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North Carolina's Developing Public Policy Wrongful Discharge Doctrine in the New Millennium: Basic Principles, Causation and Proof of Improper Motive

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The courts will be very derelict in their duty if they do not enforce justice in favor of employees as well as the public.²

[I]n a civilized state where reciprocal rights and duties abound the words "at will" can never mean "without limit or qualification" . . . . An at will prerogative without limits could be suffered only in an anarchy, and not there for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counter balancing rights and obligations that hold such societies together. . . . [T]here can be no right to terminate [an employment] contract for an unlawful reason or purpose that contravenes public policy.³

I. NORTH CAROLINA’S PUBLIC POLICY DOCTRINE

Through a plethora of state statutes, regulations, and cases, North Carolina enjoys an extensive body of employment law. Traditionally, employment and labor relations were predominately governed by federal law. Although federal law still in part governs many employment

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This article is dedicated to John C. Midgette, Executive Director of the North Carolina Police Benevolent Association. Mr. Midgette has successfully advocated public policy claims on behalf of North Carolina law enforcement officers for more than a decade.

relationships in North Carolina, recent changes in North Carolina law have enhanced the importance of state law in North Carolina employment relationships.

In addition to numerous sources of state statutory protection for North Carolina's workforce, the common law public policy wrongful discharge doctrine continues to serve as a meaningful potential catch-

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4. For example, many federal statutes have a minimum threshold number of employees for application of a federal standard, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, which provides that the Title VII scheme applies to employers with a minimum of fifteen employees.

5. Examples of DISCRIMINATION/RETALIATION STATUTES:
   - N.C. Gen. Stat. § 95-28.1 (1999) (Prohibits employment discrimination against persons with sickle cell trait or hemoglobin C trait);
   - N.C. Gen. Stat. § 143-422.1 (1999) (Statement of public policy, without remedial provisions, promoting equal employment opportunity without regard to race, religion, color, national origin, age, sex or disability);
   - N.C. Gen. Stat. § 168A (1999) (Prohibits discrimination against disabled persons in employment as well as other areas and provides for a civil cause of action);
   - N.C. Gen. Stat. § 130A-148(i) (1999) (Prohibits discrimination in employment against persons with AIDS or who test positive for the HIV virus);

Examples of WAGES/TERMS/CONDITIONS/BENEFITS OF EMPLOYMENT:
   - N.C. Gen. Stat. § 95-25 et seq. (1999) (Establishes state minimum wage; regulates employment of minors, hours of work, payment and withholding wages);
   - N.C. Gen. Stat. § 95-126 et seq. (1999) (Establishes certain occupational safety and health standards and provides for enforcement);
   - N.C. Gen. Stat. § Ch. 96 (1999) (Establishes the Employment Security Commission and regulates the payment of unemployment insurance benefits);

Examples of PROTECTED CONDUCT AND PROTECTIONS AGAINST DISCHARGE:
   - N.C. Gen. Stat. § 95-230 et seq. (1999) (Establishes procedural requirements for drug screenings performed by employers and other examiners to protect against unreliable examinations);
   - N.C. Gen. Stat. § 14-353 et seq. (1999) (Criminal laws relating to employment, including prohibition against bribing employees, blacklisting employees, and requiring employees to pay for a medical exam as a condition of employment);
   - N.C. Gen. Stat. § 95-420 et seq. (1999) (Prohibition against retaliatory action against an employee who files a claim or complaint with regard to workers'
all remedy for North Carolina employees when an employer's conduct contravenes established public policy. This doctrine is potentially applicable to a broad range of employer conduct.\textsuperscript{6}

This article reviews the recent state and federal cases construing North Carolina's public policy wrongful discharge doctrine. The article also analyzes the most common practical problem that arises in wrongful discharge cases: the causation issue. Finally, the article

\begin{itemize}
  \item compensation, wage and hour protections, occupational safety and health standards, or mining safety and health standards;
  \item N.C. Gen. Stat. § 95-78 et seq. (1999) (North Carolina's "right-to-work" law prohibiting adverse requiring licenses, forbidding certain contract provisions and prohibiting kickbacks);
  \item N.C. Gen. Stat. § 95-47.1 et seq. (1999) (Regulates services that assist job seekers in finding jobs, requiring licenses, forbidding certain contract provisions and prohibiting kickbacks);
  \item N.C. Gen. Stat. § 143B-438.1 et seq. (1999) (Creates a State Job Training Coordinating Council to oversee the implementation of Job Training Partnership Act program);
  \item N.C. Gen. Stat. § Ch. 126 (1999) (Establishes a system of personnel administration for state employees and certain local government employees, which includes prohibitions against discrimination and discharge without cause);
  \item N.C. Gen. Stat. § 115C-271 et seq. (1999) (Regulates employment and discharge of employees within the school system) (Teachers, 115C-295; other employees, 115C-315);
  \item N.C. Gen. Stat. § 127A-201 et seq. (1999) (Requires restoration of an honorably released member of the National Guard to the employee's previous position or comparable position);
  \item N.C. Gen. Stat. § 95-28.2 (1999) (Prohibits discrimination against persons using lawful products during non-work hours as long as use does not adversely affect performance);
  \item N.C. Gen. Stat. § 95-196 (1999) (Protects employees from discharge for assisting in Department of Labor investigations or testifying regarding hazardous chemicals);
\end{itemize}

\textsuperscript{6} Some have complained that "[w]hat began as a narrow erosion of the employment-at-will doctrine is on the verge of becoming part of virtually every lawsuit arising out of termination of employment" in violation of public policy. Andrew B. Cohen, \textit{Wrongful Discharge and the North Carolina Equal Employment Practices Act: The Localization of Federal Discrimination Law}, 21 N.C. Cent. L.J. 54, 54 (1995). However, subsequent cases have not borne out the fear that every discharge will invoke the public policy exception. Rather, the North Carolina cases have expanded the doctrine carefully on a case-by-case basis. See, e.g., Amos v. Oakdale Knitting, 331 N.C. 348, 416 S.E.2d 166, (1993) (the court stated: "we allow this still evolving area of the law to mature slowly, deciding each case on the facts before us."). \textit{Id.} at 351, 416 S.E.2d at 168, n.1.
offers a framework of analysis and a multi-part test for assessing improper motive, a difficult issue which arises in virtually all public policy wrongful discharge cases.

A. North Carolina's Seminal Public Policy Case: Sides v. Duke University

North Carolina's common law wrongful discharge doctrine was born in 1985 in *Sides v. Duke University*. Sides was a nurse who allegedly was fired for refusing to commit perjury at the request of her superiors. In *Sides*, the North Carolina Court of Appeals observed that "other states have recognized a common law cause of action in tort for employees at will who are discharged for reasons that are in some way wrongful or socially undesirable." *Sides* enunciated a well-grounded rationale for recognition of a public policy wrongful discharge doctrine:

[In a civilized state where reciprocal rights and duties abound the words "at will" can never mean "without limit or qualification"... An at will prerogative without limits could be suffered only in an anarchy, and there not for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counter balancing rights and obligations that hold such societies together... [T]here can be no right to terminate such [an employment] contract for an unlawful reason or purpose [if it] contravenes public policy.]

The legislature is not at all adverse to the courts of this State entertaining actions based on a violation of policies that have been enacted or otherwise established for the protection and benefit of the public.

Plaintiff Marie Sides filed a wrongful discharge action premised upon the public policy doctrine against Duke University Hospital [hereinafter "Duke"], two physicians, and the chief nurse anesthetist at

9. 74 N.C. App. at 340-41, 328 S.E.2d at 825 (emphasis added).
10. 74 N.C. App. at 342, 328 S.E.2d at 826. In *Coman*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989), this rationale was expressly adopted.
11. 74 N.C. App. at 337, 328 S.E.2d at 823.
Duke. Sides also alleged claims for breach of contract and interference with contractual relations. The trial court granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted.

Sides was employed by Duke as a nurse anesthetist in 1970. Plaintiff was assured by Duke that nurse anesthetists could only be discharged for incompetence. This termination policy was shared by other Duke employees throughout Sides' eleven-year tenure at Duke.

In 1980, the estate of a former Duke patient initiated a malpractice action against Duke and several other individuals, including doctors Harmel and Miller. In that case, the plaintiff allegedly suffered brain damage due to the negligent administration of anesthetics by Dr. Miller. When the patient came out of surgery, Sides was on duty and Dr. Miller instructed Sides to administer certain anesthetics to the patient. Sides refused to administer the anesthetics because she believed the anesthetics would harm the patient. Dr. Miller then administered the anesthetics to the patient, who, as a result, suffered permanent brain damage.

Prior to having her deposition taken in the resulting malpractice action, Sides was advised by several Duke physicians, attorneys, and others that she should not testify to all that she had seen regarding the patient's treatment at Duke. Some of the doctors warned Sides that, if she did, she "would be in trouble." Similar pressures had already caused another nurse anesthetist to withhold information at her deposition. Despite the pressure to do otherwise, Sides testified fully and truthfully at her deposition. After the deposition, Duke physicians, particularly doctors Harmel and Miller, adopted hostile attitudes toward Sides. Ultimately, a verdict was returned for the patient's

12. Id. at 334-35, 328 S.E.2d at 822.
13. Id. at 335, 328 S.E.2d at 822.
14. Id. at 332, 328 S.E.2d at 820.
15. Id.
16. Id. at 332-33, 328 S.E.2d at 821.
17. Id. at 333, 328 S.E.2d at 821.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
estate for $1,750,000. Dr. Harmel believed that Sides had caused Duke and the other defendants to lose the case. Concerned that her candid and forthright testimony might result in retaliatory tactics by the Hospital, Sides asked the chief nurse to advise her of any complaints about her work. The chief nurse refused.

After the conclusion of the malpractice trial, some Duke physicians displayed antagonistic attitudes toward Sides, and some refused to work with her. Dr. Miller told other physicians that they "should have nothing to do with her", and Dr. Harmel encouraged these hostilities, making the performance of Sides' duties almost impossible. Sides again asked the chief nurse to assist her with these problems and was again refused. Sides was subsequently called into a meeting, was advised that her job performance was poor, and was told that she had and "abusive attitude". Sides asked for specific examples of how her work performance was poor, but none were given. Later, the chief nurse and Dr. Harmel met with Sides and discharged her.

In Sides, the North Carolina Court of Appeals reversed the trial court's dismissal of Sides' claims, and proceeded to set forth the public policy wrongful discharge doctrine in North Carolina. The egregious facts in Sides enabled the court of appeals to crack the at-will wall and recognize the common law public policy claim. Sides provided the foundation for the initial growth in the doctrine until the North Carolina Supreme Court first recognized the public policy doctrine in Coman v. Thomas Manufacturing Co. in 1989.

