UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 67 | Number 6 Article 20

9-1-1989

Josey v. Employment Security Commission: Permanent Disqualification and Re-entitlement for Unemployment Compensation Benefits under Section 96-14

Christopher T. Graebe

Josey v. Employment Security Commission: Permanent Disqualification and Re-entitlement for Unemployment Compensation Benefits Under Section 96-14

In 1936, in response to the passage of the federal Social Security Act of 1935,[1] North Carolina enacted its first unemployment compensation statute, the Employment Security Law.[2] The statute included a declaration of state public policy: "Involuntary unemployment is . . . a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force on the unemployed worker and his family."[3] The stated purpose of the legislation was to provide monetary relief to workers who became "unemployed through no fault of their own."[4]

Not all workers who become unemployed, however, are in the sympathetic position of having lost their jobs through no fault of their own. In some cases, employees are discharged for persistent absenteeism,[5] use of alcohol or drugs on the job,[6] refusal to follow safety rules,[7] or other misconduct giving the employer just cause to dismiss the worker.[8] From the date of its enactment until the present, the Employment Security Law has disqualified workers discharged for misconduct from receiving benefits for a designated number of weeks or until certain specified conditions are met.[9]

---

1. Social Security Act, ch. 531, 49 Stat. 620 (1935). The Social Security Act featured the first federal unemployment compensation program in the United States. The Act provided for a federal unemployment tax on employers to fund the program, federal grants to the states to cover administrative costs, and regulations concerning the procedural and administrative aspects of the state programs. The substantive elements of each state's unemployment compensation program, such as eligibility requirements and disqualification provisions, were left for the state legislatures to determine.

For a general history of the development of unemployment compensation in the United States, see T. BRODEN, LAW OF SOCIAL SECURITY AND UNEMPLOYMENT INSURANCE 1-12 (1962); Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 183-89 (1955); Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 21-34 (1945).

2. Act of Dec. 16, 1936, ch. 1, 1936 N.C. Pub. Laws 1 (extra session) (codified as amended at N.C. GEN. STAT. §§ 96-1 to -29 (1988)).

3. *Id.*

4. *Id.*

5. *See, e.g.*, Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982). For an analysis of this case, see Note, *The Need for a Presumption of Misconduct in Absenteeism Cases*, 18 WAKE FOREST L. REV. 921 (1982).

6. *See, e.g.*, Hester v. Hanes Knitwear, 61 N.C. App. 730, 301 S.E.2d 508, *cert. denied*, 308 N.C. 676, 304 S.E.2d 755 (1983).

7. *See, e.g.*, *In re* Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973).

8. *See, e.g.*, Hagan v. Peden Steel Co., 57 N.C. App. 363, 291 S.E.2d 308 (1982) (gross insolence); Williams v. SCM Proctor Silex, 60 N.C. App. 572, 299 S.E.2d 668 (alteration of production records), *disc. rev. denied*, 308 N.C. 544, 304 S.E.2d 243 (1983).

9. The current statute provides:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (2) For the duration of his unemployment . . . if it is determined by the [Employment Security] Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. . . .

In *Josey v. Employment Security Commission*[10] the North Carolina Supreme Court considered for the first time the potential duration of a permanent disqualification for benefits as a result of misconduct and the statutory conditions for removing the disqualification and gaining a new entitlement. The court, by a four-to-three vote, held that a permanent disqualification for misconduct in one employment continues to operate to disqualify a worker after discharge from a second, different employment, unless the worker lost his second job "through no fault of his own."[11]

This Note examines the evolution of the disqualification and re-entitlement provisions of the Employment Security Law, the policy behind those provisions, and the merits of the majority and dissenting opinions in *Josey*. The Note offers suggestions for amending the Law to achieve fairer treatment of workers who have been disqualified permanently from receiving benefits. The Note concludes that, although the court had only a limited opportunity to lighten the impact of the Employment Security Law's provisions against permanently disqualified workers, its ruling aggravates that impact, goes against the public policy that gave rise to unemployment compensation, and penalizes some workers who seek benefits under the Employment Security Law.

In September 1984 Nathaniel Josey was discharged from his position at Gold Bond Building Products following a physical altercation with his supervisor. Josey subsequently applied for unemployment compensation with the North Carolina Employment Security Commission (ESC). The ESC, pursuant to section 96-14(2), disqualified Josey from receiving unemployment compensation benefits for the duration of his unemployment because of misconduct connected with his work.[12] Josey did not appeal this decision.

In March 1986 Josey obtained new employment with Gang-Nail Systems, Inc. He continued in this employment until January 1987, when he was discharged for failure to comply with Gang-Nail's attendance policies. Based on

---

. . . .

