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## **WRONGFUL DISCHARGE AND THE NORTH CAROLINA EQUAL EMPLOYMENT PRACTICES ACT: THE LOCALIZATION OF FEDERAL DISCRIMINATION LAW**

ANDREW B. COHEN\*

In 1989, when the North Carolina Supreme Court first explicitly recognized the tort of wrongful discharge in *Coman v. Thomas Manufacturing Co.*,<sup>1</sup> Justice Meyer complained in his dissent that “the majority has outraced even the California court” in the development of exceptions to the employment-at-will doctrine.<sup>2</sup> In the five years since *Coman*, North Carolina has indeed sprinted ahead of other states in increasing the availability of wrongful discharge remedies for employees claiming termination of their employment in violation of public policy. What began as a narrow erosion of the employment-at-will doctrine<sup>3</sup> is on the verge of becoming part of virtually every lawsuit arising out of termination of employment<sup>4</sup> or refusal to hire.<sup>5</sup>

One of the principal vehicles responsible for the increased importance of the tort of wrongful discharge in violation of public policy has been the North Carolina Equal Employment Practices Act [hereinafter EEPA],<sup>6</sup> which declares it a public policy “to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap. . . .”<sup>7</sup> The EEPA,

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1. 325 N.C. 172, 381 S.E.2d 445 (1989).

2. *Id.* at 186, 381 S.E.2d at 453 (Meyer, J., dissenting).

3. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 210, 388 S.E.2d 134, 137 (1990) (“This doctrine has recently been narrowly eroded by statutory and public policy limitations on its scope.”).

4. *See, e.g.*, *Percell v. International Business Machines, Inc.*, 765 F. Supp. 297, 300 (E.D.N.C. 1991).

5. *See, e.g.*, *Bass v. City of Wilson*, 835 F. Supp. 255 (E.D.N.C. 1993) (allowing a pendent state claim to proceed under a theory of wrongful refusal to hire in violation of North Carolina’s public policy against age discrimination).

6. N.C. GEN. STAT. § 143-422.1 to 422.3 (1993).

7. Article 49A of the North Carolina General Statutes states in full:  
§ 143-422.1. SHORT TITLE.

a substantive policy declaration with no apparent remedy, works in conjunction with the tort theory of wrongful discharge in violation of public policy, a remedial mechanism with no defined substantive standards, to furnish a state common law remedy for what had previously been the exclusive province of federal statutory law.<sup>8</sup>

This article will explore how the EEPA has been transformed from a toothless legislative compromise into an apparently limitless source of employment discrimination claims. Section I of this article will set out the history of the public policy exception to the doctrine of employment-at-will in North Carolina. Section II will discuss the cases in North Carolina that have relied upon the legislative declaration in the EEPA as a basis for holding an action taken by an employer in violation of public policy. Section III will examine the underlying purpose of the EEPA by reviewing the legislative history of the Act. Section IV will present an argument against allowing claims for wrongful discharge in violation of public policy where alternative remedies are available to uphold the public policy at issue and where the legislature, in declaring the public policy, did not intend to create additional remedies beyond those previously in existence.

## I.

North Carolina has long followed the doctrine of employment-at-will.<sup>9</sup> Until the last decade, the doctrine was applied virtually without exception. The doctrine permits an employment relationship to be

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This Article shall be known and may be cited as the Equal Employment Practices Act.

§ 143-422.2. LEGISLATIVE DECLARATION.

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

§ 143-422.3. INVESTIGATIONS; CONCILIATIONS.

The Human Relations Commission in the Department of Administration shall have the authority to receive charges of discrimination from the Equal Employment Opportunity Commission pursuant to an agreement under Section 709(b) of Public Law 88-35, as amended by Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this process, the agency shall use its good offices to effect an amicable resolution of the charges of discrimination.

8. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-633(a) (1989) [hereinafter ADEA]; Title VII of the Civil Rights Act of 1964 § 702, 42 U.S.C. §§ 2000e to 2000e-17 (1988) [hereinafter Title VII]; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (Supp. II 1991) [hereinafter ADA].

9. See, e.g., *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *disc. rev. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978); *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976); *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971); *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E.2d 249 (1964); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E.2d 436

terminated without cause at the will of either the employer or the employee.<sup>10</sup>

The North Carolina Court of Appeals took the first step toward the establishment of a public policy exception to the employment-at-will doctrine in *Sides v. Duke Hospital*<sup>11</sup> by allowing the plaintiff, Marie Sides, to maintain a lawsuit alleging that she had been discharged from her nursing position for refusing to commit perjury in a malpractice action against the hospital. The court held that "the words 'at will' can never mean 'without limit or qualification'. . . for . . . the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public."<sup>12</sup> The court explained further that

while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.<sup>13</sup>

While *Sides* was a striking departure from earlier decisions,<sup>14</sup> over the next four years, courts remained reluctant to expand the holding beyond the strict facts of the case. In *Walker v. Westinghouse Electric*

(1943). See generally J. Wilson Parker, *The Uses of the Past: The Surprising History of Termination-At-Will Employment in North Carolina*, 22 WAKE FOREST L. REV. 167 (1987).

10. Prior to 1985, courts in North Carolina had only allowed suits for wrongful discharge in cases where there had been a promise of employment for a definite duration supported by some additional consideration. See, e.g., *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1976); *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964).

11. 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985). See also Susan K. Datesman, Note, *Sides v. Duke Hospital: A Public Policy Exception to the Employment-at-Will Rule*, 64 N.C.L. REV. 840 (1986); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. REV. 631 (1988).

12. *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826.

13. *Id.* The *Sides* court allowed the plaintiff's claim to proceed as well on the alternative grounds that her employment was not terminable at will since her move to North Carolina from Michigan in order to accept the job offer constituted additional consideration and "was sufficient . . . to remove plaintiff's employment contract from the terminable-at-will rule and allow her to state a claim for breach of contract. . . ." *Id.*, 74 N.C. App. at 345, 328 S.E.2d at 828. This article addresses only the exception to the terminable at will doctrine for wrongful discharge in violation of public policy and does not address cases where the employment relationship was made terminable only for cause by the furnishing of additional consideration, as in the alternative holding in *Sides*, or by a statement in an employee handbook. See, e.g., *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987). Also beyond the scope of this article is the debate over whether North Carolina should recognize a "bad faith" exception to the employment-at-will doctrine. Compare *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 176, 381 S.E.2d 445, 448 (1989) ("This Court has never held that an employee at will could be discharged in bad faith.") with *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 360, 416 S.E.2d 166, 173 (1992)("[O]ur discussion of bad faith discharge in *Coman* was dicta. . . . We did not recognize a separate claim for wrongful discharge in bad faith.").

14. See, e.g., *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *disc. rev. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978) (The North Carolina Court of Appeals held that an

*Corp.*,<sup>15</sup> for example, the North Carolina Court of Appeals affirmed the entry of summary judgment against an employee who allegedly had been discharged for expressing concerns about workplace safety. The court rejected the plaintiff's argument that his discharge fit within the public policy exception to the employment-at-will doctrine created in *Sides*, reasoning that Mr. Walker, unlike Ms. Sides, had not been asked to violate a law.<sup>16</sup> The court held that a wrongful discharge claim could be maintained only upon a showing of a "clear violation of express public policy."<sup>17</sup> While recognizing workplace safety as a major public issue, the court deferred to statutory protections for workers, stating that "[t]he legislature has worked to strike the proper balance between the employer's right to design and operate the workplace and the employee's right to work there free of threats to his or her life and health."<sup>18</sup>

In *Trouth v. Richardson*,<sup>19</sup> the plaintiff alleged *inter alia* that she was discharged for following the Nursing Practice Act<sup>20</sup> and hospital policy in transferring two nurses from the emergency room. The plaintiff argued that her discharge for following state law was analogous to the situation in *Sides*, where Ms. Sides alleged that she had been discharged for refusing to commit perjury.<sup>21</sup> In affirming dismissal of this claim, the court stated, without explanation, "[W]e do not believe this allegation is sufficient to come within or enlarge the exception created by *Sides*."<sup>22</sup>

The North Carolina Court of Appeals declined the plaintiffs' request to recognize a broad public policy exception to the employment-at-will doctrine in *Hogan v. Forsyth Country Club*.<sup>23</sup> The plaintiffs in *Hogan* claimed to have been discharged in retaliation for lodging complaints about sexual and verbal harassment and for exercising medical leave rights. In affirming the dismissal of the plaintiffs' wrongful discharge claims, the court restricted the availability of the public policy exception to situations where an individual faced a choice between violating the law and retaining her job.<sup>24</sup>

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employee at will in North Carolina had no enforceable claim against his employer for discharge in retaliation for his pursuit of worker's compensation benefits.).