A commentator and author of the treatise entitled North Carolina Employment Law has suggested that "Sides was remarkably broad . . . ." Subsequent cases have trimmed some of the breadth from Sides and yet still afford meaningful protection for employees in cases with clear public policy underpinnings.

27. Id.
28. Id. at 333-34, 328 S.E.2d at 821.
29. Id.
30. Id.
31. Id.
32. Id. at 334, 328 S.E.2d at 821.
33. Id. Such subjective and conclusory assertions are common, and may be evidence of improper motive. See, e.g., Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972); Warren v. Halstead, 802 F.2d 746 (4th Cir. 1987).
34. Sides, 74 N.C. App. at 334, 328 S.E.2d at 821.
35. Id. at 334, 328 S.E.2d at 822.
36. 325 N.C. 172, 381 S.E.2d 445.
B. Basic Principles of the Public Policy Doctrine

To state an actionable wrongful discharge claim under the North Carolina public policy wrongful discharge doctrine, an employee must demonstrate that he or she was discharged because he or she “performed an act that public policy would encourage, or refused to do something that public policy would condemn.” In *Lorbacher v. Housing Authority of the City of Raleigh*, the North Carolina Court of Appeals concisely stated the rule: “A valid claim for wrongful discharge exists when an at-will employee is discharged for an unlawful reason or in contravention of public policy.”

The public policy doctrine potentially applies to three general categories of discharges. First, the refusal of an employee to commit an unlawful act required or requested to be performed by an employer provides a basis for a public policy claim. The second category of actionable discharges involves a termination of an employee due to the employee’s performance of an obligation. The third category of actionable discharges involves employee terminations premised upon the exercise of an employee’s legal rights or privileges.

In order to determine if there is an adequate public policy to support a wrongful discharge claim, a court may look to various alternative sources of public policy contained in federal or state constitutional provisions, federal or state statutes, judicial decisions, 

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39. 127 N.C. App. 663, 493 S.E.2d 74 (1997). Professor Perritt states the four elements as follows: 1) the existence of a clear and substantial public policy, 2) jeopardy to that public policy, 3) actual conduct by the employee that promotes the policy, 4) the employer lacks a legitimate interest to justify the dismissal. Perritt, supra note 38, § 7.1, at 4 (4th ed. 1998).

40. 127 N.C.App. at 672, 493 S.E.2d at 79.


42. See Sides, 74 N.C. App. 331, 328 S.E.2d 818; Williams v. Hillhaven Corp., 91 N.C. App. 35, 370 S.E.2d 423 (1988); Larsen, supra note 33, § 6.04[1], at 6-11.


44. “Judicial decisions have been recognized as legitimate sources of public policy . . . .” Larsen, supra note 41, § 6.05, at 6-22.
administrative codes and regulations, and other defined public policies and laws. “Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions.” As long as the public policy in issue is clear, the underlying source of it, whether it be legislation, administrative rules, regulations, judicial decisions, constitutional provisions, and even professional codes of ethics, have been held to contain sufficient expressions of public policy. This fact was evidenced in Sides, in which the court articulated the principle that enforceable public policies include “policies that have been enacted or otherwise established for the protection and benefit of the public.”

Courts of other states have followed similar principles in the employment law context. For example, in Payne v. Rozendaal, the Vermont Supreme Court recognized that age discrimination violated public policy even though it was not expressly included within Vermont's Fair Employment Practices Act. The court explained:

Sometimes . . . public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right . . . .

Once a valid public policy has been recognized by the court, the only remaining element that must be demonstrated by a plaintiff employee in a public policy wrongful discharge claim is a causal connection between the employer's subversion of the recognized public policy and the adverse action taken against the employee.

C. Sides' Progeny

Post-Sides cases have fleshed out North Carolina's public policy wrongful discharge doctrine, a doctrine which has become a signifi-

45. See, e.g., Pierce v. Ortho, 417 A.2d 505 (N.J. 1980); Larsen, supra note 41, § 6.05, at 6-22.

46. "Administrative rules and regulations" have been “recognized as legitimate sources of public policy . . . .” Larsen, supra note 41, § 6.05, at 6-22.


49. Sides, 74 N.C. App. at 337, 328 S.E.2d at 824 (emphasis added). This clearly connotes that non-statutory public policies are actionable.

50. 520 A.2d 586 (Vt. 1986).

51. Id. at 588.
ciant aspect of North Carolina employment law. In *Walker v. Westinghouse Electric Corporation*, the North Carolina Court of Appeals characterized *Sides* as "a major exception to the general rule that an indefinite contract of employment is terminable at will", and that an "employer's power to terminate 'at will' cannot be absolute, in view of the many other societal obligations shared by employers and employees." However, subsequent cases have shifted the characterization of the public policy wrongful discharge doctrine from that of a "major exception" to a more narrow exception to the general rule of at-will employment, despite the fact that "public policy" continues to be broadly defined.

1. *Coman v. Thomas Manufacturing Co.: The North Carolina Supreme Court Affirms Sides*

In 1989, in the case of *Coman v. Thomas Manufacturing Co.*, the North Carolina Supreme Court addressed, for the first time, a public policy wrongful discharge claim. The holding and rationale of *Sides v. Duke University* was expressly adopted by the North Carolina Supreme Court in *Coman*. In *Coman*, the plaintiff employee was fired for refusing to drive a commercial truck in violation of federal and state regulations. The plaintiff truck driver alleged that his employer required him to falsify his log books to show purported compliance with law. The plaintiff was a long-distance truck driver employed to transfer goods in his employer's vehicles throughout the country. The employer's driving operations were governed by federal regulations and state law. The pertinent regulations provided that a driver could not drive a vehicle for more than a ten-hour shift, and further provided that driving shifts be followed by at least eight hours of

53. 77 N.C. App. at 262, 335 S.E.2d at 85.
54. See Boesche v. Raleigh Durham Airport Authority, 111 N.C. App. 149, 432 S.E.2d 137 (1993) (in which the court stated: "Sides and Coman have only narrowly eroded the employment-at-will doctrine."). Id. at 152-153, 432 S.E.2d at 139-140.
56. Id.
57. Id. at 173-74, 381 S.E.2d at 446.
58. Id.
59. Id. at 173, 381 S.E.2d at 445.
60. Id. at 173, 381 S.E.2d at 446.
The regulations also required a driver to maintain accurate logs of all travel. The employer required Coman to violate these regulations by requiring Coman to drive for periods of time in excess of that allowed by the regulations. Coman was also instructed that he would have to falsify his travel logs in order to demonstrate apparent compliance with the regulations. When Coman refused to violate the regulations in this manner, he was informed that his pay would be reduced by at least fifty percent.

The general issue before the court was whether the North Carolina Supreme Court should adopt a public policy exception to the general rule of at-will employment. Defining public policy as "the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good", Coman expressly adopted the central reasoning from Sides. The court reasoned that although "perjury and subornation of perjury differ from operating a truck in violation of law and falsifying federal records", the employer's conduct similarly offended the public policy of North Carolina. This demonstrated that the public policy wrongful discharge doctrine was not limited to the narrow perjury-specific set of facts in Sides. In Coman, the court observed that the employer's conduct violated federal Department of Transportation regulations, but also violated the public policy of North Carolina contained in N.C. Gen. Stat. § 20-384 and 20-397. The court stated: "[I]t is the public policy in this jurisdiction that the safety of persons and property on or near the public highways be protected."

Post-Coman cases on the North Carolina Supreme Court level, further circumscribing the boundaries of the public policy wrongful discharge doctrine, have shown some restrictive interpretations of the North Carolina public policy wrongful discharge doctrine. In Burgess

61. Id.
62. Id.
63. Id.
64. Id.
65. Id. at 173-74, 381 S.E.2d at 446.
66. Id. at 175, 381 S.E.2d at 447.
67. Id. at 175, 381 S.E.2d at 447 n.2.
68. Id. at 175, 381 S.E.2d at 447.
69. Id. at 175, 381 S.E.2d at 447.
70. Id.
71. Id. at 176, 381 S.E.2d at 447 (citing Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956)).
The North Carolina Supreme Court observed that North Carolina's at-will employment doctrine has "been narrowly eroded by statutory and public policy limitations on its scope." In *Kurtzman v. Applied Analytical Industries*, the North Carolina Supreme Court observed in dicta that exceptions to North Carolina's at-will employment doctrine "should be adopted only with substantial justification grounded in compelling considerations of public policy." However, a number of appellate and other North Carolina cases addressing the public policy wrongful discharge doctrine have not applied the potential import of this general limiting language.

For example, in *Battle v. Perdue*, Judge Boyle of the Eastern District of North Carolina analyzed *Coman* and the North Carolina public policy wrongful discharge doctrine. In *Battle*, the court recognized the common law public policy claim in a disability discrimination suit and reasoned: "The court [in *Coman*] broadly defined public policy as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."  

2. Amos v. Oakdale Knitting Co.

In 1993, the North Carolina Supreme Court again revisited the public policy wrongful discharge doctrine. In *Amos v. Oakdale Knitting Co.*, the North Carolina Supreme Court addressed a public policy wrongful discharge case involving an employer's decision to terminate an employee for refusing to work for less than the statutory minimum wage. Three issues were presented: first, whether terminating an employee under such circumstances was a public policy exception to the at-will employment doctrine.

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73. *Id.* at 210, 388 S.E.2d at 137 (emphasis added).
75. *Id.* at 334, 493 S.E.2d at 423. In *Regan v. Westpoint Stevens Inc.*, 139 F.3d 892, 1998 WL 112725 at *1-2* (4th Cir. March 16, 1998) (per curiam), the Fourth Circuit rejected a plaintiff employee's alleged public policy claim because plaintiff did not identify any established public policy that his termination allegedly contravened. In its opinion, the Fourth Circuit observed that "North Carolina law provides several public policy exceptions to the employment-at-will rule." Among other examples that the Fourth Circuit listed was when "an employee may not be terminated for refusing to obey the law." *Id.*
77. *Battle* at 5 (quoting *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 n.2).
78. 331 N.C. 348, 416 S.E.2d 166 (1993). While *Amos* reaffirmed and expanded the public policy doctrine, the Court also found that *Coman* had not recognized an independent bad faith wrongful discharge doctrine. *Amos* observed that *Coman*'s bad faith analysis was merely dicta. After *Amos*, although bad faith is certainly a consideration, it does not constitute a separate cause of action.
employee for refusing to work for less than the statutory minimum wage violated North Carolina public policy and therefore afforded a cause of action for wrongful discharge; second, whether the availability of alternative remedies prevents a plaintiff employee from enjoying a common law wrongful discharge claim; and third, whether Coman v. Thomas Manufacturing Co. recognized a separate "bad faith" wrongful discharge claim. 79

The court provided direct answers to these compelling issues. First, Amos did, in fact, state a valid public policy wrongful discharge claim for being terminated for refusing to work for less than the minimum wage. Second, absent express preemption, the availability of alternative federal and state remedies does not prevent a plaintiff from enjoying a common law wrongful discharge claim. Finally, Coman did not provide a separate and distinct "bad faith" exception to the employment-at-will doctrine. 80

