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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-510

Filed 7 May 2025

Wake County, No. 21 CVS 010831

MELODY S. ISAAK, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY,  
MICHAEL S. REGAN, in his individual and official capacity, and JOHN A.  
NICHOLSON in his individual and official capacity, Defendants.

Appeal by Plaintiff from order entered 12 December 2023 by Judge Vince  
Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 28  
January 2025.

*Hedrick Gardner Kincheloe & Garofalo, LLP., by A. Grant Simpkins and M.  
Jackson Nichols, for Plaintiff-Appellant.*

*Attorney General Jeff Jackson, by Special Deputy Attorney General Phillip T.  
Reynolds, for Defendants-Appellees.*

GRIFFIN, Judge.

Plaintiff Melody S. Isaak appeals from the trial court's order denying her  
motion for summary judgment and granting the motion for summary judgment filed  
by Defendants North Carolina Department of Environmental Quality ("DEQ"),

Michael S. Regan, and John A. Nicholson. Plaintiff argues the trial court erred by determining that she did not allege a successful whistleblower claim for retaliatory termination, contending she showed both a protected activity and that she presented a material issue of fact regarding Defendants' retaliatory motivation to terminate. In recognition that, by filing competing motions for summary judgment, each party submits that no legitimate issues of fact remain, we hold Plaintiff failed to present a successful whistleblower claim as a matter of law. We affirm.

## **I. Factual and Procedural Background**

Plaintiff was an employee in the human resources department of DEQ for more than 13 years. Plaintiff began as Deputy Human Resources Director and was promoted to Human Resources Director in November 2019. Defendant Michael S. Regan, as Secretary of DEQ, terminated Plaintiff's employment in August 2020. This case arises from the circumstances surrounding Plaintiff's termination, and discriminatory conduct alleged within DEQ.

### **A. Plaintiff's Discrimination Claims**

On or about 21 February 2020, Plaintiff told Defendant Regan that she had learned of racist behaviors against her, an African American female, by Defendant John A. Nicholson, a Caucasian male who was then the Chief Deputy Secretary for DEQ. Plaintiff told Defendant Regan about information learned from Charlie Bryant, a custodian who worked with DEQ: (1) in 2018, Bryant told Plaintiff that he overheard Defendant Nicholson tell another Caucasian male that Plaintiff and a

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group of her African American female coworkers who often talked in her office “need[ed] to quit holding those Black Klan Pep Rally Meetings;” and (2) in August 2019, Bryant left Plaintiff a note and told her that Defendant Nicholson had been looking into Plaintiff’s office while she spoke with her coworkers. Plaintiff did not request that any action be taken and Defendant Regan took no disciplinary action at that time.

Plaintiff mentioned the alleged racist behaviors to Defendant Regan once again sometime later, when the two spoke in the parking deck while leaving work. Plaintiff told Defendant Regan she wanted him to investigate the matter within fifteen days. Defendant Regan began investigating the matter and learned that no formal complaint had been filed, even though over a year had elapsed since the alleged incidents occurred. Defendant Regan asked Plaintiff to document her complaints in writing; Plaintiff initially agreed but later refused to do so.

On 2 March 2020, Defendant Regan met with Plaintiff and requested that she write a statement that she did not think Defendant Nicholson was racist; Plaintiff refused. On 6 March 2020, Defendant Regan met with Plaintiff and Defendant Nicholson and once again asked Plaintiff to write a statement that Defendant Nicholson was not a racist; Plaintiff initially expressed that she believed Defendant Nicholson and would write the statement, but later said she was uncomfortable writing the statement and refused. On 17 March 2020, Defendant Regan once again asked Plaintiff to write a statement and to get her coworkers to do the same; Plaintiff

once again refused. Plaintiff also informed Defendant Regan that she believed Defendant Nicholson had been treating her improperly and demeaning her in the workplace as retaliation since the March 6 meeting. Plaintiff later emailed Defendant Regan that she and Defendant Nicholson worked together well and had no further issues. Plaintiff never submitted a formal, informal, or written Equal Employment Opportunity (“EEO”) complaint, and Defendant Regan considered the matter closed.

### **B. Cook Complaint**

On 2 June 2020, Ivy Cook, then Safety Director of DEQ, informed Andrea Knight, then Inclusion Manager of DEQ, that he felt he was being treated unfairly by his direct supervisor, Kathleen Tardif, then Deputy Human Resources Director of DEQ. On 5 June 2020, Cook filed an informal, written EEO complaint against Tardif. Defendant Regan thereafter spoke with Cook and clarified that Cook’s complaint was against both Tardif and Plaintiff. Cook filed his complaint, in part, due to abrasive behavior by Plaintiff during a teleconference.