15. 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986).

16. *Id.* at 263, 335 S.E.2d at 86.

17. *Id.*

18. *Id.*

19. 78 N.C. App. 758, 338 S.E.2d 617 (1986).

20. N.C. GEN. STAT. §§ 90-171.19 to 171.47 (1981).

21. *Trouth*, 78 N.C. App. at 762, 338 S.E.2d at 619.

22. *Id.*

23. 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

24. *Id.* at 500, 340 S.E.2d at 126.

Similarly, in *Burrow v. Westinghouse Electric Corp.*,<sup>25</sup> the North Carolina Court of Appeals narrowly interpreted the *Sides* exception to allow wrongful discharge actions only upon the employer's willful violation of a clearly expressed public policy.<sup>26</sup> The court rejected the plaintiff's public policy claim based on his alleged discharge for refusing to operate his tractor-trailer when a disability in his leg prevented him from driving safely. A rule of law recognizing "that every discharge for failure to perform an allegedly unsafe task is actionable," the court reasoned, "would create a prolific and unwarranted source of trouble in the workplace."<sup>27</sup>

Federal courts applying North Carolina law interpreted the *Sides* exception narrowly as well. In *Guy v. Travenol Laboratories, Inc.*,<sup>28</sup> the Fourth Circuit Court of Appeals held that a former supervisor at a drug manufacturing plant did not state a claim for wrongful discharge by alleging that he was discharged for refusing to falsify records required by the United States Food and Drug Administration.<sup>29</sup> In *Rupinsky v. Miller Brewing Co.*,<sup>30</sup> the United States District Court for the Western District of Pennsylvania, applying North Carolina law, refused to recognize a cause of action for wrongful discharge in violation of public policy despite the plaintiff's argument that his discharge was designed to deter union organizing.

During the four years following the North Carolina Court of Appeals' *Sides* opinion, the *only* published decision allowing a wrongful discharge claim to proceed in North Carolina involved facts similar to those at issue in *Sides*: discharge for refusal to commit perjury. In *Williams v. Hillhaven Corp.*,<sup>31</sup> the North Carolina Court of Appeals held that the *Sides* public policy exception applied to the plaintiff's claim that she was discharged because she testified under subpoena at an unemployment compensation hearing on behalf of a nurse assistant who had been fired by the same employer. Although the plaintiff in *Williams*, unlike Ms. *Sides*, did not allege that she had been encouraged to commit perjury in advance of her testimony, the court pointed to the fact that both were discharged from employment for

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25. 88 N.C. App. 347, 363 S.E.2d 215 (1988), *disc. rev. denied*, 322 N.C. 111, 367 S.E.2d 910 (1988).

26. *Id.* at 354, 363 S.E.2d at 219.

27. *Id.*, 363 S.E.2d at 219-20.

28. 812 F.2d 911 (4th Cir. 1987).

29. See also J. Michael McGuinness, *The Doctrine of Wrongful Discharge in North Carolina: The Confusing Path from Sides to Guy and the Need for Reform*, 10 CAMPBELL L. REV. 217 (1988).

30. 627 F. Supp. 1181 (W.D. Pa. 1986).

31. 91 N.C. App. 35, 370 S.E.2d 423 (1988).

telling the truth, thus placing the *Williams* case "into the same narrow exception . . . that *Sides* created."<sup>32</sup>

In 1989, in *Coman v. Thomas Manufacturing Co.*,<sup>33</sup> the North Carolina Supreme Court for the first time endorsed the public policy exception to the doctrine of employment-at-will. The plaintiff alleged that he had been discharged from his job as a truck driver for refusing to drive for more than ten hours per day and refusing to falsify his driving logs, both violations of federal transportation regulations. The court observed that the employer's alleged conduct also violated the public policy of North Carolina as set forth in the North Carolina Administrative Code,<sup>34</sup> which provided that the rules and regulations adopted by the federal Department of Transportation also applied to the highways of North Carolina.<sup>35</sup>

The *Coman* court explicitly approved and adopted the language from *Sides* stating that there is no right to terminate an employment-at-will contract for an unlawful reason or purpose that contravenes public policy.<sup>36</sup> In finding that the plaintiff had stated a claim for wrongful discharge in violation of the public policy of promoting highway safety, the court explained that the "plaintiff allegedly was faced with the dilemma of violating that public policy and risking imprisonment, . . . or complying with the public policy and being fired from his employment."<sup>37</sup>

With the North Carolina Supreme Court's explicit recognition of the public policy exception to the employment-at-will doctrine in *Coman*, the principal battlefield in wrongful discharge litigation shifted to the issue of specific acts that would constitute a violation of public policy sufficient to trigger the *Sides/Coman* exception. Because the parameters of "public policy" for the purposes of this exception had not been clearly set forth in the North Carolina Supreme Court's

32. *Id.* at 39, 370 S.E.2d at 425.

33. 325 N.C. 172, 381 S.E.2d 445 (1989). See also Duncan Alford, Note, *Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the At-Will Employment Doctrine*, 68 N.C. L. REV. 1178 (1990).

34. N.C. ADMIN. CODE tit. 19A, r. 3D.0801 (1988).

35. *Coman*, 325 N.C. at 176, 381 S.E.2d at 447. N.C. GEN. STAT. § 20-384 provides that the North Carolina Division of Motor Vehicles may promulgate highway safety rules and regulations for interstate motor carriers in North Carolina, which it did by adopting by reference the federal regulations. 19A N.C. A.O.C. 3D.0801 (1983). Further, N.C. GEN. STAT. § 20-397 establishes criminal penalties for seeking to evade or defeat such regulations.

36. *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (citing, *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826). The court recognized that the perjury and subornation of perjury at issue in *Sides* differed from the operation of a truck in violation of federal law and the falsifying of federal records at issue in *Coman*, but held that "both offend the public policy of North Carolina." *Id.*

37. *Coman*, 325 N.C. at 176, 381 S.E.2d at 447.

*Coman* opinion,<sup>38</sup> the issue was left open to interpretation and expansion in subsequent judicial opinions.

The plaintiffs' bar in North Carolina seized the opportunity created by *Coman* to increase the number of wrongful discharge claims brought by employees who had arguably been discharged in violation of an established public policy, resulting in a number of federal court decisions which expanded the public policy exception. Thus, in *Harrison v. Edison Brothers Apparel Stores, Inc.*,<sup>39</sup> the United States Court of Appeals for the Fourth Circuit held that the district court erred in dismissing a wrongful discharge claim brought by a woman who alleged that she was fired after refusing a supervisor's request for sex. While the court noted that "the only three successful wrongful discharge plaintiffs . . . in reported North Carolina cases have had to choose between their jobs and violating the criminal law,"<sup>40</sup> the plaintiff's claim was allowed to go forward because the supervisor's alleged demand for sex in exchange for job security was held to violate North Carolina's law prohibiting prostitution.<sup>41</sup> Extending the *Coman* decision even further, Judge Erwin of the United States District Court for the Middle District of North Carolina held in *Riley v. Dow Corning Corp.*<sup>42</sup> that a plaintiff's assertion that he was fired for doing something that he was instructed to do, and was therefore "set up" for firing, stated a valid *Coman* claim.

