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AN ANALYSIS OF THE RETALIATORY
EMPLOYMENT DISCRIMINATION ACT
AND PROTECTED ACTIVITY UNDER
THE OCCUPATIONAL SAFETY AND
HEALTH ACT OF NORTH CAROLINA

DR. MICHAEL R. SMITH*

INTRODUCTION

Comment

On July 23, 1992, the North Carolina General Assembly ratified a law which will protect employees against discrimination and retaliatory action for particular job related activities. The law became effective on October 1, 1992 and applies to those accused of violating it on or after that date. This article analyzes that law as it applies to the Occupational Safety and Health Act of North Carolina. The law appears in its entirety as an appendix in this paper.

Background Information

The federal Occupational Safety and Health Act of 1970¹ (Act) affords employees a comprehensive range of rights and forms of protection with respect to job safety and health. As one example, any employee who believes that a violation of a standard under the Act exists (and threatens physical harm) in the workplace may request that an inspection be conducted.²

One Section of the Act³ protects employees from retaliation and discrimination as a result of exercising rights afforded by the Act. That section is frequently referred to as the anti-discrimination provision or simply as § 11(c). Employees who lodge complaints under the provision, seeking protection from discrimination and retaliation, are referred to as ‘employee complainants.’

The Act extends its protective coverage to employees of all

* The author has contributed this work in his private capacity, and the article is not meant to reflect the views of any other person or entity.

states and territories. However, the Act allows states the option of administering their own occupational safety and health plans. North Carolina enacted its own plan, the Occupational Safety and Health Act of North Carolina (OSHANC), in 1973 and federal approval was granted on February 1, 1973.

The federal Act requires states which opt to administer their own safety and health plan to enforce standards as effective as standards enforced under the federal Act. An operational status agreement between the federal government and North Carolina sets forth the boundaries between the Act and OSHANC. One paragraph of that agreement also requires that OSHANC operations be “at least as effective as the Federal program.” With respect to anti-discrimination, prior to October 1, 1992, OSHANC’s provision was almost a mirror copy of the federal Act’s provision.

In the wake of the disastrous fire at Imperial Food Products in Hamlet, North Carolina (September 3, 1991), criticism of the operation of the OSHANC anti-discrimination provision was publicized. The criticism regarded actual and anticipated retaliation for reporting unsafe work conditions to the North Carolina Department of Labor’s Division of Occupational Safety and Health (DOSH). Lengthy response times between employee complaints and action by DOSH was also criticized. The North Carolina Department of Labor acknowledged the delays, pointing to inadequate funding for staff members. In October 1991, the federal government assumed temporary enforcement authority over discrimination complaints.

In July 1992, the North Carolina General Assembly voted to increase funding to provide personnel for OSHANC operations and enacted a number of laws related to occupational safety and health. One such law, entitled “Retaliatory Employment Discrimination” (referred to in this article as the RED act), became the

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new OSHANC anti-discrimination provision. The prior OSHANC anti-discrimination provisions were eliminated by the RED act. The RED act now exists as a separate article of Chapter 95 of the North Carolina General Statutes. (Chapter 95 includes laws regarding the North Carolina Department of Labor and labor regulations.)

DOSH, now with staff trained by the federal government to investigate employee discrimination complaints, resumed jurisdiction over its anti-discrimination program in July 1992. As noted in this paper, in some respects the RED act offers North Carolina employees greater protection than that provided by the federal Act.

ANALYSIS OF THE ANTI-DISCRIMINATION PROVISION OF THE RETALIATORY EMPLOYMENT DISCRIMINATION ACT

Scope for Analysis

This part informs about protection afforded by the Retaliatory Employment Discrimination act (RED act). The RED act protects any employee who suffers discrimination or retaliation following his or her activity (or threatened activity) with respect to the Occupational Safety and Health Act of North Carolina (OSHANC).

The RED act extends its protection beyond OSHANC. It also protects employees from discrimination because of their activities with respect to the:

(1) **Workers' Compensation Act.** Regarding this act, an employee might, for example, suffer job retaliation for filing a claim for a job related injury or illness.

(2) **Wage and Hour Act.** Regarding this act, an employee might realize discrimination following a complaint about illegal deductions from a paycheck.


15. Chapter 95, Article 16 of the General Statutes.


Regarding this act, an employee might be discriminated against for complaining about an unsafe mine condition.

The scope for analysis here, however, is OSHANC and employees covered by it.

**Employees Covered v. Not Covered by OSHANC**

**Employees Covered by OSHANC**

Employees of public as well as private entities are covered by OSHANC. This contrasts with the federal Act, which does not protect employees of government entities. In the private sector, North Carolina has a large number of motor carrier employees. Those employees are protected from job discrimination for safety and health activities by a federal statute known as the Surface Transportation Assistance Act (STAA). Complaints filed under the STAA are processed by the federal government. North Carolina motor carrier employees may be addi-

19. N.C. GEN. STAT. § 95-128 (1992). See generally MICHAEL R. SMITH, OSHA LAW IN NORTH CAROLINA §§ 1.6-1.16, 4.3 (2d ed. 1992). Certain small farming operations and employers (with fewer than 11 employees) which meet specified injury criteria are exempt from particular federal Act enforcement activities. The appropriations act which funds enforcement of the federal Act, Pub. L. No. 102-170, 105 Stat. 1107, (CCH) ¶ 6281 (1991), prohibits use of the funds for enforcement activities against exempted employers. However, with respect to qualified employers with fewer than 11 employees, one of the exceptions to the OSHA enforcement exemption permits anti-discrimination actions. In North Carolina, enforcement activities are limited to those which can be financed by matching federal funds. N.C. GEN. STAT. § 95-128(6) (1992).
22. Complaints under the STAA can be filed, within 180 days of the alleged
tionally covered under the RED act for protected OSHANC activities.23

