No. 25-1096 **DISTRICT FORTY**

NORTH CAROLINA COURT OF APPEALS

****

AIDEN SETTMAN, Plaintiff, v. UNIVERSITY OF NORTH CAROLINA ASHEVILLE; and EMMA OLSON Defendants.	)	From Buncombe County No. 25CV001179-100

****

PLAINTIFF-APPELLANT'S BRIEF

****

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ISSUES PRESENTED

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I. Whether the trial court erred in granting Defendants' Motion to Dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6).

STATEMENT OF THE CASE

Plaintiff-Appellant filed this lawsuit on 21 February 2025. (R p 9). Defendants-Appellees filed a Motion to Dismiss on 28 April 2025 (R p 27) then filed their Answer and Affirmative Defenses on 28 April 2025. (R p 33). On 27 May 2025, the honorable Alan Thornburg presided over the hearing on Defendants' Motion to Dismiss and entered and filed an order on 29 May 2025, granting Defendants'-Appellees Motion to Dismiss. (R p 118). Plaintiff-Appellant filed its Notice of Appeal on 24 June 2025, appealing the 29 May 2025 Order. (R p 120).

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Judge Thornburg's Order granting Defendants-Appellees' Motion to Dismiss is a final disposition of all of the claims against the Defendants-Appellees. There are no other Defendants remaining in the Action. This is an appeal of a Final Order, and this Court has jurisdiction over this appeal pursuant to N.C.G.S. § 7A-27(b)(1).

STATEMENT OF THE FACTS

This case arises from a wrongful termination by the University of North Carolina at Asheville ("UNCA") and Emma Olson ("Olson") of Plaintiff Aidan Settman's ("Settman") employment as a researcher after Settman raised concerns about "research misconduct" and falsified data used in published reports that were being utilized to secure and maintain grant funding. (R p 22-23). In and around 2020, the North Carolina Center for Health and Wellness ("NCCHW"), a public service institute within UNCA focused on public health research and advocacy, was managing the Student Health Ambassador ("SHA") program, a public health and education program designed to mitigate the spread of Covid-19 and promote student mental health and wellbeing. (R p 10). Initially, the SHA program was funded by a grant with the North Carolina Policy Collaboratory ("NCPC") and in Spring 2021, it was funded by the Mountain Area Health Education Center ("MAHEC"). (R p 10). In September 2021, NCCHW received a substantial grant from the Dogwood Health Trust ("Dogwood"), a non-profit with the purpose to "dramatically improve the health and well-being of all people and communities in

Western North Carolina," to continue the SHA program. (R pp 10-11). As a grant funded initiative, the SHA was required to submit efficacy reports to NCPC and Dogwood. (R p 11). As a condition for its grant Dogwood required the SHA program publish its results in a peer-reviewed academic journal. (R p 11).

In September 2020, Settman initially began employment with UNCA as a researcher for the NCCHW program. (R p 10). In this position, Settman was a W-2 employee of UNCA and his duties included: contribution to research design and survey dissemination, facilitating evaluation of the SHA program, and contributing to the grant report submitted to NCPC. (R pp 11-12). Settman was supervised and managed by SHA leaders which included Olson (then-current interim executive director of NCCHW) and Amy Lanou ("Lanou") (former executive director of NCCHW). (R p 10). Settman's work was used to support a research paper (the "Paper") that the SHA leaders submitted for publication in a peer-reviewed journal with Settman designated as a co-author. (R p 12). Despite his designation as a "co-author" and Settman's multiple requests

to view and contribute to the manuscript, the SHA leaders only provided him with the Paper after it was rejected by an academic journal in or around June 2022. (R p 12). The rejection cited exaggerated claims and missing information as grounds for the rejection – the same unsupported claims and information that were included in NCCHW's report to its source of grant funding, NCPC. (R p 12).

In 2023, Settman was again offered employment with the SHA program by Olson who was designated Interim Executive Director at UNCA – with some of Olson's specific duties being to hire/fire employees and oversee operations for NCCHW. (R pp 12-13). Settman was asked to sign an "Independent Contractor" agreement with this new employment, but his duties, level of supervision, and work conduct continued to reflect the employment status of his prior tenure. (R pp 12-13). During this work, as outlined in the Complaint, Settman was subject to supervision and management by SHA leaders, was subject to behavioral and financial control, worked outside the dates of his "contract," pitched to superiors who could approve or reject his proposals, was asked to track his working

hours, and was supporting the integral function of NCCHW to meet grant outputs. (R pp 19-21).

While Settman's "Independent Contractor" agreement was slated to end 31 November 2023 – he continued to work during December 2023 and entered into another "contract" in January 2024. (R pp 14, 21). In and around December 2023, Settman began to discover a pattern within NCCHW's Paper of claims unsupported by any data that Olson or NCCHW could locate – the same being a serious violation of research integrity. (R p 14). From December 2023 through February 2024, Settman urged SHA leadership including Olson to address this lack of data retention, attempts to publish without raw data and scientific errors – patterns that fit the criteria of "research misconduct" as defined by UNCA. (R p 14). Significant issues with the research misconduct include but are not limited to: combining student answer choices to obscure negative outcomes, omitting data related to student assessments to conceal the SHA program's failure, fabricating test administration dates to deceptively demonstrate learning growth, manipulating data to

combine results of students who only took a mid-term or final assessment or post-test to falsely claim student learning, artificial inflation of sample sizes, gifting authorship (crediting individuals who provided little to no contribution to the Paper), and omitting data that established a decrease in student awareness of the SHA program from 2020 and 2021. (R p 15-16). Each of the above deceptive and fraudulent practices/research misconduct were utilized to obtain funding for NCCHW for the SHA program, misleading grantors – and were evident in the Paper which Olson and SHA leaders sought to publish in an academic journal. (R p 16-17).

