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JUDICIAL LIMITATION OF THE EMPLOYMENT AT-WILL DOCTRINE

INTRODUCTION

In February 1973, Marily Jo Kelsay was injured in the course of her employment.¹ After filing an application for compensation pursuant to the state's worker's compensation act, Kelsay received a settlement award in the amount of \$745.50.² When later dismissed from her job, she alleged it was in retaliation for the filing of her worker's compensation claim.³ Kelsay consequently commenced an action for wrongful discharge against her employer in state court.⁴

In October 1975 Daniel E. Leach filed a worker's compensation claim against his employer.⁵ Two weeks later Leach was discharged and, like Ms. Kelsay, instituted an action alleging that his employer had terminated his employment solely because he had filed a worker's compensation claim.⁶

Both cases came before the Appellate Court of Illinois, Fourth District, in August 1977. In each, the primary issue was whether the plaintiff had stated a cause of action by alleging that he was discharged solely because he had filed a worker's compensation claim.⁷ In *Kelsay v. Motorola, Inc.*,⁸ a panel of the appellate court decided that the plaintiff had failed to state a cause of action.⁹ Emphasizing that the plaintiff did not have an employment contract with the defendant for a specific term and was therefore em-

¹ *Kelsay v. Motorola, Inc.*, 51 Ill. App. 3d 1016, 1016, 366 N.E.2d 1141, 1142 (1977), *rev'd*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

² 51 Ill. App. 3d at 1017, 366 N.E.2d at 1142. In addition to the flat monetary payment, the settlement required the employer to pay for the plaintiff's medical expenses. *Id.*

³ *Id.* at 1016, 366 N.E.2d at 1142.

⁴ *Id.* The complaint was framed solely in tort and alleged that the defendant, whose conduct was described as willful and wanton, wrongfully discharged the plaintiff for filing the compensation claim. *Id.*

⁵ *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977).

⁶ *Id.* at 1023, 366 N.E.2d at 1146.

⁷ 51 Ill. App. 3d at 1022, 366 N.E.2d at 1146; 51 Ill. App. 3d at 1017, 366 N.E.2d at 1142.

⁸ 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (1977), *rev'd*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

⁹ *Id.* at 1020-21, 366 N.E.2d at 1144-45.

ployed "at will," the court held that Kelsay's employment was terminable by either party "with or without cause and with no right of action for discharge."¹⁰ In contrast, the panel that decided *Leach v. Lauhoff Grain Co.*¹¹ held that the plaintiff was entitled to relief.¹² Notwithstanding its acknowledgment of the rule that an at-will employee ordinarily may be terminated for any or no cause,¹³ the *Leach* court declared that the state's policy of compensating injured workers overrode the employer's right to discharge where "the firing [was] for the ulterior purpose of evading liability under the [worker's compensation law]."¹⁴

The purpose of this Note is to examine the at-will doctrine, which states that an employment contract for an indefinite term is terminable at the will of either the employer or the employee.¹⁵

¹⁰ *Id.* at 1017, 366 N.E.2d at 1142. Although the plaintiff cited several cases wherein the courts had relied on public policy considerations to limit the at-will employer's right to discharge, *id.* at 1019-20, 366 N.E.2d at 1143-44, the *Kelsay* court maintained that the Illinois legislature had intended to implement the public policy of its worker's compensation laws only through the imposition of criminal penalties. *Id.* at 1020, 366 N.E.2d at 1144; see ILL. ANN. STAT. ch. 48, § 138.26 (Smith-Hurd 1969 & Supp. 1979). Thus, the court concluded that it would constitute impermissible "judicial legislation" to imply that the statute authorized a cause of action in tort as an additional enforcement mechanism. *Id.* at 1020, 366 N.E.2d at 1144 (citing *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977)).

Presiding Justice Craven filed a strong dissent. Characterizing the discharge of Kelsay as an "outrageous" violation of public policy, the dissent disputed the majority's immunization of the defendant's conduct from common-law liability. 51 Ill. App. 3d at 1021, 366 N.E.2d at 1145 (Craven, P.J., dissenting). Justice Craven reasoned that if the employer retains complete freedom to fire an employee in retaliation for filing a worker's compensation claim, most injured employees will be reluctant to pursue their claims for compensation. Thus, the holding of the majority granted the employer the "best of both worlds": no common-law liability and little likelihood of a claim being filed under worker's compensation. *Id.* at 1021, 366 N.E.2d at 1145 (Craven, P.J., dissenting).

It should be noted that Kelsay appealed, and the Illinois Supreme Court reversed, employing a rationale similar to that of Presiding Justice Craven. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

¹¹ 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977).

¹² *Id.* at 1022-23, 366 N.E.2d at 1146.

¹³ *Id.* at 1024, 366 N.E.2d at 1147.

¹⁴ *Id.* at 1026, 366 N.E.2d at 1148. Presiding Justice Craven, author of the *Leach* opinion, used much of the logic employed in his *Kelsay* dissent. *Id.*; see note 10 *supra*. The court found a strong public policy in favor of providing financial and medical benefits to the victims of work-related injuries. 51 Ill. App. 3d at 1026, 366 N.E.2d at 1148. Thus, it refused to allow an at-will employer to thwart this policy by using his power of termination. *Id.*

¹⁵ Under the traditional common law, when a contract for employment expressly qualified the terms of employment, the courts enforced the wishes of the parties. *E.g.*, *Egbert v. Sun Co.*, 126 F. 568 (E.D. Pa. 1903); see *Johns v. Graham & Morton Transp. Co.*, 51 Mich. 539, 16 N.W. 893 (1883). In cases where no term was specified, however, the "American" rule has been that a contract setting forth an employee's compensation in terms of weekly, monthly, annual or other periods, but otherwise silent as to duration, was considered a con-

After a discussion of the historical development of the doctrine,¹⁶ recent legislative efforts and cases that have created exceptions to the at-will rule will be analyzed.¹⁷ Finally, the Note will articulate a standard in an attempt to lend some semblance of uniformity to the inconsistent case law. Theories of recovery will be analyzed, and the burden of proof necessary to satisfy the proposed standard under each theory also will be discussed.¹⁸

HISTORICAL PERSPECTIVE

Development of the At-Will Doctrine

During the nineteenth century, laissez-faire¹⁹ was the predominant economic theory in this country.²⁰ Writers of the period in-

tract for an indefinite period. *E.g.*, *Thoma v. Wolverine World Wide, Inc.*, 352 F. Supp. 580, 584-85 (W.D. Pa. 1972); *Farmer v. Arabian Am. Oil Co.*, 176 F. Supp. 45, 47-48 (S.D.N.Y. 1959), *rev'd on other grounds*, 277 F.2d 46 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960); *Justice v. Stanley Aviation Corp.*, 35 Colo. App. 1, 4, 530 P.2d 984, 985 (1974); *Thomas v. Ballou-Latimer Drug Co.*, 92 Idaho 337, 341, 442 P.2d 747, 751 (1968); *Cartwright v. Golub Corp.*, 51 App. Div. 2d 407, 409, 381 N.Y.S.2d 901, 902 (3d Dep't 1976); *Gillian v. Consolidated Foods Corp.*, 424 Pa. 407, 414, 227 A.2d 858, 862 (1967); *Wright v. Standard Ultramarine & Color Co.*, 141 W.Va. 368, 383, 90 S.E.2d 459, 467 (1955); *J. CALAMARI & J. PERILLO, CONTRACTS* § 23, at 32 (1970); *A. CORBIN, CONTRACTS* § 70, at 292-93 (1963); *RESTATEMENT (SECOND) OF AGENCY* § 442, Comment b at 339 (1958).

Similarly, characterizing the employment as "permanent" was insufficient to take it out of the at-will category. *E.g.*, *Milligan v. Union Corp.*, 87 Mich. App. 179, 182, 274 N.W.2d 10, 12 (1978); *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682 (1979); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 392-93, 153 N.W.2d 587, 589 (1967); *J. CALAMARI & J. PERILLO, supra*, § 23, at 32.

¹⁶ See notes 19-42 and accompanying text *infra*.

¹⁷ See notes 43-105 and accompanying text *infra*.

¹⁸ See notes 106-152 and accompanying text *infra*.

¹⁹ Laissez-faire, a theory which opposes governmental "interference" with economic affairs, has been characterized as follows:

Society, having for its object the prevention of individuals from injuring each other, has no control over industry until it becomes harmful. The nature of industry is to struggle against a rival industry, by a perfectly free competition, with efforts to obtain an intrinsic superiority. . . . Of the rights, that society certainly possesses, it results that it does not possess a right to employ against the industry of one, in favor of another, the power and the means that were given it for the benefit of all.

B. TWISS, *LAWYERS AND THE CONSTITUTION* 45-46 (1942) (quoting brief for plaintiff upon Reargument at 46 (Appendix), *Butcher's Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter House Co.*, 83 U.S. (16 Wall.) 36 (1872)).

²⁰ See B. TWISS, *supra* note 19, at 44-62. See generally E. BOGART, *ECONOMIC HISTORY OF THE UNITED STATES* (1912); Y. BRENNER, *A SHORT HISTORY OF ECONOMIC PROGRESS* (1969); J. GALBRAITH, *AMERICAN CAPITALISM* (1956); R. GRAY & J. PETERSON, *ECONOMIC DEVELOPMENT OF THE UNITED STATES* (1912); Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-

sisted on freedom of bargaining as a "fundamental and indispensable requisite of progress."²¹ It was asserted that only by free bargaining could the employer reach an agreement with the employee that was satisfactory to both.²² The at-will doctrine is a product of this era.²³ Rather than evolving from judicial decisions or legislative mandate, the rule apparently originated in a treatise on the law of master and servant.²⁴ Nevertheless, the majority of American jurisdictions adopted the doctrine as a matter of course.²⁵ The legal underpinning of the rule was primarily the contractual principle of mutuality of obligation.²⁶ The principle presumed, as do most contractual principles, equality of bargaining power between the parties to the agreement. Thus, since it was never assumed that an employee was employed permanently or for a fixed period and therefore was free to terminate the employment

19 (1967).

