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# The Employment-at-Will Doctrine: Time to Collapse Another Citadel

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# COMMENT

## THE EMPLOYMENT-AT-WILL DOCTRINE: TIME TO COLLAPSE ANOTHER CITADEL

### I. INTRODUCTION

The legal proposition that employees who work under employment contracts of unspecified duration are terminable at the will of their employer has been accepted legal doctrine in America since the mid-nineteenth century.[1] Recently, however, courts have begun to modify the rule in an attempt to bring this country in step with the other industrialized countries of the world.[2] The judicial modifications to the doctrine have been based upon both tort and contract law.

This comment will consider the background of the employment-at-will doctrine and it will focus on the dubious underpinnings of the rule in America. The comment will then address the various theories that have been advanced to support exceptions to the rule. Representative cases will be discussed to illustrate the arguments used to permit or deny relief to wrongfully discharged employees. The most common exceptions sounding in tort law and based on public policy will be addressed first, and the advantages and disadvantages of these exceptions will be reviewed. The comment will then treat those exceptions grounded in contract law in a similar manner. Finally, recommendations will be offered regarding further modification or abrogation of this common law doctrine which the judiciary and the legislature should consider when faced with employment-at-will problems.

The doctrine of employment-at-will should be abolished. A discharge without cause is patently unfair to the terminated employee. In

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1. For discussion of the development of the employment-at-will doctrine, see *infra* notes 3–24 and accompanying text.

2. The United States is the only industrialized country that still adheres to the employment-at-will doctrine. England, Japan, West Germany, and France all have statutes providing for some kind of arbitration-grievance procedure or "just cause" requirement before an employer can discharge an employee. *See generally* PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE (J. Stieber & J. Blackburn ed. 1983) (proceedings of a conference held at Michigan State University School of Labor and Industrial Relations) [hereinafter cited as PROTECTING UNORGANIZED EMPLOYEES] (on file with Universtity of Dayton Law Review); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

addition, continued use of the doctrine will result in greater diseconomies in the affected industries. The abrogation of the doctrine is not difficult; the means to this end are contained in the origin of the doctrine itself.

## II. BACKGROUND

The employment-at-will doctrine originated under the English rules governing masters and servants.[3] The original English interpretation of the doctrine was that a hiring for an indefinite period was presumptively a hiring for one year.[4] As industrialization increased, English courts placed less emphasis on the duration of employment, focusing instead upon the notice required to terminate the employment relationship.[5] Under English law, each party was required to give reasonable notice to the other party before termination of the employment relationship.[6] What constituted reasonable notice was a question of fact to be determined in light of the circumstances surrounding each case.[7]

In America, the formulation of the doctrine was initially similar to the English view—a general hiring was presumed to be a hiring for one year.[8] Another version of the rule which later arose was that a hiring at a specific rate of pay raised a presumption of a hiring for a one-year period.[9] This uncertainty over the rule led an American treatise writer,

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3. Hill, *Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal*, 3 N. ILL. U.L. REV. 111, 113–15 (1982). As this commentator's research revealed:

> Individual societal status governed the law of employment from the fourteenth to nineteenth century. The doctrine of "master" and "servant" during this period developed through analogy to the feudal relation of lord and tenant where the rights and duties associated with the relationship were dependent upon the positions each occupied in the feudal society. . . . The legal status of the master-servant relationship was viewed as essentially a domestic relationship and, with the rise of industrialization, the status of the relationship evolved to one of "employer" and "employee."

*Id.* at 113–14 (footnotes omitted).

4. 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER & SERVANT § 156, at 504–05 (2d ed. 1913); *See also* Hill, *supra* note 3, at 114.

5. Hill, *supra* note 3, at 115.

6. *Id.*

7. *Id.*

8. *Id.* at 116.

9. *Id. But see*, S.D. CODIFIED LAWS ANN. § 60-1-3 (Supp. 1985) ("The length of time which an employer and employee adopt for the estimation of wages is relevant to a determination of the term of employment."). While South Dakota has codified the notion that the length of time agreed to by the parties for salary estimation is relevant to the determination of length of employment, the wording of § 60-1-3 before its recent amendment is noteworthy. The previous statute provided: "An employee is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring for piece work, for no specified term." S.D. CODIFIED LAWS ANN. § 60-1-3 (1978) (amended 1985).

Thus, while South Dakota had originally codified the old English rule that a hiring at a specified rate of pay created a presumption of a specified term of employment, the new statute

H.G. Wood, to articulate the rule in a radically different form in the late-nineteenth century.[10] According to Wood, because the rule regarding indefinite hirings was " 'inflexible; a general or indefinite hiring was *prima facie* a hiring at-will . . . .' "[11] The "Wood rule" became the predominate doctrine in this country,[12] despite the writings of other commentators who adhered to the English notion that a hiring for an unspecified term was presumptively a hiring for one year.[13] These writers argued that the presumption of a yearly contract was rebuttable.[14] Wood, however, rejected the idea of a presumption of duration, and stated that the burden of proof was on the employee to prove the employment was not at will.[15]

Wood's rule was readily accepted in this country due to the *laissez-faire* economic attitude of the late-nineteenth and early-twentieth centuries.[16] The attractiveness of the rule stemmed from the emergent theory of freedom of contract, which proposed that if the parties to an employment agreement had intended it to be for a specific duration they would have expressly provided for such duration in the contract.[17] This formalistic approach to indefinite employment contracts[18] led to the conclusion that an employee "at will" could be discharged "for good cause, for no cause or even for cause morally wrong."[19] This concept prevailed even though at least one commentator in the early-twentieth century argued that all of the circumstances of the employment relationship should be considered to determine if the employment was truly "at will."[20]

As the twentieth century progressed, congressional efforts attempted to mitigate the harsh economic conditions of the American worker. The chief legislative efforts were the National Labor Relations

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provides for nothing more than an evidentiary factor to be considered.

10. *See* Note, *Looking Through the Door Left Open by Abrisz v. Pulley Freight Lines, Inc.: Adopting a Viable Cause of Action in Iowa for the Wrongfully Discharged Employee at Will*, 32 DRAKE L. REV. 785, 789 (1982–1983) (extensive discussion of Wood treatise).

11. *Id.* at 789 (quoting H.G. WOOD, MASTER AND SERVANT § 136, at 282–83 (2d ed. 1886)).

12. 1 C. LABATT, *supra* note 4, § 160, at 519–20.

13. Hill, *supra* note 3, at 115–16 (citing T. REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, AND MASTER AND SERVANT, AND POWERS OF THE COURT OF CHANCERY 347 (1846); C. SMITH, MASTER AND SERVANT (1852); 2 W. STORY, CONTRACTS § 1290 (5th ed. 1874)).

14. *Id.*

15. *Id.*

16. *See* Note, *supra* note 2, at 1824–26.

17. *Id.* at 1824–25.

18. *Id.* at 1825–26. *See also* Hill, *supra* note 3, at 118–20.

19. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519–20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

20. *See* 1 C. LABATT, *supra* note 4, § 160, at 519–20.

Act[21] and the Norris-LaGuardia Act.[22] While these acts allow workers to organize into labor unions and to bargain collectively, they do not benefit the majority of American workers, who are still considered employees "at will."[23] Only recently have courts taken the lead in modifying the rule, by creating judicial exceptions to its application. The most common exceptions to the employment-at-will doctrine have been found in cases where the employer's actions of discharge have been deemed to violate public policy.[24]

## III. CASES SOUNDING IN TORT—THE PUBLIC POLICY EXCEPTION

Exceptions to the employment-at-will doctrine have been recognized for various public policy reasons.[25] A cause of action has been allowed in tort for wrongful discharge where an employee was terminated for asserting a statutory right,[26] for refusing to commit a criminal act,[27] or for complying with a statutory duty.[28] A legitimate cause of action has also been recognized in cases where employees were discharged for reporting alleged violations of the law ("whistleblow-

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21. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–167 (1982)).

22. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115 (1982)). *See also* Civil Rights Act of 1964 (Title VII), Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000–2002 (1982)) (prohibiting discrimination based on sex, race, color, religion, or national origin).

23. There were 102,345,000 employed persons in the United States as of June, 1984 (excluding agricultural and military personnel). BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1985, at 390 (table 653—total non-institutional employment-June, 1984) [hereinafter cited as CENSUS REPORT]. Of this total, approximately 16,034,000 were employed by federal, state, and local governments. *Id.* at 292 (table 472—governmental employees-1983). Federal civil servants generally receive statutory protection against at-will discharge pursuant to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5, 10, 15, 28, 38, 39, and 42 U.S.C.). The available statistics indicate that the number of employees who are members of labor organizations is approximately 22,811,000. CENSUS REPORT, *supra*, at 424 (table 709—labor organization membership-1980). Thus, out of a total work population of approximately 102,345,000, there are approximately 63,500,000 workers who do not have the protection of union collective bargaining agreements or statutory civil service protection.

24. 111 BNA: LABOR SPECIAL PROJECTS UNIT, THE EMPLOYMENT-AT-WILL ISSUE 7–8 (Nov. 22, 1982) [hereinafter cited as THE EMPLOYMENT-AT-WILL ISSUE].

25. *Id.* at 3.

26. *See, e.g.*, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (cause of action recognized for employee discharged for filing workers' compensation claim); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976) (employee discharged for filing workers' compensation claim stated valid cause of action).

27. *See, e.g.*, Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee discharged for refusing to commit perjury stated a valid claim).

28. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (employee fired for serving jury duty stated valid cause of action); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (employee discharged for serving on jury stated valid cause of action).

ing").[29] Those jurisdictions which have addressed the question of wrongful or "retaliatory" discharge have generally taken three different approaches to these "public policy" cases. These approaches are: (1) refusing to recognize a policy exception in any case;[30] (2) allowing an exception when the public policy is clearly expressed by statute;[31] and (3) allowing an exception when the public policy is clear, regardless of the source.[32]

### *A. Jurisdictions That Refuse to Recognize Public Policy Exceptions*

Some jurisdictions have, at times, totally rejected a public policy exception to the employment-at-will doctrine, holding that it is solely the function of the legislature to formulate public policy and to provide remedies for its violation.[33] These jurisdictions have viewed employ-

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29. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (employee fired for revealing violations of Connecticut Uniform Food, Drug, and Cosmetic Act stated valid claim); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee discharged for reporting possible theft by fellow employee stated valid claim); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (employee discharged for reporting employer's violations of consumer credit laws stated valid claim).

30. *See infra* notes 33–50 and accompanying text.

31. *See infra* notes 51–70 and accompanying text.

32. *See infra* notes 70–76 and accompanying text.

33. *See, e.g.*, Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (employee fired for refusing to falsify medical records did not state a claim as it is the legislature's function to create a remedy); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978) (employee fired for filing workers' compensation claim did not state a valid cause of action; allowing recovery would usurp the function of the legislature, the only source for such a remedy); Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950) (only the legislature can provide a remedy to an employee discharged for filing a workers' compensation claim).

The ferment in this area of law is evidenced by rapid changes. For example, although *Raley* and *Dockery* have not been expressly overruled, the courts of North Carolina and South Carolina have recently recognized tort-public policy exceptions to employment-at-will. In Sides v. Duke Hosp., ___ N.C. App. ___, 328 S.E.2d 818 (1985), the North Carolina Court of Appeals recognized a public policy exception in a case where a nurse was discharged for allegedly refusing to testify falsely in a medical malpractice suit. The *Sides* court noted that *Dockery* may have been undermined by the subsequent action of the state legislature, which amended the workers' compensation statutes to allow actions by employees discharged for filing compensation claims. *Id.* at ___, 328 S.E.2d at 823. The court then indicated that the public policy considerations in the *Sides* case were more compelling than the policy considerations in *Dockery*: "Though the public has a strong interest in allowing workers to pursue their statutory remedies for worker's compensation without being in fear of losing even greater benefits—their jobs and means of livelihood—if they do, the public interest in preventing the obstruction of justice is greater still." *Id.* at ___, 328 S.E.2d at 823. The court indicated that its holding was confined to the facts before it, stating:

> Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. . . . We hold, therefore, that no employer in this State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case . . . .

*Id.* at ___, 328 S.E.2d at 826.

ment-at-will as a rule of substantive law, which can only be changed by legislative action.[34]

One difficulty encountered by the courts is the definition of public policy—a definition some courts find too "nebulous" to define without legislative action.[35] There is also concern that allowing an action for wrongful discharge will inhibit the employers' business discretion and will expose employers to "vexatious lawsuits by disgruntled employees . . . ."[36]

The arguments against finding a public policy exception to the employment-at-will rule are unpersuasive for several reasons. First, courts that refuse to allow recovery for wrongful discharge out of deference to the legislature have misapprehended the nature of the doctrine. Because employment-at-will has always been a common law doctrine, its modification is properly a function of the judiciary.[37] Additionally, the public policy in many cases is clear, such as where an employee is fired for refusing to engage in criminal activity.[38] The judiciary, therefore, is the logical body to provide a remedy in these cases.

Refusing to allow a judicially created remedy for wrongful dis-

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In Ludwick v. This Minute of Carolina, Inc., ___ S.C. ___, 337 S.E.2d 213 (1985), the South Carolina Supreme Court also recognized an exception to employment-at-will. In this case, the employee was discharged when she testified before the South Carolina Employment Security Commission. Her employer had previously informed her that if she obeyed the Commission's subpoena to testify, she would be discharged. *Id.* at ___, 337 S.E.2d at 213–14. Although the supreme court noted that employment-at-will remained the law of the state, an exception existed on the grounds of public policy. *Id.* at ___, 337 S.E.2d at 216. The *Ludwick* court indicated that failure to obey a subpoena was a crime in South Carolina and held that the public policy exception would apply when an employer requires an employee to violate the law as a condition of continued employment. *Id.* at ___, 337 S.E.2d at 216.

