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* Garth Glissman, B.A., with Highest Distinction, 2005, University of Nebraska-Lincoln; J.D. expected 2009, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Member, 2007-08). Thanks to my parents, Blayne and Susan Glissman, and my brother, Taylor Glissman, for teaching me to love, work and believe, and for your immeasurable support throughout each chapter in my life. Thanks also to two professors whose influence during pivotal moments of my education changed the trajectory of my life: Peter Maslowski, my undergraduate history professor and mentor, for teaching me how to write; and Luke Meier, my first-year Torts professor for instilling confidence in me during my first year of law school. And thanks to all the family, teachers, classmates, coaches, teammates, and friends who have shaped me and will always be a part of me.
Designed to promote economic and judicial efficiency, Nebraska's at-will employment doctrine is rooted in the notion that employers (rather than courts) are best positioned to manage the workplace.\(^1\) Yet application of a rule that enables employers to terminate employees at any time for any reason—absent constitutional, statutory, or contractual limitations—can lead to harsh results.\(^2\) Given the imbalance in power and resources between employers and employees, the need to balance efficiency with fairness manifests itself in common law exceptions to the at-will employment doctrine.\(^3\) Most frequent


[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.


3. Epstein, *supra* note 1, at 949. Epstein stated:

"It is a widely accepted proposition that large corporations now pose a threat to individual freedom comparable to that which would be posed if governmental power were unchecked. The proposition need not, however, be limited to the mammoth business corporation, for the freedom of the individual is threatened whenever he becomes dependent upon a private entity possessing greater power than himself. Foremost among the relationships of which this generality is true is that of employer and employee." The contract at will is thus thought to be particularly unwise because it invites the exercise of arbitrary power by persons with a dominant economic position against individuals whose mobility is said to be limited by the structure of the labor markets.

among these is a common law exception that forbids employers from terminating employees when doing so clearly violates public policy.4

In Nebraska and elsewhere, courts engage in an efficiency versus fairness tug-of-war to determine the proper scope of the public policy exception. Where the exception is widened, theory suggests that a more employee-friendly workplace is achieved at the expense of economic and judicial efficiency as employers and courts become increasingly entangled in litigating workplace disputes.5 Where the exception is narrow, theory suggests that employers are empowered to manage employees as they see fit. A more responsive and productive workforce is achieved resulting in increased overall economic efficiency, but employees have less legal protection from employers. In addition to debating the merits of the public policy exception, courts struggle with whether such policy concerns should be left entirely to the state legislature.6

In Trosper v. Bag 'N Save,7 the Nebraska Supreme Court addressed whether an employee's demotion for seeking compensation rightfully owed him under the State's workers' compensation laws falls within the State's public policy exception to the at-will employment doctrine. Already having recognized a public policy exception when an employee is discharged for seeking compensation under the State's workers' compensation laws,8 the specific issue facing the Court was whether retaliatory demotion should be protected to the same extent as retaliatory discharge.9

Part II of this Note provides the background law relevant to Trosper. Section A offers a brief synopsis on Nebraska's at-will employment doctrine and application of the public policy exception. Section B summarizes the majority, concurring, and dissenting opinions in Trosper. Section C addresses case law from other jurisdictions that the Court extensively relied on in Trosper. The crux of this Note is the Analysis contained in Part III, which is broken into two closely related sections. Section A contends that Trosper reached the proper conclusion by holding that a private right of action for retaliatory demotion is necessary when a private right of action for retaliatory discharge has already been recognized, but recognizes that doing so inserts ambiguity into the law. Section B seeks to resolve that ambiguity by providing a guidebook for courts and employers dealing with the nebulous

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4. Frank J. Cavico, Employment at Will and Public Policy, 25 Akron L. Rev. 497 (1992) ("The most widely-accepted and expansive approach employed by the courts emerges as the 'public policy' exception.").
5. Epstein, supra note 1.
9. Trosper, 273 Neb. at 856, 734 N.W.2d at 706.
concept of retaliatory demotion. Part IV offers some concluding thoughts on how courts and employers should address the post-*Tros-per* ambiguity.

II. BACKGROUND

A. Nebraska's Public Policy Exception to the At-Will Employment Doctrine

Nebraska's clear and frequently cited at-will employment doctrine provides that "unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason." Though such language allows employers to manage their workforce without judicial interference, an employer's ability to hire and fire employees is not without limitation. To "temper . . . harsh and unjust results from the rigid application" of the rule, Nebraska's common law recognizes a public policy exception to the at-will employment doctrine, under which an employee can claim damages for wrongful discharge when the court holds that the motivation for the firing clearly contravenes public policy. As a way of keeping the public policy exception within a clear and manageable standard, Nebraska recognizes a mandate of public policy only where criminal sanctions or explicit statutory directives exist, or legislative intent is easily ascertainable.

Nebraska's Supreme Court first applied the public policy exception in *Ambroz v. Cornhusker Square Ltd.*, where the plaintiff-employee was discharged for refusing the defendant-employer's demand to submit to a polygraph examination. Finding the requisite public policy expressed in *NEB. REV. STAT. § 81-1932* (Reissue 1981), which provided that "[n]o employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination," the Court

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held that the discharge was a “violation of a clear, statutorily mandated public policy.”

The background case most relevant to Trosper—Jackson v. Morris Communications—involved an employee who was discharged after filing a workers’ compensation claim. The Jackson Court noted that the Nebraska Workers’ Compensation Act (NWCA) “does not specifically prohibit an employer from discharging an employee for filing a claim, nor does it specifically make it a crime for an employer to do so.” However, the Court noted that other jurisdictions recognize an exception, even in the absence of a specific statutory prohibition, based on the policy merits of promoting economic security for injured employees and their dependents. Similarly, the Court recognized that it has consistently given the NWCA a “liberal construction to ‘carry out justly the spirit of the [NWCA].’” Because “a rule which allows fear of retaliation for the filing of a claim undermines that policy,” the Court held that a public policy exception to Nebraska’s at-will employment doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for seeking workers’ compensation.

B. Trosper v. Bag ‘N Save

1. Facts

While employed as a “deli manager” for Bag ‘N Save, Kimberlee Trosper suffered a work-related injury that required medical treatment. After reporting her injury to Bag ‘N Save and filing for compensation under the NWCA, the company demoted Trosper from “deli manager” to “deli clerk.” Bag ‘N Save also reduced Trosper’s annual salary from $30,100 to $22,500. Though Trosper was demoted rather than discharged, Trosper brought an action against her employer, alleging that Bag ‘N Save acted in a retaliatory manner con-
Bag 'N Save moved to dismiss the action, alleging that the complaint failed to state a claim upon which relief could be granted. Because Nebraska law did not recognize a private cause of action for retaliatory demotion, the trial court sustained the motion and dismissed the complaint. Trosper appealed, arguing that demotion, like discharge, frustrated the public policy underlying the NWCA.

2. Majority and Concurring Opinions

Using Jackson as a framework for its analysis, the Court noted that when it created a private remedy for employees who had been discharged in retaliation for seeking workers' compensation, "[the Court] reasoned that 'a rule which allows fear of retaliation for the filing of a claim undermines [the important public policy of the NWCA].' And [the Court] stated that 'the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal.'" Accordingly, the Court concluded that allowing employers to demote an employee for filing a workers' compensation claim would circumvent the policy in Jackson and thus a private remedy for retaliatory demotion was required:

An employee's right to be free from retaliatory demotion for filing a worker's compensation claim is married to the right to be free from discharge. Demotion, like termination, coercively affects an employee's exercise of his or her rights under the [NWCA]. If we fail to recognize a claim for retaliatory demotion, it would create an incentive for employers to merely demote, rather than discharge, employees who exercise their rights. To promote such behavior would compromise the act and would render illusory the cause of action for retaliatory discharge. Thus, we believe that extending the tort created in Jackson to include retaliatory demotion is a logical step, and one which gives vitality to that decision.

