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Worker's Compensation -- Retaliatory Discharge -- The Legislative Response to Dockery v. Lampart Table Co.

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Workers' Compensation—Retaliatory Discharge—The Legislative Response to *Dockery v. Lampart Table Co.*

North Carolina adopted its Workers' Compensation Act[1] in 1929 for the purposes of providing swift and certain medical and wage-replacement benefits to injured workers and ensuring limited liability for employers.[2] The social goal behind a worker's compensation system is compensating victims of employment-related injuries in an efficient and dignified manner and allocating these costs ultimately to the consumers of products.[3] The North Carolina Supreme Court has stated that the primary purpose of worker's compensation legislation is "to compel industry to take care of its own wreckage,"[4] and has often held that the Act is to be construed liberally for the benefit of injured employees.[5]

Despite the clear and consistent articulation of these policies favoring compensation, North Carolina shares with much of the nation a persistent problem in administering its compensation system. Unscrupulous employers have commonly avoided their statutory obligations by threatening to fire employees who file compensation claims following injury. Such a threat forces an employee to choose either to bear the full cost of the injury, in direct conflict with the statutory mandate, or to lose his or her job. If the threat is successful, the employer avoids the higher insurance premiums that result from compensation claims; if the threat is unsuccessful and the injured employee is fired, an example is set for the remaining employees. That the practice is not new is demonstrated by cases over the past three decades brought by employees alleging discharges in retaliation for pursuit of workers' compensation[6] and by the enactment of several state statutes outlawing

1. Law of Mar. 11, 1929, ch. 120, 1929 N.C. Sess. Laws 117 (current version at N.C. GEN. STAT. §§ 97-1 to -122 (1979)).

2. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966). Under a workers' compensation system, the employee is deprived of common law rights and remedies for employment-related injuries in exchange for certainty of compensatory payments. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966); Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937).

3. *See* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 2.20 (1978); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951).

4. Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943).

5. Thomas v. Raleigh Gas Co., 218 N.C. 429, 433, 11 S.E.2d 297, 300 (1940); Johnson v. Asheville Hosiery Co., 199 N.C. 38, 40, 153 S.E. 591, 593 (1930); Bartlett v. Duke Univ., 17 N.C. App. 598, 603, 195 S.E.2d 371, 376, *rev'd on other grounds*, 284 N.C. 230, 200 S.E.2d 193 (1973).

6. *See, e.g.*, Greenwood v. Atchison, T. & S.F. Ry., 129 F. Supp. 105 (S.D. Cal. 1955); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Christy v. Petrus, 365

the practice.[7] The Chairman of the North Carolina Industrial Commission has reported that the practice of retaliatory discharge is widespread in North Carolina,[8] and attorneys familiar with worker's compensation agree with that assessment.[9] In 1978, the North Carolina Court of Appeals first addressed the problem and held that an injured employee has no legal protection against being fired for pursuing workers' compensation benefits.[10] Shortly thereafter, the North Carolina General Assembly responded to the court's decision by amending the Workers' Compensation Act to create a claim for relief for employees who are fired for pursuing workers' compensation benefits.[11]

In *Dockery v. Lampart Table Co.*,[12] plaintiff Dockery received neck and back injuries when a load of tables fell on him while working at defendant's furniture factory.[13] He filed for and received temporary disability benefits under the Workers' Compensation Act.[14] After two months of recuperation, he returned to work but was soon fired without being given a reason.[15] Dockery brought an action against his employer, alleging that his discharge was in retaliation for pursuit of his remedies under the Act and was an attempt to discourage his pursuing those remedies.[16] Therefore, Dockery argued, the discharge both undermined the policy of the Act and violated G.S. 97-6, which prohibits the use by an employer of any "device" to relieve the employer of its

Mo. 1187, 295 S.W.2d 122 (1956); Raley v. Darling Shop of Greeneville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950).

7. *E.g.*, CAL. LAB. CODE § 132a (West Supp. 1979); HAW. REV. STAT. § 378-32 (1976); MD. ANN. CODE art. 101, § 39A (1979); N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1979); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1979); OKLA. STAT. ANN. tit. 85, § 5 (West Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1979); W. VA. CODE § 23-5A-1 (1979); WIS. STAT. ANN. § 102.35 (West Supp. 1979).

8. Statement by William H. Stephenson, Chairman of N.C. Industrial Commission, to North Carolina House Committee considering H.B. 568 (now codified at N.C. GEN. STAT. §§ 97-6.1, 1-55(3) (1979 & Supp. 1979)); *see* Charlotte Observer, May 21, 1979, at 1.

9. Telephone conversations with attorneys Charles Cromer of High Point, Judith Kincaid of Raleigh and Al Adams of Raleigh (Oct. 3, 1979).

A survey of insurance executives, union officials, and workers' compensation attorneys in Texas indicated that retaliatory discharge is also common in that state. 4 TEX. TECH. L. REV. 387, 388-90 (1973).

10. Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978).

11. Law of June 1, 1979, ch. 738, 1979 N.C. Sess. Laws 806 (codified at N.C. GEN. STAT. §§ 97-6.1, 1-55(3) (1979) & Supp. 1979)), *quoted at* note 60 *infra*.

12. 36 N.C. App. 293, 244 S.E.2d 272, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978).

13. *Id.* at 294, 244 S.E.2d at 274.

14. *Id.*

15. *Id.* at 295, 244 S.E.2d at 274.