34. *See, e.g., Hinrichs*, 352 So. 2d 1130 (Ala. 1977).

35. *See, e.g., id.* (public policy is "too nebulous a standard" and fashioning a tort remedy is best left to the legislature). *See also* Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). In *Murphy*, the employee was discharged for alleging accounting improprieties on the part of his superiors. The New York Court of Appeals rejected the employee's claim of abusive discharge, refusing to consider the employee's public policy arguments. *Id.* at 301, 448 N.E.2d at 89, 461 N.Y.S.2d at 235–36. The court held that such expressions of public policy were best left to the legislature. *Id.*

36. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1428 (1967). *See* Comment, *The Development of Exceptions to At-Will Employment: A Review of the Case Law from Management's Viewpoint*, 51 U. CIN. L. REV. 616, 630 (1982). *See also Palmateer*, 85 Ill. 2d at 144–45, 421 N.E.2d at 881 (Ryan, J. dissenting).

37. *See, e.g.*, Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982). In the *Parnar* decision, the Hawaii Supreme Court discussed the origin of the doctrine at great length, stating that the courts are the proper place to change the doctrine. *Id.* at 379, 652 P.2d at 636. The court did not, however, explicitly state that it came to its conclusion because the doctrine is based on common law. *See also* Note, *supra* note 2, at 1838. *See generally* Blades, *supra* note 36 (tracing common law nature of the doctrine).

38. *See, e.g., Petermann*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee fired for refusing to commit perjury stated a valid claim).

charge because such actions inhibit the employer's business discretion is an equally unpersuasive argument. As the courts that recognize exceptions to employment-at-will indicate,[39] a great deal of deference should be given to legitimate business decisions.[40] This follows from the idea that a truly legitimate reason for discharge is based on business considerations only, and therefore cannot violate public policy.

Finally, the argument that recognition of a tort cause of action would create a flood of vexatious litigation is also invalid. While it cannot be denied that tort actions will expose employers to the possibility of punitive damages,[41] the increased costs to businesses will induce employers to reassess their termination procedures, thus decreasing their liability exposure.[42] The deterrent aspect of punitive damages cannot be overstated, especially in cases of egregious violations of public policy.[43]

The punitive damages issue notwithstanding, the "flood of litigation" argument has even been rejected by one court that did *not* recog-

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39. *See infra* notes 70–76 and accompanying text.

40. *See, e.g., Parnar*, 65 Hawaii at 379–80, 652 P.2d at 631. In allowing a wrongful discharge action, the *Parnar* court indicated that public policy "addresses the need for greater job security and preserves to the employer sufficient latitude to maintain profitable and efficient business operations." *Id.*

41. Punitive damages are damages given to enhance compensatory damage recovery because of the malicious nature of the defendant's actions. These damages are in the nature of punishment and are designed to deter the defendant from committing similar offenses in the future. Punitive damages are considered consistent with public policy. *See* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984). Punitive damages, however, are generally not available in contract cases. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 14-3, at 520–21 (2d ed. 1977).

42. The employer faced with the future spectre of a large recovery by a wrongly discharged employee would do well to review the personnel policies in effect. By eliminating arbitrary behavior by management, the employer may gain the benefit of a work force that is more loyal to the employer's business. *See* Strasser, *Employment-At-Will: The Death of a Doctrine?*, Nat'l L.J., Jan. 20, 1986, at 1, col. 2. It is asserted that only eight states have not recognized some form of exception to the employment-at-will doctrine. *Id.* One of the management lawyers interviewed by the commentator admitted that the recognition of causes of action for wrongful discharge may be in management's favor:

> "This is not all so negative as it might sound," . . . "Employers are less quick on the trigger in making decisions today. Rather than pre-emptorily firing someone, many clients now have a human resources manager review the case to determine if there are really sound reasons. There is a greater element of fairness to the relationship."

*Id.* at 7, col. 1 (quoting Joseph W. Ambash, of Foley, Hoag & Eliot, Boston, Mass.). Many employees are now getting more complete evaluations of their strengths and weaknesses, giving management an opportunity to work with them in order to improve performance. *Id.*

43. *See* Kelsay v. Motorola, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The plaintiff-employee in *Kelsay* was discharged for filing a workers' compensation claim. The *Kelsay* court stated that one of the reasons for allowing an employee's claim for retaliatory discharge was the deterrent effect of the threat of punitive damages. *Id.* at 186–87, 384 N.E.2d at 359. The court did not allow punitive damages in this case, however, because to do so would mean punishment for theretofore permissible acts. *Id.*

nize a cause of action for retaliatory discharge.[44] This court noted that any possible burden on the judicial system was not a reason for denying a forum to a plaintiff with a justiciable claim.[45]

Another counterargument to the idea that employee lawsuits unduly burden the employer is that courts can readily prevent spurious litigation by simple evidentiary requirements.[46] It has been suggested, for example, that the burden of proof should be on the employee to show that his or her discharge was motivated by malice or retaliation.[47] In addition, the employee might even be held to a higher burden of proof, that of "clear and convincing evidence."[48]

Finally, recognition of a cause of action for wrongfully discharged employees may actually *help* employers. Employers who provide their employees with a sense of job security may well improve their company's economic performance.[49] A stable work force promotes continuity, company loyalty, reduced training costs, and lower employee turnover.[50]

### *B. Jurisdictions that Recognize "Statutory Exceptions" Exclusively*

Some jurisdictions have recognized a tort exception to employment-at-will only in narrow instances where the legislature has expressed a "clear mandate" of public policy.[51] These courts are wary of expanding the scope of public policy beyond that which is readily discernable from a statute. This wariness is illustrated by *Frampton v.*

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44. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). For a discussion of the *Geary* decision, see *infrja* notes 66–69 and accompanying text.

45. *Geary*, 456 Pa. at 181, 319 A.2d at 179.

46. Blades, *supra* note 36, at 1429.

47. *Id.*

48. *Id.* at 1429–30.

49. Note, *supra* note 2, at 1834–35. Indeed, a business where the employees are assured that they will only be terminated for "just cause" may well present a difficult "target" for labor unions. Moreover, while organized labor may indicate support for "just cause" legislation, a vice president for the United Auto Workers has admitted that such protection for all workers is not a union priority. *See* THE EMPLOYMENT-AT-WILL ISSUE, *supra* note 24, at 18. The position of the AFL-CIO is that there is no possibility of workers achieving "just cause" protection without unions. *Id. See also* Note, *supra* note 2, at 1837–38 (strong union support unlikely because reform of the employment-at-will doctrine would detract from the union's arguments that protection from unjust dismissal is only possible under a collective bargaining agreement).

