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THE ARKANSAS REMEDY FOR EMPLOYER RETALIATION AGAINST WORKERS’ COMPENSATION CLAIMANTS

J. Thomas Sullivan*

Workers who suffer discharge or other forms of retaliation as a result of filing workers’ compensation claims have been extended protection from this discrimination in many jurisdictions. The recognition of a remedy for wrongful discharge or other employer retaliation has proceeded on a number of diverging paths in Arkansas over the past decade. In 1993, the General Assembly sought to expressly annul decisions of the state supreme court recognizing a civil remedy in contract for retaliation. This article examines both the civil remedies and the administrative remedy created by the General Assembly to supplant them. The author argues that Arkansas law fails to adequately protect workers’ compensation claimants from retaliatory discharge or other employer discrimination. Part I examines the administrative remedy created by Act 796 of the 79th General Assembly. Part II explores the contractual remedy predicated on the Arkansas Supreme Court’s recognition of public policy-based claims for wrongful discharge in its decision in Sterling Drug v. Oxford. Part III examines the development of tort remedies, particularly the tort of outrage, as an alternative approach for recovery in light of the recent history of outrage and the peculiar facts which surround retaliatory discharge of workers’ compensation claimants. The author also argues that the General Assembly’s attempt to reaffirm the doctrine of employment at will by annulling the judicial remedy for wrongful discharge as applied to workers’ compensation claimants constitutes an unconstitutional exercise of legislative power. If so, both the contractual and tort remedies for illegal employer activity directed at injured workers may continue to afford compensation claimants protection.

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INTRODUCTION

The Arkansas General Assembly enacted a dramatic revision of the State’s workers’ compensation law during its 79th Session.1 The reworking of the basic public protection for workers injured in job-related contexts will undoubtedly be viewed as a major and positive stroke by the insurance industry.2 However, the change in focus from the traditional paternalism implicit in most compensation schemes3 does not bode favorably for the state’s workers who are subject to both its protections and limitations.4


2. For a thorough discussion of the history of this recent revision in Arkansas workers’ compensation law see Philip Pesek, The New Workers’ Compensation Law: What Happens Now?, Ark. Law., Summer 1993, at 20. This symposium documents the legislative change from the perspective of the insurance industry, Joseph H. Purvis, From the Respondent: Workers’ Compensation Reform; An Attempt to Save the Goose that Laid the Golden Egg, Ark. Law., Summer 1993, at 25, and from labor’s perspective, Zan Davis, From the Claimant: Workers’ Compensation Reform; Cutting Costs by Eliminating Employees from Coverage, Ark. Law., Summer 1993, at 27. Pesek notes generally that the management and industry-dominated committee formed by Arkansas Insurance Commissioner, Lee Douglass, “carried the majority of votes [on contested provisions] and the result of their work was a management-oriented recommendation.” Pesek, supra, at 20.

3. The revision is explained by the General Assembly as necessary to ensure the fiscal integrity of the system, as well as to provide medical services necessary to restore injured workers to employability. Section 1 of Act 796 sets forth the legislative policy in revising the workers’ compensation scheme:

The primary purposes of the workers’ compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses
The sweeping reform favoring industry may be seen in general terms, such as in the mandated shift in the standard of review from one of "liberal construction" of the Act to benefit the aggrieved worker to one of "strict compliance." Or it may be evidenced in particular provisions which affect the standard of proof of compensable injury, such as the shift in the burden of proof on the issue of total disability.

resulting therefrom and then to return the worker to the workforce, and to improve workplace safety through safety programs; improve health care delivery through use of managed care concepts; encourage the return to work of injured workers; deter and punish frauds of agents, brokers, solicitors, employers and employees relating to procurement of workers' compensation coverage or the provision or denial of benefits; curtail the rise in medical costs associated with the provision of workers' compensation benefits; and emphasize that the workers' compensation system in this state must be returned to a state of economic viability.


4. See generally Davis, supra note 2, at 27, concluding: Act 796 of 1993 will attempt to reduce workers' compensation costs by simply eliminating large groups of injured workers from coverage. Specifically, many 'gradual' injuries, psychological injuries, injuries resulting from aggravation of preexisting conditions, and those suffering from work related respiratory or heart problems will be significantly restricted or entirely eliminated from coverage under the Workers' Compensation Law.

5. Section 35 of Act 796 sets forth the legislature's expressed position on the development of workers' compensation law in Arkansas:

The Seventy-Ninth General Assembly realizes that the Arkansas Workers' Compensation statutes must be revised and amended from time to time. Unfortunately many of the changes made by this act were necessary because Administrative Law Judges, the Workers' Compensation Commission, and the Arkansas Courts have continually broadened the scope and eroded the purpose of the Workers' Compensation statutes of this state. In the future if such things as the Statute of Limitations; the standard of review by the Workers' Compensation Commission or courts; the extent to which any physical condition, injury or disease should be excluded from or added to coverage by the law; or the scope of the Workers' Compensation statutes need to be liberalized, broadened, or narrowed it shall be addressed by the General Assembly and should not be done by Administrative Law Judges, the Workers' Compensation Commission or the courts.

6. For instance, former § 11-9-519(b) provided that: "In the absence of clear and convincing proof to the contrary, loss of both hands, both arms, both legs, both eyes, or any two (2) thereof shall constitute permanent total disability." Ark. Code Ann. § 11-9-519(b) (1987) (amended 1993). The amended version adds a further burden to the claimant in seeking compensation for total disability. Subsection (e) of the revised version provides: "'Permanent total disability' means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment." Ark. Code Ann. § 11-9-519(e) (Michie Supp. 1993).
One important aspect of the General Assembly's restriction on the general workers' compensation remedy involves the specific abrogation of the judicially recognized remedy for wrongful discharge of a compensation claimant by an employer based on the employee's reliance on his statutory remedy for recovery. In two 1991 decisions, *Wal-Mart Stores, Inc. v. Baysinger* and *Mapco, Inc. v. Payne*, the Arkansas Supreme Court had recognized that Arkansas public policy afforded a cause of action to workers' compensation claimants discharged by their employers in retaliation for pursuing compensation benefits.

Act 796 expressly disavows the remedy recognized by the state supreme court in *Baysinger* and *Payne*. Section 6 of the Act amends former section 11-9-107 to provide for an administrative remedy and potential criminal liability for discriminatory action by an employer in discharging an employee who relies on the workers' compensation statutory remedy. The provision directs that the court's decisions

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10. This action reflects a general tendency of the General Assembly in enacting Act 796 to legislatively annul prior judicial decisions. Thus, in defining "compensable injury" in Section 2 of the Act—amending prior § 11-9-102 of the Arkansas Code—the legislature specifically sought to annul prior commission and court proceedings on point in subsection 5(C): "(C) Any and all prior decision by the Commission and the Courts inconsistent with the definition of compensable injury as herein set forth are hereby specifically annulled, repealed, and held for naught."
11. Section 6 in its entirety states:

> SECTION 6. Arkansas Code Ann. 11-9-107 is amended to read as follows:
> Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual’s claim for benefits under this chapter, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter shall be subject to a fine of up to ten thousand dollars ($10,000) as determined by the Workers' Compensation Commission. This fine shall be payable to the Workers' Compensation Commission Second Injury Fund and paid by the employer and not by the carrier. In addition, the prevailing party shall be entitled to recover costs and a reasonable attorney's fee payable from the fine; provided however, if the employee is the nonprevailing party, the attorney's fee and costs shall, at the election of the employer, be paid by the employee or deducted from future workers' compensation benefits. The employer may also be guilty of a Class D felony. This section shall not be construed as establishing an exception to the 'employment at will doctrine.' A purpose of this section is to preserve the exclusive remedy doctrine and specifically annul any case law inconsistent herewith, including but not necessarily limited to: Wal-Mart Stores, Inc., vs. Baysinger, 306 Ark. 239, 812 S.W.2d 463 (1991); Mapco, Inc. vs. Payne, 306 Ark. 198, 812 S.W.2d 483 (1991); and Thomas vs. Valmac
in *Baysinger* and *Payne*, along with the decision in *Thomas v. Valmac Industries*, are annulled, consistent with the legislative purpose of preserving the newly created legislative remedy as exclusive under the Act.\(^3\)

This article surveys the development of the retaliatory discharge remedy in Arkansas. The first section focuses on the action taken by the General Assembly in passing Act 796; the next section discusses the evolution of the remedy prior to the recent legislative action in light of alternative remedies under Arkansas law and in comparison with remedies recognized in other jurisdictions.

I. THE LEGISLATIVE REMEDY FOR WRONGFUL DISCHARGE: ACT 796

Responding to the judicial recognition of a civil remedy for discharge of a workers’ compensation claimant in violation of state law,\(^4\) the General Assembly included a wrongful discharge remedy in its comprehensive reformation of the state’s workers’ compensation scheme. The remedy includes two dimensions: creation of an administrative sanction against an offending employer by fine of up to $10,000 and potential liability for criminal prosecution as a class D felony.\(^5\) In addition, the remedy is deemed exclusive by the legislature, with language specifically purporting to “annul” the state supreme court decisions recognizing a civil remedy for wrongful discharge.\(^6\) Assuming that Arkansas courts uphold the Act against constitutional challenge or otherwise refuse to permit alternative causes of action for wrongful discharge to proceed in accord with the expressed legislative intent,\(^7\) the administrative and criminal

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13. See supra note 11 for text of Section 6 which expressly declares the legislative intent to “annul” the decisions of the Arkansas Supreme Court.
15. See supra note 11.
16. See supra note 11.
17. In *Baysinger*, the court rejected the argument that the “exclusive remedy” provision of the Workers’ Compensation Act precluded recourse to civil remedies
remedies in section 6 of Act 796 will control this aspect of employer/employee relations in the future.

A. The Constitutional Question Posed by Section 6

While workers' compensation statutes have been upheld against broad constitutional challenges,\(^8\) the abrogation of the wrongful discharge remedy attempted by the General Assembly in adopting section 6 of the Act poses a more narrow question. Section 6 purports to abrogate the judicial remedy for wrongful discharge and to substitute statutory remedies preserving the "employment at will" doctrine.\(^9\)

The constitutional authority for creation of a workers' compensation remedy rests in Article 5, section 32 of the state constitution, which generally provides that the legislature is authorized to enact laws governing compensation to be paid by employers for injuries suffered by employees.\(^20\) This provision also precludes additional legislative action controlling the amount of recovery in other actions and preserves the right to recovery for loss in the

not included in the statute. 306 Ark. at 243-45, 812 S.W.2d at 466-67. The decision effectively overruled the holding in Johnson v. Houston General Ins. Co., 259 Ark. 724, 536 S.W.2d 121 (1976), in which the court had affirmed the trial court's reliance on the "exclusive remedy" concept to dismiss a civil complaint predicated on the employer's purposeful delay in settling the claim. Johnson had been relied on by the court in Cain v. National Union Life Ins. Co., 290 Ark. 240, 718 S.W.2d 444 (1986), when an action for bad faith on the part of the employer was again dismissed based on the existence of exclusive remedies under the Workers' Compensation Act for the activities alleged to have been engaged in by the employer.


19. See supra note 11, for complete text of section 6. The specific reference to the doctrine of "at will" employment provides: "This section shall not be construed as establishing an exception to the 'employment at will doctrine.'" For a general discussion concerning developments in the doctrine of "at-will employment," particularly involving the drafting of the Model Employment Termination Act, see Randall Samborn, *At-Will Doctrine Under Fire*, NAT'L L.J., Oct. 14, 1991, at 1.

20. ARK. CONST., art. V, § 32 provides, in its entirety:

The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.
event of death. Consequently, the grant of authority included in this constitutional provision is limited, rather than general.

The General Assembly’s action in creation of an exclusive remedy for retaliatory discharge and abrogation of the judicially recognized remedy is subject to challenge because regulation of the employment relationship is simply not sanctioned by the provision authorizing creation of a workers’ compensation scheme. Instead, a strict reading of the state constitution compels the conclusion that the legislature’s authority to implement a compensation remedy is specifically limited to the operation of the compensation system and establishing benefit levels. In fact, the authority to implement the system has been interpreted as limited to the power to supplant traditional liability with exclusive remedies for compensation for work-related injuries.

Consequently, the attempt to expand upon the legislative authority conferred by Article 5, section 32 to include regulation of the employment relationship itself is clearly not contemplated by the precise wording of the constitutional provision; nor could such a grant of authority be inferred from a fair reading of the constitutional language. Assuming the Arkansas Supreme Court would apply the same standard of “strict construction” in evaluating a challenge to section 6 of the Act 796 that the General Assembly mandated for construction of the Act itself, the attempt to regulate the employment

21. Id.
22. In Baldwin Co. v. Maner, 224 Ark. 348, 352, 273 S.W.2d 28, 30 (1954), the court held that regulation of recovery is appropriate only where the employer/employee relationship is established. Consequently, the legislature is powerless to attempt regulation of recovery in the absence of an employment relationship. Yet, section 6 purports to regulate employer conduct in hiring to prevent discriminatory decisions not to hire based on an applicant’s prior reliance on the statutory compensation remedy. Section 6, therefore, contemplates regulation of conduct outside the scope of the employment relationship because it purports to regulate conduct that actually predates the creation of the employment relationship. By analogy, Baldwin Co. v. Maner might well support the conclusion that the narrow grant of authority to the legislature under the state constitution cannot include any regulation beyond that of recovery for compensable injuries suffered as a consequence of employment.

23. See supra note 20.


relationship in section 6 would undoubtedly fail as violative of the limited grant of authority to the legislature by the state constitution. Any conclusion on the court’s part that section 6 is unconstitutional would leave the remainder of Act 796 intact and presumably resurrect the judicially recognized cause of action for wrongful discharge relied on by the claimants in Baysinger and Payne.

On the other hand, a decision upholding section 6 as constitutional would serve to preclude reliance on the civil remedy for discharge in retaliation for the filing of a workers’ compensation claim. A review of the administrative and criminal liability imposed under section 6 demonstrates the inadequacy of the protection purportedly afforded compensation claimants by its terms. Somewhat ironically, the General Assembly’s action was predicated on reaffirmation of the doctrine of “employment at will,” as expressed in section 6. However, the doctrine itself is of judicial origin, rather than constitutional or statutory imperative.

B. The Nature of the Remedy

1. The Administrative Remedy

Under section 6, an employer who discriminates in hiring or terminates a workers’ compensation claimant, or otherwise interferes with or impedes the filing of a workers’ compensation claim, is subject to an administratively imposed fine of up to $10,000. At the outset, this potential liability for the actions of a discriminating employer would appear significant and likely to deter illegal conduct. However, the administration of the civil penalty suggests a number

27. Act 796 includes a savings clause in section 39 which provides that any section declared unconstitutional will be deemed severed from the remainder of the Act.
30. For an analysis of the tort remedy, see discussion infra part III.
31. See supra note 11.
33. 1993 Ark. Acts 796 § 6; see supra note 11.
of problems. First, although a fine in the maximum amount might well serve to deter employer illegality in discriminating against compensation claimants, the statutory language is ambiguous in two important respects.

Initially, the problem of proof of an employer violation under the Act will be complicated. The claimant or the commission must establish that any discrimination inflicted against a claimant/employee or prospective employee was "willful," as opposed to incidental to other potentially legitimate concerns of the employer in making an employment decision. For example, an employer faced with rising compensation premiums might well conclude that any employee suffering a work-related injury presented an unacceptable threat in terms of future costs for coverage and elect to terminate the employee. This very real business concern for managing overhead costs should hardly permit the employer to manipulate future premium levels by simply terminating injured employees claiming benefits under the Act, but whether this conduct would be deemed willful in the usual sense of discriminatory intent is not specifically addressed in the language of section 6.

Moreover, the problem posed by the burden of proof is not insignificant, since the imposition of both administrative and criminal penalties is predicated on proof of willfulness. A difficult question of intent is presented by the employer who terminates or refuses to hire on the ground that the injury or prior history of injury likely makes the employee less physically capable of performing the tasks associated with employment. In a sense, an employer concerned


35. Some employment decisions are clearly made on the basis of concern for worker fitness and costs associated with workers’ compensation coverage. For instance, in Hunt v. Van Der Horst Corp., 711 S.W.2d 77, 79 (Tex. Ct. App. 1986), the appellate court reversed a grant of summary judgment for the employer on a retaliatory discharge claim based, in part, on the plaintiff's responsive affidavit which averred that a manager had stated during a meeting of the plant accident board that "Workers' Compensation was going up every time someone got hurt and that we had to stop it." Id. at 80. Similarly, concern for rising compensation coverage premiums was a factor demonstrating a retaliatory motive in Murray Corp. v. Brooks, 600 S.W.2d 897, 901 (Tex. Ct. App. 1980).

36. However, the decision in Mapco, Inc. v. Payne, 306 Ark. 198, 200-02, 812 S.W.2d 483, 485-86 (1991), clearly suggests that a business motive for refusal to rehire an injured former employee after completion of her convalescence would not have barred recovery on a claim for wrongful termination brought under the cause of action recognized there.

37. In fact, Arkansas courts have recognized the right of employers to inquire
about the problem of re-injury not only manifests concern for overhead, but may realistically be reflecting legitimate concern for the long-term health or safety of the injured employee or the safety of coworkers dependent upon the ability of the injured employee to perform successfully. The employer’s decision on hiring or termination in this situation may well involve discrimination, but not the type of “willful” discrimination the General Assembly intended to punish with either administrative or criminal penalties.  

Additionally, the language is less than promising because it provides no minimum penalty which might be levied against a discriminating employer. Consequently, there is no assurance that any fine at all will be imposed against an offender. In fact, some employer illegality may go essentially unpunished because the Act contains no specific guidelines for assessing what fine may be appropriate in a particular circumstance. This is particularly true with respect to discrimination involving hiring or interference in the prosecution of a compensation claim, rather than termination. The degree of injury attributable to such illegality may be difficult to assess, especially in the case of discriminatory decisions not to hire,  


38. Section 6 specifically addresses discrimination in refusing to hire, providing in pertinent part: “Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual’s claim for benefits under this chapter. . . .” 1993 Ark. Acts 796, § 6 (codified at Ark. Code Ann. § 11-9-107 (Michie Supp. 1993)) (emphasis added). Other jurisdictions have split with respect to whether discrimination in refusing to hire is actionable under their wrongful discharge causes of action. Compare Smith v. Coffee's Shop for Boys & Men, Inc., 536 S.W.2d 83 (Tex. Ct. App. 1976) (stating that statutory remedy does not include reference to discrimination in refusing to hire prior compensation claimant) with Shaw v. Doyle Milling Co., 683 P.2d 82 (Or. 1984) (applying Or. Rev. Stat. § 659:415 (1977) which precludes discrimination in hiring based on prior history of compensation claim) and Moorehouse v. Workers' Compensation Appeals Bd., 201 Cal. Rptr. 154 (Cal. Ct. App. 1984) (holding refusal to hire actionable in construction of statute extending remedy to “any employee” where employee’s loss of employment occurred as a result of work related injury sustained while employed by same company). The same rationale for precluding non-discrimination in hiring exists for rehiring decisions under the language of the Arkansas statute and the prior statute which provided the basis for the plaintiff’s claim in Mapco, Inc., 306 Ark. at 200-01, 812 S.W.2d at 485.  