(10) Any employee disqualified for the duration of his unemployment due to the provisions of . . . (2) . . . above may have that permanent disqualification removed if he meets the following three conditions:

a. Returns to work for at least five weeks and is paid cumulative wages of at least 10 times his weekly benefit amount;

b. Subsequently becomes unemployed through no fault of his own; and

c. Meets the availability requirements of the law.

N.C. GEN. STAT. § 96-14 (1988).

For a discussion of the history and evolution of the misconduct disqualification and re-entitlement provisions in North Carolina, see *infra* notes 40-46 and accompanying text.

10. 322 N.C. 295, 367 S.E.2d 675 (1988).

11. *Id.* at 299-300, 367 S.E.2d at 678.

12. N.C. GEN. STAT. § 96-14(2) (1988); *see supra* note 9. "Misconduct connected with work" is defined as:

conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

N.C. GEN. STAT. § 96-14(2) (1988).

his employment with Gang-Nail and other employment following his discharge from Gold Bond in 1984, Josey had sufficient earnings to entitle him to eighteen weeks of unemployment compensation benefits if he was otherwise eligible.[13]

In March 1987 an ESC appeals referee, pursuant to section 96-14(2A),[14] disqualified Josey from receiving benefits for four weeks for "substantial fault with mitigating circumstances." This decision was based on stipulated facts and was not appealed. However, Josey later learned that the ESC considered the permanent disqualification imposed in 1984 still to be in effect, because he had not satisfied the statutory requirement that his subsequent unemployment occur "through no fault of his own."[15]

Josey then filed a petition with the ESC for a reduction of his disqualification period.[16] He asked that the ESC either (1) interpret "duration of his unemployment" under section 96-14(2) not to extend to the period following his second employment, or (2) exercise its discretion to reduce his disqualification.[17] In June 1987 the Commission denied the petition.

After this decision, Josey petitioned the superior court for review of the ESC's ruling,[18] requesting a declaratory judgment that the ESC erred in holding that the duration of his unemployment extended through subsequent periods of unemployment and in ruling that the ESC's discretion to reduce permanent disqualifications was limited to extraordinary cases. The superior court granted the ESC's motion for summary judgment. Josey then appealed and petitioned the supreme court for discretionary review under section 7A-31.[19]

---

13. The rather complex mathematical procedure for determining the amount of benefits due an unemployed worker is found at N.C. GEN. STAT. § 96-12(a)-(d) (1988).

14. A worker who is found to have been discharged for substantial fault connected with his work is disqualified for not less than four or more than thirteen weeks. Substantial fault includes:

> those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

N.C. GEN. STAT. § 96-14(2A) (1988).

15. *Id.* § 96-14(10)(b) (1988).

16. The ESC may exercise its discretion to reduce a permanent disqualification to a time certain of not less than five weeks upon a showing of good cause by the disqualified worker. *Id.* § 96-14(10) (1988).

17. Brief for Appellant at 4, *Josey* (No. 875SC1171).

18. A superior court may review decisions of the ESC. N.C. GEN. STAT. § 96-15(i) (1988). The role of the superior court is limited to (1) determining whether there was evidence before the ESC to support its findings of fact, and (2) deciding whether the facts found sustain the ESC's conclusions of law and its resulting decision. Miller v. Guilford County Schools, 62 N.C. App. 729, 731, 303 S.E.2d 411, 413, *cert. denied*, 309 N.C. 321, 307 S.E.2d 165 (1983).

19. In any case in which appeal is taken to the court of appeals, with certain exceptions, the supreme court may in its discretion certify the case for review either before or after the appeals court has determined it. The supreme court may grant review before determination by the court of appeals when in the opinion of the supreme court:

> (1) The subject matter of the appeal has significant public interest, or
>
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
>
> (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or

The court, after ruling that it had jurisdiction to hear the case,[20] was faced with a single issue:[21] whether an employee can remove a permanent disqualification for misconduct by earning a new entitlement to benefits in a second job nearly three years after the permanent disqualification was imposed.[22] The court held that the "plain words"[23] of the Employment Security Law's disqualification and re-entitlement provisions[24] require the court to uphold the decisions of the ESC and the superior court. Justice Webb, writing for the majority, wrote: "An unemployed person may have this [permanent] disqualification removed under N.C.G.S. § 96-14(10) if he meets three requirements, one of which is that he subsequently becomes unemployed through no fault of his own. The appellant did not subsequently become unemployed through no fault of his own."[25] The court interpreted "subsequent employment" to mean any employment following the permanent disqualification, whether it is with the same or a different employer.[26] Therefore, Josey's discharge from Gang-Nail in 1987 for "substantial fault with mitigating circumstances"[27] was not sufficient to remove the 1984 disqualification arising out of his employment with Gold Bond.

