# Section 3.2 of HB 2 and Its Impact on Wrongful Discharge Claims

## *North Carolina Law Before HB-2*

Since 1985, workers in North Carolina who have been fired for a reason that offends the State's public policy have been able to bring a common law claim of wrongful discharge against public policy. The North Carolina Court of Appeals joined the majority of states in recognizing this common law claim in Sides v. Duke Hospital in 1985, which involved an employee fired for refusing to commit perjury at the employer's behest. The North Carolina Supreme Court recognized this claim in Coman v. Thomas Mfg. Co. in 1989,

which involved an employee truck driver's refusal to violate state trucking regulations and falsify paperwork, adopting the reasoning in Sides v. Duke.

The North Carolina Equal Employment Practices Act (NCEEPA), G.S. 143-422.1-.3, passed into law in 1977, states that discrimination based on religion, race, color, national origin, age, sex, or disability is against the public policy of North Carolina. For decades, employees who have been fired because of their religion, race, color, national origin, age, sex, or disability have been able to rely upon the public policy expressed in the NCEEPA to bring a common law claim of wrongful discharge in violation of public policy in North Carolina state courts. This common law claim only applies to those who are terminated for these discriminatory reasons by employers who regularly employ 15 or more employees.

**The Impact of Section 3.2 of HB 2**

Section 3.2 of HB 2 added a sentence to existing N.C. Gen. Stat. SS 143-422.3, eliminating an employee's ability to rely upon N.C. Gen. Stat. SS 143-422.2 for a public policy basis supporting the employee's wrongful discharge claim:

"This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

(This language is also included in Section 3.3 of HB 2, addressing public accommodations.)

This change abolished the common law claim for wrongful discharge in violation of the public policy codified in the NCEEPA, as its primary sponsor admitted when questioned about this provision on the House floor. However, the sponsor also stated that federal law provided a remedy which was "far more robust" than the remedies available under State wrongful discharge law. This statement was incorrect, as explained below.

**Why a Federal Remedy Is Insufficient in Many Cases**

Some wrongfully discharged employees may have an alternate but limited remedy under federal law. However, the federal claims are a poor substitute for the state common law wrongful discharge claim, and often the federal claims are not available for wrongfully discharged employees for real-world reasons.

1. Federal claims must be brought within 180 days of the unlawful act by filing a Charge with the Equal Employment Opportunity Commission ("EEOC"). Many employees are unaware of their rights, or of this short timeline, have never heard of the EEOC and are too focused on trying to provide for their family or find new employment after being wrongfully terminated. As a result, they often miss the deadline and lose their federal claims.

2. Many employees who have been fired do not realize, within 180 days of the termination, that an unlawful discriminatory motive caused their termination. Often, this information is received from the employee's former co-workers, over a period of time, and after the 180 days for filing have passed. In other cases, the evidence of unlawful discrimination does not exist until more than 180 days after termination (for example, a 50-year old black female whose "position is eliminated" might have a viable discrimination claim if a 22-year old white male with no experience is later placed in the "eliminated" position).

3. The EEOC is an already over-burdened federal bureaucracy that can take years to "investigate" a Charge of discrimination. This required procedure not only delays justice (often by a year or more), but increases litigation expenses, and can even lead to the loss of key Title VII claims in a subsequent lawsuit for their federal Title VII claims, as the employee's subsequent lawsuit is limited to the claims raised in the EEOC process.

4. There are only three EEOC offices in North Carolina: Charlotte, Greensboro, and Raleigh.

5. Federal court filing fees are twice as much as state court fees. In general, federal court costs more to litigate for both employers and employees because of much more formal procedures.

6. Although employees may initially file their federal claims in State superior court, those claims are almost always removed to federal court by the defendant, as a matter of right and strategic advantage: historically, federal judges and juries are more hostile to employment discrimination claims than are State judges and local juries.