The majority and concurring opinions also rebutted the prevailing arguments against extending the public policy exception to include retaliatory demotion. First, the Court dismissed the distinction between discharge and demotion as uncompelling. "Although Jackson specifically addressed discharge," the Court explained, "the intent in Jackson was to protect the important public policy and beneficent purpose of the [NWCA]. Although demotion is less harsh than dismissal, nevertheless, it would shrink an employee's right to pursue workers' compensation." Employees' fear of demotion would reduce their
willingness to file for workers' compensation rightfully owed them and thus circumvent the policy of the NWCA.

Next, recognizing that Trosper may result in increased litigation of workplace disputes, the majority opinion admitted that, "allowing a cause of action for retaliatory demotion could result in claims for other retaliatory conduct." Despite promising to "deal with those concerns case-by-case," the majority opinion provided little guidance for doing so. The concurring opinion, however, went to great lengths to dispel this ambiguity, suggesting application of the United States Supreme Court's McDonnell Douglas burden-shifting analysis as an analytical framework for resolving retaliatory demotion cases. The McDonnell Douglas burden-shifting analysis has frequently been applied by Nebraska's highest court in employment discrimination cases, most recently in Riesen v. Irwin Industrial Tool Co.

Finally, both the majority and concurring opinions acknowledged that the NWCA does not contain a statutory prohibition that prevents employers from terminating or retaliating against employees who seek compensation under the NWCA, but nevertheless warrants judicial intervention when employers do so. The majority opinion cited other states which have recognized similar public policy exceptions absent a clear statutory ban. It also noted that the NWCA serves the important public purpose of protecting injured workers and their dependents from the adverse economic effects of work-related injuries. "This duty 'would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of dis-

29. Id. at 866, 734 N.W.2d at 712.
30. Id.
32. Trosper, 273 Neb. at 868, 734 N.W.2d at 713 (Gerrard, J., concurring).
35. Trosper, 273 Neb. at 859, 734 N.W.2d at 707–08.
charge.” The concurring opinion emphasized that enactment alone of the NWCA represents the public policy of this State and the Court’s holding merely upholds the Legislature’s intent.

3. Dissenting Opinion

Singing the old-and-familiar tune that judges should not legislate from the bench, the dissent concluded that “whether or to what extent the public policy considerations underlying the NWCA require or warrant regulation of the terms and conditions of an existing at-will employment relationship” should be left for the Nebraska Legislature to decide. As the dissent pointed out, “[t]he Legislature has enacted statutes prohibiting retaliation or discrimination based upon an employee’s exercise of certain statutory rights,” but no statutory prohibition exists in the NWCA. By holding that “an implicit declaration of public policy can serve as the basis of an employment discrimination claim in a nondischarge situation,” the majority opinion acts as though such a statute does exist.

Despite concluding that policy concerns should be left entirely to the state legislature, the dissent did not resist inserting a policy argument of its own. Specifically, the dissent argued that an employer should be free to determine the makeup of its workforce without judi-

36. Id. at 859, 734 N.W.2d at 708 (quoting Jackson v. Morris Commc’ns Corp., 265 Neb. 423, 431, 657 N.W.2d 634, 640 (2003)).
37. Id. at 872, 734 N.W.2d at 715 (Gerrard, J., concurring) (“[I]t was the very point of [Jackson] that the Legislature has declared the public policy of this state, by enacting the [NWCA].”)
38. Fahleson, supra note 6, at 975 n.96 (“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.” (quoting THE FEDERALIST No. 47 (James Madison))). Justice Scalia made this same basic argument in Webster v. Reprod. Health Servs., 492 U.S. 490 (1989). For an excellent summary of Scalia’s argument, see David B. Anders, Note, Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O’Connor and Justice Scalia Over Enumerated Fundamental Rights, 61 FORDHAM L. REV. 895, 910–11 (1993):

Justice Scalia’s stance exemplifies the representative democratic view of our governmental system. Scalia insists that Justices’ personal views should not replace the will of the people. Our system does not grant judges the power to instill their values in law, but only the power to protect specifically enumerated constitutional rights. To receive additional protections, citizens can create other enforceable liberties through the legislative process.

Id. at 911.
41. Id. at 875, 734 N.W.2d at 717–18 (Stephan, J., dissenting).
cial oversight. As a result of *Trosper*, the dissent predicted that Nebraska’s courts would become increasingly entangled in workplace disputes. In particular, the dissent anticipated numerous scenarios in which employers would be unfairly restricted when dealing with employees who fall under *Trosper*’s protective umbrella:

>The reality is that a job-related injury may bring about legitimate changes in an employment relationship. A workers’ compensation claimant may be temporarily or permanently prevented from performing job requirements by the physical effects of the injury. Will a transfer to a different position, perhaps at a reduced wage, in order to accommodate the worker’s diminished physical abilities, now be deemed a retaliatory demotion? An employee who has filed a workers’ compensation claim is subject to the employer’s work rules to the same extent as other employees. Will routine disciplinary actions involving workers’ compensation claimants now be the basis for a retaliation lawsuit? If there is a restructuring necessitated by changing business conditions, will the employer be required to exempt workers’ compensation claimants from any changes in hours or job status in order to avoid a retaliation claim? Will an employer be prevented from taking measures to address the unsatisfactory job performance of an employee who has a pending workers’ compensation claim?6

**B. Other States’ Case Law Discussed in *Trosper***

The question of whether a private right of action for retaliatory discharge of employees who file workers’ compensation claims should be expanded to include retaliatory demotion was an issue of first impression in Nebraska. Consequently, the Court examined the rulings of three states—Illinois, Kansas, and Utah—that previously addressed the same question. Each court reached a different conclusion. In Illinois, an employee may not be fired for seeking compensation under the State’s workers’ compensation laws. But in response to an employee’s pursuit of rights lawfully owed him under Illinois workers’ compensation laws, an employee may be unjustifiably demoted (in job status or reduced salary) without protection from the state’s public policy exception to the at-will employment doctrine. This is not the case in Kansas where retaliatory discharge and demotion both violate public policy because, as the Supreme Court of Kansas noted, the damage to the employee differs in degree only. Utah’s Supreme Court has taken yet a different route and carved out a middle ground: an employer’s retaliation or discrimination against an employee for

42. *Id.* at 873–75, 734 N.W.2d at 716–17 (Stephan, J., dissenting). This view is consistent with the traditional common law rule that an employer could terminate an employee “for good cause, for no cause or even for cause morally wrong.” *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. at 518–19 (1884), *overruled on other grounds by*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

43. *Trosper*, 273 Neb. at 874–75, 734 N.W.2d at 717 (Stephan, J., dissenting).


seeking workers' compensation does not trigger a public policy exception to the at-will employment doctrine unless the retaliation rises to the level of a constructive or actual discharge. A constructive discharge occurs when a reasonable employee would consider the working conditions intolerable. The Illinois and Utah opinions—because they reached conclusions different than *Trosper*—provide especially helpful points of comparison and thus are the focus of this section.

