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RETALIATORY FIRINGS: THE REMEDY UNDER THE TEXAS WORKERS' COMPENSATION ACT

*by: J. Thomas Sullivan**

Worker compensation systems are traditionally thought to have developed as a means of facilitating the industrialization of American society by stabilizing employer liability for injuries sustained by employees while at the same time maximizing the prospects for employee recoveries based on loss of earning capability as a result of suffering those injuries.¹ Their continued viability attests to the economic needs of the production and insurance industries for regulating costs arising from work-related injuries and for avoiding the multimillion dollar judgments now fairly common in tort litigation.² An important component in the overall fairness of the system, as distinguished from the question of the fairness of the compensation rates,³ is the assurance that employees claiming compensation will not summarily suffer termination of their employment as a consequence of filing a compensation claim. The purpose of this article is to focus on the remedy for retaliatory firings under the Texas

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1. See 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 5.20-5.30 (1985) [hereinafter LARSON].

2. A response to large verdicts can be seen in the adoption of section 11.02(a) of article 4590i limits recovery in medical malpractice actions to \$500,000 in damages other than medical expenses and in section 11.03, which limits recovery for non-economic loss—pain and suffering, mental anguish, consortium and disfigurement—to \$150,000 in the event the damage limitation of section 11.02(a) should be declared unconstitutional. See TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02(a) & 11.03 (Vernon Supp. 1987). The damages limitation was declared unconstitutional in Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. App.—Beaumont 1984), writ *ref'd n.r.e. per curiam*, 714 S.W.2d 310 (Tex. 1986). In its *per curiam* opinion, the supreme court held that the appellate court need not have passed on the constitutional question. 714 S.W.2d at 310. *But See* Rose v. Doctors Hosp. Facilities, 735 S.W.2d 244 (Tex. App.—Dallas 1987, no writ) (holding that damage limitations under the medical malpractice claims statute does not offend the "open courts doctrine" of article 1, section 13 of the Texas Constitution since the limitation on recovery does not bar recovery on claims).

3. See LARSON, *supra* note 1, at § 2.50.

Workers' Compensation Act⁴ (the Act) and the problems associated with actions brought under the statute, with suggestions for enhancing the deterrent effects of the provision by strengthening the claimant's position at trial, where necessary.

Generally, the provision authorizing an action for retaliatory firing, article 8307c,⁵ must be viewed as an exception to the traditional doctrine of "employment at will" found in Texas law.⁶ While other statutory authorization for retaliatory firings does exist in Texas law,⁷ the cause of action is usually seen as totally dependent on legislative expression for exception to the "at will" approach taken by Texas courts.⁸ Thus, in *Phillips v. Goodyear Tire & Rubber Co.*,⁹ the Fifth Circuit reversed a substantial damage award in an action predicated on the employer's alleged termination of the employee as a consequence of the latter's truthful deposition testimony which was adverse to the employer.¹⁰ The court, after surveying Texas law,¹¹ could find no basis for holding that the state would recognize an exception to the doctrine of "at will employment" based on the public policy goal of encouraging truthful testimony in judicial proceedings.¹²

4. See TEX. REV. CIV. STAT. ANN. art. 8306-8309-1 (Vernon 1967 & Supp. 1987) [hereinafter the Act].

5. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1967 & Supp. 1987).

6. See *East Line & R.R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); Julian, *Good Cause, Bad Cause, or No Cause at All: Does it Matter in Texas?*, 17 TEX. TECH L. REV. 1477 (1986); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667 (1984).

7. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5207a (Vernon 1987) (discharge based on membership or nonmembership in union prohibited); *Id.* art. 5765 § 7A (Vernon Supp. 1987) (discharge based on employee's active duty in state military forces prohibited); *Id.* art. 5221k § 5.01 (Vernon 1987) (discharge based on race, color, handicap, religion, national origin, age or sex prohibited).

8. See *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 734-35 (Tex. 1985) (noting legislative action in creating causes of action for termination based on factors noted in note 7, *supra*). The court observed that while exceptions to the at-will employment doctrine have been created by the legislature, the doctrine itself is of judicial origin and thus subject to judicial modification. *Id.* at 735.

9. 651 F.2d 1051 (5th Cir. 1981).

10. *Id.* at 1053.

11. *Id.* at 1055.

12. *Id.* at 1055-56. See also *id.* at 1055 n.5 (discussing plaintiff's theory of the lawsuit based on a limited "public policy exception" to the rule of "at-will" termination.). An argument can be made that the defendant's conduct may have violated a Texas criminal statute, TEX. PENAL CODE ANN. § 36.06(a) (Vernon Supp. 1987), (prohibiting interference with testimony to be given by a witness in an official proceeding).

While commentators have criticized the doctrine,¹³ recent case law demonstrates some shift in the thinking of the Texas Supreme Court on the adequacy of cause for termination of an employee not employed pursuant to a contract defining a definite term or period of employment. As recently as 1982, the supreme court declined to review a decision by the Austin Court of Appeals denying a right of recovery for a nurse reporting inadequate nursing home care who was subsequently terminated in *Maus v. National Living Centers*.¹⁴ Then, in *Sabine Pilot Service v. Hauck*,¹⁵ the supreme court held in 1985 that an employee does have a cause of action for wrongful termination where the firing results from the employee's refusal to perform an illegal act at the insistence of the employer.¹⁶ The *Hauck* court did not discuss *Maus* in recognizing the cause of action,¹⁷ but, as has been suggested, it is quite difficult to distinguish between the requirement by the employer of performance of an illegal act as giving rise to a cause of action based on refusal and consequent termination, and termination based on the employee's disclosure of information when non-disclosure itself may constitute an illegal act.¹⁸ Public policy concerns would appear not to justify such a distinction,¹⁹ leading to the inference that *Maus* was impliedly rejected by the *Hauck* court unless a greater element of wilfulness on the employer's part seems to have attended the command to the employee to engage in illegality.²⁰

13. See Julian, *supra* note 6; and BAYLOR Comment, *supra* note 6. See also Comment, *Action for Wrongful Discharge of an Employee*, 24 S. TEX. L.J. 883, 883-84 (1984) (arguing for general cause of action for wrongful discharge and specifically criticizing "at-will" employment doctrine).

14. 633 S.W.2d 674 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

15. 687 S.W.2d 733 (Tex. 1985).

16. *Id.* at 735.

17. See *id.*

18. See Julian, *supra* note 6, at 1479.

19. In *Hauck*, the precise holding of the court in defining the narrow judicial exception to the "at-will" doctrine was:

We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine announced in *East Line & R.R.R. Co. v. Scott*. That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such a case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

687 S.W.2d at 735.

20. The only plausible distinction would be that in *Hauck* the retaliatory firing followed

The evolution of wrongful discharge law may well reflect a generalization of concern for the rights of employees, specifically exemplified by the legislature's action in creating the remedy for retaliatory discharge under the compensation act.²¹ Nevertheless, because the Act places the burden on the employee to prove the intent of the employer in discharging him, the remedy created may not so clearly afford the discharged employee a viable cause of action.²² This problem exists because sophisticated employers are not likely to make termination decisions in a manner so obvious as to establish the violation. Moreover, the interpretation given the scope of the remedy may be unreasonably narrow in terms of affording the employee the truly just measure of compensation necessary to implement the goals of the legislature in enacting article 8307c.

I. PROBLEMS OF PROOF

The most critical problem for an illegally discharged employee seeking redress is establishing the employer's retaliatory motive in terminating the employment.²³ Texas decisions demonstrate that the burden of proof can be met, but also point to the problems of proof

the employee's refusal to follow a direct order to perform an act violative of a criminal statute. *Id.* at 734. In *Maus* the firing retaliated for unilateral "whistle-blowing" by the employee. *Maus*, 633 S.W.2d at 675. This distinction cannot be reconciled with the stated purpose of the public policy exception set forth by the court in *Hauck*. A number of federal statutes protect "whistle-blowers" from retaliation for reporting violations of the acts involved. See Occupational Safety and Health Act of 1970 § 11(c), 29 U.S.C. § 660(c) (1982); Clean Air Act Amendments of 1977 § 312(a), 42 U.S.C. § 7622(a) (1982); Employment Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (1982).

21. See Comment, *supra* note 13, at 888-92.

22. Absent evidence indicating the employer's illegal, retaliatory motive in discharging the employee, the employee cannot sustain his cause of action for wrongful termination. In such instances, the employer's illegal act will not result in redress or compensation. See *infra* notes 137-44 and accompanying text.

23. In a recent Texas decision reviewing a jury verdict in favor of the employee, *VanTran Electric Corp. v. Thomas*, 708 S.W.2d 527 (Tex. App.—Waco 1986, writ ref'd n.r.e.), the evidence showed that the employee's supervisor told him the following:

Mark, I thought you were going to come back and work for us. If you're intending to come back to work, why did you go and file a workman's comp [claim]? When you filed on workman's comp, we're going to punish you and I'm going to see to it personally that you never get a job anywhere else.

708 S.W.2d at 530. Other evidence developed at trial showed that the supervisor called another company after Thomas had obtained work there and told the employer that Thomas "had suffered a back problem and was totally disabled to work, and had filed a lawsuit against VanTran." *Id.*

inherent in dealing with sophisticated managerial techniques which may serve to obscure the true motive for firing in many cases.²⁴

A. The Burden of Proving a Retaliatory Motive for Discharge

Article 8307c sets forth the statutory remedy for retaliatory discharge resulting from the employee's action in filing a workers' compensation claim or other action taken to institute a compensation proceeding.²⁵ Section 1 of this article provides:

No person may discharge or in any other manner discriminate against any employee because the employee 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 Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.²⁶

Section 2 provides that the "burden of proof shall be upon the employee" in an action predicated on his or her retaliatory discharge as a result of the exercise of the rights or options set forth in Section 1.²⁷

The burden is most easily met by the employee when the former employer has engaged in a pattern of conduct establishing hostility directed at the employee as a result of the filing of a compensation claim. In *Santex, Inc. v. Cunningham*,²⁸ for instance, the employer engaged in discriminatory conduct resulting finally in the termination of the claimant's employment following issuance of a favorable award for the claimant by the Industrial Accident Board.²⁹ The employer's

24. See *infra* notes 25-41 and accompanying text.

25. See TEX. REV. CIV. STAT. ANN. art. 8307c § 1 (Vernon Supp. 1987). The Act does not require actual filing of a claim for compensation as a requisite for showing a retaliatory discharge. The fact that the employer has actual knowledge of the filing or retention of counsel to prosecute a claim may enhance the prospect of demonstrating, at least in terms of sequence, that the termination followed an action triggering the protections of the Act. See *VanTran Electric Corp.*, 708 S.W.2d at 530.

26. TEX. REV. CIV. STAT. ANN. art. 8307c § 1 (Vernon Supp. 1987).

27. *Id.* § 2. Section 2 provides:

A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Id.

28. 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ).

29. See *id.* at 560. The evidence showed that the employer illegally discriminated against the worker apart from the termination by reducing his hourly wage following the pre-hearing conference. *Id.*

explanation that the discharge was due to unsatisfactory work on the part of the employee was effectively rebutted by the fact that the employee had twice been given raises during the period of time which the employer had identified as the period when the employee's work became deficient.³⁰

The pattern demonstrated in *Santex* is one which most readily links the termination with the employee's action in availing himself of remedies under the Act. The Waco Court of Appeals noted that the employer's sentiments apparently surfaced at the hearing, when the company president "became openly angry and upset toward Cunningham, his attorney, and the representative of the Industrial Accident Board."³¹

In other cases, the intent of the employer has surfaced through equally unequivocal evidence as that present in *Santex*. For example, in both *Schrader v. Artco Bell Corp.*³² and *A.J. Foyt Chevrolet v. Jacobs*,³³ the testimony disclosed that the employees' supervisors had told them that representation by counsel in the compensation actions was itself an impediment to their return to work.³⁴ In *Schrader*, the claimant also testified that the company personnel officer had told him that "since a settlement of appellant's compensation case had been made the appellee company could not put him back to work."³⁵ The irritation caused by representation was more bluntly testified to in *Jacobs*, where the company's general manager "testified that Jacobs was discharged because he would not fire his lawyer."³⁶ This type of direct link in the testimony between the filing of the compensation claim or other action—such as retention of counsel—for asserting remedies under the Act will almost certainly support the retaliatory firing action.

The evidence developed in *Murray Corp. of Maryland v. Brooks*³⁷ shows both direct and circumstantial approaches to meeting the plaintiff's burden of proving a retaliatory motive for the firing.

30. *Id.*

31. *Id.*

32. 579 S.W.2d 534 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

33. 578 S.W.2d 445 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

34. See 579 S.W.2d at 536; 578 S.W.2d at 447.

35. 579 S.W.2d at 539.

36. 578 S.W.2d at 447.

37. 600 S.W.2d 897 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). See also Comment, *supra* note 13, at 889.

Deposition testimony showed that the increase in compensation premiums resulting from the employee's filing of a claim was considered as a factor in his termination.³⁸ An important circumstance refuting the employer's subsequent explanation for the firing was the employer's post-recession decision not to rehire only two previous employees, both of whom had filed compensation claims.³⁹

The reliance on circumstantial, rather than direct evidence of the employer's intent in terminating the employee is often necessary in order to establish the *prima facie* case. Because of the necessity for reliance on circumstantial evidence in some cases, the *Santex* decision includes an extremely significant rule for proof of the violation.⁴⁰ There, the court held that the claimant had only to prove that the filing of the claim was only *a* reason for his termination, rather than *the* reason.⁴¹ Thus, the employer's effort to create a justification after the fact of the firing is not necessarily dispositive of the issue as to the intent motivating the firing, even though the explanation may be plausible. Three of the most compelling circumstances which support an inference that the true intent for termination is the filing of a claim for compensation are: (1) absence of another, legitimate cause for the termination existing prior to the filing of the claim; (2) negative attitudes expressed toward the employee's medical treatment and recovery from injury; and (3) circumstances surrounding the termination of other employees, specifically terminations following the filings of claims for compensation.

1. Lack of Justifiable Cause for Termination

The most obvious advantage for the claimant forced to rely on circumstantial evidence of the employer's illegal intent in terminating

38. *Id.* at 901.

39. *Id.* at 902.

40. 618 S.W.2d at 559.

41. *Id.* at 559-60. In fact, the court rejected the employer's argument that there was a "hopeless conflict" between the jury findings that the employee was charged both because of the filing of the claim and, in response to the employer's requested special issue, because his work performance had been unsatisfactory. *Id.* at 560. The court reasoned: "[U]nder our view of the case, we have held that the employee has a cause of action if he is discharged because he filed a Worker's Compensation claim, even though this was not the only reason for such discharge." *Id.* See also *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987) (following *Santex* in holding that the discharged employee need not prove that the filing of the claim for compensation was the *sole* cause for her dismissal, but merely *a* cause).

the contract of employment is the absence of other justification for the termination.⁴² Once the plaintiff establishes a causal link between the firing and the filing of the workers' compensation claim, the burden shifts to the employer to prove a non-retaliatory motive for the termination of employment as the court held in *Hughes Tool Co. v. Richards*.⁴³ While the decision does reinforce the statutory burden placed on the plaintiff in the suit for retaliatory discharge,⁴⁴ the shift in this burden is of perhaps greater significance since the plaintiff routinely bears the burden of proof in any civil action.⁴⁵ The shift in the burden here, however, significantly restricts the employer's otherwise secure reliance on the Texas tradition of "at will" employment.⁴⁶ Despite the rule that the employer could have fired the employee without any cause or good reason prior to the filing of the claim,⁴⁷ once the claim precedes termination and suggests the causal link, the employer is virtually required to demonstrate good cause to support the firing.⁴⁸

In *Santex*, for example, the employer's attempt to justify the termination based on a claim of poor job performance by the employee was effectively rebutted by evidence that during that period of alleged unsatisfactory performance the employee was twice given

42. For example, in *VanTran Electric Corp. v. Thomas*, 708 S.W.2d 527 (Tex. App.—Waco 1986, writ ref'd n.r.e.), two members of the employer's management team admitted that no reason other than the filing of the compensation claim existed to justify the termination. See *id.* at 530. The opinion relates that the production foreman testified that while he did not consider the employee dependable, he had "evaluated plaintiff three different times and reported that the employee will work out satisfactorily . . ." and that no reason appeared in the plaintiff's employment file justifying his discharge. 708 S.W.2d at 531.

43. 624 S.W.2d 598, 599 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991 (1982).

44. TEX. REV. CIV. STAT. ANN. art. 8307c § 2 (Vernon Supp. 1987). See *supra* note 27 (containing text).

45. See, e.g., *Vance v. My Apartment Steak House*, 677 S.W.2d 480, 482 (Tex. 1984) (reiterating general rule that plaintiff bears burden of proving all elements essential to the cause of action he has pleaded).

46. See *supra* notes 6, 13 and 19 and accompanying text.

47. See, e.g., *Maus v. National Living Centers, Inc.*, 633 S.W.2d 674, 676 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (reaffirming the traditional doctrine of "at-will" employment even in light of the fact that plaintiff's termination resulted from the disclosure of violations of the standard of care required by law for nursing home operators).