Nevertheless, other federal court decisions continued to interpret the public policy exception narrowly. In *Strickland v. MICA Information Systems*,<sup>43</sup> Judge Tilley of the Middle District dismissed a wrongful discharge claim brought by a plaintiff claiming to have been discharged in retaliation for filing a wage and hour complaint with the Department of Labor. The court based its decision upon the Fourth Circuit's holding in *Harrison* that the public policy exception applies only to situations where an employee's continued employment is conditioned upon the violation of a criminal law or regulation.<sup>44</sup>

The first post-*Coman* North Carolina state court opinion to address the public policy exception was *McLaughlin v. Barclays American*

38. "Public policy" in *Coman* was defined as "the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 n.2, citing *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. App. 1959)).

39. 924 F.2d 530 (4th Cir. 1991). See *infra* text accompanying notes 69-70 for discussion of the district court's opinion in *Harrison*.

40. *Id.* at 533 (the court was referring to *Sides*, *Williams*, and *Coman*).

41. *Id.* at 533 (citing N.C. GEN. STAT. § 14-203 which prohibits "the offering or receiving of the body for sexual intercourse for hire.").

42. 767 F. Supp. 735 (M.D.N.C. 1991).

43. 800 F. Supp. 1320 (M.D.N.C. 1992).

44. *Id.* at 1326 (citing *Harrison*, 924 F.2d at 533).



*Corp.*,<sup>45</sup> in which the North Carolina Court of Appeals began its discussion by noting that “[p]ublic policy” is a “vague expression.”<sup>46</sup> In *McLaughlin*, plaintiff asserted a public policy favoring an “employee’s use of self-defense” after he had been discharged following an altercation with another employee.<sup>47</sup> The court narrowly interpreted the public policy exception in affirming the entry of summary judgment against the plaintiff. The court stated that it did “not read the [*Coman*] decision as being broad enough to support the exception Mr. McLaughlin would have [it] announce.”<sup>48</sup> The facts of the case were held to be “not of sufficient moment” to justify spawning the deluge of wrongful termination suits that would result from allowing a potential claim for every employee involved in an altercation.<sup>49</sup>

The North Carolina Court of Appeals next addressed the issue in *Amos v. Oakdale Knitting Co.*<sup>50</sup> The case involved three former employees of Oakdale Knitting Company who learned in February, 1988 that their pay had been effectively reduced to \$2.18 per hour, below the statutory minimum wage of \$3.35 per hour. When they asked why their pay had been reduced below the minimum wage, they were told by one of the owners of the company that they could either accept the lower wages or be fired. The three employees refused to work under these conditions, and were discharged. They sued for wrongful discharge, seeking lost wages, special damages for emotional distress, and punitive damages. The court of appeals upheld the superior court’s ruling that the plaintiffs were not entitled to sue for wrongful discharge, since the State Wage and Hour Act allowed them to continue working and pursue a statutory remedy for back pay. The court reasoned that “[r]elegating an employee to his statutory remedy is . . . a sound policy where . . . the employee has not been required to engage in unlawful conduct and the employer’s statutory violation does not threaten the public safety.”<sup>51</sup>

On direct appeal, however, the North Carolina Supreme Court reversed, holding that the availability of an alternative state or federal statutory remedy does not preclude a wrongful discharge claim under

45. 95 N.C. App. 301, 382 S.E.2d 836, *cert. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989).

46. *Id.* at 305, 382 S.E.2d at 839.

47. *Id.* at 304, 382 S.E.2d at 838-39.

48. *Id.* at 307, 382 S.E.2d at 840.

49. *Id.*

50. 102 N.C. App. 782, 403 S.E.2d 565 (1991), *reversed*, 331 N.C. 348, 416 S.E.2d 166 (1992). The North Carolina Supreme Court’s reversal of the court of appeals’ decision in *Amos* laid the legal groundwork for the use of the North Carolina Equal Employment Practices Act as a basis for wrongful discharge in violation of public policy claims, notwithstanding the availability of statutory remedies under federal discrimination laws. See *infra* text accompanying notes 56-60.

51. *Id.* at 786, 403 S.E.2d at 568.

the public policy exception to the employment-at-will doctrine.<sup>52</sup> The court framed the issue before it to be "whether *Coman* is limited to situations in which the fired employee has no other available remedy."<sup>53</sup> In holding that "[t]he existence of other remedies . . . does not render the public policy exception moot," the court explained that the public policy exception recognized in *Coman* was not meant to be merely a "remedial gap-filler."<sup>54</sup> Rather, the court described the exception as "a judicially recognized outer limit to a judicially created doctrine, designed to vindicate the rights of employees fired for reasons offensive to the public policy of this State."<sup>55</sup>

The court explained that the existence of an alternative remedy would only preclude a claim for wrongful discharge where federal legislation preempts state law under the Supremacy Clause of the United States Constitution<sup>56</sup> or where the state legislature has expressed its intent to supplant the common law with exclusive statutory remedies.<sup>57</sup> The issue of federal preemption was not squarely addressed by the supreme court in *Amos* since it had not been raised in the lower courts.<sup>58</sup> The court could find no intent by the state legislature to supplant the common law of wrongful discharge with exclusive statutory remedies, due to the absence of any express or implied statement precluding a common law action and the fact that the statutory declaration of public policy in the Wage and Hour Act predated the existence of the common law wrongful discharge claim.<sup>59</sup>

In *Amos*, the supreme court laid the groundwork for allowing alleged victims of employment discrimination to proceed simultaneously under federal statutory theories and state common law wrongful discharge theories. *Amos* seemingly provides a parallel state tort action for wrongful discharge in violation of public policy to virtually every plaintiff with a state or federal statutory claim arising out of a discharge from employment.

The impact of *Amos* was felt almost immediately with the release two weeks later of an order in *Battle v. Perdue Foods, Inc.*<sup>60</sup> by Judge Boyle of the United States District Court for the Eastern District of

52. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992). While refusing to offer a precise definition of the term "public policy" as applied to the exception to the employment-at-will doctrine, the court stated that "at the very least public policy is violated when an employee is fired in contravention of expressed policy declarations contained in the North Carolina General Statutes." *Id.*, 331 N.C. at 353, 416 S.E.2d at 169.

53. *Id.* at 355, 416 S.E.2d at 170.

54. *Id.* at 356, 416 S.E.2d at 171.

55. *Id.*

56. U.S. CONST. art. VI, cl. 2.

57. *Amos*, 331 N.C. at 356, 416 S.E.2d at 171.

58. *Id.* at 357, 416 S.E.2d at 172.

59. *Id.* See also *infra* discussion of state law preclusion at text accompanying notes 126-128.

60. No. 91-68-CIV-2-BO, 1992 U.S. Dist. LEXIS 13769 (E.D.N.C. May 28, 1992).

North Carolina. In *Battle*, the court held that a woman who had been discharged for falling asleep during her shift after taking pain medication for tendonitis could maintain an action for wrongful discharge in violation of public policy,<sup>61</sup> based on the public policy expressed in the North Carolina Handicapped Persons Protection Act.<sup>62</sup> This ruling came despite the fact that the plaintiff had missed the claims filing deadline set by the state legislature in the statute which established the public policy against handicap discrimination.<sup>63</sup>

Under *Amos*, the existence of alternative remedies to vindicate the rights of discharged employees will not generally bar plaintiffs from pursuing wrongful discharge claims, either alone or in conjunction with available statutory claims. As discussed below, federal courts in North Carolina have interpreted the holding of *Amos* to mean that claims for wrongful discharge in violation of public policy may be based upon the public policy articulated in the EEPA,<sup>64</sup> notwithstanding the legislature's decision in enacting that statute that employment discrimination litigation in North Carolina should proceed under the existing federal statutory framework.<sup>65</sup>

## II.

Due to the breadth of the public policy declaration contained in the EEPA,<sup>66</sup> the plaintiffs' bar in North Carolina has increasingly found the statute to be a fertile source of public policy wrongful discharge claims. The North Carolina Supreme Court's decision in *Amos* was a watershed opinion for allowing wrongful discharge claims to be based on the public policy of the EEPA.

