that she could not rely upon the anti-discrimination provisions of N.C. Gen. Stat. §143-422.1 to assert a public policy wrongful discharge claim: "Unlike the filing of a discrimination complaint with the EEOC, a statutorily protected activity under N.C.G.S. § 143-422.1, complaining to a plant manager and a consultant are not so protected and are insufficient under these facts to serve as the basis for a claim of retaliatory discharge."

Bigelow v. Town of Chapel Hill, 2016 N.C. App. LEXIS 510 (N.C. App. Feb. 11, 2016) (Robert Hunter, J.) (unpublished) *Court of Appeals affirmed summary judgment for defendant, where plaintiffs failed to present evidence showing they were replaced after their termination by individuals not members of a protected class, and where they failed to rebut Town's evidence of nondiscriminatory reason for termination.*

Plaintiffs, both African-Americans, were sanitation workers employed by the Town of Chapel Hill who made various complaints during their employment including of race discrimination and safety violations. Subsequent to their complaints, due to complaints received from residents regarding their job performance, the Town instituted an investigation which disclosed a litany of performance issues such as yelling at residents and photographing their houses. The Town terminated plaintiffs in 2010. This case wound its way through the courts, including a prior visit to the Court of Appeals on a Rule 12(b)(6) motion, and finally was dismissed on summary judgment by Judge Fox. Plaintiffs appealed again.

The Court of Appeals affirmed summary judgment for the defendant-town. First, the Court found that plaintiffs failed to forecast evidence of a prima facie discrimination case. While they properly alleged they were members of a protected class, were qualified for their jobs, and were fired, they did not allege they were replaced by other employees who are not members of the protected class. Further, the one plaintiff who had alleged he lost his opportunity for promotion to another, less-qualified applicant, was barred from pursuing that claim due to res judicata as that claim had been litigated in federal court. The Court easily found the Town had met its burden of showing a nondiscriminatory reason for termination, and plaintiffs failed to put forth

any specific evidence to discredit the Town's evidence. In short, plaintiffs' claims were properly dismissed because of their own misconduct, discovered as a consequence of an investigation very likely prompted by their very complaints.

WAGE AND HOUR ACT/ BREACH OF CONTRACT

Bigelow v Sassafras Grove Baptist Church, 2016 N.C. App. LEXIS 527 (N.C. App. May 10, 2016) (Geer, J.) *Motion to dismiss plaintiff's breach of contract and Wage and Hour claims was improperly granted, where plaintiff, who had been employed as defendant church's minister, did not challenge the defendant's authority to terminate his employment but brought claims for unpaid wages and salary due. Plaintiff's at-will status did not bar a contract claim for wages promised; the First Amendment's ministerial exception was not a jurisdictional bar but merely an affirmative defense which does not apply to a breach of promise to pay wages; and the ecclesiastical abstention doctrine did not apply where the wages promised involved on the neutral application of the law and not interpretation of ecclesiastical doctrine.*

Plaintiff was hired as a part-time minister for defendant, a Yanceyville church, and also for a period worked full-time for General Electric, where he would have been eligible for full retirement in 2013. In 2001 plaintiff resigned his job at GE and became full-time at the church. At that time he entered into a written contract with the church in which the church expressly declined to hire him for a particular term of years but did promise that if he were to become disabled before his retirement the church would pay his full salary until such time as his disability insurance began to be paid and the church "relieve[d] of its responsibility to Pastor." Ten years later, in 2011, plaintiff developed serious kidney disease, was hospitalized, and could no longer perform his job. The long term disability plaintiff had once held had lapsed, and the church ceased paying his salary and benefits. Plaintiff filed suit in 2013 in Caswell County, alleging breach of contract and violations of the North Carolina Wage and Hour Act. He specifically alleged he was due "salary continuation upon his disability" and "salary, housing, utilities, social security, and medical insurance . . . through February 13, 2013" in consideration for his forfeiture of his previous job's benefits. Defendant filed a motion to dismiss, which was granted. Plaintiff appealed.

The Court of Appeals reversed. The Court first addressed defendant's argument that plaintiff could not assert a breach of contract claim where he was expressly at an-will employment. The Court disagreed, holding that while he did not have a cause of action for termination without cause under a breach of contract theory, the ""at will" doctrine does not preclude an at-will employee from suing for breach of contract with respect to benefits or compensation to which the parties contractually agreed." Because the plaintiff had not challenged the basis of his termination but rather the salary and benefits owed to him under the contract, the at-will doctrine was "beside the point" and plaintiff had properly alleged his breach of contract claim for lost salary and benefits. Plaintiff likewise had sufficiently pled a claim for unpaid wages under the N.C. Wage and Hour Act.

The Court then turned to defendant's primary argument, that the claims should have been

dismissed because plaintiff's causes of action were barred by the "ministerial exception" or the "ecclesiastical abstention" doctrine. The Court held neither doctrine barred plaintiff's claims for unpaid wages and benefits. While N.C. appellate courts had not previously addressed the substance of the ministerial exception, the Court observed that under the Supremacy Clause North Carolina courts are bound by U.S. Supreme Court application of the doctrine as set forth in Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., ___U.S.___, 181 L. Ed. 2d 650, 132 S. Ct. 694 (2012). The Court then reminded the parties that the ministerial exception is not a jurisdictional bar to claims but only an affirmative defense. It pointed out that the U.S. Supreme Court had extended the ministerial exception doctrine to a Title VII claim in which the minister challenged her church's decision to fire her, but that it had not been extended as a defense to ordinary breach of contract claims. The Court of Appeals then reviewed how the ministerial exception doctrine was applied in other jurisdictions and observed that while the exception could operate as a defense to a discriminatory termination, a minister's breach of contract would not be so barred. The Court quoted from Kirby v. Lexington Theological Seminary, 426 S.W.2d 597 (Ky. 2015), which held that "Contractual transactions, and the resulting obligations, are assumed voluntarily. Underneath everything, churches are organizations. And, like any other organization, a church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court. Surely, a church can contract with its own pastors just as it can with outside parties. Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights." The N.C. Court of Appeals found those decisions to be persuasive and held, "Accordingly, because plaintiff's complaint does not challenge the Church's decision to terminate his employment, but instead seeks to enforce a contractual obligation regarding his compensation and benefits, we hold that the ministerial exception does not apply and is not a basis for dismissal of plaintiff's claims."