On 13 March 2024, Olson invited Settman to a virtual meeting entitled "SHA Manuscript Discussions" and in response Settman emailed Olson, Nickolas Gold-Leighton ("Gold"), and John Dougherty ("Dougherty") UNCA's General Counsel and Chief of Staff, identifying his concerns regarding the research misconduct, evincing his willingness to escalate these concerns further. (R p 18). Settman received no reply to his email, no further communication prior to the 18 March 2024 meeting,

and his weekly meetings were cancelled. (R p 18). In the virtual meeting on 18 March 2024, Olson then terminated Settman stating that the reason was his condescending conduct that "harmed" colleagues. (R p 18). The firing was a pretext as all prior performance reviews of Settman had only been positive, with Olson herself emphasizing her appreciation and the value of Settman's work. (R pp 18-19). While his prior "Independent Contractor" Agreement had required written notice of termination, Settman did not receive such notice – further illustrating his status as an at-will employee of UNCA. (R p 19).

Upon his termination, Olson relayed that she was in communication with Tim Elgren, and that Settman would receive a legal document regarding his termination – and despite Settman contacting Elgrin's office 13 times to no avail, no such document was ever presented. (R p 19). Additionally, Settman attempted to submit a complaint on the UNCA Institution Hotline at the direction of UNCA's Dean of Social Sciences, but the hotline was and remains disabled. (R p 19). At the time

of his termination, Settman was owed compensation from UNCA. (R p 20).

Plaintiff then brought the present action against his employer, UNCA, and its employee, Emma Olson (Settman's supervisor) based on the adverse employment action that came as a proximate and immediate response to Settman's reporting to Olson and UNCA's general counsel the fraudulent activity and research misconduct utilized to obtain grant funding.

ARGUMENT

I. SOVEREIGN IMMUNITY DOES NOT APPLY; THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE CLAIM AND PERSONAL JURISDICTION OVER THE DEFENDANTS.

A. Standard of Review

This Court reviews de novo a motion to dismiss based on the applicability of sovereign immunity, and in so doing accepts all allegations of the Complaint as true, viewing them in the light most favorable to the non-moving party. *Est. of Long v. Fowler*, 378 N.C. 138,

142, 861 S.E.2d 686, 691 (2021) (quoting *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894 (2017)).

B. The North Carolina Whistleblower Act (N.C. Gen. Stat. §126-84 *et seq*.) Waives Sovereign Immunity.

Sovereign immunity does not serve as a bar on claims against the state and its agencies when there is consent or waiver by statute via the general assembly. *Great Am. Ins. Co. v. Gold, Comm'r of Ins.*, 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961). This statutory waiver of sovereign immunity and consent to be sued exists in various contexts in North Carolina, including the Whistleblower Act.

> Sovereign immunity establishes that 'a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit.' The Whistleblower Act, [N.C.G.S. § 126-84 et seq.], 'represents a clear statutory waiver of sovereign immunity to redress violations of the nature described in G.S. § 126-85.

Yili Tsang v. Martin, 247 N.C. App. 400, 786 S.E.2d 433, 2016 NC App. LEXIS 509, *6-7 (2016) (citations omitted). The Court of Appeals also held in *Minneman v. Martin*, that "the Whistleblower Act, in providing for specific remedies, represents a clear statutory waiver of sovereign

immunity to redress violations of the nature proscribed in G.S. § 126-85." *Minneman v. Martin*, 114 N.C. App. 616, 619, 442 S.E.2d 564, 566 (1994).

N.C. Gen. Stat. Chapter 126, Article 14, commonly referred to as the Whistleblower Act, creates a civil private right of action for a state employee who is retaliated against for engaging in protected activity – namely, as in the case at bar, for exercising the employee's duty to report violations of state law, fraud, or gross mismanagement. N.C.G.S. § 126-84 *et. seq*. N.C.G.S. § 126-86 provides that a State employee discharged by a State agency or other State employee for reporting fraud may bring a private cause of action for damages, an injunction or other remedies as described in § 126-87. N.C. Gen. Stat. § 126-86. The Whistleblower Act covers "State department, agency, or institution" and allows an employee to "maintain an action … against the *person or agency* who committed the violation." *Id.* at 619, 442 S.E.2d 564, 566 (quoting N.C. Gen. Stat. §§ 126-85 and 86 (1993)) (emphasis added)).

In this case, Mr. Settman brings his claims against UNCA and Defendant Olson under the Whistleblower Act, which undoubtedly waives sovereign immunity. Mr. Settman has named the University of

North Carolina at Asheville ("UNCA") as a Defendant, such institution being a state agency subject to the Act. (R p 23). Additionally, the individual Defendant, Emma Olson (a state employee), was a supervisor working for UNCA whom the complaint sufficiently alleges made a retaliatory adverse employment action against Plaintiff in violation of the Act. (R p 23).