²¹ Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921).

²² A necessary assumption was that the employer and employee had comparable bargaining power. While this may have been true at one time, see Y. BRENNER, *supra* note 20, at 210, it is apparent that this is no longer the case, see notes 32-42 and accompanying text *infra*. See generally A. JAY, *MANAGEMENT AND MACHIAVELLI* (1967).

²³ See 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, 823 (1975). See generally Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

²⁴ H. WOOD, *MASTER AND SERVANT* § 134 (1877). In this work, the author proclaimed: With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

Id. As support for his conclusion Wood merely cited four cases: *Wilder v. United States*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. (13 Wall.) 254 (1871); *De Briar v. Minturn*, 1 Cal. 450 (1851); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871). Ironically, none of these cases supported him. Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 & n.54 (1974).

²⁵ See, e.g., *Haney v. Caldwell*, 35 Ark. 156 (1879); *Greer v. Arlington Mills Mfg. Co.*, 17 Del. 581, 43 A. 609 (1899); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895). See generally *Blades*, *supra* note 20; *Summers, Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107 (1942); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-47 (1974).

²⁶ The concept of mutuality of obligation provides that unless both parties to a contract are bound, neither is bound. J. CALAMARI & J. PERILLO, *supra* note 15, § 67; see I S. WILLISTON, *CONTRACTS* § 105A (3d ed. 1957). The doctrine of mutuality of obligation, however, has been disfavored in recent years. See note 39 *infra*.

relationship at any time, it was reasoned that the employer must also have the right to dismiss the employee for any or no reason.²⁷

The rather harsh effects of this rule, however, soon became apparent. In one case,²⁸ for example, an at-will employee alleged that he had been discharged solely because his immediate superior had been unsuccessful in an attempt to alienate the affections of the plaintiff's wife.²⁹ In dismissing the action, the court held that the plaintiff's discharge was legal "regardless of the motive or malice which actuated it."³⁰ This holding was typical of the approach taken by many courts that the at-will employee could be terminated "for good cause, for no cause, or even cause morally wrong, without being thereby guilty of legal wrong."³¹

²⁷ *Pitcher v. United Oil & Gas Syndicate, Inc.*, 174 La. 66, 139 So. 760 (1932). The *Pitcher* court explained why an employment for an indefinite term was terminable at will as follows:

The reason . . . is obvious. An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself And if the contract of employment be not binding on the employee . . . then it cannot be binding upon the employer; there would be lack of "mutuality."

Id. at 67, 139 So. at 761.

²⁸ *Comerford v. International Harvester Co.*, 235 Ala. 376, 178 So. 894 (1938).

²⁹ *Id.* at 377, 178 So. at 895.

³⁰ *Id.* at 378, 178 So. at 896.

³¹ *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); *accord* *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976) (employee dismissed after 26 years service allegedly because he refused to give false information to the government); *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964) (dismissal after 28 years service because of an allegedly mistaken diagnosis by the employer's physician); *Mitchell v. Stanolind Pipe Line Co.*, 184 F.2d 837 (10th Cir. 1950) (employee fired for filing a tort claim against a fellow employee); *DeMarco v. Publix Super Mkts., Inc.*, 360 So. 2d 134 (Fla. Dist. Ct. App. 1978), *cert. denied*, 367 So. 2d 1123 (Fla. Sup. Ct. 1979) (employee terminated allegedly because his daughter brought a personal injury action against the employer); *Simmons v. Westinghouse Elec. Corp.*, 311 So. 2d 28 (La. Ct. App. 1975) (foreman with 25 years seniority discharged without notice or hearing for alleged "unsatisfactory performance"); *see* *Portable Elec. Tools, Inc. v. NLRB*, 309 F.2d 423 (7th Cir. 1962); *Swaffield v. Universal Eesco Corp.*, 271 Cal. App. 2d 147, 76 Cal. Rptr. 680 (1969); *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960); *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978) (*per curiam*); *Runyan v. Economics Lab. Inc.*, 147 Ga. App. 53, 248 S.E.2d 44 (1978); *Harp v. Bureau of Unemployment Comp.*, 12 Ohio Misc. 34, 230 N.E.2d 376 (1976).

By the early twentieth century, the absolute power of the employer to discharge an at-will employee had been raised to a constitutional right. In *Coppage v. Kansas*, 236 U.S. 1 (1915), the Supreme Court declared unconstitutional a Kansas state law that outlawed the firing of employees for union membership. *Id.* at 26. The Court relied on *Adair v. United States*, 208 U.S. 161 (1908), which held a similar federal statute unconstitutional. *Id.* at 180.

Erosion of the Theory Underlying the At-Will Doctrine

With the development of an industrial and technologically advanced America, it became clear that the individual employee and the employer generally did not have equal bargaining power.³² The inferiority of the employee's position may be attributed to the immobility of the worker,³³ which was then and is now the result of several factors. First, and most important, the employee characteristically relies only on his employment for his livelihood.³⁴ Secondly, the worker typically accrues retirement, medical, vacation, and other benefits in direct relation to his longevity in a particular position.³⁵ The value of the benefits can be substantial, and when considered in conjunction with the progressive-with-time nature of most pay scales, they can further impede the mobility of the average laborer.³⁶ A third factor tending to restrict the ability of workers to change jobs freely is specialization.³⁷ As the employee's work

Although the Court later overruled these cases and upheld the power of Congress to protect union activities, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), it specifically noted that its decision would not affect the right of the employer to fire for any reason other than union activity. *Id.* at 45-46.

³² Although the rapid expansion of the early American industrial economy created jobs at a rate sufficient to provide work for those displaced as a result of technological advances and, at the same time, accommodated the increase in the size of the work force caused by a substantially increasing population, this situation was short lived. Y. BRENNER, *supra* note 20, at 210-11. Inevitably, the number of qualified workers began to exceed the number of available positions. As a result, the employer acquired significant leverage in negotiating employment contracts. The effects of the inequality in bargaining position were shown in the long hours and poor working conditions experienced by most of the labor force. As late as 1920, for example, the steel industry worked a 12-hour day and a 72-hour week, with a 24-hour shift every two weeks. J. GALBRAITH, *supra* note 20, at 114-15.

³³ See J. GALBRAITH, *supra* note 20, at 114-15; Blades, *supra* note 20, at 1405.

³⁴ Feinman, *supra* note 23, at 132.

³⁵ See Holmans, *Fringe Benefits in the United States*, in FRINGE BENEFITS, LABOUR COSTS AND SOCIAL SECURITY 124-44 (G. Reid & D. Robertson eds. 1965). See generally H. MACAULAY, JR., FRINGE BENEFITS AND THEIR FEDERAL TAX TREATMENT 3-18 (1959). It has been estimated, for example, that the cost of employee benefits in the public and private sectors adds about 33% to the average payroll. M. MEYER & H. FOX, PROFILE OF EMPLOYEE BENEFITS 1 (1974).

³⁶ This is supported by data collected in the 1970 Census which indicated that young workers are the most mobile members of the labor force. For example, among male workers aged 20-29 in 1965, 51.4% of them had changed jobs at least once by 1970. In contrast, the percentage of those who had changed in the 30-39 age group (37.5%) and the over 60 age group (12%) decreased significantly and in direct proportion to their ages. BNA [1977] LABOR RELATIONS Y.B. 59.

³⁷ "[A] change of occupational specialty usually requires some degree of risk and may require long-term investment in retraining." U.S. DEP'T OF LABOR, EMPLOYMENT & TRAINING ADMINISTRATION, EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT 135 (1976).

becomes more specialized, the range of employment opportunities for which he is qualified diminishes.³⁸ Thus, mutuality of obligation, which relied on substantial equality of bargaining power between parties to a contractual relation, no longer remains persuasive as a justification of the at-will doctrine.³⁹

It has long been recognized that as an unexpected product of freedom of bargaining, the employer's unfettered power of discharge has enabled him to influence significantly the activities of his employees.⁴⁰ Fear of dismissal provides the employer with the power to affect the conduct of the employee in matters having little or no connection with the workplace.⁴¹ Thus, the ability to terminate the employment relation has proven to be a potent tool in the hands of the unscrupulous employer. Moreover, since this influence may be implicit as well as explicit, even the ethical employer has the potential to control the nonwork-related lives of his employees.⁴²

LEGISLATIVE RESTRICTION OF THE EMPLOYER'S ABSOLUTE RIGHT OF DISCHARGE

The first major legislative break with the at-will rule came with the passage of the National Labor Relations Act of 1935 (NLRA).⁴³ In addition to fostering the growth of collective bar-

³⁸ See, e.g., *Hudson Foam Latex Prods., Inc. v. Aiken*, 82 N.J. Super. 508, 512-13, 198 A.2d 136, 138-39 (1964). See also *Blake, Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

³⁹ The principle of mutuality of obligation has fallen into disfavor among commentators, see J. CALAMARI & J. PERILLO, *CONTRACTS* § 4-14 (2d ed. 1977); *RESTATEMENT (SECOND) OF CONTRACTS* § 81 (Tent. Draft 1973); 1 S. WILLISTON, *supra* note 26, § 105A. In addition, statutes such as the NLRA, 29 U.S.C. §§ 151-169 (1976); see notes 43-46 and accompanying text *infra*, which limit the right of the employer to discharge employees with no corresponding restriction of the employee's authority to terminate his employment, display little concern over the lack of mutuality. Nevertheless, mutuality of obligation is asserted as a viable rationale for the at-will doctrine.

⁴⁰ J. GALBRAITH, *supra* note 20, at 114-15; *Blades, supra* note 20, at 1404-10; see Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1443-46 (1975).