The court further relied on the "plain words"[28] of the statute to reject Josey's argument that the general assembly did not intend the words "duration of unemployment" in section 96-14(2) to include periods of unemployment occurring more than two years after a worker's original period of unemployment

---

(4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

N.C. GEN. STAT. § 7A-31(b) (1986).

20. *Josey*, 322 N.C. at 297-98, 367 S.E.2d at 677. The ESC argued that the court lacked jurisdiction on two grounds. First, it claimed that because Josey's petition to the ESC asked only that it exercise its discretion to reduce his permanent disqualification, he cannot now ask the court to rule that the 1984 disqualification did not apply to his 1987 entitlement. The court held that, although Josey's petition may be read as seeking only an exercise of discretion, his memorandum of law to the ESC did request an interpretation of section 96-14(10). Further, the ESC actually ruled on the matter of interpretation. Therefore, because the ESC passed on the question which Josey brought before the court, the court had jurisdiction to determine it. *Id.*

The ESC, relying on *In re* Employment Security Commission, 234 N.C. 651, 68 S.E.2d 311 (1951) (employee must file with the court a statement of the grounds on which review is sought), also contended that the case could not be determined in the courts because Josey had failed in his petition to the superior court to allege that the ESC had abused its discretion. *Josey*, 322 N.C. at 297-98, 367 S.E.2d at 677. The court held that it properly exercised jurisdiction because (1) Josey had filed his grounds for review with the court, and (2) abuse of discretion by the ESC was not a ground upon which relief was sought in this appeal. *Id.* at 298, 367 S.E.2d at 677.

21. The court briefly addressed a second issue. Josey raised the argument that the application of his 1984 permanent disqualification to his 1987 entitlement violated the requirements of 42 U.S.C. §§ 501-503 (1982). The United States Supreme Court held that sections 501-503 require state unemployment compensation programs to begin payments when they are first administratively allowed after a proper hearing. California Dep't of Human Resources v. Java, 402 U.S. 121, 133 (1971). The North Carolina Supreme Court held that *Java* had no application, because in this case Josey was never administratively determined to be eligible for benefits after his 1984 disqualification. *Josey*, 322 N.C. at 300, 367 S.E.2d at 678. The dissent did not address the federal law question.

22. *Josey*, 322 N.C. at 298, 367 S.E.2d at 677.

23. *Id.* at 299, 367 S.E.2d at 678.

24. N.C. GEN. STAT. § 96-14(2), (10) (1988). These subsections are quoted *supra*, at note 9.

25. *Josey*, 322 N.C. at 299, 367 S.E.2d at 678.

26. *Id.*

27. *Id.* at 296, 367 S.E.2d at 676.

28. *Id.* at 300, 367 S.E.2d at 678.

and after a subsequent job with a different employer.[29] The statute mentions nothing about the relevance of the passage of time or the existence of a different employment. The statutory test and Josey's failure to satisfy it were equally clear to the court: "The . . . disqualification may be removed by later employment and a discharge through no fault of the claimant. There was later employment in this case but the claimant was at fault for this discharge."[30]

In his dissent, Justice Martin applied the rule that the court "must strictly construe in favor of the claimant those sections of the [Employment Security] Act that impose disqualifications, and disqualifications should not be enlarged by implication."[31] Construed in favor of the claimant, Justice Martin argued, "duration of unemployment" applied in this case only to the period of unemployment resulting from Josey's discharge from Gold Bond in 1984.[32] Martin conceded that Josey's discharge for misconduct disqualified him from receiving any benefits from his employment at Gold Bond until the re-entitlement conditions were met.[33] According to Martin, however, to extend the disqualification to bar Josey from receiving benefits from his employment at Gang-Nail constitutes an expansion of the disqualification provision by implication, which violates the rules of statutory construction and the purpose of the Employment Security Law.[34]

Justice Martin noted that the court's opinion penalizes some employees for seeking benefits under the unemployment compensation program.[35] If a discharged employee seeks benefits and is found to be permanently disqualified, he may not receive benefits from any subsequent employment until he has complied with the conditions in section 96-14(10). If the employee sought no benefits from the first employment, even if he were discharged for a similar cause, he is free to receive benefits from subsequent employment without having to satisfy the re-entitlement conditions.[36] Justice Martin concluded that the general assembly could not have intended such an "incongruous result,"[37] and he voted to reverse the judgment of the superior court.

At the heart of the majority and dissenting opinions were the interpretations of the permanent disqualification and re-entitlement provisions of section 96-14. These provisions have existed in their present form only since 1977, when the North Carolina General Assembly undertook a general strengthening of the consequences of disqualifications for benefits.[38] The 1977 amendment

29. *See supra* note 9.

30. *Josey*, 322 N.C. at 300, 367 S.E.2d at 678.