Defendants' Motion to Dismiss focuses their affirmative defense of sovereign immunity on a discrete issue – whether Plaintiff was a permanent state employee entitled to protections under the Whistleblower Act. (R p 111). As illustrated in the specific allegations of the Complaint and herein *infra* and *supra*, this question as to whether Plaintiff was an employee entitled to protections under the Act first turns on the statutory language of the Act itself and second, the factual circumstances surrounding Settman's employment. Both an analysis of the plain language of the Act and the facts underlying Plaintiff's employment demonstrate that he was a State employee. As such, Settman is entitled to the protections under the Act and sovereign immunity does not apply in this case.

C. Plaintiff-Appellant is an Employee Protected Under the Act Under a Plain Reading of the Statutory Language.

Applying the rules of statutory interpretation, a plain reading of the Whistleblower Act within its statutory scheme establishes that Plaintiff is a state employee entitled to the protections under the Act. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012). When appropriate, the Court may also look to the purpose underlying the legislation, "presume[ing] that the legislature acted with care and deliberation[,]" as well as the broader statutory scheme. *Id.* This process will include examining the statute as a whole or phraseology of the surrounding words. *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003).

While there is an absence within the Whistleblower Act of any one full or complete definition of what constitutes a "state employee," there are provisions within the broader Human Resources Act (Chapter 126) that highlight the types of workers the legislature sought to protect. For

one example, in § 126-8.6(b) and (c), the Act uses the term a "time-limited, part-time, State employee." This language makes clear that the legislature contemplated there would be individuals working in non-permanent positions or on a part-time basis and that such individuals would be treated as State employees under Chapter 126. Defendant misconstrues Article 14 (the Whistleblower Act) as applying whistleblower protections to only "permanent positions." (R p 29). Section 126-5(c5) of the Act, however, clearly states that Article 14 applies to **all State employees**, public school employees, and community college employees" – making no distinction between permanent, temporary, or part-time. N.C.G.S § 126-5, 126-14 (emphasis added).

Defendants-Appellees' argument that the Act only applies to those working in permanent positions (R p 29) was dispelled and rejected by the Court of Appeals in both *Caudill v. Dellinger*, 129 N.C. App. 649, 653-54, 501 S.E.2d 99, 102 (1998) and *Yan-Min Wang v. UNC-CH Sch. of Med.*, 216 N.C. App. 185, 194, 716 S.E.2d 646, 652 (2011). In *Caudill*, the Court of Appeals delved into the creation of the Act by and through Senate Bill 125 in 1989, specifically highlighting that Senate Bill 125,

which added the Whistleblower Act to the broader statutory scheme of Chapter 126, ensured a broad application of the Act to all state employees – without regard to tenure or duration of employment:

> Senate Bill 125 added Article 14, popularly known as the "Whistleblower Act," to Chapter 126. Senate Bill 125 amended the provisions of Chapter 126 which set out numerous categories of exempt employees, by adding the following language: "(c5) Notwithstanding any other provision of this Chapter, Article 14 of this Chapter shall apply to all State employees, public school employees, and community college employees.

Caudill, 129 N.C. App. at 653-54, 501 S.E.2d at 102. This focus on the expansive scope and application of the Whistleblower act to all employees was set against the previously existing exemptions of certain types of employees under other provisions of Chapter 126 and highlights that "the protection of the [Whistleblower] Act applies to all state employees, regardless of any other provision of the Chapter 126." *Id.* (citing N.C.G.S. § 126-5(c5)). This broad application of the Act is consistent with the intent and spirit of the Act to "suppress the evil which the legislature intended to prevent by this remedial legislation." *Id.* at 655, 501 S.E.2d 99, 103.

Further, in *Yan-Min Wang*, the Court of Appeals specifically addressed and disposed of the exact argument that Defendants-Appellees have made in this case: that the Plaintiff was not a "career state employee" and therefore the Whistleblower Act does not apply. The court held that "[t]he legislative intent that the protections of this legislation apply to all state employees is clear." *Yan-Min Wang*, 216 N.C. App. at 194, 716 S.E.2d at 653 (2011). This is because the language "notwithstanding" that precedes section 126-5(c1) should be interpreted as meaning "'in spite of any other provision of this Chapter,' the Whistleblower Act applies 'to all State employees, public school employees, and community college employees,'." *Id.* Employees who are not career state employees are not left out but rather covered by the Whistleblower Act. *Id*.

As demonstrated by the plain language in Chapter 126 and the Whistleblower Act as well as North Carolina Courts' interpretation of the expansive protections afforded to all state employees under the Act, it is clear that Plaintiff is an employee as defined within the Act and afforded protection for reporting improper government activities.

D. Plaintiff-Appellant's Duties, Level of Supervision, and Continuous Employment Relationship with Defendants-Appellees illustrate that he was in an Employee/Employer Relationship Covered Under the Whistleblower Act.