39. Section 6 expressly includes discrimination in terms of hiring or setting the terms or conditions of work, or impeding the filing or obstructing the processing of a workers’ compensation claim. See supra note 11 for text of Section 6.
because it will be virtually impossible to prove, except through circumstantial evidence, that an employer has based a non-hiring decision on an employee's prior compensation claim. An employer may elect to evade liability under the Act by asserting a non-discriminatory reason for refusing to hire, perhaps including a good faith belief that a prior history of injury renders the prospective employee insufficiently physically fit to undertake the work activities involved in the employment.40

Assertion of an apparently non-discriminatory motive as an alternative theory for the action, or as one of a number of reasons for the action, will likely provide discriminating employers with a ground of defense in the event the Commission should actually contemplate a claim. The language of the Act fails to provide for imposition of penalties regardless of whether "discriminatory" intent is the sole cause or one of multiple causes of the discriminatory act.41

Second, section 6 suggests, but fails to define, the process by which a claim of discrimination may be raised and litigated. The statutory language does, however, clearly indicate that a claim may be brought on behalf of the claimant because it provides that attorneys' fees may be awarded and paid from the fine imposed.42 Nevertheless, the procedure does not provide that any sum will be paid to the aggrieved claimant, regardless of the amount of fine imposed. Further, in the event the claim of discrimination is not sustained, attorneys' fees may be taxed against the claimant in favor of the employer and even ordered paid in installments from prospective compensation payments.43

Consequently, the administrative remedy created by the General Assembly in section 6 offers no compensatory feature for the claimant which would encourage the filing of a claim with the Commission. The employee/claimant has no recognized mechanism for obtaining

41. For an analysis of the "sole cause" burden of proof, see discussion infra part IV.
42. Section 6 provides, in pertinent part:
In addition, the prevailing party shall be entitled to recover costs and a reasonable attorney's fee payable from the fine; provided however, if the employee is the nonprevailing party, the attorney's fee and costs shall, at the election of the employer, be paid by the employee or deducted from future workers' compensation benefits.
43. Id.
compensation based on the discrimination; on the contrary, the Act provides that an unsuccessful complaint may actually render the claimant liable for attorneys' fees for the employer's defense counsel.

Finally, although the potential fine may appear significant, the $10,000 limitation on fine authority may prove inadequate to deter employer illegality. Some employers may simply elect to discharge injured employees as a rational business decision, assuming the long-range potential liability for additional expenses in the event the employee is retained will exceed whatever fine might actually be imposed. In addition, the employer may treat any fine as a deductible business expense, even though the Act precludes coverage for illegality by the compensation carrier, reducing the actual cost of liability arising from a wrongful discharge.

The potential range of administrative liability imposed under Act 796 is less onerous than the damages assessed in *Baysinger* or *Payne.* Comparison of the very limited history of recovery under the civil action recognized by the state supreme court with the maximum punishment provisions of Act 796 suggests that, at least in terms of economic liability, discrimination has a less costly range of potential consequence under the legislatively created remedy of the Act than under pre-existing civil remedies. However, the Act retains the criminal liability feature of former Section 11-9-107 and increases the potential criminal liability for violation.

### 2. Criminal Liability

Act 796 retains a general statement of public policy declaring employer discrimination against workers' compensation claimants to be illegal. In addition, like Act 796, the prior act also provided for

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44. *Id.* Section 6 specifically provides: "This fine shall be payable to the Workers' Compensation Commission Second Injury Fund and paid by the employer and not by the carrier." This approach is consistent with decisions from other jurisdictions which have held that compensation for illegal discriminatory employer action is not appropriate under coverage designed to provide for actual payment of benefits. See *Arcto-Bell Corp. v. Liberty-Mutual Ins. Co.*, 649 S.W.2d 722, 724 (Tex. Ct. App. 1983); *Rubenstein Lumber Co. v. Aetna Life & Casualty Co.*, 462 N.E.2d 660, 661 (Ill. App. Ct. 1984); see also *Roxanne L. Holmes, Insurance Coverage for Claims of Wrong Employment Termination*, 91 DICK. L. REV. 895 (1987) (discussing holding in *Arcto-Bell*).

45. The jury returned a verdict for $24,000 in compensatory damages. 306 Ark. at 241, 812 S.W.2d at 464 (1991).

46. The jury awarded the employee $15,000. 306 Ark. at 199, 812 S.W.2d at 484 (1991).
criminal liability to be predicated on proof of "willful discrimination."\textsuperscript{47} However, the potential liability, both in terms of fine and incarceration, has been dramatically increased in the amended version. Originally, the potential fine was $100 and the range of incarceration was limited to six months in jail upon proof of a violation.\textsuperscript{48}

The increase in penalty range to a potential fine of $10,000 and liability for a Class D felony is certainly facially significant. However, the Act does not mandate prosecution in the event "willful" discrimination is demonstrated. The language is permissive in this respect, simply providing that criminal liability "may" be imposed.\textsuperscript{49}

In contrast, the preceding section of Act 796 provides that in the event of a misrepresentation—presumably directed at the filing or prosecution of a false claim—the party advancing the misrepresentation "shall be guilty of a Class D felony."\textsuperscript{50}

The distinction between the terminology in the two sections may well reflect anti-employee bias in the operation of the Act itself. Section 5 is directed toward misrepresentation in the prosecution or defense of compensation claims, and this liability is rather definite given the choice of "shall" to describe its application. The use of "shall" usually is directive in legislation, reflecting a mandatory intent on the part of the legislature.\textsuperscript{51} In contrast, the use of "may" is permissive in nature, reflecting commitment of discretion.\textsuperscript{52}

\textsuperscript{47} The prior act provided:

Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of his claiming benefits under this chapter or who in any manner obstructs or impedes the filing of claims for benefits under this chapter shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not to exceed one hundred ($100) dollars, or by imprisonment of not to exceed six (6) months, or by both fine and imprisonment.


\textsuperscript{48} Id.


\textsuperscript{50} Section 5 of Act 796 provides the penalties for misrepresentation:

Any person or entity who willfully and knowingly makes any material false statement or representation for the purpose of obtaining any benefit or payment, or for the purpose of defeating or wrongfully increasing or wrongfully decreasing any claim for benefit or payment or obtaining or avoiding workers' compensation coverage or avoiding payment of the proper insurance premium (or who aids and abets for either of said purposes), under this chapter shall be guilty of a Class D felony. . . .


\textsuperscript{52} See, e.g., Chrisco v. Sun Indus., Inc., 304 Ark. 227, 229, 800 S.W.2d 717,
it is true that the normally mandatory "shall" may be construed to be permissive to avoid absurdity in construction, the tenor of the legislation clearly suggests an employer bias. The legislature delegates discretion to state prosecutors to pursue criminal actions against discriminating employers, yet imposes mandatory criminal liability for misrepresentation in the filing or prosecution of a compensation claim. Thus, while culpability for misrepresentation is imposed equally against offending employers and claimants in the context of litigation of a claim for compensation or determination of benefit levels, the imposition of culpability in the event of employer discrimination, even apparently when proved in an administrative action, remains discretionary.

While Section 5 remedies directed at misrepresentation may well appear neutral in directing prosecution of either claimants or employers engaging in "willful" misrepresentation in an attempt to obtain or preclude benefits, or in the setting or alteration of benefit levels, a review of the section indicates far greater emphasis is given to this aspect of compliance with the Act than in Section 6. For example, upon a showing of a Section 5 violation, the Act mandates referral for prosecution. In contrast, imposition of criminal liability under Section 6 is permissive and not directive. Section 5 also provides for creation of a fraud investigation section within the Commission

54. However, this is not to say that an employer could incur or suffer no liability under Section 5 of Act 796, particularly if a misrepresentation as to notice or the circumstances of a work-related injury was advanced in an attempt to defeat the claim for compensation. See supra note 49 for the relevant language. Thus, an offending employer is subjected to the same degree of criminal liability for the willful and knowing misrepresentation made to defeat a claim for compensation or to secure a decrease in benefits as is a misrepresenting employee.
55. Section 5(c) of Act 796 amends Section 11-9-106 to provide, in pertinent part:

Where the commission or the Insurance Commissioner finds that false or misleading statements or representations were made willfully and knowingly for the purpose of obtaining benefits or payments, or for the purpose of obtaining, wrongfully increasing, wrongfully decreasing, or defeating any claim for benefit or payment or obtaining or avoiding workers' compensation coverage or avoiding payment of the proper insurance premium, under this chapter, the chairman of the commission or the Insurance Commissioner shall refer the matter for appropriate action to the prosecuting attorney of the district where the original hearing was held. 1993 Ark. Acts 796, § 5(c) (codified at Ark. Code Ann. § 11-9-106(c) (Michie Supp. 1993) (emphasis added).
which is charged with the responsibility of determining whether misrepresentations have been made. Particularly significant is the section requiring employers and carriers, upon threat of civil and criminal sanctions, to report claims of violations while immunizing them from civil actions based on such reporting. Contrarily, employees are immunized from civil liability for reporting suspected violations by management or carriers, but no additional legislative directive mandating disclosure is imposed.

The creation of penalties for failure to take action to trigger investigation of suspected employee fraud demonstrates the extent to which concern for fraud permeates the legislative action in adopting the provisions of Act 796. No comparable demonstration of resolve accompanies the permissive suggestion of criminal liability for employer discrimination directed at an employee for seeking compensation under the statutory compensation scheme.

Whether the administrative or criminal liability provisions of Act 796 will serve to actually deter employer discrimination based on the claiming of compensation benefits might be reserved for evaluation of the system in the future. However, the history of the pre-existing criminal penalties of Section 11-9-107 does not demonstrate any effort at criminal prosecution eventually resulting in published appellate decisions memorialized in the annotations to the section. The lack of any appellate history of this section might well suggest that it effectively served to deter employer illegality, but if so, the increase in potential criminal liability would hardly have been justified or necessary. Moreover, the decisions in Baysinger and Payne


Every carrier or employer who has reason to suspect that a violation of subdivision (a)(1) of this section has occurred shall be required to report all pertinent matters relating thereto to the Workers' Compensation Fraud Investigation Unit. No such carrier shall be liable to any employer or employee for any such report, and no employer shall be liable to any employee for such a report unless they knowingly and intentionally include false information. Any such carrier or employer who knowingly and intentionally fails to report any such violation shall be guilty of a misdemeanor and on conviction shall be punished by fine not to exceed one thousand dollars ($1,000) or by imprisonment for a period not to exceed one (1) year, or by both fine and imprisonment. Although not mandated to report suspected violations of subdivision (a)(1) of this section by an employer or employee, any employee who does make such a report shall not be liable to the employer or employee whose suspected violations he has reported.
58. Id.
demonstrate that total compliance with the prior act was not achieved; additionally, there is no evidence that these civil actions were accompanied by criminal prosecutions. Consequently, one reasonable inference is that the imposition of criminal liability is virtually meaningless and that civil remedies for damages are the appropriate way to deter employer illegality or compensate an injured employee when such illegality is demonstrated.

Nevertheless, the legislature has acted to annul the judically recognized civil remedy, perhaps effectively insulating employers from any realistic possibility of deterrence.

C. The Exclusivity of Remedy Question

The legislative action also attempts to prevent recognition of alternative remedies to Section 6 in the future. In its attempt to preserve exclusivity, the General Assembly expressly sought to annul the principal wrongful discharge decisions in Baysinger and Payne. To the extent that this attempt to preserve exclusivity is given effect, the civil remedy recognized as available to aggrieved workers' compensation claimants in those decisions would no longer be viable.

Four possible consequences of judicial intervention in this scheme should be considered by prospective plaintiffs and their counsel. First, the appellate courts might well conclude that the legislative fiat with regard to regulation of the employment relationship does exceed the constitutional authority granted to the General Assembly to regulate compensation for work-related injuries, as suggested earlier. This determination of the constitutional question would effectively restore the range of remedies available to the claimant suffering discrimination before passage of Act 796, including the implied contract action approved by the Arkansas Supreme Court in Baysinger and Payne.

Second, the state supreme court might uphold the General Assembly's action in abrogating those decisions in favor of the administrative and criminal remedies expressly provided to claimants suffering discrimination in Section 6 of Act 796. This approach would affirm the legislative action in nullifying the court's recognition of the implied contract action for workers' compensation claimants proving discriminatory employer conduct.

Third, the state supreme court could take a more moderate approach while upholding the legislative action by affirming the General Assembly's authority to create the administrative remedy and strengthen the pre-existing criminal remedy for employer

59. See supra note 11.
discrimination, while holding that these remedies cannot be applied exclusively. This approach would afford claimants a range of alternatives in challenging employer discrimination and leave the General Assembly's additional response to this problem intact.

Finally, the court might conclude, applying a principle of strict construction to Act 796, that the General Assembly in fact accomplished exactly what it purported to in annulling Baysinger and Payne, while leaving recourse to alternative remedies in tort for outrageous or discriminatory conduct on the part of employers intact. The tort remedy was in the process of development when the court announced its position in Sterling Drug v. Oxford recognizing the civil action sounding in contract for retaliatory discharge of whistle-blowers and others whose termination would violate Arkansas public policy. Importantly, the Sterling Drug court did not discount the possibility of asserting a claim for outrage in addition to the contractual claim for wrongful discharge in that case, finding instead that, on those facts, the employer's conduct was not so egregious as to constitute "outrageous" conduct.61

Exclusivity of remedy is an important function of workers' compensation systems, as the court recognized in Baysinger.62 In fact, exclusivity formed the basis for Justice Hays's dissenting opinion in Baysinger, despite his general affirmance of the public policy against employer retaliation responding to an injured worker's decision to seek benefits under the Act.63 Justice Hays concluded that Arkansas precedent supported the proposition that the Act was comprehensive in regulating "every eventuality arising from the employment relationship."64 However, he did not consider the language of the state constitution that grants to the General Assembly its authority to create a compensation system, including the apparent lack of any specific delegation of authority to regulate the employment relationship.

60. 294 Ark. 239, 743 S.W.2d 380 (1988).
61. Id. at 244, 743 S.W.2d at 382-83.
63. 306 Ark. at 250, 812 S.W.2d at 469 (Hays, J., dissenting) (concluding that statutory remedy provided in former Section 11-9-107 is exclusive remedy for employer retaliation).
64. Id.
beyond the question of providing a scheme for compensation of work-related injuries.

In fact, of course, the remedies authorized by the Act are not exclusive in a comprehensive sense because of the existence of important federally-protected rights that are enforceable through remedies created by Congress. The most significant of these potential remedies may eventually lie in the adoption of the Americans with Disabilities Act, which presents dramatic consequences for employers superficially secure in their autonomy by the doctrine of employment at-will. In addition, other federal remedies provide alternative sources of rights which restrict the employer in the employment relationship, including federal anti-discrimination legislation, legislation specifically protecting certain whistle-blowers, and federal collective bargaining legislation which permits employees to bargain for discharge and grievance procedures limiting employer autonomy. The existence of alternative federal remedies to address certain types of employer discrimination has already effectively reduced the traditional employer autonomy associated with the doctrine of employment at-will. This suggests the General Assembly's declared purpose of protecting that doctrine may prove far less significant than one might expect.

II. THE RECENT EVOLUTION OF THE JUDICIAL REMEDY FOR WRONGFUL DISCHARGE OF WORKERS' COMPENSATION CLAIMANTS

The decisions in Baysinger and Payne built upon the court's earlier holding in Sterling Drug v. Oxford, in which the court had

70. 306 Ark. 239, 812 S.W.2d 463 (1991).
71. 306 Ark. 198, 812 S.W.2d 483 (1991). Payne brought suit alleging that her employer refused to rehire her after she completed convalescence from knee surgery
for the first time recognized a wrongful discharge cause of action for employees employed in the traditional "at will" capacity whose terminations violated public policy.

The Baysinger, Payne, and Sterling Drug decisions served to confirm earlier predictions that the doctrine of "employment at will" would suffer erosion in Arkansas, as it had nationally. Sterling Drug arose in the context of a "whistle-blower" case, yet the opinion clearly suggested that the public policy exception would serve to limit the doctrine in cases in which the employee's termination results from the filing or prosecution of a workers' compensation claim. The subsequent decisions in Baysinger and Payne confirmed this suggestion.

Other jurisdictions had already accepted the need to protect injured workers from retaliation by employers through the adoption of legislation or by judicial recognition of an implied remedy to redress employer discrimination toward employees pursuing remedies under state created and mandated workers' compensation systems. The decision in Sterling Drug did not expressly recognize or create such a remedy, but merely noted the strong public policy determination that had prompted other jurisdictions to judicially approve a cause of action for retaliatory discharge in the workers' compensation context.

The remedy recognized by the state supreme court in Sterling Drug is predicated on the theory of breach of implied contract, required by a work-related injury. The court, through Justice Corbin, concluded that there was sufficient evidence to demonstrate that Payne's unsuccessful attempt at re-employment was the result of discrimination on the part of the employer. Id. at 200-02, 812 S.W.2d 485-86.


78. 294 Ark. 239, 743 S.W.2d 380.

79. 294 Ark. at 249, 743 S.W.2d at 385 (citing Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (1983)).
and it was this contractual theory which the court in 1991 extended to recognize the right of injured workers to recover for discriminatory discharge. Because employees are particularly vulnerable to both threats and consequences of termination resulting from the filing of workers' compensation claims, it is necessary to understand both the rationale and dimensions of the remedy in order to appreciate the deficiencies of *Sterling Drug* in this regard, even while recognizing the dramatic step forward taken by the court in limiting the virtually absolute power over employees traditionally exercised by Arkansas employers.

A. The Nature of Public Policy Exceptions to the Doctrine of "At Will" Employment

The protection of whistle-blowers, workers' compensation claimants, and other classes of employees subject to discrimination by their employers has generated the most significant source of exception to continued viability of the doctrine of "at will" employment. However, in Arkansas and elsewhere, judicial modification of the doctrine has also resulted from the recognition that some employees whose termination violates company-expressed policies or personnel manual guarantees of private due process are entitled to sue on the theory of implied contract. The contract is implied from the employer's expression of policies, particularly in personnel manual form, and from the employee's reliance on the expression of such policies to form a relationship that is essentially contractual, rather than unilaterally beneficial. Actions founded on an implied contract, however, are truly contractual in nature since

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80. See *supra* notes 8 & 9 and accompanying text.
81. This autonomy in controlling the employment relationship vested in the employer was apparently the concern of the General Assembly in expressly noting that the remedy created in Act 796, section 6, was not intended to modify the doctrine of "at-will employment." See *supra* note 11 for pertinent text of section 6.
82. See *Sterling Drug*, 294 Ark. at 245-49, 743 S.W.2d at 383-85.
84. *Id.* Compare Justice Purtle's dissenting opinion, characterizing the employment-at-will doctrine as "archaic" and noting the 1968 decision in *Hinson v. Culberson-Stowers Chevrolet*, Inc., 244 Ark. 853, 427 S.W.2d 539 (1968), in which the court had determined that an at-will employee had the status of "servant" in the "master/servant" relationship whose physical conduct was "subject to the master's right of control." 292 Ark. at 137, 728 S.W.2d at 505. Justice Purtle argued that the personnel manual in issue had created the expectancy that employment could not be terminated except for cause and that since the employer had written the manual, it should be bound by its representations. *Id.* at 138-39, 728 S.W.2d at 506-07.
the termination is alleged to have violated the agreement between
the employer and the employee which forms the basis for the
employment relationship.