16. *Id.*

obligations under the Act.[17] In addition, he argued that the discharge constituted a tort actionable independently of the statute.[18]

Unable to cite North Carolina precedent recognizing a tort of retaliatory discharge, Dockery relied heavily on the leading case of *Frampton v. Central Indiana Gas Co.*[19] In *Frampton*, the Indiana Supreme Court recognized a claim for relief based upon plaintiff's allegation that she had been fired for filing a workers' compensation claim after being injured on the job. This result was based in part upon a provision of the Indiana workers' compensation statute that prohibits an employer's use of a device to avoid its obligations under the statute in terms substantially identical to the North Carolina Act.[20] The court reasoned that under the statute employers have a duty to compensate employees for work-related injuries and employees have a right to compensation. The goals of the system would be defeated if employers were permitted to penalize employees for filing compensation claims because the fear of being discharged would have a "deleterious effect"[21] on the employee's exercise of his or her statutory rights, resulting in the employer being "effectively relieved of his obligation."[22] Discharge or threat of discharge was thus held to be a "device" prohibited by the statute.[23] The court went further to hold that such a discharge was an intentional, wrongful act actionable in tort.[24] Because the *Frampton* court was concerned with the employer's motive and the coercive effect upon employees, who would choose to bear the full cost of job-related injuries rather than suffer discharge, it found that plaintiff's receipt of statutory compensation did not affect her tort action.[25]

The *Dockery* court, in upholding the dismissal of the complaint for failure to state a claim upon which relief could be granted, rejected the *Frampton* reasoning and refused to find a common-law right of

17. *Id.* N.C. GEN. STAT. § 97-6 (1979) provides that "[n]o contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided."

18. 36 N.C. App. at 295, 244 S.E.2d at 274.

19. 260 Ind. 249, 297 N.E.2d 425 (1973).

20. *Id.* at 252, 297 N.E.2d at 427-28; *see* IND. CODE ANN. § 22-3-2-15 (Burns 1974).

21. 260 Ind. at 251, 297 N.E.2d at 427.

22. *Id.* at 252, 297 N.E.2d at 427.

23. *Id.* at 252, 297 N.E.2d at 428.

24. *Id.*

25. *Id.* at 251, 297 N.E.2d at 427. Other state courts have accepted the *Frampton* reasoning. *See* Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976). *But see* Kelsay v. Motorola, Inc., 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (1977).

action for retaliatory discharge.[26] According to the court, plaintiff's rights were determined by the common-law rule that employment contracts of indefinite duration may be terminated at the will of either party, with or without cause,[27] unless a statute provides otherwise. The court then found no right to relief conferred by statute, refusing to define "device" as used in G.S. 97-6 to include this single act of retaliatory discharge.[28] Further, the court inferred from the statute's failure to provide civil liability for retaliatory discharge a legislative intent that no such claim for relief be created.[29]

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26. 36 N.C. App. at 296, 244 S.E.2d at 275.

27. *Id.* at 297, 244 S.E.2d at 275. The terminable at will rule developed in the late nineteenth century as a presumption to be used in judicial interpretation of employment contracts of unspecified duration. The rule soon froze into a rule of law and has often been responsible for harsh results. *See, e.g.*, Clarke v. Atlantic Stevedoring Co., 163 F. 423 (E.D.N.Y. 1908) (96 black stevedores hired for permanent positions discharged to make room for white stevedores); Lewis v. Minnesota Mut. Life Ins. Co., 240 Iowa 1249, 37 N.W.2d 316 (1949) (company's best salesman dismissed without notice or cause despite promise of lifetime employment in return for remaining with company). *See generally* Note, 15 N.C.L. REV. 276 (1937). The rule contributed to the employer's freedom of enterprise by permitting discharge of employees without judicial examination of the employer's motive and without enforcement of any equity theories of contractual fairness. *See* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438-40 (1975); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-45 (1974).

28. 36 N.C. App. at 298, 244 S.E.2d at 276.

29. *Id.* at 300, 244 S.E.2d at 277. In Cort v. Ash, 422 U.S. 66 (1975), the United States Supreme Court delineated the factors relevant to a consideration of whether an implied cause of action should be recognized. These include: (1) whether plaintiff is one of the class for whose special benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny a remedy; and (3) whether implying a remedy is consistent with the underlying purposes of the statutory scheme. *Id.* at 78. Although the *Dockery* court held there was no actual violation of the statute because plaintiff received his compensation benefits, the *Cort* analysis provides the basis for an argument that an implied statutory cause of action should have been recognized. Plaintiff is one of the class benefited by the workers' compensation scheme, and it is consistent with the scheme to protect the exercise of statutory rights from the threat of job loss. *See, e.g.*, Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); text accompanying notes 19-25 *supra*.

Plaintiff in *Dockery*, however, relied on a tort as well as a statutory cause of action. An example of a tort action for wrongful discharge, as distinguished from an action implied from the terms of a statute, appears in Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978). In *Harless*, plaintiff was discharged for attempting to bring defendant, his employer, into compliance with state and federal consumer credit protection laws. The consumer credit statutes in question did not create a cause of action upon which he could rely, but the court recognized a tort action for discharge based on contravention of substantial public policy. *Id.* at 275 & n.5. Commenting upon the relationship between the policies established by statute and plaintiff's tort action, the court stated:

> We have no hesitation in stating that the Legislature intended to establish a clear and unequivocal policy that consumers of credit covered by the Act were to be given protection. Such manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge.

Id. at 276. In *Dockery*, plaintiff relied on this same principle.

The terminable at will rule of employment contracts has functioned in North Carolina primarily as a canon of contract construction, used by the courts when presented with a discharged employee who asserts a contractual right to continuing employment.[30] Ordinarily the rule operates as a presumption, providing that the employment relationship will be considered terminable at will unless plaintiff can prove a contract for a definite term.[31] Prior to *Dockery*, the rule had been relied upon in North Carolina in only two tort actions for wrongful discharge, as opposed to actions based upon alleged employment contracts. In both *Elmore v. Atlantic Coast Line R.R.*[32] and *May v. Tidewater Power Co.*,[33] plaintiffs alleged that they were summarily and maliciously discharged without cause and that they suffered humiliation due to subsequent public knowledge of the events.[34] The court in each case held that a tort action for wrongful discharge can succeed only if the discharge is accompanied by an independently actionable tort,[35] because, while the discharge itself is not actionable, the terminable at will rule does not alter the duties of conduct imposed upon the parties by tort law.[36]

The *Dockery* court did not undertake the analysis suggested in

30. The rule was adopted in North Carolina in Edwards v. Seaboard & Roanoke R.R., 121 N.C. 490, 28 S.E. 137 (1897), in which the supreme court ruled for the first time that the duration of an employment contract is a question of law rather than a factual question of the parties' actual intentions. The *Edwards* court held that the parties would have specified a duration had they not meant for the contract to be terminable at will. *Id.* at 491, 28 S.E. at 137. The *Edwards* rule has survived intact in contract actions. *See, e.g.*, Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); Tuttle v. Kernersville Lumber Co., 263 N.C. 216, 139 S.E.2d 249 (1964); Wilkinson v. Erwin Mills, Inc., 250 N.C. 370, 108 S.E.2d 673 (1959); Howell v. Commercial Credit Corp., 238 N.C. 442, 78 S.E.2d 146 (1953); Malever v. Kay Jewelry Co., 223 N.C. 148, 25 S.E.2d 436 (1943); Currier v. W.M. Ritter Lumber Co., 150 N.C. 694, 64 S.E. 763 (1909).