In Amos, the plaintiff employees learned that their salary had been reduced to $2.18 per hour, which was below the statutorily-prescribed minimum wage contained in N.C. Gen. Stat. § 95-25.3. 81 The employer informed plaintiffs that they either had to work for the reduced pay or they would be terminated. 82 Plaintiffs refused and were fired. 83

In Amos, the court expressly rejected making any further definition of public policy:

Although it may be tempting to refine the definition of 'public policy' in order to formulate a more precise and exact definition, we decline to do so. Any attempt to make the definition more precise would inevitably lead to at least as many questions as answers. True to the common law tradition, we allow this still evolving area of the law to mature slowly, deciding each case on the facts before us. 84

Also particularly noteworthy because of its rejection of the pre-emption doctrine, 85 Amos expressly held that the North Carolina public policy wrongful discharge doctrine is not limited to situations in

79. Id. at 350, 416 S.E.2d at 168.
80. Id.
81. Id.
82. Id.
83. Id.
84. 331 N.C. at 353, 416 S.E.2d at 170 n.1. In Coman, the Court had defined public policy as the principle of law holding that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. 325 N.C. at 175, 381 S.E.2d at 447 n.2. See also McLaughlin v. Barclays, 95 N.C. App. 301, 305, 382 S.E.2d 839, 839 (1989).
85. Amos, 331 N.C. at 356, 416 S.E.2d at 171.
which the employee has no other available remedy. In Amos, the plaintiffs could have initiated claims under the Fair Labor Standards Act and the North Carolina Wage and Hour Act. The court, however, held that this did not “automatically preclude a claim for wrongful discharge based on the public policy exception . . . .”

Amos reasoned that “[t]he public policy exception adopted by this Court in Coman is not just a remedial gap-filler. It is . . . designed to vindicate the rights of employees fired for reasons offensive to the public policy of this State.” This breadth of language and the holding in Amos have provided fertile ground for the public policy doctrine to gradually develop through the 1990’s. The concerns of possible floodgates of public policy litigation has not materialized.


The Sides, Coman, and Amos trilogy provided the public policy wrongful discharge foundation until 1999, when the North Carolina Supreme Court again directly revisited the public policy wrongful discharge doctrine. In Garner v. Rentenbach Constructors, Inc., the North Carolina Supreme Court held that an employee discharge which was in violation of a controlled substance examination regulation did not constitute an actionable claim under the public policy wrongful discharge doctrine.

The issue before the court in Garner was whether the termination of plaintiff’s employment premised upon a positive drug test constitutes a wrongful discharge when the drug test was not performed in compliance with a state statute. The plaintiff employee was administered a drug test and the plaintiff’s sample tested positive for the presence of marijuana. Consequently, plaintiff was terminated. (Plaintiff denied using any illegal drugs.) Plaintiff brought an action against his employer, contending that his discharge was wrongful in that the defendant employer, in violation of N.C. Gen. Stat. § 95-232,
failed to have the testing performed by an “approved laboratory” as defined by N.C. Gen. Stat. § 95-231(1).\footnote{Id.}

Having traced the history of North Carolina’s public policy wrongful discharge doctrine beginning with \textit{Sides v. Duke University} up through the most recent cases,\footnote{Id. at 569-571, 515 S.E.2d at 439-440.} the court concluded:

We agree that N.C.G.S. 95-230 is an expression of the public policy of North Carolina. However, we do not agree with plaintiff that because defendant violated N.C.G.S. 95-232 by failing to use an approved laboratory, the public policy exception to the employment-at-will doctrine is automatically triggered, giving rise to a claim for wrongful discharge. . . . Under the rationale of \textit{Sides}, \textit{Coman}, and \textit{Amos}, something more than a mere statutory violation is required to sustain a claim of wrongful discharge under the public-policy exception. An employer wrongfully discharges an at-will employee if the termination is done for “an unlawful reason or purpose that contravenes public policy.” As stated in \textit{Amos}, the public-policy exception was “designed to vindicate the rights of employees fired for reasons offensive to the public policy of this State.”\footnote{Id. at 571, 515 S.E.2d at 441 (quoting \textit{Sides}, 74 N.C. App. at 342, 328 S.E.2d at 826; \textit{Amos}, 331 N.C. at 356, 417 S.E.2d at 171) (citations omitted).}

This language likely contemplates that a degree of improper intent or willfulness on the part of the employer must be present before the public policy wrongful discharge doctrine is triggered. In other words, in order to support a claim for wrongful discharge, it appears that the termination must be at least in part motivated by an unlawful reason or purpose that is against public policy.\footnote{Garner, 350 N.C. at 572, 515 S.E.2d at 441.} Presumably reasoning along these lines, the court concluded that the plaintiff failed to forecast any evidence that at the time of the plaintiff’s testing the employer knew or even suspected that the laboratory did not qualify as an approved laboratory.\footnote{Id.}

The import of \textit{Garner} seems to be that because the employer was not shown to have known of its violation of the statute requiring an approved drug testing laboratory at the time of the violation, the employer’s actions could not be construed to be a knowing violation of public policy. Thus, under \textit{Garner}, a mere unintentional, technical violation of a statute or public policy that is not causally connected to the employee’s termination will not suffice to constitute an actionable claim.

\footnote{100. Garner, 350 N.C. at 572, 515 S.E.2d at 441.}
\footnote{101. Id.}

In *Kurtzman v. Applied Analytical Industries, Inc.*, the North Carolina Supreme Court reversed the affirmance of an employee's verdict in a contract-based employment case. *Kurtzman* did not involve an arguable public policy claim, but contains dicta suggesting limitation of the recent erosion of the at-will employment doctrine.

In *Kurtzman*, the defendant employer recruited the plaintiff to work for the defendant and subsequently the parties negotiated the terms of the employment. During the negotiations, plaintiff inquired into the security of his proposed position with the defendant. The employer's agents made the following representations to the plaintiff: "if you do your job, you'll have a job"; "[t]his is a long-term growth opportunity for you"; "[t]his is a secure position"; and "[w]e're offering you a career position."

Plaintiff argued that the combination of the additional consideration of plaintiff moving his residence and defendant's specific assurances of continued employment removed the employment relationship from the at-will presumption and created an employment contract under which he could not be terminated without cause. The court overruled *Sides* in limited part regarding the contract based claim.

Ruling for the defendant employer, the court observed in dicta that the employment-at-will doctrine has prevailed in this state for a century. The court stated: "The narrow exceptions to it have been grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law." The court further reasoned that "[a] century later, the [at-will] rule remains an incentive to economic development, and any significant erosion of it could serve as a disincentive. Additional exceptions thus demand careful considera-

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103. *Id.*

104. *Id.* at 333-45, 493 S.E.2d at 423-24.

105. *Id.* at 330, 493 S.E.2d at 421.

106. *Id.*

107. *Id.* at 331, 493 S.E.2d at 421.

108. *Id.* at 331, 493 S.E.2d at 421-22.

109. *Id.* at 331, 493 S.E.2d at 422.

110. *Id.* at 333, 493 S.E.2d at 423. See also Edward v. Seaboard, 121 N.C. 490, 491-92, 28 S.E. 137, 137 (1897).

111. *Kurtzman*, 347 N.C. at 333-34, 493 S.E.2d at 423. There are, however, several North Carolina appellate cases which do not fit within *Kurtzman*'s suggested parameters.
tion and should be adopted only with substantial justification grounded in compelling considerations of public policy."\textsuperscript{112} This reasoning suggests some limitations on the future of the public policy wrongful discharge doctrine. However, the effect of this language remains dubious because \textit{Kurtzman} was not a public policy case.

5. Additional Post-Coman Decisions

A number of post-Coman decisions have afforded relief to discharged employees in alternative circumstances. In \textit{Lenzer v. Flaherty},\textsuperscript{113} the North Carolina Court of Appeals recognized the application of the public policy wrongful discharge doctrine when a state employee was discharged because she reported abuses at an alcohol rehabilitation center.\textsuperscript{114} \textit{Lenzer} recognized a classic whistleblower theory. \textit{Lenzer} is particularly noteworthy because the public policy basis that the court relied upon was the employee's free speech rights guaranteed by the North Carolina Constitution.\textsuperscript{115} Because of the breadth of constitutional language, \textit{Lenzer}'s recognition of the use of the North Carolina Constitution as a source of public policy substantially broadened the number of potentially actionable public policies.

In \textit{Deerman v. Beverly California Corporation},\textsuperscript{116} one of the more instructive recent cases, the North Carolina Court of Appeals held that a nurse stated a valid claim for wrongful discharge under the public policy doctrine.\textsuperscript{117} In \textit{Deerman}, the plaintiff employee was a registered nurse responsible for managing medical care and treatment for patients at the defendant employer's facility.\textsuperscript{118} The plaintiff encountered a patient who had begun to seriously deteriorate, was in acute distress, and needed a change of treatment.\textsuperscript{119} The plaintiff documented and reported all of the patient's medical difficulties to the patient's physician and attempted to further communicate with the physician in this regard, but the physician did not respond.\textsuperscript{120}

\begin{thebibliography}{99}
\bibitem{112} Id. at 334, 493 S.E.2d at 423.
\bibitem{114} Id.
\bibitem{115} Id. at 514, 418 S.E.2d at 287.
\bibitem{116} 135 N.C. App. 1, 518 S.E.2d 804 (1999).
\bibitem{117} Id. at 2, 518 S.E.2d at 805.
\bibitem{118} Id.
\bibitem{119} Id.
\bibitem{120} Id.
\end{thebibliography}
Plaintiff was contacted by a member of the patient's family regarding the patient's difficulties and deteriorating condition.\textsuperscript{121} Plaintiff advised the patient's family as to her concerns, and one of the family members asked the plaintiff's advice as to what should be done; the plaintiff advised that she would reconsider the choice of physicians, and that the appropriate treatment had not been provided.\textsuperscript{122} After being advised that the plaintiff had informed the patient's family that they should reconsider their choice of physicians for the patient, the employer terminated the plaintiff. The employer's stated basis for the termination was "due to her advising the family of the patient that they should consider changing physicians for the patient."\textsuperscript{123} The trial court dismissed the complaint pursuant to Rule 12(B)(6).\textsuperscript{124}

In \textit{Deerman}, the court of appeals observed that "our courts have enunciated no 'bright-line' test for determining if termination of an at-will employee violates public policy . . . ."\textsuperscript{125} The public policy in issue was the Nursing Practices Act\textsuperscript{126} and the administrative regulations promulgated thereunder.\textsuperscript{127} The court of appeals concluded that "[t]he NPA and attendant administrative regulations thus evidence a clear public policy in North Carolina to protect public safety and health by maintaining minimum standards of nursing care."\textsuperscript{128}