31. *Id.* at 301, 367 S.E.2d at 679 (Martin, J., dissenting) (citing *In re* Watson, 273 N.C. 629, 639, 161 S.E.2d 1, 10 (1968)). Chief Justice Exum and Justice Frye joined the dissent.

32. *Id.* (Martin, J., dissenting).

33. *Id.* (Martin, J., dissenting).

34. *Id.* (Martin, J. dissenting); see *supra* text accompanying notes 3-4 for the stated purpose of the Employment Security Law.

35. *Josey*, 322 N.C. at 301-02, 367 S.E.2d at 679 (Martin, J., dissenting).

36. *Id.* (Martin, J. dissenting).

37. *Id.* at 302, 367 S.E.2d at 679.

38. Act of Feb. 24, 1977, ch. 26, 1977 N.C. Sess. Laws 19 (codified as amended at N.C. GEN. STAT. § 96-14(2) (1988)).

represented the culmination of a trend in North Carolina toward harsher treatment of workers discharged for misconduct.[39]

From its original enactment, the Employment Security Law has postponed or canceled benefits to workers disqualified for misconduct. The 1936 statute disqualified such employees for the week in which the discharge occurred, and for one to nine additional weeks, depending on the circumstances in each case.[40] This provision stood until 1943 when the general assembly increased the postponement to the week of discharge plus five to twelve additional weeks.[41] The 1943 amendment also reduced the benefits that the worker could receive after the disqualification had expired.[42] Finally, the general assembly added North Carolina's first re-entitlement provision: once an individual becomes re-employed, any remaining weeks of disqualification are canceled and cannot affect any subsequent discharge.[43]

The 1943 statute stood without substantial change in the disqualification and re-entitlement provisions until 1977, when the general assembly enacted the current versions.[44] The 1977 amendment made two major alterations. First, it disqualified the worker discharged for misconduct from receiving benefits for the duration of his unemployment, as opposed to the earlier postponement for a certain number of weeks.[45] Second, it included a new re-entitlement provision that is unique among the states: the worker could not requalify for benefits unless he subsequently became unemployed "through no fault of his own."[46]

---

39. *See infra* notes 40-46 and accompanying text.

40. Act of Dec. 16, 1936, ch. 1, § 5(b), 1936 N.C. Pub. Laws 1, 4 (codified as amended at N.C. GEN. STAT. § 96-14(2) (1988)). North Carolina's original misconduct disqualification followed the recommendation of the federal Social Security Board draft bill in adopting the one to nine week postponement. For a general outline of the provisions of the federal draft bill, see Larson & Murray, *supra* note 1, at 196-200.

Sixteen other states similarly have followed the Board's proposal. Eleven states provided for from one to five weeks' disqualification for misconduct. Most other states fell between these two groups. Only three states adopted more stringent provisions, and Washington was the only state to disqualify a worker for the duration of his unemployment. Larson & Murray, *supra* note 1, at 198.

41. Act of Mar. 2, 1943, ch. 377, § 7(b), 1943 N.C. Sess. Laws 364, 366 (codified as amended at N.C. GEN. STAT. § 96-14(2) (1988)).

42. Act of Mar. 2, 1943, ch. 377, § 7, 1943 N.C. Sess. Laws 364, 366-67 (codified as amended at N.C. GEN. STAT. § 96-14(10) (1988)). The amendment reduced the maximum amount of benefits due the employee during his then-current benefit year by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount. *Id.*

The 1943 amendment reflected a general trend among the states toward strengthening the disqualification for misconduct. In 1937, 44 states merely postponed benefits and six added reductions or cancellations of benefit rights. By 1944 the latter group had increased to 21 states. Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147, 147 n.1 (1945).

43. Act of Mar. 2, 1943, ch. 377, § 7, 1943 N.C. Sess. Laws 364, 367 (codified as amended at N.C. GEN. STAT. § 96-14(10) (1988)).

44. Act of Feb. 24, 1977, ch. 26, § 1(10), 1977 N.C. Sess. Laws 19, 20-21 (codified as amended at N.C. GEN. STAT. § 96-14 (1988)).

45. *Id.* § 1, 1977 N.C. Sess. Laws at 19-20. In 42 states, discharge for misconduct now results in a disqualification for benefits for the duration of the worker's unemployment. U.S. DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-35 to 4-37 (1988).

46. Act of Feb. 24, 1977, ch. 26, § 1(10)(b), 1977 N.C. Sess. Laws 19, 21 (codified as amended at N.C. GEN. STAT. § 96-14(10)(b) (1988)). For a general comparison of state unemployment compensation statutes, see U.S. DEPARTMENT OF LABOR, *supra* note 45.