1. **Illinois: Zimmerman v. Buchheit of Sparta, Inc.**

Like Nebraska, Illinois recognizes a private cause of action for retaliatory discharge when employees are fired for seeking compensation owed them under the State's workers' compensation laws. In *Zimmerman v. Buchheit of Sparta, Inc.*, the Illinois Supreme Court addressed whether to extend its private cause of action for retaliatory discharge to include retaliatory demotion. The case involved a plaintiff, Linda Zimmerman, an at-will employee, who filed a complaint against her employer and claimed that her employer "demoted and discriminated against" her when she sought compensation under the Illinois Workers' Compensation Act (IWCA). Although she conceded that her complaint did not state a cause of action for retaliatory discharge, Zimmerman argued that "there must be some comparable doctrine, to protect employees from other distinct measures of retaliation, short of an actual discharge." The trial court granted the defendant-employer's motion to dismiss for failure to state a cause of action. The Illinois Appellate Court reversed, concluding that retaliatory demotion is an impermissible violation of public policy.

47. Touchard v. La-Z-Boy Inc., 143 P.3d 945, 955 (Utah 2006).
50. *Id.* at 878.
51. *Id.* at 878–79 (citing *Kelsay*, 384 N.E.2d 353).
52. Zimmerman v. Buchheit of Sparta, Inc., 615 N.E.2d 791 (Ill. App. Ct. 1993), overruled by 645 N.E.2d 877. The Illinois Appellate Court concluded that recognizing a public policy exception for retaliatory demotion was a necessary extension of the preexisting exception for retaliatory discharge:

Plaintiff has suffered a loss of income and employment, but not a termination of her employment. We see little difference between retaliation by loss of employment by termination and retaliation by reduction in hours and demotion. If the allegations of the complaint are true, the defendant clearly "discriminated" against the plaintiff in violation of the [IWCA].

Under these circumstances, a cause of action could lie to ensure that the public policy behind the enactment of the [IWCA] is not frustrated. It would be a bitter irony if employers were allowed to circumvent the public policy recognized by the supreme court in *Kelsay* and adopted by the [legislature] by performing retaliatory and "discriminatory" actions short of termination. Public policy will not allow employers to frustrate an employee's rights under the Workers' Compensation Act and to avoid
A plurality of the Illinois Supreme Court disagreed. The Court described the virtue of the retaliatory discharge exception as "its narrow and easily identifiable features," and concluded that recognizing a private cause of action for retaliatory demotion would insert ambiguity into the law and increasingly involve courts in workplace disputes. Though "the term 'demotion' may appear amenable to clear definition," the Court noted several uncertainties that would exist if a private cause of action existed for retaliatory demotion: "Is a demotion in title or status, but not salary, actionable? Could a transfer from one department to another be considered a demotion? Would it be fair to characterize as a demotion a significant increase in an employee's duties without an increase in salary?"

The concurrence agreed with the plurality's holding that there is no implied cause of action for retaliatory demotion under the IWCA, but emphasized the inconsistency in recognizing a private cause of action for retaliatory discharge and not doing so for retaliatory demotion. "[I]f we do not have a cause of action for retaliatory demotion, we, in effect, will not have a cause of action for retaliatory discharge. We have invited those who wish to discharge in retaliation to simply demote in retaliation, and thereby escape the effect of the law." The concurrence argued that the only explanation for this "apparent inconsistency" is an outright acknowledgment that the Court erred by

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statutorily imposed duties by retaining the employee but demoting or reducing the employee's hours.

53. Zimmerman, 645 N.E.2d at 882 ("We decline plaintiff's request to extrapolate from the rationale of Kelsay a cause of action predicated on retaliatory demotion.").

54. Id. ("Retaliatory discharge is considered a limited and narrow exception to the general rule of at-will employment.") (quoting Hindo v. Univ. of Health Scis./Chicago Med. Sch., 604 N.E.2d 463, 468 (Ill. App. Ct. 1992)). Also note that Illinois courts have refused to accept a "constructive discharge" concept. See, e.g., Hinthorn v. Roland's of Bloomington, Inc., 519 N.E.2d 909 (Ill. 1988); Dudycz v. City of Chicago, 563 N.E.2d 1122 (Ill. App. Ct. 1990).

55. Zimmerman, 645 N.E.2d at 882. The court reasoned:

[A]doption of plaintiff's argument would replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept of retaliatory conduct or discrimination. The courts then would be called upon to become increasingly involved in the resolution of workplace disputes which center on employer conduct that heretofore has not been actionable at common law or by statute.

56. Id.

57. Id.

58. Id. at 885 (Bilandic, J., concurring).

59. Id.

60. Id.

61. Id. (Bilandic, J., concurring). The concurrence states:

[It] is my judgment that the only reasonable explanation for the apparent inconsistency between the plurality decision and the Kelsay decision
making an “unwarranted intrusion into the legislative arena to amend the [IWCA] in a manner that the legislature had undoubtedly considered, but declined to adopt.” 62

The dissent called the plurality’s “basic flaw” the failure to realize that “the tort of retaliatory demotion is not a variant of retaliatory discharge, but rather a companion to it.” 63 Under the plurality’s holding, the Court noted that an employer could take extraordinary measures—“demote a Vice President to a stock person, or reduce an employee’s hours from 40 hours per week to 1 hour per week, with complete immunity from the civil justice system.” 64 Clearly, the purpose and spirit of IWCA “would be no less undermined if employers were permitted to discriminate against employees for seeking compensation under the [IWCA] than it would be if they were permitted to discharge such employees.” 65

2. Utah: Touchard v. La-Z-Boy Inc.

In Touchard v. La-Z-Boy Inc., 66 the Utah Supreme Court accepted a question, on certification from the United States District Court for the District of Utah, asking:

Whether the termination of an employee in retaliation for the exercise of rights under the Utah Workers’ Compensation Act (UWCA) . . . implicates a ‘clear and substantial public policy’ of the State of Utah that would provide a basis for a claim of wrongful termination in violation of public policy. 67

In the event that the Utah Supreme Court concluded that it did implicate a clear and substantial public policy, the federal court also asked whether the cause of action applies when: “the employee is not fired but resigns under circumstances that constitute a ‘constructive discharge’;” and “the employee who has filed for benefits under the [UWCA] is neither fired nor constructively discharged, but experiences other discriminatory treatment or harassment from an employer.” 68

is an outright acknowledgment that the Kelsay court erred when it recognized an ‘implied’ cause of action for retaliatory discharge. . . . Recognition of a cause of action for retaliatory discharge was clearly a matter for the legislature and not the courts.

Id.

62. Id. (“[H]ad the legislature thought that recognition of a civil cause of action for retaliatory discharge was desirable or necessary to effectuate the policies underlying the [IWCA], it would have included such a remedy within the statute.”).

63. Id. at 887 (Harrison, J., dissenting).

64. Id. at 882; Brief of Plaintiff-Appellee at 2, Zimmerman, 645 N.E.2d 877 (No. 75793).

65. Zimmerman, 645 N.E.2d at 888 (Harrison, J., dissenting).

66. 148 P.3d 945 (Utah 2006).

67. Id. at 947.

68. Id.
Touchard began by providing a synopsis of Utah's at-will employment doctrine. Although an employer's decision to terminate an employee is presumed to be valid under Utah law, a discharged employee can overcome this presumption if the termination of employment constitutes a violation of clear and substantial public policy. Utah's Supreme Court had previously identified four categories that "invoke a clear and substantial public policy": (1) discharging an employee for 'refusing to commit an illegal or wrongful act'; (2) discharging an employee for 'performing a public obligation'; (3) discharging an employee for 'exercising a legal right or privilege'; and (4) discharging an employee for reporting an employer's criminal activities to the appropriate authorities.