N.C. Gen. Stat. § 90-171.20(4) defines "nursing" as "'a dynamic discipline which includes the caring, counseling, teaching, referring and implementing of prescribed treatment in the prevention and management of illness . . . .'"\textsuperscript{129} The cited administrative regulations provide more specific detail as to the required functions of a registered nurse.\textsuperscript{130} The statute and regulations imposed both requirements and express prohibitions relevant to the plaintiff's cause of action.\textsuperscript{131} For example, the regulations note that "'teaching and counseling include . . . making referrals to appropriate resources.'"\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} at 3, 518 S.E.2d at 805.
\item \textsuperscript{124} \textit{Id.} at 4, 518 S.E.2d at 806.
\item \textsuperscript{125} \textit{Id.} (citing Teleflex Information Systems, Inc. v. Arnold, 132 N.C. App. 689, 691, 513 S.E.2d 85, 87 (1999)).
\item \textsuperscript{127} 135 N.C. App at 6, 518 S.E.2d at 807.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 7, 518 S.E.2d at 807 (quoting N.C. Gen. Stat. § 90-171.20(4)).
\item \textsuperscript{130} \textit{Id.} at 7, 518 S.E.2d at 808.
\item \textsuperscript{131} \textit{Id.} at 8, 518 S.E.2d at 808.
\item \textsuperscript{132} \textit{Id.} at 9, 518 S.E.2d at 808 (quoting N.C. Gen. Stat. § 90-171.20(7)).
\end{itemize}
The court in *Deerman* observed that "had plaintiff allegedly been terminated in consequence of her refusal to violate the minimal requirements of her position as described by the General Assembly and the Board, a claim for wrongful termination would clearly lie . . . ."\(^{133}\) The court held that plaintiff's termination based on plaintiff's statements which "were proffered in fulfillment of her 'teaching and counseling' obligations as a licensed nurse" constituted a viable claim under North Carolina's public policy wrongful discharge doctrine.\(^{134}\) The court concluded that plaintiff's termination by the defendant was "motivated by [a] . . . reason or purpose that is against public policy."\(^{135}\)

In *Deerman*, the court went on to note that if plaintiff "was terminated for meeting the minimum requirements of the practice of nursing as established and mandated by the NPA and regulations thereunder, then such termination violated the public policy of this state to ensure the public a minimum level of safe nursing care."\(^{136}\) The court further reasoned that "[t]he public policy recognized herein, *i.e.*, the protection of public safety and health by ensuring a competent level of nursing care, is equally as compelling as that acknowledged in *Coman* . . . ."\(^{137}\)

In *Caudill v. Dellinger*,\(^{138}\) the North Carolina Court of Appeals concluded that a valid claim for wrongful termination was stated where the employee was terminated for giving truthful information about the employer's bank account to the State Bureau of Investigation.\(^{139}\) In this case, the defendant was a district attorney who allegedly fired plaintiff, an administrative assistant, because plaintiff reported the defendant to the North Carolina State Bureau of Investigation for alleged banking and expense account irregularities.\(^{140}\) Plaintiff presented evidence from which a jury could find that she was discharged for giving truthful information about defendant's expense accounts and falsification of bank documents to SBI agents.\(^{141}\) The court reasoned that "[i]t is the public policy of this state that citizens

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\(^{133}\) *Id.* at 10, 518 S.E.2d at 809.

\(^{134}\) *Id.*

\(^{135}\) *Id.* at 11, 518 S.E.2d at 810 (quoting Garner v. Rentenbach Constructors, Inc., 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999)).

\(^{136}\) *Id.* at 12, 518 S.E.2d at 810.

\(^{137}\) *Id.* at 12, 518 S.E.2d at 811.


\(^{139}\) *Id.*

\(^{140}\) *Id.* at 651, 501 S.E.2d at 99.

\(^{141}\) *Id.* at 656, 501 S.E.2d at 104.
cooperate with law enforcement officials in the investigation of crimes.”

In *Roberts v. First Citizens Bank & Trust Co.*, the plaintiff alleged that she was terminated for her refusal to act in violation of N.C. Gen. Stat. § 25-9-505, a provision of the North Carolina Uniform Commercial Code. The employee contended that she was fired because she refused to cash out a customer’s certificate of deposit without giving the notice required by the statute. The jury awarded plaintiff $300,000.00 in compensatory damages and $1,000,000.00 in punitive damages. The court of appeals concluded that North Carolina public policy would have been violated had plaintiff complied with the employer’s instructions. The North Carolina Supreme Court granted certiorari; however, the case was settled before the supreme court heard arguments in the case.

In *Vereen v. Holden*, the North Carolina Court of Appeals held that the employee stated a viable public policy wrongful discharge claim where the employee’s termination was premised upon his political affiliation and activities. The court explained:

In the present case, plaintiff alleges that he was fired by defendants due to his political affiliation and activities. If true, this would contravene rights guaranteed by our State Constitution . . . and the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99 (1991). As a result, if proven, these actions would surely violate North Carolina public policy.

*Vereen* has broad implications, particularly in public sector cases.

In *McMurry v. Cochrane Furniture*, the North Carolina Court of Appeals affirmed summary judgment for the employer where the employee contended that the employer promised to continue the plaintiff’s employment in order to avoid violating federal plant closing regu-

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142. *Id.* at 657, 501 S.E.2d at 104.
143. *Id*.
145. *Id.* at 717, 478 S.E.2d at 812.
146. *Id.* at 722, 478 S.E.2d at 815.
147. *Id.* at 715, 478 S.E.2d at 810.
148. *Id.* at 722, 478 S.E.2d at 815.
150. *Id*.
151. *Id.* at 784, 468 S.E.2d at 474.
lations. The court rejected a separate cause of action for bad faith discharge and reasoned that "any allegations of bad faith must rise to the level of the public policy violation." 154

In Tompkins v. Allen, 155 the North Carolina Court of Appeals reaffirmed the rejection of the bad faith wrongful discharge doctrine and reasoned that "[w]hile plaintiff's evidence tends to show bad faith, not to be condoned, such behavior does not rise to the level of a public policy concern." 156 Tompkins involved a situation in which the employer temporarily altered inventory records and then used the altered records as an excuse for the plaintiff's discharge. 157 Tompkins is perhaps the most troubling case rejecting application of the public policy doctrine in light of the employer's deceitful and egregious conduct.

In Daniel v. Carolina Sunrock Corporation, 158 the North Carolina Supreme Court reversed the court of appeals in a case in which an employee, who was subpoenaed to testify, was instructed to say no more than was necessary, and was told by her employer to be sure to "remember that you work for me and represent me and my company." 159 The employee responded that she intended to testify honestly. 160 The employee contended that her relationship with the employer deteriorated thereafter, 161 even though the underlying lawsuit was settled without the employee ever having to testify. 162

The employee's public policy wrongful discharge claim was dismissed by the trial court, but the court of appeals reversed, holding for the plaintiff employee. 163 Judge Lewis dissented on multiple grounds from the court of appeals' ruling for the plaintiff, 164 and the North Carolina Supreme Court's ultimate reversal of the decision of the court of appeals, through its per curiam opinion, was premised upon "the reasons stated in the dissenting opinion by Judge Lewis." 165 Judge

153. Id.
154. Id. at 55, 425 S.E.2d at 737.
156. Id. at 623, 421 S.E.2d at 178.
157. Id. at 622, 421 S.E.2d at 178.
160. Id.
161. Id.
162. Id. at 381, 430 S.E.2d at 309.
163. Id. at 381, 430 S.E.2d at 309-310.
164. Id. at 384-85, 430 S.E.2d at 311.
Lewis reasoned that the employer never directly told the employee to commit perjury, and therefore summary judgment for the plaintiff was appropriate.\textsuperscript{166} Judge Lewis further opined that the delay in the termination from the underlying alleged precipitating event and confrontation was too tenuous to support a causal connection.\textsuperscript{167}

In \textit{Rush v. Living Centers-Southeast, Inc.},\textsuperscript{168} the North Carolina Court of Appeals held that a termination based upon the employee's refusal to testify at trial did not violate public policy.\textsuperscript{169} In \textit{Rush}, the plaintiff's employer was involved in a dispute with the spouse of a deceased patient in regard to an unpaid account.\textsuperscript{170} The plaintiff had previously participated in an ordered arbitration of the dispute in her capacity as bookkeeper for the defendant.\textsuperscript{171} The defendant appealed the decision of the arbitrator to the superior court; plaintiff was unaware of the appeal and assumed that the case was over.\textsuperscript{172} Almost a year later, defendant contacted the plaintiff late one afternoon and instructed her to appear in court the next morning to testify in the pending case.\textsuperscript{173} Plaintiff refused the request, stating it was a "complex matter" and she did not have adequate time to prepare her testimony.\textsuperscript{174} The case was then tried without plaintiff's participation. Plaintiff was then suspended and ultimately terminated on grounds of insubordination.\textsuperscript{175}

In \textit{Rush}, plaintiff contended that the termination of her employment violated public policy because she was not subpoenaed and was therefore not required to appear in court, and that the lack of time to prepare would have prevented her from giving "full, fair, and accurate" testimony.\textsuperscript{176} The court of appeals concluded that plaintiff's contention—that defendant's insistence upon plaintiff's participation might have caused her to perjure herself—was not supported by the record.\textsuperscript{177} Plaintiff loosely claimed that there was an inference from the employer to "'do what you have to do.'"\textsuperscript{178} The court concluded

\begin{itemize}
\item \textsuperscript{166} 110 N.C. App. at 385, 430 S.E.2d at 311-12.
\item \textsuperscript{167} Id. at 385, 430 S.E.2d at 312.
\item \textsuperscript{168} 135 N.C. App. 509, 521 S.E.2d 145 (1999).
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 510, 521 S.E.2d at 146.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id. at 512, 521 S.E.2d at 147 (quoting plaintiff's deposition).
\item \textsuperscript{177} Id. at 514, 521 S.E.2d at 149.
\item \textsuperscript{178} Id. at 513, 521 S.E.2d at 148 (quoting plaintiff's deposition).
\end{itemize}
that a reasonable employee would not have understood the employer's statements to the plaintiff to be directives that she testify untruthfully, and therefore that there was no violation of public policy.\footnote{179. \textit{Id.} at 514, 521 S.E.2d at 148.} \textit{Rush} seems to be a direct reaffirmation of\textit{ Daniel v. Carolina Sunrock Corporation.}\footnote{180. 335 N.C. 233, 436 S.E.2d 835 (1993).}

