

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF DURHAM

FILED

FILE NO. 18-CV-_____

BENJAMIN DURANT,

Plaintiff,

v.

NORTH CAROLINA CENTRAL
UNIVERSITY and JOHNSON O.
AKINLEYE, in both his official capacity
as Chancellor of North Carolina Central
University and in his individual capacity,

Defendants.

2018 APR 17 P 12:48

DURANT, et al., vs. NCCU

BY _____

COMPLAINT

COMPLAINT

COMES NOW Plaintiff Benjamin Durant, by and through counsel, and for his Complaint against Defendants North Carolina Central University and Johnson O. Akinleye, states and alleges as follows:

INTRODUCTION

1. Mr. Benjamin Durant has spent more than twenty-five years as a civil servant, during which time he has enjoyed an unblemished career.
2. Mr. Durant's unblemished career came to an abrupt halt on January 31, 2018, when he was wrongfully discharged from his employment as Vice Chancellor – Administration and Finance at North Carolina Central University ("NCCU").
3. On January 31, 2018, NCCU Chancellor Johnson O. Akinleye sent Mr. Durant a letter stating that Mr. Durant's employment was discontinued because Chancellor Akinleye wanted to make a "strategic change." This was not true.

4. As set forth in greater detail below, the real reasons that Mr. Durant's employment with NCCU was terminated were: (1) Mr. Durant reported certain unlawful and inappropriate activities to a member of the NCCU Board of Trustees; (2) Mr. Durant vocally opposed the misappropriation of State funds to purchase a luxury vehicle for the Chancellor's personal use; and (3) Upon information and belief, Chancellor Akinleye feared that Mr. Durant would take further actions and/or make additional reports of illegal and improper activities.

5. Because he tried to follow State statute and regulations, Mr. Durant was terminated from his employment two years and one month shy of full retirement vesting in the North Carolina State Employee Pension Plan and suffered other damages to his income and reputation.

6. Mr. Durant seeks just compensation for his losses pursuant to the North Carolina Whistleblower Act and common law.

THE PARTIES

7. Plaintiff Benjamin Durant is a citizen of North Carolina who resides in Durham County. He was employed as NCCU's Vice Chancellor – Administration and Finance from December 1, 2014 through January 31, 2018.

8. Plaintiff Durant accepted a written offer of employment from NCCU dated October 6, 2014, and signed EPA Terms of Employment on October 9, 2014. These two documents together set forth the basic terms of the employment agreement between Plaintiff Durant and Defendant NCCU.

9. At all times relevant to this Complaint, Plaintiff Durant was a "state employee" entitled to the protections of Article 14 of the North Carolina Whistleblower Act pursuant to N.C. Gen. Stat. § 126-5(c)(5).

10. Defendant North Carolina Central University (“NCCU”) is a public university and member of the University of North Carolina system located in Durham, North Carolina.

11. Defendant Johnson O. Akinleye is a citizen of North Carolina who resides in Durham County. Defendant Akinleye was appointed Chancellor of NCCU on or about June 26, 2017, and has held the appointment continuously since that date. He is being sued in both his official capacity and his personal capacity.

12. As NCCU’s Chancellor, Defendant Akinleye is the head of a State institution or, in the alternative, a State employee exercising supervisory authority, within the meaning of N.C. Gen. Stat. § 126-85.

FACTUAL BACKGROUND

A. The Steering Of A \$90 to \$120 Million Public-Private Partnership Contract.

13. The North Carolina Board of Governors is a body politic and corporation comprised of approximately twenty-nine (29) members who are elected by the membership of the Boards of Trustees of the various public institutions that are part of the University of North Carolina system. Pursuant to N.C. Gen. Stat. § 116-11, the Board of Governors has been delegated powers and duties that include the general management and oversight of all of the constituent universities in the University of North Carolina system, including NCCU.

14. In or about 2016, NCCU began studying the possibility of a “Public-Private Project” (hereafter “P3”) as defined in N.C. Gen. Stat. § 142-128.1C(a)(8) to facilitate the development, construction and operation of new on-campus student housing at a cost of between \$90 and \$120 million.

15. In or about 2017, NCCU also began to consider seeking a so-called “Millennial Campus” designation pursuant to N.C. Gen. Stat. § 116-198.33(4b). The Board of Governors is

empowered and responsible for establishing any portion of a campus in the University of North Carolina system as a “Millennial Campus.”