Based on the principle that discharging an employee for exercising a legal right or privilege violates public policy, Touchard held that terminating an employee for seeking workers' compensation violates public policy and thus creates a private cause of action. Out of deference to the state legislature, Touchard declined to extend this cause of action to an employee who has suffered only harassment or discrimination or to an employee who has been retaliated against for opposing an employer's treatment of employees who are entitled to claim workers' compensation benefits. The Court stated that, "[m]uch as we might lament the suffering of an employee who has been harassed for exercising his or her statutory rights, ... employees under these circumstances should look to the legislature to define their recourse against employers who discriminate against them in retaliation for claiming the compensation to which they are entitled."

Another reason for requiring an actual or constructive discharge is that the Court was particularly concerned with potential ambiguity in attempting to find a working definition of actionable retaliatory har-

69. Id. at 948 (quoting Fox v. MCI Commc'ns Corp., 931 P.2d 857, 859 (Utah 1997)).
70. Id. at 948-49 (quoting Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 408 (Utah 1998)).
71. Id. at 953 ("If employers are permitted to penalize employees for filing workmen's compensation claims, ... employees will not file claims for justly deserved compensation—opting, instead to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation." (quoting Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973))).
72. Id. at 960.
73. Id. at 956. The court also noted that many other states have enacted such legislation. See e.g., Conn. Gen. Stat. § 31-290a (2005) (prohibiting the discharge of or discrimination against an employee who has exercised workers' compensation rights and granting employees a private cause of action against employers who violate the statute); Mo. Rev. Stat. § 287.780 (2000) (prohibiting the discharge of or discrimination against an employee who has exercised workers' compensation rights and granting employees a private cause of action against employers who violate the statute); N.C. Gen. Stat. § 95-241 (2005) (prohibiting retaliatory discrimination against employees who have filed workers' compensation claims).
assment and/or discrimination. The Court argued that strict adherence to the discharge requirement was the best way to keep the narrow and easily identifiable parameters of the public policy exception.\textsuperscript{74}

Unique to Utah—in comparison to retaliation law in Nebraska, Illinois, and Kansas—is the concept of constructive discharge.\textsuperscript{75} Noting that other jurisdictions have recognized that a constructive discharge is the same as an actual discharge,\textsuperscript{76} the Court held that a “resignation under working conditions that a reasonable employee would consider intolerable is equivalent to a termination.”\textsuperscript{77} Although constructive discharge (like demotion) lacks the easily identifiable features of a traditional discharge, the Court did not express concern that the concept of constructive discharge would insert ambiguity into the law.

III. ANALYSIS

A. Who Decides—Courts or Legislatures

Although the \textit{Trosper} dissent raises the fundamental and controversial question of whether courts should even venture into the area of shaping public policy or leave policy judgments exclusively to the state legislature, extended inquiry into the proper roles of the three branches of government in America’s representative democracy goes

\textsuperscript{74} \textit{Touchard}, 148 P.3d at 955. The court explained:

\begin{quote}
The concept of discharge is fairly concrete—either the employer actually terminated the employee or the employee resigned under circumstances so unbearable that no reasonable employee could tolerate them. However, discrimination and harassment have the potential to implicate a much broader range of behavior, including demotions, salary reductions, job transfers, or disciplinary actions. If employees were allowed to bring a cause of action for retaliatory discrimination, we fear the “courts would be called upon to become increasingly involved in the resolution of workplace disputes which center on employer conduct that heretofore has not been actionable at common law.”
\end{quote}

\textit{Id.} (citation omitted) (quoting \textit{Zimmerman v. Buchheit of Sparta, Inc.}, 645 N.E.2d 877, 882 (Ill. 1994)).

\textsuperscript{75} \textit{BLACK’S LAW DICTIONARY} 495 (8th ed. 2004) defines constructive discharge as: “A termination of employment brought about by making the employee’s working conditions so intolerable that the employee feels compelled to leave.”

\textsuperscript{76} \textit{See}, e.g., Breitsprecher \textit{v. Stevens Graphics, Inc.}, 772 So. 2d 1125, 1130 (Ala. 2000) (recognizing that an employee who was constructively discharged for claiming workers’ compensation benefits had a wrongful discharge cause of action against her former employer); Sterling Drug, Inc. \textit{v. Oxford}, 743 S.W.2d 380, 381 (Ark. 1988) (upholding a wrongful discharge jury instruction based on substantial evidence of constructive discharge); Casenas \textit{v. Fujisawa USA, Inc.}, 67 Cal. Rptr. 2d 827, 835 (Cal. Ct. App. 1997) (“a constructive discharge is legally regarded as a firing rather than a resignation”).

\textsuperscript{77} \textit{Touchard}, 148 P.3d at 954.
far beyond this Note’s intended scope. Rather, this Note addresses the policy implications of the Court’s holding in Trosper, and provides courts and employers with a guidebook for resolving the post-Trosper ambiguity.

78. For an in-depth analysis of whether courts should defer to the state legislature on public policy matters such as at-will employment, see Fahleson, supra note 6. Fahleson’s basic argument is that in a representative democracy, the legislature is the proper body for determining the public policy of the jurisdiction, as well as the remedies and means of the enforcement of its legislation. Given their fact-finding and deliberative faculties, legislative bodies are better equipped to handle the multi-faceted nature of shaping public policy. Not only do courts lack the resources necessary to make these decisions, the basic structure of our governmental system demands that basic political questions and value judgments be decided through the legislative process. Courts are equipped to make decisions when the record is laid out before them and the facts are confined to the specific case at hand. Thus, a strong presumption against courts implying a private right of action via the public policy exception to employment at-will should exist. Employees should look to the legislature to define their recourse against employers who discriminate against them in retaliation for claiming the compensation to which they are entitled. See id. at 979. Fahleson also argued that the Nebraska State Legislature may have intentionally designed the NWCA not to include a private right of action for employees who are discharged in retaliation for seeking workers’ compensation:

Clearly, it was foreseeable to the legislature that an employer could evade its legal obligation to provide compensation to an injured employee by simply terminating the employee. The legislature may have felt that such an omission was rational, considering the potential damage to reputation, good will and employee morale that employers would undoubtedly experience. The legislature may have concluded that this loss to employers for terminating such employees was an adequate disincentive for employers. Moreover, the legislature may have chosen not to provide a private remedy for fear of a possible flurry of lawsuits alleging wrongful discharge for workers’ compensation benefits.

Id. For an alternative view of the proper role of the judiciary, see Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469 (1981); Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007). These commentators possess an expansive view of the judiciary’s role. They argue that courts serve as fora of principle and privileged sites for the diffusion of human reason, and thus should be permitted, even encouraged, to declare new rights and obligations where they are needed to protect important social values. A more moderate approach might argue that deference to the legislature—though an admirable goal—cannot always be achieved because statutes are inherently open to interpretation, lack the hair-splitting distinctions to effectively resolve complex disputes unanticipated by the legislature, or (in the case of the NWCA) contain loopholes that seemingly undermine its purpose. Where the legislature has not adequately done its job, courts must do it for them.
B. Whether a Private Right of Action for Retaliatory Demotion is Needed When a Private Right of Action for Retaliatory Discharge is Already Recognized

Aside from abandoning precedent by holding that policy concerns related to the NWCA should be left entirely to the legislature, Trosper left the Nebraska Supreme Court with two basic options: holding that (1) a private right of action for retaliatory demotion is an unnecessary extension to the previously recognized cause of action for retaliatory discharge, or (2) a private right of action for retaliatory demotion is an indispensable companion to the private cause of action for retaliatory discharge.