31. Thus, for example, in the case of Tatum v. Brown, 29 N.C. App. 504, 224 S.E.2d 698 (1976), plaintiff alleged that she left a job she had held for six years to accept employment with defendant, who had promised her a permanent position. Defendant revoked his promise of employment and plaintiff brought suit to recover the salary promised her until she located comparable employment. The court relied on the terminable at will rule in holding that plaintiff's allegations gave rise to no claim upon which relief could be granted because the promise was for an indefinite period. *Id.* at 505, 224 S.E.2d at 699.

32. 191 N.C. 182, 131 S.E. 633 (1926).

33. 216 N.C. 439, 5 S.E.2d 308 (1939); *see* Note, 18 N.C.L. REV. 261 (1940).

34. 191 N.C. at 185, 131 S.E. at 634-35; 216 N.C. at 440, 5 S.E.2d at 309-10.

35. Under the facts of the cases, there were no independently actionable torts. *See* 191 N.C. at 189, 131 S.E. at 636-37; 216 N.C. at 441-42, 5 S.E.2d at 310. In neither case was it suggested that violations of public policy or statutory rights would support a tort action for wrongful discharge.

36. *See* W. PROSSER, THE LAW OF TORTS 613 (4th ed. 1971). "Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties [to the contract]. . . ." *Id.*

Elmore and *May* of inquiring whether there was an independently actionable tort. Dockery's allegation of retaliatory discharge conceded the general terminable at will rule but asserted an exception to the rule based upon defendant's particular motive and the effect of the Workers' Compensation Act in rendering that motive unjustified. Such an allegation states the elements essential to the general tort action sometimes characterized as prima facie tort.[37]

The prima facie tort approach recognizes a claim for relief for damages caused by defendant's intentional and malicious action that is calculated to harm and is without justification or privilege.[38] Though prima facie tort is a principle of general applicability, it is applied primarily to injuries to economic relations.[39] It thus supplements the strictly categorized nominate torts that protect personal and property interests, and provides an analytical tool for measuring the interests of the plaintiff that have been intentionally invaded against the defendant's justification for his or her action.[40] A familiar example is the spite fence. A person has the legal right to erect fences on his or her land as he or she wishes, but erection of a fence solely to block his or her neighbor's light and air is actionable, even though the neighbor has no common-law right to light and air.[41] Intent to injure and absence of justification are the key elements, and social policy influences the outcome.[42]

37. This characterization has its genesis in the statement of Justice Holmes that "[i]t has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action . . . ." Aikens v. Wisconsin, 195 U.S. 194, 204 (1904). The law of prima facie tort, so characterized, developed primarily in New York. *See generally* Annot., 16 A.L.R.3d 1191 (1967); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465, 475-76 (1957); Note, *The Prima Facie Tort Doctrine in New York - Another Writ?*, 42 ST. JOHN'S L. REV. 530 (1968).

38. The leading case is Mogul S.S. Co. v. McGregor, Gow., & Co., 23 Q.B. 598 (1889), *aff'd*, [1892] A.C. 25, in which Lord Bowen formulated the classic statement of the elements of the tort: "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without cause of excuse." *Id.* at 613.

39. *See generally* Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. UNIV. L. REV. 563 (1959); Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894); Note, 52 COLUM. L. REV. 503 (1952).

40. *See* Forkosch, *supra* note 37; Note, *supra* note 39, at 505. That a consideration of the defendant's motive and justification is central to the determination of liability is evident in many tort fields, *see, e.g.*, W. PROSSER, *supra* note 36, at 24-26, 26 n.8, despite the misleading but frequently noted adage that malicious motives alone do not make wrongful an act that is in its essence lawful. *See, e.g.*, Richardson v. Wilmington & W. R.R., 126 N.C. 100, 101, 35 S.E. 235, 235 (1900).

41. Welsh v. Todd, 260 N.C. 527, 133 S.E.2d 171 (1963); Burris v. Creech, 220 N.C. 302, 17 S.E.2d 123 (1941); Barger v. Barringer, 151 N.C. 419, 66 S.E. 439 (1909). *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS 78 (1956); W. PROSSER, *supra* note 36, at 25.

42. *See generally* Holmes, *supra* note 39, at 3.

Although the North Carolina courts have not adopted the prima facie tort approach by name, the analytical approach is employed in resolving many tort issues. The North Carolina Supreme Court has distinguished actual malice, or ill will, which does not create liability, from legal malice, or absence of justification for an intentionally caused injury, which does impart liability.[43] This terminology is conclusory in itself but reflects the court's resolution of conflicting interests when a defendant has exercised an otherwise legal right in a wrongful manner. This analytical approach has guided the North Carolina Supreme Court's reasoning in the tort fields of nuisance,[44] abuse of process and malicious prosecution,[45] and particularly in the myraid forms of interference with contractual or other economic relationships.[46]

The North Carolina Supreme Court's recent treatment of claims of interference by defendants with contracts of employment between plaintiffs and third parties provides a good example of this analytical approach. In the past, the most common defense to claims of interference with contracts of employment has been the justification of "legal right" to terminate the contract at will,[47] thus precluding an examination of defendant's motive.[48] In *Smith v. Ford Motor Co.*,[49] however, the North Carolina Supreme Court eschewed a formalistic[50] analysis of

43. Childress v. Abeles, 240 N.C. 667, 675, 84 S.E.2d 176, 182 (1954); Coleman v. Whisnant, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945).

44. *See* cases cited note 41 *supra*.

45. *See* Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. REV. 285, 302-04 (1969). *See generally* 1 F. HARPER & F. JAMES, *supra* note 41 at 330 (abuse of process defined as legal process employed "in a manner technically correct but for a wrongful or malicious purpose to attain an unjustifiable end or an object which it was not the purpose of the particular process employed to effect").