In \textit{Johnson v. Mayo Yarns, Inc.},\footnote{181. 126 N.C. App. 292, 484 S.E.2d 840 (1997).} the North Carolina Court of Appeals held that the termination of an employee for refusing to remove a confederate flag decal from his tool box did not violate public policy.\footnote{182. \textit{Id.}} In this case, plaintiff was employed as a technician whose responsibility was to repair textile spinning frames that were used in the defendant's plant.\footnote{183. \textit{Id.}} Plaintiff used a tool box, purchased at his own expense, for performing these repairs.\footnote{184. \textit{Id.}} On his tool box, plaintiff attached a two by three inch decal of a confederate naval flag.\footnote{185. \textit{Id.}} Plaintiff was subsequently instructed to remove the flag decal.\footnote{186. \textit{Id.}} Plaintiff refused, was issued a warning for violation of the defendant's harassment policy, and was ultimately terminated for being in violation of that policy.\footnote{187. \textit{Id.}}

Plaintiff relied upon \textit{Lenzer v. Flaherty}\footnote{188. 106 N.C. App. 496 (1992).} in support of his contention that the North Carolina Constitution can serve as a source of public policy in a wrongful discharge claim.\footnote{189. \textit{Johnson,} 126 N.C. at 296, 484 S.E.2d at 843.} The court of appeals in \textit{Johnson} found \textit{Lenzer} to be distinguishable.\footnote{190. \textit{Id.} \textit{Brewington v. Bedsole,} 1993 WL 819885 (May 14, 1993) and \textit{Benson v. McQueen} (7:98-CV-164-DE) (Aug. 17, 2000) follow the \textit{Lenzer} approach rather than \textit{Johnson.} \textit{Lenzer, Brewington, and Benson} provide a more consistent and logical approach, consistent with \textit{Loman.}} The court concluded that "plaintiff's conduct carried out in private employment is not constitutionally protected activity. Therefore, plaintiff has failed to allege facts sufficient to support a claim of wrongful discharge based on his activity being protected speech and expression by our Constitution."\footnote{191. \textit{Id.} at 297, 484 S.E.2d at 843.}

In \textit{Johnson}, the court employed a narrow view of public policy by failing to apply the \textit{Lenzer} principle. In \textit{Johnson}, plaintiff was not
attempting to litigate a constitutional free speech claim. Rather, he was merely attempting to use the free speech basis in the North Carolina Constitution as an underlying basis of public policy to support his claim. Without explanation, the Johnson court implicitly limited potential use of the North Carolina Constitution as a source of public policy. Johnson inherently conflicts with the essential point from Lenzer, which is that the North Carolina Constitution is an actionable source of public policy. Lenzer and its progeny represent the more logical position.

D. The North Carolina Equal Employment Practices Act

N.C. Gen. Stat. § 143-422.2, a North Carolina statute that expressly provides public policy for certain characteristics in the employment context, provides in pertinent part:

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.192

In Brewer v. Cabarrus Plastics, Inc.,193 the North Carolina Court of Appeals reversed a trial court's directed verdict for an employer in a case involving a common law wrongful discharge claim premised upon the North Carolina Equal Employment Practices Act "public policy."194 Brewer arose out of a course of conduct initially involving an alleged denial of promotion on the basis of race, and which culminated in a retaliation charge, the plaintiff claiming that the defendant employer retaliated against the plaintiff for pursuing the initial grievance involving plaintiff's denial of promotion on the basis of discrimination.195 Brewer (the plaintiff) initiated EEOC charges but did not file a Title VII suit.196 Rather, he initiated suit in state court and alleged that he was fired because of his race and because he had filed an EEOC charge against his employer.197 Brewer alleged causes of action under the public policy wrongful discharge doctrine and under 42 U.S.C. § 1981.198 Brewer survived summary judgment but after he presented

194. Id.
195. Id.
196. Id.
197. Id. at 684, 504 S.E.2d at 583.
198. Id. at 685, 504 S.E.2d at 583.
his evidence at trial, the trial court granted the employer’s motion for a directed verdict. 199 It is implicit that the court of appeals, in reversing the trial court’s ruling for the defendant, concluded that Brewer’s retaliatory discharge claim was premised upon the public policy expressed in the North Carolina Equal Employment Practices Act. 200

In Atkins v. USF Dugan, Inc., 201 Judge Beatty of the Middle District of North Carolina held that an employee stated a valid public policy wrongful discharge claim based upon a termination of the plaintiff allegedly based on the plaintiff’s age and disability. 202 Atkins reasoned that the North Carolina Equal Employment Practices Act was “invoked merely for the purpose of identifying the expressed public policy of North Carolina.” 203 Similarly, in Russell v. Carolina Machine & Associates, Inc., 204 the court of appeals affirmed a jury award to a plaintiff employee for claims of sexual harassment under Title VII and a common law wrongful discharge claim premised upon the North Carolina Equal Employment Practices Act. 205

E. Federal Interpretations

The Fourth Circuit has embraced the North Carolina public policy wrongful discharge doctrine, 206 as have many federal district courts in North Carolina. 207 Federal courts sitting in North Carolina have further recognized other forms of classic discrimination as violative of public policy including gender, national origin, race, disability and disability.

In Hughes v. Bedsole, 208 Judge Dupree of the Eastern District of North Carolina recognized a North Carolina common law wrongful discharge claim where the employee was discharged on the basis of gender. The employer argued that the common law claim should be dismissed because she had an adequate remedy in state court under

199. Id.
200. Id. at 685-91, 504 S.E.2d at 583-87.
202. Id. at 809-10.
203. Id. at 809 n.11.
204. 129 N.C. App. 519, 500 S.E.2d 728 (1998).
205. Id.
206. See Harrison v. Edison Brothers, 924 F.2d 530 (4th Cir. 1991) (recognizing doctrine of wrongful discharge based on sexual harassment).
Title VII. In Hughes, Judge Dupree explained that the North Carolina Supreme Court held in Amos that public policy is violated when an employee is fired in contravention of express policy declarations. Judge Dupree held that the plaintiff had stated a valid common law sex discrimination claim based on the public policy doctrine. Judge Dupree's recognition of gender as actionable public policy represents the majority position among the federal district courts sitting in North Carolina. For example, in Iturbe v. Wandel, the court held that a discharge based on sex or national origin violates the North Carolina public policy doctrine.

In Williams v. Avnet, Inc., Judge Boyle of the Eastern District recognized the application of the North Carolina common law public policy wrongful discharge doctrine where the underlying matter "concerns disability discrimination." The court further recognized that "an action for termination in contravention of public policy need not necessarily be exclusive of other available remedies.

In Phillips v. J. P. Stevens & Co., Judge Bullock of the Middle District similarly recognized a public policy claim. In Phillips, the plaintiff alleged sexual harassment, sexually discriminatory discharge, and retaliation. After discussing Amos, the Phillips court held that the public policy expressed in the North Carolina Equal Employment Practices Act "is essentially identical to the public policy articulated in Title VII." Phillips then went on to categorically reject the preemption doctrine:

Under Amos, the fact that a plaintiff has a remedy under Title VII in no way diminishes her claim for wrongful discharge. Amos made clear that the availability of an alternative remedy does not prevent plaintiff from seeking tort remedies for wrongful discharge in violation of public policy.

209. Id. at 429.
210. Id.
211. Id.
213. Id.
215. Id. at 1137.
216. Id.
218. Id.
219. Id.
220. Id. at 353.
221. Id. at 352.
In *Mumford v. CSX Transportation*, Judge Tilley of the Middle District of North Carolina recognized the public policy wrongful discharge claim where the underlying allegation involved race discrimination. Judge Tilley reasoned that "the public policy of North Carolina is to protect all persons from discriminatory employment practices."223

In *Harrison v. Edison Brothers Apparel Stores, Inc.*, the Fourth Circuit construed North Carolina's doctrine of wrongful discharge and recognized a common law wrongful discharge claim based on sexual harassment.225 The plaintiff employee was discharged for refusing to engage in sexual relations with her supervisor.226 The allegation constituted classic sexual harassment, which is prohibited by federal and state public policy.227 The court held that North Carolina's public policy wrongful discharge doctrine was applicable to prohibit sexual harassment.228

In *Battle v. Perdue*, the court held that the Americans with Disabilities Act and the North Carolina Handicapped Persons Protection Act provide sources of public policy in which to premise a valid common law wrongful discharge claim. In *Mayser v. Protective Agency, Inc.*, the court held that race discrimination was a proper basis for a North Carolina common law public policy claim. In *McKinney v. Northern Telecom, Inc.*, the Middle District held that an employee who brought suit under the Age Discrimination and Employment Act also stated a claim for wrongful discharge in violation of public policy. The court held that the ADEA does not preempt state law actions for age discrimination: "The common law remedy supplements rather than hinders the ultimate goal of protecting employees who have been fired in violation of public policy."232 The court further held that wrongful discharge claims have not been supplanted by the Equal Employment Practices Act because it provides no enforceable remedy.233

223. *Id.* at 832.
224. 924 F.2d 530 (4th Cir. 1991).
225. *Id.* at 533-34.
226. *Id.* at 531.
227. *Id.*
228. *Id.* at 534.
233. *Id.*
Thus, a substantial array of federal authority has recognized that employees may maintain common law public policy wrongful discharge claims premised upon the EEPA.234 (A number of federal courts have however refused to extend the common law public policy claim to retaliation claims.)235

F. Actionability of Other Adverse Actions

The public policy wrongful discharge doctrine arose in the context of terminations. However, adverse actions that do not rise to the level of terminations may similarly frustrate public policy. There have been very few cases that have considered this issue. There is some authority suggesting that adverse action other than termination is also recognized under the public policy doctrine. For example, in Bass v. City of Wilson,236 the Eastern District of North Carolina held that the failure to hire could constitute a violation of public policy. Similarly, in Hinson v. Liggett Group, Inc.,237 the Fourth Circuit cited Bass for the proposition that the failure to hire in violation of public policy stated a cause of action.238

G. The Use of Federal Public Policy

Numerous courts have recognized that federal public policy may properly form the basis for a wrongful discharge claim in state court.239 In Coman v. Thomas,240 which involved violations of federal

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234. See e.g., Bannerman v. Burlington, 7 F. Supp. 2d 645 (E.D.N.C. 1997) (age discrimination); Bradley v. CMI, 17 F. Supp. 2d 491 (W.D.N.C. 1998) (NCEEPA has been interpreted to permit the common law public policy wrongful discharge action premised upon gender discrimination); Hicks v. Robeson Co., 1998 WL 1669080 (E.D.N.C. Oct. 15, 1998) (NCEEPA can serve as basis for common law wrongful discharge claim).


237. 61 F.3d 270 (4th Cir. 1995).