48. In *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. App.—Waco 1981, no writ), the court rejected the employer's argument that the doctrine of "at-will" employment negated any claim by the employee of a justified expectation of future or continued employment. *Id.* at 559.

pay raises.⁴⁹ The after-the-fact attempt by the employer to demonstrate a reason for the termination was not only inadequate, but may have strengthened the employee's claim of an improper motivation for the firing by circumstantially demonstrating the lack of credibility in the employer's denial of an improper motive for the termination.⁵⁰

A similar fact pattern was demonstrated in *Hunt v. Van Der Horst Corp.*,⁵¹ a 1986 decision of the Dallas Court of Appeals reversing the trial court's grant of summary judgment for the employer. The employer contended that summary judgment was proper because the decision to terminate the employee had been made prior to the filing of his compensation claim.⁵² The testimony adduced in discovery showed that the injury was sustained by the claimant on the very day that a termination slip had been prepared and that the general manager fired him later that afternoon without knowledge that Hunt had been injured within the intervening period.⁵³ In reversing the trial court, the Dallas Court of Appeals looked to the prior relationship between the parties in finding that the evidence raised an issue of material fact that precluded summary disposition.⁵⁴ The claimant had worked for the company since 1956.⁵⁵ The evidence showed that the same general manager had decided to fire Hunt in 1980 and had filled out a termination slip to effect that decision but immediately voided it.⁵⁶ At the time of his firing in 1981, Hunt held the position of Chief Inspector at the employer's Terrell, Texas plant.⁵⁷

Based on the prior action of the general manager and Hunt's sworn testimony in deposition that he notified his immediate supervisor of his injury on the day it occurred, the court rejected the argument made by the employer that "if it had decided to fire Hunt prior to his alleged injury, the actual act of firing Hunt, which occurred after his alleged injury, could not be causally connected with his workers' compensation claim."⁵⁸ The court noted that the

49. *Id.* at 560.

50. *See id.* at 558.

51. 711 S.W.2d 77 (Tex. App.—Dallas 1986, no writ).

52. *Id.* at 78-79.

53. *Id.* at 79.

54. *Id.*

55. *Id.* at 78.

56. *Id.*

57. *Id.*

58. *Id.* at 79.

actual firing occurred a day ahead of schedule, according to the general manager's testimony, and that the other summary judgment evidence relied on by the employer consisted of testimony and statements by interested employees of the company.⁵⁹

The court noted other factors militating against the conclusion that the company had carried its burden on summary judgment, including the duration of employment; the fact that the firing occurred after Hunt gave notice of the injury; and the fact that the termination preceded the scheduled date of termination, as claimed by the general manager.⁶⁰ Moreover, the court found Hunt's deposition testimony that the general manager had previously expressed concern over the rising cost of workers' compensation insurance premiums during meetings of the company's accident board as potentially quite probative.⁶¹ While the employer contended that these expressions by management merely reflected proper concern for employee safety, the court declined to accept this explanation as conclusive, instead indulging the inference most favorable to the employee in resisting summary judgment—that management was indicating its concern over premiums by improperly seeking to avoid payment of meritorious claims.⁶²

59. *Id.* The employer argued that one of the witnesses testifying in the affidavit was distinterested because she no longer worked for the employer. *Id.* The court observed:

We note, however, that in her affidavit Wadle alleges affirmatively that she was a Van Der Horst employee on February 12, 1981 [the date of plaintiff's termination], but she does not indicate that she is no longer employed there. We have found no other *evidence* in the record that would show that Wadle is no longer a Van Der Horst employee.

Id. at 79 (emphasis added).

60. *Id.* at 80.

61. *Id.* The court related a significant portion of the plaintiff's affidavit in its opinion:

During a portion of the time that I was employed by Van Der Horst Corporation of America, I was a member of the accident board. During meetings of the accident board, I have personally heard Mr. Herb Hallett state to the effect that "Workers' Compensation was going up every time someone got hurt and that we had to stop it."

Id. See *Murray Corp. v. Brooks*, 600 S.W.2d 897, 901 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (management admits concern over rising compensation premiums).

62. 711 S.W.2d at 80 (relying on *Montgomery v. Kennedy*, 669 S.W.2d 309, 311 (Tex. 1984) (reaffirming the rule that every reasonable inference from the evidence must be indulged in favor of the party opposing summary judgment and that all doubts must be resolved in non-movant's favor)).

The Dallas court decided another important legal issue in favor of the claimant in its *Hunt* decision. The defense had argued that because no claim had formally been filed at the time of the termination, the firing could not be shown to have been the result of the employee's attempt to avail himself of the remedies of the Act.⁶³ Relying on *Texas Steel Co. v. Douglas*,⁶⁴ the court concluded that the causal link between the firing and institution of a compensation claim could be shown even though termination preceded the filing of the claim.⁶⁵ The *Hunt* Court held:

In the instant case, Hunt deposed that, before he was told that he was fired, he informed his supervisor that he had suffered an injury on the job and that he was going home and to see a doctor. We conclude that, in light of the purpose of article 8307c, Hunt had at this point "instituted a proceeding" under the Act. To hold otherwise would be to reward employers who are particularly adept at anticipating and quick in firing potential workers' compensation claimants over those who are slower to retaliate. At the trial on the merits, the trier of fact will, of course, be free to draw whatever inference it wishes from the preliminary nature of the proceeding when Hunt was terminated regarding a causal connection between Hunt's workers' compensation proceeding and Van Der Horst's termination of his employment.⁶⁶

This approach is important in tightening the potential viability of article 8307c as a deterrent to retaliatory firing or demotion as a result of the employee's expression of intent to avail himself of the remedies afforded by the Act.

Santex and *Hunt* are significant decisions pointing toward the appropriate response to an employer's after-the-fact explanation for the claimant's termination. Even where the jury found that the employer's explanation that the employee's performance contributed to the decision to fire, the *Santex* Court looked to its other finding showing that the jury was also convinced that the filing of the compensation claim was a factor in the firing decision to hold that

63. 711 S.W.2d at 80.

64. 533 S.W.2d 111, 115 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

65. 711 S.W.2d at 80. Specifically, the court said, "In accordance with this purpose [protection of workers entitled to compensation under the Act], it has been held that the article [8307c] may apply to a situation in which the employee was fired prior to filing his claim for compensation." *Id.* (following *Texas Steel Co. v. Douglas*, 533 S.W.2d at 115-16).

66. *Id.*

the employee had met his burden of proof.⁶⁷ Thus, an employer's plausible explanation as to the reason for the termination may serve to raise a fact issue, but even an affirmative finding on a special issue directed at this cause will not negate the possibility that the compensation claim was also considered by the employer as a reason to proceed with termination.⁶⁸

The employer's stated reason for terminating the employee may indeed be sufficient to raise an issue of fact regarding the real basis for the firing and where the issue is supported by the evidence, the jury finding will not be disturbed. Thus, where the employer's explanation that the termination stemmed from the employee's act in making a false statement on his employment application and the evidence supported this explanation, the court in *Douglas v. Livingston Shipbuilding Co.*⁶⁹ held that the finding favorable to the employer would not be disturbed.⁷⁰ Similarly, in *DeFord Lumber Co. v. Roys*,⁷¹ the appellate court reversed the jury finding for the employee where the employer's stated basis for termination was violation of company policies which were admitted by the employee and where no evidence was offered by the employee—even including his own testimony—to show that the firing was motivated by the filing of a claim for compensation benefits and the hiring of counsel to resrepresent him.⁷²

The easiest case in which to rebut the employer's stated reason for termination will always be one in which the employer's own records reflect that the stated reason is basically fabricated. In *Carnation Co. v. Borner*,⁷³ for instance, the employer claimed that the reason for termination was that he was "[p]hysically unable to perform assigned work." However, the evidence showed that the employee had returned to his former duties some months earlier

67. *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 560 (Tex. App.—Waco 1981, writ ref'd n.r.e.).

68. See *supra* note 41 and accompanying text; see also *E-Tex Dairy Queen, Inc. v. Adair*, 566 S.W.2d 37, 40 (Tex. Civ. App.—Beaumont 1978, no writ) (noting employer's justification for termination based on employee's record of improprieties with female employees as credible, but not sufficient to avoid recovery where employer also admitted that termination was motivated by filing of compensation claim).

69. 617 S.W.2d 718 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

70. *Id.* at 719.

71. 615 S.W.2d 235 (Tex. Civ. App.—Dallas 1981, no writ).

72. *Id.* at 237.

73. 610 S.W.2d 450 (Tex. 1980).

while awaiting final settlement of his compensation claim and that no complaints about his performance on the job had been made after he returned to work.⁷⁴ His discharge on August 10th, following approval of the settlement by the Industrial Accident Board on August 8th of the same year, was itself sufficient to establish the link between the prosecution of the claim and the firing.⁷⁵

2. Employer's attitude toward employee's medical treatment

The employer's negative attitude toward medical treatment necessitated by the worker's on-the-job injury is a circumstance highly probative of the employer's attitude toward the compensation system.⁷⁶ In the absence of other evidence directly pointing to the employer's retaliatory motive in terminating an employee asserting his rights under the Act, circumstances surrounding the employer's response to the need for medical treatment may be sufficient to show an illegal motive for the firing. In *Hunt v. Van Der Horst*,⁷⁷ the Dallas Court of Appeals noted the significance of the seeking of medical treatment for a job-related injury as an initial step in instituting a claim for compensation.⁷⁸ Since the compensation system

74. *Id.* at 451.

75. *Id.*

76. For example, in *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ), the employee testified that his supervisor had criticized him for filing a worker's compensation claim, urging him instead to "try to collect damages from the insurance carrier of the party who rear-ended" him. *Id.* at 560. In a similar vein, the worker's foreman in *Luna v. Daniel Int'l Corp.*, 683 S.W.2d 800 (Tex. App.—Corpus Christi 1984, no writ), commented on the company having to pay the medical bills incurred for the worker's treatment for an injury sustained on the job. *Id.* at 802. See *infra* notes 83-93 and accompanying text.

77. 711 S.W.2d 77 (Tex. App.—Dallas 1986, no writ).

78. *Id.* The *Hunt* Court noted the significance of extending the remedy afforded by the Act to terminations following an initial treatment of the injury which will pre-date the filing of a compensation claim:

In the instant case, Hunt deposed that, before he was told he was fired, he informed his supervisor that he had suffered an injury on the job and that he was going home and to see a doctor. We conclude that, in light of the purpose of article 8307c, Hunt had at this point "instituted a proceeding" under the Act. To hold otherwise would be to reward employers who are particularly adept at anticipating and quick in firing potential workers' compensation claimants over those who are slower to retaliate.

711 S.W.2d at 80. See also *Webb v. Dayton Tire & Rubber Co.*, 697 P.2d 519 (Okla. 1985) (employee terminated after receiving temporary benefits and medical treatment, but prior to filing formal claim, had instituted proceeding for purpose of establishing retaliation claim). Accord, *Roseborough v. N.L. Indus.*, 10 Ohio St. 3d 142, 462 N.E.2d 384 (1984).

is designed to benefit the worker for loss of earning capacity as a result of physical injury, the need for medical treatment is a threshold matter for entitlement to benefits. Consequently, the employer's response to the initial need for treatment or diagnosis may be highly probative of intent where termination subsequently occurs.

In *Texas Steel Co. v. Douglas*,⁷⁹ the evidence probative of the employer's intent in terminating the claimant was principally developed through the attitudes of the claimant's supervisor toward his need for medical treatment.⁸⁰ The record showed that upon being notified of the worker's injury, his supervisor "went out of his way to get the doctor . . . to release him for light duty work at a time when the doctor advised that his condition was such that he should not be required to lift more than five to eight pound objects"⁸¹ When the worker overslept while taking pain medication and failed to report to work at 6:00 a.m., he was fired by the supervisor.⁸²

A recent decision by the Corpus Christi Court of Appeals, *Luna v. Daniel International Corp.*,⁸³ demonstrates that the employer's attitude toward medical treatment sought by the employee may prove sufficient to create a material fact issue precluding summary judgment.⁸⁴ On appeal, the claimant relied on deposition testimony which had earlier been offered by the employer to support motion for summary judgment.⁸⁵ The deposition recited that claimant's foreman discouraged him from seeking aid at the company first aid station the day after suffering an on-the-job injury to his eye.⁸⁶ After

79. 533 S.W.2d 111 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

80. See *id.* at 114-15.

81. *Id.* at 117.

82. *Id.*

83. 683 S.W.2d 800 (Tex. App.—Corpus Christi 1984, no writ).

84. *Id.* at 803.

85. *Id.* at 801-03. For a discussion of the problems associated with reliance on deposition testimony in summary judgment proceedings see *Bryant v. INA of Texas*, 673 S.W.2d 693 (Tex. App.—Waco 1984), *aff'd*, 686 S.W.2d 614 (Tex. 1985); Note, *Bryant v. INA of Texas: A New Splinter from an Old Log*, 37 BAYLOR L. REV. 277, 287-88 (1985) (criticizing court of appeals decision in *Bryant* based on plaintiff's reliance on unobjected to hearsay in plaintiff's deposition testimony in reversing grant of summary judgment for carrier who expressly relied on depositions on file in the case in support of its motion); Sullivan, *Litigating a Novel Course and Scope of Employment Issue: INA of Texas v. Bryant*, 5 REV. OF LITIGATION 297, 302-05 (1986) (responding to criticism in the BAYLOR Note).

86. 683 S.W.2d at 802. Similarly, in *Milner v. Stepan Chem. Co.*, 599 F. Supp. 358 (D. Mass. 1984), the employee testified that his supervisors harassed him about reporting a work-related injury in an apparent effort to maintain safety records. See *id.* at 359-60.

consulting a physician and spending some amount of time off the job due to transportation problems in getting to and from the doctor's office, Luna was discharged for failing to return from the doctor's office in a timely manner.⁸⁷ The opinion recites that there was no discussion between Luna and his foreman about worker's compensation benefits, but that the foreman did admit that the company would have to pay for the doctor visit.⁸⁸ The foreman's deposition disclosed that the reason for the discharge was that Luna had failed to return to work after going to see the doctor and suggested that Luna would have been terminated as part of a larger layoff intended to take effect that afternoon anyway.⁸⁹

The claimant's characterization of his foreman's attitude toward his required medical treatment was deemed highly probative by the court in terms of raising an unresolved issue of material fact concerning the employer's intent in terminating him.⁹⁰ His testimony showed that the foreman was in a "bad mood" and appellant perceived that he didn't want to do the "paperwork" or want the company to know about the injury or doctor's visit.⁹¹ Based on these facts, the court concluded "that appellant's deposition testimony regarding Cox's attitudes towards appellant's doctor's visit was sufficient to raise at least a fact issue as to the causal connection between appellant's discharge and his possible claim for worker's compensation benefits."⁹² Apparently, the Corpus Christi court would sustain a jury verdict on the merits on the basis of evidence detailed in the opinion, even if Luna were unable to offer any other evidence sufficient to show the employer's intent in terminating him.⁹³

87. 638 S.W.2d at 802.

88. *Id.*

89. *Id.*

90. *Id.* at 803.

91. *Id.*

92. *Id.*

93. If the testimony is sufficient to raise a material fact issue requiring reversal of summary judgment, then it would appear sufficient to sustain a jury finding favorable to the employee, at least against a "no evidence" claim. In the absence of additional testimony, an appellate court might nevertheless reverse a jury verdict on the ground of factual insufficiency. For an example of the distinction between "no evidence" and "factual insufficiency" points of error on appeal, consider these sets of opinions: *Deatherage v. Int'l Ins. Co.*, 615 S.W.2d 181 (Tex. 1981); *American States Ins. Co. v. Walters*, 636 S.W.2d 794 (Tex. App.—Tyler 1982), *reversed*, 654 S.W.2d 423 (Tex. 1983). Perhaps the most cited single article in discussions of Texas law concerning this distinction is Calvert, "No evidence" and "Insufficient" Points

Reliance on employer attitudes toward medical treatment alone, however, may be insufficient to convince the jury of the employer's intent in terminating the claimant, even though it is sufficient to raise an issue precluding summary judgment.⁹⁴ Comments directed toward the necessity for treatment may simply be misunderstood by an employee unhappy with an otherwise valid or justifiable discharge and the jury may accept the explanation of management in the absence of other evidence probative of the employer's intent. Moreover, some discussion of the injury, treatment, and recovery may be justified as the employer's attempt to discern how best to provide a substitute for the disabled employee,⁹⁵ or to make a decision based on the employee's apparent inability to return to work.⁹⁶

3. Patterns of retaliatory action

The decision in *Murray Corp. v. Brooks*⁹⁷ suggests the significance of investigation of the employer's practice of dealing with compensation claims generally as a means of proving an illegal intent in the discharge of a given claimant. There, the employee bolstered

of Error, 38 TEX. L. REV. 361 (1960). It provides the best starting point for understanding these approaches to issues on appeal. For insight into how the Corpus Christi Court of Appeals might ultimately judge sufficiency of the evidence in an appeal following jury verdict in *Luna*, consider the court's opinion in *Blair v. INA of Texas*, 686 S.W.2d 627, 629-30 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (reversing jury finding against worker, and for carrier, in workers' compensation action on the issue of work-related cause of worker's heart attack. The court concluded that the jury's negative answer to the special issue inquiring whether the injury arose from the performance of the duties of employment was "against the great weight and preponderance of the evidence."). The decision in *Blair* may simply reflect the general favor with which Texas courts look upon claimants in workers' compensation actions.

94. In reversing the trial court's grant of summary judgment, the court, in *Hunt v. Van Der Horst Corp.*, 711 S.W.2d 77 (Tex. App.—Dallas 1986, no writ), noted: "At the trial on the merits, the trier of fact will, of course, be free to draw whatever inference it wishes from the preliminary nature of the proceeding when Hunt was terminated regarding a causal connection between Hunt's workers' compensation proceeding and Van Der Horst's termination of his employment." *Id.* at 80.

95. Similarly, the court in *Hunt* apparently regarded the argument of the employer that its admitted concern over rising workers' compensation insurance premiums reflected a general concern of management for worker safety as a legitimate interest of the employer. *See* 711 S.W.2d at 80.

96. *But see* *Carnation Co. v. Borner*, 610 S.W.2d 450, 451 (Tex. 1980) (employer's explanation that the employee was terminated because he was "[p]hysically unable to perform assigned work" was rebutted by the fact that the employee returned to work three months earlier and performed his duties without complaint from the employer during that period).