⁴¹ *Blades, supra* note 20, at 1406 (citing W.E. MOORE, *THE CONDUCT OF THE CORPORATION* 28 (1962)).

⁴² An employee's mere knowledge of the employer's right to discharge may result in alteration of conduct to insure that this power will not be used against him.

⁴³ Act of July 5, 1935, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1976)). Congress was cognizant of "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" *Id.*, § 151; see *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *Fafnir*

gaining agreements,⁴⁴ the NLRA prohibits an employer from discriminating in employment to deter union membership.⁴⁵ This statutory restriction of the employer's right of discharge is especially significant because, where it is found that an employee has been wrongfully dismissed, one of the remedies available to him is reinstatement.⁴⁶ Similar laws have been enacted in many states,⁴⁷ and parallel statutes have extended like protection to a majority of public employees.⁴⁸

Since 1935, both the states and the federal government have continued to limit the employer's formerly absolute power of discharge. For example, veterans,⁴⁹ debtors,⁵⁰ the elderly,⁵¹ and jurors⁵² are statutorily protected from wrongful dismissal. Other laws, such as those prohibiting discrimination on the basis of race, color, religion, national origin, or sex,⁵³ although not expressly directed toward remedying the inequalities inherent in the employ-

Bearing Co. v. NLRB, 362 F.2d 716, 717 (2d Cir. 1966). Since its enactment, the courts have realized that an important purpose of the NLRA is to protect the employee from improper discharge. *Stewart Die Casting Corp. v. NLRB*, 132 F.2d 801, 804 (7th Cir. 1942); see *NLRB v. Milk Drivers Local 338*, 531 F.2d 1162, 1163 (2d Cir. 1976) (citing *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-42 (1954)); *Evans v. American Fed'n of Television & Radio Artists*, 354 F. Supp. 823, 847 (S.D.N.Y. 1973), *rev'd on other grounds sub nom. Buckley v. American Fed'n of Television & Radio Artists*, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

⁴⁴ 29 U.S.C. § 157 (1976); see, e.g., *Valley Mould & Iron Corp. v. NLRB*, 116 F.2d 760 (7th Cir. 1940), *cert. denied*, 313 U.S. 590 (1941); *Fort Wayne Corrugated Paper Co. v. NLRB*, 111 F.2d 869 (7th Cir. 1940).

⁴⁵ 29 U.S.C. § 158 (1976); *accord NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴⁶ See 29 U.S.C. § 160(c) (1976).

⁴⁷ E.g., CONN. GEN. STAT. ANN. §§ 31-101 to 31-111b (West 1972 & Supp. 1980) (Connecticut Labor Relations Act); N.Y. LABOR LAW §§ 700-717 (McKinney 1977) (New York State Labor Relations Act).

⁴⁸ Under federal regulation, for example, civil service employees may not be dismissed except "for unacceptable performance," 5 U.S.C. § 4303(a) (Supp. II 1978), or "for such cause as will promote the efficiency of the [civil] service." 5 U.S.C. § 7513(a) (Supp. II 1978). See generally Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L. REV. 287 (1968); Isbell, *Carter's Civil Service Reform: 35 Percent Ifs, Buts & Maybes*, 5 CIV. LIB. REV. 6 (1978); Lanzarone, *Teacher Tenure—Some Proposals for Change*, 42 FORDHAM L. REV. 526 (1974).

⁴⁹ Veterans Preference Act, 38 U.S.C. § 2021 (1976); see *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968). See also Summers, *supra* note 25, at 502.

⁵⁰ Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976).

⁵¹ The Age Discrimination In Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976).

⁵² Jury System Improvement Act of 1978, § 6, 28 U.S.C. § 1875 (Supp. II 1978).

⁵³ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976); ALASKA STAT. § 18.80.220 (1962); CAL. LAB. CODE § 1420(a) (Deering 1976); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1979-1980).

ment relationship, also have circumscribed the employer's authority to fire an employee.⁵⁴

Notwithstanding these significant limitations, the essence of the at-will doctrine, the arbitrary power of dismissal, has not been eviscerated. The extension of legislative safeguards has been a piecemeal affair; indeed no state has gone so far as to bar wrongful or abusive discharges.⁵⁵ By default, the judiciary has begun a perceptible move toward further limiting the operation of the at-will doctrine.⁵⁶

JUDICIAL EXCEPTIONS TO THE AT-WILL DOCTRINE

Early Cases

The first major judicial limitation of the at-will doctrine⁵⁷ was

⁵⁴ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), makes it an unlawful employment practice to discharge an employee because of his race, color, religion, sex, or national origin, or because the employee opposed any practice made unlawful by Title VII, or made a charge or otherwise participated in any investigation, proceeding or hearing under Title VII, *id.* §§ 2000e-2(a), 2000e-3(a) (1976).

⁵⁵ In contrast to the United States, many other countries provide much broader protection to employees. Summers, *supra* note 25, at 508-19.

⁵⁶ It has been asserted that judicial limitation of the at-will doctrine is the "best" means. See Geary v. United States Steel Corp., 456 Pa. 171, 188, 319 A.2d 174, 182 (1974) (Roberts, J., dissenting); note 107 and accompanying text *infra*. But see Summers, *supra* note 25.

⁵⁷ Some of the earlier cases circumvented the operation of the at-will rule, not by creating exceptions to it, but by finding that the employment was not for an indefinite term. For example, several courts, although acknowledging the "American rule" that a contractual provision stating compensation in terms of a specific time period does not create a presumption of employment for that length of time, *see* note 15 *supra*, have held that when considered with other relevant circumstances, the compensation clause may support an inference of a hiring for such period. *E.g.*, Testard v. Penn-Jersey Auto Stores Inc., 154 F. Supp. 160, (E.D. Pa. 1956); Holcomb & Hoke Mfg. Co. v. Younge, 103 Ind. App. 439, 8 N.E.2d 426 (1937); Fountain v. Oreck's, Inc., 245 Minn. 202, 71 N.W.2d 646 (1955); Henkel v. Educational Research Council of America, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976).

Some courts have even subscribed to the "English rule" that if compensation is expressed in terms of a time period, it is presumed that the hiring is for a definite term equal to the specified period. Chas. S. Stiff Co. v. Florsheim, 203 Ark. 1043, 159 S.W.2d 748 (1942); Putnam v. Producers' Live Stock Mktg. Ass'n, 256 Ky. 196, 75 S.W.2d 1075 (1934); Shenn v. Fair-Tex Mills, Inc., 26 App. Div. 2d 282, 273 N.Y.S.2d 376 (1st Dep't 1966); Delzell v. Pope, 200 Tenn. 641, 294 S.W.2d 690 (1956). *See also* Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891).

Other courts have forestalled the application of the at-will doctrine by enforcing contracts purporting to make the employment permanent. Although the general rule is that a contract for permanent employment is for an indefinite period and therefore falls within the ambit of the at-will rule, *see* note 15 *supra*, where the employee has given consideration in addition to the services for which he was hired, the courts have stated that the contract of employment was enforceable and valid and not terminable at the will of either party. *E.g.*,

announced in 1959 by a California appellate court in *Petermann v. Teamsters Local 396*.⁵⁸ The plaintiff claimed that the employer had instructed him to commit perjury and that he was fired because of his refusal to do so.⁵⁹ The *Petermann* court acknowledged that an employment agreement that fails to specify a fixed period of duration is generally terminable at the will of either party.⁶⁰ Nevertheless, the court decided that in order fully to effectuate California's public policy against perjury, a restriction of the employer's power to discharge was necessary.⁶¹ Accordingly, *Petermann* was held to have stated a cause of action for breach of the employment contract.⁶²

The *Petermann* decision represented a significant, albeit limited, break with the absoluteness of the at-will doctrine. The court proclaimed that where the dismissal of an at-will employee violates the public policy of the state as expressed by statute, the employee may recover damages. Significantly, the *Petermann* panel apparently accorded little weight to the absence of a corresponding infringement on the employee's right to terminate the at-will relationship.⁶³

Several years after *Petermann* was decided, the Indiana Supreme Court similarly allowed an at-will employee to pursue a wrongful discharge action against his former employer. In

Pierce v. Tennessee C.I. & R. Co., 173 U.S. 1 (1899); *Baltimore & O.R. Co. v. Foar*, 84 F.2d 67 (7th Cir. 1936); *Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910 (E.D. Mich. 1977); *Ruinello v. Murray*, 36 Cal. 2d 687, 227 P.2d 251 (1951). Where a permanent employment has been held valid, the employer may terminate only for cause. See *Maloney v. E.I. DuPont de Nemours & Co.*, 352 F.2d 936 (D.C. Cir. 1965), cert. denied, 383 U.S. 948 (1966); *Stevens v. G.L. Rugo & Sons, Inc.*, 209 F.2d 135 (1st Cir. 1953); *F. S. Royster Guano Co. v. Hall*, 68 F.2d 533 (4th Cir. 1934); *Mowbray v. Gould*, 83 App. Div. 255, 82 N.Y.S. 102 (1st Dep't 1903). Since mere refusal of other employment is not sufficient "additional consideration" to make a contract for permanent employment enforceable, this exception rarely is available to the average wage earner. See, e.g., *Milligan v. Union Corp.*, 87 Mich. App. 179, 274 N.W.2d 10 (1978).

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

⁵⁹ *Id.* at 187, 344 P.2d at 26.

⁶⁰ *Id.* at 188, 344 P.2d at 27.

⁶¹ *Id.* at 189, 344 P.2d at 27. The court noted that the presence of criminal sanctions normally would be sufficient to deter both the employer and the employee from committing perjury. Observing that the public policy against perjury would be undermined if an employee could lose his job for defying his employer's order to commit the offense, the *Petermann* court held that the civil law must assist the advancement of California's public policy against perjury by restricting the at-will employer's otherwise absolute power of discharge. *Id.*

⁶² *Id.* at 192, 344 P.2d at 28.