The statute does not address, and therefore the court in *Josey* was forced to resolve, the apparent inconsistency between a disqualification that disallows benefits for the duration of a worker's unemployment and a re-entitlement provision that mandates a no-fault discharge from subsequent employment. The court had two possible interpretations: (1) "Subsequent employment" under section 96-14(10) means *any* subsequent employment, and "duration of unemployment" must therefore continue even though the worker becomes re-employed; or (2) "duration of unemployment" under section 96-14(2) can only mean that period until the worker becomes re-employed, and the re-entitlement provisions only affect benefits from the original employment, not *all* subsequent employments.

No matter which position the court chose, it was forced to twist the language of the statute. On the one hand, it seems obvious that "duration of unemployment" means the time during which a worker is unemployed, and that the "duration" ends when the worker gets a new job. On the other hand, section 96-14(10) states simply that the permanently disqualified worker, in order to gain a new entitlement to benefits, must "[s]ubsequently become unemployed through no fault of his own,"[47] without distinguishing between the original and subsequent employments.

Although the majority did not wrestle specifically with the meaning of "duration of unemployment," its decision by implication results in a period of what may be termed "dormant unemployment." During dormant unemployment the worker is employed, but the duration of his original unemployment continues. Therefore, the supreme court, albeit unintentionally, introduced into the interpretation of the Employment Security Law a legal fiction operating against the discharged worker.[48] This legal fiction of dormant unemployment, as Justice Martin noted, goes against the rule that disqualifications may not be enlarged by implication.[49]

The dissent also stretched the statutory language. That the "clear purpose" of section 96-14(10) is only to prevent Josey from receiving benefits from Gold Bond and not from *any* subsequent employment is not nearly so apparent as the dissent argued.[50] The statute makes no mention of limiting the disqualification to any particular employment. Further, the dissent's position would transform a permanent disqualification into a temporary disqualification by limiting its effect to denying benefits only from the original employment. Finally, to limit the permanent disqualification to Josey's original employment at Gold Bond would soften the deterrent effect of the permanent disqualification provision. That is, if the no-fault discharge requirement does not pertain to *any* subsequent employment, the incentive for good behavior on the second job is substantially

47. N.C. GEN. STAT. § 96-14(10)(b) (1988).

48. A legal fiction is an "[a]ssumption of fact made by [a] court as [the] basis for deciding a legal question." BLACK'S LAW DICTIONARY 804 (5th ed. 1979). In this case the assumption is that the worker is unemployed, whether or not the worker is actually unemployed.

49. *Josey*, 322 N.C. at 301, 367 S.E.2d at 679 (Martin, J., dissenting) (citing *In re* Watson, 273 N.C. 629, 639, 161 S.E.2d 1, 10 (1968)).

50. *See id.* at 301, 367 S.E.2d at 679 (Martin, J., dissenting).

reduced.[51]

If the language of the Employment Security Law provides no clear resolution to the controversy in *Josey*, some answers may be found by examining the legislative intent of the statute. The stated purpose of the statute is to provide benefits for persons "unemployed through no fault of their own."[52] At first glance, this declaration of intent seems to exclude from benefits all employees who are discharged for misconduct. That view is belied by the fact that the 1936 legislature did not cancel, but only postponed, benefits for workers discharged for misconduct.[53] The resolution of this apparent contradiction between statutory policy and provisions lies in the historical setting of the statute.

During the Great Depression of the 1930s, unemployment in the United States was at an all-time high. In 1933 approximately one in four American workers in the civilian labor force was unemployed, often for prolonged periods.[54] In such a severely depressed economic setting, the cause of an individual's continuing unemployment could not be pinpointed as a single act of misconduct. In such a case, even if the initial reason for a worker's unemployment was misconduct or some other act meriting discharge, after a week, or a month, or a year of searching for a job during a period of massive unemployment, causation ceases to be attributable to the worker and shifts to the economic situation in which he finds himself.[55]

The 1936 disqualification provision, in setting a one-to-nine week disqualification, recognized these economic realities and postponed benefits accordingly.[56] Under that provision, a worker's own contribution to the cause of his unemployment was accounted for by a postponement proportional to his fault, but he was not blamed for an economic situation that lay far beyond his control. The general assembly apparently understood that whatever cause prompted the individual's unemployment, at some point after discharge it genuinely became involuntary. Thus, under the original statute, no inconsistency existed between the policy of helping only the involuntarily unemployed and providing postponed benefits for workers discharged for misconduct.

Statutes such as the 1936 law fall under a category known as "causal theory" statutes.[57] Under this theory, the disqualification provision is intended to carry out the general purpose of providing unemployment compensation benefits

51. Of course, the possibility of a second permanent disqualification for a second act of misconduct or other reasons still would exist in the second employment. As in *Josey*, however, an employee could be discharged from a second employment for substantial fault, resulting in a disqualification for a certain number of weeks, and still receive postponed benefits under the dissent's view. *Id.*

52. N.C. GEN. STAT. § 96-2 (1988).

53. Act of Dec. 16, 1936, ch. 1, § 5(b), 1936 N.C. Pub. Laws 1, 4 (codified as amended at N.C. GEN. STAT. § 96-14(2) (1988)). For a history of the misconduct disqualification in North Carolina, see *supra* notes 40-46 and accompanying text.