Defendant also had argued that the ecclesiastical abstention doctrine was a bar to jurisdiction over the dispute. The Court agreed that N.C. precedent recognized such a bar to adjudicating ecclesiastical matters of a church. However, while civil courts have no authority over ecclesiastical disputes, precedent establishes that they do have authority over civil, contract and property rights that arise from a church controversy. Distinguishing the case before it from Tarasi v. Jugis, 203 N.C. App. 150, 692 S.E.2d 194 (2010), where the Court of Appeals had applied the ecclesiastical abstention doctrine in a situation where a Catholic priest was promised compensation consistent with the canons of that church, the Court of Appeals here held the facts in the Bigelow case did not require the courts to interpret or apply any ecclesiastical doctrines in order to determine the quantity of salary and benefits due to plaintiff, and ruled that the ecclesiastical abstention doctrine would not bar jurisdiction.

UNEMPLOYMENT BENEFITS

Jackson v. North Carolina Department of Commerce, 775 S.E.2d 687 (N.C. App. July 2015) (Chris Dillon, J.) *Denial of unemployment benefits was upheld, where the only evidence of employee misconduct was a hearsay statement presented at the hearing to which plaintiff did not object at the time of the hearing; plaintiff's later efforts to object to the evidence were held to*

be too late.

Plaintiff was employed as a CNA at a nursing facility and was fired in 2013 for failing to report that a resident had fallen out of a wheelchair, which would have triggered a medical evaluation. Plaintiff filed for unemployment benefits, and at her hearing testified the patient had not fallen, just slumped in the chair. The employer submitted a written statement by a co-worker not in attendance at the hearing, which stated the plaintiff had called the co-worker in to help her and she had seen the patient on the floor. Employer did not offer any other evidence of a fall. The appeals referee denied unemployment benefits, finding that the patient had in fact fallen. Employee appealed, and the case eventually was reviewed by the superior court, Beecher Gray presiding. Judge Gray ruled there was no competent evidence of a fall, and reversed the denial of benefits. The Department appealed.

The Court of Appeals reversed Judge Gray's decision, effectively denying unemployment benefits. The Court's ruling turned on the fact that plaintiff had failed at the hearing to object to the hearsay statement of the co-worker. The Court relied on appellate precedent that "hearsay evidence which is not properly objected to [at an unemployment benefits hearing] is entitled to be considered for whatever probative value it may have." Findings of fact made by the Division of Employment Security which are supported by competent evidence are conclusive and binding on review by the superior court. While plaintiff later objected to the hearsay evidence at the Board of Review and the superior court, those objections were too late. The finding of misconduct was upheld.

PUBLIC EMPLOYEE APPELLATE DECISIONS

N.C. SUPREME COURT

CONSTITUTIONAL - WRONGFUL DISCHARGE CLAIMS

Young v. Bailey, 781 S.E.2d 277 (N.C. 2016) (Robert Edmunds Jr., J.) *Since sheriff's employees are not "county employees" as defined in the county employee political activity statute, N.C. Gen. Stat. § 153A-99, that statute does not protect them from dismissal for partisan purposes. A deputy sheriff, as a sworn law enforcement officer, can be terminated for political reasons without violating his free speech rights under the state constitution.*

Terry Young was a deputy sheriff employed by the Mecklenburg County Sheriff Daniel Bailey. Sheriff Bailey sent a letter to his employees announcing his candidacy for reelection and requesting campaign contributions. Terry did not contribute or volunteer for his campaign. Terry was terminated shortly after Bailey's reelection. Terry filed claims of wrongful discharge in violation of public policy under N.C. Gen. Stat. § 153A-99, which protects county employees' right to political association and belief, and violation her free speech rights under the North Carolina Constitution. The Mecklenburg County Superior Court (W. Robert Bell, J.) granted

summary judgment for Bailey. Terry appealed. The unanimous decision of the Court of Appeals (Sanford Steelman Jr., J.) affirmed summary judgment for Bailey.

On discretionary review, the Supreme Court affirmed the Court of Appeals' decision, upholding summary judgment for Sheriff Bailey. The Court first addressed Young's wrongful discharge in violation of public policy claim based on the public policy of protecting "county employees" from specific forms of political coercion embodied in N.C. Gen. Stat. §153A-99. The Court held that deputy sheriffs are not entitled to the protection of § 153A-99 because deputies are employees of the sheriff, not the county. Subdivision (b)(1) defines "'County employee' or 'employee' [as] any person employed by a county or *any department or program thereof that is supported, in whole or in part, by county funds*." The Court noted that a sheriff is an elected, constitutional officer, who "has the exclusive right to hire, discharge, and supervise the employees in his office," N.C. Gen. Stat. § 153A-103(1), and the county government lacks hiring, supervisory, and firing authority over deputies. The Court concluded that in light of the distinct demarcation between county government and the office of the sheriff, a sheriff's office is not a program or department of a county, and "the fact that the sheriff's office receives funds therefrom is of no moment." As a result, Young was not covered by § 153A-99 and could not pursue a wrongful discharge claim based on that statute.

The Court also rejected Young's claim that her termination was in violation of her rights to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution were not violated. The Court assumed without deciding that Young was terminated because of her failure to contribute to Bailey's reelection campaign. While recognizing that "[a] State may not condition public employment on an employee's exercise of his or her First Amendment rights," O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996), the Court noted exceptions to the general rule when the employee's loyalty to the employer is paramount. Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980). The Court noted that North Carolina constitution mandates election of sheriffs, and the election of a particular candidate signifies public support for that candidate's platform, policies, and ideology. The Court also pointed to case law recognizing that deputies serve as the alter egos of the sheriff, and, if liability results from the acts of a deputy, the sheriff is held responsible. Based on this law, the Court concluded that "a deputy sheriff fills a role in which loyalty to the elected sheriff is necessary to ensure that the sheriff's policies are carried out." The Court held that [w]hen, as here, mutual confidence and loyalty between a sheriff and a deputy are crucial in accomplishing the sheriff's policies and duties," the dismissal of Young based on political considerations falls squarely within the exceptions in Elrod and Branti. Accordingly, the Court held that Young's rights under the North Carolina Constitution were not violated.