16. As Vice Chancellor – Administration and Finance, Mr. Durant was involved in identifying solutions to NCCU’s student housing issues and methods of financing any solutions chosen.

17. In or about July 2017, Mr. Durant recommended to Chancellor Akinleye that NCCU extend the scope of its existing contracting relationship with Reith Jones Advisors (hereinafter “RJA”) to include designing and implementing a process for selecting a P3 partner that would comply with North Carolina law and would be fair and open, so as not to erode public trust and confidence. Chancellor Akinleye accepted Mr. Durant’s recommendation.

18. During the Summer and Fall of 2017, Mr. Durant worked closely with RJA to develop a Request for Qualifications (the “RFQ”) for a P3 partner that would comply with the requirements of N.C. Gen. Stat. § 143-128.1C(h).

19. Beginning in or about September 2017, Chancellor Akinleye held a series of secret meetings about NCCU’s exploration of a P3 and Millennial Campus designation. The electronic calendar invites and other materials referenced these secret meetings as “Chancellor’s Strategic Meetings.”

20. Chancellor Akinleye asked Mr. Durant to attend at least some of the “Chancellor’s Strategic Meetings.”

21. North Carolina Board of Governors members Darryl Allison and Harry Smith also attended some of the “Chancellor’s Strategic Meetings.”

22. The first “Chancellor’s Strategic Meeting” Mr. Durant attended was held at Chancellor Akinleye’s home on a Sunday evening in approximately September 2017.

23. Mr. Durant attended approximately five “Chancellor’s Strategic Meetings” in the Fall of 2017.

24. On October 17, 2017, Mr. Durant attended a Chancellor’s Strategic Meeting at Board of Governors member Darryl Allison’s office in downtown Raleigh. Other attendees included Mr. Allison, Chancellor Akinleye, Associate Vice-Chancellor for Facilities Jonathan Peeler and Budget Director Akua Matterson.

25. In advance of the October 17 Meeting, Chancellor Akinleye’s Chief of Staff circulated a presentation deck prepared by private developer Preiss Development Company, in which Preiss touts its prior experience and suitability as a private partner to develop and operate on-campus housing.

26. At the October 17 meeting, Mr. Allison suggested that NCCU work with Preiss as the P3 partner to develop student housing.

27. Mr. Durant told Mr. Allison that NCCU was obligated to run a fair, open and competitive RFQ process to select the private partner.

28. Mr. Allison responded, “In the private sector, we go through those processes too, but we already know the developer we are going to pick up front.”

29. On October 19, 2017, a second meeting was convened at Mr. Allison’s offices in downtown Raleigh. This meeting was attended by Board of Governors member Harry Smith, as well as the individuals who attended the October 17 Meeting.

30. During the October 19 meeting, the attendees discussed the Preiss Company and their presentation deck a second time. Mr. Smith led the discussion about Preiss Company and answered questions on behalf of the Preiss Company.

31. Mr. Smith aggressively questioned Mr. Durant during the October 19 meeting, and suggested at one point that Mr. Durant should disengage from the P3 selection process.

32. In November and December 2017, Chancellor Akinleye repeatedly and aggressively questioned Mr. Durant regarding his insistence on proceeding with an open RFQ process.

33. In early December 2017, Chancellor Akinleye contacted Mr. Durant and said he had received complaints via Board of Governors members from Mr. Joe Green at Preiss Development Company about the manner in which the RJA consultant was discussing the RFQ process with potential developers. Chancellor Akinleye instructed Mr. Durant to “smooth things over” with Mr. Green.

34. In early January 2018, the RJA consultant related to Mr. Durant a conversation that the consultant had with an architect working with Preiss Development Company. In the conversation, the architect told the consultant that Mr. Green was “very powerful,” “could be helpful to [the consultant’s] career,” and that “Harry Smith is one of [Mr. Green’s] investors.”

35. Based on the conduct and information described above, Durant reasonably and in good faith had concerns that Chancellor Akinleye and Board of Governors members Darryl Allison and Harry Smith were attempting to “steer” the P3 development contract to Preiss Development Company.

36. The “steering” of a P3 contract violates the requirements set forth in N.C. Gen. Stat. § 143-128.1C(h) and (i), which require decisions regarding which private developer to partner with on a project to be based on “the qualifications package submitted” in response to the RFQ.