97. 600 S.W.2d 897 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

his evidence of an admitted employer concern for rising compensation premiums with a showing that the only two employees not rehired after the company had laid off workers during a period of recession had both filed worker's compensation claims prior to the layoff.⁹⁸ This evidence may not have been necessary in order to sustain the plaintiff's burden, but it reinforced the admitted concern for rising insurance premiums by showing the implementation of a policy designed to either limit the filing of claims or to simply free the employer of previously injured employees who might arguably be susceptible to repetitive injury. At a minimum, the two employees not rehired had previously filed claims and could be expected to assert their rights under the Act if injured again.

An early discussion of the adoption of article 8307c points to the prevalence of retaliatory firing as a practice among employers, at least prior to the adoption of the provision.⁹⁹ One study showed that a single employer had apparently fired 37 of 49 employees filing compensation claims in the two-year period surveyed.¹⁰⁰ The adoption of the provision recognizing the action for retaliatory firing must be seen, moreover, as evidence of the legislature's concern that retaliation for the institution of compensation claims was either a widespread practice in Texas industry, or of such concern in isolated instances that the remedy was necessary to combat this motive for termination.¹⁰¹

It is likely, of course, that the adoption of article 8307c has achieved its desired purpose in reducing retaliation as an acceptable motive for termination among Texas employers. At a minimum, adoption of the remedy has probably caused employers to avoid the appearance of an illegal motive in terminating injured workers when, in fact, that is the true motivation for discharge. Regardless of the true impact of the statute, one must assume that the incidence of retaliatory firing is now less common than prior to the enactment of article 8307c. Thus, evidence of a common practice or scheme in terminating employees who have filed compensation claims, while

98. *Id.* at 902.

99. Note, *Remedies for Wrongful Discharge Under the Texas Workmen's Compensation Act—The Need for Revision*, 4 TEX. TECH L. REV. 387, 388-90 (1973).

100. *Id.* at 389.

101. *Id.* The author notes the nearly unanimous vote of the Texas House of Representatives in passing the legislation creating the article 8307c remedy for wrongful discharge. *Id.* n.10.

likely more rare than in earlier years, should prove highly probative of the employer's intent when the circumstances suggest a retaliatory firing in an individual case.¹⁰²

Counsel representing the discharged employee should seek data concerning the filing of compensation claims against the employer and follow-up data on the status of those employees after the filing or settlement of the claim.¹⁰³ This may require two separate requests for production or interrogatories—one respecting identification of company employees who have filed compensation claims and the other focusing on terminations and demotions of employees within a reasonable period of time antedating the plaintiff's termination.¹⁰⁴ Comparison of the two lists of employees should afford a preliminary basis for assessing the employer's pattern or practice of dealing with compensation claims.

While the plaintiff's reliance on the employer's practice with regard to dealing with other claimants through retaliatory means is probative of the employer's intent in terminating the plaintiff in an individual case, it does not follow that lack of a pattern of retaliatory firings would be admissible in defense of the employer's explanation for termination. Since the plaintiff's burden is to prove only that the institution of a compensation claim was a reason prompting the termination, that reason may exist uniquely for the individual employee and not reflect a general practice of retaliatory firing. Were

102. This type of evidence would appear to be admissible under Texas Rule of Evidence 405(b) which permits introduction of specific prior instances to prove character or a common trait of character, or under Rule 406 which authorizes proof of the routine practice of an organization to prove that the conduct of the organization on the particular occasion conformed to the routine practice. See Tex. R. Evid. 405(b) and 406.

103. In *Texas Employers' Ins. Ass'n v. Fashing*, 706 S.W.2d 801 (Tex. App.—El Paso 1986, no writ), the court denied the carrier's petition for writ of mandamus to set aside the trial court's discovery order compelling the carrier to produce the employee's entire claim file. *Id.* at 801. The file had not been prepared in contemplation of the wrongful discharge action in which its production was sought and, thus, could not be construed as privileged matter covered by Rule 166b(3)(d) of the Rules of Civil Procedure. *Id.* at 802-03. The contents of the file, moreover, might have been particularly relevant to the employer's intent in terminating the worker.

104. An appropriate interrogatory might require the employer to identify all employees having filed workers' compensation claims within the preceding five years; their current status as employees; and, for all discharged employees, their dates of termination and the date of settlement or other resolution of their workers' compensation claims as well as their current or most recent addresses. The second interrogatory would require the employer to identify all discharged employees and the reason for discharge in each instance, plus the most recent available address of each employee.

the plaintiff required to prove that the sole reason for termination was the filing of a claim, an employer's otherwise clean record in dealing with worker's compensation claimants would be far more probative of absence of an illegal motive in the individual case since one would expect that termination would be a more institutionalized practice for the business.¹⁰⁵ The *Santex* rule, that termination does not have to be *solely* caused by the filing of the claim,¹⁰⁶ protects those employees for whom the filing of the claim is the culminating reason for termination.

Where the employer does show a justifiable reason for discharge, however, the lack of a pattern of retaliatory firing would clearly seem probative of the employer's good faith and legal intent in terminating the employee.¹⁰⁷ The fact that an employer does not engage in retaliatory firing as a general practice is consistent with the explanation that the firing was for good cause. An example of this type of situation would be firing for a violation of company policy regarding safety regulations which resulted in the injury upon which the compensation claim is brought.¹⁰⁸ In such a case, the employer's explanation that the employee violated company policy, exposing both the employee and perhaps fellow employees to injury and the employer to the consequences of unsafe practices, could be supported by evidence showing that other employees were not ter-

105. Such evidence might be admissible under Rule 406 of the Texas Rules of Evidence, providing for proof of routine practice of an organization to show conformity with the routine in a particular circumstance. See TEX. R. EVID. 406.

106. See *supra* notes 28-31 and accompanying text. Compare the more rigorous burden imposed by the *Hauck* court in recognizing the judicial "public policy" exception to the doctrine of "at-will" employment. See *supra* notes 8 and 15-20, and accompanying text. The plaintiff, proceeding pursuant to *Hauck*, bears the burden of proving that the employer's *sole* reason for terminating the employment relationship was the employee's refusal to perform an illegal act at the employer's direction. See *Hauck*, 687 S.W.2d at 735.

107. Once the burden shifts to the employer and a justification for the termination is advanced, evidence of the employer's non-discriminatory routine in dealing with other employees filing claims would probably be properly admitted under Rule 406 of the Texas Rules of Evidence. See *supra* note 102.

108. See, e.g., *Travelers Ins. Co. v. Burden*, 94 F.2d 880, 882 (5th Cir. 1937) (employee violating company regulation regarding wearing of respirator nevertheless entitled to recover compensation benefits for injury sustained); *Port Neches Indep. School Dist. v. Soignier*, 702 S.W.2d 756, 757 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (affirming recovery for worker despite employer's argument that employee violated safety instructions and that violation resulted in injury). While compensation might not be precluded by violation of the employer's safety regulations, the violation might justify discharge of the employee, particularly if the violation followed a pattern of non-compliance or endangerment of other employees.

minated when injured, particularly if safety infractions were not involved.

In assessing the admissibility of evidence relating to the employer's general practices, it is essential that the trial court weigh the probative value against potential prejudice as required by Rule 403 of the Texas Rules of Evidence.¹⁰⁹ If the plaintiff offers the evidence affirmatively, it may prove so probative as to establish the prima facie case when supporting the plaintiff's own testimony concerning the stated or perceived basis for his termination.¹¹⁰ The trial court should be less liberal in the admission of the evidence defensively where the plaintiff has not expressly raised the issue of the employer's dealings with similarly situated employees, even though the evidence is arguably admissible under Rule 406 which governs proof of routine habit or practice.¹¹¹ Unless the case is one in which the plaintiff's case is devoid of proof of improper motive and the employer provides a reasonable explanation for the termination, evidence showing absence of a pattern of retaliation may tend to obscure the real issue in the case—whether this particular plaintiff was fired in retaliation for having filed a compensation claim.

109. See TEX. R. EVID. 403. Rule 403 directs the trial court to weigh the probative value of relevant evidence against the potential prejudice to the opponent, if any, from its introduction, prior to admitting the evidence over objection. *Id.*

110. Admission of evidence of the employer's discrimination toward other employees, offered to show the likelihood of discriminatory motive in discharging the employee, is proper because the employee bears the burden of establishing a prima facie case of illegal intent. See *supra* notes 97-98 and accompanying text. See also *Smith v. Mallory Timers Co.*, 97 A.D.2d 571, 468 N.Y.S.2d 74 (1983), *rev'd*, 63 N.Y.2d 1002, 473 N.E.2d 733, 484 N.Y.S.2d 505 (1984) (fact that other employees terminated as a result of economic conditions had been rehired when claimant had not was substantial evidence that termination was effected in retaliation for filing of compensation claim).

111. See TEX. R. EVID. 406. The apparent disparity in treatment of evidence of the employer's action in other cases is justified by the proper application of the relevance test embodied in Evidence Rule 401. See TEX. R. EVID. 401. Compare *Charter Oak Fire Ins. Co. v. Perez*, 446 S.W.2d 580, 585-86 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (held that evidence that claimant's co-workers had not filed claims for compensation based on lung disease was not relevant to the claimant's theory that his exposure to toxic substances in the workplace had resulted in his development of pneumoconiosis) and *Home Ins. Co. v. Blancas*, 713 S.W.2d 192, 194-95 (Tex. App.—Corpus Christi 1986, no writ) (evidence that two co-workers had developed asbestosis was deemed relevant to the claimant's argument that his own asbestosis developed as a result of exposure to the toxic substance in the workplace, particularly in light of the expert's testimony that "it would be almost impossible" for the worker not to have asbestos in his lungs in light of the findings relating to the co-workers).

B. Proposed Definitions and Instructions for the Employee's Case

Given the problems of proof inherent in attempting to demonstrate an illegal motive in the termination of the compensation claimant's employment, trial counsel should give considerable thought to drafting instructions that correctly express the applicable law from a posture fair to the plaintiff. Because certain characteristics of the firing are likely to be present in most retaliatory firings, the following suggested definitions and instructions are proposed as a guideline to the jury charge in the retaliatory firing case. No effort is made to duplicate those general instructions which are routinely given in civil cases, such as the definition of the burden of proof by a preponderance of the evidence,¹¹² even though these might be tailored by skillful counsel to fit unique factual matters that arise in the individual action.

1. Instruction generally stating the applicable law

Trial counsel may desire a very generalized statement of the law of article 8307c, broadly defining those acts which may be deemed sufficient to constitute the "institution of a compensation claim" for purposes of claiming the benefits of the statutory protection.¹¹³ The following suggested instruction may be modified to fit the facts which counsel expects to prove at trial:

You are instructed that an employer terminates or fires an employee in violation of the law when he causes or orders termination of the employee's employment as a result of the employee's act in [filing a worker's compensation claim],¹¹⁴ [hiring an attorney to represent him in the prosecution of a worker's compensation claim],¹¹⁵ [giving notice of his intention to file a

112. See 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES 10-11 (1970) ("SHORT FORM" COMPENSATION CHARGE).

113. See *supra* note 78.

114. See *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 560 (Tex. Civ. App.—Waco 1981, no writ) (employer criticized employee for filing claim); *VanTran Electric Corp. v. Thomas*, 708 S.W.2d 527, 530 (Tex. App.—Waco 1986, writ ref'd n.r.e.) (employer questioned employee's intent in filing claim).

115. See *A.J. Foyt Chevrolet v. Jacobs*, 578 S.W.2d 445, 447 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (employer expressed anger over worker having retained attorney).

worker's compensation claim],¹¹⁶ [giving notice of his intention to hire an attorney to represent him in prosecuting a worker's compensation claim]¹¹⁷ or [seeking medical treatment or payment for medical treatment for an injury sustained while at work, on the job, or while engaged in the furtherance of his employer's business or interests].¹¹⁸

The bracketed alternative statements of the protections of article 8307c permit counsel to provide the jury with a general statement of the applicable law tailored to fit the act alleged to have caused the firing of the claimant, triggering the protections of the statute.

2. Application of the burden of proof

The claimant in the retaliatory firing case bears the burden of proving a causal link between the institution of a worker's compensation claim or proceeding and his firing.¹¹⁹ However, as noted in *Hughes Tool Co. v. Richards*,¹²⁰ once the employee establishes the "causal link," the burden shifts to the employer to show a legitimate, non-retaliatory motivation for the firing.¹²¹ Trial counsel should be

116. Article 8307, Section 4a requires the employee to give "notice of injury" to the employer within 30 days after the work-related injury is sustained, unless the employer has actual notice of the injury, as a prerequisite to filing a claim under the Act. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon Supp. 1987). Notice of filing has also been held accomplished where a treating physician forwarded his summary of treatment and charges showing a work-related injury to the employer's insurance carrier. *Cadengo v. Compass Ins. Co.*, 721 S.W.2d 415, 417-18 (Tex. App.—Corpus Christi 1986, no writ).

117. *E.g. Schrader v. Artco Bell Corp.*, 579 S.W.2d 534, 539 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (employer told worker he could not work as long as he had attorney representing him on compensation claim).

118. See *Hunt v. Van Der Horst Corp.*, 711 S.W.2d 77, 79 (Tex. App.—Dallas 1986, no writ) (employer terminated employee upon notice of injury requiring medical treatment); *Luna v. Daniel Int'l*, 683 S.W.2d 800, 802 (Tex. App.—Corpus Christi 1984, no writ) (termination followed employee's report of injury and early departure from work to seek medical treatment); *Texas Steel Co. v. Douglas*, 533 S.W.2d 111, 117 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (termination resulted from side effect of treatment necessitated by work-related injury).

119. *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991 (1982).

120. *Id.*

121. Consider *Geddes v. Benefits Review Bd.*, 735 F.2d 1412 (D.C. Cir. 1984), where the court held that the employee's burden is not the usual preponderance of evidence standard, but a standard under which the employee is entitled to benefit from all favorable inferences which might be drawn from the facts; factual doubts are resolved in his favor. *Id.* at 1416. The employer's burden is then to prove that the employee's exercise of his right to claim workers' compensation benefits played no part in the decision to discharge. *Id.* at 1417. The

careful to request an instruction sufficient to state the plaintiff's burden and to explain the shift to the employer once the burden is met. The following instruction can be tailored to the specific act allegedly causing the employer's retaliation, such as the filing of a claim or hiring of an attorney, or can express the burden in general terms:

The burden of proof is on the employee to establish a "causal link" or reason for his discharge as a result of the filing of a worker's compensation claim or other action instituting a worker's compensation proceeding. Once the employee has made a prima facie case showing the causal link between the filing of the worker's compensation claim or other act instituting a worker's compensation proceeding and his discharge by his employer, the employer has the burden to prove that there was a legitimate, non-retaliatory, non-pretextual reason for the discharge.

The problem inherent in this instruction lies in the fact that it points to the difficulty the employee may experience in establishing the "causal link" between the institution of a compensation proceeding and the firing. If the evidence is insufficient to make out the prima facie case, the employer is never forced to shoulder the burden of proving a legitimate reason for the firing.¹²² The following three instructions are designed to address the situation in which the lack of a legitimate reason for the firing is relied upon, itself, as part of the employee's case.

3. The "sole cause" instruction

In order to establish that the employer's motive in firing was retaliatory, the employee must link the firing to some action triggering the protections of article 8307c.¹²³ The *Santex* decision makes clear that while other reasons for termination may be demonstrated, there is no requirement that the "sole cause" for termination be the institution of compensation claim proceedings.¹²⁴ Instead, the claim-

application of this more liberal standard would clearly favor illegally terminated employees who are otherwise unable to prove their claim of discriminatory motivation because of the employer's sophistication in concealing this motivation for the discharge. See *id.* at 1418.

122. See *Hughes Tool Co.*, 624 S.W.2d at 599-60 (employee's discharge followed his use of obscene and abusive language at employer's medical department).

123. See *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ).

124. *Id.* at 559-60.

ant is required to show only that his reliance on the Act was a factor in the employer's decision to terminate. Trial counsel should request an instruction such as the following:

It is not necessary that the employee show that the sole cause or only cause of his discharge was his action in filing a worker's compensation claim or taking other action to institute a worker's compensation proceeding. Instead, the employee must show only that his action in filing a claim or taking other action to institute a worker's compensation proceeding was a reason for his firing, even if other reasons for the firing existed.

This instruction should serve to limit the burden on the employee to show only that retaliation for the institution of worker's compensation proceedings was a factor in the employer's decision to terminate the employee.¹²⁵ In *Santex*, for instance, the jury returned affirmative answers on two special issues relating to the employer's motivation.¹²⁶ One issue involved retaliation for the filing of a claim.¹²⁷ The other, however, focused on the employer's explanation for the firing in terms of dissatisfaction with the employee's performance on the job.¹²⁸ The affirmative answer on the special issue regarding the employer's explanation for the firing did not deprive the plaintiff of a verdict in his favor based on the special issue concerning retaliation.¹²⁹ This principle must be clearly explained to the jury, since an employer facing trial may be expected to offer a legitimate explanation for the firing, even if it is merely the product of hindsight.

4. Circumstantial evidence instructions

The absence of a direct admission by the employer of a retaliatory intent in discharging the employee after the filing of a compensation claim may require that the employee prove intent inferentially. Proof of an illegal or improper intent is often shown by reference to circumstances and the logical inferences flowing

125. See, e.g., *DeFord Lumber Co. v. Roys*, 615 S.W.2d 235, 236-37 (Tex. Civ. App.—Dallas 1981, no writ) (appellate court sustained employer's "no evidence" point on appeal where employee's trial counsel requested special issue which inquired whether the employer's firing of employee in retaliation for the filing of a compensation claim was the *sole* cause for the discharge).