How the Analysis Proceeds

The RED act and OSHANC are North Carolina statutes. In a civil action to enforce the RED act for discrimination for particular employee activities with respect to OSHANC, the court would probably examine analogous decisions of North Carolina courts. The court may also consider legislative history, federal court decisions regarding similar federal statutes, scholarly treatises, and the practical realities of the situation at hand.24

One federal statute which the court would surely consider is the anti-discrimination provision of the federal Act. That provision is section 11(c) of the federal Act25 and will be referred to here as § 11(c). Section 11(c)(1) reads:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

The U.S. Secretary of Labor (Secretary) has established regulations for guidance in the application of § 11(c).26 The federal discrimination, with the Regional Administrator, Occupational Safety and Health Administration, 1375 Peachtree Street N.E., Suite 587, Atlanta, Georgia 30367, or with the Area Director, Occupational Safety and Health Administration, Century Station, 300 Fayetteville Mall, Room 104, Raleigh, North Carolina 27601. If filed with DOSH, the complaint would be referred to the federal government.


25. Pub. L. No. 91-596, § 11(c) (codified as 29 U.S.C. § 660(c)).

courts accord the Secretary great deference with respect to interpretations of the federal Act and its standards and regulations. Indeed, if the regulation is ambiguous, the Secretary's interpretation must prevail.27

The RED act and § 11(c) are similar in many respects. OSHANC and the federal Act are identical in many respects. Wherever similarities exist, the Secretary's regulations interpreting § 11(c) will be used in this part to guide the analysis of the RED act. Federal court decisions and other relevant information will also be used.

The Analysis

No "Person" Shall Discriminate

The RED act states that "no person shall discriminate or take any retaliatory action because the employee in good faith does or threatens to" exercise rights under OSHANC.28 The RED act defines person as "any individual, partnership, association, corporation, business trust, legal representative, the State, a city, town, county, municipality, local agency, or other entity of government."29

The analogous federal Act's definition of person30 is similar to that found in the RED act. The U.S. Secretary of Labor has interpreted person as it relates to § 11(c) of the federal Act.31 The Secretary interprets person in its broadest sense.32

Person is not limited to the employee's employer. A person would be prohibited from discriminating against anyone's employee because of the employee's activities with respect to OSHANC. Accordingly, such entities as labor organizations, employment agencies, and all other persons would be prohibited by

32. See, e.g., Donovan v. RCR Communications, Inc., 119 L.R.R.M. (BNA) 3398, 1985 O.S.H.D. (CCH) ¶ 27,330 (M.D. Fla. 1985) (Docket No. 84-1252-Civ-T-13) (defendants unsuccessfully argued that as corporate officials acting in their corporate capacities, they were eliminated from § 11(c) jurisdiction over "persons").
the RED act from discriminating against any employee for his or her OSHANC activities.

**No Discrimination or Retaliatory Action Against an “Employee”**

Questions may arise as to whether the subject of alleged discrimination is an employee or is the respondent’s employee. The RED act does not define employee. For purposes of OSHANC, employee is defined as “an employee of an employer who is employed in a business or other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer.” OSHANC’s definition of “employer” also facilitates understanding of who is considered an employee: “employer means a person engaged in a business who has employees, including any state or political subdivision of a state, but does not include the employment of domestic workers employed in the place of residence of his or her employer.”

“Employ” is not defined by the RED act or OSHANC. The Safety and Health Review Board of North Carolina uses the “economic realities test” to determine whether, for purposes of liability for employees’ safety and health, one is an independent contractor or employee. Adhering to the U.S. Secretary of Labor’s interpretations with regard to § 11(c), employ — with respect to the RED act — would be construed in the broad sense of any employment

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33. A federal district court held that § 11(c) did not protect a complainant where the defendant company was not the employer. The complainant was an engineer who was ordered off the job after lodging safety complaints with the defendant. Lummus Co., 8 O.S.H. Cas. (BNA) 1358, 1980 O.S.H.D. (CCH) ¶ 24,465 (N.D. Ohio 1980) (Docket No. C 77-169).


35. N.C. GEN. STAT. § 95-127(10) (1992). Thus, unlike § 11(c) of the federal Act, the RED act considers one who works for a public entity to be an employee to be protected, as well.

36. Brooks v. L.P. Cox Co. of Concord, Inc., 2 N.C.O.S.H.D. 836, 840 (1986). The economic realities test, also used to identify the correct employer, asks such questions as: (a) Whom do the workers consider their employer? (b) Who pays the workers’ wages? (c) Who has the responsibility to control the workers? (d) Does the alleged employer have power to control the workers? (e) Does the alleged employer have the power to hire, fire, or modify the employment conditions of the workers? (f) Does the ability of the workers to increase their income depend on efficiency rather than initiative, judgment, and foresight? (g) How are the workers’ wages established?

relationship created by economic realities.

**No Discrimination or Retaliatory Action Against a Representative of an Employee**

The RED act bars discrimination against any employee who causes specified activities to be "initiated on an employee's behalf" or exercises any right afforded by OSHANC on behalf of "any other employee." Arguably, this language would include any employee representative, authorized or not. It would definitely include an authorized employee representative.