McLaughlin v. Bailey, 781 S.E.2d 23 (N.C. 2016) (Per Curiam) (Sam Ervin IV, J., not participating) *See holding above in Young v. Bailey.*

Ivan McLaughlin, a detention counselor, and Timothy Stanley, a deputy sheriff, were both employed by the Mecklenburg County Sheriff's Department. Sheriff Daniel Bailey, a Democrat, sent a letter to his employees announcing his candidacy for reelection and requesting campaign

contributions. McLaughlin and Stanley, who were Republicans, did not contribute or attend a fundraiser. Bailey was reelected. Stanley was terminated for being disruptive during a meeting by talking in the back of the room and making remarks expressing a preference for Bailey's opponent in the election. McLaughlin was terminated for violating the Sheriff's Department rules. McLaughlin and Stanley ("Plaintiffs") filed claims of wrongful discharge in violation of public policy, namely, in violation of N.C. Gen. Stat. § 153A-99, which protects county employees' right to political association and belief, and violation of their rights under the North Carolina Constitution. They claimed that they were terminated for failing to support Bailey's campaign and for having "Republican beliefs." The Mecklenburg County Superior Court (Robert Ervin, J.) granted summary judgment in favor of Bailey. Plaintiffs appealed. The divided decision of the Court of Appeals **(Sanford Steelman Jr., J.)** affirmed summary judgment for Bailey.

The Supreme Court affirmed the Court of Appeals' decision, upholding summary judgment for Sheriff Bailey. For the reasons stated in Young v. Bailey, the Court rejected Plaintiffs' wrongful discharge claims under G.S. § 153A-99, and Stanley's constitutional claims. With respect to McLaughlin's claim as a detention counselor, who was a civilian employee, as opposed to a sworn law enforcement officer, the Court assumed, without deciding, that he could not lawfully be terminated for his exercise of his free speech rights. The Court found that since McLaughlin conceded that he violated sheriff's department policies by failing to properly conduct his pod tours and by falsifying paperwork submitted to his supervisors, the sheriff had sufficient job-related reasons to terminate his employment.

Lloyd v. Bailey, 781 S.E.2d 24 (N.C. 2016) (Per Curiam) *See holding above in Young v. Bailey.*

Justin Lloyd was a deputy sheriff employed by the Mecklenburg County Sheriff Daniel Bailey. Bailey sent a letter to his employees announcing his candidacy for reelection and requesting campaign contributions. Lloyd did not contribute or volunteer for his campaign. Lloyd was terminated shortly after Bailey's reelection. Lloyd filed claims of wrongful discharge in violation of public policy under N.C. Gen. Stat. § 153A-99, which protects county employees' right to political association and belief, and violation her free speech rights under the North Carolina Constitution. The Mecklenburg County Superior Court (W. Robert Bell, J.) granted summary judgment for Bailey. Lloyd appealed. The unanimous decision of the Court of Appeals (Sanford Steelman Jr., J.) affirmed summary judgment for Bailey.

On discretionary review, the Supreme Court affirmed the Court of Appeals' decision, upholding summary judgment for Sheriff Bailey. For the reasons stated in Young v. Bailey, the Court rejected Lloyd's wrongful discharge claims under G.S. § 153A-99 and constitutional claims.

CAREER STATUS LAW

North Carolina Association of Educators, Inc. v. State, ___ S.E.2d ___, 2016 WL 1551208, No. 228A15 (N.C. April 15, 2016) (Robert Edmunds Jr., J.) *The repeal of the Career Status*

Law violates the Contracts Clause of the U.S. Constitution and the Law of the Land Clause of the N.C. Constitution as to teachers who had already achieved career status when the law was repealed. Any teacher who had career status before July 26, 2013, keeps their career status; the pre-2013 law continues to apply to them and they can only be fired for certain reasons and have a right to a hearing. All teachers who were probationary in 2013 or anyone hired since then works under term-limited contracts per the 2013 law.

Until 2013, North Carolina public school teachers were employed under a system described as the "Career Status Law," through which teachers could earn career status after successfully completing a probationary period and receiving a favorable vote from their school board. That system changed with the Legislature's passage of the Current Operations and Capital Improvements Appropriations Act of 2013 ("the Act"). The Act created a new system of employment for public school teachers, repealed the Career Status Law, and retroactively revoked the career status of teachers who had already earned that designation ("Career Status Repeal"). The North Carolina Association of Educators (NCAE), five career status teachers, and one probationary teacher filed a complaint against the State of North Carolina for declaratory and injunctive relief, arguing that the State's enactment of legislation repealing the Career Status Law, as applied to both career status teachers and probationary teachers on track to achieve career status, constituted a taking of property without just compensation under Article I, Section 19 of the North Carolina Constitution (Law of the Land Clause) and an unconstitutional impairment of their contractual rights under Article I, Section 10 of the United States Constitution (Contracts Clause). The Wake County Superior Court (Robert Hobgood, J.) granted association and teachers partial summary judgment as to claims related to career status teachers, permanently enjoined the State from implementing the law as applied to career status teachers, and granted the State partial summary judgment as to claims related to probationary teachers. The State appealed, and the NCAE and teachers cross-appealed.

Affirming the trial court, the Court of Appeals unanimously affirmed the trial court's decision to grant summary judgment in favor of the State as to probationary teachers. The Court of Appeals majority held that the repeal of the Career Status Law violated both the Contract Clause and the Law of the Land Clause with regard to teachers who had already attained career status. The court applied a three-part test for analyzing alleged violations of the Contract Clause: "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." Bailey v. State, 348 N.C. 130 (1998). First, the court concluded that "career status rights constitute a valuable employment benefit and that by satisfying the requirements of the Career Status Law prior to the Career Status Repeal, plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille earned vested contractual rights to the valuable employment benefit that career status protections represent." The court then concluded that "the Career Status Repeal substantially impairs Plaintiffs' vested contractual rights" by replacing their "continuing contracts with time-limited contracts that can be non-renewed without meeting any of the Career Status Law's grounds for dismissal or demotion and eliminating career status teachers' rights to a hearing in dismissal cases." The court also concluded that the impairment of plaintiffs' contractual rights was not reasonable and necessary to further the State's purported objective of

improving North Carolina's schools because (1) the Career Status Law already provided for the dismissal of career status teachers for performance reasons; (2) school administrators testified without dispute "that the Career Status Law effectively provided school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance;" and (3) there were many less drastic alternatives to revoking earned employment protections. Having found that teachers who earned career status before the Career Status Repeal had vested contractual rights to their earned employment protections, the court held that the Career Status Repeal also constituted a taking of those teachers' property without just compensation, in violation of the Law of the Land Clause.