50. Note, *supra* note 2, at 1834–35.

51. *See, e.g., Petermann*, 174 Cal. App. 2d at 188–89, 344 P.2d at 27 ("[I]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury, an act specifically enjoined by statute."); *Frampton*, 260 Ind. at 253, 297 N.E.2d at 428 ("We agree with the Court of Appeals that, under ordinary circumstances, an employee at will may be discharged without cause. However, when an employee is discharged solely for exercising a statutorily conferred right, an exception to the general rule must be recognized.").

*Indiana Gas Co.*,[52] one of the first cases to recognize a cause of action for retaliatory discharge.

In *Frampton*, the Indiana Supreme Court was confronted with a situation where the plaintiff-employee was discharged for filing a workers' compensation claim.[53] The supreme court reversed the lower court's grant of a motion to dismiss for failure to state a claim, concluding that the fear of discharge for exercising a statutory right would contravene the public policy behind the workers' compensation statute.[54] The court held, therefore, that an employee discharged for filing a workers' compensation claim has a cognizable cause of action.[55]

Just as a public policy exception exists when workers' compensation statutes are involved, other public policy exceptions to the employment-at-will doctrine have been created based on other statutory mandates. For example, a valid cause of action has been found where an employee was discharged for refusing to commit perjury.[56] Courts have also recognized the claims of workers fired for serving on a jury.[57] In the recent Virginia case of *Bowman v. State Bank*,[58] the Virginia Supreme Court held that discharged employees stated a valid claim against their employer, based on the public policy embodied in the federal and state securities laws.[59] In this case, the employees owned shares of their employer's stock. When a corporate merger proposal was submitted to the shareholders, the shareholder-employees were ordered to vote in favor of the merger, with the understanding that if

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52. 260 Ind. 249, 297 N.E.2d 425 (1973).

53. *Id.* at 250, 297 N.E.2d at 426.

54. *Id.* at 251, 297 N.E.2d at 427. The purpose behind workers' compensation acts is "to afford injured workers 'an expeditious remedy both adequate and certain, and independent of any negligence on their part or on the part of the employer.' " *Id.* (citations omitted).

55. *Id.* at 253, 297 N.E.2d at 428. *Accord Kelsay*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). While Illinois recognized the public policy exception for workers' compensation claims in *Kelsay*, the scope of this exception has been a source of some tension for the Illinois Supreme Court. For example, three years after *Kelsay* was decided, the supreme court recognized a public policy cause of action for an employee who was discharged in retaliation for reporting an alleged theft by a coworker. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981). What is interesting about the two cases is that the author of the majority opinion in *Kelsay*, Justice Howard C. Ryan, vigorously dissented in *Palmateer*. The basis for the dissent was Justice Ryan's view that there was no clear legislative expression of public policy, as there had been in *Kelsay*. *Id.* at 136, 421 N.E.2d at 881 (Ryan, J., dissenting). While there was a statutory right involved in *Kelsay* (workers' compensation), no such statute was directly involved in *Palmateer*. The majority noted that while citizens are not statutorily required to actively engage in crime prevention, public policy favored "citizen crime-fighters." *Id.* at 132, 421 N.E.2d at 880.

56. *See, e.g., Petermann*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

57. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc. 255 Pa. Super. 28, 386 A.2d 119 (1978).

58. ___ Va. ___, 331 S.E.2d 797 (1985).

59. *Id.* at ___, 331 S.E.2d at 800.

they refused to do so, they might be terminated.[60] The court ruled that the policy behind the securities and proxy laws presupposed a freedom to vote one's shares without coercion, and that the termination of the employees in this case would effectively subvert this policy.[61]

While courts that confine the public policy exception to situations of clear statutory policy do provide a much-needed remedy in certain cases, these courts do not go far enough. Although it might be conceptually easier to justify a recovery in tort based on a "breach of a statutory duty,"[62] such a restrictive concept of public policy provides no redress for worthy plaintiffs who are unable to point to specific statutory language.

An example of the impact of such a restrictive concept within a single state is illustrated by comparing the Pennsylvania cases of *Reuther v. Fowler & Williams, Inc.*,[63] and *Geary v. United States Steel Corp.*[64] In *Reuther*, the Pennsylvania Superior Court recognized a cause of action for an employee who had been discharged for serving jury duty.[65] In *Geary*, however, the Pennsylvania Supreme Court did not allow a cause of action for an employee who was discharged for reporting the defective nature of the employer's product to his superiors.[66] Even though the product was subsequently removed from the market because of the defect, the *Geary* court indicated that the praiseworthiness of Geary's motives did not outweigh the employer's legitimate business interest in preserving its operations from disruption.[67] The supreme court, in a footnote, cited cases where causes of action were found based on "clear and compelling" mandates of public policy as found in statutory language.[68] The plaintiff, however, had failed to show such a policy.[69]

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60. *Id.* at ___, 331 S.E.2d at 799. If the merger proposal was defeated, the employees voting against the merger would be terminated. If the merger passed, however, employees voting against the merger were told that their vote would "have a definite adverse effect on [their] jobs." *Id.* The two plaintiff-employees voted in favor of the merger proposal, but two days after the proposal narrowly passed (by eight votes), they sent a letter to the president of the bank indicating that their proxies had been coerced and were, therefore, "improper and null and void." *Id.* Subsequently the board of directors decided against the merger. The plaintiffs alleged that this decision resulted from the board's fear that the use of illegal proxy solicitations would be discovered. *Id.* Six days after the decision to abort the merger, the employees were fired. *Id.*

61. *Id.* at ___, 331 S.E.2d at 801.

62. *See Frampton*, 260 Ind. at 251, 297 N.E.2d at 427.

63. 255 Pa. Super. 28, 386 A.2d 119 (1978).

64. 456 Pa. 171, 319 A.2d 174 (1974).

65. *Reuther*, 255 Pa. Super. at ___, 386 A.2d at 120–21.

66. *Geary*, 456 Pa. at 179, 319 A.2d at 177.

67. *Id.* at 183, 319 A.2d at 180.

68. *Id.* at 183–84 n.16, 319 A.2d at 180 n.16 (citing *Petermann*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Frampton*, 260 Ind. 249, 297 N.E.2d 425 (1973)).

69. *Geary*, 456 Pa. at 184–85, 319 A.2d at 180.

While courts that recognize the public policy exception based on a statute do provide a remedy for wrongfully discharged workers, the approach is too limited. Although a "statutory approach" obviates some of the problems inherent in defining public policy, many deserving plaintiffs are still left without redress.