"Authorized employee representative" is not defined by the RED act or OSHANC. The Rules of Procedure of the Safety and Health Review Board of North Carolina, however, define that term as "a labor organization whether local or international which has a collective bargaining relationship" with the employee.

**No Person Shall Discriminate or Take "Retaliatory Action"**

The RED act prohibits any person from taking retaliatory action against any employee who, in good faith, "does or threatens to" exercise rights under OSHANC. Retaliatory action is defined as "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment."

**Protected Activities and Unprotected Activities**

*Protected Activities*

Relevant language within the RED act which protects employees from discrimination for activities with respect to OSHANC states that,

40. Secretary of Labor v. Kennedy Tubular Products, 1977-1978 O.S.H.D. (CCH) ¶ 21,843 (W.D. Pa. 1977) (Civil Action No. 75-1519). The federal district court held that an employer's refusal to allow the elected union representative to enter the workplace to discuss safety concerns violated the federal Act's anti-discrimination provision.
41. Safety and Health Review Board of North Carolina, Rules of Procedure, Rule .0101(4) (24 N.C.A.C. 3.0101(4)).
(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:

* * *

b. Article 16 of this Chapter [OSHANC].

2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee’s behalf.

3) Exercise any right on behalf of the employee or any other employee afforded by . . . Article 16 of this Chapter [OSHANC] . . . of the General Statutes.

(Emphasis supplied.)

The RED act protects employees against discrimination for their activities “with respect to” OSHANC and for exercising any right “afforded by” OSHANC.

The federal anti-discrimination provision, § 11(c), protects employees against discrimination for their activities “related to” the federal Act and for exercising rights “under” and/or “afforded by” the Act. The U.S. Secretary of Labor has interpreted “related to” to include protection for such activities as complaints to various agencies with responsibility for job safety and health and complaints by workers to their employers. Employee complaints to the union about workplace safety are protected activity. Similarly, § 11(c) protection would extend to the employee who merely causes activities related to the federal Act to occur. To illustrate, an employee could provide others with information needed to set activities in motion.


47. 29 C.F.R. § 1977.10 (1992). In Donovan v. R.D. Andersen Constr. Co., 552 F. Supp. 249 (D. Kan. 1982), § 11(c) protection extended to an employee who was dismissed following his conversation with a newspaper reporter. The employee's information to the reporter on asbestos in the workplace led to the newspaper's inquiry and subsequent article.
OSHANC provides employees numerous rights. Additional rights derive from other sources, including OSHANC standards and administrative and judicial resolutions (case law) of issues which have arisen under OSHANC. As noted below, employees of the agriculture industry must pursue some of their rights in different ways. Migrant employees have additional rights.48

Training. Employees have the right to be trained and to complain about the lack of training regarding aspects of their job which might pose a hazard to them. The types of training employees may be required to receive would vary with the nature of the job, but examples of such training include: the proper use of respirators; emergency and fire prevention techniques; safe working procedures involving occupational noise exposure; how to handle and store liquefied petroleum gases; the safe operation of particular machines; how to detect the presence of hazardous chemicals; and how to interpret a material safety data sheet (MSDS) regarding a hazardous chemical.49

Standards. The development of job safety and health standards may be initiated by employees and employees may, in various ways, become involved in proceedings regarding standards. Employees may: (a) Propose to the commissioner of labor that a safety or health standard be developed;51 (b) Participate in hearings about standards which have been proposed by anyone;52 (c) Petition the commissioner of labor for a review of any standard be-


49. To learn more about employee rights regarding training, see NC-OSHA INDUSTRY GUIDE X, A GUIDE TO VOLUNTARY TRAINING AND TRAINING REQUIREMENTS IN OSHA STANDARDS. (Bureau of Education, Training, and Technical Assistance, Division of Occupational Safety and Health, North Carolina Department of Labor, Raleigh, North Carolina.)

50. For more information about OSHANC standards, see NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR GENERAL INDUSTRY; NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR THE CONSTRUCTION INDUSTRY. (Bureau of Education, Training, and Technical Assistance, Division of Occupational Safety and Health, North Carolina Department of Labor.) See also INTRODUCTION TO MIGRANT HOUSING INSPECTIONS IN NORTH CAROLINA. (Bureau of Migrant Housing, Division of Occupational Safety and Health, North Carolina Department of Labor).


lied to affect them or other employees adversely;\textsuperscript{53} (d) Participate in any hearing concerning their employer’s variance application.\textsuperscript{54} Employees must be notified by their employer of its application to the commissioner of labor to be allowed to vary from a standard (protect employees in a manner other than that prescribed by the standard).\textsuperscript{55} Employees must be notified regardless of whether the application is for a temporary variance or permanent variance;\textsuperscript{56} (e) Petition the commissioner of labor to review any variance granted to their employer if the variance is thought to affect them or other employees adversely;\textsuperscript{57} or (f) Within six months of the issuance of a permanent variance, apply to the commissioner of labor, asking that the variance be revoked.\textsuperscript{58}

**Inspections.** The category “inspections” invokes the entire gamut of protected activities and rights. For example, employees may: (a) Request that the commissioner of labor inspect their workplace regarding what they believe to be a violation of safety or health standards;\textsuperscript{59} (b) Report conditions which they believe to be imminent dangers or extreme hazards by calling the Governor's toll free hotline (1-800-662-7952); (c) Ask that the complainant’s name not be revealed in any request made for an inspection of a workplace (the plea for confidentiality must be honored);\textsuperscript{60} (d) Be free from discrimination or retaliatory actions for having exercised the right to request an inspection of the workplace (or for exercising any other right guaranteed by OSHANC);\textsuperscript{61} or (e) Consult with the commissioner of labor and his or her agents, including the compliance officer who inspects the workplace.\textsuperscript{62}