Plaintiff learned that Cook filed a personnel complaint on the evening of June 5 during a call with Knight. Knight expressed concerns to Plaintiff that Knight was not the appropriate person to investigate the complaint, because Plaintiff oversaw Knight, Tardif, and Cook. Plaintiff added Tardif to the call, and Tardif also expressed concern with Knight and Plaintiff handling the complaint. Plaintiff nonetheless “told Knight that [Plaintiff] would contact [the Office of State Human Resources] to notify

them of the complaint and to seek guidance on how to proceed,” but also told Knight that “she expected Knight to perform her normal duties in investigating the complaint, but that [Plaintiff] would not be involved in the investigation.” Plaintiff instructed Knight to investigate the complaint and then “send her findings directly to DEQ leadership and OSHR.”

Cook submitted his resignation on 8 June 2020. Plaintiff directed Knight to email Cook and confirm that he wanted to continue with his complaint. Knight emailed Cook on June 8 and verified that, though he had resigned, he still wanted to proceed with his complaint. Cook wanted to proceed because it was “important that [Tardif] and [Plaintiff’s] behavior be documented so it doesn’t happen to anyone else.”

Plaintiff did not inform DEQ senior leadership of Cook’s complaint on June 5. Defendant Nicholson learned about Cook’s resignation on the evening of June 8. Defendant Nicholson informed Defendant Regan the following day on June 9. Defendant Regan then spoke with Cook on 10 June 2020 and learned that Cook had filed an EEO complaint prior to his resignation. Following his conversation with Defendant Regan, Cook rescinded his resignation and his position as Safety Director was moved from DEQ’s Human Resources Division to its Financial Services Division.

On 11 June 2020, Defendant Regan spoke with Knight. Knight explained to Defendant Regan that she did not feel comfortable investigating Cook’s complaint, and that she had expressed her ethical concerns to Plaintiff but Plaintiff instructed her to proceed with the investigation. Defendant Regan assigned William Lane, then

general counsel for DEQ, with the investigation into Cook's complaint, removing the matter from Knight and Plaintiff's purview.

When Plaintiff learned that Knight had been removed from the investigation, she began preparing a response to the complaint and requested that Tardif create a record of Cook's job performance. Tardif emailed the documentation to Plaintiff on 15 June 2020. Plaintiff also "coached" Tardif to write her an email describing concerns with the transfer of Cook's position to Financial Services. Tardif drafted the email and sent it to Plaintiff; Plaintiff then forwarded the email to Defendant Regan on 18 June 2020, along with her own critiques of Defendant Regan's decision.

### **C. Investigation of Plaintiff's Conduct**

On or around 15 June 2020, Defendant Regan asked Lane to identify someone outside DEQ to investigate Plaintiff's handling and reporting of Cook's complaint and resignation. Lane ultimately decided to conduct the investigation himself, and to handle both investigations together. Despite Plaintiff's earlier claims against Defendant Nicholson, Defendant Nicholson became Lane's lead point of contact in his investigation of Plaintiff's conduct. As part of his investigation, Lane interviewed Defendant Nicholson and learned that Plaintiff had raised a complaint against Defendant Nicholson.

On 22 June 2020, Defendant Nicholson informed Plaintiff that she was placed on investigatory leave with pay during Lane's investigation. Defendant Regan made the decision to place Plaintiff on leave based on advice from Lane and OSHR.

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On 20 July 2020, Lane submitted a memorandum to Defendant Nicholson detailing his investigation into Cook's complaint. The memorandum stated that Lane was assigned to the investigation by Defendant Regan to avoid the potential for conflicts of interest by Knight, and also concluded Cook's unfair treatment claims were unsubstantiated.

On 21 July 2020, Defendant Nicholson informed Plaintiff that her investigatory leave was extended.

On 19 August 2020, Lane submitted a memorandum to Defendant Regan detailing his investigation into Plaintiff's handling of Cook's complaint. The memorandum recommended that Plaintiff be dismissed for improper conduct which "compromised the integrity of the investigation" into Cook's complaint, including her failure to immediately notify Defendants Nicholson or Regan of Cook's complaint. Among other things, the memorandum noted Plaintiff's June 18 email to Defendant Regan as direct action in the investigation despite her conflict of interest.

Defendant Regan held a pre-disciplinary conference with Plaintiff on 20 August 2020. During the conference, Plaintiff brought up the allegedly discriminatory conduct against her by Defendant Nicholson. This was the first time Plaintiff had raised the issue during the investigation into Cook's complaint and her handling of it, and the first time she had discussed the complaint with Defendant Regan since March 2020.

Defendant Regan terminated Plaintiff's employment with DEQ on 21 August

2020, for the reasons outlined in Lane's memorandum. On 10 September 2020, following her dismissal, Plaintiff filed a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC").