### *C. Jurisdictions That Recognize the Public Policy Exception Regardless of the Source*

The broadest public policy exceptions have been allowed by those courts that do not restrict the meaning of public policy to that provided by statutes. These courts construe public policy broadly, looking to statutory language, legislative intent, or judicial pronouncements. For example, in *Parnar v. Americana Hotels, Inc.*,[70] the Hawaii Supreme Court reversed a summary judgment in favor of the defendant-employer. In its discussion of public policy, the court held that an employer can be liable in tort if the discharge violates a clear mandate of public policy.[71] In determining whether such a mandate exists, the *Parner* court held that "courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy."[72]

Another example of a court's recognition that non-statutory authority can be used to support a public policy exception to the doctrine of employment-at-will is *Pierce v. Ortho Pharmaceutical Corp.*[73] The plaintiff-employee in *Ortho*, a medical doctor, alleged that she was wrongfully discharged for her refusal to engage in certain medical research, which she claimed would cause her to violate her Hippocratic Oath.[74] Although the New Jersey Supreme Court found for the defendant-employer, it did recognize that professionals must not only comply with federal and state mandates, but also with codes of ethics that govern their professions.[75] Ethical considerations may, in some instances,

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70. 65 Hawaii 370, 652 P.2d 625 (1982). In this case, the employee's discharge was allegedly motivated by the employer's desire to have her leave Hawaii, and therefore be unavailable to testify in antitrust proceedings against the employer. *Id.* at 373, 652 P.2d at 627. The *Parnar* court stated: "In the instant case, we easily discern the relevant public policy from the antitrust laws. The notion that it is the purpose of those laws to protect the public interest in free and unrestrained competition is too well-established to require citation." *Id.* at 380, 652 P.2d at 631.

71. *Id.* at 380, 652 P.2d at 631.

72. *Id.*

73. 84 N.J. 58, 417 A.2d 505 (1980).

74. *Id.* at 72, 417 A.2d at 512.

75. *Id.* The plaintiff in *Ortho*, a research doctor, refused to continue research on a drug containing saccharin. The plaintiff's sole reason for discontinuing the research was her belief that saccharin was "controversial." The supreme court did not find the necessary conflict with the Hippocratic Oath on these facts because the drug was not shown to be dangerous, nor was the

require a professional employee to justifiably vary from employer policies and requirements.[76]

### *D. Summary of the Public Policy Exception—Advantages and Limitations*

The primary advantages of proceeding under a tort theory are the potential damages that an injured plaintiff may recover. The spectre of punitive damages will act as a deterrent, compelling employers to scrutinize their personnel policies. The remedy in tort is particularly useful in those situations where the employer is motivated by malice. The public policy exception is certainly a viable starting point for the modification of the employment-at-will doctrine.

Nevertheless, the exceptions to the employment-at-will doctrine that are based on public policy-tort theory are limited in their utility by the problems courts have in defining the concept of public policy.[77] Courts that have recognized public policy exceptions have not focused upon the wrong done to the *individual*, but rather upon the wrong done to some *public interest*, such as the workers' compensation system or the jury system.[78] In order to succeed in a tort action for wrongful discharge, the employee must be able to show that it is in the public interest to have his or her job protected.[79] It may often be difficult for a wrongfully discharged employee to identify a particular public policy which protects his or her job. Nevertheless, the courts should not hesitate to use a public policy exception when the relevant policy can be garnered from an analysis of constitutional, statutory, administrative, or judicial authority.

The biggest drawback to the public policy-tort approach, however, is the limited number of employees who can assert a claim under even the broadest definition of public policy. This drawback is attributable to the fact that the majority of wrongful terminations cannot be "tied" to any particular public policy. Some courts have realized this drawback and have allowed recovery under an alternative approach—breach

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testing being done on humans at that time. *Id.* at 73–75, 417 A.2d at 513. The court also noted that before any public marketing could take place, the drug would have to receive FDA approval. Under the circumstances of this case, the court viewed the plaintiff's conflict with her employer as no more than a difference of opinion. *Id.* at 73–76, 417 A.2d at 513–14.

76. *Id.* at 71–72, 417 A.2d at 512 (citing Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805, 832 (1975)).

77. *See supra* note 35 and accompanying text.

78. Blackburn, *Judicial Action*, in PROTECTING UNORGANIZED EMPLOYEES, *supra* note 2, at 33 (citing Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975)).

79. *Id.*

of contract.

## IV. Exceptions Grounded in Contract

The second prong of the judicial attack on the employment-at-will citadel is based on contract theory which has advantages over tort theory in the employment-at-will context. The main advantage of contract theory is its flexibility because "contractual" exceptions can reach a broader spectrum of employees. This flexibility exists because all circumstances of the employment relationship can be considered to rebut the presumption of a terminable-at-will relationship.[80] These circumstances include oral and written agreements made between the employee and his or her employer, and an employee's legitimate expectations based on those policy statements.[81] In essence, the exceptions grounded in contract are more flexible than tort exceptions because they take into consideration the express and implied agreements reached between an employee and his or her employer, rather than merely focusing on whether a public interest is at issue.

Additionally, exceptions grounded in contract make more sense conceptually because the employment-at-will doctrine was originally based on contract theory.[82] The courts have used various legal rationales to create contract exceptions. Generally, contract cases can be divided into three categories: (1) cases that embody a mixture of public policy and implied contract theories;[83] (2) true implied contract cases;[84] and (3) cases involving promissory estoppel.[85]

### *A. Public Policy/Implied Contract Hybrids*

The public policy/implied contract hybrid recognizes that the general public has an interest in employer-employee relationships. One of the first cases to adopt an implied contract approach based on public policy was the case of *Monge v. Beebe Rubber Co.*[86] In *Monge*, an employee was allegedly discharged in response to her refusal to date

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80. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Blackburn, *Judicial Action*, in Protecting Unorganized Employees, *supra* note 2, at 33. The idea of a rebuttable presumption regarding employment contracts of indefinite term is of historical significance. Although American courts have only begun to analyze indefinite contracts in this manner, the English courts originally presumed that indefinite employment contracts were for one year in duration. This presumption was rebuttable. *See supra* notes 3–4 and accompanying text.

81. *See Toussaint*, 408 Mich. at 598–99, 292 N.W.2d at 885.

82. *See* Note, *supra* note 2, at 1824–26. *See also supra* notes 16–20 and accompanying text.

83. *See infra* notes 86–99 and accompanying text.

84. *See infra* notes 100–27 and accompanying text.

85. *See infra* notes 128–33 and accompanying text.

86. 114 N.H. 130, 316 A.2d 549 (1974).

her foreman.[87] The New Hampshire Supreme Court acknowledged that a proper balance must be maintained between the employer's right to manage, the employee's concern for job security, and the public's interest in both.[88] The court maintained, however, that the jury could have inferred that the discharge was motivated by malice or bad faith.[89] It reasoned that such a discharge was not in the best interests of the economic system or the public good, concluding that such bad faith constituted a breach of the employment contract.[90] This holding by the New Hampshire court—malicious discharges are against public policy and constitute a breach of contract—can be viewed as a "bridge" between the public policy and contract exceptions.[91]

A second example of this "bridge" is *Petermann v. International Brotherhood of Teamsters, Local 396*.[92] In this California case, the appellate court ostensibly based its decision on clear statutory public policy, yet indicated that an implied term of good faith is inherent in all contracts.[93] In *Petermann*, the employee was discharged for his refusal to commit perjury.[94] The *Petermann* court held that the public policy against perjury would be subverted if an employer were allowed to discharge an employee for refusing to commit perjury.[95] In the course of its opinion, the court addressed the requirement of good faith in employment contracts. Citing the fact that the employee was hired

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87. *Id.* at 131, 316 A.2d at 550.