**Citations.** Citations may involve employees directly in proceedings. Employees may: (a) See any citation received by their employer for the alleged violation of a safety or health standard (the citation should be posted at or near the place where the violation oc-

\textsuperscript{54} N.C. GEN. STAT. § 95-130(4) (1992).
\textsuperscript{55} N.C. GEN. STAT. § 95-130(3) (1992).
\textsuperscript{57} N.C. GEN. STAT. § 95-130(5) (1992).
\textsuperscript{58} N.C. GEN. STAT. § 95-132(b)(3) (1992).
\textsuperscript{60} N.C. GEN. STAT. § 95-136(d)(1) (1992).
\textsuperscript{61} Chapter 95, Article 21 of the General Statutes.
curred); or (b) Write to the commissioner of labor, contesting the length of time allowed their employer for the correction of a violation of a safety and health standard.

Review. Employees may testify in review proceedings or become directly involved as parties or intervenors. Employees may: (a) Appear before the Safety and Health Review Board of North Carolina (board) as a party in any contest filed by their employer or by an employee. (Employees of agricultural employers have the right to appear before the Office of Administrative Hearings); (b) Participate as a party before the board when their employer petitions the commissioner of labor for a modification (normally, a postponement) of the date set in the citation for the abatement of any violation of a safety or health standard; (c) Appear as a party before the board to contest particular aspects of a proposal between their employer and the commissioner of labor to settle a citation; or (d) Appeal to the North Carolina superior court any final board decision which is counter to their interest in a contested case.

Work conditions. Employees have a right to safe and healthful working conditions. Employees may: (a) Ask the commissioner of

65. N.C. GEN. STAT. § 95-135(e) (1992). An employee of the agriculture industry may contest (see N.C. GEN. STAT. § 95-137(b)(5) (1988)) the length of the abatement period established in a citation to his or her employer. N.C. GEN. STAT. § 150B-23(a) (1992) also grants a person the right to initiate a contested case before the Office of Administrative Hearings, if the person is aggrieved by a state government agency. Initially, the agricultural employee’s notice of contest would be sent to the director of the Division of Occupational Safety and Health, North Carolina Department of Labor, who will advise the employee of the right to file a petition with the Office of Administrative Hearings. (Office of Administrative Hearings, 424 North Blount Street, Raleigh, North Carolina 27601; (919) 733-2698).
67. SAFETY AND HEALTH REVIEW BOARD OF NORTH CAROLINA, supra note 41, Rules .0107(f), .0701(c). To learn more about employee rights with respect to the Safety and Health Review Board of North Carolina, see the Rules of Procedure, Safety and Health Review Board of North Carolina (Safety and Health Review Board, 121 West Jones Street, Raleigh, North Carolina 27603; (919) 733-3589). See also MICHAEL R. SMITH, A GUIDE TO PROCEDURES OF THE SAFETY AND HEALTH REVIEW BOARD OF NORTH CAROLINA (NC-OSHA INDUSTRY GUIDE R). (Bureau of Education, Training, and Technical Assistance, Occupational Safety and Health Division, North Carolina Department of Labor).
labor to investigate if they believe they are being harmed by physical hazards or by exposure to toxic materials;\textsuperscript{70} (b) Gain access to their exposure records, if exposed to toxic substances or harmful physical agents (such records provide the results from tests which monitored the effects of exposure);\textsuperscript{71} (c) Obtain their medical records regarding their exposure to toxic substances or harmful physical agents;\textsuperscript{72} (d) Ask for and receive a copy of their employer's hazard communication program if it uses chemicals which would require it to have such a program;\textsuperscript{73} (e) Obtain from their employer the identity of any chemical with which they are required to work;\textsuperscript{74} (f) Assist the commissioner of labor in an inspection of the employer's hazardous chemicals (they are protected from discharge and discrimination that may result from such assistance);\textsuperscript{75} or (g) Learn of any imminent danger in their place of employment, whenever it is discovered by an OSHA compliance officer.\textsuperscript{76}

\textit{Unsafe work; refusing to perform it.} No language in the RED act specifically protects employees who are disciplined for refusing to perform allegedly unsafe work. Yet, the U.S. Secretary of Labor's regulations require any state with its own occupational safety and health plan to have an anti-discrimination provision as effective as § 11(c).\textsuperscript{77}

No language in the federal anti-discrimination provision specifically protects employees who refuse to perform unsafe work. Under the U.S. Secretary of Labor's regulations, § 11(c) would not normally protect an employee who is disciplined for refusing to work because of perceived hazards. If, however, the danger were too imminent to await correction through normal channels and the

\begin{itemize}
\item \textsuperscript{70} N.C. Gen. Stat. § 95-130(6) (1992).
\item \textsuperscript{71} N.C. Gen. Stat. § 95-143(c) (1992); 29 C.F.R. § 1910.20 (1992).
\item \textsuperscript{72} 29 C.F.R. § 1910.20 (1992).
\item \textsuperscript{73} 29 C.F.R. § 1910.1200 (1992). This hazard communication standard may be obtained in booklet form free, from the Bureau of Education, Training, and Technical Assistance, Division of Occupational Safety and Health, North Carolina Department of Labor. Ask for the North Carolina Occupational Safety and Health Hazard Communication Standard.
\item \textsuperscript{74} 29 C.F.R. § 1910.1200 (1992).
\item \textsuperscript{75} N.C. Gen. Stat. § 95-196 (1992).
\item \textsuperscript{76} N.C. Gen. Stat. § 95-140(c) (1992).
\item \textsuperscript{77} 29 C.F.R. § 1977.23 (1992). If the state's anti-discrimination provision is not as effective, the secretary of labor may assume jurisdiction over the employee complainant.
\end{itemize}
employer could not or would not correct the hazard, § 11(c) protection would apply. 78