The Supreme Court affirmed the opinion of the Court of Appeals, though with slightly different reasoning. While the Court of Appeals majority had concluded that the career status law itself created contractual rights for teachers, the Supreme Court disagreed. The Court found that the Career Status Law was not explicit enough because it did not use the word "contract" enough. However, the Court then held that teachers had contracts with their individual school districts, the Career Status Law was incorporated as part of that contract, and because of the importance of career status rights to teachers, the teachers reasonably relied on the law's provisions as part of the contract. On the second and third prongs of the Contract Clause test, the Supreme Court agreed with the Court of Appeals that the repeal of career status and replacement with term-limited contracts was a substantial impairment of contractual rights, and this substantial impairment was not reasonably necessary because there was no evidence that school districts had difficulties removing ineffective teachers under the Career Status Law. In addition, had such a problem existed, the Legislature could have used a more narrow approach to solve rather than eliminate career status entirely. Accordingly, the Court held the repeal of career status unconstitutional as retroactively applied to those teachers who already had career status.

Wetherington v. North Carolina Department of Public Safety, 780 S.E.2d 543 (N.C. 2015). **(Barbara Jackson, J.)** *Trooper's superior had discretion in disciplining trooper for violating truthfulness policy and mistakenly believed that the only available discipline for trooper's dishonestly was termination. Just cause is a flexible standard.*

During a traffic stop in 2009, State Highway Patrol Trooper Thomas Wetherington lost his trooper hat. Wetherington and other Highway Patrol officers failed to locate the hat after searching the area, and Whethering told another trooper while searching that he did not know what happened to the hat. When questioned by his supervisor, Wetherington said that a gust of wind blew off his hat into the path of a truck, he then heard a crunching noise, and he did not see the hat again. Three weeks later, the mother of the driver who was pulled over in the traffic stop called the trooper, saying that she had his hat, which was returned to his supervisor in good condition. After an internal affairs investigation, Wetherington was fired for violating the Highway Patrol's truthfulness policy, which states: "Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall willfully report any inaccurate, false, improper, or misleading information." Wetherington challenged his dismissal. Though an administrative law judge and the State Personnel Commission determined

the dismissal was supported by just cause, the Wake County Superior Court (Howard Manning Jr.) reversed, finding Wetherington's actions were unacceptable personal conduct that did not rise to the level of just cause for termination. The Highway Patrol and Wetherington appealed. The Court of Appeals affirmed, upheld the trial court's decision that there was no just cause for terminating petitioner.

On discretionary review, the Supreme Court modified and affirmed the decision of the Court of Appeals, with different reasoning: "Because it appears that the official who dismissed [Wetherington] proceeded under a misapprehension of the law, namely that he had no discretion over the range of discipline he could administer, we now modify and affirm the opinion of the Court of Appeals." Col. Randy Glover, then head of the Highway Patrol, had testified before the administrative law judge that he felt he literally had no other option but to fire Wetherington, that termination was the only appropriate penalty for any confirmed act of untruthfulness. The Court noted that a career state employee can only be terminated for "just cause," and that just cause is a flexible concept that can only be determined upon an examination of the facts and circumstances of each individual case. The Court concluded that Glover mistakenly believed that the only available discipline for Wetherington's dishonesty was termination. "While dismissal may be a reasonable course of action for dishonest conduct, the better practice, in keeping with the mandates of both Chapter 126 and our precedents, would be to allow for a range of disciplinary actions in response to an individual act of untruthfulness, rather than the categorical approach employed by management in this case." Therefore, the Court concluded that the Highway Patrol erred when it failed to exercise discretion in deciding petitioner's discipline. Because Glover's use of a rule requiring dismissal for all violations of the patrol's truthfulness policy was an error of law, the Court found "it prudent to remand this matter for a decision by the employing agency as to whether petitioner should be dismissed based upon the facts and circumstances and without the application of a per se rule." The Court then remanded to allow the Highway Patrol to exercise its discretion in disciplining Wetherington. The Court declined to decide whether or not Wetherington's conduct constituted just cause for dismissal.

NORTH CAROLINA COURT OF APPEALS

WHISTLEBLOWER ACT

Hodge v. North Carolina Department of Transportation, 784 S.E.2d 594 (N.C. Ct. App. 2016) (Linda Stephens, J.) *Doctrine of administrative exhaustion did not bar Whistleblower lawsuit in superior court after OAH dismissed claims for lack of subject matter jurisdiction. Summary judgment for DOT affirmed where there was no evidence that DOT's stated reasons for termination were mere pretext, as required to support Whistleblower claim.*

Glen Hodge was the Chief of NC DOT's Internal Audit Section (IAS) until 2008, when DOT implemented an agency-wide reorganization. Before this reorganization, Hodge's supervisor asked what he thought about the DOT's pending reorganization and unifying auditing functions into one unit, called the Office of Inspector General (OIG). Hodge told his supervisor that the proposed OIG plan was a direct violation of the Internal Audit Act (IAA) and the North Carolina

Supreme Court's rulings in two previous lawsuits that Hodge brought against DOT, Hodge I (holding that the Chief of IAS is not a policymaking exempt position) and Hodge II (holding the NC Administrative Code requires reinstatement of dismissed employees to "same or similar" position). After the reorganization the Office of State Controller established a new internal control program called EAGLE, Hodge began repeatedly missing deadlines for completing his EAGLE assignments. Hodge also filed a complaint against the DOT in Wake County Superior Court alleging violations under the Whistleblower Act. He later advised his supervisor that "on the advice of his lawyer" he would not be completing any of his EAGLE assignments and he believed the DOT was out to get him because of his previous lawsuits against the agency. Hodge was notified that his refusal to complete his work assignments would be insubordination, and thus potential grounds for termination, but Hodge continued to refuse to complete his work assignments. The DOT terminated Hodge for insubordination. Hodge filed an untimely grievance with DOT that was administratively closed. Hodge then filed a petition for a contested case hearing alleging he was terminated without just cause, and later attempted to add a claim under the Whistleblower Act. Hodge's OAH claim was dismissed for failure to timely exhaust his administrative remedies, and the decision was affirmed by the Wake County Superior Court. Hodge voluntarily dismissed his Whistleblower complaint, but later re-filed a lawsuit alleging violations of the Whistleblower Act. The Wake County Superior Court (Michael O'Foghludha, J.) granted summary judgment in favor of DOT. Hodge appealed.