In contrast to the implied contract theory, which affords a
remedy for some terminations even in the absence of an express
contract of employment, the action for retaliatory or discriminatory
discharge is designed to afford redress for employees who suffer
consequences as a result of activity which might be said to lie largely
outside the realm of the traditional contract. An overview of the
public policy exceptions which have typically received rather wide
approval reveals three major concerns of this litigation remedy.

1. Constitutional and Statutory Remedies for Discrimination

While it may be overlooked in the analysis of public policy as
a basis for modification of the doctrine of at will employment, the
single most significant restraint on employer autonomy not arising
from employment contract would appear to be legislation which
makes actionable discharge or other discrimination based upon the
employee's race, ethnic background, national origin, gender, religious
belief, or age. Federal legislation, particularly the various civil rights
acts which deal with discrimination by employers whose enterprises
operate within the rather loose definition of interstate commerce,
provides the most significant limitation on employer autonomy. This
is even more likely to be true in southern states, such as Arkansas,
which have experienced the dual historical phenomena of racial
segregation by law and relatively low employee organization by the
national unions.

In addition to the recent domination of employment relationships
by Congressional enactment of civil rights legislation creating both
administrative and judicial remedies for acts of discrimination,
some state legislation has also provided significant potential for

86. Title VII remedies provided by 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6,
2000e-8 and 2000e-9 require the filing of a complaint with the Equal Employment
Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act
or within 300 days in states with approved enforcement agencies. 42 U.S.C. § 2000e-
87. Id. If EEOC does not initiate proceedings against the employer within 180
days, issuance of a right to sue letter permits the complainant to file a civil action
redressing employment discrimination. Similarly, federal labor legislation provides protection for employees seeking to organize or conduct negotiations leading to collective bargaining agreements. The National Labor Relations Act provides an administrative remedy aimed at illegal employer activity designed to frustrate employee exercise of organization rights under the Act and preempts state action in this area to create a federally enforced standard of conduct for employers faced with organization attempts.

This type of legislation, however, is general in nature. It purports to deal with acts of discrimination, including termination, which result from a generalized discriminatory intent based on the employee's class or preference, quite apart from any individual animosity directed toward the employee. The legislation reflects either a constitutionally or legislatively recognized public policy, but a policy designed to redress group grievances, rather than one tailored to individual complaints. Similarly, federal labor legislation protects the class of employees, even in its protection of individuals, but does not preempt state legislation to protect the rights of employees not directly related to the organization or bargaining process.

In this sense, this type of generalized legislation promotes broad public policy concerns necessary to ensure compliance with policies, such as desegregation, which are broader in social concern than

88. TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.01 (West 1987), for example, makes discharge from employment based on race, color, handicap, religion, national origin, age, or sex actionable. Article 5207a of the same statute prohibits discharge based on the employee's membership or nonmembership in a union, while discharge of an employee as a result of his active duty in state armed forces is prohibited by article 5765, section 7A of the same statute (currently codified at corresponding sections (West 1994)).

91. See 2 MORRIS, supra note 90, at 1504-98.
92. The National Labor Relations Act purports to protect only "concerted activities" of employees engaged in for purposes of furthering the group interest in collective bargaining and organization. Section 7 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 . . . .
29 U.S.C. § 157 (1988). For an authoritative discussion of the distinction to be drawn between "concerted activity" and individual activity, see 1 Morris, supra note 90, at 136-44.
simply discrimination on the job. The legislation facilitates the national policy of eliminating officially sanctioned race-based prejudice, rather than specifically directing attention toward the circumstances of the individual employee, even though the individual employee may well bring the actual claim which prompts compliance with the national policy.

2. Public Policy Exceptions which Protect Employees from Refusal to Perform Illegal Acts

The second major source of limitation upon employer autonomy is the recognition of actions which promote the social goal of compliance with both civil and penal statutes by making actionable discrimination aimed at employees who refuse to violate the law. There are plausibly three types of acts made subject to litigation by either statute or case law that fall within this category. Termination or other discrimination may be actionable if predicated on: a) the employee's refusal to violate a penal or civil statute or ordinance;\(^9\), b) the employee's lawful conduct which may prove contrary to the employer's interests;\(^9\) and c) the employee's action in disclosing illegality on the part of the employer.\(^9\) A fourth category of claims giving rise to wrongful discharge actions may be discerned in cases in which the activity implicates no statutory legal duty or limitation, but instead suggests a morally offensible employer activity directed at the employee. An example of this type of claim would involve an employee's refusal of an employer's improper sexual advances that results in discharge.

a. Termination based on employee's refusal to perform an illegal act

In *Sabine Pilot Service, Inc. v. Hauck*,\(^9\) the Texas Supreme Court recognized, for the first time in that jurisdiction, a judicially

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\(^9\) An example is judicial recognition of a cause of action for wrongful discharge by the Texas Supreme Court in *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734-35 (Tex. 1985), where the employee was discharged for his refusal to violate a federal statute.

\(^9\) See, e.g., *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1055-56 (5th Cir. 1981) (holding a plaintiff who suffered termination following his apparently truthful testimony given in the course of a deposition which was adverse to the interest of his employer did not have a viable cause of action for wrongful discharge).


\(^9\) 687 S.W.2d 733 (Tex. 1985).
created exception to the doctrine of at will employment based on
discharge of an employee for his refusal to perform an illegal act.
The employee in question had refused to comply with a duty of
his work that compelled him to violate federal law by pumping
bilges of the boat on which he worked into the water.98 Prior to
his refusal to perform this duty, he had called the United States
Coast Guard to confirm a warning he had observed which advised
that such activity was illegal. The Texas court recognized that its
adoption of a limited exception to the doctrine of employment at
will followed that of twenty-two other jurisdictions99 which had
applied similar limitations on employer autonomy during the preceding
thirty years.

The exception recognized by the Texas court in *Hauck*
represents a very narrow application of the public policy rationale for limitation
on employer autonomy. The court expressly held that the limitation
recognized under Texas law would only apply to violation of “public
policy, as expressed in the laws of Texas and the United States
which carry criminal penalties.”100 Further, the court limited recovery
to those situations in which the employee is able to demonstrate
that the termination resulted solely from the refusal to violate a
criminal statute.101 Hauck’s employer had offered summary judgment
evidence that the discharge was based not upon his refusal to perform
an illegal act, but rather upon dereliction of duty in a number of
instances.102

The *Hauck* court’s recognition of public policy as that expressed
in Texas penal statutes represents a narrow view of the doctrine.103
Other courts, to address the problem of defining “public policy”
for purposes of wrongful discharge, have adopted broader readings
of the concept. For example, the Wisconsin Supreme Court adopted
a contract-based exception to at will employment in *Brockmeyer v.
Dun & Bradstreet*,104 in which expression of public policy was

98. *Id.* at 734.
99. *Id.*
100. *Id.* at 735. Although the Arkansas court in *Sterling Drug* relied on a criminal
statute as a basis for its conclusion that a public policy of the state was violated
by the termination of a whistle blowing at will employee, the court broadly
interpreted the public policy of the state as embodied in its “constitution and
statutes.” *Sterling Drug*, 294 Ark. at 249, 743 S.W.2d at 385 (citing Kirksey v.
City of Fort Smith, 227 Ark. 630, 300 S.W.2d 257 (1957)).
101. 687 S.W.2d at 735.
102. *Id.* at 734 (“Sabine testified through one of its officers that Hauck was
discharged because he refused to swab the deck, man a radio watch and other
derelictions of duty.”).
103. *Id.* at 735.
104. 335 N.W.2d 834, 838 (Wis. 1983).
specifically limited to constitutionally or statutorily defined policy. A more liberal approach to defining public policy, including judicial opinions as expression of public policy, was applied by the Hawaii Supreme Court in *Parnar v. Americana Hotels, Inc.*

Even more expansive expressions of public policy may be noted in the decisions of the Massachusetts and New Hampshire supreme courts, which have made actionable employer discrimination or retaliation merely importing "bad faith, malice or retaliatory motives." In the New Hampshire case, *Monge v. Beebe Rubber Co.*, the discharged employee had apparently failed to respond to her foreman's sexual harassment on the job and, after having collapsed at work, the employee was hospitalized for four days, resulting in her termination for failure to report to work for a period of three days. This decision illustrates the extent to which employer autonomy is now limited both by federal regulation which would have rendered the same conduct actionable and by evolving attitudes of state courts away from the traditional at will employment relationship.

The posture adopted by the Texas court in *Hauck* reflects to some extent the resistance to any broad invasion of the autonomy of employers based upon vague or generalized public policy considerations. Nevertheless, it serves to illustrate the type of exception, narrowly drawn, which suggests that an erosion of the doctrine is likely to be a long-term reality for employers and non-contractual workers. The New Hampshire court's recognition of a "bad faith" basis for a retaliation claim in *Monge* may well indicate a parameter for possible judicial intervention that will enhance employee rights because of the overlapping of remedies afforded by federal anti-discrimination legislation and state-created remedies.

b. The public policy exception based on the performance of legal acts adverse to the employer's interests

A somewhat more sophisticated problem is that posed by the discharge of an employee whose performance of a lawful or legally

105. 652 P.2d 625 (Haw. 1982).
108. *Id.* at 550-51.
109. Recently, for example, the Supreme Court approved recovery for on the job sexual harassment based on a showing that the conduct complained of would generally be deemed inappropriate and offensive without demonstration that the plaintiff experienced any particular psychologically traumatic injury as a result of the harassment. Harris v. Forklift Sys., 114 S. Ct. 367 (1993).
110. *Id.*
111. 316 A.2d 549.
required act is perceived as adversely affecting the interest of his employer. An example of this type of problem is presented by the decision of the Fifth Circuit in *Phillips v. Goodyear Tire & Rubber Co.* The employee had testified by deposition in an action in which his testimony, allegedly truthful, was adverse to his employer. Thereafter, he was terminated. Reversing a substantial jury verdict in his favor, the Fifth Circuit based its rejection of the plaintiff's cause of action on its review of Texas decisions that indicated that Texas did not recognize a public policy based exception to the doctrine of at will employment at the time.

While the employer's conduct might have violated a Texas penal statute which prohibits interference with testimony to be given by a witness in an official proceeding, the Fifth Circuit concluded that despite the laudable goal of encouraging truthful testimony in judicial proceedings, Texas law would not preclude termination of an at will employee by an employer whose interests had been compromised by such testimony.

Clearly, the more liberal definitions given to the concept of public policy by some state courts would afford a basis for an action for retaliatory discharge by an employee situated similarly to the discharged worker in *Phillips v. Goodyear*. In *Ludwick v. This Minute of Carolina, Inc.*, for instance, the South Carolina court recognized a limitation on the employment at will doctrine when an employee was fired for obeying a subpoena which required an appearance at an official proceeding. Similary, the Oregon and Pennsylvania courts in *Nees v. Hocks* and *Reuther v. Fowler & Williams, Inc.*, respectively, recognized that strong public policy considerations favoring compliance with a summons or notification for jury duty justified an exception to the employment at will rule.

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112. 651 F.2d 1051 (5th Cir. 1981).
113. *Id.* at 1053.
114. *Id.* at 1055-56. In contrast, in an Eighth Circuit diversity decision pre-dating *Sterling Drug*, Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984), the court anticipated that Arkansas would adopt a wrongful discharge cause of action based on public policy considerations. The termination occurred as a result of an employee's refusal to engage in sexual activity with her foreman.
115. See Tex. Penal Code Ann. § 36.06(a) (West 1974), which prohibits interference with testimony to be given by a witness in an official proceeding. Retaliation based upon the giving of sworn testimony in a proceeding or deposition would appear to violate the statute.
116. 651 F.2d at 1055-56.
118. 536 P.2d 512, 517 (Or. 1975).
By statute, Texas has limited employer autonomy to preclude termination based on employee service in the state National Guard\textsuperscript{120} and for service on jury duty,\textsuperscript{121} in addition to more generalized provisions which protect employees against discharge based on race, religion, national origin, handicap, age, or sex,\textsuperscript{122} or due to membership or refusal to become a member of a trade union.\textsuperscript{123}

c. Protection of "whistle-blowers"

Not only do public policy exceptions recognize protection for employees who refuse to violate civil or penal laws or whose compliance with laws or exercise of rights may be perceived as adverse to the interests of their employers, but public policy concerns have been applied most directly to protect those employees who report acts of wrong-doing on the part of their employers. This broad basis for exception to the doctrine of at will employment is perhaps the most easily understood public policy basis for exception since it reflects the goal of protecting public, rather than private, interests. Previously discussed theories for exceptions typically protect the individual employee from being exposed to criminal liability or from discrimination based upon exercise of a right or statutory privilege personal to the employee. The whistle-blower exception, to the contrary, truly seeks to protect the general public interest.

The Arkansas Supreme Court's decision in \textit{Sterling Drug} arises from just such a whistle-blower situation.\textsuperscript{124} The majority opinion relied on a number of decisions from other jurisdictions in which the whistle-blower protection had been afforded to employees who reported acts of illegality involving their employers.\textsuperscript{125} Oxford, the

\textsuperscript{124} Sterling Drug, 294 Ark. at 242-43, 743 S.W.2d at 381-82.
\textsuperscript{125} Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (employee fired for insisting employer comply with food labelling and licensing laws); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (discharge based on employee's attempt to induce compliance with consumer credit laws); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985) (employee allegedly fired for reporting shipment of adulterated milk to authorities after being ordered to deliver it); McQuarry v. Bel Air Convalescent Home, Inc., 684 P.2d 21 (Or. 1984), rev. denied, 688 P.2d 845 (Or. 1984) (nursing supervisor's
discharged employee in *Sterling Drug*, was believed to have reported the employer to the General Services Administration for pricing violations which resulted in a settlement of GSA's claim against the employer in an amount in excess of one million dollars. Even though Oxford denied having made the accusation, the employer conducted an eighteen month campaign of harassment against him which eventually resulted in his termination.126

In holding that Oxford could bring an action against Sterling Drug for the retaliatory acts which eventually resulted in his termination, the supreme court concluded that a limited remedy predicated on contract law would provide redress for employees who could demonstrate that their discharge from employment resulted from actions taken in aid of the public interest. In defining "public interest," the court looked to the state constitution and statutes as sources of this concept,127 rather than more expansive policy concerns not previously expressed in either constitutional or statutory provisions. The court looked to the penal statute which provides for prosecution of an individual who retaliates "against a witness, informant, or juror" for any act done by the subject of the retaliation in the performance of his duties.128 Based on the criminal retaliation statute, the majority was able to conclude that "there is an established public policy favoring citizen informants or crime fighters."129 The majority then specifically concluded that the public policy of the state is "contravened if an employer discharges an employee for reporting a violation of state or federal law."130

3. *The Public Policy Exception which Protects Workers' Compensation Claimants*

Within the general considerations of public policy concerns which have served to carve exceptions from the traditional doctrine of at

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126. 294 Ark. at 242-43, 743 S.W.2d at 381-82.
127. *Supra* note 100.
129. 294 Ark. at 250, 743 S.W.2d at 386.
130. *Id.*
will employment, the most specific has focused on discharge of employees who have filed claims for workers' compensation benefits.\textsuperscript{131} In \textit{Frampton v. Central Indiana Gas Co.},\textsuperscript{132} the Indiana Supreme Court first judicially recognized a public policy based exception to the doctrine affording discharged employees a remedy when the employer's act in terminating results from the filing of a workers' compensation claim. Finding that the workers' compensation statute expressly prohibited employers from engaging in acts designed to frustrate the purposes of the legislation, the Indiana court concluded: "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule [of employment at will] must be recognized."\textsuperscript{133} Despite the fact that \textit{Frampton} essentially inaugurated retaliatory discharge litigation in the workers' compensation context less than two decades ago, a significant body of caselaw has developed nationally demonstrating the value and problems associated with this remedy.\textsuperscript{134}

The Arkansas Supreme Court recognized the decision in \textit{Frampton} in its opinion in \textit{Sterling Drug v. Oxford},\textsuperscript{135} including the Indiana case in a varied listing of decisions nationally which have relied on the public policy concept as a basis for exception to the doctrine of at will employment.\textsuperscript{136} However, the decision technically focused on discharges which are predicated on an express violation of public policy as defined in Arkansas constitutional or statutory provisions. The court did not elaborate on whether the remedy recognized in favor of whistle-blowers would necessarily extend to other classes of terminated employees who might claim public policy bases for their retaliatory discharge actions, including those discharged allegedly for filing workers' compensation claims.\textsuperscript{137} In the subsequent decisions


133. \textit{Id.} at 428.

134. \textit{Supra} note 131.

135. 294 Ark. at 246, 743 S.W.2d at 384.

136. \textit{Id.}

137. The court did recognize the cause of action for wrongful discharge in the following terms: "[W]e hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state." 294 Ark. at 248-49, 743 S.W.2d at 385.
in *Wal-Mart v. Baysinger* and *Mapco, Inc. v. Payne* the court clearly extended the *Sterling Drug* concept of public policy to protect workers' compensation claimants and approved recoveries based upon the remedy articulated in *Sterling Drug*.

One troubling aspect of the *Sterling Drug* decision is its limitation of the remedy to matters which involve the interest of the public. In recognizing the public policy exception to the doctrine of employment at will, the majority expressly held that this exception was intended to protect only matters of interest to the public. The majority warned: "This is a limited exception to the employment-at-will doctrine. It is not meant to protect merely private or proprietary interests." In so limiting the scope of the exception, the majority referred to the Arizona Supreme Court holding in *Wagner v. City of Globe*, a whistle-blower case. This distinction reveals the difference between the whistle-blower cases and those in which the exception is based on the employee's refusal to perform illegal acts, from public policy based exceptions to the doctrine of employment at will which essentially focus on deprivation of a right exercised by the individual employee. An exception based on protection of workers' compensation claimants falls within the latter category, even though a greater public concern may also be inferred from violation of the rights of an individual.

The public interest served by recognition of an exception to employment at will differs markedly from that characterizing extension of the exception for discriminatory treatment of workers' compensation claimants. Protection of workers who report significant wrongdoing on the part of their employers furthers the goal of directly protecting the important public interests which underly the prohibition of the activity reported by the whistle-blower. Protection of compensation claimants represents a more narrowly based public interest in terms of the individual worker being affected by discrimination, yet the overall viability of workers' compensation as a system of protecting employers and workers from the consequences of injury is of significant general interest. The "right" recognized by the *Sterling Drug* court was substantially diluted by the remedy it also recognized.

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138. 306 Ark. at 244-45, 812 S.W.2d at 466-67.
139. 306 Ark. at 201, 812 S.W.2d at 485.
140. 292 Ark. at 249, 743 S.W.2d at 385.
141. 722 P.2d 250 (Ariz. 1986) (discussing police officer who was wrongfully discharged after reporting illegal detention of prisoner).
B. The Inadequacies in the Remedy Recognized in *Sterling Drug*
When Applied to Discrimination Based on the Filing of
Workers' Compensation Claims by Non-contractual
Employees

Before evaluating the effectiveness of the contractual remedy for retaliatory discharge of workers' compensation claimants, it is important to understand that the decision in *Sterling Drug* raised not only the issue of availability of a remedy in contract, but also the possibility that a retaliation claim might be raised as a claim of outrageous conduct in tort. The Arkansas Supreme Court held, on the facts of the case, that the employer's conduct there did not rise to the level of *outrageous* conduct, as that term had been construed in recognition of the tort of outrageous conduct in the 1980 decision in *M.B.M. Co. v. Counce.* However, the majority opinion in *Sterling Drug* left open the possibility that an action might sound in tort for an employer's "outrageous" acts undertaken in connection with the discharge of a non-contractual employee. The remedy in tort is examined in the next section of this article.