⁶³ See note 39 *supra*.

Frampton v. Central Indiana Gas Co.,⁶⁴ the court held that a dismissal in contravention of the state's public policy as announced in its worker's compensation act⁶⁵ constituted "an intentional, wrongful act on the part of the employer" for which the employee was entitled to full compensation in damages.⁶⁶ It was not until 1974, however, that the courts began to explore the possibility of carving out an exception to the at-will rule that was not confined to statutorily pronounced mandates of public policy. The highest courts in New Hampshire, Pennsylvania and Massachusetts addressed the question and arrived at different conclusions.

The first case, *Monge v. Beebe Rubber Co.*,⁶⁷ was an action for breach of contract.⁶⁸ The plaintiff claimed that when she refused to go out with her foreman, he embarked on a program of demotion and harassment with the acquiescence of the company's personnel manager.⁶⁹ Ultimately, the plaintiff was discharged.⁷⁰ Sustaining the plaintiff's judgment,⁷¹ the New Hampshire Supreme Court proclaimed:

We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.⁷²

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

⁶⁵ The plaintiff was discharged without explanation after she received a settlement for a claim filed under the state's worker's compensation law. *Id.* at 250, 297 N.E.2d at 426. *Frampton* alleged that she had been discharged solely in retaliation for the filing. *Id.* at 253, 297 N.E.2d at 428.

⁶⁶ *Id.* at 253, 297 N.E.2d at 428. The court stated that although at-will employees generally may be dismissed without cause, when the discharge results solely from the employee's exercise of a "statutorily conferred right an exception to the general rule must be recognized." *Id.* Analogizing the *Frampton* case to a landlord-tenant action for "retaliatory eviction," the court concluded that fear of retaliation for filing a worker's compensation claim "undermines a critically important public policy." *Id.* at 252-53, 297 N.E.2d at 428.

⁶⁷ 114 N.H. 130, 316 A.2d 549 (1974).

⁶⁸ *Id.* at 130, 316 A.2d at 550.

⁶⁹ *Id.* at 131-32, 316 A.2d at 550-51.

⁷⁰ *Id.* at 131-32, 316 A.2d at 551.

⁷¹ *Id.* at 134, 316 A.2d at 552.

⁷² *Id.* at 133, 316 A.2d at 551.

The dissent in *Monge* took issue with "the broad new unprecedented law laid down" by the majority. *Id.* at 135, 316 A.2d at 553 (Grimes, J., dissenting). Justice Grimes declared that neither *Petermann* nor *Frampton*, see notes 58-66 and accompanying text *supra*, supported the majority's holding. 114 N.H. at 135-36, 316 A.2d at 553 (Grimes, J., dissenting). The dissent also noted that *Monge* was a union member and that she failed to pursue the grievance procedure prescribed in the collective bargaining agreement. *Id.* at 136, 316 A.2d

The court cited the *Petermann* and *Frampton* holdings as support for its decision.⁷³ Unlike these cases, however, there was no statutory public policy prohibiting the discharge in *Monge*. Rather, the New Hampshire court announced an expansive public policy exception to the at-will doctrine that was not limited to legislative declarations of public policy.⁷⁴ Another significant aspect of the decision in *Monge* was the court's recognition of the importance of achieving a proper balance between the interests of the employer in efficiently managing his business and that of the employee in retaining his employment.⁷⁵

The Pennsylvania Supreme Court was presented an opportunity to adopt a similar broad public policy exception to the at-will rule in *Geary v. United States Steel Corp.*⁷⁶ George Geary, employed as a salesman by the United States Steel Corporation for 14 years,⁷⁷ questioned the safety of one of the company's new products since, in Geary's opinion, it had been inadequately tested. When the plaintiff informed his superiors of his concern,⁷⁸ he was told to "follow directions."⁷⁹ Geary agreed to do so, but later expressed his misgivings about the new product to a vice president in charge of sales.⁸⁰ Allegedly because of his efforts to ensure that only a safe product be marketed, Geary was discharged.⁸¹ He then brought an action against his former employer, in which he sought compensatory and punitive damages for injury to his reputation in the industry, for mental anguish, and for financial harm.⁸²

at 553. Although union members must exhaust the grievance machinery as a prerequisite to seeking judicial relief, the argument apparently was never made in this case. See Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1437 n.9 (1975).

⁷³ 114 N.H. at 133, 316 A.2d at 551.

⁷⁴ See generally Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Comment, *Employment Contract Terminable at Will: Monge v. Beebe Rubber Co. and Bad Faith Discharges*, 63 Ky. L.J. 513 (1975); 16 B.C. INDUS. & COM. L. REV. 232 (1975); 7 CONN. L. REV. 758 (1975); 43 FORDHAM L. REV. 300 (1974).

⁷⁵ 114 N.H. at 133, 316 A.2d at 551 (citing Note, *California's Controls on Employer Abuse of Employee Rights*, 22 STAN. L. REV. 1015 (1970)). The court believed that its ruling would not interfere with the legitimate concerns of either the employer or employee. 114 N.H. at 133, 316 A.2d at 551-52.

⁷⁶ 456 Pa. 171, 319 A.2d 174 (1974).

⁷⁷ *Id.* at 173, 319 A.2d at 175.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* As a result of his efforts, the product was re-evaluated and withdrawn from the market. *Id.* at 173-74, 319 A.2d at 175.

⁸¹ *Id.* at 174, 316 A.2d at 175.

⁸² *Id.*

The court first recognized the traditional rule that absent a provision to the contrary, the law has "taken for granted" the power of either party to an at-will employment contract to terminate the relationship for any or no reason.⁸³ Addressing the argument that the defendant's conduct constituted the tortious act of "malicious abuse of recognized rights,"⁸⁴ the court stated that the cause of action requires "an element of specific intent to cause harm or accomplish an ulterior purpose."⁸⁵ Geary, however, had failed to satisfy his burden of proof.⁸⁶ Nevertheless the *Geary* court opined that "there are areas of an employee's life in which his employer has no legitimate interest." Although a cause of action might be premised upon an intrusion into one of these areas

⁸³ *Id.* at 175, 319 A.2d at 176. The court cited as support the RESTATEMENT OF TORTS § 762 (1939) which states:

One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not

- (a) a breach of the actor's duty to the other arising from the nature of the actor's business or from a legislative enactment, or
- (b) a means of accomplishing an illegal effect on competition, or
- (c) part of a concerted refusal by a combination of persons of which he is a member.

Conceding that economic conditions have changed radically since the formulation of the Restatement rule, 456 Pa. at 176, 319 A.2d at 176, the court refused to grant Geary relief. *Id.* at 176, 319 A.2d at 180. The majority commented: "Appellant candidly admits that he is beckoning us into uncharted territory. No court in this Commonwealth has ever recognized a non-statutory cause of action for an employer's termination of an at-will employment relationship." *Id.* at 174, 319 A.2d at 175.

⁸⁴ *Id.* at 178, 319 A.2d at 177.

⁸⁵ *Id.*

⁸⁶ *Id.* at 179, 319 A.2d at 177-78. Refusing to hold that the tort requires only a showing of general intent "in the sense that an employer knew or should have known the probable consequences of his act" the court stated that such a rule essentially would nullify an employer's right of discharge "for some degree of harm is normally foreseeable whenever an employee is dismissed." *Id.* at 178, 319 A.2d at 177. Moreover, the court observed that a general intent theory might permit an employer to interfere with an employee's right to change jobs. *Id.* at 178 n.8, 319 A.2d at 177 n.8.

Similarly, the court was not convinced by Geary's contention that, because he had acted in the best interests of the public and his employer, he should be protected from dismissal in retaliation for questioning the marketing of a potentially dangerous product. *Id.* at 181, 319 A.2d at 178. Since Geary was neither responsible for nor qualified to make an expert judgment in matters of product safety, *id.*, 319 A.2d at 178-79, the court considered his argument equivalent to a claim for protection from dismissal based on his good intentions, *id.* at 181, 319 A.2d at 179. The court concluded, however, that "[t]he everpresent threat of suit"—a likely result of recognizing a cause of action based upon such a claim—could interfere with an employer's legitimate hiring process and normal operational procedures. *Id.* at 181-82, 319 A.2d at 179-80.

through the employer's power of discharge,⁸⁷ the court held that to be actionable, the intrusion would have to violate a "clear mandate of public policy," a criterion not met under the facts.⁸⁸

A few years after *Geary* was decided, the Supreme Judicial Court of Massachusetts considered the issue. In *Fortune v. National Cash Register Co.*,⁸⁹ a salesman with 40 years of service alleged that his employer had discharged him to avoid paying commissions on a five million dollar sale.⁹⁰ While the plaintiff admitted that his employment was at-will, he contended that the dismissal was in bad faith and constituted a breach of the employment contract.⁹¹ The defendant, in contrast, argued that an at-will employer's motives in terminating the employment relationship are irrelevant.⁹² The court held that the employer's reasons for the dismissal could be considered by the jury because the plaintiff's contract "contain[ed] an implied covenant of good faith and fair dealing and a termination not made in good faith [would] constitut[e] a breach"⁹³ Emphasizing the exceptions that had been fash-

⁸⁷ *Id.* at 184, 319 A.2d at 180.

⁸⁸ *Id.* at 184-85, 319 A.2d at 180. The court specifically declined to adopt a broad public policy exception to the at-will doctrine.