In determining that a worker like Settman is an employee or an independent contractor under the Whistleblower Act, the Court should engage in a factor-based inquiry that has been applied in a wide range of contexts both in North Carolina state and federal courts. *Hayes v. Bd. of Trustees of Elon College*, 244 N.C. 11, 16, 29 S.E. 2d 137, 140 (1944) (applying a multi-factor test to classify an employer-employee relationship that focuses on whether the employer retained a right of control over the worker in the context of Workmen's Compensation Act); *State ex re. N.C. Doc. v. Aces Up Expo Solutions, LLC*, 275 N.C. App. 170, 182-83, 853 S.E.2d 769, 778 (2020) (citing to *Hayes* factors when determining the employment relationship in the context of NC Employment Security Act); *Rhoney v. Fele*, 134 N.C. App. 614, 617, 518 S.E. 2d 536, 539 (1999) (reiterating the *Hayes* factors in the context of respondeat superior while noting the key factor used to determine an employment relationship is "control"). As demonstrated by North

Carolina Courts' fact-based analysis to determine the status of a worker as employee or independent contractor across contexts and statutes, it is clear that the mere assignment of the label "Independent Contractor" by an employer is not dispositive of the issue – as Appellees would contend. (T pp 5-6) *See e.g. Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 585, 350 S.E.2d 83, 89 (1986) ("the parties' own conclusion about their legal relationship is not binding on the Court").

In *Hayes*, the Court set out eight factors that should be considered in determining the degree of control and whether an independent contractor relationship exists:

1. Is engaged in an independent business, calling or occupation;
2. Is to have the independent use of their special skill, knowledge or training in the execution of the work;
3. Is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
4. Is not subject to discharge because they adopt one method of doing the work rather than another;
5. Is not in the regular employ of the other contracting party;
6. Is free to use such assistants as they may think proper;
7. Has full control over such assistants;

8. Selects his own time.

Hayes v. Bd. of Trustees of Elon College, 244 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). "No particular one of these factors is controlling in itself, and all the factors are not required. Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor." *McCown v. Hines*, 353 N.C. 683, 687, 549 S.E.2d 175, 178 (2001).

Further guidance can be found specifically for public employers in North Carolina in the article "Determining Whether a Worker is an Independent Contractor or an Employee" published in the Fall 2006 issue of UNC School of Government's Popular Government journal publication. Diane M. Juffras, *Determining Whether a Worker Is an Independent Contractor or an Employee*, POPULAR GOVERNMENT, Fall 2006, Vol. 72, at 25. Among the tests for worker classification used by the Department of Labor and Internal Revenue Service, the article assesses a "right to control test" and five key factors to consider in assessing independent contractor/employee status:

> (1) The nature and the degree of the hiring organization's control over the worker; (2) The nature of the work performed—whether it is an integral part of the hiring organizations business; (3) the worker's opportunity for profit or loss; (4) the exclusivity and the duration of the relationship between the hiring organization and the worker; and (5) the hiring organization's right to discharge the worker.

Id. at 27.

While this question has not been specifically addressed in the context of the North Carolina Whistleblower Protection Act under Chapter 126 of the General Statutes, North Carolina courts' repeatedly-used factor-based analysis provides the proper test and guidance to determine Plaintiff's employment relationship with Defendants. Defendants-Appellees seem to rely wholly on the description of Plaintiff's employment contract with UNCA as an "Independent Contractor agreement" to support their position that Settman was an independent contractor and therefore not entitled to protections under the Whistleblower Act. (T pp 5-6). However, this reliance is not supported by North Carolina precedent and flies in the face of the fact-specific inquiry that our courts have repeatedly required for exactly this determination.

Further, adopting Defendant-Appellees' rationale would undermine public policy and set the stage to allow any state agency to convert their employees to independent contractors simply by virtue of the title on a contract – evading accountability under the Whistleblower Act.

Ultimately, when assessing the facts and circumstances of the instant case as set forth in the Plaintiff's Complaint, accepting all allegations as true, the Court should find the Complaint sufficiently states a claim that Settman was an employee under the Whistleblower Act entitled to the protections set forth therein.

i. <u>Defendants exerted and retained control over Plaintiff consistent with an employer/employee relationship.</u>

The vital test in determining whether a worker is an employee or independent contractor is whether the employer has retained the right of control or supervision of the employee as to the details regarding their performance of work. *McKenzie v. Charlton*, 262 N.C. App. 410, 413, 822 S.E.2d 159, 161 (2018). Courts will look to the degree of control and direction retained by the employer over the details of the work performed

in determining the employment relationship. *Vaughn v. N.C. Dep't of Human Res.*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979); *see also Gammons v. N.C. Dep't of Human Res.*, 344 N.C. 51, 56-7, 472 S.E.2d 722, 725-26 (1996); *Rhoney v. Fele*, 134 N.C. App 614, 617, 518 S.E.2d 536, 539 (1999) (finding that the "central issue in determining whether one is an independent contractor or an employee is whether the hiring party retained the right to control or superintendence over the contractor or employee as to details.")

In *McKenzie*, the plaintiff filed suit against the defendant, alleging wrongful death as a result of the actions of the defendant's employee. *Id.* at 411, 822 S.E.2d at 160-61. The court in *McKenzie* found that whether an agent is an independent contractor or an employee significantly depends on the degree of control retained by the principal over the critical points of work regardless of whether such control was actually utilized. *Id.* at 412-13, 822 S.E.2d at 161. The *McKenzie* court pointed out "[t]he right to fire is one of the most effective means of control and . . . an independent contractor is subject to discharge only for cause and not

because he adopts one method of work over another, whereas an employee, on the other hand, may be discharged without cause at any time[.]" *Id.* at 418, 822 S.E.2d at 164.