The Court of Appeals affirmed the trial court's grant of DOT's motion for summary judgment. The Court initially addressed the jurisdictional issue of whether the doctrine of administrative exhaustion barred Hodge's whistleblower claim after the OAH dismissed Hodge's claims for lack of subject matter jurisdiction. The court recognized its previous precedent establishing that although the General Statutes provide two avenues to redress Whistleblower Act violations - jurisdiction in OAH, or in superior court - a plaintiff "may choose to pursue a [w]histleblower claim in either forum, but not both." However, the Court held that because the OAH never acquired subject matter jurisdiction over Hodge's whistleblower claim, the doctrine of administrative exhaustion did not bar his lawsuit. The Court then held that even assuming Hodge has established a *prima facie* case that DOT violated the Whistleblower Act when it fired plaintiff after he complained about the DOT's organizational restructuring, summary judgment for DOT was proper because Hodge failed to put forward any argument or evidence indicating that DOT's given reason for firing him – his prolonged, consistent pattern of insubordinately refusing to complete his work assignments after the reorganization – was a pretext for retaliation.

POLITICAL AFFILIATION DISCRIMINATION

North Carolina Department of Public Safety v. Ledford, __ S.E.2d __, 2016 WL 1742840 (N.C. Ct. App. May 3, 2016) (Linda Stephens, J.) *A former agency director, a Democrat who took a demotion into a non-policy-making exempt position, showed that his subsequent termination during a Republican administration was a result of political affiliation discrimination.*

During the Beverly Perdue administration, Chauncey John Ledford served as Director of the

Alcohol Law Enforcement Division (ALE). At the end of the Perdue administration, he requested and received a demotion back to his former position as an ALE agent. Ledford returned to a field agent position as a probationary employee without career status. The position he filled was originally open in Wilmington, but the position was transferred to Ledford's hometown of Asheville, where there was an identified need for an agent. The open position was for a lower-level agent, but Ledford was classified as an advanced agent. Although his salary was set at the maximum for the position, it was a 41% pay cut from his salary as ALE Director. At the beginning of Pat McCrory's administration, Ledford was terminated from his position as an ALE agent. In a contested case hearing before OAH, Chief Operating Officer of DPS Mikael Gross testified over DPS's hearsay objection that Republican State Senator Apadoca and the incoming-DPS Secretary Shanahan had objected to Ledford's reassignment. Specifically, Apodoca told him Ledford's reassignment "shouldn't have occurred and that they're going to fix that if they even have to just get rid of the position in the budget," and that Shanahan agreed that the reassignment "really shouldn't have happened." ALJ Morrison issued a decision finding that Ledford successfully proved that his termination resulted from political affiliation discrimination. The NC Department of Public Safety (DPS) filed a petition for judicial review, and the Madison County Superior Court (C. Philip Ginn, J.) issued an order affirming ALJ Morrison's decision. DPS appealed.

The Court of Appeals affirmed ALJ Morrison's decision. The court concluded that there was substantial evidence in the record that Ledford met his initial burden of establishing a prima facie case for political affiliation discrimination: (1) the employee work[ed] for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation), (2) the employee had an affiliation with a certain political party, and (3) the employee's political affiliation was the cause behind, or motivating factor for, the adverse employment action. With regard to the first element, the court concluded that Ledford worked for a public agency in a non-policymaking position because the record was devoid of any evidence that "loyalty to the Governor" is a required attribute of the ALE Special Agent position, or that Ledford had any policy-making authority while in that role. With regard to the third element, the court concluded that Gross's testimony that the termination was politically motivated was not inadmissible hearsay. First, ALJ Morrison correctly noted that the OAH rules "provide that an ALJ can admit any evidence that has probative value and determine what weight to give it."

Furthermore, the court concluded that Ledford was not offering those statements to prove the truth of the matters they asserted – that is, that his reassignment was wrong and should not have occurred – but instead to show their existing mental states and motives. The court also concluded that Gross's challenged testimony was highly probative and, in light of the additional bases articulated in ALJ Morrison's decision, its probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, the court concluded that ALJ Morrison did not err in admitting Gross's challenged testimony or in concluding that respondent established a prima facie case for political affiliation discrimination. The Court also held that there was ample support for ALJ Morrison's decision that DPS's purportedly legitimate nondiscriminatory reasons were not credible and, instead, were just a pretext, given how rapidly

the DPS rationales unraveled during the OAH hearing.

The court rejected DPS's warnings against the public policy ramifications that this case might allow future administrations of both parties to frustrate our state's democratic ideals by entrenching partisan appointees before relinquishing power: "We find it difficult to discern how this rationale applies in the case of a veteran law enforcement officer who has dedicated his entire career to serving and protecting the people of this state, wishes to continue doing so in a role that has no clear impact on effectuating either party's policy priorities, and, unlike more common stereotypical well-heeled political appointees, has no proverbial golden parachute to guarantee a comfortable landing in the private sector. If our General Assembly is truly concerned with protecting North Carolinians against such harms as DPS forewarns, it can take appropriate legislative action, but this court declines DPS's invitation to turn respondent into a scapegoat for all that ails our body politic."