Justice Roberts vigorously dissented, contending that *Geary's* discharge offended the public policy of Pennsylvania and that a cause of action for a wrongful discharge should thus be recognized. Noting that courts have granted relief to persons injured by defective merchandise and that the plaintiff had played an important role in removing a potentially dangerous product from the market, *id.* at 188, 319 A.2d at 181 (Roberts, J., dissenting), Justice Roberts stated that the majority neglected to consider that prevention of injury is a "substantial, clear, and compelling" objective of society, *id.* at 194, 319 A.2d at 185 (Roberts, J., dissenting)(citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)). Stressing the judiciary's obligation "to fashion remedies for the changing circumstances of economic and social reality, *id.* at 193, 319 A.2d at 185 (Roberts, J., dissenting), the dissent also declared that the "time has surely come to afford unorganized employees an opportunity to prove in court a claim for arbitrary and retaliatory discharge," *id.* at 188, 319 A.2d at 182 (Roberts, J., dissenting).

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

⁹⁰ *Id.* at 99-100, 364 N.E.2d at 1253-54.

⁹¹ Under his employment arrangement with the defendant, Fortune would receive part of the bonus due on sales if a sales territory was assigned to him at the date of the order, and part if the territory was assigned to him at the date of the delivery and installation; if the territory was assigned to him at both times, he would receive the full bonus. *Id.* at 97-98, 364 N.E.2d at 1253. Fortune alleged that his dismissal was motivated by a desire on the part of the defendant to deprive him of the second part of a commission on the sale of merchandise. *Id.* The trial court, holding for the plaintiff, awarded him \$45,649.62, the stipulated amount of unpaid bonuses. *Id.* at 101-02 & nn.6-7, 364 N.E.2d at 1255 & nn.6-7.

⁹² *Id.* at 101, 364 N.E.2d at 1255.

⁹³ *Id.* at 101, 364 N.E.2d at 1256. The court stated that the implied covenant of good faith would not impede the flexibility that an employer must be accorded in running his business and making personnel decisions. *Id.*

ioned by the judiciary to avoid the "rigidity" of the at-will rule,⁹⁴ the court cited *Monge* as standing for the proposition that

in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.⁹⁵

The *Fortune* court, however, refused to predict future "adherence to so broad a policy," nor would it "speculate . . . whether the good faith requirement is implicit in every contract for employment at will."⁹⁶ Rather, the court specifically limited its holding to the facts of the case.⁹⁷

Recent Case Trends

The dissatisfaction with the employment-at-will doctrine continues to grow, and the number of jurisdictions creating exceptions has increased accordingly.⁹⁸ While there has been no general ac-

⁹⁴ *Id.* at 102, 364 N.E.2d at 1256. The court noted that while some courts have fashioned a remedy in tort, see, e.g., *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970); *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), it would proceed in this case on the basis of breach of contract. 373 Mass. at 102, 364 N.E.2d at 1256. For a discussion of the various causes of action used to limit the arbitrary power of dismissal given the employer under the at-will doctrine, see notes 119-143 and accompanying text *infra*.

⁹⁵ 373 Mass. at 104, 364 N.E.2d at 1257 (emphasis in original) (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933)).

⁹⁶ 373 Mass. at 104, 364 N.E.2d at 1257.

⁹⁷ *Id.* at 104-05, 364 N.E.2d at 1257. The court stated that when a principal attempts to deprive an agent of compensation by terminating the contractual relationship, the principal has acted in bad faith, thus entitling the agent to his commission. *Id.*

⁹⁸ At least 18 states have recognized the non-absoluteness of the at-will doctrine. Eleven of these have explicitly recognized a cause of action by an at-will employee, where he alleged that his discharge violated the public policy of the state. See *Savodnik v. Korvettes, Inc.*, N.Y.L.J., April 28, 1980, at 3, col. 1 (E.D. N.Y. April 23, 1980); *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978). Courts in an additional seven states, although not yet explicitly allowing exceptions to the at-will rule, have indicated that given proper circumstances they would be amenable to recognizing a limitation to the at-will doctrine. See *Moore v. Home Ins. Co.*, 601 F.2d 1072 (9th Cir. 1979)(Arizona); *Lampe v. Presbyterian Medical Center*, 41

ceptance of the broad public policy exception promulgated by the *Monge* court,⁹⁹ the cases that have permitted at-will employees to state causes of action for wrongful discharge have not limited themselves to the "clear mandate of public policy" requirement of *Geary*. Thus, these decisions have allowed recovery even where a dismissal did not contravene a statutory public policy.¹⁰⁰ Instead, the courts have accepted and rejected specific limitations to the at-will rule in an attempt to protect the legitimate concerns of both the employer and the employee under the particular facts.¹⁰¹ Underlying this judicial circumscription of the at-will doctrine, however, is a slow expansion of the idea that all discharged employees, regardless of their at-will status, are entitled to judicial redress where termination of their employment transgresses a substantial public policy. Thus, at-will employees have been found to state causes of action where they were discharged for refusal to commit an unlawful or unethical act,¹⁰² for asserting certain statutory

Colo. App. 465, 590 P.2d 513, (1978); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Abriz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. 1977); *Stephens v. Justiss-Mears Oil Co.*, 300 So. 2d 510 (La. Ct. of App. 1974); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977)(en banc).

⁹⁹ Indeed, some courts have rejected the *Monge* decision. *E.g.*, *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977); *Criscione v. Sears, Roebuck & Co.*, 66 Ill. App. 3d 664, 384 N.E.2d 91 (1978); *Abriz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978).

The Washington Supreme Court, however, left open the possibility of adopting the *Monge* rule. *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 898, 568 P.2d 764, 771 (1977).

¹⁰⁰ There was at least some indication in the *Geary* decision that the "clear mandate of public policy" requirement would only be satisfied where the state's public policy was embodied in statutory law. *See* 456 Pa. at 183 n.16, 319 A.2d at 180 n.16; *Beidler v. W.R. Grace, Inc.*, 461 F. Supp. 1013, 1015 (E.D. Pa. 1978). *But see* *Davis v. United States Steel Supply, Div. of U.S. Steel Corp.*, 581 F.2d 335 (3d Cir. 1978).

¹⁰¹ *See, e.g.*, *Crownover v. Sears, Roebuck & Co.*, 594 F.2d 565 (6th Cir. 1979)(under Michigan law, no exception recognized where termination based solely on economic reasons); *Lekich v. International Business Mach. Corp.*, 469 F.Supp. 485 (E.D.Pa. 1978) (no cause of action for wrongful discharge where firing was for "plausible and legitimate" reason); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977)(exception recognized for intentional infringement of public policy) (dictum); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. 1977)(exception to at-will rule limited to matters of public concern); *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335, 399 A.2d 1023 (1979)(exception recognized where employee discharged for following a "reasonably supportable ethical standard"); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975)(exception to at-will doctrine where dismissal based upon a "socially undesirable" motive).

¹⁰² In light of *Petermann*, it is clear that "[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 an employee . . . on the ground that the employee declined to commit . . . an act specifically enjoined by statute." *Petermann*, 174 Cal. App. 2d at 188-89, 344 P.2d at 27.

rights,¹⁰³ for absence from work because of jury duty service in state courts,¹⁰⁴ and for "blowing the whistle" on illegal employer activities.¹⁰⁵

Thus, there has been little trouble recognizing a limitation to the at-will rule based on a discharge in retaliation for an employee's refusal to commit an illegal act. *See* *Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910, 916 (E.D. Mich. 1977); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 333-34, 563 P.2d 54, 57 (1977); *Trombetta v. Detroit, Toledo, Ironton R.R.*, 81 Mich. App. 489, 495, 265 N.W.2d 385, 388 (1978); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 651, 245 N.W.2d 151, 155 (1976); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 418, 390 A.2d 149, 150 (1978).

Although the courts have been less receptive to recognizing an exception to the at-will doctrine where the termination was based upon the employee's refusal to perform an unethical act, *see, e.g.*, *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978), at least one court has indicated that an exception should be allowed where the employer attempts to compel the employee to violate "a reasonably supportable ethical standard," *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335, 343, 399 A.2d 1023, 1027 (1979). For a discussion favoring adoption of an exception in this area, *see* 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 (1975).

¹⁰³ The worker compensation cases have been the primary vehicle for limiting the at-will doctrine where an employee was dismissed for exercising statutory rights. *See, e.g.*, *Kel-say v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Sventko v. Kroger Co.*, 69 Mich. App. 664, 245 N.W.2d 151 (1976); notes 1-14, 64-66 and accompanying text *supra*. This exception to the at-will rule has been extended to several other areas. *See, e.g.*, *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (refusal to submit to polygraph test where statute proscribed employer use of device); *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (exercise of rights under minimum wage law); *Glen v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d, 13 Cal. Rptr. 769 (1961) (exercise of right to encourage unionism).

¹⁰⁴ *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); *see, e.g.*, *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 273 (W. Va. 1978). Jurors in federal court are protected from dismissal for their service by statute. *See* 28 U.S.C. § 1875 (Supp. II 1980).

¹⁰⁵ *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978); *see* *Hoopes v. City of Chester*, 473 F. Supp. 1214, 1223 n.4 (E.D. Pa. 1979). In *Harless*, the court held that the plaintiff had stated a cause of action by alleging that he was fired because he reported violations of the consumer credit laws by his employer. 246 S.E.2d at 275. This tempering of the at-will rule was permitted because the court found that the employer's motivation for the discharge violated a "substantial public policy principle, *viz.* that of protecting consumers of credit." 246 S.E.2d at 275-76.