#### **D. Plaintiff's Retaliation Lawsuit**

Plaintiff filed a complaint on 11 August 2021 alleging a whistleblower claim under sections 126-84 and -85 of the North Carolina General Statutes, as well as claims for wrongful termination, tortious interference with contract, and violation of her right to freedom of speech.<sup>1</sup> Defendants moved to dismiss, but the trial court denied their motion. On 9 January 2023, Defendants filed an answer.

On 1 March 2023, Plaintiff filed a motion for partial summary judgment asking the court grant summary judgment in her favor on her whistleblower claim. In response, Defendants also moved for summary judgment against Plaintiff on the whistleblower claim. Following a hearing on the matter, the trial court entered a written order granting Defendant's motion for summary judgment against Plaintiff's whistleblower claim and denying Plaintiff's partial motion for summary judgment on 12 December 2023. Plaintiff timely appeals.

## **II. Analysis**

Plaintiff argues the trial court erred by granting Defendants' motion for summary judgment against Plaintiff's whistleblower claim, and by denying her

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<sup>1</sup> Plaintiff voluntarily dismissed her claim for wrongful termination on 28 August 2023.



motion in support. Plaintiff argues the undisputed facts show that she was engaged in a protected activity when she was terminated by Defendants, and that she satisfied her burden to refute Defendants' proffered non-retaliatory motive.

### **A. Standard of Review**

Plaintiff's appeal follows the trial court's judgment resolving competing motions for summary judgment from each party. We review the trial court's summary judgment order *de novo*, considering the matter anew and freely substituting our judgment for that of the trial court. *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422, 894 S.E.2d 709, 712 (2023).

"A movant is entitled to summary judgment when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits' show that the movant is 'entitled to a judgment as a matter of law' and 'that there is no genuine issue as to any material fact.'" *Hinman v. Cornett*, 386 N.C. 62, 65, 900 S.E.2d 872, 874 (2024) (quoting N.C. R. Civ. P. 56(c) (2023)). "When evaluating a trial court's decision to grant or deny a summary judgment motion in a particular case, we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *Beavers v. McMican*, 385 N.C. 629, 633, 898 S.E.2d 690, 694 (2024) (citations and internal quotation marks omitted).

In this case, "[t]he parties conceded there is no question of material fact by submitting cross-motions for summary judgment." *Erie Ins. Exch. v. St. Stephen's*

*Episcopal Church*, 153 N.C. App. 709, 711, 570 S.E.2d 763, 765 (2002). “If there are no disputed issues of material fact, we only need to determine whether summary judgment was entered properly or whether the trial court should have entered summary judgment in favor of the other party.” *REO Props. Corp. v. Smith*, 227 N.C. App. 298, 301, 743 S.E.2d 230, 232 (2013).

## **B. Whistleblower Claims under N.C. Gen. Stat. § 126-85**

North Carolina’s Whistleblower Act, codified as sections 126-84–89 of the North Carolina General Statutes, requires State employees to report activity by other State employees which violate State or federal rules, laws, or regulations. *See* N.C. Gen. Stat. §§ 126-84–89 (2023). Section 126-85 thereafter prevents retaliatory adverse actions by State employees following an employee’s report of inappropriate activity or an employee’s refusal to follow an unlawful directive:

(a) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee’s compensation, terms, conditions, location, or privileges of employment because the State employee . . . reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

(a1) No State employee shall retaliate against another State employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84.

(b) No head of any State department, agency or institution

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or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the employee's . . . employment because the State employee has refused to carry out a directive which in fact constitutes a violation of State or federal law, rule or regulation or poses a substantial and specific danger to the public health and safety.

(b1) No State employee shall retaliate against another State employee because the employee has refused to carry out a directive which may constitute a violation of State or federal law, rule or regulation, or poses a substantial and specific danger to the public health and safety.

*Id.* § 126-85. Whistleblower claims under section 126-85 require a plaintiff to first present their *prima facie* case through three material elements: “(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken.” *Semelka v. Univ. of N.C.*, 289 N.C. App. 198, 212, 888 S.E.2d 385, 395 (2023), *review denied*, 385 N.C. 888, 898 S.E.2d 302 (2024) (citation omitted).

Each party admits that Plaintiff has shown the second element of her *prima facie* case: Defendant Regan, as secretary of DEQ, took adverse action, dismissal from employment, against Plaintiff. Plaintiff contends she has also shown evidence to fulfill the first and third elements.

Plaintiff argues “[t]here is no credible dispute that Plaintiff engaged in a protected activity by reporting [Defendant] Nicholson’s comments to [Defendant] Regan and that she was subsequently fired.” Plaintiff’s arguments on appeal then

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contend, “[f]urther, [] Plaintiff’s whistleblower claim is premised on the allegation that adverse employment actions were taken against her based on, among other things, her reporting [Defendant] Nicholson’s comments regarding ‘black klan pep rallies’ to [Defendant] Regan and her refusal to sign a statement that [Defendant] Nicholson was not racist.”