Regardless of the reservation of a tort-based action for retaliatory discharge by the *Sterling Drug* majority, that decision made clear that an employee claiming a retaliatory motive for discharge or other discrimination had to look first to the "exclusive contract approach" the *Sterling Drug* majority elected to apply in whistle-blower cases. That remedy was ultimately utilized by aggrieved claimants in actions brought in *Baysinger* and *Payne*. Those decisions do not indicate

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143. The claim of outrageous conduct was predicated on an eighteen month program of harassment conducted by Sterling Drug through its subsidiary against plaintiff Oxford resulting from the employer's belief that Oxford had reported the company to the General Services Administration for pricing violations. The whistle-blowing eventually resulted in the employer negotiating a settlement with the federal government in excess of one million dollars. 294 Ark. at 242-45, 743 S.W.2d at 381-83.

144. 268 Ark. 269, 269, 596 S.W.2d 681, 681 (1980).

145. 294 Ark. at 243-45, 743 S.W.2d at 382. In two other Arkansas cases, the court had concluded that the facts were sufficient to demonstrate a colorable claim of outrage in a termination of employment situation. Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312 (1984); Hess v. Treece, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied, 475 U.S. 1036 (1986).
that additional relief in tort was also pursued by the claimants,\textsuperscript{146} as the plaintiff in \textit{Sterling Drug} had sought, although unsuccessfully. The contractual remedy should be examined in order to determine its fairness when pursued by workers who suffer discrimination as a result of having availed themselves of the benefits of the statutory workers' compensation scheme.


In evaluating the development of wrongful discharge law nationally, the \textit{Sterling Drug} majority made a deliberate and reasoned decision to reject a remedy for retaliation sounding in tort.\textsuperscript{147} In so doing, the majority relied on the Wisconsin decision in \textit{Brockmeyer v. Dun \& Bradstreet},\textsuperscript{148} in which the Wisconsin Supreme Court had applied a contract-based remedy in a case involving improper termination of a whistle-blower. The Arkansas court relied on the rationale that a "public policy discharge action is essentially predicated on the breach of an implied provision that an employer will not discharge an employee for an act done in the public interest."\textsuperscript{149} The majority then concluded that a contract action is appropriate because it provides employees a measure of protection against discharge while limiting recovery.\textsuperscript{150}

The court in \textit{Sterling Drug} relied, in part, on \textit{Scholtes v. Signal Delivery Service, Inc.},\textsuperscript{151} in which Judge Waters discerned in 1982 that Arkansas would recognize a cause of action for wrongful discharge.\textsuperscript{152} Judge Waters had observed:

[W]e have no hesitancy in concluding that Arkansas law would recognize at least four exceptions to the at-will employment doctrine, excluding implied contracts and estoppel. These are: (1) cases in which the employee is discharged for refusing to violate a criminal statute; (2) cases in which the employee is discharged for exercising a statutory right; (3) cases in which the employee is discharged for complying with a statutory duty; and (4) cases

\textsuperscript{146} In neither Wal-Mart Stores v. Baysinger, 306 Ark. 239, 812 S.W.2d 463 (1991), nor Mapco, Inc. v. Payne, 306 Ark. 198, 812 S.W.2d 483 (1991), did an issue concerning the continuing viability of alternative remedies in tort appear in the opinion of the court, suggesting that counsel had elected simply to rely on the \textit{Sterling Drug} remedy for damages in contract.

\textsuperscript{147} 294 Ark. at 249, 743 S.W.2d at 385.

\textsuperscript{148} \textit{Brockmeyer}, 335 N.W.2d 834 (Wis. 1983).

\textsuperscript{149} 294 Ark. at 249, 743 S.W.2d at 385.

\textsuperscript{150} \textit{Id}.

\textsuperscript{151} 548 F. Supp. 487 (W.D. Ark. 1982).

\textsuperscript{152} 249 Ark. at 245, 753 S.W.2d at 383.
in which employees are discharged in violation of the general public policy of the state.\textsuperscript{153}

Three things are significant in Judge Waters's analysis harmonizing the different legal doctrines involved in recognition of the wrongful discharge action. First, the court's opinion in \textit{Scholtes} focuses on causes of action for wrongful termination based on theories apart from "implied contract." This is interesting because the \textit{Sterling Drug} court recognized a cause of action, as predicted by the federal courts, but deliberately grounded its remedy in the notion of implied contract, not a remedy in tort. Second, the opinion notes four specific categories of grievance which the court predicted would be recognized in Arkansas law, including a general public policy basis for the cause of action. The \textit{Sterling Drug} court broke new ground in addressing a claim which most appropriately could be seen as arising in the type of public policy exception theory apparently envisioned by the district court in \textit{Scholtes}. Third, and perhaps quite importantly, the reliance on \textit{Scholtes} by the \textit{Sterling Drug} court suggests approval for the general principle of an expanded remedy for terminations which implicate operation of state law.

The contract theory for recovery would at first seem to be a logical extension of evolving Arkansas law relating to the doctrine of "at will" employment. In 1987, the court had held that termination without cause in violation of procedures set forth in a personnel manual or employment agreement gives rise to an action based on the contract which may be implied by the employee's reliance on the statement of policy made by management in the manual or agreement.\textsuperscript{154} The majority also relied on assessments of Arkansas law made by federal courts in \textit{Scholtes v. Signal Delivery Service, Inc.},\textsuperscript{155} and \textit{Lucas v. Brown & Root, Inc.}\textsuperscript{156} In both instances, causes of action predicated on public policy exceptions to the doctrine of at-will employment were held to be consistent with Arkansas law. Clearly, both pre-dated the 1988 decision in \textit{Sterling Drug}, and, almost certainly, both the district court\textsuperscript{157} and Eighth Circuit\textsuperscript{158}

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  \item \textsuperscript{153} 548 F. Supp. at 494.
  \item \textsuperscript{154} Gladden v. Arkansas Children's Hosp., 292 Ark. 130, 136, 728 S.W.2d 501, 505 (1988).
  \item \textsuperscript{155} 548 F. Supp. 487, 490 (W.D. Ark. 1982).
  \item \textsuperscript{156} 736 F.2d 1202, 1204-05 (8th Cir. 1984).
  \item \textsuperscript{157} The district court found that Arkansas would likely recognize exceptions to the doctrine in situations both directly addressed by statutory grant of right or prohibition and in those situations in which the discharge contravenes public policy. \textit{Scholtes}, 548 F. Supp. at 494. But in \textit{Sterling Drug}, the court limited public policy
\end{itemize}
recognized a much broader theory of Arkansas public policy than that defined by the state supreme court in *Sterling Drug*.

The majority then noted that the court had previously suggested adoption of a public policy exception in *Counce* and had mentioned the national trend in recognizing causes of action based on retaliation in *Jackson v. Kinark Corporation*, a 1984 case. The author then launched into a national survey of developing law, leading to the conclusion that the decision in *Brockmeyer v. Dun & Bradstreet* represented the soundest course of action in terms of actually approving the new cause of action under Arkansas law.

Undoubtedly, recognition of an action sounding in contract may simply reflect the most acceptable way to reach a majority in an

considerations to those expressed in the constitution and statutes of the state. *See supra* note 100.

158. *Lucas*, 736 F.2d at 1204-05. Sexual harassment may form the basis for an action under federal law, but it is not clear that Arkansas law expressly precludes retaliation based upon an employee's rejection of sexual advances made by an employer. While economic coercion to obtain sexual services is morally improper, it does not violate the provisions of Chapter 14 of the Criminal Code which define sexual offenses. "Forsible compulsion" must be demonstrated to show that a rape has been committed or attempted. *ARK. CODE ANN. §§ 5-14-101(2), 103* (Michie 1987). Nor would the employer's conduct satisfy the requirements for proof of the offense of prostitution unless the employment could be termed a "fee" earned for performance of sexual activity. *ARK. CODE ANN. § 5-70-102* (Michie 1987).

159. 268 Ark. 269, 273, 596 S.W.2d 681, 683 (1980). The court suggested that the plaintiff might have stated a valid cause of action in contract if she had been discharged for exercising a statutory right, for performing a duty required of her by statute, or if her termination had been based on some other violation of public policy. *Id.* The plaintiff had been discharged from her employment and forced to submit to a polygraph test regarding an allegation of lost money. *Id.* at 271-72, 596 S.W.2d at 683. Despite the fact that she passed the test, the sum of missing money was deducted from her final paycheck. *Id.* at 272, 596 S.W.2d at 683. The *Counce* court declined to find that this activity violated public policy. *Id.* at 273, 596 S.W.2d at 683-84. While the discharge might have been supported based on the grounds given by the employer, including the employee's bad attitude and customer complaints, the circumstances under which the amount of her final check was diminished should have suggested to the court that an employer's demand that the employee take a polygraph examination followed by the employer's refusal to act in deference to test results would violate a general public policy of fair dealing.

160. 282 Ark. 548, 669 S.W.2d 898 (1984) (holding, based on the existence of an employee handbook affording employees a basis for a claim of procedural rights in the termination process, that an employee's refusal to take a polygraph test in connection with an allegation of theft of the employer's property may give rise to a cause of action in tort).

161. 335 N.W.2d 834 (Wis. 1983).

162. 294 Ark. at 249, 743 S.W.2d at 385 (terming *Brockmeyer* "pragmatic and well reasoned").
otherwise sharply divided—at least in terms of theory—court. Nevertheless, there is little actual reasoning in the opinion demonstrating how the notion of implied contract could be so readily imposed on a retaliatory action based on the employee’s willingness to further the public interest. While the court’s decision in *Gladden v. Arkansas Children’s Hospital*, which recognized an implied contract based on the employee’s reliance on management’s promises not to discharge except for cause, is consistent with the notion of a legitimate exception to at-will employment, the decision in *Sterling Drug* is not. In contrast to an express promise made in an employment manual or agreement, upon which an employee may rationally be said to rely, no such promise is inherent in the non-contract relationship consistent with the traditional doctrine of employment at-will. To hold otherwise is simply to declare the concept invalid, which the *Sterling Drug* court declined to do.

Because the public policy of Arkansas is expressed in the state’s constitution and statutes, as interpreted by the judiciary, one might query whether the Arkansas Supreme Court’s decision in *Sterling Drug* fully compromises the employer’s traditional autonomy by requiring an employer to assert a cause for virtually every termination. However, because the doctrine of employment at-will is essentially a creation of the common law, its modification to require compliance with constitutional and statutory guarantees appears, in a very strict sense, less than extreme. Following *Sterling Drug v. Oxford*, the doctrine differs markedly from that which employers might reasonably have understood until the last decade. The *Sterling* decision may have properly limited employer autonomy, but the court acted inappropriately in recognizing a contract where neither employer nor

163. With two dissenting justices in *Sterling Drug* indicating their willingness to dismiss Oxford’s complaint and one justice dissenting based on the disposition of both the outrage claim and remedy for wrongful discharge afforded by the majority, the reliance on *Brockmeyer* may simply reflect the only basis by which Chief Justice Holt could form a majority approving any theory of relief at all for Oxford.


165. The exception flows from the fact that the parties have essentially modified the terms of employment to include some restriction on employer autonomy, even though the modification may have been unilaterally made by the employer itself in the adoption of a policy manual, handbook, or particular representations concerning the terms of employment. See *Proctor v. East Cent. Ark. EOC*, 291 Ark. 265, 724 S.W. 2d 163 (1987) (employer’s written expression of policy creates employment contract only if definite term of employment imposed); see also Youngdahl, *supra* note 69, at 562-65 (summarizing theories of liability in Arkansas wrongful discharge actions).
employee expressly relied on matters of public policy external to the employment relationship. For, as a result of the Sterling court's reasoning, a tribunal can now infer an implied contract in a range of matters that never before would have provided discharged employees with any theory for recovery. The principle also serves to extend contract law beyond the typical understanding of the contract as a bargained-for agreement. If the parties are presumed to rely on Sterling Drug's notion of public policy in the inception and continuation of their employment relationship, then, as a matter of contract law, nothing should prevent them from simply bargaining away this reliance in undertaking their respective obligations in the relationship. Of course, in a successor case, the Arkansas Supreme Court could simply rule that the public policy of the state precludes an agreement that disregards public policy in defining the parameters of the employment relationship.

The problem for terminated workers' compensation claimants posed by the Sterling Drug decision lies not so much in the theory of implied contract adopted by the majority, but in the limited remedy afforded by contract actions generally. In concluding that the contract remedy was appropriate, the majority held that this approach would strike a "fair balance" in providing employees with "protection from employer retaliation" while concurrently limiting recovery. In fact, application of a contractual remedy for workers' compensation claimants would hardly serve to achieve a fair balance at all and would certainly not be sufficient to provide a meaningful deterrent against future employer discrimination toward compensation claimants.

2. The Limitations of the Implied Contract Remedy for Discharged Workers' Compensation Claimants

In remanding for a new trial in Sterling Drug v. Oxford, the state supreme court discussed the measure of damages that will apply in contract actions brought for wrongful discharge. The court noted the difficulties in producing an accurate measure of damages in cases in which the contract of employment has no definite term and rejected a remedy that would have permitted a jury to estimate the prospective wages lost by the employee based on characteristics of

166. 294 Ark. at 249, 743 S.W.2d at 385. The majority also noted that if the employer's conduct was outrageous or extreme, the discharged worker could still assert a tort claim for outrage. Id.
his prior employment, such as seniority. Instead, labelling that approach as "too speculative and uncertain," the majority stated the measure of damages to be applied in Arkansas actions:

We conclude that the sum of lost wages from termination until the day of trial less the sum of any wages that the employee actually earned or could have earned with reasonable diligence is the general measure of damages in a public policy wrongful discharge action. In addition, an employee can recover for any other tangible employment benefit lost as a result of the termination. Future damages are not recoverable.

This measure of damages effectively permits an employee to recover only for actual economic loss sustained as a result of the employer's wrongful discharge. Yet in other contexts Arkansas courts have traditionally permitted recovery for those future economic losses that can be supported by evidence. Under the formula adopted by the Arkansas Supreme Court, a wrongfully discharged employee may receive an award of damages equal to the actual amount of wages lost, reduced by any wages earned from other employment subsequent to discharge, plus the economic value of any benefits lost as a result of the discharge.

167. 294 Ark. at 251, 743 S.W.2d at 386. But see Panhandle E. Pipe Line Co. v. Smith, 637 P.2d 1020, 1025 (Wyo. 1981), (permitting recovery for future losses based on factors such as prior service, average years of employment with the company for all workers, and the intended period of employment for the discharged employee). The Sterling Drug court criticized the approach taken in Panhandle. 294 Ark. at 251, 743 S.W.2d at 386. However, in Medi-Stat, Inc. v. Kusturin, 303 Ark. 45, 50, 792 S.W.2d 869, 872 (1990), the court subsequently concluded that a parent could recover for pecuniary loss attributable to the death of a child who might reasonably have been expected to support the parent.

168. 294 Ark. at 251, 743 S.W.2d at 386. But see Carnation Co. v. Borner, 610 S.W.2d 450 (Tex. 1980) (evaluating case in which the jury returned a verdict on prospective loss of earnings in response to a specific inquiry); Santex, Inc. v. Cunningham, 618 S.W.2d 557 (Tex. Ct. App. 1981) (deciding that a loss of future wages calculation is possible if based on an employee's earnings before termination and lower wages after obtaining other employment).

169. 294 Ark. at 251-52, 743 S.W.2d at 386-87. This restriction on recovery of future loss of earnings may be appropriate in the case of whistleblowers who do not necessarily suffer loss of earning capacity as a result of discharge, but Arkansas has traditionally recognized recovery for prospective loss of earnings for plaintiffs who suffer personal injuries that compromise future earning capacity. See Check v. Meredith, 243 Ark. 498, 420 S.W.2d 866 (1967).


171. Generally, an Arkansas plaintiff claiming economic loss must demonstrate a good faith attempt at mitigation of damages, but the reasonableness of the effort
The measure of damages approved by the court in a public policy wrongful discharge action strictly limits the discharged employee's scope of recovery. This measure of damages is inadequate if the plaintiff is an employee discharged for filing a workers' compensation claim—perhaps as opposed to an employee who makes a conscious decision to report employer wrongdoing—particularly if the employee has suffered a seriously disabling injury. In short, the Sterling Drug remedy is insufficient as applied to workers' compensation claimants because it fails to afford an adequate measure of recovery for the injured employee.\(^{173}\)

For whistle blowers, who may rationally decide to risk employment in order to promote the public interest, the remedy is also woefully inadequate because the mitigation requirement serves to penalize those employees who either conscientiously pursue other employment or are forced to attempt other employment for economic reasons. The employee whose sense of social responsibility compels him to report employer illegality is punished for exactly the type of commendable behavior that will likely compel him to diligently seek other employment. This measure of damages may well reveal the majority's concern that only whistle blowing undertaken for the noblest of motives may be protected under the Sterling Drug approach. If so, the court appears to have achieved this goal, because the limited availability of economic recovery is certainly not likely to induce a feeling of security for employees who consider reporting employer illegality.

a. The contract theory fails to address the range of discriminatory acts that violate the public policy concerns expressed in section 11-9-107

By providing a recovery only for retaliatory discharge, the court failed to account for non-discharge acts of discrimination. Unless an employee is actually terminated, no loss of earnings can be

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172. 294 Ark. at 251-52, 743 S.W.2d at 386-87. This measure of damages has been criticized as demonstrating to at-will employees that "all that glitters is not gold," because the remedy is inadequate to prevent employer illegality or compensate the discharged employee.

173. In contrast, in Carnation Co. v. Borner, 610 S.W.2d 450, 453-54 (Tex. 1980), the Texas Supreme Court held that recovery for loss of wages and benefits in the future are properly recoverable in an action for wrongful discharge of an employee fired in retaliation for filing a workers' compensation claim.
However, the prohibitions imposed by both the former and amended versions of section 11-9-107 include not only discharge in retaliation for the filing of a claim for benefits, but also acts of discrimination with respect to hiring or in setting the terms or conditions of work. In Mapco, Inc. v. Payne, the court recognized a right to recovery in a "refusal to rehire" context, rather than in the typical termination setting. The jury assessed damages and the court affirmed the verdict. In the discriminatory non-hiring context, the same measure of damages can be employed as that recognized in Sterling Drug: the jury could simply compute, from the date of the refusal to hire to the date of the trial, the total earnings lost as a result of discrimination. However, other forms of discrimination, such as reassignment or imposition of more restrictive working conditions, are not so readily susceptible to an acceptable calculation of precise amounts of compensable lost wages. Yet, the public policy relied on by the court in Sterling Drug and subsequently in Wal-Mart v. Baysinger and Mapco, Inc. v. Payne clearly incorporates discriminatory behavior other than termination or refusal to hire. That policy would additionally appear to require some measure of economic recovery consistent with the Sterling Drug holding.