46. *See* Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954); Coleman v. Whisnant, 225 N.C. 494, 35 S.E.2d 647 (1945); Haskins v. Royster, 70 N.C. 601 (1874). The court's analysis in this area has suffered from confusion of tort and contract principles when addressing interference with contractual relationships. *See* Note, 54 N.C.L. REV. 1284, 1286 n.17 (1976). *See also* Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936) (interference with expected legacy).

47. *See* Note, *supra* note 46, at 1287-88 n.24.

48. *See, e.g.*, Beane v. Weiman Co., 5 N.C. App. 279, 168 S.E.2d 233 (1969); Biggers v. Matthews, 147 N.C. 299, 302 61 S.E. 55, 57 (1908).

49. 289 N.C. 71, 221 S.E.2d 282 (1976); *see* Note, *supra* note 46, at 1284; Note, 12 WAKE FOREST L. REV. 901 (1976).

50. Formalistic contract law postulated that the contract itself is the exclusive determinant of the parties' legal rights and the only measure of justice. Formalism superceded earlier conceptions of "natural" law that gave legal status to ethical duties outside the actual terms of contract. Formalism in judicial thinking thus forecloses "particularized equitable inquiries into the circumstances of individual cases and [destroys] more particular legal rules in the name of promoting the 'rule of law.'" M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 263 (1977). *See generally* C. FRIEDMMAN, CONTRACT LAW IN AMERICA 18-22 (1965); M. HOROWITZ, *supra*, at 253-63; Dawson, *Economic Duress - An Essay in Perspective*, 45 MICH L. REV. 253 (1947).

contractual relations that would have vindicated defendant and instead examined defendant's actual motive in inducing plaintiff's employer to discharge plaintiff.[51] Plaintiff was employed by an auto dealer and alleged that defendant auto manufacturer had coerced the dealer into firing him by threatening to terminate the dealer's franchise agreement with defendant, which was terminable at will. Although contract analysis placed an "absolute" right in defendant to terminate the franchise and in the dealer to terminate plaintiff's employment,[52] the court held that defendant's right was limited to those motives "reasonably related to the protection of a legitimate business interest."[53] Similar cases in other jurisdictions[54] have employed the *Smith* reasoning in allowing tort claims by employees whose discharge was induced by their employer's workers' compensation insurance carrier because of the employee's pursuit of compensation benefits.[55]

These cases demonstrate the readiness of courts, including North Carolina courts, to look beyond contractual rights when prima facie tort issues of wrongful motive and absence of justification are presented in the employment context. In *Dockery*, plaintiff alleged that his discharge was motivated solely by an attempt to coerce him into foregoing his statutory rights to compensation. The wrongful nature of such a motive is plain. The North Carolina courts in the pre-workers' compensation era recognized that an employer has great influence in determining the conduct of its employees and may use that influence wrongfully to their injury.[56] In one case an employer's attempt to coerce, by means of a threatened discharge, an employee into foregoing a remedy for a work-related injury was viewed as supporting a ruling of undue influence that invalidated a release obtained by the employer.[57]

51. 289 N.C. at 88-90, 94, 221 S.E.2d at 293, 296.

52. *See id.* at 94, 221 S.E.2d at 296.

53. *Id.* Plaintiff in *Smith* was manager of a Ford dealership and alleged that Ford procured his discharge because of his participation in an alliance of Ford dealers who were seeking to improve their bargaining position with Ford. The court indicated that discharge for this reason did not further a legitimate business interest. *Id.* at 87, 221 S.E.2d at 292.

54. *See, e.g.*, American Surety Co. v. Schottenbauer, 257 F.2d 6 (8th Cir. 1958); United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1921); Hilton v. Sheridan Coal Co., 132 Kan. 525, 297 P. 413 (1931).

55. Although this issue had not been presented in North Carolina prior to *Dockery*, the modicum of protection against unjustified interference with the employment relationship established by *Smith* created the possibility that, after *Dockery*, a court could require a legitimate business justification for discharge by the employer's franchisor or insurance carrier but not for discharge by the employer himself. *See generally* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1424 (1967).

56. King v. Atlantic Coast Line R.R., 157 N.C. 44, 63, 72 S.E. 801, 808 (1911).

57. Causey v. Seaboard Air Line Ry., 166 N.C. 5, 10-11, 81 S.E. 917, 918 (1914).

Workers' compensation does not abrogate this common law censure of coercive tactics; rather, the goals as well as the terms of the statute are additional support for the censure. The *Dockery* court's conclusory response to plaintiff's assertion of wrongful motive was that defendant has a legal right to discharge except when there is a statutorily created exception. This begs the very question presented—whether this "right" applies if the discharge arguably contravenes clearly established public policy.[58] Although the *Dockery* court stated that it would leave the "valid" policy issues to the legislature,[59] the court in fact made a very clear policy decision. Those who lost their jobs for pursuing their rights to compensation and those who chose to forego their rights to compensation in order to retain their jobs were left without legal recourse.

In 1979, the North Carolina General Assembly responded to the *Dockery* decision by amending the Workers' Compensation Act to prohibit the discharge or demotion of any employee because the employee has filed a workers' compensation claim.[60] An employee discharged or demoted in violation of the new provision is entitled to be reinstated to

58. In similar circumstances some courts have adopted a "public policy exception" to the terminable at will rule and have held that such contracts may not be terminated for reasons that contravene clearly expressed public policy. *See, e.g.*, Petermann v. International Brotherhood of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (wrongful to discharge for refusal to perjure); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (wrongful to discharge for serving jury duty); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (wrongful to discharge for attempt to bring employer into compliance with consumer credit laws). *But see*, Geary v. U.S. Steel Corp., 452 Pa. 171, 319 A.2d 174 (1974) (not wrongful to discharge for warning public about dangers of employer's product, because public policy not clearly established). *See generally* Blumrosen, *The Right to Seek Workmen's Compensation*, 15 RUTGERS L. REV. 491 (1961).