126. See 618 S.W.2d at 558.

127. *Id.*

128. *Id.*

129. *Id.* at 560.

therefrom, particularly in criminal cases¹³⁰ or in civil prosecutions of fraud claims.¹³¹ The plaintiff's circumstantial evidence instruction in a retaliatory firing action may take the following form:

An employer's intent in terminating an employee may be established by direct evidence or circumstantial evidence or both. A fact is established by direct evidence when proved by witnesses who saw the act done or heard the words spoken or by documentary evidence. A fact is established by circumstantial evidence when it may fairly and reasonably be inferred from other facts proved. The intent of the employer in terminating the employment relationship with the employee may be inferred from the facts surrounding the termination, [the prior relationship of the employer and employee],¹³² and [the subsequent conduct of the employer toward the employee].¹³³

The defense may object to this instruction as not requiring the proof in a circumstantial evidence case to be such that the conclusion to be proved by the facts and circumstances of the case make that conclusion more probable than any other theory, conclusion or hypothesis which might be drawn from those facts. However, even in criminal cases, the "moral certainty" instruction which traditionally was required in Texas criminal trials¹³⁴ has now been abandoned¹³⁵ and the newly adopted Rules of Evidence make no such requirement that the jury differentiate between circumstantial and direct evidence.¹³⁶

130. See *Thomas v. State*, 699 S.W.2d 845, 850 (Tex. Crim. App. 1985) (The Court of Criminal Appeals discussed proof of criminal intent by referring to "attendant circumstances from which the defendant's mental state can be inferred [which] must be collectively examined in light of the definition of criminally negligent conduct.").

131. See *Pulchny v. Pulchny*, 555 S.W.2d 543 (Tex. Civ. App.—Corpus Christi 1973, no writ) (holding that intent may be shown by circumstantial evidence).

132. See *Santex*, 618 S.W.2d at 560 (the court noted that the prior history of promotions or pay raises given the employee might be relevant).

133. See, e.g., *VanTran Electric Corp. v. Thomas*, 708 S.W.2d 527, 530 (Tex. App.—Waco 1986, writ ref'd n.r.e.) (the court refers to the fact that after the employee had been terminated, his supervisor, a vice-president of the company, personally called the employee's subsequent employer to inform them of his back injury and total disability).

134. See *Richardson v. State*, 600 S.W.2d 818, 825 (Tex. Crim. App. 1980) (the court holds that a trial court has a duty to give a charge on the law of circumstantial evidence).

135. See *Hankins v. State*, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (on rehearing).

136. See TEX. R. EVID. 401. Neither the definition of "relevant evidence" provided by the Texas Rules of Evidence, nor the comparable provision in the rules adopted for criminal cases in Texas, differentiates between direct and circumstantial evidence. See TEX. R. EVID. 401; TEX. R. CRIM. EVID. 401. The civil rule provides the following definition: "'Relevant evidence'

5. Presumption of "retaliatory intent"

Absence of direct evidence of "retaliatory intent" for the firing of an employee who has instituted worker's compensation proceedings may defeat many claims where the sophisticated approach taken by the employer provides no indication of illegality other than the timing of the firing. In order to fully implement the goals of the Act in protecting employees from retaliation, and based on a liberal construction of article 8307c for the benefit of the employee fired or discriminated against,¹³⁷ trial counsel should urge the court to instruct the jury that the illegal intent may be presumed in some actions. The instruction is particularly important where the only "causal link" which can be demonstrated by the employee is the proximity in time between the discharge and the absence of a legitimate reason for the firing.¹³⁸ A sample instruction on this proposed presumption reads:

The law presumes that when an employee is terminated by his employer shortly after the filing of a worker's compensation claim or other action taken to institute a worker's compensation proceeding, the termination is in retaliation for the employee's action in availing himself of the right to seek compensation for a work-

means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401.

137. *Navarette v. Temple Indep. School Dist.*, 706 S.W.2d 308, 309 (Tex. 1986) (holding that the Workers' Compensation Act must be liberally construed in favor of the employee).

138. The District of Columbia Circuit Court in *Geddes v. Benefits Review Bd.*, 735 F.2d 1412 (D.C. Cir. 1984), analogized the reduced burden of proof in a retaliatory firing case to the application of the doctrine of *res ipsa loquitur* in tort actions. *Id.* at 1417-18. Once the negligent plaintiff proves a set of facts from which a reasonable conclusion of defendant's negligence can be drawn and shows that the correct explanation of the event is more accessible to the defendants than to the plaintiff, the plaintiff benefits from a rebuttable presumption or inference that one or more of the defendants was, in fact, negligent. *Id.* In the dissent, Judge MacKinnon argued that the specific finding of the administrative law judge that the employer's animus toward the terminated worker was general and not attributable to the worker's act in filing a workers' compensation claim was binding on the court and entitled to deference on appeal. *Id.* at 1419-21 (MacKinnon, J., dissenting).

The majority's acceptance of the analogy to *res ipsa loquitur* perhaps reflects concern that meritorious claims of discriminatory intent are so difficult to prove in most circumstances that claimants are entitled to the assistance of a legal presumption to make their cases. *See id.* at 1418. Judge MacKinnon's approach, requiring "an initial showing that the employer's discrimination was improperly motivated . . ." under the applicable Act, would restrict recoveries where the only evidence available to show retaliatory motive is the discharge itself. *Id.* at 1421 (MacKinnon, J., dissenting). Effectively, the "at-will" employment doctrine would serve to protect those employers who are inclined to discriminate, yet are sophisticated in their approach to the act of discrimination.

related injury. The presumption may be rebutted by the employer with evidence showing that the employee's termination was based on reasons other than and unrelated to the employee's action in asserting his legal remedies under the Workers' Compensation Act. However, the presumption is not rebutted unless the evidence shows that the employee's assertion of his legal rights was not a reason for his termination.¹³⁹

No decision has been found in which such an instruction has been given, challenged or approved by a Texas court. However, the legislative requirement that the Act be given a liberal construction for the benefit of workers virtually requires that in some actions the employee be permitted to benefit from a presumption where the necessary evidence to prove a claim under the Act cannot otherwise be offered due to the particular circumstances of the case.

Thus, for instance, in *Scott v. Millers Mutual Fire Insurance Co.*,¹⁴⁰ the Texas Supreme Court recognized that an employee's beneficiaries could establish that his unexplained death occurred in the course and scope of his employment if his dead body is discovered at a place where his duties would require him to be, or where he might properly have been in the performance of his duties, during the hours of his work.¹⁴¹ The presumption may be rebutted, of course, by evidence showing that he was not engaged in furtherance of his employer's business or interests at the time he suffered his fatal injury.¹⁴² Similarly, in his concurring opinion in *Walters v. American States Insurance Co.*,¹⁴³ Justice McGee argued that a similar presumption should benefit workers who sustain injury as a result

139. This instruction was requested by the plaintiff in *Sikes v. Railroad Comm'n*, No. 85-13,282 (160th Judicial District Court of Dallas County, Texas, filed July 30, 1986). The *Sikes* case was resolved by settlement of the claim prior to trial.

140. 524 S.W.2d 285 (Tex. 1974).

141. See *id.* at 288. For a discussion of the application of this presumption in compensation cases see *Deathrage v. Int'l Ins. Co.*, 615 S.W.2d 181, 183 (Tex. 1981), and 1A LARSON, *supra* note 1, § 24.10.

142. 524 S.W.2d at 288.

143. 654 S.W.2d 423 (Tex. 1983). Compare with *American States Ins. Co. v. Walters*, 660 S.W.2d 859 (Tex. App.—Tyler 1984, no writ) (opinion on remand). Three justices of the supreme court would have concluded that the claimant was entitled to the presumption in spite of the absence of any evidence that the death was attributable to a work-related cause. 654 S.W.2d at 430 (McGee, Spears, and Kilgarlin, J.J., concurring). The court of appeals on remand found evidence sufficient to sustain the claimant's jury verdict at trial. 660 S.W.2d at 860.

of assaults committed by third persons where the motivation for the assault cannot be readily demonstrated.¹⁴⁴

Applying the reasoning of the court in *Scott* and the concurrence of Justice McGee in *Walters*, the lack of direct evidence of retaliatory intent in the termination of an employee who has filed a compensation claim should not bar the employee from at least forcing the employer to show a non-retaliatory intent motivating the firing at trial. The shifting burden requires the employee to first demonstrate a prima facie case before the employer is required to even explain his motivation for the firing. In many instances, however, the only evidence of the employer's intent may be that inferable from the timing of the firing. In those cases, the close proximity between the filing or institution of a worker's compensation proceeding and the firing of the employee should be sufficient, in itself, to establish the "causal link" necessary to shift the burden to the employer to justify the firing.

C. The Relationship Between the Plaintiff's Burden and the Proposed Instructions

The retaliatory firing case may be difficult to try and prove because the very tangible type of evidence which accompanies other actions in tort and contract may be missing when an employee is terminated in a state traditionally dominated by the concept of "at will" employment. One of the problems with illegal discharge actions will likely be that the reported decisions will serve in some real way to educate employers to avoid statements and acts clearly suggesting retaliation as a motivation for the termination of an employee who has filed a worker's compensation claim.¹⁴⁵ Although one may assume that many employers have simply complied with the Act since enactment of article 8307c, the remedy afforded by the section is not capable of eliminating discrimination by employers of a mind to discriminate or retaliate.¹⁴⁶

144. 654 S.W.2d at 430 (McGee, Spears, and Kilgarlin, J.J., concurring).

145. Of course, the recent decision in *VanTran Electric Corp. v. Thomas*, 708 S.W.2d 527 (Tex. App.—Waco 1986, writ ref'd n.r.e.), demonstrates that not all blatantly discriminatory discharges have been deterred by the reported decisions. See *supra* notes 23 and 42.

146. This would especially appear to be the case during periods of economic constriction or recession when employers might be expected to attempt to control costs by avoiding increasing premium rates for workers' compensation coverage through selective discharge procedures. See *supra* notes 51-62 and accompanying text.

Faced with the prospect of trying the lawsuit without clear direct evidence of retaliatory intent, plaintiff's trial counsel must be prepared to demonstrate the illegal intent circumstantially. Of course, where direct evidence is available, the burden of producing a prima facie case will be easily met. The shift in the burden of proof to the employer will then either open up the employer's fabricated justification for discharge to impeachment, having a potentially stronger impact than the direct evidence, or will permit the plaintiff to argue that a retaliatory motive is simply one among several motives where the employer's other justifications are credible. In the latter instance, the *Santex*-based instruction will be most critical in protecting the plaintiff from a jury determination representing a choice between likely motives shown by the evidence.¹⁴⁷

In the absence of direct evidence, an instruction on the law of circumstantial evidence and means of proof of intent will be critical in assisting counsel to explain that the jury is entitled to infer an illegal motive from the circumstances of the firing. Regardless of how favorable or unfavorable the circumstantial evidence instruction appears to the plaintiff, the mere inclusion of the instruction in the jury charge will afford plaintiff's counsel an opportunity to argue that jurors should not disregard reason and common sense in evaluating the employer's actions. Such an opportunity is especially important in those cases in which the employee's work record was not itself objectionable or the employer can be shown to have fabricated a claim of justification for the termination after the fact. If the employer makes such a claim and is effectively impeached, the impact of the exposed lie or rationalization may have a demonstrably greater impact on jurors than no offer of justification at all.

Where the most probative fact that a plaintiff can establish is a good work record and proximity in time between the filing of the claim and the firing, the plaintiff's counsel should urge the trial court to consider the presumption instruction set forth in the pre-

147. See *supra* notes 119-25 and accompanying text. In *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ), the defense strategy at trial was to rely on a requested special issue requiring plaintiff to prove retaliatory motive as the sole cause of the discharge and to offer another reason for the discharge based on the employee's poor performance at work. *Id.* at 558. The employer succeeded in obtaining an affirmative jury finding on the latter proposition, but the trial court's refusal to charge the jury on discrimination as the sole cause of the discharge was upheld by the appellate court. *Id.* at 559.

ceding section.¹⁴⁸ The presumption would serve both to provide a legal basis for avoiding a directed verdict¹⁴⁹ and in affording the jury a similar basis for evaluating the sufficiency of the employer's explanation for the firing once the burden has shifted following the evidence establishing a *prima facie* case. Moreover, the presumption should prove especially valuable in cases where the employee seeks to rely on the employer's inability to provide an affirmative justification to support his argument that the proximity of the discharge to the assertion of rights under the Act demonstrates or suggests the illegal, retaliatory intent of the employer.

Finally, the wording of the special issue should be considered by counsel as bearing on the likelihood that the jury will answer favorably. Where direct evidence has been shown on the issue of intent, formation of the special issue is not likely to be critical unless the issue seems to require the jury to find that retaliation constitutes the single, or the most significant motive for the firing. Even where direct evidence is strong, plaintiff's counsel should avoid the pitfall of permitting the jury to simply choose between an employer's legal and illegal motivations in determining whether there has been a violation of the Act.¹⁵⁰ Otherwise, the verdict may be jeopardized by competing claims appealing to individual jurors and the employee may lose the benefit of the *Santex* decision.¹⁵¹ As a strategic matter, the circumstances in that case point to an alternative means of instructing the jury. To minimize the possibility that jurors will be swayed by their concern for the effect of the verdict, counsel may elect not to request the instruction on the "sole cause" issue. Even

148. See *supra* notes 137-39 and accompanying text.

149. A directed verdict is appropriate when there is no evidence of probative force to support the plaintiff's cause of action or a necessary element of the cause of action. *Murray Corp. v. Brooks*, 600 S.W.2d 897, 900 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.); *Texas Employers Ins. Ass'n v. Page*, 553 S.W.2d 98, 102 (Tex. 1977). Application of the presumption would serve to insure that the plaintiff established a fact issue requiring submission based on an unexplained or unjustified discharge following closely in time his institution of workers' compensation proceedings.

150. See *supra* note 146.

151. See 618 S.W.2d at 557. For example, in *E-Tex Dairy Queen, Inc. v. Adair*, 566 S.W.2d 37 (Tex. Civ. App.—Beaumont 1978, no writ), the court observed that there appeared to be merit in the employer's claim that the employee had been terminated for misconduct with female employees, as well as his filing a claim for compensation. *Id.* at 40. Had trial counsel opted for a *sole* cause issue, the jury might well have found the employer's explanation credible and been forced to answer negatively, even though it also had concluded that discriminatory intent was present in the firing. See *id.*

if the jury finds different reasons for the termination in response to different special issues, following the reasoning of the *Santex* court, the legal effect of an affirmative finding on the retaliation issue will preserve the verdict.¹⁵² Thus, while counsel may want the jury to understand in some instances that the retaliatory motive must only be shown to be one among many motives raised by the evidence in order for the violation to be established, in other cases, the composition of the jury may be such that counsel will simply want responses to individual special issues in hope that the jury will find the retaliatory motive supported by the evidence without regard for the consequences of its verdict.

Phrasing of the special issue or issues will require counsel's understanding of both the state of the evidence and the likely inclination of the jury. In the relatively straightforward case, the following form may be adequate:

Do you find from a preponderance of the evidence that the plaintiff was fired or discharged by the employer as a result of having filed a worker's compensation claim?¹⁵³

ANSWER:

We do _____.

We do not _____.

152. 618 S.W.2d at 560. The *Santex* Court held that affirmative answers to each of two special issues relating to the reason for discharge—one unlawful under the Act and one lawful—did not present irreconcilable answers requiring reversal. *Id.*

153. The special issue submitted in *Santex* read: "Do you find from a preponderance of the evidence that the Defendant Santex, Inc., discharged Jesse L. Cunningham because Jesse L. Cunningham had, in good faith, filed a claim under the Texas Worker's Compensation Act?" 618 S.W.2d at 558.

The instruction posed is far more favorable than that requested by the employer and refused by the trial court, which would have required the jury to find that retaliation was the *sole* cause for the discharge. *See id.* However, the reference in the issue to the causal relationship between the filing and firing through the use of the unmodified "because" could have resulted in a negative response had the jury interpreted the wording as limiting causality to a single factor, rather than multiple factors. *See id.*

Moreover, the issue posed unnecessarily interjected the "good faith" issue unless the employee's "good faith" in filing a claim had previously been raised and litigated at trial. *See id.* The defense of "bad faith" apparently has not been raised in many Texas actions; the question of whether the defense must plead and prove "bad faith" as a defense to the retaliatory discharge action is unresolved. The issue appears to constitute an inferential rebuttal issue which must be raised in a fashion comparable to affirmative defenses in compensation actions. *See United States Fire Ins. Co. v. Monn*, 643 S.W.2d 207, 208 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); Sullivan, *Unexplained Accidents and Assaults: The Problems and Burdens of Proof Under the Texas Workers Compensation Statute*, 16 TEX. TECH L. REV. 875, 927-31 (1985).

In a case in which competing explanations have been offered for the termination and a single special issue is to be submitted, the following form may serve to protect the plaintiff from the jury's perception that it must choose from among the explanations:

Do you find from a preponderance of the evidence that a cause or reason for the plaintiff's discharge by his employer was the fact that he filed a worker's compensation claim?

ANSWER:

We do _____.

We do not _____.

Counsel may well draft more appropriate instructions and special issues paralleling the instructions given the facts developed in the individual case. The proposed instructions and special issues provided here are simply designed to demonstrate alternatives available in producing the best set of instructions for the claimant at trial. The important factor is that counsel give consideration to the importance of the instructions in arguing for a verdict favorable to the client.