Two major concerns face workers' compensation claimants who are potentially subjected to retaliation from employers. First, claimants face the possibility of discrimination in employment based on their prior history of work-related injury and compensation claims. For an employer concerned about insurance premiums or costs of litigation, including very legitimate concerns about bad faith claims, the initial employment application may well provide the easiest way to attempt to avoid claims or litigation. If a prospective employee has an admitted history of either injury or claims, the employer may be

174. The opinion specifically addresses the damage issue in terms of discharge and does not offer any remedy for other acts of discrimination such as demotion, reassignment, or forfeiture of seniority. 294 Ark. at 250, 743 S.W.2d at 386. However, the opinion does recognize that these other forms of discrimination might support a claim for constructive discharge when they result in conditions so intolerable that the employee is forced to resign. Id. (citing Harris v. Wal-Mart, 658 F. Supp. 62 (E.D. Ark. 1987)).

175. See supra note 38 and accompanying text.


177. Id. at 201, 812 S.W.2d at 485.

178. An employer could defend an action based on a good faith concern that the prospective employee might have brought frivolous compensation claims in the past, for instance.
induced not to hire based upon: 1) the perception that the employee is more likely to sustain additional injuries or aggravate pre-employment conditions or injuries; 2) a presumption that the employee's understanding of workers' compensation law demonstrates a willingness to pursue statutory claims for benefits; or 3) the concern that the employee, once hired, may be more difficult to fire because of the protections afforded by the trend in the law toward less employer autonomy in termination decisions.

Section 11-9-107 expressly prohibits employer discrimination in the hiring process based on the prospective employee's history of claiming benefits under the Act.\(^{179}\) The provision does not, however, expressly prohibit reliance on the history of work-related injury as a factor the prospective employer might consider in making the hiring decision. Unless the application form specifically addresses the issue of prior claims, as opposed to injuries or limitations on physical activity, it would be quite difficult for a prospective employee to meet the burden, required by section 11-9-107, of showing that the employer "willfully discriminate[d]"\(^{180}\) in failing to hire based on the applicant's history of claiming benefits.\(^{181}\)

Even if the job applicant could show that the refusal to hire was predicated on discrimination proscribed by section 11-9-107, the

\(^{179}\) Other jurisdictions have attempted to impose similar protections in the hiring process. See Or. Rev. Stat. § 659.410 (Supp. 1994); Morehouse v. Workers' Compensation Appeals Bd., 201 Cal. Rptr. 154 (Cal. Ct. App. 1984) (concluding that an employer's refusal to rehire a recovered employee is actionable). However, in Smith v. Coffee's Shop for Boys & Men, 536 S.W.2d 83, 84 (Tex. Civ. App. 1976), the court impliedly determined that the Texas statute applicable to workers' compensation claimants would not expressly proscribe discrimination in the hiring decision based on the applicant's prior reliance on the Act to seek or secure benefits for a work-related injury or condition.


\(^{181}\) Presumably, any reason advanced by an employer for not hiring an applicant with a prior history of compensation claims or compensable injuries, other than the applicant's prior experience with the compensation system, would serve to avoid criminal liability under § 11-9-107, whether offered in good faith or merely as a pretext. If an employer were able to offer any legitimate alternative reason for the refusal to hire, then the claimant would face a difficult burden in establishing his claim. However, if the employer refused to hire after communicating with a prior employer against whom the prospective employee had filed a claim, the applicant might show circumstantially that this was the basis for the unfavorable decision on his application. For instance, in Van Tran Elec. Corp. v. Thomas, 708 S.W.2d 527, 530 (Tex. Ct. App. 1986), the injured employee's supervisor called a company with whom the worker subsequently sought employment to tell its hiring officer that the employee had suffered a totally disabling back injury and had also filed a lawsuit against the supervisor's company. In such a situation, the aggrieved applicant might be able to demonstrate circumstantially that a decision not to hire was discriminatory and in violation of the workers' compensation law.
issue of the measure of damages available under *Sterling Drug* would materialize. Because the employee was not hired, the only appropriate measure of damages would be the sum of wages that would have been earned from the date of refusal to hire until the date of trial. Any other formulation would fail to meet the majority's objection to speculation in future damages. More significantly, the difficulty in proving the employer's motive, absent a virtual admission of discriminatory intent, would probably bar recovery as a practical matter, if not as a matter of law.182

Second, the *Sterling Drug* remedy fails to account for other forms of employer discrimination, such as reassignment, that might flow from a claim for benefits. Refusing to work will often be difficult or impossible for an injured employee who must assume the same position or perform the same duties as required prior to the injury. Similarly, reassignment of the employee to new duties may drastically impair performance and thus afford the discriminating employer a "protected" basis for ultimately terminating the employee based on inability to perform the duties required of the position. Section 11-9-107 does not purport to prevent an employer from terminating an employee whose injury makes return to work impossible, or from providing a replacement for an employee whose lengthy absence from the job compromises production.

While the majority in *Sterling Drug* did expressly recognize as accurate the decision in *Harris v. Wal-Mart*,183 in which the District Court for the Eastern District of Arkansas had held that a "constructive discharge" occurs when the employer makes working conditions so unsatisfactory as to cause resignation,184 that decision may not be applicable to employees forced to suffer unsatisfactory working conditions because economic necessity compels them to continue their employment.185 Moreover, a change in working

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182. This is particularly true when the employer can legitimately predicate a decision not to hire on its concern that a prior injury may demonstrate the employee's inability to physically perform the task of the desired employment. *See, e.g.*, Elzey v. Forrest, 739 P.2d 99 (Okla. 1987) (deciding that an employer may terminate an employee who is unable to perform duties of employment).
184. *Id.* at 70-71.
185. The court in *Sterling Drug* adopted a formula that measures damages by computing lost wages that accrue from the date of discharge until the day of trial. 294 Ark. at 251-52, 743 S.W.2d at 386-87 (citing Seaman Stores v. Porter, 180 Ark. 860, 23 S.W.2d 249 (1930)). Consequently, in the absence of an actual discharge or other termination that may be appropriately characterized as a "constructive discharge," the employee would have no way of demonstrating any starting point for the accrual of loss of wages.
conditions that does not directly suggest harassment, but that could legitimately relate to different training, skills, or physical capabilities may not prove so onerous as to justify resignation.

No measure of damages suggested by the court in *Sterling Drug* will appropriately reflect the type of injury sustained by an employee who is neither fired nor subjected to a reduction in wages, but rather experiences discriminatory changes in working conditions. Consequently, no remedy in contract could compensate an employee suffering this type of discrimination because there would be no wage differential that could be calculated by the jury in response to a special interrogatory founded on the contract theory. For non-termination cases, the remedy imposed in *Sterling Drug* would simply prove inadequate for employees suffering discrimination because of their claims for benefits under the Workers' Compensation Act.

b. The contract theory fails to provide a complete remedy for discharged employees

The measure of damages approved by the *Sterling Drug* majority fails to afford many injured workers a complete remedy for the discrimination they have suffered. While the decision does permit recovery of lost wages through the date of trial, as well as the economic value of benefits associated with employment, the majority position denied two critical bases for recovery.

First, the *Sterling Drug* majority's hesitance to permit recovery for future loss of wages on the theory that these types of damages are too speculative severely limits a discharged employee who also has sustained a work-related injury. The fact of the injury itself may preclude the employee from ever again fully realizing his employment potential in light of the possible difficulty in obtaining another position once the employee discloses the prior injury on an employment application. Even though the employee may recover substantial benefits under the workers' compensation law for a total and permanent incapacity, this measure of recovery is not designed.

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186. See 294 Ark. at 251-52, 743 S.W.2d at 386-87.
187. 294 Ark. at 251-52, 743 S.W.2d at 386-87.
188. *Id.* at 252, 743 S.W.2d at 387. The benefit must be a "tangible employment benefit." *Id.*
189. This is particularly true in light of the right of Arkansas employers to inquire about prior injuries and compensation on pre-employment applications. See *supra* note 37. For a comprehensive discussion of the impact of the federal Americans with Disabilities Act on Arkansas employment practices, see Oliver, *supra* note 65.
190. Benefits for a nonpermanent incapacitating injury are limited to a maximum
to fully support an employee indefinitely. Consequently, the injured and discharged employee faces the very real prospect that his recovery will be limited to wages lost between the date of discharge and the date of trial, despite the fact the he may not be able to gain other employment.

By comparison, the limitation on recovery of future lost wages may not prove so onerous for an employee who is discharged in retaliation for his action in reporting illegality on the part of the employer. The "whistle-blower" makes a conscious decision to report the illegality, and he may elect not to do so if he cannot rationally bear the loss of his job. Moreover, even if the loss of the job poses severe consequences, the whistle-blower typically has not sustained an incapacitating injury that could limit his ability to perform tasks required for other employment. Nor has the whistle-blower engaged in an activity that may threaten economic consequences for a prospective employer concerned about workers' compensation premiums, even though the prospective employer may elect not to hire based on the whistle-blower's evidenced zeal in reporting his prior employer's illegal activity.

In addition to placing a limitation on the recovery of future lost wages, the Sterling Drug opinion may limit the recovery of the economic value of benefits associated with employment. For example, how should a fact-finder compute the value of discontinuation of weekly payment of 70% of the average weekly wage in the state. Even in the case of permanent total disability, weekly benefits are limited to two-thirds of the worker's average weekly wage. 191. Disability not amounting to permanent disability, regardless of severity, entitles the injured employee to benefits payable for a maximum period of 450 weeks. 192. See supra note 166 and accompanying text.

191. Disability not amounting to permanent disability, regardless of severity, entitles the injured employee to benefits payable for a maximum period of 450 weeks. 192. See supra note 166 and accompanying text.


194. See Hunt v. Van Der Horst Corp., 711 S.W.2d 77, 80 (Tex. Ct. App. 1986) (determining that an employer's admission of concern over rising workers' compensation insurance premiums may be used as evidence of retaliatory motive, despite alternative inference that the statement demonstrated concern for legitimate business concerns, including worker safety).
the employee's participation in a pension program, particularly one that has already vested or is near to vesting? Certainly, it is possible to calculate the economic value of immediate benefits, such as accrued vacation leave or sick leave that an employee may take in monetary compensation if not used. But participation in retirement programs is more difficult to value for precisely the same reasons that the *Sterling Drug* majority relied upon in rejecting recovery for future loss of wages. Recognizing that other courts had relied on factors such as the length of employment, average tenure of employees with the company, and the employee's own expression of intention to stay with the company, the supreme court nevertheless concluded that these factors were not sufficiently precise to enable fact-finding free from speculation and rejected recovery based on that combination of circumstantial evidence and direct testimony by the interested plaintiff. Yet these same assumptions must be made in computing the long-term economic value of the employee's participation in retirement or stock option benefit programs that might be available as a feature of the employment. Consequently, the discharged employees may lose some amount of the real value of lost benefits simply because calculation of the value of these benefits will prove too speculative to satisfy the stringent test for recovery set in *Sterling Drug*.

Second, the reliance on the contract remedy deprives the discharged worker of any claim involving one type of recovery that normally is available in tort actions: damages for the psychic injury suffered by the plaintiff. The terminated employee may well suffer extreme anxiety as a loss of employment, particularly where the discharge follows a lengthy employment relationship or demonstrates significant vindictiveness in light of the employee's record of service to the enterprise. In addition, the contract remedy fails to recognize damages that may flow from stress in the worker's personal life.

195. By precluding the recovery of future damages, the opinion suggests that the "tangible" employment benefit which might be recovered would be the current value of the employee's interest in the retirement plan. See 294 Ark. at 252, 743 S.W.2d at 387. However, under the court's formulation an unresolved question would be whether the current value of plan participation would be the value on the date of termination or the value on the day of trial.

196. 294 Ark. at 251, 743 S.W.2d at 386.

197. In Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 353-57 (Iowa 1989), the Iowa Supreme Court held, based on the underlying theory of the tort as an intentional, rather than merely negligent, act, that an employers retaliatory discharge of a workers' compensation claimant properly gives rise to damages for emotional distress.
that is induced by the loss of employment.\textsuperscript{198} For instance, increased instability within the employee's family or marriage that is attributable to the loss of income or the stabilizing influence of regular work hours may be significant, but nonetheless non-compensable under \textit{Sterling Drug}.\textsuperscript{199} Closely paralleling the lost opportunity for recovery of damages suffered because of psychic injuries associated with the termination is the inability to recover punitive damages designed to punish the employer's illegal acts. The \textit{Sterling Drug} majority, in striving for a remedy that would balance the interests of the parties, essentially sacrificed the single most significant deterrent available to prevent future employer illegality by adopting a contract remedy which makes no provision for assessment of exemplary damages. These damages would not only provide the desired deterrent against future retaliatory conduct, but also offer a source of vindication for the loss of the employee's legal right to seek workers' compensation benefits for injuries sustained on the job.\textsuperscript{200}

c. The requirement for mitigation of damages serves to restrict the availability of the contract remedy for many workers

The contract formulation for recovery recognized by the \textit{Sterling Drug} majority fails to afford protection for the class of unskilled or low-skilled workers that is most likely to be subject to discriminatory discharge. Highly skilled or unionized workers are more likely to

\textsuperscript{198} For instance, the \textit{Sterling Drug} court noted that the employee claimed that, prior to his discharge, his life had already been subjected to considerable stress from a recent divorce and that the employer was aware of this stress while pursuing its pattern of harassment against him. 294 Ark. at 244, 743 S.W.2d at 382-83. The employee relied on these facts in asserting that Sterling Drug's conduct in the matter was "outrageous." \textit{Id.} Nevertheless, the court rejected recovery under this theory. \textit{Id.} at 244-45, 743 S.W.2d at 383.

\textsuperscript{199} 294 Ark. at 251, 743 S.W.2d at 386 (limiting recovery of damages to lost wages). This approach was severely criticized by Justice Purtle, dissenting, who observed: "The conduct by the employer in this case caused the appellee embarrassment, humiliation, physical and mental problems, and severe financial losses. None of these elements of damages are recoverable under the majority decision." \textit{Id.} at 254-A, 743 S.W.2d at 388. In his dissent from the per curiam order denying rehearing, Justice Purtle continued his attack on the court's adoption of purely contractual damages. 294 Ark. 239, 254-A to 254-D, 747 S.W.2d 579, 579-80 (1988) (per curiam). Justice Dudley indicated that he would have granted rehearing, but did not join Purtle's scathing dissent. \textit{Id.} at 254-A, 747 S.W.2d at 579.

\textsuperscript{200} For example, in Azar Nut Co. v. Caille, 734 S.W.2d 667, 668 (Tex. 1987) the jury awarded plaintiff Caille $167,464 in actual damages for lost wages and insurance benefits and $175,000 in punitive damages. This award was upheld on direct appeal, Azar Nut Co. v. Caille, 720 S.W.2d 685 (Tex. Ct. App. 1986), and on review by the Texas Supreme Court. 734 S.W.2d at 668-69.
be protected against the effects of employer discrimination by their ability to obtain other employment or through the protection afforded by collective bargaining agreements. For employees at the lower end of the skills spectrum who are not protected by collective bargaining agreements, the loss of wages formulation presents substantial problems in terms of a suitable remedy.

First, the potential recovery in wrongful discharge actions, predicated on lost wages from the date of termination until trial, may be insubstantial. Recovery potential in the range of $15,000 to $25,000 for a worker employed at or near minimum wage may hardly be expected to excite interest from plaintiffs' lawyers providing services under a contingent fee contract, even though the preparation and conduct of the trial might not be complicated or expensive.

Second, availability of attorneys' fees under the newly adopted statutory provision, which might make wrongful discharge litigation more attractive, does not ensure ready access to representation because the likelihood of recovery in contract may not be favorable in the typical termination case. This is true because the employer may defeat the claim simply by offering a reasonable, credible explanation for the termination as an alternative to the employee's allegation that she was discharged because of a claim for workers' compensation benefits. While the greater potential for recovery in tort would likely induce settlement in cases in which the employee's claim for relief is admitted by the employer, the limited recovery potential of the contract action may make it more feasible for the employer to resist reasonable settlement demands and proceed to trial. Moreover, the contract action might serve to limit the admissibility of evidence extraneous to the employment relationship that could have a bearing on the plaintiff's ability to prove the claim.

Third, the requirement for mitigation of damages impacts severely on the first two considerations by reducing both the potential for recovery and the reasonableness of attorneys' fees. Employees already

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201. Nevertheless, the published opinions in *Wal-Mart v. Baysinger* and *Mapco Inc. v. Payne* demonstrate the plaintiffs' counsel have been willing to pursue even the limited remedies available under the *Sterling Drug* damages formula. In *Baysinger*, the jury returned a verdict for $24,000. *Wal-Mart v. Baysinger*, 306 Ark. 239, 241, 812 S.W.2d 463, 464 (1991). The jury verdict in *Payne* was for $15,000. *Mapco Inc. v. Payne*, 306 Ark. 198, 199, 812 S.W.2d 483, 484 (1991). Whether this level of recovery will support litigation in cases other than test cases, however, remains to be seen. The General Assembly's adoption of exclusive administrative and criminal remedies in Act 796 may preclude the development of additional caselaw that would provide a basis for discerning whether the recovery available under *Sterling Drug* is adequate to justify litigation.

earning low wages are unlikely to be able to avoid re-employment, when available, because of the whip of economic necessity. The reduction in an already small loss of wages by other wages earned can only serve to limit the attractiveness to the terminated employee and her counsel of pursuing a claim against the offending employer. Even with the potential for full compensation of counsel through an attorneys' fee award, the attractiveness of the litigation and, thus, the potential vindication of the client's interests, may be rendered so economically insignificant as to induce the client not to take action. The consequence to an individual worker who has otherwise always experienced job insecurity may actually not be serious, but the overall impact on the system can only be to encourage employers to engage in vindictive or retaliatory conduct toward non-contractual workers who are injured during the course of their employment and apply for workers' compensation benefits.

III. THE FEASIBILITY OF THE TORT REMEDY FOR WRONGFUL DISCHARGE

The General Assembly's express language nullifying the decisions in *Wal-Mart v. Baysinger* and *Mapco, Inc. v. Payne*, might be left undisturbed by Arkansas courts reviewing constitutional challenges to the provisions of Act 796. If that is the case, workers' compensation claimants suffering discrimination would theoretically be limited to those remedies adopted by the General Assembly. However, the courts might hold that tort remedies for an employer's retaliatory discrimination are not affected by the provision of Act 796. Applying a rule of strict construction to the Act, as dictated by the General Assembly, would require Arkansas courts to hold that the nullification of those decisions applying *Sterling Drug* to discharged workers' compensation claimants has effectively eliminated the implied contract theory of recovery for wrongful discharge.