From the tenor of the RED act, it seems reasonable to conclude that the legislature intended to protect employees who in good faith refuse to perform unsafe work if no viable alternative exists. 79 If the RED act is construed such that employees are not protected where they refuse work they believe is unsafe, an affected employee might opt not to file a claim under the RED act. Rather, the employee might seek relief through a private suit against the employer. 80

If an employee is discharged for refusing work which, if performed would compromise public safety, the discharge might be seen as a violation of public policy. 81 Finally, judicially created law known as the “public policy” exception to an employer’s right to fire an employee “at will” is evolving. The courts may well determine that discriminating against an employee for refusing to en-

78. The regulation, 29 C.F.R. § 1977.12(b)(1) (1992), has been upheld by the United States Supreme Court in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). The Court characterized the protected right as “the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.” Id. at 3-4. A recent case which precisely meets four elements which the employee must establish is Dole v. H.M.S. Direct Mail Serv., Inc., 752 F. Supp. 573 (W.D.N.Y. 1990), where the employee’s suspension and eventual termination for refusal to operate a collating and binding machine violated § 11(c) (reversed in part, to restore the full back pay owed the employee, Martin v. H.M.S. Direct Mail Serv., Inc., 936 F.2d 108 (2d Cir. 1991)).

79. Cf. Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992). In Amos, the Wage and Hour Act provided an avenue for employees to recover wages of less than the minimum wage, if they continued working while pursuing the act’s remedy. If they refused to work for minimum wage and were fired, no remedy was specifically available. It was apparent to the North Carolina Supreme Court that “the intent of the legislature was to provide an employee an avenue to recover back wages while remaining employed.” Id. at 358, 416 S.E.2d at 172.

80. N.C. GEN. STAT. § 95-244 (1992) states that “Nothing in this Article shall be deemed to diminish the rights or remedies of any employee . . . at common law.” Regarding employee’s who were discharged from their jobs, the North Carolina Supreme Court has stated: “We hold therefore that absent . . . the intent of our state legislature to supplant the common law with exclusive statutory remedies, the availability of alternative remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception.” Amos, 331 N.C. at 356-57, 416 S.E.2d at 171.

gage in unsafe work violates public policy, despite the nature of the work.\textsuperscript{82}

\textit{Unprotected Activities}

Engaging in protected activities does not immunize the employee from adverse actions grounded in legitimate reasons.\textsuperscript{83} The RED act does not restrain an employer from discharging, demoting, or suspending an employee if, regardless of the employee's protected activities, the adverse action would have been taken for legitimate reasons.\textsuperscript{84} Further, assuming the basis for adverse action by the employer (or others) were not legitimate, the basis may nonetheless be unrelated to OSHANC and not protected by the RED act.\textsuperscript{85}

If it is shown, however, that the employee engaged in pro-

\textsuperscript{82} Amos, 331 N.C. at 353, 416 S.E.2d at 169. "Although the definition of 'public policy' approved by this Court does not include a laundry list of what is or is not 'injurious to the public or against the public good,' at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." In view of this language, OSHANC, at N.C. GEN. STAT. § 95-126(2) (1992), appears pertinent: "The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources."

\textsuperscript{83} Examples of legitimate reasons for adverse actions, listed by the legislature in the Workers' Compensation Act (N.C. GEN. STAT. § 97-6.1(c)(1991)), included "willful or habitual tardiness or absence from work or being disorderly or intoxicated while at work, or destructive of an employer's property." The U.S. secretary of labor's regulations hold that § 11(c) does not protect employees who refuse to comply with their employer's safety rules and regulations. 29 C.F.R. § 1977.22 (1992). OSHANC requires employees to obey its standards. N.C. GEN. STAT. § 95-130(1) (1992). Well established case law makes particular defenses to OSHANC citations unavailable to employers who fail to discipline employees for safety rule violations. See Michael R. Smith, supra note 19, §§ 5.7-5.13 (citing North Carolina Occupational Safety and Health Decisions).

\textsuperscript{84} N.C. GEN. STAT. § 95-241(b) (1992).

\textsuperscript{85} See U.S. secretary of labor's interpretation. 29 C.F.R. § 1977.6(a) (1992). See also Express Container Serv., Inc., 1980 O.S.H.D. (CCH) ¶ 24,765 (E.D. Va. 1980) (Civil Action No. 79-1017-N) (employee attempted to use § 11(c) for protection where protected activities were not involved). Nonetheless, if the basis for adverse action was not legitimate and not prohibited by the RED act, the employee still may be protected by other North Carolina statutes (see generally L. Larson, UNJUST DISMISSAL (1989 & Supp.) for a comprehensive list of North Carolina statutes which prohibit job discrimination for various reasons); and by common law remedies.
ected activity and the protected activity was a substantial causative factor in the adverse action against the employee, the burden of proof shifts to the employer. The employer must then show that the same adverse action would have been taken for legitimate reasons, notwithstanding the employee’s involvement in the protected activity.

