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# Retaliatory Discharge Claims in North Carolina

BLOG | MAY 2, 2014

In North Carolina, where a federal statute is not indicated, retaliatory discharge tort claims are governed by the Retaliatory Employment Discrimination Act (REDA). The core of the statute is contained in N.C. Gen. Stat. § 95-241.

Pursuant to REDA, to succeed on a retaliatory discharge claim, it is the plaintiff's burden of pleading and proving: (1) they exercised rights under REDA (N.C. Gen. Stat. § 95-241(a)); (2) they suffered an adverse employment action; and (3) the alleged adverse employment action was taken because he/she exercised rights under REDA (N.C. Gen. Stat. § 95-241(a)). An "adverse employment action" includes "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment."

In order to establish "causation" in a REDA claim, the plaintiff must prove that his protected conduct was a "substantial factor" in the employer's decision to terminate the employee. *Lilly v. Mastec North America, Inc.*, 302 F.Supp.2d 471, 480 (N.C. 2002). Essentially, this only requires that the plaintiff show that unlawful retaliation was one factor out of potentially several factors motivating the employer's decision to terminate the employee. Of course, the plaintiff must show that the decision-maker actually knew of the plaintiff's protected activity.

The plaintiff may establish causation through circumstantial evidence, including temporal proximity, though it is rare that a claimant could prevail on temporal proximity alone. *See Smith v. Computer Task Group, Inc.*, 568 F.Supp.2d 603 (M.D.N.C. 2008) The circumstantial evidence must be more than mere speculation, as courts do "not intend an employee who engages in protected activity to be immune from discipline or discharge arising out of unprotected activity or work performance." *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226 (1989).

Employers have several defenses to a claim of retaliatory discharge. One of the most effective defenses would be to show that a similarly situated employee was not terminated from the employment in the same circumstances. Another defense is to prove that the employee would have been terminated regardless of her engagement in a protected activity. N.C. Gen. Stat. § 95-241(b) Another potential affirmative defense may be a lack of timely filing by plaintiff, although this defense is not jurisdictional, but is more akin to a statute of limitations defense. Finally, *res judicata* may be a defense to a retaliatory discharge claim if the issue has been previously decided in another context. Please call us if you have questions about the North Carolina Retaliatory Discharge statute, or retaliation claims related to federally protected activity.

**About the author:** Lori Allen is a member of the firm's workers' compensation team who represents employers and

insurers throughout all stages of litigation. Please contact Lori with questions or comments about this article.

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