In this case, UNCA and Olson retained ultimate control over the details of Settman's work. Settman was first hired as W-2 employee in 2020 and was extensively supervised and instructed on what role he was to play within the SHA program. (R p 20). Settman was rehired in 2023 to continue largely the same work, he was subject to a high level of oversight and onboarding and was required to submit status reports and pitches throughout his employment (R pp 19-20). As admitted in Paragraph 11 of Defendants' Answer, Olson and Lanou oversaw the SHA program and Plaintiff's contributions. (R p 36). Plaintiff reported to supervisors: Gold and Olson; had to regularly provide reports and updates regarding progress on the Paper, and Plaintiff's drafts required supervisor approval. (R p 13). Not only was Settman's final product subject to approval, but his methods and means of research and revisions were under constant scrutiny. Further, Olson did not limit Settman's

work to solely the Paper, but also directed Settman to work on and draft other papers during his time working for UNCA at her direction. (R p 13).

The SHA Program was run out of NCCGW, and as Defendants admit in Paragraph 35 of their Answer, Olson oversaw operations and funding of the NCCHW – the buck stopped with her. (R pp 13, 42). While Settman was rehired in 2023 to revise the Paper for publication, he did not have control over the means or methods to do so. Settman could not revise any paper, much less the Paper, worthy of publication making scientific claims without the underlying raw data utilized to make those claims – and only Olson, who declined to supply access, could provide that data as admitted in Paragraph 37 of Defendants' Answer. (R pp 14, 42-43). Olson further forced Plaintiff, over his objections, to credit individuals with contributing to the Paper who did not in fact make contributions – further illustrating that Plaintiff had no authority to act unilaterally or with autonomy for the duration of his employment with UNCA. (R pp 15, 17, 83).

When Settman was asked to continue working in 2024 after his contract was scheduled to terminate, Olson increased his wage. (R p 13). This authority was granted to her by UNCA which also granted the authority to hire and fire workers at NCCHW. (R pp 13, 84). As shown in the "Independent Contractor Agreement" the power of terminations rested with Olson and UNCA who could terminate the contract "at any time by notice in writing from UNCA." (R p 93). Further establishing Olson and UNCA's absolute control and authority over Settman, Settman was actually fired with no notice, much less any written notice as would have been required for an independent contractor – indicating again that Settman was treated as an employee. (R pp 21, 93). Thus, UNCA and Olson retained complete and ultimate control over Settman's work processes and product as well as the ability fire Settman with no notice – demonstrating that Settman was treated as an employee subject to the protections of the Whistleblower Act.

ii. Plaintiff was paid on a regular interval by the hour, consistent with an employer-employee relationship, was not engaged in an independent business, and saw no opportunity for profit or loss.

When a Plaintiff shows that he did not in fact operate as an independent business nor retain the unfettered right to make "independent use of [his] skill, knowledge, and training" nor did he perform work for a fixed lump sum - it is indicative that the relationship is that of employee not an independent contractor. *Hayes*, 224 N.C. at 15-16, 29 S.E.2d at 139-40. Courts examining employee relationships will also give weight to the method of payment made to a worker, finding that "[p]ayment on a time basis is a strong indication of the status of employment [while p]ayment on a completed project basis is indicative of independent contractor status." *Capps v. Southeastern Cable*, 214 N.C. App. 225, 235, 715 S.E.2d 227, 234 (2011) quoting *Juarez v. CC Servs.,* 434 F. Supp. 2d 755, 762, 2006 U.S. Dist. LEXIS 39866, *18 (D. Ariz. 2006).

In *Capps*, despite the factual circumstances that the Defendant provided Plaintiff with tax forms for an independent contractor, Plaintiff had to obtain his own insurance, and Plaintiff was specifically hired as a subcontractor, the Court of Appeals found that Plaintiff was an employee based on an analysis of the *Hayes* factors. *Id.* at 242-243. Despite evidence presented by the Defendant in support of independent contractor status, the Court of Appeals re-iterated N.C. Supreme Court's prior determination that "the parties' own conclusion about their legal relationship is not binding on the Court." *Id.* at 231 (quoting *Lemmerman v. Williams Oil Co.,* 318 N.C. 577, 584, 350 S.E.2d 83, 88 (1986)) (internal citations omitted). The court's analysis instead focused on the fact that Plaintiff did not engage in independent work as a cable installer, received special training from Defendant, lacked the freedom to use his specialized skill or his own tools, and was required to perform work subject to the instruction and supervision of Defendant. *Id.* at 230-35.

In this case, when Settman was initially hired in 2020 he earned an hourly wage, payable at regular intervals. (R p 11). Notably – as pled in

the Complaint – Plaintiff's work did not change under the "Independent Contractor" agreement and in fact he again was paid an hourly wage, payable at regular intervals. (R pp 12-13, 92). Under both tenures, Plaintiff had to submit timecards to Olson showing the number of hours worked in a month. (R pp 11-12, 92). This payment on a per hour basis is a strong indication of employee status. *See generally Eren v. Comm'r*, 180 F.3d 594, 597, 1999 U.S. App. LEXIS 13123, *7 (4th Cir. Ct. App. 1999).