Several commentators have suggested that a retaliatory discharge should be actionable even in the absence of legislative expressions of public policy. *E.g.*, Blades, *supra* note 55; Note, *Workmen's Compensation—No Private Right of Action for Retaliatory Discharge in North Carolina*, 15 WAKE FOREST L. REV. 139 (1979) (discussing *Dockery*). The only case fully accepting this position is Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). *See* Comment, *Employment Contracts Terminable at Will: Monge v. Beebe Rubber Co. and Bad Faith Discharges*, 63 KY. L.J. 513 (1975); Note, 16 B.C. INDUS. & COM. L. REV. 232 (1974). In *Monge*, plaintiff alleged that she was discharged for refusing to date her foreman, and the court held that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." 114 N.H. at 133, 316 A.2d at 551.

59. 36 N.C. App. at 300, 244 S.E.2d at 277.

60. Ch. 738, § 1, 1979 N.C. Sess. Laws 806 (codified at N.C. GEN. STAT. § 97-6.1 (1979)). This amendment to the Workers' Compensation Act reads as follows:

> 97-6.1. **Protection of claimants from discharge or demotion by employers.**—(a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.
>
> (b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and

his or her former position and may bring a civil action for damages suffered as a result of the violation.[61] The provision provides that the

an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

(c) Any employer shall have as an affirmative defense to this section the following: willful or habitual tardiness or absence from work or being disorderly or intoxicated while at work, or destructive of an employer's property; or for failure to meet employer work standards not related to the Workers' Compensation Claim; or malingering; or embezzlement or larceny of employer's property; or for violating specific written company policy of which the employee has been previously warned and for which the action is a stated remedy of such violation.

(d) The General Court of Justice shall have jurisdiction of actions under this section.

(e) The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for permanent disability, total or partial, shall in no manner be deemed a violation of this section.

(f) The statute of limitations for actions under this section shall be six months as set out in G.S. 1-55.

61. This statutory limitation upon the employer's absolute right of discharge has an interesting constitutional background. When the North Carolina Workers' Compensation Act was enacted in 1929, the employer's right to discharge an employee under a terminable at will contract was considered protected under the contracts clause of the Constitution, and state interference with the "right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it" had been held by the United States Supreme Court to be a deprivation of due process in violation of the fourteenth amendment. Coppage v. Kansas, 236 U.S. 1, 10 (1914) (quoting Adair v. United States, 208 U.S. 161 (1908) (invalidating federal legislation similar to the state statute invalidated in *Coppage*)). There were also numerous state rulings similarly construing state and federal constitutions. *See, e.g.*, Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 305, 76 P. 848, 850 (1904); St. Louis S.W. Ry. v. Griffin, 106 Tex. 477, 489, 171 S.W. 703, 707 (1914). Not until the National Labor Relations Act was upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), was legislative power to limit the employer's right of discharge acknowledged. *See id.* at 45-46; 29 U.S.C. § 158(a)(3), (4) (1976). In North Carolina, labor statutes adopted prior to *Jones & Laughlin* neither created civil causes of action on behalf of an employee injured by a violation nor prohibited discrimination or discharge by the employer in retaliation for pursuit of statutory rights. *See, e.g.*, N.C. GEN. STAT. § 6566 (Michie 1931) (maximum hours per shift for common carrier employees) (repealed and superseded by 1937 N.C. Sess. Laws, ch. 409, (current version at N.C. GEN. STAT. §§ 95.15 to .25 (1975)); *id.* §§ 5032-33 (Michie 1931) (child labor) (repealed and superseded by 1937 N.C. Sess. Laws, ch. 317 (current version at N.C. GEN. STAT. §§ 110.1 to .20 (1975)); *id.* § 6554-57 (Michie 1931) (miscellaneous provisions). Instead, such statutes used criminal provisions to regulate the conditions of employment pursuant to the state's police power. Their interference with the employment contract was seen as incidental and was distinguished in *Coppage* from direct interference by statutes that proscribed the employer's right of discharge. 236 U.S. at 18. The one North Carolina labor statute that did provide employees with a cause of action prior to *Jones & Laughlin* was the blacklisting statute adopted in 1909, which established criminal and civil penalties for an employer who, having discharged an employee, then attempted to prevent that employee from obtaining employment with any other employer. *See* N.C. GEN. STAT. § 14-355 (1969). The blacklisting statute was construed in Seward v. Seaboard Air Line Ry., 159 N.C. 242, 75 S.E. 34 (1912), as not interfering with the employer's right to discharge with or without cause. Consistent with *Coppage*, in Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1928), the court stated that "[t]he purpose of these blacklisting statutes is to protect employees in the enjoyment of their natural rights and privileges guaranteed them by the Constitution, viz., the right to sell their labor and acquire property thereby." *Id.* at 483, 146 S.E. at 133.

Since *Jones & Laughlin*, North Carolina has adopted several statutes that limit the employer's absolute right of discharge, but until the new § 97-6.1, all such provisions had been based upon prior federal legislation. For example, N.C. GEN. STAT. § 95-83 (1975), which protects employees

employee has the burden of proof of a violation and establishes as affirmative defenses available to an employer several non-retaliatory motives for the discharge or demotion.[62] The statute of limitations for such actions is six months.[63]

Several issues are raised by the language of the new provision. First, the range of actions that an injured employee may take in pursuit of compensation while being protected from discharge is unclear. While the original version of the amendment protected an employee who "has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the North Carolina Workmen's Compensation Act, or has testified or is about to testify in any such proceeding,"[64] the words "in good faith filed a claim, hired a lawyer to represent him in a claim" were deleted during legislative hearings. This deletion, however, does not resolve the question of the precise scope of the protection afforded by the statute. The scope of protection turns on the meaning of a "proceeding under the . . . Act"; that is, whether "proceeding" is limited to formal adversary proceedings before the Industrial Commission or extends to all actions that under the Act are in furtherance of the injured employee's pursuit of compensation benefits.