Prior to *Amos*, attempts to use the EEPA as a basis for public policy wrongful discharge claims met with mixed results. The decisions appeared to vary depending on the particular federal district court judge assigned to the case,<sup>67</sup> at times with conflicting pronouncements coming out of the same judicial district. In *Frazier v. First Union National Bank*,<sup>68</sup> the first published decision in North Carolina to address this issue, Judge Potter of the United States District Court for the Western

61. *Id.* at 7.

62. N.C. GEN. STAT. §§ 168A-1 to 23 (1987).

63. Ms. Battle's claim under the Handicapped Persons Protection Act was dismissed because she filed suit two days after the expiration of the 180-day period for filing suit under the statute. See N.C. GEN. STAT. § 168A-12.

64. See *infra* Section II.

65. See *infra* Section III.

66. N.C. GEN. STAT. § 143-422.2. See *supra* note 7 for text of this section.

67. All of the published opinions involving claims for wrongful discharge in violation of the public policy of the Equal Employment Practices Act have come from the courts of the three federal districts in North Carolina.

68. 747 F. Supp. 1540 (W.D.N.C. 1990).

District of North Carolina held that a plaintiff who had an adequate statutory remedy in Title VII should not be permitted to pursue a public policy wrongful discharge claim based on the public policy embodied in the EEPA. The court cited *Harrison v. Edison Bros. Apparel Stores, Inc.*<sup>69</sup> in stating that "the public policy exception is limited to circumstances where the plaintiff could establish: (1) that the discharge violates some well-established public policy; and (2) that there is no remedy to protect the interest of the aggrieved employee or society."<sup>70</sup> Because Title VII provided plaintiffs with an adequate remedy, the wrongful discharge claims in *Frazier* were dismissed.

In *Percell v. International Business Machines, Inc.*,<sup>71</sup> a black employee alleged that his discharge violated the public policy against race discrimination contained in the EEPA.<sup>72</sup> Judge Dupree initially granted the defendant's motion to dismiss the wrongful discharge claim, based largely on the North Carolina Court of Appeals' decision in *Amos* that the public policy exception to the employment-at-will doctrine should not be extended to afford a cause of action in addition to that provided by statute.<sup>73</sup> The court rejected the argument that allowance of a state common law wrongful discharge claim for discriminatory discharge was compelled by the open courts clause of the state constitution.<sup>74</sup> Judge Dupree pointed out that "although the statutory remedy available to plaintiff is a federal one, plaintiff has been afforded a state court forum through the state's exercise of concurrent jurisdiction over Title VII claims."<sup>75</sup> Moreover, the court

69. 724 F. Supp. 1185, 1193 (M.D.N.C. 1989), *rev'd*, 924 F.2d 530 (4th Cir. 1991).

70. *Frazier*, 747 F. Supp. at 1553. This test was explicitly rejected by the Fourth Circuit in its opinion reversing the district court's *Harrison* decision. *Harrison*, 924 F.2d at 533 (4th Cir. 1991). The Fourth Circuit found that there was no North Carolina authority for the proposition that wrongful discharge claims were only available where there was no other remedy to protect the interest of the employee or society. *Id.* However, the Fourth Circuit did not base the public policy wrongful discharge claim on the EEPA, and in fact stated that "[t]here is no North Carolina statute analogous to Title VII." *Id.*, n.2. While the underlying acts of alleged sexual harassment could have been found to be violative of the public policy embodied in Title VII or the EEPA, the court instead allowed the wrongful discharge claim to proceed based upon the public policy against prostitution. *Id.* at 534.

71. 765 F. Supp. 297 (E.D.N.C. 1991).

72. The plaintiff's wrongful discharge claim was pendent to claims under Title VII and 42 U.S.C. § 1981.

73. The district court later reinstated the state wrongful discharge claim. 90-538-CIV-5-D (E.D.N.C. Dec. 8, 1992). The motion to reconsider the federal discrimination claims under Title VII was denied. 785 F. Supp. 1229 (1992), *aff'd*, 23 F.3d 402 (4th Cir. 1994).

74. N.C. CONST. art. I, § 18 states:

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

See also *Coman*, 325 N.C. at 174, 381 S.E.2d at 445.

75. *Percell*, 765 F. Supp. at 302 (citing *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990)). The plaintiff in *Percell* filed his complaint in state court, though the action was removed to federal court by the defendant. *Id.* at 298.

noted that approval of a public policy wrongful discharge claim based on the EEPA "would likely result in a pendent state claim for wrongful discharge in violation of public policy being attached to virtually every employment discrimination suit filed."<sup>76</sup>

Exactly one week after the release of the *Percell* decision holding that the EEPA could not be the basis for a public policy wrongful discharge claim, Judge Gordon of the Middle District of North Carolina came to the opposite conclusion in *Iturbe v. Wandel & Goltermann Technologies, Inc.*<sup>77</sup> The court stated that *Amos* had established a two-part test for the application of the public policy exception: "(1) the discharge must violate some well-established public policy, and (2) there must be no North Carolina statutory remedy to protect the interest of the aggrieved employee or society."<sup>78</sup> Because the legislature provided no North Carolina statutory remedy for a violation of the public policy articulated in the EEPA, the court held that a wrongful discharge claim based on the public policy of the act should be allowed to proceed.<sup>79</sup>

Approximately two months later, Judge McMillan of the Western District of North Carolina held in *Mayse v. Protective Agency, Inc.*,<sup>80</sup> that a violation of the EEPA constituted a violation of public policy sufficient to state a wrongful discharge claim under *Coman*. The underlying facts involved allegations of racial discrimination and harassment lodged by two black women against their former employer. In affirming the right of the plaintiffs to proceed under a wrongful discharge theory, Judge McMillan cited both *Percell* and *Iturbe*, but stated that he found the reasoning of *Iturbe* to be persuasive.<sup>81</sup>

Less than two months after *Mayse*, Judge Britt of the Eastern District addressed the same issue in *Leach v. Northern Telecom, Inc.*,<sup>82</sup> a case involving a wrongful discharge claim brought pendent to claims of sex discrimination and retaliation under Title VII. The opinion in *Leach* also discussed both the *Percell* and *Iturbe* decisions,<sup>83</sup> but

76. *Id.* at 300.

77. 774 F. Supp. 959 (M.D.N.C. 1991). While the plaintiff's claims survived a motion to dismiss, the action was later dismissed following the granting of the defendant's motion for summary judgment. *Iturbe*, No. 1:90CV00242 (M.D.N.C. Apr. 28, 1993).

78. *Id.* at 963 (citing *Amos*, 102 N.C. App. at 787, 403 S.E.2d at 568). However, Judge Gordon misstated the test set out in *Amos*. The court of appeals' *Amos* decision spoke only about the need for a remedy to protect the interest of the aggrieved employee or society; there was no requirement that the remedy be a North Carolina statutory one. *Amos*, 102 N.C. App. at 787, 403 S.E.2d at 568.

79. *Iturbe*, 774 F. Supp. at 963.

80. 772 F. Supp. 267 (W.D.N.C. 1991).

81. *Id.* at 275.

82. 141 F.R.D. 420 (E.D.N.C. 1991).

83. *Id.* at 426-27.