238. Id.

Department of Transportation regulations and state law, the North Carolina Supreme Court recognized that "many courts have held that violations of federal public policy may form the basis for a wrongful discharge action . . . ."\(^{241}\)

It is also instructive to note that North Carolina Pattern Jury Instruction (Civil) 640.20 provides the standard jury instruction for North Carolina common law wrongful termination cases. The instruction provides: "Public policy may include federal as well as state public policy."\(^{242}\) Both the 1991 and 1996 editions of the Pattern Instructions stated the law as including federal public policy as a basis for a wrongful termination claim. Consistent with this fact, Professor Perritt demonstrates in his treatise that federal law is frequently the source of public policy in state common law wrongful termination claims.\(^{243}\)

In *Mumford v. CSX Transportation*,\(^{244}\) Judge Tilley, and ultimately the Fourth Circuit, held that "North Carolina law relies on federal authority to establish the standards applicable to state law wrongful discharge claims."\(^{245}\) A leading example appears in *Kilpatrick v. Delaware*,\(^{246}\) a Pennsylvania case in which the court held that the Occupational Health and Safety Act announces a significant public policy adequate under Pennsylvania law to bring about a legal claim for wrongful termination. Another Pennsylvania federal court has enunciated the same principle: "Clearly, Pennsylvania courts allow that federal law may state public policy cognizable in Pennsylvania common law."\(^{247}\)

In 1991, in *Leach v. Northern Telecom, Inc.*,\(^{248}\) Judge Britt of the Eastern District of North Carolina rejected the proposition that federal public policy may serve as the basis for a North Carolina common law policies contained in federal statutes." Professor Perritt demonstrates the broad range of potential sources of public policy. *Id.* § 7.11, at 23-28.

241. *Id.* at 178, 381 S.E.2d at 449.
243. Perritt, *supra* note 244, § 7.13, at 31 (4th ed. 1998). Professor Perritt cites scores of cases for this proposition. See, e.g., Cancellier v. Federated, 672 F.2d 1312, 1318 (9th Cir. 1982).
244. 878 F. Supp. 827 (M.D.N.C. 1994), aff'd, 57 F.3d 1066 (4th Cir. 1995).
245. *Id.* at 832.
public policy wrongful discharge claim. However, *Leach* was issued before the *Amos* decision was released by the North Carolina Supreme Court, in which the court expanded the scope of the public policy doctrine. *Leach* was based upon the court of appeals decision in *Amos*, which was later reversed by the North Carolina Supreme Court. Thus, it is important to note that *Leach* is inconsistent with the North Carolina Supreme Court's analysis in *Amos* and the more recent cases.

In *Worrell v. Bedsole*, an Eastern District of North Carolina case, the Fourth Circuit court reinstated plaintiff's constitutional free speech and public policy wrongful discharge claims. While the Fourth Circuit's opinion did not specifically address the underlying details, the asserted basis for the public policy claim in *Worrell* was federal public policy grounded in the North Carolina Constitution. *Worrell* was tried to a $781,400.00 verdict.

In *Williams v. Avnet, Inc.*, Judge Boyle of the Eastern District of North Carolina held that "disability discrimination" would violate public policy for purposes of a public policy wrongful discharge claim. The disability discrimination in issue included the Americans with Disabilities Act and the North Carolina Handicapped Persons Protection Act. On summary judgment, the court concluded that plaintiff's claim failed because the plaintiff did not offer sufficient evidence to establish her discrimination claim. It is implicit in the court's ruling, however, that the ADA may serve as a valid basis of

249. *Id.*
251. *Leach* was decided in 1991; the North Carolina Supreme Court did not issue a final ruling in *Amos* until 1993.
256. *Id.* at *3-5.
257. *Id.*
259. *Id.* at 1137.
260. *Id.* at 1129.
261. *Id.* at 1138.
federal public policy applicable to North Carolina common law wrongful discharge.262

In Williams, the court observed that "the North Carolina Supreme Court would 'look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases.'"263 This proposition clearly supports the principle that federal public policy is recognized as a basis for a wrongful discharge claim. Similarly, North Carolina courts "look to federal decisions for guidance"264 in matters of federal public policy.265

In conclusion, the last fifteen years have brought a new era of common law protection for North Carolina employees where recognized public policy has been violated. In Coman, the employer and its amici speculated that opening the public policy door would deluge the courts with floodgates of new litigation. This has not happened. Rather, a sensible case-by-case fact sensitive approach has emerged.

II. PROOF OF IMPROPER MOTIVE IN EMPLOYMENT LITIGATION

A. The Causation Issue

In employment cases with an intent standard, the prevailing proof standard typically requires a plaintiff to establish that an improper reason was a substantial or motivating factor in the decision to terminate.266 Because employers rarely admit any direct considerations of improper motive, causation is typically established through indirect, circumstantial, and inferential proof. The link between the improper motive and the adverse employment action is typically indirect or circumstantial.

Brewer v. Cabarrus Plastics, Inc.267 is an extremely instructive North Carolina case addressing causation issues. Brewer observed that "plaintiff's proper reliance on evidence of the sequence of events herein raises a factual issue sufficient to preclude grant of a directed

262. Id. at 1130-36.
263. Id. at 1137 (quoting N.C. Department of Correction v. Gibson, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983)).
verdict.” Brewer also relied on Abels v. Renfrow Corp. for the proposition that even “weakness of ‘the evidence of causal connection’” may suffice. This “sequence of events” methodology has been a settled standard in federal constitutional cases. The sequence of events approach inherently recognizes the typical camouflaged nature of improper intent. This approach is devoid of a rigid elements test, but considers logic, common sense, time-sequence of events, and other fact-based analysis.

The “substantial or motivating factor” test is ordinarily a question of fact to be decided by the jury. For example, in Hall v. Marion, the Fourth Circuit explained how the causation determination “is a factual one.” Similarly, in Carr v. F. W. Woolworth Co., Judge Boyle of the Eastern District of North Carolina addressed causality as involving “questions of fact and credibility”.

The doctrine of inferred intent is most often employed to satisfy causation in employment termination cases. In the leading case of Anthony v. Sundlun, the court explained:

[w]hat an actor says is not conclusive on a state-of-mind issue. Notwithstanding a person’s disclaimers, a contrary state of mind may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish that which he professes not to have intended.

A finding of improper intent is certainly not limited to instances where decision-makers openly articulate some bad purpose. As Chief Justice Rehnquist has explained: “There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.” Invidious discrimi-
natory or improper intent "may often be inferred from the totality of the relevant facts."\(^\text{278}\)

B. North Carolina’s Employment Causation Rule: Abels v. Renfro Corporation

In *Abels v. Renfro Corp.*,\(^\text{279}\) the North Carolina Supreme Court addressed the causation issue in wrongful termination litigation. *Abels* involved the plaintiff’s termination that occurred allegedly because plaintiff was believed to be about to file a worker’s compensation claim.\(^\text{280}\)

Plaintiff had been employed as a knitter by the defendant for many years prior to her discharge in 1987.\(^\text{281}\) Plaintiff alleged that she had been injured in June, 1984.\(^\text{282}\) Plaintiff alleged that she reported that injury but did not file a worker’s compensation claim at that time.\(^\text{283}\) Plaintiff alleged a second injury that occurred in June, 1987.\(^\text{284}\) Defendant discharged the plaintiff on August 19, 1987.\(^\text{285}\) Approximately six weeks after her termination, plaintiff filed worker’s compensation claims for her June 1984 and June 1987 injuries.\(^\text{286}\)

Plaintiff alleged that she was discharged in retaliation for her anticipated filing of worker’s compensation claims.\(^\text{287}\) The employer contended that plaintiff was fired due to the poor quality of plaintiff’s work, and that prior to her discharge, plaintiff received several warnings from management to either improve the quality of her work or be terminated.\(^\text{288}\) The jury returned a verdict in plaintiff’s favor for $82,200 in damages.\(^\text{289}\) On appeal, the employer challenged the sufficiency of the evidence.\(^\text{290}\)

\(^{280}\) Id. at 213, 436 S.E.2d at 824.
\(^{281}\) Id. at 212, 436 S.E.2d at 824.
\(^{282}\) Id. at 213, 436 S.E.2d at 824.
\(^{283}\) Id.
\(^{284}\) Id.
\(^{285}\) Id.
\(^{286}\) Id.
\(^{287}\) Id.
\(^{288}\) Id.
\(^{289}\) Id.
\(^{290}\) Id. at 214, 436 S.E.2d at 825.
Plaintiff testified that she had good production throughout her period of employment. There was evidence that the plaintiff was allowed to engage in light work following her first injury, that the defendant employer was aware that she had been injured again in 1987 while at work, and that her doctor had requested that plaintiff be given a one month leave of absence. Shortly after her second injury, plaintiff was discharged. The court explained:

We conclude that, although the evidence of causal connection between the discharge and the filing of the worker's compensation claim is weak, the jury could have inferred that [the defendant employer] having earlier escaped a worker's compensation claim by allowing plaintiff to continue earning her salary at lighter duties, eventually concluded, upon her second injury, that this prospect was no longer to be avoided and that, in order to forestall the anticipated filing of a worker's compensation claim, the most expedient remedy would be to discharge plaintiff. We thus hold that there was sufficient evidence to support an inference that plaintiff was fired because Defendant Renfro Corporation anticipated her good-faith filing of a worker's compensation claim.

In Abels, the jury was able to examine all of the evidence and draw the inference of causal connection between the termination and an anticipated filing of a worker's compensation claim. The court in Abels later addressed the issues of motivation in wrongful termination cases. The court explained:

In a case such as this, the motivation of the employer in the dismissal of the employee is the primary issue to be decided by the jury. It is unlikely that either plaintiff or defendant will be able to present any direct evidence of the employer's state of mind in the making of the decision. Thus, critical to this determination would be evidence of how the employer has treated similarly situated employees in the past and how it was treating them at the time of the disputed discharge. This evidence, though circumstantial in nature, is perhaps the best indication, other than testimony of the parties themselves, of the rationale of the employer for the discharge.

Because of the sparse number of North Carolina cases directly addressing the causation issue, reference to federal and other cases

291. Id. at 216, 436 S.E.2d at 826.
292. Id.
293. Id.
294. Id.
295. Id. at 218, 436 S.E.2d at 827.
296. Id.
may be necessary to find persuasive analysis in addressing causation and standard of proof issues.

For example, providing additional guidance in North Carolina public policy cases is in *St. Mary's Honor Center v. Hicks*, in which the United States Supreme Court reconsidered the standard of proof framework for employment discrimination cases. In *Hicks*, the Court held that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." The Supreme Court, in essence, observed that "when presented with sufficient evidence to find both that the plaintiff has made a prima facie case and that the employer's pro-offered non-discriminatory reasons for the challenged actions were not credible, the fact finder can properly find that the defendant employer has intentionally discriminated against the plaintiff." The Court explained: "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination," and "upon such rejection, '[n]o additional proof of discrimination is required.'" The Court concluded that "[r]ejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination . . . ."