The same issue has arisen under the Texas retaliatory discharge statute,[65] which is the only state statute that has protective language identical to that in the original version of the North Carolina provision. In *Texas Steel Co. v. Douglas*,[66] plaintiff sustained an injury on the job and received medical treatment and wage replacement benefits during a one-month period of disability. On the day that he returned to work, plaintiff arrived late, having overslept as a result of taking medication for pain. He was fired when he arrived.[67] In his subsequent action

from discharge or other discrimination in employment due to membership or nonmembership in a union, was adopted after such antidiscrimination provisions were authorized by § 14(b) of the Taft-Hartley Act, 29 U.S.C. § 164(b) (1976). In addition, N.C. GEN. STAT. § 95-130(8) (1975), protecting employees from retaliation for initating OSHA inspections or proceedings, was adopted in 1971 after enactment of the federal Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), which authorizes states to assume enforcement duties, *id.* § 667, and protects employees against retaliation for initiating proceedings, *id.* § 660(c). *See also* N.C. GEN. STAT. § 74-24.15(b) (Supp. 1979) (provision of the Mine Safety and Health Act), N.C. GEN. STAT. §§ 74-24.1 to .20 (Supp. 1979), which is patterned after § 815(c)(1) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. §§ 801-961 (1976 & Supp. I 1977).

62. N.C. GEN. STAT. § 97-6.1(b), (c) (1979).

63. *Id.* § 97-6.1(f).

64. H.B. 568, 1979 N.C. Sess. (introduced March 1, 1979).

65. TEX. REV. CIV. STAT. ANN. art 8307c (Vernon Supp. 1979).

66. 533 S.W.2d 111 (Tex Civ. App. 1976) (*cert. denied*).

67. *Id.* at 114-15.

under the retaliatory discharge statute, the court was presented with the question whether plaintiff had instituted a "proceeding" under the Workmen's Compensation Law, since he had not filed a formal claim. The court held that plaintiff had instituted a proceeding because the Act required the employer to notify the Industrial Commission of the accident and to provide for necessary medical treatment.[68]

The statutory scheme under the North Carolina Act is similar to that of Texas: injured employees must notify their employers in writing of an accident within thirty days of its occurrence;[69] employers must pay for necessary medical treatment for injuries,[70] must keep records of all work-related injuries and must notify the Industrial Commission of injuries that cause absence from work for more than one day.[71] As in Texas, these steps "set the wheels of the Workmen's Compensation Law into motion,"[72] although no formal claim has been filed. In most routine cases injured employees receive compensation benefits for work-related injuries without filing formal claims with the Industrial Commission.[73] Thus, it would be inconsistent with the statutory scheme to conclude that no proceeding under the Workers' Compensation Law was ever initiated, even though the employee had collected all benefits provided by law, just because the formal claim for compensation was never filed.[74] Section 97-6.1, therefore, should protect the injured employee in taking any action that under the scheme of the North Carolina Act would ultimately lead to the receipt of statutory benefits, regardless of whether such action includes the filing of a claim or results in a formal adversary hearing before the Industrial Commission.[75]

An analogy to this broad reading of the statute's protective language is found in the United States Supreme Court's construction of section 8(a)(4) of the National Labor Relations Act.[76] Section 8(a)(4)

68. *Id.* at 115-16.

69. N.C. GEN. STAT. § 97-22 (1979).

70. *Id.* §§ 97-25, -59.

71. *Id.* § 97-92(a).

72. 533 S.W.2d at 115.

73. Between July 1, 1977 and June 30, 1978, there were 48,215 major industrial injuries reported to the North Carolina Industrial Commission. Of these only 3,050 were contested and resulted in hearings before a member of the Commission. TWENTY-FIFTH BIENNIAL REPORT OF THE NORTH CAROLINA INDUSTRIAL COMMISSION 10, 28 (1979).

74. 533 S.W.2d at 115.

75. This conclusion derives further support from the legislature's rejection of the more restrictive term "file a claim" in favor of the broader "institute a proceeding." *See* N.C. GEN. STAT. § 97-6.1(a) (1979); H.B. 868, 1979 N.C. SESS. (introduced March 1, 1979).

76. 29 U.S.C. § 158(a)(4) (1976).

declares it to be an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the Act]."[77] This section is the progenitor of the retaliatory discharge provisions adopted in many federal and state statutes.[78] In *NLRB v. Scrivener*,[79] the Supreme Court construed section 8(a)(4) to protect from discharge an employee who gave a written statement to an NLRB official investigating an unfair labor practice charge filed against the employer but who had not filed the charge or testified at a formal hearing.[80] The Court reasoned that Congress intended in adopting section 8(a)(4) that all persons with information about unfair labor practices be free from coercion against reporting such practices to the NLRB.[81] This freedom is essential since the NLRB does not initiate its own proceedings but depends upon information provided by employees and employers to implement the National Labor Relations Act.[82] The integrity of the NLRB's activities, therefore, requires a broad scope of protection from retaliation rather than the inconsistent and unequal protection that would result from a narrow reading of the statute.[83]

This reasoning is equally applicable to the retaliatory discharge provision of the North Carolina Workers' Compensation Act. Like the NLRB, the North Carolina Industrial Commission cannot initiate its own proceedings to award compensation for work-related injuries. Furthermore, the need for protection during the informal stages of the employee's pursuit of benefits is heightened because the workers' com-

77. *Id.*

78. For state statutes, see note 7 *supra*. Federal statutes include the following: § 215(a)(3) of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1976), prohibits discharge or discipline of any employee who invokes the provisions of F.L.S.A.; § 2000e-3(a) of Title VII, 42 U.S.C. §§ 2000e to -17 (1976), prohibits discrimination, including discharge, against any employee on the basis of the employee's opposition to or initiation of proceedings regarding any unfair employment practice; § 623(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1976), prohibits discrimination, including discharge, on the basis of age; § 1674(a) of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-91 (1976), prohibits discharge of an employee whose wages have been garnished. For the constitutional background of such statutes, see note 61 *supra*.

79. 405 U.S. 117, *reh'g denied*, 405 U.S. 1033 (1972).

80. *Id.* at 121-25.

81. *Id.* at 121-22; *see* Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 (1967).

82. 405 U.S. at 122; *see* 29 U.S.C. § 160-61 (1976).