Judge Britt elected to follow the reasoning of *Percell* and dismissed the plaintiff's wrongful discharge claim.<sup>84</sup>

In *Royster v. GKN Automotive, Inc.*,<sup>85</sup> Judge Ward of the Middle District dismissed a pendent wrongful discharge claim alleging that a black employee's discharge violated the public policy of the EEPA. Citing the 1991 *Percell* decision,<sup>86</sup> Judge Ward held that the public policy exception should not be extended to cover such claims. The court framed the issue not as whether the presence or absence of a North Carolina remedy for employment discrimination should preclude a common law wrongful discharge action, but instead as whether the particular legislative act should serve as a basis for such a claim. Judge Ward expressed his agreement with the holding of *Percell* that "the North Carolina Employment Practices Act does not afford a basis for a public policy exception to the at-will employment doctrine."<sup>87</sup>

Thus, prior to *Amos*, the federal district courts in *Frazier*, *Percell*, *Leach*, and *Royster*<sup>88</sup> had held that the EEPA could not be the basis for a public policy wrongful discharge claim, while the courts in *Iturbe* and *Mayse* had reached the opposite result. Based on the North Carolina Supreme Court's *Amos* decision, however, motions to reconsider were granted in both the *Percell* and *Royster* actions. In holding that the new decision in *Amos* meant that a wrongful discharge claim could be based on the public policy of the EEPA despite the availability of Title VII remedies, Judge Dupree observed in *Percell* that the North Carolina Supreme Court had rejected the argument that the availability of an alternative statutory remedy would automatically foreclose a wrongful discharge claim.<sup>89</sup> In *Royster*, Judge Ward reconsidered his earlier holding that a violation of the public policy of the EEPA could not give rise to a wrongful discharge claim. Although he expressed misgivings about the ruling, he felt the result was compelled by *Amos*.<sup>90</sup>

84. *Id.*

85. No. 2:91CV00438, slip. op. (M.D.N.C. Aug. 7, 1992), *motion to reconsider granted*, No. 2:91CV00438 (M.D.N.C. Mar. 18, 1993).

86. 765 F. Supp. at 300-01.

87. *Royster*, No. 2:91CV00438, slip op. at 4 (M.D.N.C. Aug. 7, 1992).

88. *Royster* was actually released after the supreme court's *Amos* decision, but Judge Ward was apparently unaware of the decision, as it is not cited in his original ruling on the motion to dismiss in *Royster*.

89. *Percell*, No. 90-538-CIV-5-D, slip op. at 4 (E.D.N.C. Dec. 8, 1992).

90. In granting the motion to reconsider, Judge Ward wrote:

The Court takes this action with great reluctance. However, the Court understands that with regard to issues arising out of pendent state claims in federal court, it is bound by the legal tenets developed by the North Carolina Supreme Court. The Court does not waiver from its belief that the North Carolina Supreme Court has essentially created a pendent state claim for wrongful discharge for virtually every employment discrimination suit filed under Title VII. Since there cannot be a double recovery, the real issue in federal court will

Since the supreme court's *Amos* decision, several other federal court decisions in North Carolina have held that allegations of violations of the EEPA could be the basis of a claim for wrongful discharge in violation of public policy: *McKinney v. Northern Telecom, Inc.*<sup>91</sup> (age discrimination); *Phillips v. J.P. Stevens & Co.*<sup>92</sup> (sexual harassment and sex discrimination); and *Gower v. United States Fidelity & Guaranty Co.*<sup>93</sup> (age discrimination violating the EEPA was not preempted by conflicting remedial provisions of the federal ADEA).

Perhaps the most surprising development in the public policy tort area was the approval of a claim for "age discrimination in violation of public policy" brought by a rejected job applicant in *Bass v. City of Wilson*.<sup>94</sup> The *Bass* decision, which was written by Magistrate Judge Denson of the Eastern District, held that the plaintiff was permitted to maintain a cause of action for "failure to hire in violation of the public policy articulated in N.C.G.S. § 143-422.1 *et seq.*"<sup>95</sup> The defendant had filed a motion to dismiss the public policy claim, arguing that the plaintiff was merely a job applicant, not an employee, and thus was not protected by the EEPA as applied through wrongful discharge actions under *Coman* and *Amos*. While acknowledging that no court in North Carolina had recognized such a claim, Magistrate Judge Denson found that "[i]f it violates public policy to discriminate against an individual during employment or as a basis for termination, then it is equally abusive to discriminate against an individual seeking employment."<sup>96</sup> The effect of *Bass*, if upheld and followed by other courts, will be to transform a once narrow exception to the doctrine of employment-at-will into a doctrine that goes beyond the wrongful discharge context and reaches into the hiring process.

It thus appears, as predicted by Judge Dupree in his 1991 *Percell* opinion, that the allowance of wrongful discharge claims based on the public policy of the EEPA has resulted "in a pendent state claim for

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be the state claim. Title VII simply becomes the vehicle by which a plaintiff arrives in federal court. This should not be so.

*Royster*, No. 2:91CV00438, slip op. at 2-3 (M.D.N.C. Mar. 18, 1993).

91. No. 1:91CV00426 (M.D.N.C. Sept. 24, 1992) [1992 U.S. Dist. LEXIS 21948].

92. 827 F. Supp. 349 (M.D.N.C. 1993).

93. No. 93-211-CIV-5-F (E.D.N.C. Oct. 28, 1993).

94. 835 F. Supp. 255 (E.D.N.C. 1993).

95. *Id.* at 258.

96. *Id.* However, this analysis ignores the fact that discrimination in hiring and termination are generally treated as distinct matters in employment litigation. Thus under 42 U.S.C. § 1981, prior to the amendments in the Civil Rights Act of 1991, race discrimination at the hiring or contract formation stage was actionable, while race discrimination in the termination context was insufficient to state a Section 1981 claim. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Mojica v. Gannett Co.*, 779 F. Supp. 94, 98 (E.D. Ill. 1991) (discussing the effect of the 1991 Civil Rights Act on *Patterson*).

wrongful discharge in violation of public policy being attached to virtually every employment discrimination suit filed."<sup>97</sup>

### III.

The surge of wrongful discharge claims based on the public policy declared in the EEPA has come without any serious examination of the underlying purpose of the statute. Therefore, in order to address the issue of the proper use of the EEPA, it seems appropriate as a first step to study the manner in which the EEPA was enacted.<sup>98</sup>

A review of the legislative history shows that the EEPA as enacted in 1977 was a watered-down version of a proposed bill which would have created a state enforcement mechanism to resolve employment discrimination claims. When the original bill faced strong opposition in the Senate committee to which it was referred, a compromise was reached whereby virtually all enforcement power was stripped from the EEPA, leaving little more than a simple declaration of public policy.<sup>99</sup>

The EEPA was introduced in the State House of Representatives by Representative Michaux as House Bill 810 and in the State Senate by Senator Sebo as Senate Bill 459 on April 8, 1977.<sup>100</sup> The stated purpose of the bill was "to promote and protect the welfare of the people of the State of North Carolina by prevention and elimination of discriminatory employment practices and policies based upon race, color, religion, national origin, ancestry, age, or sex."<sup>101</sup> The bill would have added a new article to Chapter 143 of the North Carolina General Statutes to prohibit employment discrimination in much the same way as Title VII of the Federal Civil Rights Act of 1964. The bill called for the creation of a state administrative agency that would hear and resolve complaints not resolved by conciliation.

The bill, which began with a legislative declaration of public policy similar to that contained in the enacted version of the EEPA, would have prohibited discrimination in any aspect of the employment rela-

97. *Percell*, 765 F. Supp. at 300.

98. The North Carolina Supreme Court has recently held that the primary task of the courts in construing a statute is "to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The court also stated that the legislative history of a state statute may be examined as a means of discerning the legislature's intent. *Id.* at 656, 403 S.E.2d at 295.

99. Under *Electric Supply v. Swain*, "[c]hanges made by the legislature to statutory structure and language are indicative of a change in legislative intent and therefore provide some weight in our analysis." *Id.* at 656, 403 S.E.2d at 295.

100. Daily Bulletin (University of North Carolina at Chapel Hill Institute of Government), Bulletin No. 63, April 8, 1977, at 515, 524. See S. 459, 1st Sess., 1977 N.C. Gen. Assembly for the full text of the proposed bill.