In *Carrington v. Hunt*, Judge Britt of the Eastern District issued a substantial opinion addressing the causation issue in a public employee free speech case. Judge Britt's analysis demonstrates how imperative it is to afford an employee "the benefit of all conflicting inferences considered" in deciding causation on summary judgment. Judge Britt sifted through the contentions and concluded that "the resolution of a question of intent often depends upon the credibil-

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297. 509 U.S. 502 (1993). * Cf. Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133 (2000) (in which the Court analyzed proof standards and burdens under the Age Discrimination in Employment Act; the Court reaffirmed its holding and analysis in *St. Mary's v. Hicks*. In *Reeves*, the Court stated: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . . [T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 134.

298. 509 U.S. at 511.


300. *Hicks* at 511 (quoting *Hicks v. St. Mary's Honor Center,* 970 F.2d 487 (8th Cir. 1992), rev'd, 509 U.S. 502 (1993)) (citations omitted).

301. *Id.* n.4.


303. *Id.*
ity of the witness, which can best be determined by the trier of fact after observing the demeanor of the witnesses during direct and cross examination.\textsuperscript{304} In denying summary judgment,\textsuperscript{305} Judge Britt observed that the plaintiff raised sufficient evidence to support a credible argument that the defendant's purported justification for dismissing the plaintiff may have been a pretextual argument conceived after the initiation of the lawsuit.\textsuperscript{306}

C. Close Temporal Proximity May Demonstrate Nexus

Several federal cases have held that close proximity in time between the protected conduct and the adverse action creates a presumption and prima facie case of retaliation.\textsuperscript{307} These cases establish that temporal proximity alone, especially if the protected conduct is particularly close to the adverse action, is a primary factor militating in favor of a jury question on the issue of causation.

The authoritative treatise by Retired Judge George Pratt of the Second Circuit and Professor Martin Schwartz states the general rule: "Proof that exercise of protected expression was a substantial and motivating factor can be shown by close proximity in time between the exercised First Amendment rights and retaliatory action."\textsuperscript{308} This rule is supported by scores of cases.\textsuperscript{309} These cases represent the backbone of causation law in the employment context.

\textsuperscript{304} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Id.
\textsuperscript{307} See, e.g., DeCinto v. Westchester Co. Med. Ctr, 821 F.2d 111 (2nd Cir. 1987) (adverse action taken within one year creates presumption of retaliation); Walsdorf v. Board of Comm'rs, 857 F.2d 1047 (5th Cir. 1988) (adverse action within seven months creates inference of retaliation); Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992).
\textsuperscript{308} See 1 George Pratt & Martin Schwartz, Section 1983 Civil Rights Litigation 642-43 (1996).
\textsuperscript{309} See Stever v. Indep. Sch. Dist. No. 625, 943 F.2d 845 (8th Cir. 1991) (close proximity in time between last complaint of teacher and retaliatory transfer shows causal connection; suspicious sequence of events is one factor to consider); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1315 (7th Cir. 1989) (close temporal proximity can show causal connection); Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991) (circumstantial evidence indicated superior was aware of complaint made by employee; adverse action taken shortly thereafter; causal connection shown); Schwartzman v. Valenzuela, 846 F.2d 1209, 1212 (9th Cir. 1988) (close proximity in time between exercise of First Amendment rights and firing creates inference that firing related to speech; conduct deficiencies did not arise until after speech infers retaliation); Allen v. Scribner, 812 F.2d 426, 435 (9th Cir. 1987) (close proximity in time between public criticism and adverse action creates inference of retaliation), amended by 828 F.2d 1445 (9th Cir. 1987); Davis v. State Univ. of New York, 802 F.2d
Adverse action within nine months of protected activity has been held to provide enough evidence of an inference of retaliation.\textsuperscript{310} "That an employee can provide an organization with 24 years of service and then be summarily discharged without a hearing or even a day's notice is powerful evidence that Defendant may have had questionable motives."\textsuperscript{311} Judge Pratt and Professor Schwartz explained that a "plaintiff can also show causal connection by differential treatment of other similarly situated, by showing that non-retaliatory reasons is a pretext or sham or by direct statements of animosity by employer based on statements of public concern."\textsuperscript{312}

D. The Arlington Heights Test

In the leading case of \textit{Village of Arlington Heights v. Metropolitan Housing Development Corporation},\textsuperscript{313} the United States Supreme Court identified several factors to be examined to determine whether discriminatory intent or purpose is present. Those factors are:

(1) The impact of the decision/action;\textsuperscript{314}
(2) The historical background of the decision, particularly if it reveals a series of actions taken for invidious purposes;\textsuperscript{315}
(3) The sequence of events leading up to the decision;\textsuperscript{316}
(4) Departures from normal procedure;\textsuperscript{317}
(5) Departures from normal substantive criteria;\textsuperscript{318}
(6) The legislative or administrative history;\textsuperscript{319}
(7) Contemporaneous statements by members of the decision-making body.\textsuperscript{320}

\textsuperscript{311} Id. at 5.
\textsuperscript{312} 1 George Pratt & Martin Schwartz, Section 1983 Civil Rights Litigation (citing Clements v. Airport Authority, 69 F.3d 321, 335 (9th Cir. 1995) and other cases).
\textsuperscript{313} 429 U.S. 252 (1977).
\textsuperscript{314} Id. at 266.
\textsuperscript{315} Id. at 267.
\textsuperscript{316} Id.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
\textsuperscript{319} Id. at 268.
\textsuperscript{320} Id.
In *Arlington Heights*, the Court stated: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."321 A finding of improper intent is certainly not limited to instances where decision-makers articulate some bad purpose. "If proof of a civil right[s] violation depends on an open statement by an official . . ., the Fourteenth Amendment offers little solace to those seeking its protection."322

In *Smith v. Town of Clarkton*, 323 the Fourth Circuit recognized that statements revealing improper intent are often "camouflaged."324 As Chief Justice Rehnquist has explained: "There will seldom be 'eyewitness' testimony as to the employer's mental processes."325 Invidious discriminatory or improper intent "may often be inferred from the totality of the relevant facts . . .."326 The United States Supreme Court has held that one need not submit "direct evidence of discriminatory intent."327 Finally, it is not necessary to prove that the challenged employment decision rested solely on an improper or discriminatory purpose.328 However, it must be established that an improper or discriminatory purpose has been one of the motivating factors involved, but it need not be the dominant or primary purpose.329 While the case law has somewhat eased the technical burden in proving intent, practical proof of improper intent is often difficult to capture. *Fowler v. Smith*330 demonstrates the essence of the causation principle:

[D]irect evidence in proving illegitimate intent is not required to avoid summary judgment in unconstitutional retaliation claims; circumstantial evidence will suffice . . . We recognize that direct evidence of improper motive is usually difficult, if not impossible, to obtain and requiring direct evidence would effectively insulate from suit public officials who deny an improper motive . . .

321. *Id.* at 266.
323. 682 F.2d 1055 (4th Cir. 1982).
324. *Id.* at 1066.
328. *Arlington*, 429 U.S. at 266.
329. *Id*.
330. 68 F.3d 124 (5th Cir. 1995).
331. *Id.* at 127 (citation omitted).
E. Factors Demonstrating Improper Motive and Causation

The following have been relied upon as a basis for a sufficient inference of a retaliatory or improper motive:332

1. Decisionmaker's attitude regarding the conduct of the individual or employee. A hostile attitude suggests an improper motive.333
2. Disparate treatment, particularly unequal discipline among employees or individuals.334
3. Reduced employee evaluations after engaging in protected conduct.
4. Manner, tone and language of how the individual is informed of the deprivation.
5. Inadequate investigation of allegations surrounding the adverse action. Failing to review and consider all facts purportedly in the individual's favor suggests arbitrariness.335
6. Deviations from routine procedures.
7. Lack of reasonable warnings or notice of alleged violation or noncompliance.
8. Temporal proximity. Timing of the adverse action following engagement in protected activity.336
9. The magnitude of the alleged offense. Comparisons of punishment showing that the employee has been more harshly punished than others suggests an improper motive.
11. Investigation or scrutiny of employee's conduct following protected conduct.
12. The employer's creation of the problem that is supposedly the basis for the employer's criticism of the employee.
13. Subjectivity in termination or rejection criteria.337
14. Pretext (proof that the articulated reason is not the true reason).

332. See, e.g., Jim Causley Pontiac v. N.L.R.B., 620 F.2d 122, 125 (6th Cir. 1980); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980); Lewis Grocer Co. v. Holloway, 874 F.2d 1008 (5th Cir. 1989). See also Russell L. Wald, Retaliatory Termination of Private Employment, 7 POF2d 1 (1975); 1 Kent Spriggs, Representing Plaintiffs in Title VII Actions § 5.15 (1994).


335. See Martinez v. El Paso County, 710 F.2d 1102, 1104 (5th Cir. 1983).


337. See Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Warren v. Halstead Indus., 802 F.2d 746 (4th Cir. 1987); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976).
(15) Employee’s lack of history of the alleged basis of termination.
(16) Changed grounds for the adverse action. 338
(17) Employer’s failure to adhere to its own procedural or substantive policies or regulations.
(18) Undue delay in processing applications.
(19) Changes in the course of dealings among the parties.
(20) Changes in qualifications or rules after commencement of selection process.
(21) A secret paper trail, without notice to the employee. 339
(22) Delayed articulation of alleged justification. 340

Many other cases provide various means of inferring causation. 341 In Carr v. F.W. Woolworth Co., 342 Judge Boyle of the Eastern District of North Carolina addressed causality as involving “questions of fact and credibility.” 343 Judge Boyle observed how the plaintiff’s evidence of retaliation was based on plaintiff’s testimony that the employer’s “attit-

338. Changed asserted grounds for termination are among the most telling factors ascertaining pretext. 1 Kent Spriggs, Representing Plaintiffs in Title VII Actions § 19.24 (1994). For example, in Schmitz v. St. Regis Paper Co., 811 F.2d 131 (3d Cir. 1988), one court was confronted with a similar situation where one reason was initially given to the company officer, another reason was given to an administrative agency and yet a much more sophisticated reason was offered at trial. Cf. Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983) (reversing summary judgment due to the indicia of pretext where differing accounts of the reasons for the termination were in record).
340. Lindahl v. Air France, 930 F.2d 1434 (9th Cir. 1991) (four month delay was evidence of pretext).
341. See, e.g., Ratliff v. Wellington Exempted Vill. Sch. Bd., 820 F.2d 792, 796 (6th Cir. 1987) (relying upon post-speech job criticism and post-speech vindictiveness as inference of improper motive; verdict affirmed); Ware v. Unified Sch. Dist. No. 492, 881 F.2d 906, 911-912 (10th Cir. 1989) (relying upon proof of body language and other non-verbal conduct as evidence of causation); Morro v. City of Birmingham, 117 F.3d 508 (11th Cir. 1997) (proof of causation was based on the chronology of events; verdict affirmed); Stever v. Indep. Sch. Dist. No. 625, 943 F.2d 845, 851-52 (8th Cir. 1991) (sequence of events and timing and order of events raises inference of retaliatory motive); Martinez v. City of Opa-Locka, 971 F.2d 708, 713 (11th Cir. 1992).
343. Id. at 16.
tude towards her changed substantially" after the employer learned of the protected activity.344