54. G. REJDA, SOCIAL INSURANCE AND ECONOMIC SECURITY 329 (1984).

55. This is true of a discharge in a less drastically depressed economy as well. If one is fired from a position, and no other jobs are available, after a certain period the worker's original discharge can no longer be deemed the reason for his unemployment.

56. Act of Dec. 16, 1936, ch. 1, § 5(b), 1936 N.C. Pub. Laws 1, 4 (codified as amended at N.C. GEN. STAT. § 96-14(2) (1988)).

57. *See* Kempfer, *supra* note 42, at 149-53.

to those who are involuntarily unemployed. The rationale is that when a worker becomes unemployed due to his own act, his unemployment is caused by that act, at least for a limited period.[58] If the causation principle is followed logically, no disqualification occurs when intervening employment breaks the causal connection between the disqualifying act and the resulting unemployment.[59] The misconduct resulting in the worker's discharge from the first job is simply too remote to have a reasonable relation to the worker's later unemployment.[60]

The 1943 amendment maintained the causal theory approach. The re-entitlement provision of that amendment allowed a worker to remove his disqualification merely by gaining new employment.[61] This second job broke the chain of causation between his original discharge and any subsequent unemployment.

The 1977 amendment, by instituting a permanent disqualification and establishing the re-entitlement condition of no-fault discharge from subsequent employment, abandoned the causation theory that had characterized the statute to that point.[62] The current statute no longer provides for an allowance for economic hard times; instead it permits an act of misconduct to disqualify a worker from benefits indefinitely, regardless of conditions in the labor market. Thus, a permanently disqualified worker and his family may suffer economic hardship for an extended period without benefits, even if no jobs are available.

The current law exemplifies what have been termed "penalty theory" statutes;[63] that is, the disqualifications are so severe as to operate as penalties. As penalties, however, the disqualification provisions are inconsistent with punishing misconduct, since of those workers who commit the disqualifying acts, only those who seek unemployment benefits are punished.[64] The Employment Security Law does not apply statutory sanctions to misconduct per se, but only in connection with claims for benefits.[65] For example, had Josey not applied for benefits from his employment with Gold Bond, he would have applied with a clean slate following his employment with Gang-Nail. In other words, the punishment fell on him not when he engaged in misconduct, but when he applied for benefits. Therefore, the intended punishment falls unequally on those who attempt to take advantage of the unemployment compensation system.[66]

---

58. Kempfer, *supra* note 42, at 149.

59. Kempfer, *supra* note 42, at 153.

60. Kempfer, *supra* note 42, at 153.

61. Act of Mar. 2, 1943, ch. 377, § 7, 1943 N.C. Sess. Laws 364, 366-67 (codified as amended at N.C. GEN. STAT. § 96-14(10) (1988)).

62. Act of Feb. 24, 1977, ch. 26, § 1(2), (10), 1977 N.C. Sess. Laws 19, 20-21 (codified as amended at N.C. GEN. STAT. § 96-14(2), (10) (1988)).

63. Kempfer, *supra* note 42, at 148.

64. *Id.* Justice Martin noted this inconsistency, but his criticism was aimed at the majority opinion, not the statute itself. *Josey*, 322 N.C. at 301, 367 S.E.2d at 679 (Martin, J., dissenting).

65. Kempfer, *supra* note 42, at 148.

66. In spite of the inequality that results from the North Carolina disqualification provision, it is unlikely that Josey or other claimants successfully could advance a constitutional equal protection argument. In Dandridge v. Williams, 397 U.S. 471 (1970), the United States Supreme Court rejected an equal protection challenge to the administration of the Aid to Families with Dependent Children (AFDC) program. Justice Stewart's majority opinion stated:

> [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the 14th Amendment only because

Of those workers who are penalized by permanent disqualification, the punishment falls hardest on those who are unemployed for long periods.[67] These workers and those dependent on their income may suffer depleted savings, burdensome debt accumulation, and even homelessness as a result of unemployment. Moreover, re-employment is more difficult for some groups than for others. Black and Hispanic workers, for example, typically have an unemployment rate significantly above the national average.[68] Permanent disqualification for such individuals has an especially harsh impact.

North Carolina has been fortunate in that, except for brief periods of recession in 1981 and 1982, it has enjoyed a steady increase in insured employment since 1980.[69] Many economic forecasters predict an impending downturn in the national economy,[70] which could affect severely the employment picture in North Carolina and across the country. A permanent disqualification in the midst of such conditions could mean grave consequences for the unemployed worker.