37. On or about January 15, 2018, Mr. Durant reported the information in Paragraphs 18 through 34 above to Mr. Michael Johnson, a member of the NCCU Board of Trustees and the Chairman of the Board of Trustees' Audit Committee.

38. Trustee Johnson and Mr. Durant discussed a plan to put an end to any attempt to "steer" the P3 contract. Had Trustee Johnson refused to take action, Mr. Durant intended and was prepared to contact the State Auditor's office regarding his concerns. Before Trustee Johnson's plan could be implemented, however, Mr. Durant was terminated from his employment.

B. The Chancellor's Luxury Vehicle Purchase.

39. Within a few weeks of his June 2017 appointment, Chancellor Akinleye requested that NCCU furnish him with a black sports utility vehicle ("SUV") with Bluetooth technology.

40. In or about August 2017, staff secured a new, black Nissan Pathfinder for Chancellor Akinleye through a lease from the State Motor Pool.

41. Chancellor Akinleye took possession of the Nissan Pathfinder in or about August 2017.

42. In October 2017, Chancellor Akinleye requested that staff replace the Nissan Pathfinder with a GMC Yukon Denali with black exterior, black leather interior, and Bluetooth technology, among other things.

43. Mr. Durant delegated to Associate Vice-Chancellor for Facilities Jonathan Peeler the task of attempting to determine whether Chancellor Akinleye's request could be fulfilled.

44. In approximately November 2017, Mr. Peeler outlined several potential avenues for pursuing acquisition of the vehicle. Mr. Peeler recommended and Mr. Durant agreed that the most appropriate means of financing the vehicle acquisition was to request funds from the NCCU Foundation so that there could be no accusation of misappropriation of State funds.

45. Upon information and belief, Chancellor Akinleye or staff acting on his behalf declined to accept Mr. Peeler's recommendation to use NCCU Foundation funds.

46. On December 13, 2017, the North Carolina Department of Administration sent a letter addressed to Chancellor Akinleye stating that the Department deemed the GMC Yukon Denali a "luxury vehicle," and that the Division of Motor Fleet Management did not maintain a contract for, and would not purchase or assign, a "luxury vehicle" for official State use.

47. Upon information and belief, Chancellor Akinleye's office received the Department of Administration's letter on December 18, 2017. Mr. Durant was on vacation surrounding the Christmas holiday at the time.

48. Upon information and belief, Akinleye or staff acting on his behalf summoned a member of front-line staff to the Chancellor's office, gave the front-line staff member a copy of the Department of Administration's letter, and instructed the staff member to immediately execute the vehicle purchase using the General Fund.

49. On December 20, 2017 (while Mr. Durant was still on vacation), NCCU used the General Fund to purchase a GMC Yukon Denali meeting the Chancellor's specifications for \$69,403.91.

50. NCCU's use of the General Fund to purchase a vehicle not covered by a State contract violated N.C. Gen. Stat. § 116-13 and applicable North Carolina regulations.

51. On or about January 25, 2018, Chancellor Akinleye contacted Mr. Durant by phone to inform him that the temporary registration tags on the vehicle had expired. During the conversation, Chancellor Akinleye asked, "How did we pay for the vehicle? I hope we didn't use state funds."

52. Mr. Durant investigated the source of funding and found the December 13 correspondence from the Department of Administration. Mr. Durant promptly informed Chancellor Akinleye that State funds should not have been used, and reiterated his earlier recommendation that the NCCU Foundation issue funds to purchase the GMC Yukon Denali.

53. On January 26, 2018, Mr. Durant contacted Mr. Antonio McDaniel, Executive Director of the NCCU Foundation, to explain that it was urgent that the NCCU Foundation approve use of the Chancellor's Discretionary Fund at the Foundation to purchase the GMC Denali and reimburse the General Fund for the cost. Mr. McDaniel initially agreed to Mr. Durant's request, but stated that he had to get additional approvals before releasing Foundation funds.

54. On January 29, 2018, Chancellor Akinleye called Mr. Durant into the Chancellor's office and informed Mr. Durant that the Foundation was questioning whether it should pay for the vehicle. Chancellor Akinleye stated, "I don't want to burn my political capital with the Foundation over this vehicle."

55. Chancellor Akinleye tried to convince Mr. Durant to drop the issue of the funds used to purchase the vehicle. Mr. Durant continued to reiterate that State appropriations were not properly used to purchase the vehicle.