UNIVERSITY EMPLOYEES

Frampton v. University of North Carolina at Chapel Hill, 773 S.E.2d 526 (N.C. Ct. App. 2015) (Lucy Inman, J.) *University's policies did not allow it to place tenured professor charged with a crime in another country and unable to perform his job duties on unpaid leave without his consent. If University followed its own policies, it would have initiated disciplinary proceedings, and the professor would have been paid until his employment ended.*

In January 2012, although he was assigned to teach a physics course, tenured faculty member Paul Frampton traveled to Argentina without notifying the University of North Carolina at Chapel Hill (UNC) and without making arrangements for another professor to cover his class. On January 23, 2012, Frampton was arrested and charged with attempting to smuggle two kilograms of cocaine in his suitcase. Frampton maintained that he was an innocent victim of an internet scam involving an alleged romantic relationship with an Italian swimsuit model. However, on November 20, 2012, he was convicted of smuggling cocaine and sentenced to four years and eight months imprisonment in Argentina. After learning of Frampton's arrest, and believing his protestations of innocence, UNC placed him on unpaid leave beginning March 1, 2012, rather than initiating disciplinary proceedings. Frampton filed a grievance protesting his placement on unpaid leave. The grievance committee agreed with Frampton that he could not be placed on unpaid leave unilaterally. However, the chancellor disagreed and left Frampton on unpaid leave. UNC's board of trustees and Orange County Superior Court (Allen Baddour, J.) upheld the chancellor's decision.

The Court of Appeals reversed and remanded for the superior court to determine the date on which Frampton's employment was terminated and to determine the amount of salary and benefits which were withheld and should be paid to Frampton. While acknowledging that Frampton's situation where he was arrested in another country for alleged criminal behavior was certainly novel and unique, the court concluded that Frampton's situation fell within the scope of the university's tenure policies. The court noted that the plain language of the faculty leave policy prohibited UNC from unilaterally placing a faculty member on unpaid personal leave. The

faculty leave policy stated that a faculty member on nine months service "shall, upon his/her request, be granted up to sixty calendar days of paid leave in a fifty-two week period" for serious illness or major disability. Under the tenure policies, UNC could have initiated disciplinary proceedings against Frampton for misconduct, including alleged criminal conduct, incompetence, and neglect of duty immediately upon learning that he was incarcerated in Argentina. Nothing in the record established that unpaid leave had ever before been imposed on a non-requesting, non-consenting faculty member. Thus, the court viewed UNC's actions with less deference than it may have if UNC had shown a standard practice. The court concluded that it could not affirm the superior court's ruling based either on UNC's concern for Frampton's well-being or on UNC's determination of what was in his best interest. Thus, Frampton was entitled to be paid from the date he was placed on leave until the date his employment ended.

Frazier v. North Carolina Cent. University, 779 S.E. 2d 515 (N.C. Ct. App. 2015) (Linda Stevens, J.) *Trial court lacked jurisdiction over University employee's breach of contract claim against University where employee with five-year contract stating that his position was at-will and "governed by the common law of the State of North Carolina and not by any statutory [State Personnel Act or Exempt Personnel Act] policies or procedures" failed to exhaust his administrative remedies under the Administrative Procedure Act before filing suit in superior court, even where university counsel advised employee that he had exhausted his University appeal rights.*

Henry Frazier was employed as head football coach at North Carolina Central University (NCCU) pursuant to a 5-year contract. Frazier's contract with NCCU said he was an employee at will, so that his position was "governed by the common law of the State of North Carolina and not by any statutory [State Personnel Act (SPA) or Exempt Personnel Act (EPA)] policies or procedures," and that NCCU could terminate him for just cause. Frazier received a warning from NCCU after he was charged with misdemeanor assault on a female and his wife obtained a protective order against him. He was fired after he was arrested for violating the protective order. After Frazier's initial internal appeal, he was acquitted of the charges that led to his arrest. Frazier's attorney asked general counsel for NCCU if he was required to complete any further internal or more formal appeals process before legal action ensues. NCCU's general counsel responded by letter that Frazier "has exhausted his campus based appeal rights" and his contract precluded him "from pursuing avenues of appeal/review provided for in the [SPA]." The letter also stated that as counsel to NCCU, she was "not in the position to identify all of the claims that you believe your client may have . . . or to identify every potential statutory or other requirement pursuant to such claims" before advising Frazier to obtain local counsel familiar with state law. Rather than filing a petition for judicial review of NCCU's decision to terminate his employment within 30 days of receiving this letter, Frazier waited roughly six months and then filed a lawsuit for breach of employment contract and wrongful discharge in violation of public policy. The Durham County Superior Court (Michael O'Foghludha, J.) granted NCCU's motion to dismiss for failure to exhaust administrative remedies. Frazier appealed.

The Court of Appeals affirmed, holding that because Frazier failed to exhaust his available administrative remedies, and also failed to adequately allege that those remedies were inadequate, the trial court did not err in dismissing his complaint. The court concluded that despite the language in Frazier's contract, as a state employee, the coach was required to exhaust

his administrative remedies under the Administrative Procedure Act (APA) before filing his lawsuit in superior court. The court reasoned that nothing in the contract expressly purported to exempt Frazier from the APA and it was immaterial that the contract said the EPA and SPA did not apply. The Court also concluded that even though the APA does not provide for breach of contract damages, a state university employee who fails to exhaust the administrative remedies under the APA is barred from bringing a subsequent, separate action in superior court for breach of contract. Huang v. N.C. State Univ., 107 N.C. App. 710, 421 S.E.2d 812 (1992). Moreover, the court concluded that Frazier failed to allege inadequacy of available administrative remedies. Although Frazier argued that his claim for compensatory and punitive damages rendered the administrative remedies available pursuant to the APA inadequate, neither the original complaint nor any of his three amended complaints makes any allegation of inadequacy, and merely pleading a breach of contract claim was insufficient to adequately allege that judicial review pursuant to the APA is an inadequate remedy.