83. *Id.* at 124. *See also* Marshall v. Whirlpool Corp., 593 F.2d 715, 722-26 (6th Cir. 1979) (broad reading of retaliatory discharge provision of Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1) (1976)); Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977) (*semble*, Fair Labor Standards Act, 29 U.S.C. § 215(a) (1976)); Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975) (*semble*, Coal Mine Health & Safety Act of 1969, 30 U.S.C. § 820(b)(1) (1976)); Smith v. Columbus Metropolitan Hous. Auth., 443 F. Supp. 61 (S.D. Ohio 1977) (*semble*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (1976)).

pensation system operates to a significant degree without recourse to formal proceedings.[84] To limit the scope of protection to the filing of formal claims would lead to intolerable results. Employees would remain subject to retaliation for such actions as notifying their employers of their work-related injuries or participating in a fellow employee's preparation for formal proceedings short of actually testifying.

To be protected under section 97-6.1, the employee's activity in pursuing workers' compensation benefits must also be in good faith.[85] Thus, the employee must be pursuing the right to benefits for an injury or disease that he or she has some reason to believe is compensable under the Act. This test looks solely to the employee's honest belief concerning the legitimacy of the claim;[86] the actual merits of the claim should not be considered in a retaliatory discharge case.[87]

Another question to be faced in the application of section 97-6.1 is a determination of precisely what employer actions are prohibited. The original version of the provision stated that no employer may "discharge or in any other manner discriminate against any employee" for engaging in the protected activity of pursuing statutory benefits.[88] This language was changed to prohibit only discharge or demotion.[89] The change is significant because the deleted term "discriminate" has a broader reach, particularly in encompassing the possible effects of non-retaliatory policies of the employer that operate to the detriment of injured employees. An example of such an effect was presented in the California case of *Judson Steel Corp. v. Workers' Compensation Appeals Board*.[90] In *Judson*, an employee injured on the job and disabled for

84. See text accompanying notes 69-74 *supra*.

85. *See* N.C. GEN. STAT. § 97-6.1(a) (1979).

86. For a statutory definition of good faith in another context that is consistent with this conclusion, see N.C. GEN. STAT. § 32-2(b) (1976), which provides: "A thing is done 'in good faith' within the meaning of this Article when it is in fact done honestly, whether it be done negligently or not." *Cf.* Wooten v. S.R. Biggs Drug Co., 169 N.C. 64, 85 S.E. 140 (1915) (good faith in prayer for relief in civil complaint is honest purpose and rational relation between prayer and facts alleged).

87. *Accord*, Pettaway v. American Cast Iron Pipe Co., 411 F.2d 998, *reh'g denied*, 415 F.2d 1376 (5th Cir. 1969). Construing the meaning of the retaliatory discharge provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (1976), the court stated:

> There can be no doubt about the purpose of [the provision]. In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.

411 F.2d at 1004-05.

88. H.B. 568, N.C. SESS. 1979.

89. N.C. GEN. STAT. § 97-6.1(a) (1979).

90. 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250 (1978).

fifteen months was fired when he returned to work because, under the terms of a collective bargaining agreement, employees lost their company seniority if absent from work for twelve consecutive months due to illness or injury.[91] In prior instances, however, this contract provision had been waived by the company and the union to permit the injured employee to return to work.[92] Drawing on the California retaliatory discharge statute, which prohibits an employer from discharging or in any manner discriminating against an employee because of his or her pursuit of workers' compensation benefits,[93] the court held that the loss of seniority and resulting layoff penalized the injured employee in violation of the statute's prohibition of discrimination.[94] Although the employee's loss of seniority and layoff were due to the long period of absence caused by the injury and not to the filing of a claim or other exercise of statutory rights, the court noted that the statute broadly prohibits "any manner" of discrimination against injured employees.[95] The North Carolina provision does not reach such non-retaliatory actions; only the retaliatory acts of discharge and demotion are expressly prohibited. The policy behind the new section, however, could justifiably be found to extend to other retaliatory actions by employers. Because the statute condemns retaliation, the term "demote" could be read to encompass actions such as the withholding of employment benefits or the adoption or enforcement of rules by the employer when taken with a retaliatory motive.[96]

The prohibition against discharge or demotion is further qualified: "The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for permanent disability, total or partial, shall in no manner be deemed a violation" of section 97-6.1.[97] This limitation was added by the legislature to ensure that an employer is not obligated to retain employees who are no longer capable of performing their tasks.[98] Retaliatory discharge statutes in several states

91. *Id.* at 662, 586 P.2d at 566, 150 Cal. Rptr. at 252.

92. *Id.* at 665, 586 P.2d at 567, 150 Cal. Rptr. at 253.

93. CAL. LAB. CODE § 132a (West Cum. Supp. 1979).

94. 22 Cal. 3d at 667, 586 P.2d at 569, 150 Cal. Rptr. at 255.

95. *Id.*

96. An attempt by an employer to force an injured employee to seek benefits under an employee health plan rather than under the Workers' Compensation Act might be construed as retaliatory enforcement of a rule. *Cf.* Krispy Kreme Doughnut Corp., 245 NLRB No. 135 (Sept. 28, 1979).

97. N.C. GEN. STAT. § 97-6.1(e) (1979).

98. Interview with N.C. Rep. Adams, sponsor of H.B. 568 (Oct. 3, 1979).

contain provisions that exempt from protection employees who are no longer able to work because of their injuries.[99] In every one of these states, however, the exemption is expressly limited to employees who are not capable of working. The new North Carolina provision, on the other hand, may be read as removing, as a class, all recipients of permanent partial benefits[100] from the protection of section 97-6.1, even though many such employees are capable of continuing to work.[101]

An award of permanent partial disability benefits is premised on a finding that the injured employee is capable of continuing to work but only with a reduced earning capacity. For some types of injuries, the Act prescribes a particular amount of compensation for the employee's reduction in earning capacity, regardless of the amount of actual reduction; for other injuries the prediction is made on an individual basis after a determination of actual reduction suffered by the injured employee.[102] Such awards are common: for the loss of a finger, for example, a permanent partial disability payment is made in a statutorily scheduled amount, regardless of whether the employee's earning capacity has actually been reduced.[103] To exempt as a class employees who

99. *See, e.g.*, HAW. REV. STAT. § 378-32(2) (1976) ("unless the employee is no longer capable of performing his work as a result of the work injury and the employer has no other available work which the employee is capable of performing"); N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1978) ("provided, if such employee shall cease to be qualified to perform the duties of his employment he shall not be entitled to such restoration and compensation."); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1978) (*semble*); OKLA. STAT. ANN. tit. 85, § 5 (West Supp. 1979) ("Provided no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties."). *See also* 33 U.S.C. § 948a (1976) ("*Provided*, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.").