As a consequence of the application of a strict reading of the Act, tort remedies for employer illegality would remain intact and

203. *Id.* § 11-9-107(e).
204. Although the General Assembly expressly sought to avoid the appearance of abridging the doctrine of "employment at will," *Ark. Code Ann.* § 11-9-107(d) (Michie Supp. 1993), continued application of tort remedies for outrageous conduct would not constitute an exception to that doctrine. Instead of holding that the employer's autonomy is limited by the "implied contract" recognized by the court in *Sterling Drug*, the application of tort remedies would simply redress illegal discrimination in the treatment of an injured worker seeking to avail herself of the benefits of the compensation system.
available to aggrieved compensation claimants. Nothing in the Act expressly addressed other judicial decisions that had recognized a tort recovery, particularly one based on the theory of outrage, as potentially available for employees subjected to illegal discrimination. The implications for the continued viability of a tort-based remedy for discrimination directed toward employees claiming workers' compensation benefits will be particularly important if the appellate courts reject a constitutional challenge aimed at the General Assembly's attempt to insulate the doctrine of at-will employment by nullifying prior decisions that recognize an exception to this general principle for aggrieved compensation claimants.

Historically, the development of the remedy for wrongful discharge of workers' compensation claimants has involved actions sounding in tort rather than contract. While the Arkansas Supreme Court elected in Sterling Drug to recognize a remedy that is predicated on the theory of implied contract and couches recovery in terms of traditional contract damages, an overwhelming majority of jurisdictions have, either by judicial decision or legislative enactment, grounded the remedy in tort. Prior to the court's recognition of the contract-based cause of action in Sterling Drug, however, a number of Arkansas decisions focusing on employer misconduct in terminating or retaliating against employees had arisen in tort contexts, particularly in the development of the tort of outrage. This section examines outrage and tort recovery generally as an alternative remedy for those compensation claimants who experience employer discrimination.

The expanded potential for recovery in tort actions, when contrasted with the limited measure of damages available for recovery in contract, represents a significant improvement in the compensation available for employees discharged in retaliation for having filed claims for workers' compensation benefits. For example, the range of available damages is far more expansive in most tort actions than those damages recognized by the Sterling Drug court as sounding.

207. Id.
208. See, e.g., Givens v. Hixson, 275 Ark. 370, 371-72, 631 S.W.2d 263, 264 (1982) (finding allegation of employer's anger during discharge insufficient to state claim for outrage, particularly where plaintiff admitted that employer had not been made aware of plaintiff's heart condition and daily medication).
in contract, for tort damages may include recovery for future lost wages and emotional distress. Moreover, the intentional nature of any tort applicable to cases involving wrongful discharge indicates the appropriateness of punitive damage awards to deter future employer misconduct.

The discharged employee in Sterling Drug brought his action for wrongful discharge both in tort and contract, basing the tort action on the relatively new Arkansas remedy for outrageous conduct. The majority rejected the claim for damages in tort, finding the conduct of the employer not to be sufficiently outrageous to justify recovery under that theory of relief. Nevertheless, the ma-


210. In Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760 (1992), the Arkansas Supreme Court held that a complaint alleging mental distress for outrageous conduct committed by school officials who failed to follow required procedures for removal of asbestos from a school and misrepresented the condition to induce the continued attendance and participation of the school's students and employees stated a cause of action. Other jurisdictions have permitted recovery of damages for emotional distress for employees wrongfully terminated. Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 355-56 (Iowa 1989) (citing decisions arising under the wrongful discharge tort law of West Virginia, Oklahoma, Michigan, Indiana, Minnesota, Oregon, Virginia, and Washington).

211. See, e.g., Bruns v. Bruns, 290 Ark. 347, 719 S.W.2d 691 (1986) (concluding that punitive damages are recoverable for an intentional violation of another's rights); Brown v. Missouri Pac. R.R., 703 F.2d 1050 (8th Cir. 1983) (holding Arkansas authorizes punitive damages to deter defendant from simply assuming costs of litigation and refusing to take appropriate measures to remedy defective condition); see also Azar Nut Co. v. Caille, 734 S.W.2d 667, 668 (Tex. 1987) (upholding award of punitive damages in wrongful firing of workers' compensation claimant).


213. 294 Ark. at 244-45, 743 S.W.2d at 383. The factual claim for outrage in M.B.M. Co. v. Counce, 268 Ark. 269, 271, 596 S.W.2d 681, 682 (1980), was based on the defendant's termination of the plaintiff's employment and subsequent deduction from the plaintiff's final check of money that the employer claimed was missing from the store at the time of the discharge. The plaintiff was forced to take a polygraph examination, but even after being told that she passed the test the manager of the store withheld the disputed money. Id. at 271-72, 596 S.W.2d at 683. Although the court declined to find that the plaintiff's termination constituted outrageous conduct or that she had suffered extreme emotional distress, it nevertheless reversed the grant of summary judgment and remanded for further proceedings on the issue of whether the employer's conduct in withholding the disputed money constituted outrageous conduct. 268 Ark. at 280-81, 596 S.W.2d at 687-88.
majority did not foreclose an action for outrage in wrongful discharge cases, observing: "If an employer's conduct in breaching a contract of employment is sufficiently egregious or extreme, the employee can still claim tort damages on a cause of action for outrage." 214

This observation is grounded in the notion that an implied contract of employment may be found where the discharge is based on the employer's vindictiveness in punishing the employee for an act done in furtherance of the public interest. 215 Thus, the court appears to have concluded that the act of retaliation itself warrants recovery for breach of the implied employment contract, while the employer's additional behavior incident to the retaliatory act might itself be so egregious as to warrant an additional remedy for outrage. 216

Because the court has left intact the possibility that an action for wrongful discharge may be argued in terms of outrageous conduct, that tort theory, as characterized by Arkansas decisions, must be scrutinized to determine whether it affords discharged employees adequate recourse against retaliating employers. In addition, discussion of an alternative theory of recovery may disclose another approach to wrongful discharge cases which will prove more successful in individual cases.

A. The Tort of "Outrage" in Arkansas

The Arkansas Supreme Court first recognized a remedy for infliction of emotional distress in *M.B.M. Company v. Counce,* 217

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214. 294 Ark. at 249, 743 S.W.2d at 385.
215. The public interest aspect of the firing is critical for proof of wrongful discharge under Arkansas law, although not necessarily for proof of outrage. Thus, in *Smith v. American Greetings Corp.*, 304 Ark. 596, 599, 804 S.W.2d 683, 685 (1991), the court rejected the argument that termination based on the employee's engaging in a fight with his shift supervisor constituted a wrongful discharge, as the claim involved mere vindication of a private interest.
216. The *Sterling Drug* court offered no example of employer behavior that might be so egregious as to warrant an additional recovery in tort. One example of such behavior might be an employer who not only retaliates by discharging the worker claiming compensation benefits, but who also attempts to influence other prospective employers not to hire the discharged employee. See *VanTran Elec. Corp. v. Thomas*, 708 S.W.2d 527, 530 (Tex. Ct. App. 1986) (discharging employer telephoned subsequent employer to inform him of employee's back injury and total disability).
217. 268 Ark. 269, 596 S.W.2d 681 (1980).
a 1980 decision in which the court characterized this theory of recovery as the "tort of outrage."\textsuperscript{218} \textit{Counce} arose in the context of the discharge of a non-contractual employee, and, perhaps significantly, the subsequent history of this theory of recovery is most dramatically reflected in actions based on the employment relationship of non-contractual employees.

In \textit{Counce}, the employee was terminated after her employer discovered checks and money missing from the counter where she had worked the preceding night.\textsuperscript{219} The employee submitted to a polygraph examination, at the employer's demand, but the employer did not subsequently reinstate her and also withheld remuneration from her final paycheck.\textsuperscript{220} Then, the employer responded to the employee's application for unemployment compensation by stating that she had been terminated due to customer complaints and because of her failure to follow company policy.\textsuperscript{221} The supreme court, in reversing the summary judgment entered by the trial court, found that the circumstances of the case were sufficient to raise a fact issue as to whether the employer's behavior constituted extreme and outrageous conduct.\textsuperscript{222}

Although the court in \textit{Counce} addressed the possibility of recognizing a cause of action expressly designed to redress wrongful discharge,\textsuperscript{223} the supreme court ultimately rested its holding on the narrow remedy of outrage.\textsuperscript{224} At first blush, the court's willingness to consider the adoption of a cause of action for wrongful discharge might appear to have offered great promise for the development of a remedy expressly designed to protect workers' compensation claimants from unjustified termination. Five years later, however, the court held in \textit{Harris v. Arkansas Book Company},\textsuperscript{225} that the mere discharge of an at will employee is not, in itself, sufficiently extreme and outrageous as to be actionable under the tort of outrage.\textsuperscript{226}

\begin{itemize}
\item 218. \textit{Id.} at 280, 596 S.W.2d at 687.
\item 219. \textit{Id.} at 271, 596 S.W.2d at 683.
\item 220. \textit{Id.} at 271-72, 596 S.W.2d at 683.
\item 221. \textit{Id.} at 272, 596 S.W.2d at 683.
\item 222. \textit{Id.} at 281, 596 S.W.2d at 688.
\item 223. In fact, the \textit{Counce} court expressly rejected any general exception to the doctrine of "at-will" employment, but recognized that an exception might be found if the discharge occurred because the employee "exercis[ed] a statutory right, or \ldots perform[ed] a duty required of her by law, or \ldots [i]f the reason for the discharge was in violation of some other well established public policy." \textit{Id.} at 273, 596 S.W.2d at 683.
\item 224. 268 Ark. at 280, 596 S.W.2d at 687-88.
\item 225. 287 Ark. 353, 700 S.W.2d 41 (1985).
\item 226. \textit{Id.} at 357, 700 S.W.2d at 43. ("A supposed breach of vague assurance of
A survey of outrage cases that have arisen in the employment context demonstrates two significant undecided issues which pose questions for the utility of that tort as a vehicle to protect workers' compensation claimants.

1. **Outrageous Conduct Generally**

   If *Counce* and *Harris* define the parameters of the tort of outrage in employment relations cases, then the issue of the remedy available for a terminated workers' compensation claimant may be cast in terms of the egregiousness of the employer's conduct in terminating the employee.\(^{227}\) Clearly, the *Sterling Drug* court affirmed that sufficiently extreme or outrageous conduct on the part of the employer will, in addition to the remedy in contract made available in that decision, still support an action in outrage.\(^{228}\)

   The decisions on outrage rendered subsequent to *Counce* regrettably do not provide a ready understanding of the nature of conduct that will support a tort claim for wrongful discharge. For instance, the pattern of harassment demonstrated in *Sterling Drug* itself, ultimately leading to the forced resignation of Oxford, was not deemed sufficient to state a claim for relief in outrage.\(^{229}\) In two other decisions, though, the court concluded that the evidence of the employer's misconduct was sufficient to support a claim for relief for outrageous.

   The employer in *Tandy Corporation v. Bone*,\(^{230}\) a 1984 decision, accused the employee of theft and interrogated him for an extended period in a stressful environment. The employer then denied the

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\(^{227}\) It is important to remember that a claim for wrongful discharge may suggest recovery for outrage, but not necessarily so. Under Arkansas law, all improper discharges simply do not qualify as outrageous acts on the part of the employers. *Webb v. HCA Health Services of Midwest, Inc.*, 300 Ark. 613, 617-18, 780 S.W.2d 571, 573 (1981).

\(^{228}\) *See* *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 244-45, 743 S.W.2d 380, 382-83 (1988).

\(^{229}\) *Id.* at 244, 743 S.W.2d at 383. Indeed, in *Givens v. Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982), the court had observed that the concept of outrage was "new and still developing" and that the claim required "clear-cut proof."

\(^{230}\) 283 Ark. 399, 678 S.W.2d 312 (1984). The opinion suggests that the critical fact in determining that the plaintiff had stated a claim for outrage was the fact that the employer knew about plaintiff's medical condition and need for valium at the time it refused to permit plaintiff access to the prescription drug. *Id.* at 316-17.
employee access to his prescription medication, valium, which had been prescribed to relieve the worker’s stress. In Hess v. Treece, the court considered an ongoing dispute between a Little Rock police officer and city director over a personal matter. The conflict escalated into a two-year pattern of harassment by the director of the officer which included surveillance, communication of threats to have the officer terminated, and the making of false reports relating to the officer’s performance. In both cases, the court found that the pattern of conduct on the part of the employer was sufficiently egregious to provide a basis for a claim of damages in outrage.

However, in Ingram v. Pirelli Cable Corporation, the court rejected a claim of outrage predicated on a lengthy period of employer harassment which eventually resulted in a de facto termination of plaintiff’s employment. The majority characterized management’s conduct as “petty, insulting and less than one might expect from manager level executives of a reputable firm,” but, nevertheless, concluded that the conduct did not rise to the requisite level of outrageousness to afford the employee a remedy in tort. The majority distinguished the facts from those in Counce and Bone, rejecting application of the remedy for conduct which essentially consists of “mere insults, indignities, threats, annoyances, petty oppressions or other trivialities.”

Dissenting, Justices Dudley and Purtle found the majority’s attempt to distinguish the facts in Ingram from those demonstrated in Counce unpersuasive, given the extended period of harassment the plaintiff had suffered and his testimony concerning the nature of the anxiety he had suffered as a consequence of his employer’s conduct. The dissenters would have held the evidence sufficient to demonstrate an unresolved issue of fact requiring determination by the jury, whereas, on less egregious facts, the Counce court reversed the summary judgment and remanded the case for trial.

Ingram does follow, in principle, the decision in White v. Apollo-

231. 286 Ark. 434, 693 S.W.2d 792 (1985).
233. Id. at 157, 747 S.W.2d at 105.
234. Id.
235. Id. at 160-61, 747 S.W.2d at 107-08.
236. The dissenters characterized the conduct of the employer in Ingram as far more egregious than that held sufficient to establish a claim of outrage in Counce. Id.; See supra notes 214-21 and accompanying text.
237. 268 Ark. at 269, 596 S.W.2d at 687-88.
Lakewood Inc.,\textsuperscript{238} in which the plaintiff sued for intentional infliction of emotional distress based on the employer's assignment of the employee to tasks which were almost necessarily likely to produce injury from exposure to highly toxic chemicals used in the production of agricultural products. A unified supreme court rejected the contention that the employer's intentional assignment of dangerous tasks to the employee despite the known risks constituted actionable conduct.\textsuperscript{239}

Rather, the court in \textit{White} held that the employee's exclusive remedy under Arkansas law was to apply for appropriate benefits under the Workers' Compensation Act\textsuperscript{240} for any injury ultimately suffered. In so holding, the court distinguished the employer's actions from those in which the employee sustains a willful assault or battery by the employer\textsuperscript{241} or his agent, which may afford the employee an election to seek damages for the intentional act under a theory of constructive discharge or pursue recovery under the workers' compensation statute.\textsuperscript{242} Where the employer's acts fall within the scope of his authority to make company policy and implement the same, the poor quality of decision-making exemplified in policy does not give rise to the cause of action for outrage. In both \textit{Ingram}\textsuperscript{243} and \textit{White},\textsuperscript{244} the claim of outrageous conduct essentially related to actions, policies, or implementation which traditionally have fallen within the autonomy accorded to employers.

These decisions strongly suggest that only where the employer's conduct exceeds the bounds of enterprise decision-making, such as in the false accusation of theft or failure of performance, will any set of facts support an action for outrage.\textsuperscript{245} The \textit{Harris} court

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  \item \textsuperscript{238} 290 Ark. 421, 720 S.W.2d 702 (1986).
  \item \textsuperscript{239} 290 Ark. at 424, 720 S.W.2d at 703. Justice Purtle, perhaps the strongest proponent of "outrage" as a basis for liability in tort, wrote the court's opinion.
  \item \textsuperscript{240} 290 Ark. at 423, 720 S.W.2d at 703. The majority relied on prior decisions in Cain v. National Union Life Ins. Co., 290 Ark. 240, 719 S.W.2d 444 (1986) and Miller v. Ensco, Inc., 286 Ark. 458, 692 S.W.2d 615 (1985), in which independent actions for bad faith on the part of insurers refusing to pay claims in a timely fashion were rejected, the court holding that the exclusive remedy for failure to timely pay claims for medical expenses was that afforded by the workers' compensation act. \textit{Id.}
  \item \textsuperscript{241} 290 Ark. at 423, 720 S.W.2d at 703.
  \item \textsuperscript{242} The employee is permitted to elect to choose the assault as a severance of the employment relationship. \textit{Id.}
  \item \textsuperscript{243} 295 Ark. 154, 747 S.W.2d 103.
  \item \textsuperscript{244} 290 Ark. 421, 720 S.W.2d 702.
  \item \textsuperscript{245} In Smith v. American Greetings Corp., 304 Ark. 596, 601, 804 S.W.2d 683, 686 (1991), the court noted: "We have taken a strict view in recognizing such a claim [for outrageous conduct], especially in employment relationship situations." \textit{Id.}
\end{itemize}
expressed the limitation on reliance on outrage in a termination situation in the following way:

Because of the employer's right to discharge an at-will employee, a claim of outrage by an at-will employee cannot be predicated upon the fact of the discharge alone. However, the manner in which the discharge is accomplished or the circumstances under which it occurs may render the employer liable .... To be actionable the employer's conduct must be so extreme and outrageous as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community.

This formulation may afford some discharged employees a basis for recovery on the theory of outrage. However, a literal application of the notions "beyond all possible bounds of decency" and "atrocious and utterly intolerable in a civilized community" would require an almost impossible burden in most cases. In fact, the conduct related in *Counce*, *Bone*, and *Hess v. Treece* might hardly be said to go "beyond all possible bounds of decency." On the contrary, the non-actionable conduct of an employer requiring an employee to be exposed to hazardous chemicals carrying a threat of development of cancer might prove more difficult to justify; yet the court in *White* found this conduct permissible, presumably because the employee could eventually apply for workers' compensation benefits once the cancer is diagnosed.

The difficulty in meeting the standard set for recovery and the inconsistency in the supreme court's review of outrage cases suggest the general problems in pursuing a remedy for wrongful discharge

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246. 287 Ark. at 353, 700 S.W.2d at 43.
247. *But see* Sterling v. Upjohn Healthcare Servs., Inc., 299 Ark. 278, 772 S.W.2d 329 (1989) (disallowing a claim for outrage where plaintiff's supervisor harassed him, falsely told other employees that plaintiff was habitually drunk, accused plaintiff of making false statements on his employment application, delayed payment on plaintiff's expense vouchers, directed other employees to watch plaintiff and report back to him, instructed plaintiff not to communicate with other employees, and cursed plaintiff angrily in the presence of other employees).
249. Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312 (1984).
251. 290 Ark. at 422, 720 S.W.2d at 703.
252. *Id.* One might well argue that there could be little to distinguish an employer's behavior in deliberately exposing employees to a known cancer risk from behavior which is "so extreme and outrageous as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community."
based on this theory. However, two factors suggest that a specific remedy in outrage might be appropriate where the discharge is effected in retaliation for the filing of a workers' compensation claim. First, the discriminating employer clearly is aware that the conduct in discharging or otherwise penalizing the employee violates state law. Second, the employer is virtually by definition aware that the discharged or penalized employee has suffered an injury or disability requiring medical treatment which may impair future ability to work.