This is juxtaposed against an independent contractor who would be paid based on deliverables or commission – rather than hourly based on days or hours worked. A true independent contractor would have some investment of resources into the project or work performed – potentially seeing some return on that investment or some potential to retain profits or sustain a loss. *Kesler Const. Co. v. Dixson Holding Corp.*, 207 N.C. 1, 5-6, 175 S.E. 843, 845-46 (1934); see also *Weber v. Comm'r*, 60 F.3d 1104, 1112, 1995 U.S. App. LEXIS 20238, *25 (4th Cir. Ct. App. 1995).

This simply is not the case for Mr. Settman, who saw zero opportunities for profit or loss based on performance. Plaintiff was assigned a role, heavily supervised, limited in the ways he could perform his role, was paid based solely on the amount of time he devoted to UNCA and NCCHW, and saw no opportunity for payment based on performance or deliverables. Olson retained the ability to increase Plaintiff's wage and to hire or fire Plaintiff – in her sole discretion. (R p 13, 19-21). The greater weight of the evidence as shown in the record establishes that Defendants maintained financial control over Settman consistent with an employer-employee relationship – thus establishing that Settman is an employee protected under the Whistleblower Act and sovereign immunity does not apply.

iii. Plaintiff's work was continuous and integral to the primary purpose of UNCA's NCCGW and SHA program.

An additional factor considered by courts across jurisdictions is whether the work is integral to the operations of the hiring organization and whether the work is continuous. Diane M. Juffras, *Determining*

Whether a Worker Is an Independent Contractor or an Employee, POPULAR GOVERNMENT, Fall 2006, Vol. 72, at 27. *See generally Thomas v. Brock*, 617 F. Supp. 526, 534-536, 1985 U.S. Dist. LEXIS 16554, *22-28 (W.D.N.C. 1985)(holding that the continuous nature of work and central role in operations weighed in favor of finding an employee status); *See also Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC 81, *102, 2019 NCBC LEXIS 116, *60 (Sup. Ct. 2019) (finding an employee-employer relationship despite two separate contracts denoting defendant Siskey as "independent contractor" of Defendant Metlife, noting that Siskey continued to do the same work which was integral to Metlife's operations).

Settman's work was continuous and integral to the primary purpose of the NCCGW's SHA program. When Settman was rehired in 2023 there was identical verbiage describing Settman's scope of work from when he was a W-2 employee. (R p 84). Additionally, the work assigned built upon the research design, survey dissemination, and the grant report from when he was a research assistant – and his supervisor,

Olson, remained the same as in his prior tenure. (R pp 12, 21). Further, Settman worked beyond his second contract without any contract in place from December 1, 2023, to January 2024, despite no acknowledgment from UNCA. (R p 21). All parties treated Settman as an integral team member – accepting the benefits of his work beyond the term of the "Independent Contractor Agreement." When a new employment contract was proposed to Settman in January 2024, it was to last six months as opposed to the prior 3-month term, demonstrating a trend toward longevity of this employment relationship. (R pp 13, 85). This continuous nature of his work with UNCA's SHA program is indicative of an employee relationship.

The NCCHW's SHA program was focused upon mitigating the spread of COVID-19 and promoting student mental health and well-being. (R p 10). This work is critical to the founding purpose of the NCCHW and SHA programs because they are a public service institution within UNCA that conducts public health research and advocacy. (R p 10). As admitted in Paragraph 17 of Defendants' Answer, grant-funded

projects such as the SHA funded by the Dogwood Health Trust, are expected to submit reports and publish the project's findings. (R pp 11, 37). Without such reports, funding would be lost. Settman was specifically hired and extensively supervised to meet these tasks, and as admitted in Paragraph 26 of Defendants' Answer, Settman's work as a student employee was utilized to support a version of the Paper submitted but rejected to JACH for publication. (R pp 21, 39). The integral nature of Settman's work for UNCA's programs set against the backdrop of the Whistleblower Act's public policy cannot be understated. Where the goal of the Act is the prevention of fraud against the general public and assurance of integrity among public employers – and Settman's integral role with UNCA included (though was not limited to) uncovering gaps in research, unsubstantiated claims, and otherwise ensuring honesty and integrity in academic research – Settman's status as an employee of UNCA is clear.

Ultimately, the record contains ample and sufficient allegations and admissions of factual circumstances surrounding Settman's

employment relationship with UNCA to establish the jurisdictional fact that Settman was an employee of Defendants, not an independent contractor. Pursuant to this employee-employer status, Settman is afforded the protections under the Whistleblower Act and sovereign immunity does not apply.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS-APPELLEES' MOTION TO DISMISS BECAUSE THE COMPLAINT CONTAINS SUFFICIENT ALLEGATIONS TO SUPPORT EACH ELEMENT OF A CLAIM UNDER THE NORTH CAROLINA WHISTLEBLOWER ACT.

A. Standard of Review.

A Motion to dismiss pursuant to Rule 12(b)(6) will fail when the moving party cannot demonstrate "beyond doubt that the [P]laintiff can prove no set of facts in support of his claim which would entitle him to relief." *Brown v. Brown*, 21 N.C. App. 435, 436, 204 S.E.2d 534, 536 (1974). The Court's review under Rule 12(b)(6) is confined to the face of the pleadings. When considering a Rule 12(b)(6) motion, the allegations of the complaint are liberally construed, and the court must deny the motion "unless it appears to a certainty that plaintiff is entitled to no

relief under any statement of facts which could be proved in support of the claim." *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995). The question for the Court is whether "the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (internal citation omitted).