88. *Id.* at 133, 316 A.2d at 551.

89. *Id.* at 133–34, 316 A.2d at 552.

90. *Id.* at 134, 316 A.2d at 552.

91. *See* THE EMPLOYMENT-AT-WILL ISSUE, *supra* note 24, at 52–53. The New Hampshire Supreme Court subsequently restricted the application of *Monge* to situations where the employee was fired for doing something that public policy would encourage, or for refusing to do something that public policy would condemn. Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980). In a subsequent case, the New Hampshire Supreme Court promulgated a two-step test based on the *Monge* and *Howard* decisions. *See* Clotier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981). This test requires the employee to show that the discharge was motivated by malice or bad faith *and* that the discharge violated some public policy. *Id.* at 921–22, 436 A.2d at 1143–44.

A more interesting item in the *Clotier* case can be found in the dissenting opinion, authored by Justice Bois, who referred to the *Monge* holding as a *recognition of the tort of abusive discharge*. *Id.* at 925, 436 A.2d at 1146 (Bois, J., dissenting). Justice Bois' interpretation of *Monge* contradicts the language used in that case, as well as the perception of *Monge* by many commentators, who classify the case as involving contract law. *See, e.g.*, Blackburn, in PROTECTING UNORGANIZED EMPLOYEES, *supra* note 2, at 34; Comment, *supra* note 36, at 623. This confusion is indicative of the difficulty courts generally have with categorizing "public policy" cases. The reliance on contract theory has the advantage of at least indicating more clearly what legal principles apply to a given case.

92. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

93. *Id.* at 189, 344 P.2d at 28.

94. *Id.* at 187, 344 P.2d at 26.

95. *Id.* at 188–89, 344 P.2d at 27.

for as long as "his work was satisfactory,"[96] the court indicated that the employee's discharge the day after being told that his work was "highly satisfactory" raised the issue of the employer's lack of good faith in discharging the plaintiff.[97] The court stated that it was " 'well settled that the employer must act in good faith; and, where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction with the services the question [of wrongful termination] is one for the jury.' "[98]

Although cases like *Monge* and *Petermann* can properly be categorized as "public policy" cases, the "bad faith" reasoning in *Monge*, and the "good faith" reasoning in *Petermann* signal a willingness by courts to use contract theory as a basis for finding exceptions to employment-at-will. Some courts have expanded the bad faith reasoning in *Monge*, and have implied a requirement of good faith and fair dealing in all contracts.[99]

### *B. Implied Contract Cases*

Some jurisdictions have gone beyond the reasoning in *Monge* that a discharge made in bad faith is against public policy. These courts have focused on the employment relationship itself and indicate that the *individual* has certain rights inherent in the employment contract. For example, in *Fortune v. National Cash Register Co.*,[100] a salesman with twenty-five years of service with the company was discharged the next business day after he had made a large sale which would have entitled him to a commission of over $92,000.[101] The Massachusetts Supreme Court held that the circumstances surrounding the discharge were sufficient to permit the inference that the discharge was motivated by a bad faith desire not to pay the entire commission.[102]

Although the *Fortune* court conceded an employer's right to run its business as it sees fit, the court also indicated that enforcing a requirement of good faith in employment contracts would not unduly hamper the employer's decision-making ability.[103] The court stated the

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96. *Id.* at 189, 344 P.2d at 28.

97. *Id.*

98. *Id.* (quoting Coats v. General Motors Corp., 3 Cal. App. 2d 340, 348, 39 P.2d 838, 841 (1934)).

99. *See, e.g.*, Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). *But see* Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 304, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983) (New York recognizes the good faith covenant, but nothing can be implied that is inconsistent with the other terms of the contract, such as the implicit "terminable at will" clause).

100. 373 Mass. 96, 364 N.E.2d 1251 (1977).

101. *Id.* at 99, 364 N.E.2d at 1254.

102. *Id.* at 105, 364 N.E.2d at 1258.

103. *Id.* at 102, 364 N.E.2d at 1256.

general requirement that parties to a contract must act in good faith toward one another, characterizing the remedy as being "on the expressed contract."[104] It further noted that the requirement of good faith and fair dealing was a pervasive standard in contract law, and cited commercial transactions as an example of this standard.[105]

The idea of an implied covenant of good faith and fair dealing in employment contracts was expanded in *Cleary v. American Airlines*.[106] In *Cleary*, a California appellate court stated that the concept of good faith and fair dealing is not only unconditional and independent in nature, but is applicable to all contracts.[107] Therefore, the court held that the discharge of an eighteen-year employee for alleged union activities offended "the implied in law covenant of good faith and fair dealing contained in all contracts."[108] The basis for this implied covenant, according to the *Cleary* court, is the idea that neither party should do anything that would infringe upon the rights of the other party to receive the benefits of the contractual arrangement.[109]

Other courts have found contractual terms precluding termination-at-will in situations where the employer made representations of job security and/or the availability of specific grievance procedures, and the employee relied on such representations.[110] In dealing with these cases, courts have begun to realize that the employment-at-will doctrine is *not* a rule of substantive law, but is really a rule of construction.[111] Such courts have correctly noted that the underlying basis of the employment-at-will doctrine is not the erroneous concept of mutuality of obligation.[112] Rather, they have held that the correct inquiry is whether there exists consideration for the employer's agreement with

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104. *Id.*

105. *Id.* The court pointed out that the Uniform Commercial Code requires good faith dealing between parties. *Id. See* U.C.C. § 1-203 (1977). *See also* Note, *supra* note 2, at 1832–33.

106. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

107. *Id.* at 453, 168 Cal. Rptr. at 728.

108. *Id.* at 454, 168 Cal. Rptr. at 729.

109. *Id.*, 168 Cal. Rptr. at 728.

110. *See, e.g., Toussaint*, 408 Mich. 579, 292 N.W.2d 880 (1980); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

111. *See Toussaint*, 408 Mich. at 600, 292 N.W.2d at 884; *See also* J. CALAMARI & J. PERILLO, *supra* note 41, § 2-13, at 47–49.