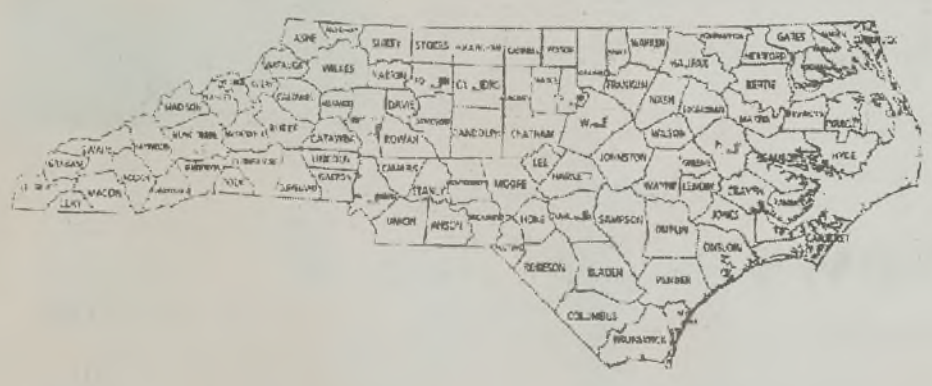
7. A federal court venue can be far more inconvenient for the parties and their witnesses. In North Carolina, there are three federal judicial districts, and the parties are required to file their lawsuit in the district including the county in which they reside, or where their former employer is located. One federal judge is randomly assigned to hear a case, for the duration of the litigation. That judge will hear the case only in the courthouse where they sit (and potentially one or two other courthouses, on occasion), and the parties must travel to those courthouses to be heard, specifically:

Eastern District: Raleigh, Greenville, Wilmington, New Bern, Elizabeth City (unstaffed), Fayetteville (unstaffed)

Middle District: Greensboro, Winston-Salem, Durham (rarely)

Western District: Asheville, Statesville, Charlotte

This graphic illustrates this large geographic area, and limited federal venues across the State:



8. Federal remedies are the same as State law remedies for wrongful discharge, but unlike State law, federal remedies for compensatory1 and punitive damages are capped, based on the size of the employer. Thus, under federal law an employer with 15-100 employees can only be required to pay a combined maximum of $50,000 in compensatory and punitive damages; an employer with between 101-200 employees can only be required to pay a combined maximum of $100,000 in compensatory and punitive damages; an employer with 201-500 employees can only be required to pay a combined maximum of $200,000 in compensatory and punitive damages; and an employer with over 500 employees can only be required to pay a combined maximum of $300,000 in compensatory and punitive damages. See 42 U.S.C. SS 1981a(b)(3).

The situation is even worse for age discrimination claims, as federal law permits such workers to recover only back wages and liquidated damages (up to the amount of the back wage award), and then only if the discrimination is found to be "willful." Compensatory damages and punitive damages are not available under federal law for age discrimination.

By comparison, North Carolina has no cap for compensatory damages, and punitive damages are available at the greater of $250,000 or three times compensatory damages. N.C.Gen.Stat. 1D-25(b).

Federal law and the U.S. Constitution provide the floor, or the lowest common denominator, of

rights for all citizens. With the passage of HB 2, North Carolina is now one of only two states that provide no remedy at state law for discriminatory wrongful discharge.

9. Complaints filed in federal court are quickly visible via an online search, while state court complaints generally are not. This discourages wrongfully fired employees from pursuing a federal claim because they are concerned this will impact their ability to obtain new employment.

1 "Compensatory damages" under federal law include future pecuniary losses, emotional pain, suffering, inconvenience,

mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 **U.S.C. SS 1981a(b)(3).**

The Human Relations Commission Provides No Relief Provides No Relief

Since its adoption of N.C. Gen. Stat. SS 143-422.3, that statute has provided that North Carolina employees may report their charge of discrimination to the N.C. Department of Administration's Human Relations Commission. However, as a practical matter, the Commission has focused on "resolving housing discrimination complaints for private persons" and "improving community relations." The Commission simply does not address employment discrimination complaints against private employers.2 Moreover, even if the Commission were actively engaged in addressing employment discrimination complaints, its authority is expressly limited to receiving, investigating, and conciliating (trying to mutually resolve) such complaints. Where those efforts are unsuccessful, the employee is still left with only the federal remedy

Additionally, the federal courts now require electronic filing, but most employees do not have the knowledge or wherewithal to accomplish electronic filing, so if they are unrepresented, they must travel to a staffed courthouse to file their lawsuit and any subsequent documents filed in the case.