As set forth more fully below, the allegations of Plaintiff's Complaint are sufficient for the Court to determine relief may be granted under the North Carolina Whistleblower Act and therefore Defendants' Motion to Dismiss should be denied.

B. The Allegations of the Plaintiff-Appellant's Complaint Set Out a Prima Facie Case for Violation of the North Carolina Whistleblower Act.

A prima facie claim under the Whistleblower Act includes "(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 against the plaintiff." *Newberne v. Dep't of Crime*

Control & Pub. Safety, 359 N.C. 782, 788, 618 S.E.2d 201, 207 (2005). Upon showing a prima facie case, "the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action." *Id.* at 789. If the employer meets this burden, the Plaintiff can show evidence "that the legitimate reason was a mere pretext for the retaliatory action." *Id.*

i. Plaintiff-Appellee was engaged in protected activity as an employee for the State of North Carolina.

Section 84(a)(2) of the North Carolina Whistleblower Act imposes on State employees a duty to report evidence of fraud committed by a State agency or State employee. N.C. Gen. Stat. § 126-84 (a)(2). Specifically, the statute states:

> "it is the policy of this State that State *employees shall* have a duty to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting any of the following: (1) A violation of State or federal law, rule or regulation. (2) Fraud. (3) Misappropriation of State resources. (4) Substantial and specific danger to the public health and safety. (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority."

N.C. Gen. Stat. § 126-84 (a) (emphasis added). As such, reporting instances of fraud, mismanagement or waste of resources, or dangers to public health and safety are protected activities under the Whistleblower Act. *Id*. If, accepting allegations in the Complaint as true, the Court finds there is sufficient evidence that Plaintiff reported activity which would fall under one of the prohibitions listed in §126-84(a) – then the Defendants' Motion to Dismiss should be denied. *See generally*, *Helm v. Appalachian State Univ.*, 194 N.C. App. 239, 251, 670 S.E.2d 571, 579 (2008), rev'd, 363 N.C. 366, 677 S.E.2d 454 (2009) (adopting reasoning of Calabria J., dissenting) (the dissent focused on the need to accept allegations of the Complaint as true as opposed to adopting a bright line rule as to what constitutes prohibited activity by a public employer under the Act).

Here, as alleged in the complaint in paragraphs 36-45 and 56-58, Settman witnessed violations of state law and research integrity in the fraudulent reporting of data during his time working for UNCA. (R pp 14, 17). This included raising concerns with data management,

unsubstantiated conclusions in the Paper being submitted for publication, the omission of negative data in reports to grant funders, NCCHW's willingness to attempt publication while lacking access to raw data from the SHA program, inaccurate data reporting to Dogwood Health Trust, and fraudulent authorship credits. (R p 14-16). As stated in Paragraph 38 of the Complaint (and as admitted by Defendants) "attempting to publish a study's conclusions without being able to readily provide its support data grossly deviates from scientific research and academic journalism standards and constitutes a serious violation of research integrity." (R p 14). Despite Plaintiff's requests for the underlying data, he was not permitted to inspect it, was told some data was irretrievable, but was instructed to continue working on the Paper for publication regardless. (R p 16).

After Plaintiff's concerns were ignored by Olson and other NCCHW colleagues and Olson pushed for publication despite the absence of supporting data – Plaintiff made explicit reports of research misconduct and fraudulent publishing of data via email to Olson (his supervisor) and UNCA General Counsel John Dougherty on 14 March 2024. (R p 18).

By reporting this activity within the UNCA system to both his supervisor and escalating to General Counsel, Plaintiff satisfied his duty pursuant to the Whistleblower Act of reporting fraudulent activity committed by a state agency or employee. This reporting by Plaintiff was protected activity squarely within the definition provided by N.C. Gen Stat. §126-84(a). This was a report about potential fraud, misappropriation of resources (submitting reports fraught with research misconduct for the purpose of obtaining grant funding), and concerns over matters endangering public health (given that the purpose behind the SHA program was to promote student-wellbeing and stop the spread of Covid-19) – and speaks to the heart of what the Whistleblower Act seeks to protect against.

The Complaint contains sufficient allegations, when accepted as true, that Plaintiff was engaged in protected activity as is defined under the Whistleblower Protection Act.

ii. <u>Settman's protected activity was a substantial, direct, and the motivating factor for UNCA and Olson's adverse employment action of firing Plaintiff-Appellant.</u>

In relevant part, the Whistleblower Act establishes state policy to protect "employees who report activities under this statute" from retaliation. N.C. Gen. Stat. § 126-85. To show and establish the second and third points of a prima facie case under the Whistleblower Act, a plaintiff must demonstrate that the defendant took adverse action against the plaintiff's employment and that there is a causal connection between the protected activity and that adverse action. *Newberne*, 359 N.C. at 788, 618 S.E.2d at 207.