If Nebraska's highest court had elected not to recognize a private cause of action for retaliatory demotion (the approach followed by the Zimmerman plurality and Touchard), the purpose and spirit of the NWCA, which the Court defended so vigorously in Jackson, would have undeniably suffered. Leaving employees unprotected in situations of retaliatory demotion would have given employers an easy way out. Any form of retaliation short of discharge would have been permissible, including a dramatic reduction in salary, status, or responsibility. An Illinois employer, for example, can demote a Vice President to a janitor, or reduce an employee's hours from 40 hours per week to 1 hour per week, with complete immunity from the civil justice system. If Nebraska followed the same approach, employers could have threatened a potential claimant with retaliation short of discharge but substantial enough to deter the filing of a claim. This would have created a workplace climate in which Jackson was virtually irrelevant and the NWCA was subverted.

For economic and ethical reasons, most businesses likely would not have intentionally used retaliatory tactics to reduce their workers' compensation obligations. However, some unscrupulous employers could have subjected employees to an unrestrained intimidation tactic, as long as the retaliation fell somewhere below the level of discharge. An employee might have been forced to settle for an injured or untreated back, shoulder, or knee, rather than risk a significant reduction in salary at the hands of a vindictive employer. The NWCA

79. Trosper v. Bag 'N Save, 273 Neb. 855, 867, 734 N.W.2d 704, 712-13 (2007) (Gerardin, J., concurring) ("[T]he overriding purpose of the [NWCA] would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge. The same is true for retaliation short of discharge—the only difference is the nature and extent of the damage suffered by the employee.").

80. See generally Fahleson, supra note 6, at 979 (quoting RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 155 (Harvard Univ. Press 1992) (To fire or retaliate against employees capriciously is "exceedingly costly to the firm because of its effects on the morale of the remaining workers.").
seeks to ensure that working Nebraskans should not have to make such a choice, yet the dissent would have thrust it upon them. By recognizing a cause of action for retaliatory demotion and thereby prohibiting unscrupulous employers from demoting employees for exercising their rights under the NWCA, the Trosper majority reached the only conclusion capable of upholding the spirit and purpose of Jackson.81

Of course, Trosper also has its downside. With each additional exception to the at-will employment doctrine comes sacrifices in the economic efficiency and administrative stability that the rule provides.82 Employers will inevitably bear the cost of litigating workplace disputes that would not be actionable but for Trosper.83 Employers are also likely to lose time and energy in documenting employment actions taken with respect to employees involved in workers’ compensation claims or in anticipation of litigation.84 Unscrupulous employees may be inclined to fake injuries to temporarily insulate themselves from the prospect of demotion.85 Collectively, these factors will result in some degree of reduced productivity which may have the trickle-down-effect of hurting employees in the way they are compensated, and the quality and quantity of jobs available to them. Yet fundamental notions of fairness—an employee should not be demoted or fired after suffering a work-related injury, the idea that employers are better positioned (economically and otherwise) to bear the brunt of costs associated with work related injuries, and the notion that employees should not be demoted for pursuing a legal right or privilege—justify these economic costs.86 Indeed, the values and logic underlying Tros-

81. Trosper, 273 Neb. at 864, 734 N.W.2d at 710–11.
82. Fahleson, supra note 6, at 979.
83. See Cheryl S. Massingale, At-Will Employment: Going, Going . . ., 24 U. RICH. L. REV. 187 (1990). One commentator has stated:

The current system, which has evolved through judicially created exceptions, is expensive, time consuming, and does not serve either party well. In addition to the uncertainty as to what termination actions will be deemed wrongful, employers are subject to huge damages that are disproportionate to the economic harm suffered by the terminated employee.

Id. at 187.
84. Id.
86. One commentator states:

There are unquestionably terminations that involve outrageous conduct by an employer or circumstances underlying a discharge that are so egregious that the legal system cannot and should not condone the discharge of the wronged employee. Traditionally, there has been considerable disparity between the bargaining positions of the employer and employee, with the employer enjoying the upper hand.

Massingale, supra note 83, at 200–01.
per are consistent with the legislature's enactment of the NWCA and the Court's holding in Jackson.

C. Conceptualizing Retaliatory Demotion in a Way that Minimizes Ambiguity for Courts and Employers

As the Trosper dissent (and the Zimmerman plurality and Touchard majority) emphasized, replacing the well-developed element of discharge with a new, difficult-to-define, and potentially all-encompassing concept of retaliatory conduct or discrimination inserts significant ambiguity into the law. This will require courts to develop new principles for addressing the fairly ambiguous concept of retaliatory demotion. Meanwhile, employers in the post-Trosper era are justifiably confused as to how they should tailor their behavior to avoid legal liability. In particular, employers are left guessing how they should handle changing working conditions or unsatisfactory job performance involving employees with past or pending workers' compensation claims. This uncertainty is especially disconcerting given the tremendous cost and disruption of business that is associated with litigation.

Clearly, Trosper has created many uncertainties among courts and employers. These concerns cannot be dismissed until courts possess an analytical framework capable of resolving them, and employers achieve an understanding of how to comply with the NWCA in the post-Trosper era. This section seeks to achieve those results.

1. A Guidebook for Courts

Whatever ambiguity Trosper has inserted into the law can be resolved by the McDonnell Douglas burden-shifting approach. Courts
have "almost universally" adapted the *McDonnell Douglas* framework from the employment discrimination context and applied it to retaliation cases.\textsuperscript{91} Where the *McDonnell Douglas* framework is lacking in detail, this Note suggests incorporation of supplementary concepts fundamental to employment discrimination law.

Step One of the proposed burden-shifting approach requires that the plaintiff prove a prima facie case for retaliatory demotion. To establish such a prima facie case,\textsuperscript{92} a plaintiff must establish that (1) the employee participated in a protected activity (i.e., filed for workers’ compensation), (2) the employer took an adverse employment action against him (i.e., demoted the employee), and (3) a causal connection existed between the employee’s filing for workers’ compensation and demotion.\textsuperscript{93}

The first element will be easily determined: official state records will show whether the employee has formally initiated the workers’ compensation process. If the employee has not formally initiated the workers’ compensation process, he has not participated in a protected activity and thus cannot establish a prima facie case. However, in the event that an employee was demoted immediately after being injured yet prior to initiating the workers’ compensation process, the employer should not be permitted to escape liability solely because the demotion occurred before the protected activity. The employee should be given a reasonable period of time (perhaps 20 to 25 business days) to attain protected activity status by filing the necessary papers to initiate the workers’ compensation process.

The second element hinges on what constitutes an adverse employment action. Because "[i]t is well understood that some threshold level of substantiality must be met for a plaintiff to make a prima facie


\textsuperscript{92} See Riesen v. Irwin Indus. Tool Co., 272 Neb. 41, 48–49, 717 N.W.2d 907, 915 (2006). Though *Riesen* applied these elements to a case involving retaliatory discharge, it noted that these elements parallel the Supreme Court of Nebraska’s established elements for unlawful retaliation in general. Id.