56. When Mr. Durant refused to let the issue drop, the Chancellor became enraged. In his anger, Chancellor Akinleye yelled at Mr. Durant and called Mr. Durant "stupid" and "clueless."

57. After trying to defend himself in the midst of Chancellor Akinleye's tirade, Mr. Durant got up from his seat, told Chancellor Akinleye that he could not take any more abuse, and left the office.

58. As Mr. Durant was leaving, Chancellor Akinleye continued to yell at him. The last thing Mr. Durant heard as he was leaving was the Chancellor yelling, "You're gone!"

59. On January 31, 2018, Mr. Durant received a letter signed by Chancellor Akinleye terminating Mr. Durant's employment with NCCU. The letter stated that Mr. Durant's at-will employment with NCCU was being discontinued because Chancellor Akinleye was changing "strategic direction."

60. Plaintiff has suffered significant damages and injuries as a result of his discharge.

C. Attempts To Exhaust Administrative Remedies.

61. As Vice Chancellor - Administration and Finance, Mr. Durant was classified by NCCU as Exempt from the grievance procedures set forth in the State Human Resources Act.

62. Pursuant to Section 5 of NCCU's Grievance Policy, a terminated employee must request, and NCCU must provide, a statement of reasons for the termination to initiate the agency's grievance process.

63. On February 5, 2018, Durant timely requested from NCCU a statement of reasons for his termination.

64. On February 12, 2018, NCCU sent another letter signed by the Chancellor. In the February 12 letter, NCCU informed Mr. Durant that it declined to provide any reason for his termination, other than that the Chancellor was utilizing his discretion to terminate Mr. Durant's "at-will" employment. The letter also contended that Section 5 of the NCCU grievance policy was "inapplicable" to Mr. Durant's termination.

**FIRST CAUSE OF ACTION – WRONGFUL/ RETALIATORY TERMINATION –
N.C. GEN. STAT. §§ 126-84, 126-85, AND 126-86
(Against NCCU and Akinleye in both his official and personal capacities)**

65. Plaintiff Durant repeats and realleges Paragraphs 1 through 64 above as if fully restated herein.

66. At all times relevant to this Complaint, Defendant NCCU was an “agency” within the meaning of N.C. Gen. Stat. § 126-86.

67. At all times relevant to this Complaint, Defendant Akinleye was a “person” within the meaning of N.C. Gen. Stat. § 126-86.

68. The actions of Defendant Akinleye and NCCU with respect to both the purchase of the GMC Yukon Denali and the steering of the public-private partnership contract to Preiss Development Company as described above constituted violations of the laws, rules and/or regulations of the State of North Carolina within the meaning of N.C. Gen. Stat. § 126-84(a)(1).

69. The actions of Defendant Akinleye and NCCU with respect to the purchase of the GMC Yukon Denali constituted a misappropriation of State resources within the meaning of N.C. Gen. Stat. § 126-84(a)(3).

70. The actions of Chancellor Akinleye, NCCU, and Board of Governors members Harry Smith and Darryl Allison with respect to the steering of the public-private partnership contract to Preiss Development as described above constituted gross mismanagement and/or a gross abuse of authority within the meaning of N.C. Gen. Stat. § 126-84(a)(5).

71. Plaintiff Durant was discharged from his employment because:

(a) He reported verbally to Trustee Johnson regarding the attempt to steer the P3 contract to Preiss Development;

(b) Defendant Akinleye and NCCU knew or should have known that Mr. Durant was preparing to report the steering of the public-private partnership to the General Administration of the University of North Carolina System and/or the State Auditor;

(c) Plaintiff Durant refused Chancellor Akinleye’s directive to “drop the issue” of the misuse of State funds to purchase the GMC Yukon Denali; and/or

(d) Defendant Akinleye knew or should have known that Mr. Durant's next step with respect to the GMC Yukon Denali would be to report the misappropriation of State funds in violation of statute and regulations to General Administration, the Department of Administration, and/or the State Auditor's office.

72. The reason given for Mr. Durant's discharge in the January 31, 2018 termination letter – that Chancellor Akinleye had decided to change NCCU's "strategic direction" – was a pretext for retaliation. The real reasons that Mr. Durant was discharged are those set forth in Paragraph 71 above.