JUST CAUSE DETERMINATIONS

Robinson v. University of North Carolina Health Care System, 775 S.E.2d 898 (N.C. Ct. App. 2015) (Donna Stroud, J.) *UNC Health Care System's code of conduct policy is a written work rule and violation of which is just cause for termination of employees, even those who achieved career status before the policy was ever adopted. Termination of employee for unfounded complaints regarding perceived unfair treatment, without any connection to a protected class, does not constitute retaliation. The burden of proof in challenging just cause for termination of a UNC Health Care System employee is placed upon the employee.*

Sheila Robinson was employed with UNC Hospitals, which became part of the UNC Health Care System, and she achieved career state employee status in 1998. Sometime after 1998, UNC Health Care System promulgated a new code of conduct. Robinson was terminated in 2012 for repeated unfounded complaints against co-workers and management, in violation of the new code of conduct. The Final Agency Decision upheld Robinson's termination, and she subsequently filed a petition for judicial review. The Durham County Superior Court (G. Bryan Collins, Jr., J.) affirmed the Final Agency Decision. Robinson appealed.

The Court of Appeals affirmed the superior court's decision to uphold Robinson's termination. First, the court rejected Robinson's argument that the UNC Health Care Code of Conduct did not apply to her. Although N.C. Gen. Stat. § 116-37(d)(2) says a career state employee who achieved such status prior to October 21, 2008 "shall not be subject to the rules regarding discipline or discharge adopted after 31 October 1998," and Robinson became a career state employee before that date, the court concluded that she was nevertheless subject to the Code of Conduct as amended over the years and any new rules governing behavior of employees even if a violation of one of those rules could ultimately lead to dismissal or discharge. The court reasoned that a new rule, which allowed the employer to terminate a career employee without prior written warning, was a written work rule as opposed to a "rule regarding discipline or discharge" because it promoted the hiring and retention of employees. The court also held that Robinson's violation of this new code constituted just cause for termination. A career state

employee may be terminated for "just cause" including "unacceptable personal conduct" such as the willful violation of known written work rules in the Code of Conduct, and Robinson's disrespectful, argumentative behavior and angry outbursts were in violation of these rules and fell within the definition of "unacceptable personal conduct." The court also concluded that because Robinson failed to raise the issue of discrimination based upon any protected class, her complaints about her treatment were not protected conduct, and her termination based upon those complaints was not retaliation. Finally, addressing Robinson's argument that the trial court erred in placing the burden of proof upon her, the Court held that since N.C. Gen. Stat. Chapter 126, Article 8 does not apply to employees of UNC Health Care System, the burden of proof remains on an employee who is challenging just cause for dismissal, as decided in Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998).

Barron v. Eastpointe Human Services LME, __ S.E.2d __, 2016 WL 1319123 (N.C. Ct. App. April 5, 2016) (Linda McGee, C.J.) *Dismissal for just cause was supported by housing director's non-professional personal cell-phone communications with an agency customer and a failure to report that customer's complaint.*

Albert Barron was the Director of Housing for Eastpointe Human Services LME. Eastpointe is a local political subdivision of the State of North Carolina and a managed care organization that oversees services related to mental health, intellectual development disabilities, and addiction in 12 eastern North Carolina counties. A consumer of housing services accused Barron of touching her sexually without her consent and of promising her furniture if she entered into a relationship with him. After the alleged touching and before the consumer made the accusation, Barron used his personal cell phone to ask for and receive photos of the consumer. Once the consumer made the accusation, Barron violated Eastpointe's policy by failing to report it immediately. He did make a report when, several months later, the consumer started texting him, complaining about his inappropriate interaction with her. Eastpointe's pre-dismissal letter cited the customer's accusation, Barron's failure to report it, and the original, inappropriate cell phone communications as bases for Barron's dismissal. After a contested case hearing before OAH, the ALJ upheld Eastpointe's dismissal of Barron, but the Greene County Superior Court (Paul L. Jones, J.) reversed.

The Court of Appeals reversed the superior court's decision, thereby affirming the OAH's decision to uphold Barron's dismissal. The court concluded that there was competent, material, and substantial evidence of just cause to terminate Barron for (1) touching the consumer sexually without her consent, (2) engaging in inappropriate text messaging with the consumer, and (3) failing to report at least some of the consumer's allegations against him until matters escalated. Accordingly, the Court held that the superior court erred by concluding that the ALJ's decision was "[u]nsupported by substantial evidence," "[a]rbitrary, capricious, or an abuse of discretion," and that there was "no rational basis in the evidence" for the agency to dismiss petitioner for just cause. The court also held that the fact that Barron's supervisor headed up the investigation, may have had bias against him after speaking to the consumer, and possibly recommended his termination, and his claim that the investigative team was made up of an "untrained, inexperienced group of females … [who] showed bias against," did not demonstrate a

disqualifying personal bias and was not a violation of Barron's due process rights. The Court also held that Eastpointe gave Barron sufficient notice of the reasons for his dismissal.

Blackburn v. North Carolina Department of Public Safety, 784 S.E.2d 509 (N.C. Ct. App. 2016) (Zachary, J.) *Dismissal for just cause was supported by correctional captain's grossly inefficient job performance when captain left a segregated inmate handcuffed for five days with no liquid except for whatever water he could drink from a sink with his handcuffed hands, and the inmate died from dehydration.*

Shawn Blackburn was a correctional captain at the North Carolina Department of Public Safety's Alexander Correctional Institution (ACI). On March 8, 2014, while Blackburn was serving as the officer in charge of ACI, he instructed an inmate to come to the door of his cell to have his handcuffs removed. When the inmate refused, Blackburn ordered that the handcuffs would remain on until the inmate complied. He ordered prison personnel to not give him milk and to check on the inmate every 15 minutes. The inmate was not seen in a standing position after that day, and the only way he could obtain any fluid would be to use his handcuffed hands to drink water from the sink. The inmate had a history of mental illness and had never acted violently toward prison staff. The inmate died five days later from dehydration. Following an investigation and pre-disciplinary conference, DPS terminated Blackburn for grossly insufficient job performance. After a contested case hearing before OAH (Selina Brooks, ALJ), ALJ Brooks upheld DPS's dismissal of Blackburn. Blackburn appealed ALJ Brooks's decision to the Court of Appeals.