112. *Toussaint*, 408 Mich. at 600, 292 N.W.2d at 885. "The enforceability of a contract depends, however, on consideration and not mutuality of obligation. The proper inquiry is whether the employee has given consideration for the employer's promise of employment." *Id.* (footnotes omitted). The concept of mutuality of obligation is shown by the following example: "[I]n a bilateral contract both parties must be bound or neither is bound. From this premise it follows that since A is not bound, B is not." J. CALAMARI & J. PERILLO, *supra* note 41, § 4-14, at 156–57. In the employment context, mutuality means that the employer has the same right to terminate employees as employees have to terminate employment, i.e., at will.

the employee.[113]

The notion that the employee must furnish additional consideration to support a "permanent" employment contract has been criticized by many.[114] Recent cases, however, have indicated that the consideration requirement is a useful evidentiary device to be used to determine the true intentions of the parties.[115] In applying this rule of construction, however, the courts should avoid mechanical analysis[116] and should not inquire as to the adequacy of consideration.[117]

Those courts which have focused on the "true" intentions of the parties have been able to find sufficient consideration, or an implied term, in a variety of situations. For instance, courts have implied contract terms where the employee was given assurances of job security during the hiring process.[118] The duty to discharge only for good cause has also been inferred from the employee's longevity with the employer, coupled with complimentary statements made regarding the quality of the employee's work.[119] Similarly, valid causes of action have been

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113. *Toussaint*, 408 Mich. at 600, 292 N.W.2d at 885; *Weiner*, 57 N.Y.2d at 463–64, 443 N.E.2d at 444–45, 457 N.Y.S.2d at 196. The *Weiner* court defined consideration as consisting of either a benefit to the promisor, or a detriment to the promisee. *Id.* at 464, 443 N.E.2d at 444, 457 N.Y.S.2d at 196. Consideration has also been defined as legal detriment that has been bargained for and exchanged for the promise. J. CALAMARI & J. PERILLO, *supra* note 41, § 4-2, at 134–35. Legal detriment is the surrender of any legal right, privilege, or immunity. *Id.* § 4-3, at 138.

114. *See, e.g., Weiner*, 57 N.Y.2d at 464, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. "Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing foreborne or promised is not crucial as long as it is acceptable to the promisee." *Id. See also* Blades, *supra* note 36, at 1419–21; Note, *supra* note 2, at 1818–24.

115. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). As the *Pugh* court stated:

> The most likely explanation for the "independent consideration" requirement is that it serves an evidentiary function: it is more probable that the parties intended a continuing relationship, with limitations upon the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service.

*Id.* at 326, 171 Cal. Rptr. at 925.

116. *Id.* " 'It is fundamental that when construing contracts involving employment rights, courts should avoid mechanical and arbitrary tests if at all possible; employment contracts, like other agreements, should be construed to give effect to the intention of the parties . . . .' " *Id.* (citations omitted in original).

117. J. CALAMARI & J. PERILLO, *supra* note 41, § 4-3, at 139.

118. For example, in *Weiner*, the court found an implied contract sufficient to support the employee's action for wrongful discharge. *Weiner*, 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. The court found that the employee was induced to leave his previous employer because of the assurances of job security made by the defendant. *Id.* The employee also rejected other offers of employment in reliance on these assurances. *Id.*

119. *See, e.g., Pugh*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). A 32-year employee who had advanced to a position of vice president was discharged without notice. The court held that the summary discharge of such a long-term employee, without legitimate reason offended the implied covenant of good faith. *Id.* at 328, 171 Cal. Rptr. at 926–27.

found where the discharged employee relied on company handbooks and/or manuals concerning job security and grievance procedures.[120]

In the handbook context, the leading case is *Toussaint v. Blue Cross & Blue Shield*.[121] In reinstating a jury verdict for a wrongfully discharged employee, the *Toussaint* court addressed the question of whether the policies stated in an employment manual could rise to the level of an enforceable contract.[122] The court agreed with the employee that the "just cause" provisions of the handbook given to the employee in response to his questions concerning job security were binding on the employer.[123] In reaching this conclusion, the court indicated that the proper inquiry was the discovery and implementation of the intent of the parties.[124] As a result, the court ruled that when an employer states that the job is secure as long as the employee "does the job, a fair construction is that the employer has agreed to give up his right to discharge . . . without assigning cause . . . ."[125]

In the course of its opinion, the *Toussaint* court discussed the reasons for the promulgation of handbooks. The court noted that the employer, in providing policies and guidelines, presumably enhances the employment relationship by securing a more loyal workforce.[126] The court also indicated that "the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies, or that the employer may change those policies unilaterally."[127]

While the *Toussaint* court dealt with policy handbooks in terms of the intent of the parties, other courts have approached employer handbooks from a slightly different direction. These courts do not speak in terms of contract *per se*, but rather in terms of "quasi-contract" or promissory estoppel.

### C. *Promissory Estoppel*

Recently, some jurisdictions have invoked the doctrine of promis-

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120. *See, e.g.*, Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); *Toussaint*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Weiner*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

121. 408 Mich. 579, 292 N.W.2d 880 (1980).

122. *Id.* at 598, 292 N.W.2d at 885.

123. *Id.*

124. *Id.* at 600, 292 N.W.2d at 885. *Accord Weiner*, 57 N.Y.2d at 464, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

125. *Toussaint*, 408 Mich. at 610, 292 N.W.2d at 890.

126. *Id.* at 613, 292 N.W.2d at 892.

127. *Id. See also Leikvold*, 141 Ariz. at ___, 688 P.2d at 205–06 (court indicated the question of whether a personnel manual modified the employment relationship was a factual question for the jury).

sory estoppel[128] to grant relief to wrongfully discharged employees.[129]

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128. Promissory estoppel is defined as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).

129. *See, e.g.*, Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981) (employee who quit job because of promise of future employment with defendant stated valid claim when defendant rescinded job offer); Jones v. East Center for Community Mental Health, 19 Ohio App. 3d 19, 482 N.E.2d 969 (1984) (employer estopped from disavowing handbook delineating disciplinary procedures that gave rise to reasonable expectations on part of employee that such procedures would be followed). *See also* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employee's longevity with company, together with expressed guidelines of the employer, operated as a form of estoppel, precluding discharge without just cause).

While promissory estoppel may be the most flexible of the theories presented, courts should not lose sight of the fact that promissory estoppel is an equitable doctrine that should be limited "as justice requires." *See supra* note 128. The Ohio Supreme Court may well have lost sight of this important limitation in the recent case of Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985). The *Mers* court indicated that employees could bring an action against their employer in the face of an employment-at-will relationship. The case was before the court for review of the grant of summary judgment in favor of the employer. *Id.* at 100, 483 N.E.2d 152. The supreme court reversed, holding that "where appropriate, the doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements when *a promise which the employer should reasonably expect to induce action or forbearance on the part of the employee does induce such action or forbearance . . . .*" *Id.* at 105, 483 N.E.2d at 155 (emphasis added).

The *Mers* court concluded that the grant of summary judgment was inappropriate, as reasonable minds could have differed over whether the employer's statements to the employee caused such reliance. *Id.* at 106, 483 N.E.2d at 155. The factual background of this case is rather bizarre, however, and it is submitted that this was not an appropriate case for the supreme court to recognize an exception to the employment-at-will rule.

The employee in *Mers* was employed for nearly four years with the defendant as a traveling sales representative. *Id.* at 101, 483 N.E.2d at 152. He was arrested and charged with the crimes of rape, gross sexual imposition, and kidnapping. *Id.* His employer subsequently suspended him without pay, pending a "favorable resolution" of the criminal charges against him. *Id.* The criminal trial resulted in a hung jury and the trial court denied a motion for acquittal. *Id.* Nevertheless, the prosecutor chose not to retry the case, as the alleged victim did not want to have it prosecuted again. When the employee tried to return to work, his employer terminated him. *Id.* The trial court and the appellate court sustained the employer's motion for summary judgment in the subsequent civil action filed by the employee. It was the interpretation of the term "favorable resolution" on which the Ohio Supreme Court indicated "reasonable minds could differ." *Id.* at 104, 483 N.E.2d at 154–55.