2. Filing for Workers' Compensation Benefits as a Factor in Arguing Outrage Arising from Discharge

Where discharge is predicated on the filing of a workers' compensation claim by an injured employee, both the situation immediately characterizing the employee's condition and the motivation for discharge should warrant a finding of outrageous conduct on the part of the employer. The discharge of an employee seeking compensation for a work-related injury distinguishes the injured employee from other plaintiffs seeking recovery in the context of the usual at will employment relationship. Thus, in *Sterling v. Upjohn Healthcare Services, Inc.*, the court rejected a claim of outrage based on the plaintiff's harassment by a supervisor who apparently slandered and undermined the plaintiff's working relationship. Instead, the court continued to follow its policy of applying a "strict" view of claims of outrage in employment situations, explaining, "[t]his is because an employer must be given a certain amount of latitude in dealing with employees." 256

The most important statement from the Arkansas Supreme Court relevant to the use of outrage as a theory for recovery for wrongfully terminated compensation claimants may well be found in *Smith v. American Greetings Corp.* There, the court observed that "[t]he extreme and outrageous character of the conduct may arise from the employer's knowledge that the employee is peculiarly susceptible to emotional distress by reason of some physical or mental

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253. For example, Justice Dudley, in dissenting from denial of Oxford's petition for rehearing in *Sterling Drug*, observed that the majority opinion in the case "clearly requires employees to suffer considerably more outrageous conduct by employers than is required of non-employees. This is a distinction not previously made by any court so far as I can determine. It is a result argued by no one and sought by no one." 294 Ark. at 239, 747 S.W.2d at 579 (emphasis added).
255. *Id.* at 279, 772 S.W.2d at 330.
256. *Id.* at 280, 772 S.W.2d at 330.
peculiarity." 258 Thus, conduct which might not constitute outrageous behavior when an employer does not know the employee is "peculiarly susceptible" would prove outrage if the employer did know of the particular circumstances of the employee. 259

This general rationale may explain the court's affirrnance of a directed verdict in Mechanics Lumber Co. v. Smith. 260 The employee alleged outrage based on the employer's requirement that he take a polygraph examination. The employee suffered from advanced multiple sclerosis and required medication. 261 After the initial test results were reported as uncertain due to the employee's medication, the test was rescheduled and the employer subsequently terminated the plaintiff as physically unfit to work. The court held that because there was no evidence that the employer knew or should have known that the plaintiff would be adversely affected in the examination results by his disease and, further, because the plaintiff admitted that the examination itself had not exacerbated his condition, no outrageous conduct was shown. The mere scheduling of the second exam was not sufficient to warrant recovery. 262 Had the plaintiff been able to allege facts showing a deliberate disregard for his health in the requirement that he take and pass the examination, he might have met the threshold requirement for demonstrating outrage.

In comparison, the workers' compensation claimant discharged or penalized by the employer is subjected to retaliation at a time when he is particularly susceptible to physical and mental distress which either is or should be apparent to the employer. 263 At a minimum, the employer who engages in any action following the

258. Id. at 602, 804 S.W.2d at 686.
259. Id. In Smith, however, the court rejected the claim of outrage on facts alleged by the plaintiff which showed that his termination was the product of a fight with a supervisor, even though the supervisor allegedly began the fight. Id. at 602, 804 S.W.2d at 685-86.
261. Id. at 287, 752 S.W.2d at 764.
262. Id. at 288, 752 S.W.2d at 765.
263. However, in Mertyris v. P.A.M. Transport, Inc., 310 Ark. 132, 832 S.W.2d 823 (1992), the court rejected a claim of outrage asserted by an employee who had been terminated following an apparent work-related mental distress. The plaintiff, a truckdriver, had been involved in a traffic fatality and was suspended following the filing of charges for manslaughter in Arizona. After he was acquitted on these charges, he filed a compensation claim alleging mental distress due to the accident and was suspended for six months by the employer. He subsequently suffered a heart attack and then required a heart transplant and was thereafter discharged after becoming disabled. The suspension was required by United States Department of Transportation regulations, however, and the court found that the employer's action did not amount to outrageous conduct. Id. at 134, 832 S.W.2d at 826.
filing of the compensation claim or notice that the worker has sustained an injury claimed to be work-related is aware of the claimed injury and the worker’s option of relying on the compensation system to seek benefits. Clearly, the discriminating employer should be aware of the peculiar vulnerability faced by the injured worker and the consequences of termination or other penalty.

First, the injured employee who is discharged for availing himself of statutory remedies for compensation is already in a threatened economic condition as a result of the injury. He has experienced some temporary or potentially permanent loss of earning capacity as a result of the injury and also, in all probability, some lost wages as a result of time off of work. Compounding the immediate economic consequences faced by the injured employee is the long term loss of security once the employer terminates the injured worker’s employment.

The termination, coupled with the prior history of injury, may well result in a further discriminatory hiring decision when the employee seeks other employment. Although this type of discrimination is prohibited by the statute, sophisticated personnel managers could readily be expected to find rational reasons for failing to hire the applicant whose prior history shows both a work-related injury and termination. Difficulty in obtaining subsequent employment obviously compounds the economic problem posed by the initial termination.

Moreover, the termination decision may have significant consequences apart from the basic loss of income, such as the loss of group medical insurance coverage for the employee and employee’s family. Once lost, this coverage is almost impossible to replace at an affordable rate without the benefit of another group umbrella policy which is available, if at all, only upon reemployment. Similarly,

264. Although the injured employee may be entitled to compensation, the level of compensation afforded by computation of the weekly wage rate will generally be less than actual wages the employee would have earned on the job. See supra note 190.
265. Supra notes 38 and 39.
266. Supra notes 175-79 and accompanying text.
267. Loss of insurance coverage and insurability appear to be elements of damages seldom pleaded or argued by plaintiff’s counsel; yet a broad reading of loss of employment benefits would certainly encompass loss of insurance coverage. Indeed, even the court in Sterling Drug may have opened the door to such recovery in holding: “In addition, an employee can recover for any other tangible employment benefit lost as a result of the termination.” 294 Ark. at 251-52, 743 S.W.2d at 387. Other courts have approved submission of broad issues relating to loss of benefits. See, e.g., Carnation Co. v. Borner, 610 S.W.2d 450, 453-54 (Tex. 1981).
the loss of other benefits, such as unvested retirement benefits and stock participation programs, may also result from the termination, as well as company-provided day care, and educational and recreational programs formerly available to the employee in conjunction with his employment.

Further, the terminated employee loses the benefit of seniority earned with the employer, even if he is able to obtain other employment. While this may have a direct impact on earnings and benefit levels which can be calculated with some degree of precision, the psychic consequences of termination following loyal employment and career advancement may prove more difficult to assess. Clearly, if the termination follows an extended period of service to the employer, the worker may suffer considerable emotional injury from the violation of his expectation of company support during a time when he has already suffered a physically painful and disabling injury, regardless of the prognosis for restoration of health or availability of other employment.

Not only does the magnitude of loss which may be experienced by the individual employee suggest that termination may constitute "outrageous" conduct under the formula applied by Arkansas courts, but the nature of the employer's conduct may also militate in favor of a finding of outrageousness. Clearly, the decisions suggest that consequences alone will probably not be sufficient to demonstrate "outrageous" conduct. But when considered with the employer's illegal motivation in terminating or otherwise discriminating against the injured employee, the requisite showing of intent and consequence should be sufficient to sustain an action for outrage. Two factors support this argument: first, the employer who discriminates engages in conduct already declared illegal and contrary to the public policy of the state; and, second, the dire consequences faced by the

268. The loss of this type of benefit appears subject to recovery under Sterling Drug, since it does not contemplate a prospective or future loss.

269. In Mechanics Lumber Co. v. Smith, 296 Ark. 285, 752 S.W.2d 763 (1988), the court held that the employer's lack of knowledge that the employee's multiple sclerosis could be worsened by the forced taking of a polygraph examination precluded a finding of outrageousness, while suggesting that had the employer known that it might have aggravated the condition, outrage would have been demonstrated. Id. at 288-89, 752 S.W.2d at 764-65.

270. In the case of an illegal discharge, the employer would not be permitted to rely on the doctrine of employment-at-will to justify otherwise egregious conduct. See, e.g., Sterling v. Upjohn, 299 Ark. 275, 772 S.W.2d 329 (1989).

271. A strong expression of this threshold of "outrage" was given to discharge of workers' compensation claimants by the North Dakota court in Krein v. Marian
employee who is terminated or discriminated against as a result of filing for benefits for a work-related injury are clearly within the realm of foreseeability.\textsuperscript{272} For example, an employer who knowingly discriminates against a worker filing for compensation benefits also knows that other employers are likely to do the same in considering the worker's application for other employment.\textsuperscript{273} The prior history of injury, coupled with the history of filing for compensation benefits and the subsequent discharge,\textsuperscript{274} are sufficient to provide any employer of a mind to discriminate with a basis for doing so in the hiring process.

The unresolved question is whether the termination of an at-will employee based on his filing of a claim for workers' compensation benefits—given both the illegal intent and the extreme consequences which may reasonably be foreseen to befall the discharged employee—will meet the standard for "outrageous" conduct set forth in \textit{Harris v. Arkansas Book Company}.\textsuperscript{275} While the \textit{Harris} court suggested the possibility that the manner of discharge or the circumstances under which it occurs may serve to demonstrate the requisite degree of extremity for stating a claim for outrage,\textsuperscript{276} the court's further expression undermines the hope initially offered. The \textit{Harris} court required that the employer's conduct meet the standard of conduct "beyond all possible bounds of decency" and be such as to be "regarded as atrocious and utterly intolerable in a civilized community." This formulation might prove so stringent that only a minority of illegally discharged employees would hope to prove circumstances sufficiently dire as to make the employer's conduct "utterly intolerable."\textsuperscript{277} Unless the standard is relaxed, the remedy

\begin{quote}
Manor Nursing Home, 415 N.W.2d 793, 794-95 (N.D. 1987):

The "sure and certain relief" for an injured worker in our Workmen's Compensation Act would be largely illusory and do little for the workman's "well-being" if the price were loss of his immediate livelihood. We agree with those courts which hold that discharge of an employee for seeking workmen's compensation profanes public policy and permits a tort action against the employer.

\textit{Id.} at 794.
\end{quote}

\textsuperscript{272} See supra notes 184-197 and accompanying text.

\textsuperscript{273} The employer may affirmatively seek to block other employment by reporting to subsequent employers investigating an application for employment the fact that the discharged employee has been injured, has filed a workers' compensation claim or pursued other remedies as a result of the discharge. See VanTran Electric Corp. v. Thomas, supra note 178.


\textsuperscript{275} 287 Ark. 353, 700 S.W.2d 41.

\textsuperscript{276} 287 Ark. at 356, 700 S.W.2d at 43.

\textsuperscript{277} See, e.g., Justice Dudley's dissent in Ingram v. Pirelli Cable Corp., supra notes 231-232 and accompanying text.
for outrage will prove so uncertain that it will afford no real prospect for either deterring employer violations\textsuperscript{278} or fully compensating meritorious claims for any but the most extreme cases.\textsuperscript{279}

The remedy based on "outrage" unfortunately fails to offer a sufficiently certain prospect for recovery at this stage in the development of Arkansas law to be effective. Plaintiffs' counsel evaluating the likelihood of recovery on this theory are justifiably inclined to view this remedy with suspicion because of the extremely high threshold for proof of "outrageous" conduct in this particular context. Until further refinements in the theory underlying this remedy can be made by Arkansas appellate courts,\textsuperscript{280} its promise is severely compromised by the practical reality that few decisions have actually affirmed that conduct demonstrated at trial or alleged in the plaintiff's pleadings was sufficient to meet the test repeated by the \textit{Harris} court.

Perhaps the best hope for aggrieved compensation claimants lies in the General Assembly's action in "annulling" the post-\textit{Sterling Drug} decisions extending that holding to compensation claimants. As a consequence of denying the judicially created remedy to a single class of wrongfully terminated employees, the courts might see expansion of the doctrine of outrage as appropriate to afford these claimants a remedy in the form of civil litigation, rather than restricting their rights to the criminal and administrative liability imposed by Act 796.\textsuperscript{281}

B. Independent Action for Intentional Tort

An alternative to the action for outrageous conduct lies in an intentional tort theory recognized by the Arkansas Supreme Court in \textit{Midwest Buslines, Inc. v. Johnson}.\textsuperscript{282} This decision is particularly significant for two reasons: first, it was issued in 1987, suggesting that it represents continuing support among the membership of the court\textsuperscript{283} at a time when the outrage theory was being held inapplicable.

\begin{itemize}
\item 278. \textit{See supra} note 190 and accompanying text.
\item 279. \textit{See supra} notes 244-50 and accompanying text.
\item 280. The alternative to a judicial expansion of the theory of "outrage" would be, of course, legislative adoption of a remedy for wrongful discharge. Such a remedy is currently in the proposal stage with the creation of a model act governing employment rights. For a discussion of the ALI Model Employment Termination Act, see Randall Samborn, \textit{At-Will Doctrine Under Fire: Model Act Divides Employment Bar}, \textit{Nat'L L.J.}, Oct. 14, 1991, at 1.
\item 281. \textit{ARK. CODE ANN.} § 11-9-107(a), (c) (Michie Supp. 1993).
\item 282. 291 Ark. 304, 724 S.W.2d 453 (1987).
\item 283. In fact, the decision authored by Justice Glaze was unanimous, in contrast
\end{itemize}
to the actions of the employer in *Sterling Drug*; and second, because the opinion expressly rejects the notion that outrage is the only theory upon which an intentional tort action predicated on mental anguish damages may be brought in Arkansas.\(^{284}\)

The *Midwest Buslines* decision, which involved a relatively insignificant sum in terms of damages, arose from the action of a company driver in ejecting an elderly passenger who was attempting to return to his home after a hospitalization in Little Rock for gastrointestinal bleeding and alcoholic hepatitis. The driver had been forewarned to expect the plaintiff as a passenger, but was apparently unprepared for the elderly man’s incontinence which resulted either in his urinating in his pants or in a paper cup in the aisle of the bus.\(^{285}\) The plaintiff testified that he had been unable to get to the restroom at the back of the bus because of people in his way in the aisle. The driver ejected the passenger, but whether he did so at a station or on the side of the road was in dispute in the testimony at trial.\(^{286}\) Nevertheless, the jury apparently believed the ejection improper and awarded damages to the plaintiff.

On appeal, the bus company argued that in the absence of a showing of physical injury resulting from the ejection, the passenger could not recover merely for mental anguish without pleading and proving that the driver’s conduct was "outrageous." However, the court rejected this line of argument with the terse explanation: "Based upon the facts of this case, we do not believe appellee was limited to such a theory."\(^{287}\)

The court’s expression does not clarify which facts warrant a non-outrage cause of action for an intentional tort in this case. As the outrage decisions demonstrate, the passenger’s claim might well not have risen to the level of conduct required to show that the driver’s behavior would have qualified under Arkansas law. Moreover, in contrast to the typical outrage case, in *Midwest Buslines* the facts demonstrate the absence of the type of relationship between the

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\(^{284}\) 291 Ark. at 305, 724 S.W.2d at 454 n.1.

\(^{285}\) 291 Ark. at 306-07, 724 S.W.2d at 454-55.

\(^{286}\) *Id.*

\(^{287}\) 291 Ark. at 305, 724 S.W.2d at 454 n.1.
actors which suggests that the offender knew or should have known the extreme nature of his conduct and its probable impact upon his "victim."

The court may have seized upon the traditional role of the common carrier as protector of the passenger, which has often given rise to a higher standard of care.\(^{288}\) in concluding that the facts in \textit{Midwest Buslines} supported an intentional tort action not grounded in the law of outrage.\(^{289}\) If this rationale explains the decision, then prospective litigants may well be limited to relying on this theory only in common carrier or perhaps accommodations situations. In contrast, the common law tradition of "at will" employment, arising along with the notion of the common carrier's greater duty toward passengers, would suggest that the improperly discharged employee would have no new cause of action following \textit{Midwest Buslines}.

One indication of the court's thinking in \textit{Midwest Buslines} may lie in its reliance on the 1940 decision in \textit{Arkansas Motor Coaches v. Whitlock},\(^{290}\) another case involving an ejection of a passenger from a common carrier. There, the court upheld compensation for mental anguish based on an actual or constructive physical injury which followed an improper use of force. Assuming that the injury occurred when the passenger was forcibly removed from the bus, the court concluded that once the passenger demonstrated a physical ejection, recovery for mental anguish could properly follow.\(^{291}\)

The forced eviction of the plaintiff in \textit{Midwest Buslines} from the vehicle, apparently unjustified on the facts, followed the factual pattern previously recognized as giving rise to a cause of action for infliction of emotional distress in \textit{Whitlock}. Thus, the court may simply have recognized a similar right or cause of action for passengers improperly evicted from public transportation based on the parallel fact patterns in the two cases, avoiding the necessity for either overruling or distinguishing the prior decision. Alternatively, the court may have affirmed a cause of action distinctively emanating from the public transportation aspect of the case, carrying forward common law principles of duties owed to passengers of common


\(^{289}\) Even if the agent of a common carrier has a legal right to eject a passenger, a known disability of the passenger requires the agent to do so without causing the passenger to be endangered. St. Louis, I. M. & S. Ry. v. Dallas, 93 Ark. 209, 124 S.W. 247 (1910); St. Louis, I. M. & S. Ry. v. Woodruff, 89 Ark. 9, 115 S.W. 953 (1909).

\(^{290}\) 199 Ark. 820, 136 S.W.2d 184 (1940).

\(^{291}\) Id. at 825, 136 S.W.2d at 187.
carriers. However, in *Midwest Buslines* the court never explained its reasoning in these terms, suggesting that an alternative theory of the action might be explored in the employment context.

Arguably, the court might move to distinguish cases of outrage from those requiring a lesser showing of extreme conduct on the part of the actor based upon the peculiar relationship of the parties. Just as the bus driver owes the passenger a duty arising from their particular relationship, the employer might be said to owe a similar duty to the employee. This notion of duty recognizes that the ongoing relationship of the two parties requires them to act with greater care, or fairness, than is required of parties who do not share any relationship or experience prior to the conduct giving rise to the action in tort. Thus, outrage would be a theory for recovery limited to extreme conduct arising from any set of circumstances, whereas the prior relationship of the parties might render less extreme conduct actionable in a more limited set of circumstances.

Applying this approach to the tort clearly recognized by the supreme court in *Midwest Buslines* and *Whitlock*, the court could conclude that conduct not rising to the extreme level necessary for establishing a cause of action for outrage is nevertheless actionable when it occurs in the context of a pre-existing relationship or experience. This would be particularly applicable where the offending party could be said to stand in a position of power or control over the offended party, such that other forms of response would not be available. Thus, extreme conduct by one businessman toward another might not prove actionable despite a long history of business transactions between the two, while similar conduct directed at an employee would prove actionable.

The option afforded counsel in the retaliatory discharge case by *Midwest Buslines* might be to plead an alternative theory to outrage and contract where the employer’s discriminatory action clearly violates the public policy set forth in Section 11-9-107 of the Arkansas Code. This approach may offer significant strategic advantages to the plaintiff’s counsel in both negotiating and trying the case. A trial judge hostile to the theory of outrage, or simply confused by the case law generated by Arkansas courts to date, may well grant summary judgment or directed verdict against a plaintiff who presents even a compelling claim of discriminatory intent and action on the part of an employer responding to the plaintiff’s claim for workers’ compensation benefits. The availability of alternative theories for the action, predicated either on the expanded notion of statutory negligence or following the *Midwest Buslines* approach,
serves to afford counsel additional lines of argument for appeal in the event the entire case is disposed of summarily. In the event that the court takes only the outrage claim from the jury, the availability of the alternative theories will permit the case to go forward and possibly result in a jury verdict rendering the trial court’s action on the outrage claim moot.