II. REMEDIES AND SCOPE OF DAMAGES

Even assuming the terminated employee can survive summary judgment and directed verdict motions, the question of the measure of recovery authorized by article 8307c will determine the viability of the statutory remedy as a means of true redress for a retaliatory firing. The range of remedies afforded by section 2 of the statute provides for reinstatement and reasonable damages suffered by the employee as a result of the discharge or other retaliatory action.¹⁵⁴

As a preliminary matter, it is important to note that the statutory remedy is limited specifically to retaliatory acts by the employer which follow from the employee's action in asserting his claim to benefits under the Act. Thus, in *Britt v. Sherman Foundry*,¹⁵⁵ the Dallas Court of Appeals held that a non-subscriber to the Act could not be sued for retaliation since the injured employee could not have filed or instituted a worker's compensation proceeding if employed by a non-subscribing employer.¹⁵⁶ Additionally, certain employers, such as state agencies and political subdivisions which are covered by special applications of the Act, may not be subject to the remedies

154. See TEX. REV. CIV. STAT. ANN. art 8307c § 2 (Vernon Supp. 1987); *supra* note 27.

155. 608 S.W.2d 338 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

156. See *id.* at 339.

created by article 8307c unless the remedy has been specifically made applicable to those public employers by legislation.¹⁵⁷ In the 1978 decision of *Gates v. City of Fort Worth*,¹⁵⁸ for example, the court reasoned that a political subdivision could not be held liable under the statute for the wrongful termination of an employee, allegedly motivated by the employee's assertion of his rights under the Act.¹⁵⁹

The remedies under article 8307c have been restrictively construed as applying only to acts occurring during the employment relationship and not to acts evincing discrimination in the hiring process itself.¹⁶⁰ In *Smith v. Coffee's Shop for Boys & Men*,¹⁶¹ the court held that a refusal to rehire based on an admittedly discriminatory motive was not actionable under article 8307c.¹⁶² This restrictive interpretation of the statute affords the prospective employer with an insulated opportunity to choose not to hire based on the prospective employee's prior history of compensable injuries or claims.¹⁶³ Such "lawful" discrimination in hiring undoubtedly permits many employers to seek to control rising compensation premiums by refusing to hire workers

157. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6674s § 7 (Vernon Supp. 1987) (application of remedy to Department of Highways and Public Transportation employees); *Id.* art. 8309h § 3 (application of Workers' Compensation Act to employees of political subdivisions); and *Id.* art. 8309g § 15(a) (application of remedy to employees covered by State Employees' Workers' Compensation Division).

158. 567 S.W.2d 871 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

159. *Id.* at 873. The court, construing article 8309h, section 3 (extending workers compensation coverage to employees of political subdivisions), held that article 8307c had not been included in those provisions expressly made applicable to political subdivisions by the legislature. *Id.* In contrast, the legislature did make article 8307c applicable to state employees covered by workers' compensation in enacting article 8309g, section 15(a)(7)(c). TEX. REV. CIV. STAT. ANN. art. 8309g, § 15(a)(7)(c) (Vernon Supp. 1987).

160. Compare with OR. REV. STAT. 659:410 (1977) (prohibits an employer from refusing to hire a prospective employee based on the latter's prior action in filing a workers compensation claim against another employer). See *Shaw v. Doyle Milling Co.*, 297 Or. 251, 683 P.2d 82 (1984) (holding actionable an employer's refusal to rehire employee replaced during period of recovery from work-related injury); *Morehouse v. Workers' Compensation Appeals Bd.*, 154 Cal. App. 3d 323, 201 Cal. Rptr. 154 (1984) (refusal to rehire actionable where court held former employee covered by statute as "any employee" when employee's loss of employment was necessitated by recovery from work-related injury sustained while employed with same company).

161. 536 S.W.2d 83 (Tex. Civ. App.—Amarillo 1976, no writ).

162. *Id.* at 84.

163. Compare *Darnell v. Impact Indus.*, 105 Ill. 2d 158, 85 Ill. Dec. 336, 473 N.E.2d 935 (1984) (holding firing actionable where termination resulted from employee's claim against previous employer). Arguably, article 8307c would afford a remedy in this same circumstance since it would be predicated on an act of termination occurring during the employment, rather than upon a refusal to hire.

whose prior history indicates at least an understanding of the availability of the remedies under the Act. An inaccurate or false statement on an employment application regarding prior injuries or workers' compensation claims may afford the employer a defense to a charge of retaliation if the employee is subsequently terminated after sustaining an injury on the job or instituting proceedings under the Act.¹⁶⁴

Finally, the remedies available under the Act may be compromised by the employee's election to pursue other remedies. In *Thompson v. Monsanto Co.*,¹⁶⁵ the Houston Court of Appeals, Fourteenth District, held that where the aggrieved employee exercised his option of filing a formal grievance through his union pursuant to a collective bargaining agreement with the employer and the grievance was prosecuted through binding arbitration, the employee was barred from relitigating the same claim in a state action based on article 8307c.¹⁶⁶ However, where the employee elects to pursue the article 8307c action before final resolution of a grievance filed pursuant to a collective bargaining agreement, his right to pursue the action through litigation

164. See *Douglas v. Livingston Shipbldg. Co.*, 617 S.W.2d 718, 719-20 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (employer properly defended a wrongful discharge action based on admitted false statement contained in plaintiff's application for employment, given despite employer's express warning that false statement in response to any question in the employment application would constitute ground for termination); accord *Swanson v. American Mfg. Co.*, 511 S.W.2d 561, 564 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.) (application falsified by employee makes application voidable by employer, but does not preclude recovery for injuries).

165. 559 S.W.2d 873 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

166. *Id.* at 877. The court held that the action under article 8307c was preempted under federal labor law by the worker's decision to seek relief by way of arbitration pursuant to a collective bargaining agreement with the employer. *Id.* at 876. The state remedy was deemed preempted by section 301(a) of the Labor Management Relations Act. *Id.* at 877 (relying on Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (1970)).

In contrast, the Hawaii Supreme Court has concluded that a wrongful discharge claim is not preempted either by the collective bargaining agreement or by federal law. *Puchert v. Agsalud*, 67 Haw. 225, 677 P.2d 449 (1984), *appeal dismissed sub nom.* *Pan American World Airways, Inc. v. Puchert*, 472 U.S. 1001 (1985). And the Missouri Court of Appeals held in *McKiness v. Western Union Tel. Co.*, 667 S.W.2d 738 (Mo. Ct. App. 1984), that exhaustion of the grievance procedure provided for in a collective bargaining agreement is a prerequisite to maintaining an action for wrongful discharge. *Id.* at 741.

The validity of the court of appeals decision in *Thompson v. Monsanto* is cast in doubt by the Texas Supreme Court's decision in *Ruiz v. Miller Curtain Co.*, 702 S.W.2d 183 (Tex. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 3295, 92 L. Ed. 2d 710 (1986), in which the court recognized and relied on the decision of the Hawaii Supreme Court in *Puchert*. *Id.* at 186.

is not barred.¹⁶⁷ A similar result was reached on the issue of whether to pursue arbitration as an alternative to suit under article 8307c in *Carnation Co. v. Borner*.¹⁶⁸ There the supreme court held that the employer's failure to respond in timely fashion to a grievance filed pursuant to the collective bargaining agreement effectively operated as a waiver of the election defense where the grievance had not been finally arbitrated prior to the filing of the action in district court.¹⁶⁹ The court noted that the jury had responded to a special issue directed at the arbitration question that no settlement between the claimant and his employer had been reached on the grievance prior to the filing of the lawsuit.¹⁷⁰

Not every collective bargaining agreement will cover the impropriety involved in an employer's discharge of an employee in retaliation for the filing of a compensation claim. Consequently, as the supreme court pointed out in its 1981 decision in *Spainhower v. Western Electric Co.*,¹⁷¹ the employer could not defend on the theory that the employee had previously arbitrated the claim as a grievance without showing that the bargaining agreement covered such a claim.¹⁷² In order to assert the election defense, an employer's duty under existing case law is to show that the collective bargaining agreement provided for resolution of the claim and that the employee utilized the grievance and arbitration process to a final resolution of the complaint.¹⁷³

A potentially more significant problem concerning availability of the state remedy is the possible preemption of the state cause of action by federal legislation. The San Antonio Court of Appeals held in *Ruiz v. Miller Curtain Co.*,¹⁷⁴ that the remedy afforded by article

167. See *Richard v. Hughes Tool Co.*, 615 S.W.2d 196 (Tex. 1981).

168. 610 S.W.2d 450, 452-53 (Tex. 1980). The court observed that the remedy available under the Act was broader than that provided under the collective bargaining agreement since the employee could recover "reasonable damages" in a civil action in addition to the back pay and reinstatement available through arbitration. *Id.* at 453.

169. *Id.* at 453.

170. *Id.* at 452.

171. 615 S.W.2d 190 (Tex. 1981) (opinion on motion for rehearing).

172. *Id.* at 191.

173. See *id.* (the court distinguished the facts from those in *Thompson v. Monsanto* because in *Thompson* the worker's grievance filed pursuant to the collective bargaining agreement had proceeded to a final decision).

174. 686 S.W.2d 671 (Tex. App.—San Antonio), *rev'd*, 702 S.W.2d 183 (Tex. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 3295, 92 L. Ed. 2d 710 (1986).

8307c is preempted by the National Labor Relations Act (NLRA)¹⁷⁵ in those cases in which the employer is engaged in activity affecting interstate commerce.¹⁷⁶ The court concluded that retaliation for the filing of a worker's compensation claim fell within the ambit of those activities which are defined as unfair labor practices by sections 7 and 8 of the NLRA.¹⁷⁷ Applying the doctrine of preemption, the court held that unless the cause of action for retaliatory firing was expressly excepted from the coverage of the federal statute, state actions were barred by the existence of the federal remedy.¹⁷⁸ The court of appeals narrowed its holding, however, finding that the retaliatory action of the employer in firing an employee who has asserted a claim for compensation was not a *per se* violation, but simply an implied violation of the national legislation.¹⁷⁹ In so holding, the court effectively concluded that a state action can be maintained if the employee can show that the retaliatory act of the employer was not of common interest to other employees.¹⁸⁰

The Texas Supreme Court reversed the San Antonio Court of Appeals, pointing out the lower court's misunderstanding of both the underlying intent of the National Labor Relations Act¹⁸¹ and the role of the preemption doctrine in limiting state remedies.¹⁸² The

175. 29 U.S.C. §§ 157, 158 (1982).

176. 686 S.W.2d at 673.

177. *Id.*

178. *Id.* at 673-75. The San Antonio Court of Appeals expressly relied on *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), in holding that state actions for retaliatory discharge are, at least in some instances, preempted by federal labor legislation. 686 S.W.2d at 674-75. In *Garmon*, however, the Supreme Court held that a California statutory cause of action for damages sustained as a result of peaceful picketing, collective action protected by federal law, was preempted by the federal labor legislation. 359 U.S. at 245-47. Contrary to the situation in *Ruiz*, *Garmon* represented a case in which state remedies worked directly at cross-purposes or in repudiation of the goals of the federal legislation by seeking to regulate activity protected by the express language of the federal law. *See id.* at 246-47.

179. 686 S.W.2d at 675.

180. *See id.* *Accord* *Rhudy v. Diamond Shamrock Corp.*, 670 S.W.2d 291, 292-93 (Tex. App.—Houston [1st Dist.] 1983, no writ).

181. 702 S.W.2d at 184-85. The court held that the filing of a workers' compensation claim by an individual employee could not be construed as "concerted activity" by employees either protected or prohibited by the NLRA. *Id.* at 185. Justice Campbell noted that plaintiff *Ruiz* was neither a union member nor employed in a shop governed by a collective bargaining agreement. *Id.* at 184.

182. *Id.* at 185-86. The court observed that the *Garmon* preemption doctrine has not been applied where the state's interest in regulating the conduct is substantial and does not interfere with the federal regulatory scheme. *Id.* at 185 (relying on *Farmer v. United Brotherhood of*

filing of the compensation claim which triggers a retaliatory firing is not an activity associated with organization or representation. Section 7 of the NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .¹⁸³

Nothing in this section could be construed to concern the filing of a claim for workers' compensation in an individual instance. The court of appeals relied on language from the opinion in *Krispy Kreme Doughnut Corp.*¹⁸⁴ rendered by an administrative law judge in a proceeding brought by the National Labor Relations Board, in which the judge found that the employer violated the NLRA in terminating the employee based on his expressed intention of filing a claim for workers' compensation benefits.¹⁸⁵ The *Ruiz* court apparently did not consider the subsequent decision of the U.S. Court of Appeals in *Krispy Kreme* which denied enforcement of the administrative law judge's order on the ground that the filing of a compensation claim by an individual employee did not constitute "concerted activity" within the scope of section 7 of the Act.¹⁸⁶ The Fourth Circuit was careful to distinguish between activity by an individual employee which is designed to benefit other employees or the employee group generally, and those activities by employees undertaken for purely personal interests.¹⁸⁷ While an individual act to enforce rights under

Carpenters, 430 U.S. 290 (1977) and *Peabody-Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1980)). In *Peabody-Galion*, the Tenth Circuit had held that an Oklahoma statute affording protection similar to that in article 8307c was not preempted by federal labor legislation. 666 F.2d at 1317-18. Other decisions following the *Peabody-Galion* reasoning noted by the court are: *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250 (1978); *Puchert v. Agsalud*, 67 Haw. 225, 677 P.2d 449 (1984), *appeal dismissed sub nom.* *Pan American World Airways, Inc. v. Puchert*, 472 U.S. 1001 (1985); *Vaughn v. Pacific Northwest Bell Tel. Co.*, 40 Or. App. 427, 595 P.2d 829 (1979), *aff'd*, 289 Or. 73, 611 P.2d 281 (1980).

183. National Labor Relations Act § 7, 29 U.S.C. § 157 (1982).

184. 245 NLRB Dec. (CCH) 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980).

185. 686 S.W.2d at 675.

186. 635 F.2d at 306. See Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 COLUM. L. REV. 514 (1953).

187. 635 F.2d at 306-07. The circuit court observed that in some instances an individual

a collective bargaining agreement may constitute protected activity under section 7, an action asserting a grievance over personal working conditions may be construed as personal to the employee and not arguably within the ambit of "concerted" activity.¹⁸⁸

The decision of the Fourth Circuit in *Krispy Kreme* undermines the theoretical underpinnings of the court of appeals' decision. The San Antonio court's further reliance on another administrative decision, *Ohio Brass Co.*,¹⁸⁹ was similarly incorrect. In *Ohio Brass Co.*, the issue was whether the employer improperly discriminated in its standard job application form by asking prospective employees if they had previously filed workers' compensation claims.¹⁹⁰ The Board concluded that this action was not violative of the Act because there were no actual decisions not to hire based on affirmative answers to the question appearing in the application¹⁹¹ and, further, because the employer's interest in the health and physical condition of prospective employees was legitimate.¹⁹² The appellate court, in *Ruiz*, relied on the concurring opinion of Board Member Zimmerman in *Ohio Brass* in which he argued that the right to file workers' compensation is an *implied* right under section 7, rather than a concerted union activity expressly protected by the statute.¹⁹³ According to Member Zimmerman, the filing of compensation claims arises from the employment relationship and thus can be presumed to be of common interest to other employees, "absent evidence of disavowal of concern" by others.¹⁹⁴ Seizing on this language, the appellate court in *Ruiz* affirmed the judgment of the trial court, dismissing the employee's action because there was no evidence present in the record indicating "disavowal of concern" by other employees of the defendant.¹⁹⁵ In this instance, the court concluded that the remedy afforded

may act on behalf of others or for the benefit of others, including the filing of a single grievance to secure rights guaranteed by the collective bargaining agreement. 635 F.2d at 306-07.

188. 635 F.2d at 308 (citing *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949)).

189. 261 NLRB Dec. (CCH) 137 (1982).

190. *Id.*

191. *Id.* at 138.

192. *Id.*

193. 686 S.W.2d at 675 (relying on *Ohio Brass Co.*, 261 NLRB Dec. (CCH) 137, 139 (1982)).

194. 261 NLRB Dec. (CCH) at 139.

195. 686 S.W.2d at 675.

by article 8307c had been preempted by the federal legislation.¹⁹⁶

The lower court not only erred in misconstruing the filing of a compensation claim by a single employee as "concerted activity" within the scope of section 7 of the NLRA;¹⁹⁷ it also incorrectly held that the existence of the federal legislation necessarily preempted state remedies.¹⁹⁸ In reaching its conclusion that federal labor legislation preempts remedies for wrongful termination created by article 8307c, the court relied on the decision in *San Diego Building Trades Council v. Garmon*¹⁹⁹ in which the Supreme Court held that the provisions of sections 7 and 8 of the NLRA preempted California legislation providing for a cause of action for damages resulting from peaceful picketing.²⁰⁰ Clearly, to the extent that picketing is a method for achieving a concerted expression of labor interests, the California legislation would have afforded employers with a means for countering concerted activity protected by the federal statute. The assertion of individual claims for workers' compensation benefits and the protections of article 8307c against retaliatory actions by the employer do not conflict with the goal of protecting concerted activity by employees engaged in organizing or in collective bargaining with their employer. Instead, the state remedy, if construed in conjunction with remedies created under the NLRA, should be seen as supplementing or augmenting the rights of employees to assert claims arising from the employment relationship. Rather than contradictory in nature, the state and federal legislation actually represent parallel efforts of the Texas Legislature and Congress to protect employees, individually and collectively, in asserting legal rights arising from the employment relationship.²⁰¹

The Texas Supreme Court's opinion in *Ruiz* correctly responds to the issues raised. The supreme court rejected both the conclusion

196. *Id.*

197. *See id.*

198. *See id.* at 674. The court held: "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 of the NLRA, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield." *Id.*

199. 359 U.S. 236 (1959).

200. 686 S.W.2d at 673-74 (relying on the holding in *Garmon*, 359 U.S. at 242-43).