73. Mr. Durant was wrongfully discharged from his employment in violation of N.C. Gen. Stat. § 126-85.

74. Mr. Durant has suffered and will continue to suffer significant damages as a result of his wrongful discharge.

**SECOND CAUSE OF ACTION – WRONGFUL TERMINATION
IN VIOLATION OF PUBLIC POLICY
(Against Defendant Akinleye In His Personal Capacity)**

75. Plaintiff Durant repeats and realleges Paragraphs 1 through 74 above as if fully restated herein.

76. Chancellor Akinleye took adverse employment action against Mr. Durant.

77. In terminating Mr. Durant's employment for the reasons stated in Paragraph 71 above, Chancellor Akinleye was acting outside the scope of his duties and authority as the Chancellor of NCCU.

78. Mr. Durant performed his job duties in a satisfactory manner at all relevant times.

79. Mr. Durant's protected activities were determinative factors in Chancellor Akinleye's decision to take such adverse employment action against him.

80. As a result of Chancellor Akinleye's unlawful employment actions, Mr. Durant is entitled to back pay, front pay, and other forms of relief.

81. It is the public policy of the State of North Carolina to encourage reporting of and opposition to illegal actions, misappropriation of State funds, and gross mismanagement of State resources, and to discourage retaliation against persons who report and/or oppose such actions in good faith, as manifested in N.C. Gen. Stat. § 126-84(a).

82. Chancellor Akinleye's adverse employment actions against Mr. Durant on account of his opposition to and reporting of illegal activities, misappropriation of State funds, and/or gross mismanagement of State resources is a violation of North Carolina public policy.

83. Mr. Durant has suffered substantial damages as a result of the adverse employment actions taken against him.

84. The conduct, acts and omissions of Chancellor Akinleye constitute malicious, willful and wanton conduct or are in reckless disregard or indifference for Mr. Durant's rights.

**THIRD CAUSE OF ACTION – TORTIOUS INTERFERENCE WITH
ECONOMIC RELATIONS
(Against Defendant Akinleye in his Personal Capacity)**

85. Plaintiff Durant repeats and realleges Paragraphs 1 through 84 as if fully restated herein.

86. Plaintiff Durant held a permanent position with NCCU pursuant to an employment agreement of indefinite duration.

87. Pursuant to the employment agreement, Mr. Durant had a reasonable economic expectation of receiving his salary and certain employee benefits as set forth in his offer letter dated October 6, 2014.

88. Defendant Akinleye knew of Mr. Durant's position with NCCU, the employment agreement between Mr. Durant and NCCU, and the salary and benefits that Mr. Durant received from the employment agreement.

89. Defendant Akinleye intentionally caused NCCU to sever its employment relationship with Mr. Durant and to cease performing under the employment agreement.

90. Defendant Akinleye's actions were taken for wrongful purposes, including the purpose of perpetuating and/or hiding the unlawful activities of Defendant Akinleye and others as alleged herein, and to prevent Mr. Durant from making further reports of those activities to appropriate authorities.

91. Defendant Akinleye exercised his supervisory powers to terminate Mr. Durant's "at will" employment with NCCU for illegal and improper purposes that were not reasonable, good-faith attempts to further Defendant Akinleye's own legitimate interests or the legitimate interests of NCCU.

92. The wrongful actions of Defendant Akinleye have caused Mr. Durant to suffer actual damages, including loss of salary and employee benefits, in an amount to be proven at trial.

93. The conduct of Defendant Akinleye constitutes malicious, willful and wanton conduct or was in reckless disregard or indifference for Mr. Durant's rights.

WHEREFORE, Plaintiff Benjamin Durant prays for the following relief:

(a) Judgment against both Defendants, jointly and severally, for compensatory damages in an amount in excess of \$25,000 plus interest as allowed by law and to be more particularly determined at trial;

(b) Reinstatement of Plaintiff and the payment of back wages pursuant to N.C. Gen. Stat. § 126-87;

(c) Full reinstatement of fringe benefits and seniority rights pursuant to N.C. Gen. Stat. § 126-87;

(d) That he recover from Defendants, jointly and severally, the reasonable costs of attorneys' fees incurred in the prosecution of this action pursuant to N.C. Gen. Stat. § 126-87;

(e) That he recover from Defendant Akinleye punitive damages pursuant to N.C. Gen. Stat. § 1D-1 *et seq.* for his malicious, willful and wanton conduct in an amount to be determined at trial;

(e) That all costs of this action be taxed against Defendants;

(f) That all issues in this case be tried by jury; and

(g) For such other and further relief that the Court deems appropriate.

Respectfully submitted this the 17th day of April 2018.

BY:



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