Recent speech cases confirm the general rule: "causation is an issue which must be decided by the jury."345 Adequate proof of causation "includes the sequence of events."346 Providing false information may provide an inference of intentional discrimination.347 In Perdomo v. Browner,348 the Seventh Circuit explained that "a fact-finder may infer intentional discrimination from an employer's untruthfulness . . . ."349

In Ware v. Unified School District No. 492,350 the Tenth Circuit reversed the district court's decision setting aside an employee's verdict after the employee was discharged for speaking out on a school bond issue. In this case, the court rejected the district court's conclusion that the employee's evidence was insufficient as a matter of law because it was subjective.351 The court stated: "Circumstantial evidence and reasonable inferences . . . will necessarily involve subjective elements."352 The court went on to explain that "[a] plaintiff may create a reasonable inference of improper motivation by presenting evidence tending to show that the reasons proffered for the adverse action are without factual support."353

The plaintiff in Ware was able to refute the employer's allegations that the plaintiff had caused a deteriorating office environment, that she was losing interest in her job, and that plaintiff resented change, among other allegations.354 The parties hashed it out and the jury was allowed to rely upon the following: "The evidence presented by both sides consisted largely of subjective evaluations of body language, tone of voice, facial expressions, the nature of the office atmosphere, and other inferences drawn from non-verbal conduct."355

344. Id.
346. Id.; Matulin v. Village of Lodi, 862 F.2d 609, 613 (6th Cir. 1988) ("causation is an issue of fact which must be decided by the jury"; court may rely on "sequence of events" as sufficient proof).
347. Perdomo v. Browner, 67 F.3d 140 (7th Cir. 1995).
348. Id.
349. Id. at 145.
350. 881 F.2d 906 (10th Cir. 1989).
351. Id.
352. Id. at 912.
353. Id. at 911.
354. Id.
355. Id. at 912.
A number of cases demonstrate how employment cases are frequently proven with circumstantial evidence and inferences. In *Duke v. Uniroyal Inc.*[^356] the Fourth Circuit reviewed an age discrimination verdict. The defendant employer raised numerous issues on appeal, including an argument that the verdict was unsupported by sufficient evidence.[^357] *Duke* involved the trial of the termination of two employees, Duke and Fox.[^358] The employer contended that it terminated Duke because his sales territory was eliminated.[^359] The employer contended that Fox was terminated because of his weakness in knowledge of the products that the employer had decided to promote, as well as an inability to promote them.[^360] The Fourth Circuit concluded that the plaintiffs' burden of proof "may be satisfied, as with any other case, by direct or circumstantial evidence."[^361]

The Fourth Circuit concluded in *Duke* that the evidence presented was such that a reasonable jury could find that the employer's articulated reasons were pretextual.[^362] As a basis for its conclusion, and as a part of reviewing the evidence, the Fourth Circuit relied upon the fact that the employer "did not fully follow its own EEO policy . . . "[^363] In *Duke*, the Fourth Circuit also noted and relied upon the fact that the plaintiffs' work performance was favorable.[^364] The Fourth Circuit further relied upon the fact that some of the relevant documents relating to the employees were developed within the termination period.[^365] The Fourth Circuit also found as relevant that a memorandum was developed just two weeks before Mr. Fox was fired.[^366]

The Fourth Circuit's analysis of the evidence in *Duke* underscores the approach that courts have historically taken in reviewing insufficiency contentions in employment termination cases based upon what are often various types of circumstantial evidence. The evidence must be carefully gleaned in its totality with a view toward examining circumstances which give inferences.

[^356]: 928 F.2d 1413 (4th Cir. 1991).
[^357]: Id. at 1415.
[^358]: Id.
[^359]: Id. at 1416-17.
[^360]: Id. at 1417.
[^361]: Id. at 1417.
[^362]: Id. at 1419.
[^363]: Id. at 1418.
[^364]: Id. at 1419.
[^365]: Id.
[^366]: Id.
In *Deloach v. Delchamps, Inc.*, the Fifth Circuit affirmed a jury verdict in favor of a plaintiff in an employment termination case. In *Deloach*, the plaintiff employee had been an employee for some twenty-eight years before his termination. Deloach was ostensibly terminated for ineffective job performance. The employer also claimed that "his employees were losing confidence in him because he was not responsive to their complaints and that he was unable to discipline managers who did not keep clean, well-stocked stores."

To show that the employer's reasons were pretextual, plaintiff demonstrated "several irregularities in the circumstances regarding his discharge." Deloach offered evidence that certain reports were not properly written, and that he was required to sign one of the reports without being provided an opportunity to read it, that he was not aware that his job was in danger at the time he was discharged.

In *Deloach*, the court further observed that the employer did not have any documentation that the employer discussed the additional claims with Deloach. This observation of the lack of documentation is a common piece of circumstantial evidence in employment termination cases. In *Deloach*, the court further pointed out how there were "inconsistencies in the testimony" of the employer. Again, inconsistent testimony is perhaps among the leading type of circumstantial evidence which is used to establish improper motive in employment termination cases.

In *Morro v. City of Birmingham*, the Third Circuit affirmed a jury verdict in favor of a law enforcement officer who brought an action challenging his suspension on First Amendment grounds. The jury returned a verdict in favor of the employee for $150,000. Among other issues on appeal, the city argued that the evidence was insufficient to support the jury's verdict. "Morro's proof of causation was based solely on the chronology of events." The court observed that:

367. 897 F.2d 815 (5th Cir. 1990).
368. *Id.* at 817.
369. *Id.* at 818.
370. *Id.*
371. *Id.* at 819.
372. *Id.*
373. *Id.*
374. *Id.* at 820.
375. 117 F.3d 508 (11th Cir. 1997).
376. *Id.* at 512.
377. *Id.* at 516.
378. *Id.* at 516 (emphasis added).
In view of the entire record, a reasonable juror could have inferred that the Chief was motivated to act against Morro by a desire to punish his First Amendment activity that tended to reflect unfavorably upon the mayor, his daughter, or the Chief.\textsuperscript{379}

\textit{Morro} underscores the long line of settled cases that the entire record of evidence should be gleaned for any inference of improper motivation. If there is any such inference, the verdict must stand.\textsuperscript{380} Several contemporary employment termination cases reject the notion of hypertechnical review of jury verdicts on issues of sufficiency of evidence.\textsuperscript{381}

In \textit{Harrington v. Harris},\textsuperscript{382} the Fifth Circuit reviewed a verdict in an employment case. In \textit{Harrington}, the court held that "a jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict."\textsuperscript{383} In \textit{Harrington}, the court explained how a plaintiff may demonstrate pretext either by showing that an improper motive more likely motivated the employer, or that the employer's explanation is unworthy of credence.\textsuperscript{384} The court in \textit{Harrington} affirmed the verdict despite the fact that the evidence offered by plaintiffs was purely circumstantial.\textsuperscript{385}

In National Labor Relations Act cases, the National Labor Relations Board has looked to several considerations in determining whether adverse action was taken in retaliation for the employee's protected activity. These include:

1. the employer's knowledge of the protected activity;
2. employer animus, showing hostility or resentment;
3. timing;
4. shifting, as opposed to consistent, employer justifications;
5. disparate, inconsistent treatment in adverse action.\textsuperscript{386}

Cases under the National Labor Relations Act have been historically relied upon in other employee discharge cases for guidance in determining the difficult issues of motivation and causation. For example, in order to establish a case of wrongful discharge under sec-

\textsuperscript{379} Id. at 517.
\textsuperscript{380} Id.
\textsuperscript{381} See, e.g., Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125 (7th Cir. 1997); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997) (discussing the imputation of discriminatory intent).
\textsuperscript{382} 118 F.3d 359 (5th Cir. 1997).
\textsuperscript{383} Id. at 367 (quoting Hilten v. Sumrall, 47 F.3d 695, 700 (5th Cir. 1995).
\textsuperscript{384} Id. at 367-68.
\textsuperscript{385} Id. at 368.
\textsuperscript{386} See Labor and Employment Law Basics 26 (1993).
tion 8(a)(3) of the National Labor Relations Act, it must be shown that the employee was engaged in protected activity, that the employer was aware of the activity, and that the activity was a substantial or motivating reason for the employer's adverse action.\(^{387}\) In *NLRB v. Grand Canyon Mining Co.*,\(^{388}\) the Fourth Circuit explained:

The Board may infer discriminatory motive from either direct or circumstantial evidence. Since motive is a factual question, we must accept the board's finding as long as the finding is supported by substantial evidence on the record as a whole, even though we would independently decide the issue differently.\(^{389}\)

In *Grand Canyon*, the Fourth Circuit observed how the temporal proximity issue is most important.\(^{390}\) The Fourth Circuit observed how the timing of the transfer in issue supported the board's conclusion of unlawful motive.\(^{391}\)

The lack of North Carolina cases addressing causation and improper motive will likely lead to further application of the principles recognized in federal cases.

### III. Conclusion

Since its birth in *Sides v. Duke Hospital* fifteen years ago, North Carolina's public policy wrongful discharge doctrine has evolved into meaningful protection for employees whose conduct falls within a clear ambit of some defined public policy. Although the North Carolina appellate courts have retreated from the recognition of a separate bad faith cause of action, a number of the recent public policy cases reveal a reasonable reach of the doctrine. Probably the safest characterization of the fifteen years of subsequent appellate decisions is that of a "mixed bag."

When the public policy violation is established and causally connected to adverse employment action, North Carolina has recognized and applied the public policy doctrine in several different contexts. The doctrine is one of general application to all employers. Because of demonstrated employer misconduct in numerous proven cases in which there is no specific meaningful statutory remedy, this doctrine has become a critically necessary component of North Carolina employment law.

\(^{387}\) See *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995).

\(^{388}\) 116 F.3d 1039 (4th Cir. 1997).

\(^{389}\) *Id.* at 1047 (citations omitted).

\(^{390}\) *Id.* at 1048.

\(^{391}\) *Id.* (citing *FPC Holdings*, 64 F.3d at 943-44, and holding that the timing of the lay-off in question raised the inference that anti-union animus motivated the lay-offs).
The cases since Sides, Coman, and Amos provide little structured doctrinal guidance for ready application to the next case. It appears that there is some recognition of a subjective sliding scale depending upon the egregiousness of the underlying facts of each case. However, few principled lines exist for consistent reapplication. It appears that the public policy doctrine will continue to travel along these uncertain paths. The public policy cases are left to be decided on a case by case basis "matur[ing] slowly",392 as the Supreme Court in Amos instructed. The doctrine remains as a meaningful step toward workplace justice and ensures compliance with statutes that are otherwise not directly enforceable.

392. Amos, 331 N.C. at 351, 416 S.E.2d at 168 n.1.