Regarding the third element of a prima facie case there are three different ways a plaintiff can establish a causal connection between the protected activity and the adverse action taken. *Id.*

> "First, a plaintiff may rely on the employer's admission that it took adverse action against the plaintiff solely because of the plaintiff's protected activity. . . . Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered

> explanation for the action was pretextual. Cases in this category are commonly referred to as pretext cases. . . .Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken."

Id. (internal citations omitted). Further, when establishing the third point of the prima facie case under the Whistleblower Act, "the employer must proffer a legitimate, non-retaliatory reason for firing the plaintiff." *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 317, 567 S.E.2d 803, 811 (2002). In reality, discovery is often necessary to understand the full scope of evidence available that could support both legitimate and illegitimate considerations for the adverse employment action. *Newberne*, 359 N.C. at 794-95. This further illustrates that upon Plaintiff's showing of a prima facie case, dismissal at this stage in the proceedings would be inappropriate.

In the context of a retaliation claim, North Carolina courts specifically hold that a prima facie case is sufficient to survive a motion

to dismiss if there is a protected activity (such as reporting fraudulent conduct, as in this case) followed quickly in time by an adverse employment action, such as a termination. "A temporal connection between the protected conduct and the adverse employment action may be sufficient to present a genuine factual issue on retaliation….Indeed, a close temporal connection between the two events is generally enough to satisfy the third element [causation] of the prima facie test." *Hoaglin v. Duke Univ. Health Sys., Inc.*, 293 N.C. App. 517, 529, 901 S.E.2d 378, 389 (2024) (internal quotations and citations omitted).

In this case, from December 2023 to February 2024, Plaintiff uncovered several instances of research misconduct and ultimately revealed that Olson and others were unable (or perhaps unwilling) to produce raw, corroborating data to support conclusions offered in: (1) their Paper submitted for publication in an academic journal, and (2) their claims in reports submitted to funders. (R p. 15-17). The Complaint sufficiently alleges that just five days after Settman reported these concerns to his supervisor and UNCA's general counsel, evincing his

willingness to escalate the issues to Tim Elgren (the Chief Research officer of the Office of Sponsored Scholarships and Programs) to initiate an investigation, he was terminated – thus establishing an adverse employment action by UNCA. (R p 18).

While Defendants have offered another reason for Settman's termination (adverse employment action), this alternative reasoning is entirely pretextual and unsupported by evidence. (R pp 18-19). Similar to the Plaintiff in *Caudill*, Settman has alleged evidence of his prior exemplary marks and performance reviews showing he was a productive and appreciated member of the NCCHW team. (R pp 18-19), *See Caudill*, 129 N.C. App. at 655, 501 S.E.2d at 103. In fact, Defendants even admit these positive employee reviews in their Answer (R pp 53-54). The temporal proximity with no intervening events or actions between Plaintiff reporting fraudulent activity to UNCA and Plaintiff's termination is sufficient to establish a prima facie case for the causal connection between the protected activity and adverse employment action. In any event, the differing narratives present at this pleading

stage establish that there is a genuine dispute as to this third element of this claim arising under the Whistleblower Act – and such is a question of fact for the jury. *See e.g. Caudill*, 129 N.C. App. at 655, 501 S.E.2d at 103.

The Complaint alleges that Settman made the report of fraudulent activity on 14 March 2024 (R p 18). Neither general counsel for UNCA nor Olson responded to his email. (R p 18). Instead, Olson led Settman to believe they were having a previously scheduled meeting on 19 March 2024 to discuss the status of the Paper. (R p 18). Then on 19 March 2024, with no prior written notice (which would have been required had Settman been actually treated as an independent contractor) – Settman was terminated just five days after his emailed report. (R p 18). Settman sought some redress after his termination and contacted the Dean of Social Sciences at UNCA who then instructed him to call the UNCA Institutional Hotline to submit a complaint. (R p 19). However, the hotline was disabled. (R p 19).

Plaintiff has made sufficient allegations, when accepted as true, that establish he was engaged in the protected activity of reporting fraud to his state employer and supervisor, he suffered a termination (adverse employment action) just five days after engaging in this protected activity, and the adverse employment action has all the hallmarks including temporal proximity to show a causal connection between the protected activity and Settman's termination. For the above reasons, Plaintiff respectfully requests this Court to reverse the trial court and deny Defendants' Motion to dismiss pursuant to Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests the Court of Appeals to reverse the trial court's order and to DENY Defendants' Rule 12(b)(1) and 12(b)(2) Motions to Dismiss because Plaintiff is a state employee protected under the Whistleblower Act and therefore, sovereign immunity does not apply. Appellant respectfully requests this Court reverse the trial court's order and DENY Defendants Motion to Dismiss pursuant to 12(b)(6) because the Complaint alleges sufficient facts to support a claim under the Whistleblower Act.

This the 26th day of February, 2026.

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CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiff-Appellant certifies that the foregoing brief, which was prepared using a 14-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

/s/ Isabel W. Carson
Isabel W. Carson

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CERTIFICATE OF SERVICE

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This is to certify that a copy of Appellant's Brief was duly served upon all parties in accordance with the provisions of Rule 26(c) of the North Carolina Rules of Appellate Procedure on **February 26, 2026**, by filing it electronically with the North Carolina Court of Appeal's electronic filing website, https://www.ncappellatecourts.org., and by concurrently emailing a copy hereof to all counsel of record at the email address listed below.

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