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**The Legislature Can Restore the Common Law Remedy Without Impairing the Remainder of HB-2**

NCEEPA has absolutely no relevance to any claim by an LGBT employee that his/her employer discriminated in its provision of restroom facilities, or that the employer otherwise failed to accommodate an LGBT employee, or that a local government overstepped its bounds. Thus it was wholly unnecessary to the General Assembly's stated goals of the Special Session to amend this statute and eliminate an important remedy for all North Carolina employees.

For decades the NCEEPA has expressed the anti-discrimination public policy of this state. Employees who have been wrongfully terminated because of their religion, race, color, national origin, age, sex, or disability have been able to obtain relief and vindicate their rights in our state courts under the common law claim of wrongful discharge against the public policy expressed in the NCEEPA. This fundamental right of North Carolina citizens is one of the few protections afforded employees under our state law. Our lawmakers need to give citizens back the limited protection they have had under state law for three decades by removing the new last sentence of N.C. Gen. Stat. SS 143-422.3 that was added by HB-2, SS 3.2.

COMPARISON OF STATE vs. FEDERAL PROCESS

| | State | Federal |
|---|---|---|
| Administrative agency prerequisite | None | Before filing lawsuit, must obtain Notice of Right to Sue from EEOC |
| Statute of limitations | 3 years | 180 days to file Charge, 90 days from issuance of Notice of Right to Sue to file lawsuit |
| Venue | County of employee's residence or employer's business | In federal judicial district, at courthouse to which randomly selected judge is assigned |
| Filing fee | $200 | $400 |
| Filing process | Delivering documents to clerk at courthouse by mail or in person | Electronic filing, after receipt of training and approved password from clerk, or hand delivery to staffed clerk's office |
| Discovery plan | None, except as provided by Rules or specifically requested by parties | Issued by Court, after Defendant answers Complaint and parties confer and provide their requests |
| Discovery start | Any time, including with the Complaint | After Court issues scheduling order, 3-4 months after Complaint filing |
| Discovery scope | Only as limited by Rules or protective order | Extremely limited, per Court order |
| Jury pool | Selected from residents of judicial district or county | Selected from residents of judicial district |
| Remedies | Back and front wages, compensatory damages (no limit), punitive damages (up to $250K or 3x compensatory damages) | Back and front wages, compensatory and punitive damages (total of both capped at $50K-$300K, depending on employer size) |
| Attorneys fees Costs | No authorization for court award Available to prevailing party | Available to prevailing party Available to prevailing party |
| Public Access to court filings | Only in-person, at courthouse, except for filings under seal | Nationally available online, except for filings under seal |

[3] *See Merger of the Human Relations Commission with the Civil Rights Division Would Yield Limited Cost Savings*, Final Report to the Joint Legislative Program Evaluation Oversite Committee, Report No. 2012-11 (June 14, 2007), available online at http://www.ncleg.net/PED/Reports/documents/HR/HR_Report.pdf. This Report explains thatthe Civil Rights Commission handles employment discrimination complaints, but only those brought by public employees.

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THE CAROLINA TIMES
L.E. AUSTIN
Editor-Publisher 1927-1971
**********
(USPS 091-380)
***
(Mrs.) Vivian Austin Edmonds
Editor-Publisher - 1971-2002

Kenneth W. Edmonds
Editor-Publisher - 2002-

Published every Thursday (dated Saturday) (except the week following Christmas) in Durham, N.C., by United Publishers, Incorporated. Mailing address: P.O. Box 3825, Durham, N.C. 27702-3825. Office located at 923 Old Fayetteville Street, Durham, N.C. 27701. Periodicals Postage paid at Durham, North Carolina 27705
Volume 95, Number 14
POSTMASTER:
Send address changes to THE CAROLINA TIMES, P.O. Box 3825, Durham, N.C. 27702-3825.
SUBSCRIPTION RATES: One year, Durham County, $25.00 (plus $1.88 sales tax; one year, outside Durham County, $30.00 (plus $1.95 sales tax; one year, out of state, $30.00. Single copy $.50. Postal regulations REQUIRE advance payment on subscriptions. Address all communications and make all checks payable to: THE CAROLINA TIMES.

NATIONAL ADVERTISING REPRESENTATIVE: THE CAROLINA TIMES, P.O. Box 3825, Durham, N.C. 27702.
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