In spite of the harshness of the permanent disqualification, North Carolina is not out of step with other states in disqualifying workers discharged for misconduct for the duration of their unemployment. Indeed, 42 states now have such a provision,[71] reflecting the trend toward more severe, penalty theory stat-

---

the regulation results in some disparity in grants of welfare payments to the largest AFDC families . . . .

. . . .

In the area of economic and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution . . . .

Id. at 484-85.

Punishment of misconduct, even if all are not punished equally, would likely be considered a "reasonable basis," satisfying the constitutional test.

67. Of the total number of unemployed workers at a given time, a significant percentage remain out of work for several months. For example, in January, 1983 11.4 million workers, or 10.2% of the American labor force, were unemployed. About one-third of those workers were unemployed for less than five weeks. Of those remaining, 4.6 million were out of work for at least 15 weeks, and 2.7 million were unemployed for at least 27 weeks. G. REJDA, *supra* note 54, at 332.

68. In January, 1983, the unemployment rate for white workers was 9.1%. For blacks, it was 20.8%; for Hispanics, 15.5%. G. REJDA, *supra* note 54, at 337.

69. LABOR MARKET INFORMATION DIVISION, EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, EMPLOYMENT AND WAGES IN NORTH CAROLINA 4 (1986). "Insured employment" covers about 90% of the total nonagricultural employment in North Carolina. Excluded from coverage are some agricultural workers, some domestic services in private homes, religious and charitable organizations, interstate railroads, family workers, and the self-employed. *Id.* at 1.

70. For example, former Congressional Budget Office Director Rudolph Penner recently predicted a recession for 1989. N.Y. Times, Feb. 18, 1988, § 2, at 6, col. 1.

71. U.S. DEPARTMENT OF LABOR, *supra* note 45. *See, e.g.*, GA. CODE ANN. § 34-8-158(2)(a) (Supp. 1987) (worker disqualified until he has been employed in insured employment and has earned wages equal to at least eight times his weekly benefit amount); MISS. CODE ANN. § 71-5-513(d)(1)(b) (Supp. 1987) (same); FLA. STAT. § 443.101(2) (Supp. 1988) (worker disqualified until he has earned 17 times his weekly benefit amount).

For an example of a provision that retains a disqualification for a certain number of weeks, see COLO. REV. STAT. § 8-73-108(5) (1986) (worker disqualified for 10 weeks). Missouri disqualifies a worker from four to 16 weeks, or until the worker has earned at least 10 times his weekly benefit amount. MO. REV. STAT. § 288.050(2) (Supp. 1988).

A few states have a harsher disqualification for gross misconduct, which generally means criminal activity. *E.g.*, KAN. STAT. ANN. § 44-706(b) (1986) (for misconduct, worker disqualified until he has earned three times his weekly benefit amount; for gross misconduct, eight times the amount).

utes.[72] Most states disqualifying workers for the duration of their unemployment allow the worker to gain a re-entitlement to benefits by becoming re-employed and working for a designated number of weeks or earning a designated amount of total wages.[73] Such provisions, although still operating to deprive the involuntarily unemployed worker of benefits in economically depressed periods, do allow a worker to gain some security from the knowledge that once the requisite number of weeks or amount of wages is gained, his entitlement to benefits is assured.

North Carolina's re-entitlement provision bears a similarity to those enacted by other states in that it also requires a worker to return to work for at least five weeks and be paid cumulative wages of at least ten times his weekly benefit amount.[74] If the statutory re-entitlement were limited to fulfilling this requirement, North Carolina's statute would be in the mainstream of unemployment compensation law, only slightly more severe than the majority of states.[75] The requirement of no-fault discharge from subsequent employment sets North Carolina's statute apart from the law of every other state.

In *Josey* the supreme court had the opportunity to interpret the no-fault discharge provision to mitigate its effect and thus to bring North Carolina into conformity with other states. Limiting the application of the no-fault discharge requirement to entitlement to benefits only from Josey's employment at Gold Bond, as the dissent urged, effectively would eliminate the no-fault discharge provision from the statute in this case.[76] Josey was not contesting his disqualification for benefits from his employment at Gold Bond. That permanent disqualification remained and would not have been affected by any outcome in this case. The no-fault discharge requirement was contested only insofar as it applied to Josey's employment at Gang-Nail. Therefore, limiting the requirement's application to Josey's entitlement to benefits from Gold Bond would have neutralized completely its effect in this case.