A "whistle blowing" exception, however, generally has met judicial resistance. *See, e.g.*, *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E.2d 51 (1978); *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979); *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 563 P.2d 1205 (1977). Congress, however, has accorded whistle blowers significant protection. For example, several legislative schemes prohibit the dismissal of employees who reveal violations of their provisions. *E.g.*, 29 U.S.C. § 158(a)(4) (1976) (NLRA); 29 U.S.C. § 215(a)(3) (1976) (Federal Fair Labor Standards Act); 5 U.S.C. § 2302(b)(8)(A) (Supp. 1979) (Civil Service Reform Act of 1978). The Civil Service Reform Act of 1978 authorizes the Merit Systems Protection Board to remedy

PROVIDING REMEDIES FOR THE WRONGFULLY DISCHARGED AT-WILL
EMPLOYEE

Standard For Dismissal

Notwithstanding the significant judicial inroads on the once inviolable employment-at-will doctrine, the state legislatures have failed to respond by statutorily mandating that all discharges be supported by just cause.¹⁰⁶ Because of the complex relationships in any employment situation and the important interests of the employer, the employee, and society that are inevitably implicated, a flexible, uniform standard implemented by the judiciary may be best suited in this area of the law.¹⁰⁷ The courts, however, have taken approaches as inconsistent as the present legislative exceptions to the at-will doctrine.¹⁰⁸ Rather than examining individual discharges to determine if the firing contravened a substantial public policy, it is suggested that the judiciary recognize the importance of balancing the interests of both parties in the employment relationship.¹⁰⁹

A standard of good faith would appear to accommodate the

retaliatory discharges caused by:

a disclosure of information by an employee . . . which the employee . . . reasonably believes evidences—

- (i) a violation of any law, rule, or regulation, or
- (ii) mismanagement, a gross waste of funds, an abuse of authority,

or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Id.

These statutory proclamations evince a public policy in favor of "blowing the whistle." It is submitted, therefore, that judicial protection for whistle blowers is warranted, for employees who expose not only illegal acts, as was the case in *Harless*, but also activity that the employee reasonably believes constitutes reckless or intentional misconduct or that violates a reasonably supportable ethical standard. See generally REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY, WHISTLE BLOWING (1972).

¹⁰⁶ *But cf.* GA. CODE ANN. § 66-101 (1979) (payment of wages for a stipulated period raises a presumption that hiring is for same period). While no states have abrogated the doctrine, the territory of Puerto Rico has abolished the at-will rule, substituting a standard of good cause. See P.R. LAWS ANN. tit. 29, § 185a (Supp. 1978).

¹⁰⁷ See *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super 335, 342, 399 A.2d 1023, 1026 (1979); *Geary v. United States Steel Corp.*, 456 Pa. at 188, 319 A.2d at 185 (Roberts, J. dissenting); *Blades*, *supra* note 20, at 1407.

¹⁰⁸ Compare notes 43-56 and accompanying text *supra* with notes 98-105 and accompanying text *supra*.

¹⁰⁹ See *Fortune*, 373 Mass. at 102, 364 N.E.2d at 1256; *Monge*, 114 N.H. at 133, 316 A.2d at 551.

often-competing interests of the employer and the employee¹¹⁰ and thus should be employed.¹¹¹ Accordingly, only where the dismissal was in bad faith would an employee be entitled to recover. A finding of bad faith would be improper where the employer can establish a legitimate business purpose for discharging an at-will employee. The good faith standard, thereby, would afford the employer with the wide discretion in the hiring and firing process that is necessitated by the vicissitudes of the business world.¹¹² Moreover, because the employer's decision to discharge sometimes may involve considerations of a highly subjective nature, the factfinder should never be permitted to presume bad faith.¹¹³ To

¹¹⁰ One author who posited that the employer's interest in "efficiency" and the employee's concern with "security" are inherently conflicting reasoned:

For the employer, the corner-stone of the employment contract in our system of economic organization is his "right" to discharge. That "right" is necessary to reinforce the "right" of command, legitimated in capitalist ideology as an attribute of private ownership, to protect production against "disruptive" conduct, and to organize operations so as to extract the maximum profit. . . . For the employee, dismissal is the capital punishment of industry. He and his family face the possibility of a long period of economic hardship . . . and grave social and psychological upheavals, particularly if he has to uproot his family to a new area in search of work.

England, *Recent Developments in Wrongful Dismissal Laws and Some Pointers For Reform*, 16 ALBERTA L. REV. 470, 470 (1978) (footnote omitted).

¹¹¹ The good faith standard would greatly contribute to safeguarding the interests of the at-will employee in his job security. See *Monge v. Beebe Rubber Co.*, 114 N.H. at 133, 316 A.2d at 551-52. In addition, it has been observed that the "just cause" standard permits the employer to proscribe employee conduct, within reasonable bounds, and to specify employee activity adequate for dismissal. See *Summers*, *supra* note 25, at 501-02. Thus, it is clear that the less restrictive good faith standard of liability would not "interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably." *Monge*, 114 N.H. at 133, 316 A.2d at 552.

¹¹² *Fortune*, 373 Mass. at 102, 364 N.E.2d at 1256; *accord*, *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976). Attempts to narrow the application of the at-will rule sometimes have been challenged because of fear of the harmful consequences of placing limitations on the right of an employer to run his business. Early in the twentieth century, similar apprehensions caused the elevation of the power of discharge to a constitutional right. See *Coppage v. Kansas*, 236 U.S. 1, 11 (1915); *Adair v. United States*, 208 U.S. 161, 172 (1908), *discussed at* note 31 *supra*. The notion that the employer's absolute right to discharge is constitutionally protected, however, has long been discredited, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43-49 (1937), and it has become increasingly apparent that it is the employee, not the employer, who needs to be safeguarded in the employment relation, see notes 32-42 and accompanying text *supra*.

¹¹³ In some situations, an employer may not be able to establish a good working relationship with an employee because of their differences in business standards or personalities. It is suggested, therefore, that an employer should not always be required to employ someone whom he does not like on a personal or business level. This argument seems particularly convincing in a small organization where there often is an element of interpersonal

the contrary, the employee should be required to prove by clear and convincing evidence that the employer was motivated *solely* by reasons unconnected to any proper business interest.¹¹⁴

From the perspective of the at-will employee, a good faith standard of dismissal would provide certainty and security. Although dismissal based solely upon subjective dislike may not always constitute bad faith,¹¹⁵ this would be true only where the dislike rose to the level of interfering with the business. In addition, the standard of good faith would extend protection to far more at-will employees than has been accomplished by the so called "public policy" exceptions to the at-will rule.¹¹⁶

contact between the employer and the employee. In many situations, this contact would also be evident in larger organizations, although usually between an employee and his supervisor. Thus, under these circumstances, dismissal based merely on subjective dislike may nevertheless be in good faith.

¹¹⁴ A showing of a bad faith reason for dismissal would shift the burden of coming forward to the employer to show that there was a legitimate business reason for the firing. If all the employee can show, however, is that one of the reasons for the discharge was wrongful, he will not have proved bad faith discharge. *See, e.g., Sventko v. Kroger Co.*, 69 Mich. App. 644, 650, 245 N.W.2d 151, 154-55 (1976) (Allen, J., concurring).

¹¹⁵ *See* note 113 *supra*.

¹¹⁶ Since broad circumscription of the at-will doctrine under a good faith standard would do much to protect the interest of all employees in retaining their jobs, it might be feared that the future vitality and growth of labor organizations will be threatened. *See, e.g., Peck, Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 3 (1979). Similar to the erosion of the at-will doctrine, the labor union movement developed as a result of the evils generated by the operation of the at-will doctrine to the disparate relationship between the employer and the employee. W. BAER, DISCIPLINE AND DISCHARGE UNDER THE LABOR AGREEMENT 1 (1972); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1448 (1975); *see American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921); S. COHEN, LABOR IN THE UNITED STATES 61-62 (2d ed. 1966); J. KUCZYNSKI, A SHORT HISTORY OF LABOUR CONDITIONS UNDER INDUSTRIAL CAPITALISM IN THE UNITED STATES OF AMERICA 115-23 (1973). Indeed, Congress apparently considered the need for reform to be so urgent that it enacted the NLRA—a statutory exception to the at-will doctrine—to encourage union membership. *See* notes 43-48 and accompanying text *supra*. The concept that restriction of the employer's formerly absolute ability to terminate the employment relation poses a threat to future union activity, however, does not survive analysis. While it is true that an important objective of unions and the collective bargaining agreements they negotiate, job security, would to a large extent be satisfied by abolition of the at-will rule, *see Peck, supra*, at 3, the worker receives much more than employment security from membership in a labor union. Section 9(a) of the NLRA designates "pay, wages, hours of employment, [and] other conditions of employment" as proper subjects for collective bargaining. The courts have interpreted these terms broadly and, therefore, bargaining contracts often provide for pension plans, vacations, holidays, bonus systems, health and welfare programs, promotions and wages, and seniority benefits. *See generally* BUREAU OF NAT'L AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS (9th ed. 1979). Additionally, even in the area of job security, the protection offered by labor unions is generally superior to that available under a private cause

Theories of Recovery

At-will employees seeking recovery for wrongful discharge have utilized both contract and tort causes of action.¹¹⁷ An important criterion to weigh in determining an appropriate theory is the damages available. One important consideration is whether punitive damages can be recovered, since such damages appear necessary to deter the abusive exercise of the at-will employer's power to terminate the employment relationship.¹¹⁸ It is submitted, therefore, that unless a cause of action makes punitive damages available, it is an inadequate means of protecting the interest of the at-will employee in retaining his employment.

Contract

Traditionally, the at-will doctrine was invoked to defeat actions framed in contract for lack of consideration or mutuality of obligation.¹¹⁹ Modern courts, however, have begun to recognize the contractual nature of the employment relationship, despite the indefinite duration of the contract, and have held that wrongful termination of the status constitutes a breach.¹²⁰ The tendency has been to imply in the contract a covenant to act in good faith.¹²¹ To

of action. See generally Weyand, *Present Status of Individual Employee Rights in NEW YORK UNIVERSITY TWENTY-SECOND ANNUAL CONFERENCE ON LABOR* 171 (T. Christensen & A. Christensen, eds. 1970); Summers, *supra* note 25. It is submitted, therefore, that rather than regarding abolition of the at-will doctrine as a threat to unionism, it be viewed as serving to fill the void in the existing artillery of protection available to the employee against today's concentrated and often unscrupulous employer.