201. As the Texas Supreme Court noted in its opinion in *Ruiz*, the state legislation is designed to protect workers generally, without reference to union activity or collective bargaining. 702 S.W.2d at 185. Federal legislation expressly protects the rights of workers to organize, make organization decisions, and bargain collectively. *Id.*

that the filing of a workers' compensation claim constituted "concerted activity" within the scope of section 7 of the NLRA and the application of the preemption doctrine to the remedies afforded by article 8307c.²⁰² The court's unanimous opinion, authored by Justice Campbell, also rests on its conclusion that the regulation of workers' compensation law is "preeminently a matter of state concern."²⁰³ Absent express congressional direction, Justice Campbell concluded that Congress did not intend for the federal legislation to preempt state legislative action in the compensation area.²⁰⁴

Trial counsel should be able to comfortably rely on the supreme court's decision in *Ruiz* to respond to any claims of federal preemption of article 8307c remedies in future state actions. The Texas Supreme Court's holding does not, of course, preclude the possibility that the federal courts might reach a contrary result at some point. But as the supreme court noted, the weight of decisions from other jurisdictions and the rejection of the *Krispy Kreme Doughnut* reasoning suggest that preemption is not a correct view of the interplay of federal and state law in this area.²⁰⁵

However, the protections of the NLRA might prove significant in establishing a federal claim that a particular employer is engaged in a policy of termination in response to employees asserting their state workers' compensation rights.²⁰⁶ Moreover, a Texas employer retaliating in apparent response to the filing of a workers' compensation claim may also demonstrate a motive prohibited by the federal act if the employee has previously been engaged in concerted activity with other employees.²⁰⁷ In such a case, an election of remedies might

202. See 702 S.W.2d at 183.

203. *Id.* at 185-86.

204. *Id.* at 185 (citing *Peabody-Galion v. Dollar*, 666 F.2d 1309, 1317 (10th Cir. 1981)).

205. *Id.*

206. See *id.* at 185-86. The decision suggests that the Texas Supreme Court may eventually adopt the view that the state remedy for retaliatory discharge is never preempted by the existence of a collective bargaining agreement. See *id.* at 185. However, if the employee elects to proceed to a final arbitration of his claim, an adverse decision might well be held to bar a further civil action, extending the distinction drawn by the supreme court in *Spainhower v. Western Electric Co.*, 615 S.W.2d 190, 191 (Tex. 1981). The court might, however, reverse its approach and require arbitration as a prerequisite to the filing of the civil action, as the Missouri Court of Appeals held in *McKinness v. Western Union Tel. Co.*, 667 S.W.2d 738, 741 (Mo. Ct. App. 1984).

207. For example, if employees sought to organize to bargain collectively because of an employer's prior history of discrimination against workers' compensation claimants, this activity

be necessary, or joinder of claims in a single action might provide an effective means for dealing with all discriminatory motivations of the employer in terminating the employee without just cause.

A. Reinstatement and Restoration as a remedy under article 8307c

Section 2 of article 8307c authorizes reinstatement of the employee to his "former position" upon a finding that his termination or demotion was ordered in retaliation for his having filed a worker's compensation claim or instituted proceedings under the Act.²⁰⁸ If the employee pleads for reinstatement to the position formerly held and obtains a verdict or judgment supporting the retaliatory discharge claim, the district court is empowered to order reinstatement pursuant to statute.²⁰⁹

Reinstatement, however, may prove to be an entirely unsatisfactory remedy in the individual employee's case, principally because the circumstances leading to the discharge can hardly be improved if the employer is subsequently forced to "re-employ" the employee after trial. The requirement of reinstatement does not provide a remedy if, after a suitable period of time, the employer simply decides to terminate for cause, or without cause, relying, at that point, on the "at will" employment doctrine to support its action.²¹⁰

might be construed as protected under section 7 of the NLRA, the filing of compensation claims already being viewed as an "implied right" under that section, as suggested by Board Member Zimmerman in his concurrence in *Ohio Brass Co.*, 261 NLRB Dec. (CCH) 137, 139 (1982).

208. For text of section 2, article 8307c, see *supra* note 27.

209. See TEX. REV. CIV. STAT. ANN. art. 8307c § 2 (Vernon Supp. 1987); *Schrader v. Artco Bell Corp.*, 579 S.W.2d 534, 539-40 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.). See *Vasquez v. Bannworths, Inc.*, 707 S.W.2d 886 (Tex. 1986), where the court held that a trial court has a duty to order injunctive relief which achieves the purpose of the legislation in ordering reinstatement of an employee illegally discharged for union activity. *Id.* at 888. This conduct is proscribed by the Texas Right to Work Law. TEX. REV. CIV. STAT. ANN. art. 5154g (Vernon 1971). The trial court failed to order reinstatement after finding that the employer violated the statutory guarantee of an employee's right to join a union. 707 S.W.2d at 887 (relying on section 1 of article 5154g). When the employer refused to rehire the plaintiff, the court held that the goal of the statute had not been met by the trial court's failure to affirmatively order reinstatement as part of the relief granted. *Id.* at 888.

210. Unless the employee could demonstrate that a later termination was somehow causally related to his earlier action in filing a workers' compensation claim, the employer's retaliation might well be insulated from redress under article 8307c simply because of problems of proof. See *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687-88 (Tex. App.—El Paso 1986), *aff'd* 734

The likelihood that the employee can be restored to an enjoyable working situation after discharge seems difficult enough, without the intervening circumstance of a lawsuit concluded in his favor against the employer. In considering whether to plead for reinstatement, plaintiff's counsel should evaluate the potential consequences of the request for this relief on the lawsuit in its entirety. Two possible problems emerge in this respect.

1. The burden of proving the employee's fitness to work

In *Schrader v. Artco Bell Corp.*,²¹¹ the terminated employee appealed from the trial court's order which did not order his reinstatement, despite a favorable answer from the jury on the special issue establishing the employer's retaliatory motive in discharging him.²¹² On appeal, he argued the evidence was sufficient to establish his physical ability to return to his former job.²¹³ The Tyler court concluded that the burden is upon the discharged employee to "establish that he was physically able to perform the duties of the job he had before his injury."²¹⁴ The court concluded that he had not met the burden, particularly in light of his own testimony showing that his ability to lift was restricted and that he continued to suffer the same pains associated with his injury.²¹⁵ In the absence of evidence showing affirmatively that he was physically able to return to work performing his former duties, the appellate court rejected his argument that the lower court's refusal to order his reinstatement was error.²¹⁶

The Act does not require the employer to alter the employee's duties within its business or operation to accommodate the employee's

S.W.2d 667 (Tex. 1987). In *Azar Nut Co.*, the discharged employee was offered a job by a company affiliated with the defendant and owned by the brother of defendant employer at a salary equivalent to that at the time of her termination by defendant. *Id.* at 687-88. The employee refused the offer which had been made after commencement of litigation. *Id.* at 688. Clearly, acceptance of the offer would have placed the employee in the uncomfortable position of both compromising her claim for damages and subjecting her to future harassment at the conclusion of the litigation. *See id.* The El Paso Court of Appeals effectively held that the employee was under no duty to accept this offer in order to show a good faith attempt to mitigate her damages. *Id.*

211. 579 S.W.2d 534 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

212. *Id.* at 536.

213. *Id.*

214. *Id.* at 540.

215. *Id.* at 539-40.

216. *Id.*

physical restrictions. The *Schrader* court strictly construed the statute to provide that reinstatement can be ordered only when it can be shown that the employee is able to resume the work he had previously performed.²¹⁷ This limitation on the power of the trial court to effect an equitable remedy shows an important problem regarding the right of reinstatement created by the article. A seriously injured employee who has been terminated is less likely to be capable of performing duties previously done in the course of his work than an employee who is less seriously or only superficially injured. The subsequent termination not only means the loss of a job, but the ramifications may include loss of employability and insurability, as well. Reinstatement would clearly provide a more favorable source of remedy if the trial court were simply authorized to direct the employer to reemploy the discharged worker in any capacity in which he could perform the job duties, given the worker's post-injury state of health. However, since the Act only authorizes reinstatement to the worker's former position, the *Schrader* court's conclusion appears to correctly express the more limited grant of authority to the district court in fashioning a remedy for the retaliatory termination.

2. Reinstatement and loss of future earnings

Reinstatement may preclude recovery for lost earnings in the future, even if such loss of earnings has been found by the jury in response to an appropriate special issue. Once the employee has been restored to his former position, including restoration to seniority and accompanying benefit levels, any claim that the employee will lose additional wages as a result of the retaliatory action of the employer in terminating him is almost necessarily inconsistent with the reinstatement.²¹⁸ To the extent that reinstatement does not include restoration of seniority and benefit levels, the equitable remedy would not completely overlap with the damage findings by the jury. However, reinstatement does, by definition, suggest that injury for future

217. *Id.* at 540. Of course, the employee's inability to return to his former position of employment is admissible in the typical workers' compensation action to show loss of earning capacity. See *Sterrett v. East Texas Motor Freight Lines*, 236 S.W.2d 776, 778 (Tex. 1951) (observation of inability of injured employee to perform job tasks is admissible evidence).

218. However, the jury finding of loss of future wages might not necessarily conflict with a reinstatement order if one considers the likelihood of termination in the future which cannot be linked by evidence to the prior discriminatory discharge.

consequences of the improper discharge has effectively been remedied.

Arguably, the trial court's power to order reinstatement encompasses the power to order restoration of seniority and accompanying benefit levels in terms of retirement benefits, paid vacation and sick leave, and other benefits attaching to the position previously held by the employee.²¹⁹ In petitioning for reinstatement, trial counsel should consider development of evidence on the record which fully documents the terms and conditions of the employee's prior employment. The evidence should document the actual loss sustained by the employee as a consequence of the termination and support a more definite statement relating to these matters in the trial court's order ultimately requiring reinstatement. In the event the trial court's order fails to fully restore the employee to his former position, the record adduced at trial would permit counsel to seek further enforcement²²⁰ or a more specific order through modification²²¹ to accommodate the legitimate expectations of the reinstated employee.

The same factors which are discussed in terms of ordering a full restoration of the employee's status prior to termination may also support a substantial jury verdict on loss of future earnings and benefits. Therefore, the employee may be placed in the position of electing reinstatement or recovery for future loss of earnings and

219. Otherwise, the grant of power to the trial court contained in article 8307c, section 2 would be incomplete because it would permit the employer to penalize the worker for filing the claim and the relief ordered by the court would not be complete. *See* TEX. REV. CIV. STAT. ANN. art. 8307c, § 2 (Vernon Supp. 1987). In *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980), the court held that recovery of damages by an employee could properly include compensation for loss of "retirement and other benefits" lost as a result of the discharge. *Id.* at 453-54. Thus, in reinstating an employee, the court would appear authorized to grant relief sufficient to restore these benefits to the employee unless the award of damages will adequately compensate the claimant for the full measure of his loss.

220. Rule 308 of the Texas Rules of Civil Procedure provides: "The court shall cause its judgments and decrees to be carried into execution. . . ." TEX. R. CIV. P. 308. This rule authorizes trial courts to use the contempt power to enforce their judgments. *See* *Various Opportunities, Inc. v. Sullivan Investments, Inc.*, 677 S.W.2d 115, 118 (Tex. App.—Dallas 1984, no writ); *Reynolds v. Harrison*, 635 S.W.2d 845, 846-47 (Tex. App.—Tyler 1982, writ ref'd n.r.e.) (holding that trial courts have inherent authority to direct orders not inconsistent with adjudication, and to make such orders as may be necessary to carry their judgments into execution).

221. Rule 308 provides that the trial court may enter an additional order to assist in the enforcement of its judgment so long as the original judgment is not so vague or imprecise that it cannot be properly enforced. TEX. R. CIV. P. 308. Where injunctive relief has been ordered as a part of the judgment, the order is enforceable under the contempt power set forth in rule 692. TEX. R. CIV. P. 692.

benefits. Although no case law requires such an election, a judgment providing for the seemingly inconsistent recovery of both the position lost and damages for the loss occasioned by the discharge would result in a double recovery to the employee.

B. Loss of Earnings as Damages

Section 2 of article 8307c authorizes recovery for "reasonable damages" suffered by the wrongfully terminated employee.²²² In *Carnation Co. v. Borner*,²²³ the supreme court held that reasonable damages included lost wages and benefits,²²⁴ and future lost wages and benefits.²²⁵ Clearly, damages in terms of accrued and prospective lost wages and benefits are recoverable in an article 8307c action.

1. Loss of earnings accruing prior to trial

The terminated employee's actual loss of wages and benefits between the date of discharge and the date of trial can usually be calculated with certainty,²²⁶ although expert testimony regarding the cash value of the lost benefits may be required. This information may be available through the employer's own classification and categorization of individual positions and their respective compensations in cash equivalents, and offered through stipulation or by the testimony of the employer's personnel officer if expenses for expert testimony are not available.

The Dallas Court of Appeals defined the correct measure of damages in a lost wages claim in *DeFord Lumber Co. v. Roys*²²⁷ as

222. TEX. REV. CIV. STAT. ANN. art. 8307c, § 2 (Vernon Supp. 1987).

223. 610 S.W.2d 450 (Tex. 1980).

224. *Id.* at 453-54.

225. *Id.* See *Texas Steel Co. v. Douglas*, 533 S.W.2d 111, 113 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

226. There is no requirement that the plaintiff specifically plead the exact sum claimed as lost wages, except that the trial court may order the plaintiff to plead the maximum amount claimed, pursuant to rule 47. TEX. R. CIV. P. 47. The plaintiff must request lost wages in his pleadings. *Phillips v. Vinson Supply Co.*, 581 S.W.2d 789 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ). Examples of employee's proving their lost wages are found in the following decisions: *Carnation Co. v. Borner*, 601 S.W.2d 450 (Tex. 1980); *Azar Nut Co. v. Caille*, 720 S.W.2d 685 (Tex. App.—El Paso 1986), *aff'd on other grounds*, 734 S.W.2d 667 (Tex. 1987); *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ); *A.J. Foyt Chevrolet v. Jacobs*, 578 S.W.2d 445, 446-47 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

227. 615 S.W.2d 235 (Tex. Civ. App.—Dallas 1981, no writ).

"that sum of money the employee would have earned, had he not been terminated, less that sum of money which he in fact did earn, from the date of termination to time of trial."²²⁸ The *DeFord* court concluded that where the record was silent as to the number of hours and days actually worked by the terminated employee and showed only the wage rate at which he had been employed, the evidence was insufficient to support the jury finding that he had suffered lost wages in the sum of \$23,500 as a result of the termination.²²⁹ The opinion demonstrates the importance of establishing by testimony, rather than conjecture, the work habits of the employee in demonstrating regular employment to permit the jury to properly draw its conclusions. Instead of regular employment, the record in *DeFord* showed that the employee had worked intermittently for the employer and was only paid for hours actually worked.²³⁰ The court observed, "[t]here is no evidence of the usual or normal number of hours in a regular workday, week, or month at either place of employment, nor is there any estimate of the number of hours he worked."²³¹ This ambiguity undermined the jury's assessment of actual lost wages, particularly in light of other testimony showing that the employee had been employed at a higher hourly wage by another employer after his termination and prior to trial.²³²

In contrast to the record available in *DeFord*, the record reviewed by the Beaumont Court of Appeals in *E-Tex Dairy Queen, Inc. v. Adair*²³³ gave the jury a factual basis for arriving at its lost wages computation of \$5,548.²³⁴ The employer's general manager was questioned and testified that similarly situated managers averaged earnings within a given range and also testified to the average length of employment of store managers.²³⁵ The employee testified to the jobs he had held and salary earned after his termination, and also as to the efforts he had undertaken in finding other employment.²³⁶ The court concluded that the evidence supported a finding that he had

228. *Id.* at 237.

229. *Id.* at 238.

230. *Id.*

231. *Id.*

232. *Id.* The jury answer was characterized as based on speculation. *Id.*

233. 566 S.W.2d 37 (Tex. Civ. App.—Beaumont 1978, no writ).

234. *Id.* at 38.

235. *Id.* at 40.

236. *Id.*

suffered lost earnings of "at least" \$5,548 based on this evidence adduced at trial.²³⁷

The burden of proving lost wages is properly placed on the employee.²³⁸ However, the court in *A.J. Foyt Chevrolet v. Jacobs*²³⁹ essentially concluded that the employer bore the burden of proving that the employee failed to discharge his duty of mitigating his damages.²⁴⁰ There, the employer failed to show that the employee had not exercised due diligence in seeking alternative employment, even though the record showed that only a minimal effort to find other employment had actually been expended.²⁴¹ The employer's burden in seeking to limit actual damages with regard to lost wages should be seen as two-fold: first, the employer should document through the employee's testimony and appropriate records the amount of money actually earned between the date of termination and the trial; and second, the employer should require the employee to document his effort to obtain other employment, or employment equally compensated as that lost, in the event the employee claims an inability to mitigate damages through earnings at other work.

No Texas decisions have dealt with the pleading burden the duty to mitigate places upon the parties. This matter is analogous to defenses of avoidance and set-off, both of which must be affirmatively pleaded by the employer in its answer, pursuant to Rule 94.²⁴²

237. *Id.*

238. *DeFord Lumber v. Roys*, 615 S.W.2d 235, 238 (Tex. Civ. App.—Dallas 1981, no writ).

239. 578 S.W.2d 445 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

240. *Id.* at 447. Texas courts have generally held that the burden of proving failure to mitigate damages falls on the party alleging such a failure. *Cocke v. White*, 697 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1985, writ ref n.r.e.); *R.A. Corbett Transport, Inc. v. Oden*, 678 S.W.2d 172, 176-77 (Tex. App.—Tyler 1984, no writ).

241. 578 S.W.2d at 447. The trial court found that Jacobs "made only a minimal effort to obtain other employment." *Id.* The court concluded that the employer failed to show that the minimal effort expended by the employer did not meet the standard of "reasonable diligence" argued for by the employer in its point of error. *Id.* But see *Azar Nut Co. v. Caille*, 720 S.W.2d 685 (Tex. App.—El Paso 1986), *aff'd on other grounds*, 734 S.W.2d 667 (Tex. 1987). In *Azar*, the evidence showed that the discharged employee was offered another position at her former salary by a company owned by the defendant's brother but rejected the offer. *Id.* at 687-88. The court concluded that the employee was not required to accept the offer, tendered after she had begun litigation in order to mitigate damages, as required under Texas law. *Id.* at 687 (citing *Gulf Consol. Int'l v. Murphy*, 658 S.W.2d 565 (Tex. 1983)).