In assessing whether the employer carried its burden of proof, the courts look for such evidence as speciousness (employees of less seniority were retained when the employee complainant was dismissed, allegedly as a result of work force reduction), (employees involved in similar allegedly unsafe work practices were retained, while the employee complainant was dismissed); pretext (poor work habits ascribed to the complainant employee but no record that they were considered prior to the discrimination); and employer statements (such as threatening to make it difficult for the employee complainant to find other employment).

Employees who engage in activity protected under OSHANC must remain no worse off than if they had not engaged in the activity. Yet, there is no intention that the protected activity should cause the employee to be better off. The North Carolina Court of Appeals has said: “This Court is not unmindful that circumstantial evidence is often the only evidence available to show retaliation against protected activity. Nevertheless, the causal connection must be something more than speculation; otherwise, the complaining employee is clothed with immunity for future misconduct and is ‘better off’ for having filed the complaint rather than merely


90. Commonwealth Aquarium, 469 F. Supp. at 691.

being no 'worse off.' ”

**PROCEDURE UNDER THE RETALIATORY EMPLOYMENT DISCRIMINATION ACT**

*Summary of Procedure*

Procedure under the Retaliatory Employment Discrimination (RED) act might be abridged in this manner: (a) an employee files a complaint; the commissioner of labor's (commissioner's) investigation fails to substantiate the complaint, it is dismissed, and the employee is allowed to file a civil suit against the alleged offender (respondent); or (b) the investigation substantiates the complaint and the violation of the RED act is resolved informally; or (c) conciliation efforts fail and the commissioner either files suit on the employee's behalf, or does not file suit but allows the employee to file suit against the respondent.

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92. *Stroh Brewery Co.*, 95 N.C. App. at 237, 382 S.E.2d at 882. This decision is probably as rich as any analysis of the issue of employer motivation. Here, the employee, an electrician, had twice failed to follow company safety rules, and created potentially life-threatening situations. Similar incidents involving other employees had resulted in employee disciplinary actions. The employer's decision to dismiss the employee followed a meeting during which the employee refused to accept that his job performance was unacceptable.
Schematically, procedure under the RED act appears like this:

Filing the Complaint

The employee may file a complaint alleging a violation of the RED act. A representative may also file on the employee’s behalf.  

Form; Where to File

No particular form of complaint is specified. The RED act does state that an employee “may file a written complaint.” How-

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ever, current practice is to accept oral complaints, as well. A written complaint is preferable because it eliminates questions regarding timeliness. An oral complaint may be effected by telephone or by addressing it personally to the North Carolina Commissioner of Labor, Director of the Division of Occupational Safety and Health (DOSH), or any DOSH agent, such as a compliance officer.

Timeliness

The RED act specifies that the complaint "shall be filed within 180 days of the alleged violation." The U.S. Secretary of Labor's regulations allow for the tolling of the filing period if there are grounds to justify a suspension. The requirement to file "within 180 days of the alleged violation" may be interpreted as when the employee first learns of the discrimination. A federal court of appeals has held that the filing period (for § 11(c) purposes) began when an employee learned that he had been fired.

94. N.C. GEN. STAT. § 95-242(a) (1992). It is not clear whether the permissive word "may" merely confers a right to file a complaint which must be written or presumes that an oral complaint is an acceptable alternative. The U.S. secretary of labor's practice is to allow oral complaints. See Employment Safety and Health Guide (CCH) ¶ 7978.100; OSHA FIELD OPERATIONS MANUAL, Ch. 10, A.2.c.

95. A written complaint should be addressed to the Bureau of Compliance, Division of Occupational Safety and Health, North Carolina Department of Labor, 413 North Salisbury Street, Raleigh, North Carolina 27603-5942 [(919) 733-3087].

96. Telephone discussion with the acting director (discrimination supervisor) of the DOSH discrimination complaint program, September 21, 1992. Chapter 10 of the DOSH FIELD OPERATIONS MANUAL provides for oral complaints and for complaints to be acceptable if lodged with agents of DOSH. Chapter 10 was drafted to implement the OSHANC anti-discrimination provision existing prior to the RED act. Nonetheless, Chapter 10 is followed, is a public document, and is very educational. For example, it informs of DOSH's use of the federal "Section 11(c)/405 Investigator Manual."

97. This time period offers North Carolina employees greater protection than previously afforded by OSHANC (N.C. GEN. STAT. § 95-130(9) allowed 30 days); employees under the federal Act (§ 11(c)(2), 29 U.S.C. § 660(c) (1992)) are presently allowed 30 days.

98. 29 C.F.R. § 1977.15(d) (1992). The employee may have been misled about grounds for adverse action, or the adverse action may have been of a continuing nature rather than a discrete occurrence. The secretary does not consider the pendency of grievance-arbitration proceedings or decision of another agency grounds for tolling. Chapter 10 of the DOSH FIELD OPERATIONS MANUAL also lists reasons which would and would not justify late filing. One reason that would not justify late filing is where the complaint is lodged with federal OSHA, unless that agency simply failed to forward the complaint to DOSH.
rather than laid off, as he had been misled to believe.99

Receipt of the Complaint

Upon receiving the complaint, the commissioner of labor (commissioner) must notify the respondent and investigate to determine whether there is reasonable cause to believe the employee's allegation is true. The RED act does not specify the type or extent of the commissioner's investigation.100

Under current practice, the investigation begins with DOSH contacting the employee to determine whether (without disproof) a violation appears to exist. If the complaint is timely, the employee engaged in protected activity, and subsequently the employee suffered adverse action, the investigation will proceed.101 DOSH will follow with a visit to the respondent. Evidence, such as witnesses' accounts, will be received to determine whether the employee's allegations can be substantiated.