101. *Id.*



tionship on the basis of a person's race, color, religion, national origin, ancestry, sex, or age.<sup>102</sup> Covered employers included the following: (1) employers having 15 or more employees; (2) labor organizations; (3) employment agencies; and (4) joint labor-management committees controlling apprenticeship or other training programs.<sup>103</sup>

The bill contained specific exemptions and exceptions which would have: (1) exempted religious organizations from the prohibition against religious discrimination for persons hired to perform work related to the organizations' religious activities; (2) allowed discrimination if religion, sex, or national origin was a bona fide occupational qualification reasonably necessary to normal business operation; (3) allowed sectarian schools to establish religious qualifications for employment; (4) allowed seniority or merit systems that measure earnings by quantity or quality of production or location of work place, notwithstanding a disparate impact on terms and conditions of employment, if such disparate impact was not the result of a prohibited intention to discriminate; and (5) permitted employment decisions based on the results of professionally developed and job-validated tests, if such tests were not designed or used to discriminate on a prohibited basis.<sup>104</sup>

The proposed bill also would have created an Equal Employment Practices Division within the State Department of Administration to serve as a referral agency under Title VII.<sup>105</sup> Complaints of discrimination were to be filed with the director of the division, who would initially investigate the matter.<sup>106</sup> If formal action were warranted, and conciliation was not successful, the director would then bring the complaint to a five-member Equal Employment Practices Commis-

102. See S. 459, § 143-416.4. The provisions with respect to discrimination on the basis of age were to apply only to individuals between the pages of 40 and 65. *Id.* § 143-416.9. Compare Section 703 of Title VII:

**EMPLOYER PRACTICES**

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1988).

103. S. 459 §§ 143-416.3 to 416.7.

104. *Id.* §§ 143-416.9 to 416.11.

105. *Id.* § 143-416.19. Under Title VII, in states with such referral agencies in place, complaints are first filed with the state agency, and proceedings before the federal Equal Employment Opportunity Commission [EEOC] are deferred pending state administrative proceedings.

42 U.S.C. § 2000e-5(c), (d) (1988).

106. S. 459 § 143-416.12.

sion within the Department of Administration.<sup>107</sup> Members of the commission were to be chosen by the Governor for staggered six-year terms, with no more than three of the five members permitted to be from the same political party.<sup>108</sup>

Under the enforcement provisions of the bill, complaints alleging employment discrimination could be filed by the aggrieved person, by his or her representative, or by the Attorney General. Complaints were to be filed within 180 days after the alleged discrimination. The director of the Equal Employment Practices Division would investigate and have 90 days to determine whether reasonable cause existed to believe that an unlawful practice had occurred. Upon a finding of reasonable cause, the director would attempt to eliminate the unlawful practice by conciliation or persuasion within 90 days.<sup>109</sup> If no reasonable cause was found, or if no conciliation was reached, the complainant could petition the Equal Employment Practices Commission to have the complaint formally adjudicated in an adversary hearing conducted pursuant to the State Administrative Procedure Act.<sup>110</sup> The commission would have had the power to order additional remedies, including reinstatement, back pay, and attorneys' fees. The commission's orders would have been appealable to or enforceable by the superior court in the county in which the hearing was conducted.<sup>111</sup>

Also under the proposed bill, a local human relations commission was to be authorized by the local governing body to process complaints alleging employment discrimination in the same manner as (and in lieu of) the state commission, at least up to and including the conciliation stage.<sup>112</sup> However, local commissions were to have no power to hold adversary hearings, and complainants would have been required to petition the state commission for a hearing to pursue a case beyond the voluntary conciliation stage. The original proposed effective date of the act was January 1, 1978.

The proposed bill was referred to the Senate Judiciary II Committee, where it was discussed at a June 7, 1977 meeting.<sup>113</sup> The bill was explained by Senator Sebo as a means to "open an avenue through which to funnel Federal money into the State and thereby ease the backlog of discriminatory claims."<sup>114</sup> However, there was sentiment in the committee against having the state duplicate functions already

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107. *Id.* § 143-416.13.

108. *Id.* § 143-416.19.

109. *Id.* § 143-416.12.

110. N.C. GEN. STAT. Ch. 150A (recodified as §§ 150B-1 to 64, effective January 1, 1986).

111. S. 459 §§ 143-416.15, 143-416.16.

112. *Id.* § 143-416.17 (N.C. GEN. STAT. § 160A-492 authorizes the governing body of any city, town, or county to establish a human relation commission).

113. Minutes, Senate Committee on Judiciary II (June 7, 1977).

114. *Id.*

performed by the federal government.<sup>115</sup> Senator Lawing "felt that the Federal government should 'beef up' their own program when they are behind" rather than having a state program created.<sup>116</sup>

Following further discussion, the committee approved a motion for an unfavorable report on the original bill and a favorable report on a committee substitute bill.<sup>117</sup> The committee's action essentially gutted the original bill, leaving only the legislative declaration of public policy<sup>118</sup> and a provision that the Human Relations Council in the Department of Administration shall have the authority to receive charges of discrimination from the EEOC and "shall use its good offices to effect an amicable resolution of the charges of discrimination."<sup>119</sup> All of the detailed provisions that would have set up a comprehensive state statutory mechanism for investigation, conciliation, and adjudication of charges of discrimination were removed from the bill.<sup>120</sup>

After a minor stylistic amendment,<sup>121</sup> the committee substitute bill was adopted by the Senate on June 10, 1977<sup>122</sup> and sent to the House, where it was adopted on June 23, 1977.<sup>123</sup> The final bill was read and ratified in the General Assembly on June 24, 1977, and became effective on July 1, 1977.<sup>124</sup>

#### IV.

Through the federal courts' application of the North Carolina Supreme Court's *Amos* decision, the EEPA has routinely become the basis for public policy wrongful discharge claims.<sup>125</sup> Courts have generally approached the issue of the viability of such claims from the standpoint of whether, under *Amos*, a wrongful discharge claim is

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115. *Id.*

116. *Id.*

117. *Id.*

118. N.C. GEN. STAT. § 143-422.2 (1993).

119. N.C. GEN. STAT. § 143-422.3 (1993).

120. Compare S. 459, 1st Sess., 1977 N.C. Gen. Assembly (April 7, 1977) with Committee Substitute for S. 459, 1st Sess., 1977 N.C. Gen. Assembly (June 8, 1977). The committee's action reduced the length of the bill from 25 pages to under two pages.

121. A proposed amendment to strike the "Investigations; conciliations" section of the bill, N.C. GEN. STAT. § 143-422.3, failed in committee. An amendment to strike the words "that violate the purposes of this act" from the end of the first sentence of that section passed. See North Carolina General Assembly Amendments to Committee Substitute for Senate Bill 459, University of North Carolina Institute of Government.

122. Senate Journal, 1977 Session (June 10, 1977).

123. House Journal, 1977 Session (June 24, 1977). On June 16, 1977, the House Judiciary I Committee had given a favorable report on the committee substitute for Senate Bill 459 and an indefinite postponement report for House Bill 810, which was identical to the original proposed Senate Bill 459. Minutes, House Committee on Judiciary I (June 16, 1977).

124. 1977 N.C. Sess. Laws, ch. 726, sess. 1. See *supra* note 7 for full text of EEPA.

125. See *supra* text accompanying notes 91-97.

foreclosed by the existence of an exclusive statutory remedy.<sup>126</sup> Pointing to the holding in *Amos* that "the existence of an alternative remedy does not *automatically* preclude a claim for wrongful discharge based on the public policy exception,"<sup>127</sup> the federal courts have uniformly ruled that the availability of federal statutory remedies does not preclude state public policy wrongful discharge claims based on the EEPA. Thus, the focus of judicial analysis has been on whether a wrongful discharge claim is precluded by alternative remedies. However, no court has approached the issue from the standpoint of whether the EEPA is a permissible basis for a public policy wrongful discharge claim. The legislative history of the EEPA shows that the legislature sought to channel employment discrimination through the existing federal statutory framework, and the EEPA should not be used as a public policy basis upon which wrongful discharge claims can be brought.

In *Sides*, the North Carolina Court of Appeals stated that "in the absence of a declaration to the contrary it should be assumed that the legislature favors the enforcement of the law by all legitimate and customary means, including suits in the civil courts in proper cases."<sup>128</sup> While there is no explicit declaration in the EEPA disclaiming an intent to enforce the act through common law wrongful discharge suits, it appears from the history of the statute's enactment that a legislative majority was not in favor of expanding the remedies available to aggrieved plaintiffs beyond those afforded by existing federal statutes. In fact, the original bill, which would have provided state law remedies similar to those which will be available under *Amos* and current wrongful discharge decisions, was considered by the state legislature and rejected in committee.