\textsuperscript{93} Id.
case of unlawful retaliation,"94 this step requires developing a working definition of an adverse employment action that weeds out the trivial harms that are part of every workplace and should not give rise to civil liability. The concurring opinion in Trosper provided such guidance:

A plaintiff sustains an adverse employment action . . . if he or she suffers a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be a significant change in employment status, more disruptive than a mere inconvenience or an altercation of job responsibilities . . . . It must be such that it might well have dissuaded a reasonable worker from engaging in the activity protected by public policy. Although the significance of any given act of retaliation will often depend upon the particular circumstances, an employee's decision to engage in protected activity cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.95

Within this broad framework, courts should be equipped with objective factors to assess whether an adverse employment action was taken against the plaintiff-employee. The Zimmerman dissent noted that "loss of income and benefits" would be subject to redress under any standard.96 Because income is the most tangible aspect of employment, any economic loss (including salary, stock options, and health and retirement benefits) suffered by the employee should be given the greatest weight in determining whether an adverse employment action occurred. Courts should also consider whether the plaintiff suffered a material change in job status or responsibility.97 In making this assessment, courts should consider (1) any change in the employee's job title or daily responsibilities,98 (2) whether the employee's background, qualifications, and experience are consistent with the type of employee who typically performs such daily responsi-

95. Id. at 870–71, 734 N.W.2d at 714–15 (Gerrard, J., concurring).
97. See generally Edwin T. Hood & John J. Benge, Golden Parachute Agreements: Reasonable Compensation or Disguised Bribery?, 53 UMKC L. Rev. 199, 203 (1985) (suggesting that change in job status can be assessed by examining whether there was a material change in employee's duties, change in employee's job location, and whether employee has the qualifications needed to carry out the duties of his new position).
98. Taking into account an employee's daily responsibilities, rather than merely assessing an employee's job title, protects employees from situations where, for example, a high-level employee keeps his job in name but his daily responsibilities change from managerial duties to more remedial tasks that the employee has never before performed as part of his employment.
bilities,\textsuperscript{99} (3) whether a change in job location occurred,\textsuperscript{100} and (4) whether a change in schedule or scheduling flexibility occurred.\textsuperscript{101}

Based on this general framework for assessing whether an adverse employment action occurred and the specific factors to aid in such an inquiry, a jury instruction on this element might read:

Finding that an adverse employment action was taken requires you to conclude that the action taken against the employee, under all the circumstances, would have dissuaded a reasonably prudent employee from seeking workers' compensation. Some of the factors you may consider in making this assessment include whether the plaintiff suffered a loss in salary, job status, or diminished responsibility or privileges at work.

Though admittedly less precise than the concept of discharge, this approach provides the trier-of-fact with a suitable framework that is equivalent to other tests of reasonableness frequently and effectively used throughout Nebraska law.\textsuperscript{102}

Satisfying the third element requires showing that the employer's adverse employment action was motivated by retaliation.\textsuperscript{103} Employers can take comfort: this element ensures that demoting an employee involved in a workers' compensation claim does not make them \textit{per se} liable. Like dealing with any other employee, there are numerous lawful reasons for demoting an employee (so long as the employee is complying with all other requirements in Nebraska's workers' compensation laws) notwithstanding that he has pursued workers' com-

\textsuperscript{99} Similar to the reason for analyzing whether a change in daily responsibilities occurred, taking an employee's background qualifications into account ensures that employees are not assigned to tasks for which they are abundantly over-qualified to perform, such that—given the employee's background and qualifications—no reasonable manager would have assigned the employee to perform such tasks absent some retaliatory purpose.

\textsuperscript{100} Taking into account job location prevents an employer from, without explanation, transferring an employee, for example, from Omaha to Kearney, or making any other change in job location that results in an unreasonable commute for the employee.

\textsuperscript{101} Taking into account job scheduling protects an employee who, for example, had been working 8 am to 5 pm from being moved, without explanation, to the "night shift" from midnight to 8 am. This example is the most extreme form of scheduling inconvenience; other forms of lesser scheduling inconvenience may also constitute actionable demotion so long as the trier-of-fact concludes that the change in scheduling would have dissuaded a reasonable employee from seeking workers' compensation.

\textsuperscript{102} This sample jury instruction is based on generic definitions of "reasonableness" for Nebraska jury instructions. \textit{See generally} NJI\textsuperscript{2d} Civ. 8.82 (2006) ("Reasonable Care Defined: Reasonable care means the care that a reasonable person would exercise under similar circumstances"); NJI\textsuperscript{2d} Civ. 8.83 (2006) ("Unreasonable Risk of Harm Defined: The term 'unreasonable risk of harm' means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.").

RESOLVING THE AMBIGUITY

Only if the employee can prove that the demotion was for purely retaliatory purposes will this element be satisfied.

Generally the third element must be satisfied by circumstantial evidence, "since the employer is not apt to announce retaliation as its motive." Circumstantial evidence capable of showing an employer's retaliatory motives include: (1) "knowledge of the compensation claim by those making the" adverse employment decision, (2) "expression of a negative attitude toward the employee's injured condition," (3) "discriminatory treatment in comparison to similarly situated employees," (4) "evidence that the stated reason for the discharge was false," (5) proximity in time between the employee seeking workers' compensation and the demotion, and (6) evidence of satisfactory work performance and supervisory evaluations at or near the time of the demotion.

The complexity associated with determining whether a causal link between the protected conduct and the adverse employment action increases when larger employers and complex chains of command are involved. An employer should not be able to escape liability merely because the ultimate decision maker was unaware of the employee's participation in the protected activity. Rather, a causal link may be "established by evidence that the ultimate decision maker . . . merely 'rubber stamped' a recommendation" to demote or "terminate . . . an employee with [actual] knowledge of the protected activity." However, the causal link may be "severed if there is evidence that the ultimate decision maker did not merely 'rubber stamp' the recommendation of the employee with knowledge of the protected activity, but conducted an independent investigation into the circumstances surrounding the employee's [demotion]" that uncovered legitimate reasons for the employment action.

Once an employee has established a prima facie case, Step Two shifts the burden to the employer to articulate some legitimate, lawful reason for the adverse employment action. The defendant must set

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104. See generally Harris v. Misty Lounge, Inc., 220 Neb. 680, 371 N.W. 2d 690 (1985) (stating that insubordination, inadequate work performance, and financial difficulties of the employer are recognized as lawful justifications for demoting an employee).
105. Riesen, 272 Neb. at 50, 717 N.W.2d at 915.
106. Id.
107. Id.
108. Id.
109. Id. at 50, 717 N.W.2d at 916.
110. Id. at 51, 717 N.W.2d at 916.
111. Id.
113. Id.
forth "reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Although this shifts the burden of production to the defendant, the ultimate burden of persuading the trier-of-fact always remains with the plaintiff. This phase of the burden-shifting analysis essentially triggers the same analysis as the third element of the prima facie case.

The employer need only explain what has been done or produce evidence of a legitimate, nondiscriminatory reason for the decision. In making this assessment, it is important to note that "[t]he filing of a workers' compensation claim does not insulate the employee from the requirement that he abide by all personnel rules. . . . Such . . . personnel policies must be applied in a neutral fashion, however." Any non-retaliatory and consistently applied explanation for demoting an employee would protect the employer from civil liability. Traditional grounds for discharging or demoting an employee—inadequate work performance, the need to reduce costs in response to financial difficulties, and insubordination—have all been recognized by the Court as reasons that "adequately substantiate" a legitimate, nondiscriminatory reason for the adverse employment action taken against the plaintiff. This would ensure that, contrary to the doomsday arguments made by the Trosper dissent, employers could effectively manage their workforce, even where employment actions with employees involved in the workers' compensation process are concerned.

If the employer establishes—merely through the burden of production, not the burden of proof—an articulated nondiscriminatory reason for disparate treatment of an employee, Step Three imposes on the plaintiff-employee the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision; i.e., that the adverse employment action would not have occurred "but for" the employer's retaliatory motives. A pretext is a "reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for his action . . . ."