Counsel representing the discharged workers’ compensation claimant should be prepared to explore tort theories for recovery despite the Arkansas Supreme Court’s apparent rejection of outrage as a basis for this type of claim by the decision in *Sterling Drug*. Certainly, the court did not preclude an action in tort for a wrongful firing, it simply rejected the outrage theory on the facts presented. Because the circumstances of the fired whistle-blower and discharged injured employee differ dramatically, the tort remedy may be peculiarly applicable to the claim brought by the latter. In fact, *Sterling Drug* might well be read less as a case focusing on remedy, and more as the opening round of discussion of the public policy exception to the tradition of employment-at-will.

IV. PROBLEMS OF PROOF IN RETALIATORY DISCHARGE CLAIMS

A central problem of proof of retaliatory intent in the discharge of an employee who has filed for workers’ compensation benefits lies in the difficulty in establishing the intent factor through direct evidence. This problem is common to proof of claims brought in a civil action, in a criminal prosecution, or in an administrative proceeding, although differing standards of proof govern civil and criminal proceedings.

Typically, an employer is not so foolish as to document an illegal or retaliatory motive for discharge. However, that may not

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292. For example, the circumstantial evidence held sufficient to support a jury verdict by the majority in *Mapco, Inc.* was characterized as “highly speculative” by Justice Brown in his dissenting opinion, which was joined by Justice Hays. 306 Ark. at 202-04, 812 S.W.2d at 486-87.

293. For an interesting analysis of one way in which a discharged employee might meet the burden of proving retaliatory intent by a preponderance of the evidence, the standard applicable in a civil action, see Moore v. McDermott, Inc., 494 So. 2d 1159 (La. 1986).

necessarily be the case given the lack of apparent history of litigation of this type of claim either in a civil action or in terms of a criminal prosecution under former Section 11-9-107. Nevertheless, in the absence of direct evidence of the employer's intent, the plaintiff in the wrongful discharge action has two difficult burdens to overcome. First, it is essential that the employee establish through circumstantial evidence, if necessary, that a discriminatory or retaliatory motive existed for his discharge. Second, the employee must be prepared to combat an alternative explanation advanced by the employer for the termination once the employer's action is challenged through litigation.

The most important legal complication in the proof of the claim may not result from the burden of proving the first proposition, but in disproving the existence of a justified motivation for termination which may coexist with the improper motivation and have prompted the firing. Because the opinion in Sterling Drug did not address the problem of "sole cause," as opposed to "contributing cause," in defining the burden of proof in the wrongful discharge action, there is no clear expression of Arkansas law guiding disposition of this issue.

If the question is resolved in terms of requiring the employee to prove that retaliation was the "sole cause" for his termination, prospects of either recovery in the individual case or deterrence generally are dimmed considerably. The employer faced with the

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295. The annotations included in the 1987 codification of the Arkansas Code do not include a single reference to a criminal prosecution brought pursuant to former Section 11-9-107. The absence of annotations does not conclusively prove that no prosecutions were undertaken, of course, but it does indicate that no appellate opinions were eventually issued in cases brought pursuant to the statute.

296. In his dissent in Mapco, Inc., Justice Brown observed: "Admittedly, providing motive and intent in these cases is difficult. Yet, something more must be shown in the way of circumstantial evidence beyond the mere filing of a workers' compensation claim and a subsequent refusal to rehire." 306 Ark. at 203, 812 S.W.2d at 486 (Brown, J., dissenting).

297. In framing the question in Mapco, Inc., the court concluded that the prima facie case can be established by demonstrating that the employee's reliance on the statutorily created workers' compensation remedy "was a cause for the retaliation." 306 Ark. at 201, 812 S.W.2d at 485 (emphasis added). Whether the use of the article "a" instead of "the" is of consequence is an issue that has been displaced, at least temporarily, by the legislative action in adoption of Act 796 and the purported effect of its section 6 in abrogating the judicially-recognized civil remedy for wrongful discharge. See Santex, Inc. v. Cunningham, 618 S.W.2d 557, 559-60 (Tex. Ct. App. 1981) (rejecting the argument that a discharged employee must prove filing for compensation benefits was the "sole cause" for discharge); accord, Azar Nut Co. v. Caille, 720 S.W.2d 685, 687 (Tex. Ct. App. 1986), aff'd, 734 S.W.2d 667 (Tex. 1987).

298. Other jurisdictions confronting the "sole cause" issue have concluded that
need to produce an alternative explanation for the discharge after the filing of a formal complaint may be able to fashion a reason, whether truthful or not, from deficient employee performance, history of friction with other employees, insubordination, or concern that the injury will render the employee unfit for performance of his usual duties in the future. Once the employer offers an alternative explanation, the employee will be faced with disproving this rationale for the termination. This is a difficult task unless the personnel file or other record of employment clearly refutes the employer’s after-the-fact explanation of his motivation in discharging the claimant following the filing of a claim for workers’ compensation benefits.

A requirement that the termination have been motivated in part, if not wholly, by the employer’s desire to retaliate against the employee for his action in pursuing workers’ compensation benefits affords the employee certain obvious benefits. First, it results in a greater likelihood that the employee in the individual instance would be able to recover for the loss sustained. Second, the reliance on a “contributing,” rather than a “sole cause,” burden would enhance the credibility of the deterrent offered by the administrative sanction imposed by Act 796. Adoption of this contributing cause, as opposed to a sole cause, approach would be consistent with recognition of the remedy in any event, because it is the improper motivation of the employer that gives rise to the cause of action. Thus, irrespective of the employer’s other reasons for termination—proof of discriminatory intent as a cause, rather than the sole cause for discharge or other adverse job action, is all that the aggrieved worker must demonstrate. See Buckner v. General Motors Corp., 760 P.2d 803 (Okla. 1988) (requiring proof that discriminatory intent was a “significant factor” in the termination decision); Santex, Inc. v. Cunningham, 618 S.W.2d 557 (Tex. Ct. App. 1981).

299. See Mapco Inc., 306 Ark. at 201, 812 S.W.2d at 486 (Brown, J., dissenting); VanTran Elec. Corp. v. Thomas, 708 S.W.2d 527, 531 (Tex. Ct. App. 1986).

300. Or, as in E-Tex Dairy Queen, Inc. v. Adair, 566 S.W.2d 37, 40 (Tex. Ct. App. 1978), evidence showing misconduct on the part of the plaintiff with a female co-employee was held insufficient to show that discharge occurred solely as a result of this misconduct, even though the employer’s assertion appeared to be supported by the record. Here, the use of a “sole cause” instruction would have likely resulted in no recovery.


302. The Arkansas approach to the burden of proof contemplates that once a prima facie case of discrimination is shown the burden shifts to the employer to show a justifiable ground for termination. Baysinger, 306 Ark. at 246, 812 S.W.2d at 467 (citing 2A ARTHUR LARSON, THE LAW OF WORKMEN’S COMPENSATION § 68.36(c) (1990)). The opinion is silent on the “sole cause” issue.

which, consistent with the doctrine of at-will employment, might include no reason at all—the existence of a retaliatory motive contravening the intent of Section 11-9-107 would still afford the discharged employee grounds for recovery.

The legislative action in amending Section 11-9-107 does not demonstrate any intent to require proof that discriminatory intent was the sole cause of the adverse employment action in order to bring the employer's action within the prohibition of Section 6 of Act 796. Moreover, the sole cause approach, when applied in other contexts under the workers' compensation law, traditionally operated to protect the employee, rather than the employer. For example, an injury resulting from the employee's voluntary intoxication would be compensable unless the intoxication could be shown to be the sole cause of the injury.³⁰⁴ Act 796 now creates a presumption that injuries sustained while intoxicated are not compensable, although the presumption is rebuttable and couches the exclusion in terms of "substantial," rather than sole, cause.³⁰⁵ Arguably, had the legislature intended to restrict liability to situations in which discriminatory intent was the sole cause of the employer's illegal action, it would have expressly provided for this standard of proof in Section 6. Section 6 did not do so. One reasonable inference is that the purpose of the provision is to punish discrimination in any event, whether reflected as the sole cause or "a" cause of the employer's action.³⁰⁶

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³⁰⁴. Elm Springs Canning Co. v. Sullins, 207 Ark. 257, 180 S.W.2d 113 (1944).
³⁰⁵. Section 2 of Act 796 provides, in pertinent part, that certain injuries are not compensable, including:

(iv) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders. The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders; every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body; an employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.


³⁰⁶. Alternatively, of course, it might also be inferred that the legislature merely retained Section 11-9-107 as a gesture to labor, and the lack of concern about the burden or standard of proof accurately reflects the legislature's perception that employers will not be threatened either administratively or criminally when they commit illegal discriminatory acts against compensation claimants.
Clearly, counsel for the plaintiff in a tort action should be prepared to submit an instruction setting forth a "contributing cause" theory for the termination while counsel for the employer will want to protect his client's interest by submitting a sole cause instruction.

Defense counsel may also need to explore the possibility of developing a defense predicated on the employee's lack of good faith in filing for workers' compensation benefits. If the employee has submitted a fraudulent claim of injury, or the employer has a reasonable basis for believing that the claim of injury is not made in good faith, discharge may be proper because it results not from the employee's attempt to exercise his rights under the workers' compensation statute, but rather from his attempt to prosecute a false claim. If the defense is developed and supported by testimony or other evidence at trial, defense counsel should pursue one of two options. First, counsel might pursue a defensive theory setting forth the principle that the employer's discretion to fire based on employee fraud is protected. Second, counsel might request an instruction requiring the plaintiff to prove that his claim for compensation has been made in good faith as a prerequisite for a jury finding of liability for illegal motivation for his termination. The latter is the preferable form.

The problem posed by the sole cause/contributing cause issue and the likelihood that the employee's proof will be largely circumstantial prompts two other concerns. First, in a civil action the employee should seek an instruction which incorporates a presumption that an employer's action in terminating an employee within a short period of time following the report of injury, filing of the workers' compensation claim, or resolution of the claim through the administrative process will support the conclusion that the employer has acted in retaliation for the employee's efforts at securing workers' compensation benefits. The presumption will be subject to rebuttal, of course, but this approach would ensure that the employer who does have a good faith explanation for termination will be required to go forward and offer this explanation for the jury's consideration.

Second, the framework provided for proof of the claim and defense in Wal-Mart v. Baysinger serves to facilitate development of both the plaintiff's theory of the case and the employer's de-

307. E.g., Elzey v. Forrest, 739 P.2d 999 (Okla. 1987) (holding statutory action for retaliation protects only employees who file claims in good faith).
fense. From the employee's standpoint, the development of the prima facie case of discrimination in the discharge should serve to shift the burden to the employer to go forward with his explanation for the termination. This would permit the jury to consider all the relevant evidence in evaluating the plaintiff's claim in a case which relies largely on either circumstantial evidence or the plaintiff's personal, and probably uncorroborated, testimony relating to the employer's retaliatory intent in terminating the employment relationship. Failure of the employer to offer an acceptable alternative explanation would result in a plaintiff's verdict unless the jury simply found his testimony incredible or was unpersuaded by the available circumstantial evidence. The question unanswered by the court in Baysinger is how the jury is to be properly instructed for consideration of the employer's explanation in the event it finds the plaintiff's proof of discrimination credible.

Certainly, the problems of proving retaliatory motive for the discharge of a workers' compensation claimant will require judicial consideration in formulating and refining a proper remedy. Nevertheless, it is critical for counsel representing the discharged employee, particularly when the termination occurs during the course of an ongoing workers' compensation proceeding, to fully explore the remedy available for the discharged employee. This may require embarking on novel litigation, especially if the employee has difficulty in obtaining other employment, or if the nature of his injury is such as to limit alternative employment opportunities.

The most significant feature of the wrongful discharge action for employers may not lie in the short-term problem of dealing with restrictions on the doctrine of at-will employment. Rather, it may result from impairment of the ability to replace employees who suffer injury which will preclude their return to the normal performance of job duties. Because any termination of a workers' compensation claimant may suggest a retaliatory motive, the employer

308. 306 Ark. at 246, 812 S.W.2d at 467.
309. Id.
310. Id. "The court did not instruct the jury on the employer's burden to prove a legitimate reason for the discharge, and no such instruction was requested by either party. The evidence offered to support Appellant's reason for terminating Appellee was not convincing." Id. Nevertheless, one might have hoped the court would have included a more detailed explanation of the proper allocation of the burden and provided a sample instruction and verdict form for use in future litigation, as did the Texas appellate court in Santex. 618 S.W.2d at 558-60.
may ultimately feel compelled to retain an employee who cannot return to work in order to avoid defending an action for wrongful discharge. However, a determination that the employee suffers such residual disability as to render him unfit to return to the job should serve to insulate the employer against an unwarranted recovery. If the employer has acted to terminate the employment prior to such a determination, the employee might well sustain a claim of retaliation. This problem is not easily resolved within the framework of traditional workers' compensation practice because an employer typically has a right to replace an employee whose injury leaves the enterprise understaffed. Every work-related injury carries with it the possibility that the employee will be unable to return to the duties typically performed on the job, though the possibility may be slight. Given this situation, termination of the employment relationship prior to the making of a medical determination of residual disability may serve to suggest that the employer's true motive is retaliation, rather than the need to fill the position. An employer may be unfairly compromised in the efficient management of the enterprise, however, when the recovery period itself creates a production gap due to inability to simply substitute a temporary worker for the injured compensation claimant.

The employer's need to replace injured employees, whether on a temporary or permanent basis, complicates the remedy which should be available for the worker terminated as a result of the filing for workers' compensation benefits. It may be that no general rules can be prescribed for such situations which will not ultimately require that individual claims of retaliation be resolved on a case-by-case basis. Unfortunately, deferral either to the employee in his right to assert claims arising under the Workers' Compensation Act or to the employer, who has traditionally been afforded the freedom to replace employees as an aspect of the doctrine of at-will employment, inherently will carry with it the prospect for injustice in the individual case. Given the disparity between the resources of the typical employer and the typical injured employee, and the public policy favoring the protection of workers who assert claims for workers' compensation benefits, that policy would best be served in a general sense by limiting employer autonomy at least until a showing of medical disability would support permanent replacement of the employee.

V. THE OPTIONS FOR AGGREVEED CLAIMANTS AFTER ACT 796

The need for a remedy tailored for the particular violation experienced by an injured worker whose claim for compensation
results in discharge or other discriminatory action would appear certain. The statutory right is set forth in the workers' compensation law which both provides the opportunity for the employee to seek benefits and expressly precludes action by the employer that infringes on the employee's right to seek those benefits.

The *Sterling Drug* court sought to harmonize the doctrines of at-will employment and wrongful discharge by relying on the theory of "implied contract." This approach, while no doubt authoritative because of the court's preeminence in matters of Arkansas law, is nevertheless wrought with internal inconsistency. By implying the existence of a contract where none exists, the court has irreparably undermined the essential notion of at-will employment. Because of the numerous expressions of public policy found in statutory law today, including the vast range of anti-discrimination legislation, it is virtually impossible to suggest that true at-will employment remains a viable approach to labor/management relationships. Nevertheless, the General Assembly clearly intended to reaffirm support for the judicially-created doctrine of at-will employment in its revision of Section 11-9-107.311

Interestingly, the General Assembly affirmed judicial doctrine in declaring its continuing support of the at-will employment concept, even while it disparaged judicial creativity in the recognition of the limited civil remedy for retaliatory discharge of compensation claimants. The question posed for claimants and their counsel is whether Act 796 is subject either to direct challenge or finesse and, if so, how to proceed.

The most obvious approach for a claimant suffering discriminatory treatment by the employer is compliance with the legislative directive in seeking redress under the revised provisions of Section 11-9-107. This means that the claimant can either actively pursue the administrative remedy of a fine or seek criminal prosecution through the local prosecutor's office. In either event, the claimant stands little likelihood of an actual financial recovery to the degree that damages would be recoverable in a civil action.

Alternatively, counsel should consider filing a civil action and litigating the issue of constitutionality of the restriction of civil remedies mandated by the General Assembly in its restructuring of the state's workers' compensation law in Act 796. Defense counsel

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311. ARK. CODE ANN. § 11-9-107(d) (Michie Supp. 1993) provides, "This section shall not be construed as establishing an exception to the employment at will doctrine."
would likely file either a motion to dismiss the civil action or a motion for summary judgment in reliance on the Act if a *Sterling Drug* or tort action were brought. Under either scenario, the issue is likely to reach the Arkansas Supreme Court on grant of summary judgment in favor of the employer, preserving the constitutional issue for direct review by the court. Because a sound constitutional argument may be made that restriction of claimant remedies in the fashion dictated by Act 796 represents an unauthorized exercise of legislative power, plaintiff's counsel should at least attempt to challenge the Act before proceeding to recommend compliance with the Act's restrictive remedy provisions.

VI. CONCLUSION

Workers who suffer job-related injuries, like other at-will employees who assert statutory rights or act in the public interest, deserve protection from employer retaliation when they file for workers' compensation benefits. Unfortunately, employers experience considerable pressure from rising workers' compensation insurance premiums. Employers believe that termination of employment for workers' compensation claimants will ultimately serve to control, though probably not reduce, premiums paid for compensation insurance. Absent strict regulation of insurance premium rates to ensure that individual employers are not compromised in their ability to compete in the market place by the effect of rising insurance costs, individual employers should be deterred from using discharge as a threat to induce workers not to apply for statutorily created benefits when injured. The most significant deterrent is the threat of civil action to compensate an employee who is terminated for making application for benefits.

The remedy recognized by the Arkansas Supreme Court in *Sterling Drug* failed to provide an effective deterrent to employer retaliation or adequate compensation for injured workers terminated as a result of their filing for workers' compensation benefits. The decision does represent an important breach in the doctrine of employment-at-will as a matter of state law. The remedy fashioned by the court in *Sterling Drug* may represent a compromise reflecting both concern for arbitrary retaliatory action taken by employers and fear that recognition of a broader, perhaps more attractive, remedy will lead to a groundswell of claims that discharges have violated public policy.

Nevertheless, the General Assembly concluded in adopting Act 796 that even the modest remedy afforded injured employees under
Sterling Drug was the product of improper judicial innovation in the field of workers' compensation. Consequently, the legislative response, including an attempt to regulate the employment relationship beyond any fair reading of the grant of authority to the legislature by the voters, seeks to restrict reliance on judicially created civil remedies designed to modify a judicially created doctrine of employment law.

With respect to Arkansas workers, it is clear that the public policy of the state demands that they be afforded ready access to benefits under the state's system of workers' compensation. Even the clear intent of Section 6 of the Act expresses this policy, yet the remedy then afforded under the statute offers little realistic hope of enforcement.

The developing law of wrongful discharge, given a significant boost in Arkansas by the decision in Sterling Drug, offers the prospect of some level of protection for workers' compensation claimants suffering discrimination, as the decisions in Wal-Mart v. Baysinger and Mapco, Inc. v. Payne clearly indicate. Whether the courts will again recognize the need for a remedy broader than that afforded by the provisions of Section 6 to protect workers' compensation claimants from retaliation at the hands of employers traditionally insulated by the doctrine of "at will" employment will depend, as in all developing areas of law, on the skill of counsel in focusing attention on issues critical to addressing the problems of injured workers.