242. TEX. R. CIV. P. 94. Rule 94 requires that a party defending on the grounds of "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence,

If the employer has failed to plead the employee's failure to mitigate, plaintiff's counsel should object to testimony on this issue²⁴³ and further object to submission of any issue²⁴⁴ which specifically asks the jury to deduct actual wages earned in other employment from those lost through termination. Under Rule 279, failure to plead the defense would appear to bar submission of a special issue on this defensive theory²⁴⁵ and counsel should timely object to the framing of any issue which permits the employer to avoid the impact of failing to plead its defense.²⁴⁶

The mitigation requirement serves to further the interest of the employer who violates the Act. An employee who is required to work to support the family may suffer a loss of value in wage or a temporary period of unemployment, but will likely have to continue working in the interim between termination and trial in order to sustain his household. To the extent that the employer is able to rely defensively on simple economic reality, the intent of article 8307c will be frustrated by the good faith efforts of the discharged employee not necessarily to mitigate his damages, but to continue to earn a living.

discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense" must affirmatively plead the defense in responding to a preceding pleading. *Id.* See *Hess v. American States Ins. Co.*, 589 S.W.2d 548, 551 (Tex. Civ. App.—Amarillo 1979, no writ).

243. See generally *Scott v. Atchison, Topeka & Santa Fe R.R.*, 572 S.W.2d 273, 277 (Tex. 1978) (judgment must be supported by pleadings and evidence).

244. See generally *United States Fire Insurance Co. v. Monn*, 643 S.W.2d 207 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (party not entitled to defensive special issue when not raised by affirmative written plea and party has proceeded to trial on general denial only).

245. TEX. R. CIV. P. 279. Rule 279 requires the trial court to "submit the controlling issues made by the written pleadings and the evidence, and . . . a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part." *Id.* Rule 66, however, permits a party to file a written trial amendment to his pleadings to specifically plead a matter shown by the evidence, and case law requires that such trial amendments be viewed liberally by trial courts and granted except where the opposing party can demonstrate unfair prejudice resulting from the amendment. *Id.* See *Chambless v. Barry Robinson Farm Supply*, 667 S.W.2d 598, 601 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

246. Rule 274 provides in pertinent part:

"A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless specifically included in the objections. . . ."

TEX. R. CIV. P. 274.

2. Prospective loss of earnings

The supreme court has held in *Carnation Co. v. Borner*²⁴⁷ that damages for loss of future earnings and retirement and other benefits are recoverable in the wrongful termination action if reasonably ascertainable.²⁴⁸ The essential problem in establishing entitlement to future lost wages is, of course, the re-employment of the worker by the time of trial. If the employee has not regained employment, the employer may seek to demonstrate lack of diligence in procuring another position such that the employee has wholly failed to discharge his duty to mitigate damages. In considering the issue of future loss of earnings, counsel should be aware of the range of effects the improper termination may have on the claimant's ability to get and keep employment at a level of compensation commensurate with that of the position formerly held.

First, if the re-employment of the plaintiff prior to trial has actually resulted in a net loss of wages when compared to his former earnings, the differential should be easily established through the employee's testimony, as supported by past and current pay records.²⁴⁹ The employee is virtually entitled to rely on the benefit of a presumption that he would have continued to work for the former employer and enjoyed the customary promotions and pay raises which regularly accompanied his former position²⁵⁰ or classification as established through the subsequent work history of similiary-situated fellow

247. 610 S.W.2d 450 (Tex. 1980)

248. *Id.* at 453-54. The key to recovery is the "reasonable certainty" of the claimed loss of future earnings. *Id.* at 454 (relying on *Bildon Farms, Inc. v. Ward County Water Improvement Dist. No. 2*, 415 S.W.2d 890 (Tex. 1967)).

249. For example, in *Santex, Inc. v. Cunningham*, 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ), the evidence showed that the claimant's wage was \$4.00 per hour at the time of the pre-hearing conference on his compensation claim. *Id.* at 560. Thereafter, the employer reduced his wages to \$3.50 per hour, apparently in retaliation for the favorable Board award obtained by the employee. *Id.* After he was later fired, the claimant was employed at \$2.75 per hour by one employer and at \$3.00 per hour by a second employer. *Id.* A simple calculation of wage differential would have permitted both an accurate compilation of actual lost wages and a basis for projecting future lost wages.

250. The supreme court implicitly approved a special issue in *Carnation* which asked the jury to consider the following in arriving at its monetary damage award:

B. Loss of wages, if any, which Willie Borner, will in reasonable probability incur in the future.

C. Retirement and other employee benefits to which Willie Borner would have been entitled had he continued to work for Carnation Company.

610 S.W.2d at 453-54.

employees. The court of appeals, in *Santex, Inc. v. Cunningham*,²⁵¹ rejected the employer's argument that since the employee could have been terminated at will in the future, unless such termination would be in violation of article 8307c, the employee had no reasonable expectation of continued employment by which loss of future earnings could be calculated.²⁵²

Second, the employee should be prepared to demonstrate efforts to get and keep employment in the event he has suffered significant periods of unemployment since his termination. In this regard, two important consequences of the termination may be established through both the employee's testimony and expert testimony relating to the employee's ability to obtain other work. First, the fact that the employee has previously suffered an injury which may have resulted in loss of physical ability to perform work may be considered by a prospective employer in assessing the fitness of the applicant for the job sought. Neither the state statute nor federal labor law bars the prospective employer from considering the applicant's history of injury, and particularly, work-related injury, in making the hiring decision.²⁵³ Second, article 8307c does not regulate the employer's

251. 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ).

252. *Id.* at 559. Specifically the court said:

Appellant next asserts that the trial court erred in allowing the jury to consider loss of future wages as an element of damages, contending thereby that this is an improper measure of damages because Plaintiff Cunningham was an employee at will and had no right to be employed for any definite period of time. This argument has been laid to rest by our Supreme Court in *Carnation Co. v. Borner* (Tex. 1980) 610 S.W.2d 450, wherein it was held involving an employee at will that under Article 8307c such employee may recover for the loss of wages in the future, retirement, and other benefits which are ascertainable with reasonable certainty and are the result of wrongful discharge.

Id. A reading of the supreme court's decision in *Borner* shows that the argument concerning the "at will" status of employment was "laid to rest" by implication only, in part perhaps because of Carnation's failure to make appropriate objections to the charge. See *Carnation Co. v. Borner*, 610 S.W.2d at 454 n.4. While the court clearly held that recovery for loss of future wages was authorized under the statute, it is less certain that Carnation argued that the "at will" employment status necessarily rendered such a termination impermissibly speculative, even though Carnation did object that those damages were speculative and not capable of calculation. *Id.* This premise was rejected by the supreme court.

253. In fact, in both *Douglas v. Levingston Shipbldg.*, 617 S.W.2d 718 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) and *Swanson v. American Mfg. Co.*, 511 S.W.2d 561 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.), the respective employees were terminated for giving false answers in their employment applications to questions inquiring about prior filing of workers' compensation claims. 617 S.W.2d at 719; 511 S.W.2d at 562-63. The courts, in

consideration of the fact that the employee may have filed for worker's compensation benefits in deciding whether or not to hire,²⁵⁴ as the decision in *Smith v. Coffee's Shop for Boys & Men* shows.²⁵⁵ Additionally, once a terminated employee has filed an action, that fact itself is a matter of public record, which if known to the employer, would suggest a third reason for discriminating against applicants who have previously demonstrated their willingness to assert their rights under the Act.²⁵⁶

Third, even if the plaintiff has obtained other employment resulting in mitigation of his damages for future lost earnings, a significant loss of benefits, particularly retirement,²⁵⁷ may have nevertheless resulted from his illegal discharge. To some employees, the loss of retirement benefits and the loss of participation in a retirement plan will be a far more substantial loss than the prospective loss of

both instances, held that the employee's action in giving a false answer on the employment application constituted a correct basis for termination. 617 S.W.2d at 720; 511 S.W.2d at 565. However, given the conclusion in *Santex*, that recovery is proper if a retaliatory motive was present as a factor in the termination decision, the *Douglas* and *Swanson* cases appear to have been incorrectly decided. See *Santex*, 618 S.W.2d at 560. Even if the employer's decision to terminate was justified on the basis of the false answers to the employment application questions, summary judgment should have been denied if the employee could also show that a subsequent filing of a compensation claim contributed to his termination. But see *supra* notes 206-07 and accompanying text. If the employer uses the employment application as a basis for discriminating against workers who have previously asserted their right to pursue state remedies for work-related injuries—even if such discrimination is not unlawful under the Texas Act—this approach might be construed as an action designed to frustrate organization rights protected by Section 7 of the NLRA. See National Labor Relations Act § 7, 29 U.S.C. § 157 (1982). The theory for an action brought pursuant to the federal act would be that the employer's questioning about prior assertion of protected rights by workers is simply designed to permit the employer to avoid hiring those workers most likely to assert their rights individually and collectively. See *supra* notes 190-91 and accompanying text.

254. See TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1987). The act focuses on actions of the employer during the term of employment. See *id.* Pre-employment discrimination is not covered by the express language of the statute. See *id.* By analogy, in *Carnes v. Transport Ins. Co.*, 615 S.W.2d 909 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.), the court held that an injury obtained prior to the actual employment of the claimant was not compensable under the Act. *Id.* at 912.

255. 536 S.W.2d 83, 84 (Tex. Civ. App.—Amarillo 1976, no writ).

256. That such discriminatory motive is present in employer decisions regarding personnel is evident in Texas decisions. See *supra* note 253 (inquiries concerning prior claims not held improper); notes 94-95 and accompanying text (noting that rising compensation premiums are of legitimate managerial concern); note 61 and accompanying text (regarding admissions that compensation premiums were a source of concern to management).

257. Loss of retirement and other company benefits is included in the measure of damages. See *supra*, notes 223-25 and accompanying text.

wages or salary, particularly to those employees who are readily re-employable. The value of lost participation in a retirement plan may be developed through the personnel officer of the defendant employer, or through independent expert testimony given by an accountant or other professional experienced in evaluating retirement plans.²⁵⁸

Another element of damages for the terminated employee that can be ascertained with some degree of precision is the loss of insurability which the employee may suffer as a result of his injury, and the termination of his group insurance as a consequence of his discharge. Although the Act provides for lifetime medical benefits for treatment necessitated by the work-related injury,²⁵⁹ this benefit is often compromised in the negotiation of a settlement of the worker's claim.²⁶⁰ Even if left intact, the scope or nature of the injury may preclude other coverage or require that the discharged employee seek personal rather than group coverage, with an appropriate exclusion for the future treatment of the injury covered by the compensation carrier's policy. The cost of obtaining personal coverage or the fact that other insurance cannot be obtained as a result of the work-related injury can be established by the employee's testimony and documentation from prospective insurers who have been contacted regarding coverage and policy rates. In the event the employee is unable to obtain coverage, estimation of future costs of medical treatment for similarly situated individuals would provide a basis in the evidence for the jury to return a finding on the cash

258. In *Williams v. General Motors Corp.*, 501 S.W.2d 930 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref. n.r.e.), for instance, a professor of economics with a Ph.D. was properly permitted to testify concerning prospective loss of wages and medical expenses to be incurred by a plaintiff injured and unable to return to full employment, from data furnished by the employer concerning salary levels and from the Bureau of Labor Statistics projecting inflated value of wages and medical expenses. *Id.* at 940. See also *Texas Steel Co. v. Recer*, 508 S.W.2d 889 (Tex. Civ. App.—Fort Worth 1974, writ ref'd. n.r.e.) (economist could testify on plaintiff's comparative earning capacity before and after injury); *Texas & N.O.R.R. Co. v. Jacks*, 306 S.W.2d 790, 795-96 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.) (insurance agent could testify concerning loss of earnings based on life expectancy tables and annuity table showing present cost of annuity comparable to plaintiff's expected earnings).

259. TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Vernon Supp. 1987).

260. See generally *Moore v. Lumbermen's Mut. Casualty. Co.*, 533 S.W.2d 171 (Tex. Civ. App.—Amarillo 1976, writ ref'd. n.r.e.) (compromise settlement agreement limiting carrier's liability for future medical expense to duration of 36 months and for services provided by named providers only held enforceable).

value of the loss of this benefit of employment.²⁶¹ If the employee was previously covered by a group plan which includes his or her dependents, evidence concerning the value of this loss of insurability should also be adduced. Finally, loss of insurability itself suggests a reason why a prospective employer might not choose to employ a previously-injured worker whose prior employment has been terminated, thereby ending his group medical insurance benefits.

Other benefits, such as loss of vacation and sick pay accruing on the basis of seniority, can also be established with reasonable certainty, forming an additional basis for the jury's answer in response to inquiry about loss of benefits resulting from the termination. The key to keeping favorable answers intact on this type of issue will be evidence in the record sufficient to warrant the jury's finding, particularly since the expansive reading of compensable damages by the court in *Carnation Co. v. Borner*²⁶² appears to authorize recovery for any loss of benefits which can be ascertained with reasonable certainty.²⁶³

3. Special issue submission

The *Borner* court related the following special issue submitted at trial on the issue of damages for lost wages:

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably and adequately compensate Willie Borner for damages sustained as a result of the discharge or discrimination, if any, by Carnation Corporation on or about August 10, 1973?

Consider the following elements of damage, if any, and none other:

261. Loss of "insurability" is apparently an aspect of damages seldom considered by plaintiff's counsel in alleging the full range of injury suffered by their clients in personal injury actions. In *Schrader v. Artco Bell Corp.*, 579 S.W.2d 534 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.), the appellate court refused to reverse the trial court's decision not to order reinstatement of the employee, despite the finding that he was wrongfully terminated. *Id.* at 539-40. The court based its conclusion on the finding that the plaintiff was physically unable to resume the duties of his employment. *Id.* Assuming his termination also necessitated termination of any group medical insurance he might have enjoyed as a benefit of employment, the loss of employment may have rendered it more difficult for him to obtain comparable insurance coverage at an affordable rate, even given the requirement that the compensation carrier continue responsibility for medical expenses arising from the work-related injury.

262. 610 S.W.2d 450 (Tex. 1980).

263. *Id.* at 454.

a. Loss of wages in the past between August 10, 1973 and today.

b. Loss of wages, if any, which Willie Borner, will in reasonable probability incur in the future.

c. Retirement and other employee benefits to which Willie Borner would have been entitled had he continued to work for Carnation Company.

Answer in Dollars and Cents, if any, to each.

Answer: a. \$24,768.00

b. \$52,000.00

c. \$44,000.00²⁶⁴

The opinion suggests that this special issue has been correctly framed, although pointing out that Carnation objected only that future damages are not recoverable under article 8307c,²⁶⁵ a contention rejected by the Court.²⁶⁶

The special issue does not include any limiting language regarding the difference between accrued lost wages and actual earnings which would have resulted in a proper measure of damages under the formulation in *DeFord Lumber Co. v. Roys*.²⁶⁷ Assuming that this defensive matter is properly pled and evidence adduced supporting the employer's claim of mitigation, the term "lost wages" could be defined in a separate definition directing the jury to subtract actual earnings from earnings which would have accrued had the employee continued on the job.²⁶⁸ The "lost" wages or earnings would then be those which the employee was unable to compensate for with other employment.

Applying the principle recognized with respect to inferential rebuttal issues, the mitigation of damages by the employee through other employment would not require or justify a separate submission.²⁶⁹ Instead, the proper means of directing the jury's attention to this fact, if applicable, would be either to define "lost" wages to

264. *Id.* at 453-54.

265. *Id.* at 454 n.4.

266. *Id.* at 454.

267. 615 S.W.2d 235, 237 (Tex. Civ. App.—Dallas 1981, no writ).

268. The use of a definition rather than a defensive special issue would comport with the goal of simplifying the court's charge. See *Scott v. Atchison, Topeka & Santa Fe R.R.*, 572 S.W.2d 273, 279 (Tex. 1978) (noting efforts of the court to provide simpler special issues). See also, *Walters v. American States Ins. Co.*, 654 S.W.2d 423, 425 (Tex. 1983) (noting carrier's failure to request instruction on statutory exclusion).

269. See TEX. R. CIV. P. 277.

include subtraction of actual other earnings from the loss in a separate definitional instruction,²⁷⁰ or to include this reference in the special issue.²⁷¹ The following form would provide for this approach:

What sum of money do you find from a preponderance of the evidence would compensate the plaintiff for the loss of wages from the date of termination to trial, based on the employee's wage or salary had he continued with the defendant employer and subtracting those wages he actually earned during this period of time, to arrive at his loss?

If the employer has failed to establish the value of actual wages earned by the employee or has failed to plead the issue defensively, plaintiff's counsel should object to this form of submission to bar the jury from making any adjustment to the loss of wages attributable to the firing.²⁷²

C. Damages for Mental Anguish and Inconvenience

In *Carnation Co. v. Borner*,²⁷³ the Supreme Court of Texas allowed an employee to recover damages for "inconvenience and mental anguish."²⁷⁴ In *Borner*, the trial court instructed the jury on exemplary damages in language which included the consideration of "compensation for inconvenience and mental anguish suffered by Willie Borner."²⁷⁵ On appeal, the employer complained that exemplary damages cannot be recovered in an action brought under article 8307c because they would not constitute damages suffered by the employee.²⁷⁶ The definition of exemplary damages upon which the jury had been instructed included reference to the inconvenience and

270. In *A.J. Foyt Chevrolet, Inc. v. Jacobs*, 587 S.W.2d 445 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ), the court held that the employer has the burden of proving the wages earned by the discharged worker subsequent to his termination in order to establish the amount of wages "lost" as a result of the discharge. *Id.* at 447.