The same pieces of circumstantial evidence used previously should be emphasized at this stage of the inquiry. Particularly relevant

116. Id. at 404, 590 N.W.2d at 694–95.
118. Riesen, 272 Neb. at 54, 717 N.W.2d at 918 (quoting 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 104.07[4] (2005)).
119. Id. at 47–48, 717 N.W.2d at 913–14.
121. Riesen, 272 Neb. at 52, 717 N.W. 2d at 917.
122. Id. (quoting Ryther v. KARE 11, 108 F.3d 832, 837 n.4 (8th Cir. 1997)).
The pieces of circumstantial evidence include: (1) temporal proximity between the employee's filing for workers' compensation and the demotion,123 (2) temporal proximity between the demotion and favorable performance evaluations, (3) treatment of other employees who possess the same deficiency the plaintiff is purportedly being demoted for,124 (4) the employer's reaction to the plaintiff-employee's work-related injury as expressed to the plaintiff-employee and other employees,125 (5) the employer's treatment of the employee throughout his entire course of employment, and (6) general company policy when dealing with employees involved in workers' compensation claims.126 Statistics (as to the percentage of past employees whose attempts to collect workers' compensation occurred without dispute) can help determine an employer's motives and general pattern of fair dealing with workers' compensation claims.127

At this final stage, the burden of proving that the proffered reason was not the true reason for the adverse employment action merges with the ultimate burden of persuading the trier-of-fact that the plaintiff-employee has been the victim of intentional retaliation for seeking workers' compensation.128 The ultimate issue of retaliation requires

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123. Id. at 52–53, 717 N.W.2d at 917–18 (The plaintiff was fired at a time when both parties were anticipating further litigation. Id. The Court distinguished this situation from one in which a discharged employee had filed a workers' compensation claim that had been settled and satisfied without serious dispute.) Id.

124. The plaintiff's case would benefit greatly from presenting evidence that other employees with somewhat similar performance deficiencies who had not filed for workers' compensation were not demoted. See generally id. at 52–54, 717 N.W.2d at 917–18 (The stated reason for the employer's decision to fire the plaintiff-employee was that he had misrepresented information on his initial employment application, and that it was company policy to terminate employees who did so. Id. But the defendant-company's director of human resources, when deposed, could not recall ever taking a disciplinary action against a similarly situated employee. Id. The Court concluded that such evidence supports an inference that defendant-company itself does not consider the inclusion of such information as essential and material and thus jumped "at the first pre-textual low-grade reason to terminate him." Id.)

125. See id. at 52–55, 717 N.W.2d at 917–19 (The Court concluded that the evidence could create an inference that the plaintiff-employee was not terminated for the employer's stated reason. Id. Rather, the employee was actually fired because the employer was upset with plaintiff-employee over his compensable injury. Id. The evidence introduced to create this inference included the employer telling another employee that, "the little son of a bitch is faking . . . it would be a lot easier . . . if [he] would just quit." Id. Additionally, employer told plaintiff-employee that "[y]ou finally messed up . . . you lied on your work comp application.") Id.


the employee prove to the trier-of-fact that the adverse employment action would not have occurred "but for" the protected activity.129

2. A Guidebook for Employers

Most suggestions contained herein are premised on the notion that the Court will heed the advice of Trosper's concurring opinion by adopting the McDonnell Douglas burden-shifting analysis as the analytical framework for retaliatory demotion cases. Although the Court may decline to follow such an approach, the principles set forth are almost certainly relevant under any framework for assessing retaliatory demotion. Many employers already may have implemented some of these suggestions. Even so, this section should help employers identify major themes and sources of tension within the emerging law of retaliatory demotion.

As a starting point, employers should establish a comprehensive system of documentation that includes objective criteria for making employment decisions.130 While employers may feel burdened by this suggestion, the law in Nebraska is clear: “Employment decisions based on subjective standards carry little weight in rebutting charges of discrimination” and, presumably, retaliation in the post-Trosper era.131 An employer's subjective “gut reaction” will not constitute a legitimate explanation for demoting an employee. Rather, employers demoting an employee involved in the workers' compensation process should have documentation of objective factors that justify the employment action.132

Employers should also document when they first learn of an employee's work-related injury and the employee's decision to seek workers' compensation. Proximity in time between the claim and adverse employment action is a typical beginning point for courts in search of a causal connection between the employee's protected activity and the adverse employment action.133 Common sense suggests that an em-

[In determining the objective criteria for a certain position, the following factors should be considered: (1) purpose—the reason for the job, (2) essential functions—the job duties which are critical or fundamental to the performance of the job, (3) job setting—the work station and conditions where the essential functions are performed, and (4) job qualifications—the minimal skills an individual must possess to perform the essential functions.]

Id.
132. Id.
ployer who demotes an employee one day after learning that the employee filed for workers' compensation will be viewed suspiciously. Conversely, an employer who demotes an employee after a workers' compensation claim has been completely resolved without serious dispute will be viewed less suspiciously.\(^{134}\)

Employers should not assume that actionable demotion cannot occur after the workers' compensation claim has been resolved. An employee (in good faith or bad) can bring an action alleging that he was demoted in retaliation for his earlier assertion of workers' compensation long after resolution of the claim. Unscrupulous employers could also be advantaged. A vindictive and patient employer determined to retaliate against an employee for seeking workers' compensation who realized that he would face a higher potential for civil liability if he retaliated against the employee via demotion or discharge anytime in the immediate future might wait for five, ten, or even fifteen years before demoting the employee.

Though it may be tempting to create a bright-line rule for a time after which no retaliatory demotion claims may be brought, a fundamental concept in employment discrimination law is that the time for filing an employment discrimination charge begins when the discriminatory act occurs.\(^{135}\) In instances of retaliatory demotion, the discriminatory act is the demotion. When an employer's subjective intentions for demoting the employee are purely retaliatory, an employee should have a private right of action under *Trosper* regardless of the timing of the demotion.\(^{136}\) The proximity in time of the lawsuit in relation to the employee's previous assertion of workers' compensation should never be dispositive.\(^{137}\) Rather, the issue of time should be viewed on a sliding scale: the further removed from seeking or resolving an employee's workers' compensation claim, the less likely that any adverse employment action taken against the employee should be seen as retaliation.\(^{138}\)

\(^{134}\) See *supra* note 123.


\(^{136}\) This could not be satisfied within the confines of any statute of limitations. The statute of limitations period would begin running with discovery of the triggering activity (i.e., demotion) which could occur long after the compensable work-related injury and even long after resolution of the workers' compensation process.

\(^{137}\) Jones, *supra* note 87.

\(^{138}\) There is economic reasoning underlying the notion that employers will be less likely to retaliate or fire capriciously long after resolution of a workers' compensation dispute. Turnover and unrest among employees results in reduced stability and cohesion, which ultimately leads to reduced productivity. See Fahleson, *supra* note 6, at 979 n.114 (citing RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 155 (Harvard Univ. Press
Employers should also note the significance of proximity in time between positive employee performance evaluations and the demotion. Evidence of unsatisfactory work performance at the time of the adverse employment action maximizes employers' chances for establishing non-retaliatory motives for the change in employment status. It is not enough for the plaintiff to show that he had performed well for some period during his employment. Nor does collecting workers' compensation entitle an employee to a career lacking in productivity. The plaintiff must show that he was performing well at the time of the demotion. Thus, when dealing with employees who have sought workers' compensation, employers should feel comfortable demoting an employee who is performing poorly at the time of the demotion, but employers should be reluctant to demote an employee who has earned favorable evaluations around the time of the demotion.

Another factor employers should emphasize is the treatment of similarly situated employees. This includes employees who (1) have pursued workers' compensation and (2) possess a deficiency (which purportedly justifies the adverse employment action taken against the plaintiff) similar to the plaintiff. For the first category of similarly situated employees, employers should document all employees who have sought workers' compensation. This log should include the job status, salary, and responsibilities of all employees before and after suffering a compensable work-related injury. If a significant change in job status occurred as a result of the work-related injury or in close proximity to the work-related injury, a thorough medical and business-related explanation should be given for the change in job status. These business records will help employers show a history of good-faith compliance with the NWCA and, if litigation arises, provide documentation that justifies the employment action.