The North Carolina Supreme Court stated in *Burgess v. Your House of Raleigh, Inc.*<sup>129</sup> that in determining the scope of the North Carolina Handicapped Persons Protection Act,<sup>130</sup> a statute which prohibits employment discrimination against handicapped persons, the court's "interpretation of [the] act must be responsive to two countervailing considerations — the desire to give effect to the statutory objectives and the need to keep the scope of the act within the boundaries intended by the General Assembly."<sup>131</sup> By allowing wrongful discharge

126. See, e.g., *Percell*, No. 538-CIV-5-D, slip op. at 4 (E.D.N.C. Dec. 8, 1992).

127. *Amos*, 331 N.C. at 356, 416 S.E.2d at 171.

128. 74 N.C. App. at 337, 328 S.E.2d at 823.

129. 326 N.C. 205, 388 S.E.2d 134 (1990).

130. N.C. GEN. STAT. §§ 168A-1 to 12.

131. 326 N.C. at 210, 388 S.E.2d at 137. The *Burgess* opinion also states that the employment-at-will doctrine was only "narrowly eroded" by public policy considerations in *Coman* and *Sides*. *Id.*

claims to be grounded upon the public policy of the EEPA, courts have ignored the second consideration identified by the supreme court in *Burgess*, which is to maintain the scope of a statute within the bounds intended by the legislature.

The weakness of the North Carolina Supreme Court's *Amos* decision, and the resulting use of that decision to expand the intended scope of the EEPA, lies in its superficial treatment of the preclusive effect of state legislation on the scope of the public policy exception to the employment-at-will doctrine. The *Amos* opinion paid only lip service to the idea that legislative intent should govern the inquiry into the preclusive effect of a state statute, by first examining the words of the State Wage and Hour Act to determine "whether the state legislature intended to preclude common law actions."<sup>132</sup>

Finding no express language precluding common law remedies, the court next looked to "the purpose and spirit of the statute and what the enactment sought to accomplish, considering both the history and circumstances surrounding the legislation and the reason for its enactment."<sup>133</sup> Because the State Wage and Hour Act was designed to provide employees with a vehicle to recover back wages while remaining employed, and provided no remedy for employees who are discharged for refusing to work for less than the statutory minimum wage, the court found it unlikely that the legislature intended to supplant a common law remedy for employees discharged in violation of public policy.<sup>134</sup>

The *Amos* court found the "strongest" and "most obvious" argument against giving the State Wage and Hour Act preclusive effect over a *Coman* public policy claim to be the fact that at the time the statute was enacted,<sup>135</sup> neither the North Carolina Supreme Court nor the court of appeals had recognized a public policy exception to the employment-at-will doctrine.<sup>136</sup> The court repeated the reasoning of an Oregon Supreme Court decision: "It seems elementary that before a legislative body can intend to eliminate certain forms of remedy it must be aware that such remedies exist."<sup>137</sup>

However, the logical corollary to the argument that a legislature cannot intend to eliminate a remedy of which it was unaware is that a legislature cannot intend, by declaring a public policy, to give rise to a multitude of wrongful discharge claims that could not have been con-

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132. *Amos*, 331 N.C. at 358, 416 S.E.2d at 172 (emphasis added).

133. *Id.*

134. *Id.*

135. 1959 for N.C. GEN. STAT. § 95-25.22 and 1979 for N.C. GEN. STAT. § 95-25.20.

136. As discussed *supra*, the exception was first recognized by the court of appeals in 1985 in *Sides* and by the supreme court in 1989 in *Coman*.

137. *Amos*, 331 N.C. at 359, 416 S.E.2d at 173.

templated under the then existing state of the common law. Stated in the terms used by the supreme court in *Amos*, it seems elementary that before a legislative body can intend to give rise to wrongful discharge remedies, it must be aware that such remedies exist.

In the context of the EEPA, this means that the legislature's conscious rejection of a proposal to enact a state remedial scheme for employment discrimination should not be interpreted as an inferred legislative intent to create a remedy within the common law. Since the enactment of the EEPA came at a time when the legislative act of declaring a public policy against employment discrimination would not give rise to a common law right of action, the legislative choice not to provide a separate private enforcement mechanism should be respected.

Of course, the vast majority of public policies were legislatively declared prior to the common law establishment of the public policy exception to the employment-at-will doctrine. Thus, an argument can be made that a pure legislative intent approach would mean that no wrongful discharge claims could be brought on the basis of public policies which predate *Sides* and *Coman*. However, there is a qualitative difference between a wrongful discharge action based upon a public policy regarding encouragement of truthful testimony in legal proceedings<sup>138</sup> and an action based upon a public policy which declares certain discharges to be discriminatory.<sup>139</sup> The most important distinction between the two is that the legislature, in creating a public policy in an area such as the encouragement of truthful testimony which is only tangentially related to employment issues, cannot be assumed to have considered the question of a proper remedy for a worker who is discharged in violation of that public policy. Where the public policy directly involves issues of discriminatory discharge, considerable deference should be given to the legislative decision to either create or not create a state law remedy that would essentially parallel existing federal remedies. This is particularly true where, as with the EEPA, the legislature had full knowledge of the existence of a federal regulatory scheme for employment discrimination but had no way of knowing that the mere declaration of a public policy without remedy would later serve to establish a state common law remedial scheme which the legislature had declined to enact by statute.

By expanding the availability of claims for wrongful discharge in violation of the public policy of the EEPA beyond the relief intended

138. This was the public policy at issue in *Sides*, 74 N.C. App. at 335, 328 S.E.2d at 822, and *Williams*, 91 N.C. App. at 39, 370 S.E.2d at 425.

139. E.g., age discrimination claims in *McKinney*, *supra* note 91, and sex discrimination in *Phillips* *supra* note 92.

by the legislature, North Carolina courts have turned away from the holding of the court of appeals in *Walker v. Westinghouse Electric Corp.*<sup>140</sup> that it is up to the legislature to "strike the proper balance" between an employer's right to operate the workplace and an employee's right not to be discharged in violation of public policy.<sup>141</sup>

The North Carolina courts have similarly repudiated the reasoning of *Wehr v. Burroughs Corp.*,<sup>142</sup> which was cited with approval by the court of appeals' decision in *Amos*.<sup>143</sup> In declining to recognize a separate breach of contract action for age discrimination in violation of the public policy of the Pennsylvania Human Relations Act,<sup>144</sup> the *Wehr* court observed:

It is clear then that the whole rationale undergirding the public policy exception is the vindication or the protection of certain strong policies of the community. If these strong policies or goals are preserved by other remedies, then the public policy is sufficiently served. Therefore, application of the public policy exception requires two factors: (1) that the discharge violate some well-established public policy; and (2) that there be no remedy to protect the interest of the aggrieved employee or society.<sup>145</sup>

The courts in North Carolina that have held that the public policy exception applies regardless of whether there is an alternative remedy to protect the interest of the aggrieved employee or society have reasoned that the open courts clause of the North Carolina Constitution<sup>146</sup> requires a state remedy for employment discrimination in addition to federal statutory remedies.<sup>147</sup> However, the flaw in this reasoning is the erroneous assumption that the open courts clause requires a state remedy (rather than a state forum) for every perceived injury. The North Carolina Constitution speaks only of a state court forum,<sup>148</sup> that can be provided through the state's concurrent jurisdic-

140. 77 N.C. App. 253, 335 S.E.2d 79 (1985).

141. *Id.* at 263, 335 S.E.2d at 86.

142. 438 F. Supp. 1052 (E.D. Pa. 1977), *aff'd as modified*, 619 F.2d 276 (3d Cir. 1980).

143. 102 N.C. App. at 786, 403 S.E.2d at 568.

144. 43 PA. CONS. STAT. ANN. §§ 951 *et seq.* (1991).