271. The use of a separate special issue for this defensive purpose would be authorized only if the issue is not characterized as an "inferential rebuttal issue," which is not to be submitted separately. TEX. R. CIV. P. 277.

272. See *Id.* 274.

273. 610 S.W.2d 450 (Tex. 1981).

274. *Id.* at 454-55.

275. *Id.* at 454. "Mental anguish" is not a legal term requiring definition for the jury. *Trotti v. K-Mart Corp.* #7441, 686 S.W.2d 593 (Tex. 1985) (per curiam).

276. 610 S.W.2d at 454.

mental anguish actually sustained by the plaintiff.²⁷⁷ The court held that the employer could not complain on appeal that the exemplary damages awarded were not proper in the absence of an objection to the definition given at trial.²⁷⁸ The court did note that the *definition* of exemplary damages given by the trial court was improper precisely because it did refer to the psychological injury sustained by the employee.²⁷⁹ The court concluded, however; "because there was no objection to the definition of 'exemplary damages,' which included the element of 'inconvenience and mental anguish,' we hold that these damages are recoverable."²⁸⁰

The significance of recovery for mental anguish lies in the possibility that this recovery will reward an employee who is otherwise penalized by his good faith in seeking other employment which results in minimization or mitigation of his damages for lost wages. The more productive the employee, the greater the likelihood that he will seek other employment to sustain his standard of living after termination. This employee may well suffer significant psychological problems from unjust loss of a job or career in which he has invested considerable energy over time.²⁸¹ Use of psychiatric or psychological expert testimony to document the stress and psychological injury suffered by the employee who has unjustly been discharged, particularly when compounding any psychological injury associated with the work-related injury itself, will afford the jury an evidentiary basis for returning an answer to an appropriate special issue.²⁸² Where the firing has resulted in unemployment and the stress associated with this status, expert testimony will provide insight into the problems suffered by the terminated employee. The employee may also need

277. *Id.*

278. *Id.* at 454-55.

279. *Id.* at 455 n.7.

280. *Id.* at 454-55.

281. Termination of the employee by the employer, particularly after the employee has suffered an injury which in itself is career-threatening, would perhaps compound the psychological consequences of the injury. This is particularly true where the injury and subsequent termination leave the employee unable to obtain other employment, given the limited period of recovery under the Act for even a totally disabling injury, 401 weeks, except in cases in which the employee loses the function of multiple body members. See TEX. REV. CIV. STAT. ANN. art. 8306, § 10 (Vernon Supp. 1987).

282. See generally *Peeples v. Home Indemnity Co.*, 617 S.W.2d 274 (Tex. Civ. App.—San Antonio 1981, no writ) (recognizing admissibility of expert psychiatric testimony regarding psychological treatment needed by worker suffering work-related injury in addition to treatment for physical injuries and symptoms).

psychological counseling and the expert's diagnosis, prognosis, and recommended course of treatment will establish the need for, and expense of, treatment necessary to counter the detrimental impact of the termination.²⁸³

D. Awards of Attorneys' Fees

None of the reported Texas decisions has discussed recovery of attorneys' fees for the successful prosecution of the wrongful termination action, and this basis for recovery is not expressly authorized by article 8307c. In other statutory actions for retaliatory or discriminatory employment actions, attorneys fees are often included as a potential basis for recovery for prevailing plaintiffs.²⁸⁴ Generally, attorneys' fees are recoverable in Texas only in situations prescribed by statute.²⁸⁵ Most situations allow recovery when the action is founded upon contract.²⁸⁶ However, characterization of the wrongful termination suit as sounding in contract as opposed to a tort action is questionable. Since the remedy is designed to protect employees from illegal activity, rather than activity in breach of the employment contract, recovery on a theory of contract would appear inconsistent with the nature of the injury and thus, would not support recovery for reasonable attorneys' fees.

However, a plaintiff should plead for and prove reasonable attorneys' fees. If the defense counsel fails to object to an appropriate issue on attorneys' fees, the opinion in *Borner*, at least, suggests that the issue will be treated as having been waived at trial,²⁸⁷ or that these fees will be construed as "damages" within the context of the article and thus, recoverable.²⁸⁸

283. Expenses incurred for counseling or treatment would be recoverable under the majority reasoning in *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980), if reduced to an estimate of a reasonably ascertained amount of money. *Id.* at 454.

284. The fees are generally recoverable as a statutory element of damages. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (1982); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

285. *See e.g.*, TEX. BUS. & COM. CODE ANN. §§ 17.46, 17.50 (Vernon Supp. 1987) (authorizing recovery of attorneys' fees for plaintiffs prevailing in deceptive trade practice or consumer fraud actions brought pursuant to the statute).

286. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1986).

287. 610 S.W.2d at 454 n.6.

288. Although attorneys' fees are generally not "damages" within the general meaning of the term, they are sometimes deemed an element of a damage award, or a factor that a jury may consider in setting an award, such as in the assessment of punitive damages. *See Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. 1984).

The uncertainty of recovery of attorneys' fees argues for legislative action in amending article 8307c to provide for recovery of attorneys' fees in wrongful termination actions. Provision for compensation of counsel is essential to insure that this remedy is fully available to discharged employees. The very circumstances addressed by the statute—improper termination of employment—would support a broadening of the remedy to include recovery for attorneys' fees in order to insure that claimants with meritorious cases are able to secure counsel prepared to represent them through the process of trial.

E. Exemplary Damages

In *Azar Nut Co. v. Caille*,²⁸⁹ the supreme court answered a question that was left open by its opinion in *Carnation Co. v. Borner*. Specifically, the court decided that exemplary damages are recoverable in actions brought under article 8307c.²⁹⁰

The employee in *Azar Nut*, Loretta Caille, was injured on the job when a file cabinet tipped over, causing a flower pot on top to strike her on the head.²⁹¹ A few days after the accident, Caille experienced a ringing in her ears and began to complain of vertigo and headaches.²⁹² These symptoms were subsequently included by Caille in a weekly status report she filed with Azar.²⁹³ Upon receiving the report, Caille's supervisor rewrote it and deleted all references to these injuries.²⁹⁴ Caille then attempted to report the information by supplementing an original report of the injury that had been prepared by Azar employees.²⁹⁵ However, this proved unsuccessful because the company clerk refused to sign the supplemental report prepared by Caille.²⁹⁶ That same clerk reported to the secretary of the company's president that Caille was "doing something dishonest by reporting the ear injury."²⁹⁷

289. 734 S.W.2d 667 (Tex. 1987).

290. *Id.* at 669.

291. *Id.* at 668.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

After filing a notice of claim with the Industrial Accident Board, Caille was approached by her supervisor who demanded an explanation.²⁹⁸ Attempts to discuss her situation with the president and vice president of the company were unsuccessful.²⁹⁹ Three weeks later, Caille was informed by her supervisor that she was fired.³⁰⁰

In addition to awarding Caille \$167,464 for lost wages and insurance benefits, the jury found that Azar acted willfully and maliciously in discharging Caille, and thus awarded her \$175,000 in punitive damages.³⁰¹ The award was affirmed by the El Paso Court of Appeals.³⁰²

In seeking reversal of the appellate court's decision, Azar contended that punitive damages were not recoverable under the language of article 8307c. More specifically, Azar relied on the language of section 2, which provides that an employer who "violates any provision of section 1 of this Act shall be liable for reasonable damages suffered by employee as a result of the violation."³⁰³ Azar argued that an "employee cannot 'suffer' punitive damages, thus such damages cannot be recovered under the statute."³⁰⁴

Looking to the legislative intent behind article 8307c, the court declined to find that the word "suffered" restricted the types of damages available to the employee.³⁰⁵ Instead, the court noted that several preliminary versions of the legislation creating article 8307c had focused on the types of damages available.³⁰⁶ The court concluded that the statute's authorization of "reasonable damages" does not preclude punitive damages.³⁰⁷

"'Reasonable,' " said the court, "seems directed more to the amount of damages recoverable, or to the relation of the injury to the damages awarded."³⁰⁸

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Azar Nut Co. v. Caille*, 720 S.W.2d 685 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987).

303. 734 S.W.2d at 668.

304. *Id.*

305. *Id.* at 668-69.

306. *Id.*

307. *Id.* at 669.

308. *Id.*

The court went further, stating that "the threat of punitive damages is inherently more likely to restrain bad faith employers from wrongfully terminating employees, and is therefore consistent with the purposes of the statute."³⁰⁹

F. Relationship of the "Retaliatory Firing" Action to Other Remedies Available to the Employee Under the Act

Some jurors may be concerned that the employee seeking compensatory damages for a retaliatory firing by the employer will obtain an unjust "double recovery" because of a misunderstanding regarding the plaintiff's potential scope of recovery in the compensation action.

Trial counsel concerned about jury speculation on either "double recovery" or the fact that the jury will misinterpret the motivation for a separate action being brought for the retaliatory firing claim can urge the trial court to instruct the jury not to consider the underlying action. However, if the employer has asserted the defense that the worker's compensation claim prompting the firing was not brought in "good faith," the potential range of instruction is expanded.³¹⁰ For example, if the good faith defense has been asserted by the employer but the employee has received a favorable Board award, settlement or judgment, plaintiff's counsel may request an instruction advising the jury of that fact. Otherwise, an instruction on the resolution of the underlying compensation claim may be inappropriate or unwise, since it may give the jury a firmer basis for concluding that the claimant is seeking a "double recovery" for his injury. Instead, counsel may request an instruction along the lines of the following directive:

When an employee of an employer or company which is covered

309. *Id.*

310. Generally, the decision of the Industrial Accident Board is not admissible in a trial *de novo* undertaken as a result of an appeal by either party from the Board award or order. See *Tanner v. Texas Employers' Ins. Ass'n*, 438 S.W.2d 395, 397-98 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).

However, a prevailing plaintiff in a compensation action should be able to plead compromise of the claim, favorable Board award, or jury verdict where necessary to defend against a claim that the retaliatory discharge was not occasioned by the employee's "bad faith" in filing the claim for compensation. In raising the defense of "bad faith", the employer should be held to have opened the door to a wide range of evidence available to rebut the charge. See, e.g., *Texas Employers' Ins. Ass'n v. Thames*, 236 S.W.2d 203, 204 (Tex. Civ. App.—Fort Worth 1951, writ ref'd.) (admission of notice of injury and claim proper in rebuttal to show no discrepancy in claim).

by the Workers' Compensation Act sustains an injury related to his work, he is entitled to claim benefits provided under the Act for temporary or permanent loss of his earning capacity resulting from the injury. An employee's right to recover for such work-related injuries is limited to the remedy provided by the Act and he may not bring any other action against the employer for damages or compensation for the injury.

To some extent, of course, a terminated plaintiff will experience a double recovery if he prevails in both compensation and retaliatory discharge actions. Article 8307c does not limit this possible double recovery. The distinctive legislative objectives of the Act generally,³¹¹ and article 8307c specifically,³¹² warrant the conclusion that any "double recovery" is justified by the legislative goals sought to be achieved by the general and specific provisions. Just as the fact that an employee has returned to work does not necessarily preclude a finding that he has been totally and permanently disabled under the Act,³¹³ this possibility of "double recovery" is justified because loss of earning capacity and loss of wages are not the same under the statutory scheme. The fact that the employee has lost wages as a result of his discharge does not mean, for instance, that recovery for lost wages will compensate him for the loss of earning capacity occasioned by the injury itself.³¹⁴

311. The goal of the compensation scheme of the Act is to provide recovery for a period of disability experienced by an employee or worker as a result of a work-related injury. The Act accomplishes its goal by providing a more certain remedy to employees so injured in return for reduction in potential recovery, a goal which has been recognized and has withstood constitutional challenge in Texas. *Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153 (5th Cir. 1984), *cert. denied*, 469 U.S. 1163 (1985).

312. See TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1987). The supreme court, in *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980), held: "The Legislature's purpose in enacting article 8307c was to protect persons who are entitled to benefits under the Worker's Compensation Law and to prevent them from being discharged by reason of taking steps to collect such benefits." *Id.* at 453 (citing *Texas Steel Co. v. Douglas*, 533 S.W.2d 111, 115 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). *Accord* *Ruiz v. Miller Curtain Co.*, 702 S.W.2d 183, 185 (Tex. 1985).

313. Subsequent employment, obtained under the economic "whip of necessity" does not bar recovery for total and permanent incapacity under the Act, even though the jury may consider the subsequently performed work in evaluating the total and permanent claim. *Consolidated Underwriters v. Whittaker*, 413 S.W.2d 709 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

314. Loss of earning capacity is calculated by statute which restricts recovery on compensation claims to the partial or total loss of earning capacity based on class of injury when multiplied by the employee's average weekly wage rate. TEX. REV. CIV. STAT. ANN. art. 8306,

CONCLUSION

The remedy for retaliatory discharge created by the legislature in the adoption of article 8307c has neither been the totally effective, nor totally ineffective, remedy predicted by earlier commentators. This provision does represent a significant legislative step toward the modernization of concepts of the employment relationship in Texas that may encourage further judicial rethinking of the "at will employment contract" traditionally recognized in the decisions of Texas courts.³¹⁵

The remedy can be strengthened in two significant respects. First, whether judicially, or by legislation,³¹⁶ the presumption should be recognized that a termination following in close proximity the filing or settlement of a workers' compensation claim is based on a retaliatory motive on the part of the employer. Prior decisions have mandated a liberal construction of the Act for the benefit of Texas workers. The decisions, properly relied upon by plaintiff's counsel in building, pleading, and requesting the charge enhance the prospects for terminated employees, even when the employer is able to assert another reason for the termination. To the extent that article 8307c has already changed employer practices and attitudes, these decisions have served to support the change by affording employees an op-

§§ 10, 11 and 12 (Vernon 1967). See, e.g., *Charter Oak Fire Ins. Co. v. Pierce*, 702 S.W.2d 259 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (applying formula for recovery for loss of 30% use of worker's hand to arrive at amount of recovery under the Act). The Act does not compensate employees for actual loss of wages occasioned by injuries compensable under the Act. *Employers Reinsurance Corp. v. Holland*, 162 Tex. 394, 347 S.W.2d 605 (1961).

315. Interestingly, in contrast to the narrow exception to the doctrine of "at will" employment announced in *Hauck*, other jurisdictions have recognized the cause of action for retaliatory discharge in response to the filing of a workers' compensation claim based on public policy. See, e.g., *Firestone Tire & Rubber Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1938) (adopting public policy exception to employment-at-will rule for retaliatory discharge actions); *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984) (adopting public policy exception to at-will employment rule for retaliatory termination actions). Subsequently, recovery of punitive damages has been recognized as furthering the goal of enforcing employers not to discriminate. *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984) (employee could file action for retaliatory discharge since action is necessary to enforce policy supporting the worker's compensation scheme, including recovery of punitive damages).

316. Legislation introduced during the 70th Session of the Texas Legislature by Rep. Criss (Dem. Galveston) would establish a presumption in favor of the employee who is discharged after filing a workers' compensation claim—that the discharge was based on the employer's discriminatory intent in violating the statute. Tex. H.B. 44, 70th Leg. (1987).

portunity to establish their causes of action fairly at trial.³¹⁷

The second development necessary to insure the effectiveness of the remedy provided by article 8307c is the amendment of the statute to provide for recovery of attorneys' fees in any action brought under the provision in which the discharged worker prevails. The absence of a statutory basis for the award of attorneys' fees in wrongful discharge actions reduces the attractiveness of these cases for counsel, particularly since discharged workers may suffer limited losses for past and future wage losses as a result of their employment at low wage levels. Application of contingent fee employment as the basis for representation in such cases likely precludes representation in many instances in which discharged workers may have meritorious, but economically limited, claims for recovery. This is particularly true in those situations in which the employee has mitigated damages in good faith.

The goal of article 8307c can only be fully achieved when meritorious claims are litigated successfully and the results serve to discourage other instances of employer illegality in retaliating against workers who assert their rights under the Act.³¹⁸ Recovery of attorneys' fees and punitive damages are necessary complements to recovery of actual damages in achieving the broader goals of the Act.

Refinements in the case law will undoubtedly clarify the issues relating to the pleading and proof burdens with regard to mitigation of damages and other defensive matters. The current ambiguities should benefit plaintiffs whose trial counsel prepare their cases well and who benefit from lapses by defense counsel. Even in a truly well-tryed case, a plaintiff may not recover because of the employer's sophistication in masking the true motivation for discharge. Moreover, the responsible worker who does mitigate his damages suffers

317. See *Walters v. American States Ins. Co.*, 654 S.W.2d 423 (Tex. 1983) (citing *Huffman v. Southern Underwriters*, 133 Tex. 354, 128 S.W.2d 4 (1939)).

318. Another aspect of Texas case law tending to promote the goals of the Act is demonstrated by the decision in *Artco-Bell Corp. v. Liberty-Mutual Ins. Co.*, 649 S.W.2d 722 (Tex. App.—Texarkana 1983, no writ) in which the court held that the compensation insurance carrier was under no obligation to reimburse an employer for damages assessed as a result of a successful retaliatory discharge action brought by a compensation claimant. *Id.* at 724. The court confined its ruling to a strict interpretation of the contract and did not discuss the public policy implication. See *id.* *Accord* *Rubenstein Lumber Co. v. Aetna Life & Casualty Co.*, 122 Ill. App. 3d 717, 462 N.E.2d 660 (1984). For a recent review of developments on this point nationally, see Holmes, *Insurance Coverage for Claims of Wrongful Employment Termination*, 91 Dick. L. Rev. 895 (1987) (discussing the decision in *Artco-Bell*).

a potential loss of remedy for a wrongful act of discharge as a result. In order to both enhance the potential for recovery for meritorious plaintiffs and to insure potential recovery sufficient to achieve the goals of the Act through aggressive litigation of meritorious claims, some fine-tuning of the remedy by the court and the legislature may be necessary.