¹¹⁷ The cases that have allowed the broadest limitation of the at-will rule have done so under a contract cause of action. *Fortune*, 373 Mass. 96, 364 N.E.2d 1251; *Monge*, 114 N.H. 130, 316 A.2d 549. The majority of cases permitting exceptions to the at-will doctrine, however, have framed the cause of action in tort. *E.g.*, *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

¹¹⁸ *E.g.*, *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186-87, 384 N.E.2d 353, 359 (1978); *Nees v. Hocks*, 272 Or. 210, 220, 536 P.2d 512, 516 (1975) (en banc); *Blades*, *supra* note 20, at 1427.

¹¹⁹ See *Blades*, *supra* note 20, at 1419-21.

¹²⁰ See, *e.g.*, *Fortune*, 373 Mass. at 104, 364 N.E.2d at 1257; *Monge*, 114 N.H. at 133, 316 A.2d at 551.

¹²¹ *E.g.*, *Fortune*, 373 Mass. at 104, 364 N.E.2d at 1256; *Monge*, 114 N.H. at 133, 316 A.2d at 551.

be successful, therefore, the plaintiff must establish that his employer dismissed him in bad faith.

It is suggested that, although well suited to implementing the good faith standard of liability, the contract cause of action nevertheless is an ineffective remedy for the wrongfully dismissed at-will employee.¹²² While the plaintiff might be awarded loss of earnings¹²³ and the cost of finding new employment,¹²⁴ punitive damages would be impermissible under the contract theory of recovery,¹²⁵ as would most claims for mental anguish.¹²⁶ Thus, a cause of action in contract would not provide an effective means of preventing improper dismissals in the first instance.¹²⁷

¹²² It has been argued, for example, that a cause of action in contract is defective since it leaves unresolved whether an implied cause of action for bad faith discharge "may be negated by contractual disclaimers of obligations or waivers of rights." Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1455 (1975).

¹²³ See J. CALAMARI & J. PERILLO, *supra* note 39, §§ 14-18. Computing loss of earnings presents some difficulty in the area of at-will employment contracts. See Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1050-52 (1970). Useful analogy to the measure of damages available in cases where the contract breached was for a definite term cannot be made. In those cases, the wrongfully discharged employee generally is entitled to the salary that would have been payable during the term of the contract, less any income that he can be expected with reasonable diligence to earn during the remainder of the contract period. *Quinn v. Straus Broadcasting Group, Inc.*, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970); *Perry v. Apache Junction Elementary School Dist. # 43 Bd. of Trustees*, 20 Ariz. App. 561, 564, 514 P.2d 514, 516 (1973); Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1050-52 (1970). Where a contract is for an indefinite term, however, there is some authority indicating that future damages or wages are not recoverable, see, e.g., *Jeter v. Jim Walter Homes, Inc.*, 414 F. Supp. 791, 792 (W.D. Okla. 1976), and the cases that have allowed recovery of future wages have not been consistent in measuring damages, see, e.g., *Rogozinski v. Airstream By Angell*, 152 N.J. Super. 133, 144, 377 A.2d 807, 813 (1977); *Garza v. United Child Care, Inc.*, 88 N.M. 30, 31, 536 P.2d 1086, 1087 (1975). One case demonstrates the extent to which future damages might be recoverable. In *Bowen v. United States Postal Serv.*, 470 F. Supp. 1127 (W.D. Va. 1979), the court, in analogous circumstances, computed the damages by using the present value of the plaintiff's anticipated earnings for the period for which the plaintiff "could reasonably expect to be employed." *Id.* at 1129.

¹²⁴ See, e.g., *National Serv. Indus., Inc. v. Malloy*, 266 So. 2d 370, 371 (Fla. Dist. Ct. App. 1972); *Vallejo v. Jamestown College*, 244 N.W.2d 753, 758 (N.D. 1976); *Lemlich v. Board of Trustees*, 282 Md. 495, 565 & n.5, 385 A.2d 1185, 1191 & n.5 (1978).

¹²⁵ E.g., *Isagholian v. Carnegie Inst., Inc.*, 51 Mich. App. 220, 222, 214 N.W.2d 864, 865 (1974); *Cangemi v. Acton*, 38 App. Div. 2d 806, 806, 328 N.Y.S.2d 882, 885 (1st Dep't 1972); see, e.g., J. CALAMARI & J. PERILLO, *supra* note 39, § 14-3; Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1145-46 (1970).

¹²⁶ E.g., *Dryden v. Tri-Valley Growers*, 65 Cal. App. 2d 990, 999, 135 Cal. Rptr. 720, 726 (1977); *McClain v. Faraone*, 369 A.2d 1090, 1094 (Del. Super. Ct. 1977); *Martin v. Donald Park Acres, Inc.*, 54 App. Div. 2d 975, 975, 389 N.Y.S.2d 31, 32 (2d Dep't 1976).

¹²⁷ An additional reason why the contract cause of action is not an effective means of redressing wrongfully discharged employees is the denial of the judiciary to allow specific

Tort

In order to take advantage of the wider range of recoverable damages, many at-will plaintiffs have framed their complaints in tort.¹²⁸ An unjustified dismissal may be considered tortious basically because it constitutes an unreasonable interference with the interest of the employee in retaining his job.¹²⁹ Often, however, the courts have recognized specific, limited tort causes of action, such as the tort of discharge in retaliation for filing a worker's compensation claim.¹³⁰ Such theories of recovery have done little to make known to the at-will employer the reasons for upholding dismissals or to alert the employee to the types of activities in which the law will protect him from employer influence through the power of dismissal.

Where plaintiffs have sought damages on broader tort theories, however, difficulties have arisen in overcoming the various proof requirements of the available theories of liability. In one case, for example, the plaintiff unsuccessfully attempted to premise liability on a tort theory analogous to abuse of process.¹³¹ The essence of stating a cause of action in abuse of process, which lies for the intentional misuse of legal process,¹³² is not that the com-

performance of employment contracts. See 5A A. CORBIN, CONTRACTS § 1204 (1964). It is suggested that specific enforcement of an at-will employment contract would, in many instances, be the best method of redressing the injury caused by the breach. See Summers, *supra* note 25, at 531; Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1047-48 (1970). For example, most collective bargaining contracts provide for reinstatement of wrongfully dismissed workers, see note 116 *supra*, as do some statutory schemes where employees are discharged in violation of their provisions, e.g., 28 U.S.C. § 1875(b) (Supp. II 1980) (Jury Systems Improvements Act of 1978). Nevertheless, by reasoning that ordering reinstatement of an employee "would involve difficulty of supervision and . . . forcing the continuance of a distasteful personal relationship," the courts continue to deny specific performance of employment contracts. J. CALAMARI & J. PERILLO, *supra* note 39, § 16-5. Although there may be circumstances under which specific performance would be unfeasible, see, e.g., England, *supra* note 110, at 515; note 113 *supra*, it is suggested that the general practicability of granting specific performance is demonstrated by the success of reinstatement provisions in collective bargaining agreements. See J. CALAMARI & J. PERILLO, *supra* note 39, § 16-5.

¹²⁸ See note 117 *supra*.

¹²⁹ See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (4th ed. 1971). See generally Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1942).

¹³⁰ *Kelsay*, 74 Ill. 2d at 185, 384 N.E.2d at 357.

¹³¹ 456 Pa. at 178, 319 A.2d at 177.

¹³² See RESTATEMENT (SECOND) OF TORTS § 682 (1977); W. PROSSER, *supra* note 129, § 121. See generally 1 T. COOLEY, A TREATISE ON THE LAW OF TORTS 348-52 (3d ed. 1906); Note, *Abuse of Process—A Misunderstood Concept*, 20 CLEV. ST. L. REV. 401 (1971); Note, *The Nature and Limitations of the Remedy Available to the Victim of a Misuse of the*

mencement of an action was unjustified, but that process was issued for the purpose of accomplishing a goal other than that for which it was designed.¹³³ Thus, notwithstanding that the institution of an action was actuated by a vicious motive, a cause of action for abuse of process will not lie where the process is used only to its proper end.¹³⁴ Similarly, it has been suggested that a cause of action be recognized for the intentional misuse of the right to discharge. Such an action would be available, it has been argued, even if the employer otherwise had a legal right to discharge the employee. To be successful under the theory, however, the employee would be required to prove that the employer had "an ulterior purpose" for his action.¹³⁵ This requirement contemplates a firing for the purpose of influencing some future activity of the at-will employee. Wrongful discharges, however, characteristically are made in retaliation for some past act or refusal to act by the employee. Thus, because of the "ulterior purpose" requirement, a tort action analogous to abuse of process often would not be available to the abusively discharged at-will employee.¹³⁶

Legal Process: The Tort of Abuse of Process, 2 VAL. U.L. REV. 129 (1967).

¹³³ *E.g.*, *Paint Prods. Co. v. Minwax Co.*, 448 F. Supp. 656, 659 (D. Conn. 1978); *Associated Radio Serv. Co. v. Page Airways, Inc.* 414 F. Supp. 1088, 1096 (N.D. Tex. 1976).

¹³⁴ *Bostick Oil Co. v. Michelin Tire Corp.*, 478 F. Supp. 68, 71 (D.S.C. 1979); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 261 F. Supp. 691, 695 (S.D.N.Y. 1966); *Petrou v. Hale*, 43 N.C. App. 650, 655, 260 S.E.2d 130, 133-34 (1979).

¹³⁵ *See, e.g.*, *Blades*, *supra* note 20, at 1423-24; 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, 828 (1975).