For the second category, when demoting an employee who has previously collected workers' compensation, employers should be able to provide documentation of (1) the employee's deficiency and (2) adverse employment action taken against employees with deficiencies similar to what the plaintiff was demoted for. Consider the following hypothetical scenario. "Ernie the Employee" has brought an action against his employer, alleging that he was demoted in pay for seeking workers' compensation. "Bob the Boss" does not deny demoting Ernie's salary from fifteen dollars to twelve dollars per hour at some point after Ernie sought workers' compensation. However, Bob claims that his

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140. Salvadori v. Franklin Sch. Dist., 293 F.3d 989, 996 (7th Cir. 2002).
reason for demoting Ernie is that he frequently arrives late to work, not because Ernie sought workers’ compensation. If Bob has documentation to verify that (1) Ernie frequently arrives late to work and (2) five other employees have consistently arrived late to work and their salary was reduced three dollars per hour for doing so, then Bob’s motives for demoting Ernie do not seem retaliatory. Under these circumstances, Bob is unlikely to be held liable for retaliatory demotion because the impetus for the demotion was legitimate. Conversely, if Bob (1) has documentation that Ernie frequently arrives late to work but (2) admits that several other employees frequently arrive late to work and Ernie is the first employee who has been demoted for doing so, then Bob’s motives for demoting Ernie look retaliatory. Under these circumstances, Bob is far more likely to be liable for retaliatory demotion. The lesson is: an employer seeking to justify an adverse employment action because of an employee’s purported deficiency should have documentation that other employees with a similar deficiency faced the same consequences.

Finally, employers would be well served by utilizing increased dialogue (both formal and informal) with employees who have suffered work-related injuries, especially those employees whose injury may require a change in job status. Informal dialogue will be useful in building positive relationships and reducing tension among management and employees. This will provide employees with an opportunity to express their concerns which likely will reduce employees’ thoughts that their employers are “out to get them” by demoting them for seeking workers’ compensation. Increased employee morale is one way to reduce the risk of employee-initiated litigation.

As part of the formal dialogue, employers should require that all employees involved in workers’ compensation claims fill out a survey (at the beginning of the workers’ compensation process, during the process, and at regular increments after the process has been resolved) documenting the employee’s level of satisfaction with their em-

141. Daniel B. Klaff, Evaluating Work: Enforcing Occupational Safety and Health Standards in the United States, Canada and Sweden, 7 U. PA. J. LAB. & EMP. L. 613, 637 (2005) (A dialogue between employees and employers that guarantees worker participation "creates a situation that is much more amenable to negotiation and resolution.").


ployer's handling of their workers' compensation claim at various stages of the process. These surveys should ask pointed questions, such as:

- Have your salary, job status, or responsibilities changed in any way as a result of your decision to seek workers' compensation?
- Are you satisfied with how your employer has treated you throughout the workers' compensation process?
- Has your employer retaliated or discriminated against you, or made you feel unwanted or guilty, in any way, since you initiated the workers' compensation process?
- Has your employer ever threatened to demote, discriminate, or retaliate against you or another employee, in any way, for seeking workers' compensation?

Although an employee's satisfaction with the workers' compensation process at one point in time does not guarantee that the employer could not retaliate against such an employee at a later point in time, it certainly helps the employer demonstrate a history of compliance and good-faith treatment of employees who have pursued workers' compensation.

While these additional precautionary measures will cost businesses time and energy, operating proactively will help ward off costly litigation in the post-Trosper era. Moreover, in the event that an employer becomes embroiled in litigation for retaliatory demotion, the ability to produce documentation of a legitimate reason for demoting the employee combined with a history of non-retaliatory responses to employees who have suffered work-related injuries will minimize the employer's exposure to liability.

IV. CONCLUSION

Extending the public policy exception to at-will employment to include a private cause of action for retaliatory demotion was the only decision the Trosper Court could have reached that was logically consistent with its prior holding in Jackson. Though Trosper was correctly decided, the dissent accurately anticipated that it would insert

144. See Richard B. Peterson & David Lewin, Research on Unionized Grievance Procedures: Management Issues and Recommendations, 39 Hum. Resource Mgmt. 395, 403 (2000) (recommending periodic employment surveys of employees' perceptions of grievance procedures and grievance procedure outcomes as a way of enhancing overall effectiveness of such procedures); Margaret L. Shaw, Designing and Implementing In-House Dispute Resolution Programs, in ALTERNATIVE DISPUTE RESOLUTION (ADR): HOW TO USE IT TO YOUR ADVANTAGE, ALI-ABA COURSE OF STUDY MATERIALS 447, 454-55 (1999) (suggesting surveys, interviews, and focus groups to determine proper goals of grievance procedures).

145. Peterson & Lewin, supra note 144, at 403.
significant ambiguity into the law. This Note endeavors to help courts and employers resolve that uncertainty.

Nebraska courts should adopt the McDonnell Douglas burden-shifting analysis as an analytical framework for deciding retaliatory demotion cases and, where necessary, supplement this analytical framework with fundamental concepts from employment discrimination law. The private remedy created by Trosper is designed to protect employees who are being retaliated against, or stated differently, discriminated against, for seeking workers’ compensation. Demotion like discrimination (and unlike discharge) is not easily identified or quantified. Yet Nebraska courts have consistently overcome such ambiguity to pursue the greater good by rooting out discrimination in workplaces. The Court has applied the McDonnell Douglas burden-shifting approach in a plethora of employment discrimination cases. Given the similarities in what is required to prove demotion and retaliation, many other jurisdictions have recognized that the McDonnell Douglas burden-shifting approach is equally applicable to the developing law of retaliation in the employment context. If Nebraska follows suit, its courts will be equipped to eliminate another form of employment discrimination: retaliatory demotion of employees seeking workers’ compensation.

Meanwhile, Nebraska’s employers should take a number of precautionary measures to preempt litigation when possible and reduce their exposure to liability when litigation is inevitable. To reduce litigation, employers should operate with a renewed commitment to opening dialogue between employees and management. If the workers’ compensation process is more transparent and employees have a forum to voice their concerns, they are less likely to feel like their employers are “out to get them” and presumably less likely to bring lawsuits against their employers.

To minimize exposure to liability—if and when litigation arises in the context of workers’ compensation—employers should develop objective criteria for making employment decisions and increase documentation of any employment action taken against an employee who has suffered a work-related injury. When taking an adverse employment action against an employee who has pursued workers’ compensation, an employer must be able to articulate a legitimate reason for the employment action and show that other employees who possessed a similar deficiency faced the same consequences. Employers would then present the documentation justifying their decision during Step Two of the McDonnell Douglas burden-shifting analysis. Without

147. See supra note 90.
148. See supra note 91.
such justification, a trier-of-fact is more likely to conclude that an employer's motives were retaliatory.

In sum, the best recipe for Nebraska's employers to cope with the uncertainty of the post-Trosper era is through increased transparency in all facets of the workers' compensation process, establishing objective criteria for making personnel decisions, and extensive documentation of any adverse employment action taken against an employee who has suffered a work-related injury. Given this guidebook for resolving the post-Trosper ambiguity, employers should not be overly concerned. They are not prohibited from demoting an ineffective or uncooperative employee who has previously received workers' compensation. They just need to be thoroughly prepared to explain their decision.