While the court indicated that it did not want to put Ohio's courts in the "untenable position of having to second-guess the business judgments of employers," *id.* at 103, 483 N.E.2d at 153, it is submitted that this is exactly what the court did. Given the fact that the employee's effectiveness as a sales representative arguably depended on the public's perception of him, the employer could have reasonably concluded that his effectiveness may have been seriously impaired. As Justice Holmes said in his dissent: "What is absolutely clear is that the Dispatch needed a 'clean bill of health' for appellant due to the sensitive nature of his work." *Id.* at 107, 483 N.E.2d at 156 (Holmes, J., dissenting). Because of the rather extreme facts of this case, perhaps it may have been conceptually "easier" to have justified the result on the basis of public policy, that policy being embodied in the idea that the employee was innocent until proven guilty. In any event, the case is troubling because the court, unlike the majority of other courts that have allowed excep-

These courts effectively sidestep the consideration argument and often allow recovery based on the employee's detrimental reliance on the employer's statements as to job security or disciplinary procedures.[130] Courts utilizing promissory estoppel are able, therefore, to adhere to the "mutuality of consideration" rule,[131] while still providing redress to the wrongfully discharged worker.

While the distinctions between the cases that imply contract terms based on employer statements and the cases that use promissory estoppel are slight, promissory estoppel may prove a more advantageous cause of action. This advantage stems from the fact that promissory estoppel is noncontractual in nature.[132] As such, courts possess even greater flexibility in fashioning remedies that are only "limited as justice requires."[133]

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tions to the doctrine, does not seem to accord much deference to the legitimate business concerns of the employer.

The case is problematical for another reason. It is difficult to perceive how the case even "fits" into the court's own definition of promissory estoppel. While the representations made by the employer could arguably be considered a promise, it is difficult to find any "detrimental reliance" on the employee's part. It does not appear that the employee did anything in reliance on the promise. Indeed, the only "injury" that he suffered was the expense of litigation. He did not forego other employment, as in *Grouse*, nor did he act on statements made in a handbook, as in *Jones*.

The *Mers* court also indicated that it was a question of fact whether the employer's oral representations and handbook provisions could rise to the level of an implied "just cause" provision. *Id.* at 104, 483 N.E.2d at 155. The majority, however, did not indicate what the exact language in the handbook was. *See id.* The dissent, on the other hand, indicated that "[t]he handbook neither requires the Dispatch to take any procedural steps, nor are there terms which limit the ability to terminate an employee. Further, '[a]ny decision by the general manager [is] regarded as final and binding.' " *Id.* at 107, 483 N.E.2d at 156 (Holmes, J., dissenting) (brackets in original).

While the terms in the handbook *may* have caused the employee to expect certain procedures before termination, it is impossible to discern such expectation from the opinion. Again, it is submitted that this was not the appropriate case, factually, for the court to recognize an implied contract exception to the employment-at-will doctrine.

130. For example, the Ohio appellate court in *Jones*, found *no* additional consideration as the employee gave nothing in return for the promises contained in the handbook and was not bound by the manual. *Jones*, 19 Ohio App. 3d at 22–23, 482 N.E.2d at 973. However, the court, finding for the employee, ruled that the manual constituted promises which the employer should have expected to induce action or forebearance on the part of the employee, and which did induce such forebearance. *Id.* at 23, 482 N.E.2d at 974. *But see Toussaint*, 408 Mich. at 619, 292 N.W.2d at 894–95. In *Toussaint*, the Michigan Supreme Court stated: "If there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim . . . . Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior . . . the employer may not treat its promise as illusory." The court also indicated in a footnote that because the policy manual presumably enhanced the employment relationship, it was not necessary for the employee to show reliance on the manual. *Id.* at 613 n.25, 292 N.W.2d at 892 n.25.

131. *See supra* note 112 and accompanying text.

132. J. CALAMARI & J. PERILLO, *supra* note 41, § 6-10, at 213–15.

133. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979). *See supra* note 128

## V. SUMMARY AND RECOMMENDATIONS

The exceptions to the employment-at-will doctrine that are based on an implied contract theory are more flexible than those exceptions based on an implied good faith theory.[134] The reason for this flexibility is that courts using a good faith analysis stress the importance of an employee's length of service.[135] While job-time is certainly important, courts should avoid a mechanical application of this approach. A strict application may well preclude relief for a wrongfully discharged employee simply on the basis of a relatively short employment history.

Those jurisdictions that recognize exceptions to the employment-at-will rule based on tort theory are less likely to grant a recovery than those using a contract theory. A tort theory, however, has the advantage of allowing recovery of punitive damages. The availability of such recovery is particularly appropriate in cases of malicious discharge.

The courts that do not recognize any exceptions to employment-at-will should realize that it is appropriate for courts to modify the common law doctrine. These jurisdictions should interpret public policy broadly, recognizing that from a purely economic standpoint, wrongful discharges are not in the best interests of the public or of the business community.

The exceptions based on tort and contract are not mutually exclusive, and some states have allowed recovery in both tort *and* contract.[136] Recovery under both theories should provide the most flexibility as wrongfully discharged employees will be better able to recover for an unjust dismissal.

## VI. CONCLUSION

The employment-at-will doctrine has come under judicial attack in recent years. The *laissez-faire* economic philosophy that spawned the doctrine is not as viable in today's society as it was in the late-nineteenth and early-twentieth centuries. Courts are the logical forum for changing the doctrine, and theories based on public policy and contract are the most efficacious means for accomplishing this end.

Tort theories based on public policy or malicious discharge provide strong incentives for employers to treat their employees fairly because

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134. For a discussion of implied contracts, see *supra* notes 100–28 and accompanying text.

135. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (32-year employee); *Cleary*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (termination of 18-year employee offends implied-in-law covenant of good faith and fair dealing); *Fortune*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (discharge of 25-year employee the next business day after five-million-dollar order was obtained allowed reasonable inference of bad faith).

136. *See, e.g., Pugh*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 17 A.2d 505 (1980).

of potential punitive damage liability. The problems the courts have with defining public policy are not insurmountable, particularly in cases of uncontroverted policy. Courts should also utilize contract theory, as this is the more flexible approach because it allows an employee to recover in the absence of "clear" public policy. Contract theory focuses on the individual circumstances surrounding the employment relationship and can reach a broader spectrum of employees.

It is time for all jurisdictions to recognize the fact that the employment-at-will doctrine has lost its viability in today's society. The courts should lead the way in collapsing the employment-at-will citadel—a collapse that is long overdue.

*Alvin J. Lopez*