¹³⁶ Professor Blades predicted that a cause of action analogous to abusive discharge would be well suited as a means of redress for wrongful discharge: "Just as the use of legal processes as a means of extortion gives rise to a damage remedy, so too should the oppressive use of the right of discharge." *Blades*, *supra* note 20, at 1424. In practice, however, the unscrupulous employer may exercise his power of discharge because of past conduct by the employee, rather than as a means of influencing the employee's future activity. In *Geary*, for example, the plaintiff was fired allegedly because he had exposed a potentially dangerous product and thus prevented it from being marketed. 456 Pa. at 173-74, 319 A.2d at 175. In dismissing the plaintiff's claim for damages, the *Geary* court explained:

There is nothing . . . from which we could infer that the company fired Geary for the specific purpose of . . . coercing him to break any law or otherwise to compromise himself. According to his own averments, Geary had already won his own battle within the company. The most natural inference from the chain of events recited . . . is that Geary had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house. This hardly amounts to an "ulterior purpose."

Id. at 180, 319 A.2d at 175 (footnotes omitted). It seems clear, therefore, that the reasoning applied in *Geary*, although wholly consistent with the proof requirements of abuse of process, would render an analogous cause of action for abusive discharge ineffective in prevent-

A second tort theory advanced as a viable means of redress for the aggrieved at-will employee is prima facie tort.¹³⁷ The primary purpose of this cause of action, which has experienced its greatest development in the New York courts,¹³⁸ is the remedy of intentional wrongs that do not fit within any of the traditionally recognized tort categories.¹³⁹ It has been defined as follows:

[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse.¹⁴⁰

To recover under the prima facie tort theory, however, an at-will employee would be required to show that the employer's conduct was malicious¹⁴¹ and that special damages were incurred as a result of the discharge.¹⁴² It is suggested that the combined effect of these proof requirements would constitute a major obstacle in the appli-

ing employer misuse of his power of dismissal.

¹³⁷ See generally Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563 (1959); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L. REV. 465 (1957); Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. Q. 503 (1952); Note, *The Prima Facie Tort Doctrine in New York—Another Writ?* 42 ST. JOHN'S L. REV. 530 (1968); Note, *Abstaining from Willful Injury—The Prima Facie Tort Doctrine*, 10 SYRACUSE L. REV. 53 (1958).

¹³⁸ See *Nees v. Hocks*, 272 Or. 210, 213, 536 P.2d 512, 513 (1975) (en banc); W. PROSSER, *supra* note 129, § 130, at 953 & n.96; Forkosch, *supra* note 137, at 475.

¹³⁹ E.g., *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904); *Knapp Engraving Co. v. Keystone Photo Engraving Corp.*, 1 App. Div. 2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956). In New York, the doctrine has been used only where the intentional injury could not be redressed under recognized principles. See, e.g., *Ruza v. Ruza*, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 810-11 (1st Dep't 1955).

¹⁴⁰ *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1889] 23 Q.B.D. 598, 613 (C.A.) (per Bower, L.J.) (citation omitted), *aff'd* [1892] A.C. 25 (1891). The principle was recognized several years later by the United States Supreme Court in *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904).

¹⁴¹ See, e.g., *Ruza v. Ruza*, 286 App. Div. 2d 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955). Under the interpretation given the malice requirement, the defendant will be liable in prima facie tort only where his motive for the discharge was solely to injure the plaintiff. E.g., *Benton v. Kennedy-Van Suan Mfg. & Eng'r Corp.*, 2 App. Div. 2d 27, 29, 152 N.Y.S.2d 955, 957-58 (1st Dep't 1956); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1073, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd without opinion*, 70 App. Div. 2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979); see Forkosch, *supra* note 137, at 481. Sometimes, the courts have had difficulty in even establishing any specific intent to harm. See, e.g., *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1074, 410 N.Y.S.2d 737, 740 (Sup. Ct. N.Y. County 1978); *Geary*, 456 Pa. at 178, 319 A.2d at 177.

¹⁴² See, e.g., *Coopers & Lybrand v. Levitt*, 52 App. Div. 2d 493, 498, 384 N.Y.S.2d 804, 808 (1st Dep't 1976); *Frawley Chem. Corp. v. A.P. Larson Co.*, 274 App. Div. 643, 644-45, 86 N.Y.S.2d 710, 713 (1st Dep't 1949). See generally RESTATEMENT (SECOND) OF TORTS § 904 (1979).

cation of the prima facie tort doctrine to the at-will employment relationship.¹⁴³

For the reasons noted, none of the above theories provide a wrongfully discharged at-will employee with both an adequate means of redress and a means to discourage an employer's improper actions. An action for "tortious breach of contract,"¹⁴⁴ however, would appear to be particularly appropriate for fulfilling both of these aims. The theory, based on the principle that bad faith conduct interfering with contractual relationships may be regarded as tortious, has been developed primarily in the area of insurance contracts.¹⁴⁵ Realizing that "the relationship of the insurer and insured is inherently unbalanced [and that] the adhesive nature of insurance contracts places the insurer in a superior bargaining position," courts have implied a duty on the insurer to deal in good faith with the insured.¹⁴⁶ The essence of tortious breach of insurance contracts is "the unreasonable conduct of the [insurance] carrier measured against its duty arising under the implied covenant of good faith and fair dealing"¹⁴⁷ This action has permitted recovery, for example, by an insured where the insurer unreasonably refuses to settle an insurance claim on his behalf.¹⁴⁸ Signifi-

¹⁴³ Another difficulty with the prima facie tort doctrine is the unwillingness of some courts to apply it. For example, in *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc), although the plaintiff alleged prima facie tort, the Supreme Court of Oregon opined that "the term serves no purpose in Oregon and we will advance the jurisprudence of this state by eliminating it." *Id.* at 213, 536 P.2d at 513.

¹⁴⁴ See generally J. McCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES (2d ed. 1978); Kircher, *Insurer's Mistaken Judgment—A New Tort?* 59 MARQ. L. REV. 775 (1976); Comment, *An Independent Duty of Good Faith and Fair Dealing in Insurance Contracts—Gruenverg v. Aetna Insurance Co.*, 11 SAN DIEGO L. REV. 492 (1974); Comment, *The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.*, 13 TULSA L.J. 605 (1978).

¹⁴⁵ See, e.g., *Escambia Treating Co. v. Aetna Cas. & Sur. Co.*, 421 F. Supp. 1367 (N.D. Fla. 1976); *United Servs. Auto Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974); *John Hancock Mutual Life Ins. Co. v. McNeill*, 27 Ariz. App. 502, 556 P.2d 803 (1976); *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); *Amsden v. Grinnell Mutual Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972); *United States Fidelity & Guaranty Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975); *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976); *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla. 1978).

¹⁴⁶ *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 820, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979) (emphasis omitted), *cert. denied*, 48 U.S.L.W. 3568 (March 3, 1980 No. 79-1073).

¹⁴⁷ *Blake v. Aetna Life Ins. Co.*, 99 Cal. App. 3d 901, 919, 160 Cal. Rptr. 528, 538 (1979) (citing *Austero v. National Cas. Co.*, 84 Cal. App. 3d 1, 26, 148 Cal. Rptr. 653, 669 (1978)) (emphasis in original).

¹⁴⁸ E.g., *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

cantly, use of the cause of action has been allowed even though the conduct of the insurer also constituted a breach of contract.¹⁴⁹

Application of the theory of tortious breach of contract to the relationship between employer and employee is warranted for the same reasons that exist in the insurance field. Adopting such a cause of action would provide adequate protection for both parties. Clearly, the employee's interest in retaining his employment would be safeguarded. The employer's right to effectively manage the organization would also be preserved, since an aggrieved employee must make "a clear showing of bad faith" on the part of the employer before he is able to recover.¹⁵⁰ In addition, the strict proof requirements under tortious breach of contract,¹⁵¹ in conjunction with the good faith standard previously advanced, would protect the employer's business decisions. The elements of proof, however, would not impede recovery for damages resulting from an employer's action that had no legal or social justification. Moreover, upon satisfaction of the proof requirements, a wrongfully dismissed at-will employee would be compensated for loss of wages and any other resultant injury. Importantly, as in other tort alternatives, punitive damages would also be available under this theory.¹⁵²

CONCLUSION

The at-will doctrine, once an absolute bar to actions by discharged at-will employees, has witnessed significant limitations re-

In *Crisci*, the first case in which the insurer's liability for bad faith was directly addressed, the court held that an insurer owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy. *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16. The court reasoned that the duty arose because of the tremendous disparity in the economic situation and the insured's lack of bargaining power. *Id.* at 431, 426 P.2d at 177, 58 Cal. Rptr. at 17.

¹⁴⁹ See, e.g., *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 578, 510 P.2d 1032, 1040, 108 Cal. Rptr. 480, 488 (1973).

¹⁵⁰ E.g., *Christian v. American Home Assurance Co.*, 577 P.2d 899, 905 (Okla. 1978).

¹⁵¹ One commentator has posited the following as the elements of tortious breach of contract:

- (1) Duty; the existence of a special relationship . . . which gives rise to the responsibility . . . to deal in good faith
- (2) Breach of that duty
- (3) Bad faith or unreasonable conduct
- (4) Damages proximately caused by the conduct.

Comment, *The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.*, 13 TULSA L.J. 605, 613 (1978).

¹⁵² See, e.g., *Richardson v. Employers Liability Assurance Corp.*, 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972); *Christian v. American Home Assurance Co.*, 577 P.2d 899, 904 (Okla. 1978).

cently both by statute and case law. Thus, it is now recognized that there are reasons for discharge entitling an aggrieved employee to damages. These limitations have not required any corresponding restriction of the employee's right to terminate the employment relationship, apparently in recognition of the development that the legal underpinning of the at-will doctrine—mutuality of obligation—has been undermined because of unequal bargaining power between employer and employee. Nevertheless, the state legislatures have declined to abolish the at-will doctrine and the majority of courts that have adopted exceptions to the traditional rule have done so only on a very limited basis. It is hoped that the future will bring a more realistic approach to the employment relationship by allowing an aggrieved employee to recover damages when he is dismissed in bad faith. A standard of good faith erected in place of the traditional rule will advance the interests of most employees without impinging the substantial rights of businessmen.

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