Such a result would mean that a worker like Josey, permanently disqualified from benefits from one employment, would be entitled to postponed benefits from a second employment, provided he achieved the requisite duration and wage requirements.[77] The dissent's proposed result, however, would not affect such a worker if he sought benefits from the original employment as well. Even if the individual had accumulated a significant number of weeks of benefit entitlement from the original employment, the no-fault discharge provision would continue to bar him from benefits from that employment upon anything less than no-fault discharge.[78]

---

72. G. REJDA, *supra* note 54, at 377.

73. *See* U.S. DEPARTMENT OF LABOR, *supra* note 45, at 4-35 to 4-37.

74. N.C. GEN. STAT. § 96-14(10)(a) (1988).

75. *See* U.S. DEPARTMENT OF LABOR, *supra* note 45, at 4-35 to 4-37.

76. *Josey*, 322 N.C. at 301, 367 S.E.2d at 679 (Martin, J., dissenting).

77. N.C. GEN. STAT. § 96-14(2A) (1988).

78. For example, in this case Josey had accumulated 18 weeks of entitlement to benefits from his employment at Gold Bond. If the no-fault discharge provision were eliminated, Josey would have become re-entitled to those benefits after working at Gang-Nail for five weeks and earning 10 times his weekly benefit amount. *See* N.C. GEN. STAT. § 96-14(10)(a) (1988). Upon discharge from

Justice Martin and the other dissenters, however, cannot be blamed for failing to advocate the total elimination of the no-fault discharge requirement.[79] The dissent went as far as possible under the current statutory language by voting to neutralize the provision in this case. The task of eliminating the no-fault discharge requirement belongs to the general assembly.

There are at least three possible courses of action available to the general assembly in amending the Employment Security Law to eliminate or reduce the impact of the no-fault discharge requirement. The first and most obvious choice is simply to remove it from the statute. Such a solution has the advantage of simplicity and the welcome effect of putting North Carolina into the mainstream among the states. The disadvantage of such a choice for many is that it would rid the statute of a deterrent mechanism for encouraging good behavior on the job. Other states' programs function without the requirement, however, and it seems likely that the permanent disqualification provision alone would operate as a sufficient deterrent against misconduct.

Second, and less drastically, the legislature could amend the statute to order the ESC to reduce an employee's original permanent disqualification upon discharge for substantial fault from a second employment. The ESC currently has the discretion to reduce a permanent disqualification to not less than five weeks upon a showing of good cause.[80] Such an amendment would have the effect of further postponing the employee's benefits following the second employment, but he would not lose benefits from his original employment entirely. The provision also could be strengthened by mandating a reduction in the weekly benefit amount for benefits from the original employment. This amendment would take into account the service of the worker to his original employer by allowing him to receive at least postponed and perhaps reduced benefits from his original employment, instead of nullifying that service by completely denying benefits.

Third, the ESC could retain its discretion to reduce a permanent disqualification to a postponement, but the "good cause" that currently triggers the ESC's discretionary power could be amended to include explicitly the employment conditions in the state. Possible specific changes include requiring the ESC to consider an unemployment rate above a certain percentage to be good cause for reduction, or simply including general economic conditions among the factors determining whether an employee has shown good cause. Such an amendment would mark at least a partial return to the well-considered causal theory of un-

---

Gang-Nail, he would have been entitled to those 18 weeks plus his entitlement from his employment at Gang-Nail, following his period of postponement for discharge for substantial fault with mitigating circumstances.

Under the dissent's view, Josey would be entitled only to the benefits from his employment at Gang-Nail. Thus, the discharge for fault from Gang-Nail still operated to nullify 18 weeks of benefits accumulated by Josey through his service to Gold Bond.

79. When a statute is in need of amendment, it is the duty of the legislature, not the courts, to change it. "As long as [the legislative body] does not exceed its powers, the courts are not concerned with the motives, wisdom, or expediency which prompts its actions. These are not questions for the court but for the legislative branch of the government." State v. Camp, 286 N.C. 148, 153, 209 S.E.2d 754, 757 (1974).

80. N.C. GEN. STAT. § 96-14(10) (1988).

employment compensation by making an allowance for conditions beyond the worker's control, while retaining the current provisions in times of greater employment opportunity.

Each of these proposed changes would have the effect of easing what is a singularly harsh provision of North Carolina's unemployment compensation statute. Until the general assembly acts to amend the statute, the courts' options for effecting beneficial change are limited.

The *Josey* court, however, did nothing to ease the severity of the no-fault discharge requirement. Its reliance on the "plain words" of section 96-14(10) caused it to ignore the history and policy of the Employment Security Law, the potentially brutal consequences of extended unemployment, and the unfortunate irony that only the employee who seeks benefits is penalized, leaving other equally guilty workers free to apply with a clean slate. By its ruling, the court aggravated the results of the no-fault discharge requirement, which in times of economic hardship may mean increased burdens on the unemployed workers of North Carolina.

CHRISTOPHER T. GRAEBE