The Court of Appeals affirmed the ALJ's order upholding Blackburn's termination. The court initially held that the ALJ did not err by denying Blackburn's *motion in limine* to exclude evidence of a prior disciplinary warning against him, and the warning was properly considered as part of the ALJ's review of the level of discipline imposed. The court next found that the certain challenged findings of fact were supported by substantial evidence. The court then held that the ALJ did not err by finding and concluding that DPS had properly determined that it had just cause to terminate Blackburn for grossly inefficient job performance, based on his actions of (1) allowing the inmate to remain lying on his bed in handcuffs for five days, (2) without receiving anything to drink during this time, and (3) without any attention to the inmate's condition, which was a violation of applicable rules, a breach of Blackburn's responsibility as a senior correctional officer, and contributed directly related to the inmate's death.

Renfrow v. North Carolina Department of Revenue, 782 S.E.2d 379 (N.C. Ct. App. 2016) (Dietz, J.) *If employer is able to show that "at the time the decision was made, with the facts available to it, the employer had good cause to believe termination was appropriate," a resignation under threat of dismissal is not a dismissal because the resignation was voluntary.*

Wanda Renfrow, who was employed with the North Carolina Department of Revenue (DOR) for almost 25 years, was audited in September 2011, and DOR discovered a number of unsupported itemized deductions. On February 29, 2013, DOR issued a notice of assessment against Renfrow for the unpaid tax liability. Renfrow acknowledged the errors, which she maintained were

unintentional, and entered into a payment plan to address her tax liability. DOR has a rule that its employees must comply with the tax laws themselves or risk immediate dismissal, but DOR did not take any action to terminate Renfrow's employment until more than 19 months later. On November 5, 2013, the then-acting director of DOR informed Renfrow that her termination was being recommended because of unacceptable personal conduct based on the violation of DOR's tax compliance policy. At her pre-disciplinary conference on November 12, 2013, Renfrow submitted evidence supporting her position and a letter and note addressing her desire to resign rather than be dismissed for cause. On November 13, 2013, DOR notified Renfrow that it was accepting her resignation. After a contested case hearing before OAH, ALJ Morrison granted Renfrow's motion for summary judgment and entered a final decision ordering DOR to reinstate Renfrow. DOR appealed the ALJ's decision to the Court of Appeals.

The Court of Appeals affirmed the ALJ's order to reinstate Renfrow. The court initially held that Renfrow adequately complied with the statutory grievance procedures, and thus OAH had subject matter jurisdiction over her contested case. Next, the court addressed DOR's argument that Renfrow could not pursue her just cause claim because she chose to resign rather than be dismissed. Citing Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988), the court recognized that "courts have held that where 'the employer actually lacked good cause to believe that grounds for termination existed,' a resignation under threat of dismissal is effectively the same as an involuntary dismissal." The court then held that even though Renfrow resigned from her position, she established that her resignation was involuntary because DOR "lacked good cause to believe it could terminate her"; thus, Renfrow's resignation was effectively an involuntary dismissal that was grievable through the administrative process. The court reasoned that DOR did not have "good cause" to support its belief that it could terminate Renfrow pursuant to the administrative code stating that an employee "may be dismissed for a *current* incident of unacceptable personal conduct, without any prior disciplinary action," when DOR discovered Renfrow's income tax filing errors but then waited 19 months before pursuing any disciplinary action. The court also held that DOR lacked just cause to terminate Renfrow because her tax errors were no longer a "current incident" when DOR pursued disciplinary action.

North Carolina Department of Public Safety v. Owens, 782 S.E.2d 337 (N.C. Ct. App. 2016) (Dillon, J.) *Superior court has the authority to grant an extension of time, for good cause shown, for a party to serve a petition for judicial review. It was arbitrary and capricious for the highway patrol to prevent an officer from taking his firearms training while on administrative leave and then terminate the officer for failing to complete the training.*

Highway Patrol officer Kevin Dale Owens was the subject of a criminal investigation relating to obtaining illegal prescriptions from a nurse he was dating. He was placed on administrative duty, essentially working in a civilian position, and required to surrender his badge and firearms. He was not allowed to complete firearms training or other training required to maintain his credentials. He was indicted on felony drug charges in federal court, but a federal judge entered an order allowing Owens to possess firearms to complete his firearms training. Owens was then terminated on November 1, 2012, based on an "administrative separation" due to his (1) loss of

credentials and (2) unavailability to perform his duties. The felony drug charges were later dismissed. He was rehired nine months later in August 2013. He filed a petition for a contested case hearing before OAH challenging his termination, and seeking to have his reinstatement applied retroactively so that he would not have any break in service and recover pay and benefits for those nine months. The ALJ concluded that Owens's termination was improper and ordered that his reinstatement be retroactive. The Highway Patrol filed a petition for judicial review, and served Owens by regular mail, a means not authorized by statute. Owens moved for dismissal of the petition, contending that the Highway Patrol failed to serve him with the petition within the 10 day time period allowed by statute. The Lenoir County Superior Court (Paul L. Jones, J.) denied Owens's motion and granted the Highway Patrol additional time to properly serve Owens. The superior court later affirmed the ALJ's order reinstating Owens retroactively. The Highway Patrol appealed, and Owens cross-appealed.

The Court of Appeals affirmed. The court first addressed Owens's cross-appeal, contending that the superior court erred by denying his motion to dismiss the Highway Patrol's petition for judicial review on the grounds he was not properly served with the petition. The court held, contrary to an unpublished decision of the Court of Appeals in Schermerhorn v. N.C. State Highway Patrol, 732 S.E.2d 395 (N.C. Ct. App. 2012) (unpublished), that the superior court had the authority to grant an extension of time, for good cause shown, to a party to serve a petition for review beyond the 10 days provided for under N.C. Gen. Stat. § 150B-46. Turning to the merits of the Highway Patrol's appeal, the court recognized that the Highway Patrol had an obligation not to act arbitrarily and capriciously when it terminated Owens for failure to maintain his credentials. The court then held it was arbitrary and capricious for the Highway Patrol to prevent Owens from taking his annual firearms training necessary to retain his credentials, although the Highway Patrol could have allowed the training, and then terminate Owens for failing to complete the training. The court also rejected the Highway Patrol's argument that Owens failed to mitigate his damages because he was asked to reapply for his position five months after his termination but waited three additional months to do so. The court relied upon the ALJ's finding that the Highway Patrol sent a form to him indicating that he would not be rehired if he reapplied, and it was reasonable for Owens to believe that it would have been futile for him to reapply for a period