However, in her motion for summary judgment below, Plaintiff presented only two protected activities to the trial court in support of summary judgment in her favor:

15. Plaintiff’s refusal to sign a statement stating that [Defendant] Nicholson was not a racist caused Defendant Regan to terminate her employment. Based on her experience, Plaintiff believes that the stated basis for her termination was pretextual, but the true basis for her termination was retaliation.

16. Plaintiff’s reporting to the EEOC, as alleged herein, also constituted protected activity under the Whistleblower Act, as such reports included violations of federal law, rules, and regulations.

. . .

19. *Because of her refusal*, Defendants . . . retaliated and discriminated against Plaintiff with respect to Plaintiff’s . . . employment by terminating her employment.

(Emphasis added). During the summary judgment hearing, Defendants responded specifically to Plaintiff’s proffered activities. Plaintiff then argued that these proffered activities were undisputably protected activities, referencing the “reports” Plaintiff made but focusing on the “crucial point” that Plaintiff was fired within days

of her refusal to sign Defendant Regan's requested statement.

Plaintiff's primary reliance on the "reports" she made in conversations with Defendant Regan regarding Defendant Nicholson's conduct as protected activities is a novel approach made for the first time on appeal. "[T]he process of preserving an issue for appellate review [requires that] the contention argued on appeal must have been raised, argued, and ruled on in the trial court." *Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 381, 756 S.E.2d 788, 795 (2014). We decline to address Plaintiff's argument not submitted to the trial court, as "the law does not permit parties to swap horses between courts in order to get a better mount." *Lannan v. Bd. of Governors of Univ. of N.C.*, \_\_\_ N.C. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2025 WL 879211, at \*5 (2025) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Our analysis will instead focus on the activities Plaintiff presented to the trial court in her motion for summary judgment.

Plaintiff's preserved activities cannot constitute protected activities to establish her *prima facie* case. Plaintiff makes no argument in her brief on appeal to support the filing of her federal EEOC as a protected activity, and it is therefore abandoned on appeal. *See* N.C. R. App. P. 28(b)(6) (2023). Assuming Plaintiff had presented this ground on appeal, filing a federal EEOC can be a protected activity; however, in order for there to be a causal connection between the protected activity and the adverse action, the protected activity must have been done prior to the adverse action. *See Norman v. N.C. Dep't of Admin.*, 257 N.C. App. 673, 683, 811

S.E.2d 177, 185 (2018) (holding “[b]ecause [the] plaintiff did not engage in a protected activity at any time prior to the exact moment in which adverse employment action was being taken against her, [the] plaintiff’s reporting of the misconduct could not possibly have been a substantial or motivating factor in her dismissal,” where the plaintiff did not report allegedly unlawful conduct until her pre-dismissal conference or later). Plaintiff submitted her report to the EEOC on 10 September 2020, over two weeks after Defendant Regan terminated her employment with DEQ. The federal EEOC claim therefore cannot have been a substantial or motivating factor in her dismissal from DEQ.

Plaintiff’s refusal to write and sign the statement as requested by Defendant Nicholson is also not a protected activity contemplated by the Whistleblower Act. Refusal to sign a statement is not a “report” of inappropriate activity enumerated in sections 126-85(a) and (a1). It may therefore only be a protected activity if Defendant Regan’s request was an unlawful directive under sections 126-85(b) or (b1). Plaintiff testified in her deposition that Defendant Regan did not frame his request as an order. She stated in her affidavit that Defendant Regan “asked” and “requested” that she make the statement, then later “attempted to convince” her to make it, but never asserted before the trial court that she was given an order to produce the statement. Plaintiff has consistently stated that, though Defendant Regan asked her to make the statement at least three times, each time was a request to do so—not a requirement. Plaintiff has presented no law, and we are aware of no legal basis,

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which prohibits Defendant Regan's request of a written statement resolving alleged workplace incidents. The trial court did not err in granting Defendants motion for summary judgment because Plaintiff failed to argue she was engaged in a protected activity before the trial court, and therefore did not present a sufficient *prima facie* case under the Whistleblower Act.

Because we hold Plaintiff failed to show that she engaged in a protected activity prior to her dismissal from employment, we need not address her argument that her dismissal was causally related to a protected activity.

**III. Conclusion**

For the foregoing reasons, we hold the trial court did not err by granting Defendants' motion for summary judgment, and for denying Plaintiff's partial motion for summary judgment, because Plaintiff failed to show the necessary elements of her whistleblower claim under N.C. Gen. Stat. §§ 126-84 and -85.

AFFIRMED.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).