Acting on the Complaint

Within 90 days after the complaint is filed, the commissioner shall make a determination.102 If reasonable cause to substantiate

100. A federal district court has held that the extent of investigation conducted for § 11(c) purposes is a matter for the U.S. secretary of labor's discretion. Dunlop v. Hanover Shoe Farms, Inc., 441 F. Supp. 385 (M.D. Pa. 1976).
101. Telephone discussion with the acting discrimination supervisor of the DOSH discrimination program, September 21, 1992. See also DOSH FIELD OPERATIONS MANUAL, Ch. 10.
102. N.C. GEN. STAT. § 95-242(a) (1992). The Red act is not clear as to whether the 90 days for determination refers to: (a) the time in which to assess the credibility of the complaint, or (b) the time for assessing the credibility of the complaint and resolving the complaint informally, or (c) the time for resolving the complaint informally. It seems reasonable that the 90 day period addresses both the time for assessing the credibility of the complaint and resolving the complaint informally because: (1) the requirement to "make a determination" within 90 days (N.C. GEN. STAT. § 95-242(a) (1992)) and (2) an additional 90 days after notifying the parties of the failure of conciliation efforts before the commissioner must decide to file suit (N.C. GEN. STAT. § 95-243(b) (1992)) equal 180 days. That 180 days is also the time which an employee must wait before requesting a right-to-sue letter if the commissioner has not acted (N.C. GEN. STAT. § 95-242(c) (1992)). Whatever its referent, the U.S. secretary of labor interprets a similar provision at § 11(c)(3) as directory, rather than as an unyielding deadline. See 29 C.F.R. § 1977.16 (1992).
the complaint is unavailable, the commissioner will notify the parties, dismiss the complaint, and issue to the employee a right-to-sue letter. This letter confers upon the employee a private right to sue the alleged offender. 103

If reasonable cause to substantiate the complaint is available, the commissioner will attempt to "remove the alleged violation" by informal means. 104 The effort will be to restore the employee to the position occupied prior to suffering the adverse action. Many employee complainants will have by then accepted other employment and may instruct DOSH to initiate a settlement for such consideration as an expunged record and back pay. 105

If the commissioner's conciliation efforts fail, the commissioner must notify the parties in writing, then either file a civil action on the employee's behalf or issue the employee a right-to-sue letter. 106 Again, this letter confers upon the employee a private right to sue the alleged offender.

Civil Action

The commissioner of labor can file a civil suit on the employee's behalf within 90 days of notifying the parties of the failure of conciliation efforts. The employee can file a civil action within 90 days of the issuance of a right-to-sue letter. 107 If the commissioner of labor has not acted within 180 days from when the complaint was filed, the employee may make a written request for a


105. Settlement efforts play a significant role. Chapter 10 of both the DOSH and the federal OSHA Field Operations Manual state that "Settlement efforts are most successful when promptly initiated before large backpay liabilities accrue and positions harden."

106. N.C. Gen. Stat. § 95-242(b) (1992). In contrast, assuming no settlement, the U.S. secretary of labor is required by § 11(c)(2) to sue on the employee's behalf. To be as effective as § 11(c), it may develop that the commissioner of labor will have to file suit for all valid complaints. However, there may well be circumstances where the North Carolina employee would benefit from filing a private suit, and exercise that preference to do so. N.C. Gen. Stat. § 95-243(b) (1992).

107. A right-to-sue letter will be issued if there is not reasonable cause to believe the complaint or if conciliation efforts fail and the commissioner does not file an action on the employee's behalf.
right-to-sue letter.\textsuperscript{108} The employee may simultaneously seek relief through collective bargaining efforts and/or through other agencies. Such efforts, however, will not cause the commissioner of labor to delay enforcement, including the filing of a civil action during the pendency of other proceedings.\textsuperscript{109} On the other hand, the employee's acceptance of remedies through such mechanisms as arbitration-grievance procedures may bar remedies through the employee's civil action.\textsuperscript{110}

Withdrawal of a complaint cannot be suggested or encouraged by DOSH.\textsuperscript{111} If the employee voluntarily withdraws the complaint, the commissioner's right to file a civil action is not necessarily foreclosed.\textsuperscript{112} The commissioner may be able to retain jurisdiction because RED act enforcement serves a broad public policy.\textsuperscript{113}

\textbf{Types of Relief}

The employee or the commissioner may ask the court to: (a) Enjoin the continued violation of the RED act; (b) Reinstate the employee to the previously held or equivalent job position; (c) Restore all fringe benefits and seniority rights; (d) Compensate the employee for lost wages\textsuperscript{114} and expenses related to the adverse action; and (e) Award attorneys' fees and other costs related to the civil action.\textsuperscript{115}

If the court determines that the offender willfully\textsuperscript{116} violated

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\item N.C. Gen. Stat. § 95-242(c) (1992). Note that the act does not require the commissioner to honor the request.
\item DOSH Field Operations Manual, Ch. 10. Also see analogous § 11(c) discussion in the federal OSHA Field Operations Manual, Ch. 10, 3.g.
\item For related information, see the U.S. secretary of labor's regulations at 29 C.F.R. § 1977.17 (1992).
\item See relevant discussion regarding the prior OSHANC anti-discrimination provision in Stroh Brewery Co., 96 N.C. App. at 238, 382 S.E.2d at 882.
\item A federal district court has held that an employer's offer to reinstate an employee did not stop the accrual of back pay because the proffered job was not equivalent to the employee's prior job. Donovan v. Commercial Sewing, Inc., 562 F. Supp. 548 (D. Conn. 1982).
\item One definition of willful is: "A violation is deemed to be willful when there is shown 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another.' " Brewer v. Harris, 279 N.C. 288, 297,
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the RED act, the court shall treble compensation for lost wages and expenses related to the adverse action. An injured employee might also be successful at seeking punitive damages in lieu of treble damages if there is evidence of a willful violation. 117