145. *Wehr*, 438 F. Supp. at 1055. *See also Harrison*, 724 F. Supp. 1185, 1193 (M.D.N.C. 1989) (holding that the North Carolina courts, if faced with the issue, would require the two factors identified by *Wehr* for application of public policy exception); *Frazier*, 747 F. Supp. at 1553 (citing Judge Gordon's *Harrison* opinion with approval).

146. N.C. CONST. art. I, § 18, *supra* note 74.

147. *See, e.g., Coman*, 325 N.C. at 174, 381 S.E.2d at 446 ("Although plaintiff may have some additional remedy in the federal courts, the courts of North Carolina cannot fail to provide a forum to determine a valid cause of action."); *Harrison*, 924 F.2d at 533 (holding that in *Coman* the existence of remedy in federal court was irrelevant since the open courts clause required a state remedy).

148. N.C. CONST. art. I, § 18, *supra* note 74.

tion over Title VII actions.<sup>149</sup> The open courts clause can thus be satisfied by allowing federal statutory remedies to be pursued in the state courts, without the need for a separate state common law remedy.

It is ironic that North Carolina's expansion of the tort of wrongful discharge has come while other states have continued to apply the public policy exception only where no other remedy is available to protect the aggrieved employee from the offending conduct.<sup>150</sup> An in-depth analysis of this issue was conducted by the Maryland Court of Appeals in *Makovi v. Sherwin-Williams Co.*,<sup>151</sup> a decision which ruled that an employee could not state a claim for wrongful discharge in violation of the public policy against sex discrimination where state and federal remedies were available. The *Makovi* court held that where the legislature had made a choice concerning the manner in which the public policy against discrimination should be enforced, plaintiffs should not be permitted to "divorce the statutory remedy from the goal and, in the name of achieving the goal, enlarge the rem-

149. *Percell*, 765 F. Supp. at 302 (holding that federal courts do not have exclusive jurisdiction over civil actions brought under Title VII).

150. See *Parlato v. Abbott Laboratories*, 850 F.2d 203, 205 (4th Cir. 1988) (common law claims in Maryland are preempted where a statutory remedy exists), *aff'd*, 886 F.2d 1429 (1989); *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 345 (5th Cir. 1990) ("Although public policy has created some limited exceptions to the at-will employee doctrine [in Texas], wrongful discharge because of race is not among them."); *Wyrick v. TWA Credit Union*, 804 F. Supp. 1176, 1182 (W.D. Mo. 1992) (no wrongful discharge action by employee who alleged that she was discharged in violation of Title VII and Missouri Human Rights Act); *Fellows v. Earth Construction, Inc.*, 794 F. Supp. 531, 538 (D. Vt. 1992) (common law action for wrongful discharge in violation of the public policy against sex discrimination was precluded by the existence of an adequate statutory remedy); *Rupp v. Purolator Courier Corp.*, 790 F. Supp. 1069, 1072-73 (D. Kan. 1992) (Title VII and Kansas Act Against Discrimination provided exclusive remedies for employee's claims); *Kinnally v. Bell of Pennsylvania*, 748 F. Supp. 1136, 1145-46 (E.D. Pa. 1990) (plaintiff may not appeal to the common law as an additional means of enforcing statutory policy against workplace discrimination); *Lapinad v. Pacific Oldsmobile-GMC, Inc.*, 679 F. Supp. 991, 993 (D. Haw. 1988) (no wrongful discharge claim for alleged sex discrimination where state and federal remedies already protected the public interest at stake); *Treadwell v. John Hancock Mutual Life Insurance Co.*, 666 F. Supp. 278, 281 (D. Mass. 1987) (employee claiming wrongful termination on grounds of age discrimination has no cause of action separate from the already established comprehensive statutory remedial scheme); *Salazar v. Furr's, Inc.*, 629 F. Supp. 1403, 1408 (D.N.M. 1986) (no wrongful discharge on sex discrimination grounds because of an available statutory remedy under Title VII and its state counterpart); *Ring v. R.J. Reynolds Industries, Inc.*, 597 F. Supp. 1277, 1280-81 (N.D. Ill. 1984) (no cause of action exists in Illinois for wrongful discharge in violation of the public policy contained in the Illinois Human Rights Act); *Shanahan v. WITI-TV, Inc.*, 565 F. Supp. 219, 224-25 (E.D. Wisc. 1982) (no wrongful discharge claim where ADEA and state statute adequately serve to promote the state's policy against age discrimination); *Dockins v. Ingles Markets, Inc.*, 413 S.E.2d 18, 19 (S.C. 1992) (wrongful discharge plaintiff limited to statutory remedy). But see *Katz v. Baldor Electric Co.*, 969 F.2d 935, 937-39 (10th Cir. 1992) (employee's allegation of handicap motivated discharge fell within Oklahoma's public policy exception to at-will employment even though administrative remedies existed); *Lockhart v. Commonwealth Education Systems Corp.*, 439 S.E.2d 328 (Va. 1994) (public policy against race and sex discrimination can be the basis for wrongful discharge claims).

151. 561 A.2d 179 (Md. 1989). The reasoning of *Makovi* was endorsed by the Fourth Circuit in *Parlato v. Abbott Laboratories*, 886 F.2d at 1429-30.



edy for a statutory violation."<sup>152</sup> The court stated further that the remedies chosen by the legislature "form part of the anti-discrimination policy," thus the public policy goal should not be considered in isolation from the legislative remedy.<sup>153</sup> To do otherwise would upset "the balance between right and remedy struck by the Legislature in establishing the very policy relied upon."<sup>154</sup>

Allowing wrongful discharge claims based on the EEOA could also interfere with the administrative investigation and conciliation conducted by the EEOC in response to charges brought pursuant to Title VII, the ADEA, and the ADA. By asserting claims for wrongful discharge in violation of the public policy of the EEOA, alleged victims of discrimination will be allowed to file suit directly in state court without first exhausting the administrative remedies procedures mandated under those federal statutes. Thus, the important role played by the EEOC in initially reviewing all charges made under federal anti-discrimination statutes and the strict time limits mandated by Congress<sup>155</sup> will be removed in cases where plaintiffs choose to proceed directly with state wrongful discharge actions.

### CONCLUSION

When the EEOA was enacted in 1977, the state legislature considered and rejected a proposal that would have made employment discrimination litigation the subject of state law. The final bill as passed omitted the broad prohibitions and enforcement mechanisms originally proposed, and instead simply declared that it was the public policy of North Carolina to promote equal employment opportunity without discrimination on account of race, religion, color, national origin, age, sex, or handicap. With the development of public policy wrongful discharge claims based on *Coman* and *Amos*, the state and federal courts in North Carolina have undone the legislative compromise that sought to have employment discrimination litigation proceed within the existing federal statutory framework.

While the federal courts in North Carolina now appear to view the availability of wrongful discharge suits based on the public policy of the EEOA as a matter of settled law, a number of federal judges have expressed their dismay at this expansion of state wrongful discharge claims. Because neither the North Carolina Court of Appeals nor the

152. *Id.* at 609, 561 A.2d at 182.

153. *Id.* at 621-23, 561 A.2d at 188-89.

154. *Id.* at 626, 561 A.2d at 190.

155. See, e.g., *Smith v. Sentry Insurance Co.*, 674 F. Supp. 1459, 1467 (N.D. Ga. 1987) ("[T]he investigatory function of the EEOC lies at the heart of the statutory scheme for remedying discrimination made illegal by the ADEA and Title VII.").

North Carolina Supreme Court has addressed the question of whether the EEPA can be the basis for a public policy wrongful discharge claim, it remains possible that the state courts will rule that the EEPA was never intended to be used in such a manner. Alternatively, the state legislature could clarify its intent in enacting the EEPA by declaring that the public policy of the EEPA should not be the basis of state common law claims which parallel federal statutory claims. At this point, further guidance from the courts or the legislature is required to reassert the legislature's original intent to maintain the federal statutory scheme as the primary means of preventing employment discrimination.