100. *See* N.C. GEN. STAT. § 97-30 (1979).

101. The language of § 97-6.1(e) was adopted for reasons of political expediency and has no rational justification in policy. Lobbyists for manufacturing interests argued that permitting an employee who had received permanent partial disability compensation benefits and had been discharged to sue for reinstatement and damages under § 97-6.1 would amount to giving the employee double compensation for the injury. Interview with Rep. Adams (Oct. 3, 1979). This argument is specious. If an employee is injured, his or her lost wages during a period of disability are part of the compensation benefits to which he or she would be entitled. Such lost wages would not be an element of damages in a retaliatory discharge case because, during the period of disability, the employee would not have been working whether or not he or she had been illegally fired. Only if the employee is capable of working has he or she suffered lost wages by reason of an unlawful discharge, and the damages recoverable are the wages that the employee would have earned had he or she been allowed to return to work rather than wage replacement benefits for having suffered an injury. Thus, there would be no double recovery.

102. 2 A. LARSON, *supra* note 3, § 57.10; *see* N.C. GEN. STAT. §§ 97-30, -31 (1979).

103. *See* N.C. GEN. STAT. § 97-3 (1979). During fiscal year 1977-78, there were 5,179 awards of permanent partial disability benefits in North Carolina. Though constituting only 11% of the number of reported major industrial injuries, these claims accounted for over half of all benefits paid during the year. TWENTY-FIFTH BIENNIAL REPORT OF THE NORTH CAROLINA INDUSTRIAL COMMISSION 28 (1978).

suffer permanent partial disabilities from the protection of section 97-6.1 is without rational basis, and the General Assembly should refine this provision to exempt only injured employees who are not capable of resuming their employment duties.

The final issue raised by the protective scheme of section 97-6.1 is the nature of the employee's burden of proof on the issue of causation. It is clear that the employee must prove that the discharge or demotion was caused by his or her protected activity. The original version of the section provided that "[t]he fact that an employee has in good faith filed a claim . . . and was later discharged or discriminated against by his employer shall be prima facie a violation of this section."[104] In the enacted version, however, the prima facie violation provision was replaced by the statement that "[t]he burden of proof shall be upon the employee."[105] No further guidance is offered by the statute as to the degree of causation that must be proved. A few states, unlike North Carolina, expressly require proof that the discharge was *solely* because of the workers' compensation claim.[106] Such an onerous burden of proof should not be presumed under the North Carolina statute in the absence of a more explicit provision. It is more likely that a plaintiff will be required to prove that his or her protected activity was *a* cause of the discharge or demotion. In addition, the legislature added a subsection enumerating several affirmative defenses available to the employer: Discharge does not violate the statute if based upon the employee's willful or habitual tardiness or absence from work, intoxication, disorderly conduct, destruction or theft of the employer's property, failure to meet work standards, or violation of certain written company policies.[107] Because the employer would have the burden of proof on these defenses, it is apparent that an employee need not prove that he or she was *not* fired for any of the enumerated reasons.

In the ordinary case direct proof of causation will not be available. Employers aware of the statutory prohibition of retaliatory discharge will not state that an employee was fired because of the filing of a compensation claim.[108] Rather, the employee's case will more often depend

104. H.B. 568, 1979 N.C. SESS. (introduced March 1, 1979).

105. N.C. GEN. STAT. § 97-6.1(b) (1979).

106. *See, e.g.*, HAW. REV. STAT. § 378-322 (1976); MD. ANN. CODE art. 101, § 39A(a) (1979).

107. N.C. GEN. STAT. § 97-6.1(c) (1979).

108. One recent case in which such direct proof was available involved a proceeding under the National Labor Relations Act. The NLRB held that a discharge in retaliation for filing a worker's compensation claim violates the Act's prohibition against discharging an employee who engages in concerted activity to improve the terms and conditions of employment. Krispy Kreme Doughnut Corp., 245 N.L.R.B. No. 135 (Sept. 28, 1979) (construing 29 U.S.C. § 158(a)(1) (1976)).

upon circumstantial evidence.[109] Thus, evidence of the approximity in time of the protected activity and the discharge and of the employee's good work record and continuing ability to perform the required tasks should have substantial probative weight. In addition, evidence of a pattern of retaliatory behavior[110]—an anti-compensation animus—on the part of the employer should be very persuasive under section 97-6.1.[111]

The addition of section 97-6.1 to the North Carolina Workers' Compensation Act is a welcome response by the General Assembly to the *Dockery* decision. Although the new provision is more limited in scope that those of several other states, especially in its unjustifiable exemption of recipients of permanent partial disability benefits from its protection, it does provide the basic protection needed by employees who pursue their rights to compensation for work-related injuries and diseases. The North Carolina courts should read the new provision liberally for the benefit of injured employees in keeping with the traditional judicial approach to the Workers' Compensation Act.[112]

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109. Such proof has been recognized as clearly sufficient in analogous circumstances. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court held that a prima facie violation of Title VII, the federal provision outlawing discrimination in employment, may be established by showing that (1) plaintiff belongs to a protected minority; (2) plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) plaintiff was rejected; and (4) after the rejection of plaintiff, the position remained open and the employer continued to seek applicants. *Id.* at 802.

110. In Britt v. Suckle, 453 F. Supp. 987 (E.D. Tex. 1978), plaintiff alleged a conspiracy by his employer to prevent employees from pursuing their workers' compensation rights in part by making an example of anyone who challenged the employer's decision not to pay medical or disability benefits for an injury. Plaintiff claimed that he was discharged after suffering a severe back injury and that his employer asked plaintiff's doctor not to treat plaintiff, urged plaintiff's lawyer not to represent plaintiff, fired plaintiff's daughter, and persuaded plaintiff's other employer to fire plaintiff. *Id.* at 990.

111. The *Dockery* court indicated that such evidence might have provided a basis for a claim for relief even in the absence of the statutory amendment. 36 N.C. App. at 299, 244 S.E.2d at 276.

112. *See* text accompanying note 5 *supra*.