The North Carolina Supreme Court has held that "absent . . . the intent of our state legislature to supplant the common law with exclusive statutory remedies, the availability of alternative remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception. The availability of alternative common law and statutory remedies, we believe, supplements rather than hinders the ultimate goal of protecting employees who have been fired in violation of public policy."118

It is clear that the RED act did not intend to supplant common law remedies. To the opposite, it affirmatively states that "[N]othing in this Article shall be deemed to diminish the rights or remedies of any employee under . . . common law."119


117. "In this State, punitive damages can be recovered only for tortuous conduct and then only on proof that the defendant acted to cause plaintiff's injury willfully, with malice, or with a reckless disregard for plaintiff's rights." Sides v. Duke Hosp., 74 N.C. App. 331, 348, 328 S.E.2d 818, 830 (1985).


§ 95-240. DEFINITIONS

The following definitions apply in this Article:

(1) "Person" means any individual, partnership, association, corporation, business trust, legal representative, the State, a city, town, county, municipality, local agency, or other entity of government.

(2) "Retaliatory action" means the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment.

§ 95-241. DISCRIMINATION PROHIBITED

(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

(1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
   b. Article 2A or Article 16 of this Chapter.
   c. Article 2A of Chapter 74 of the General Statutes.

(2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf.

(3) Exercise any right on behalf of the employee or any other employee afforded by Article 2A or Article 16 of this Chapter or by Article 2A of Chapter 74 of the General Statutes.

(b) It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee.

§ 95-242. COMPLAINT; INVESTIGATION; CONCILIATION

(a) An employee allegedly aggrieved by a violation of G.S. 95-241 may file a written complaint with the Commissioner of Labor al-
leging the violation. The complaint shall be filed within 180 days of the alleged violation. Within 20 days following receipt of the complaint, the Commissioner shall forward a copy of the complaint to the person alleged to have committed the violation and shall initiate an investigation. If the Commissioner determines after the investigation that there is not reasonable cause to believe that the allegation is true, the Commissioner shall dismiss the complaint, promptly notify the employee and the respondent, and issue a right-to-sue letter to the employee that will enable the employee to bring a civil action pursuant to G.S. 95-243. If the Commissioner determines after investigation that there is reasonable cause to believe that the allegation is true, the Commissioner shall attempt to eliminate the alleged violation by informal methods of conference, conciliation, and persuasion. The Commissioner shall make a determination as soon as possible and, in any event, not later than 90 days after the filing of the complaint.

(b) If the Commissioner is unable to resolve the alleged violation through the informal procedures, the Commissioner shall notify the parties in writing that conciliation efforts have failed. The Commissioner shall then either file a civil action on behalf of the employee pursuant to G.S. 95-243 or issue a right-to-sue letter to the employee enabling the employee to bring a civil action pursuant to G.S. 95-243.

(c) An employee may make a written request to the Commissioner for a right-to-sue letter after 180 days following the filing of a complaint if the Commissioner has not issued a notice of conciliation failure and has not commenced an action pursuant to G.S. 95-242.

(d) Nothing said or done during the course of these informal procedures may be made public by the Commissioner or used as evidence in a subsequent proceeding under this Article without the written consent of the persons concerned.

§ 95-243. CIVIL ACTION

(a) An employee who has been issued a right-to-sue letter or the Commissioner of Labor may commence a civil action in the superior court of the county where the violation occurred, where the complainant resides, or where the respondent resides or has his principal place of business.

(b) A civil action under this section shall be commenced by an employee within 90 days of the date upon which the right-to-sue letter was issued or by the Commissioner within 90 days of the date on which the Commissioner notifies the parties in writing that conciliation efforts have failed.
(c) The employee or the Commissioner may seek and the court may award any or all of the following types of relief:

1. An injunction to enjoin continued violation of this Article.
2. Reinstatement of the employee to the same position held before the retaliatory action or discrimination or to an equivalent position.
3. Reinstatement of full fringe benefits and seniority rights.
4. Compensation for lost wages, lost benefits, and other economic losses that were proximately caused by the retaliatory action or discrimination.

If in an action under this Article the court finds that the employee was injured by a willful violation of G.S. 95-241, the court shall treble the amount awarded under subdivision (4) of this subsection.

The court may award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorneys' fees, of the plaintiff in bringing an action pursuant to this section. If the court determines that the plaintiff's action is frivolous, it may award to the defendant and assess against the plaintiff the reasonable costs and expenses, including attorneys' fees, of the defendant in defending the action brought pursuant to this section.

(d) Parties to a civil action brought pursuant to this section shall have the right to a jury trial as provided under G.S. 1A-1, Rules of Civil Procedure.

(e) An employee may only bring an action under this section when he has been issued a right-to-sue letter by the Commissioner.

§ 95-244. EFFECT OF ARTICLE ON OTHER RIGHTS

Nothing in this Article shall be deemed to diminish the rights or remedies of any employee under any collective bargaining agreement, employment contract, other statutory rights or remedies, or at common law.