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Employment at Will: When Must an Employer Have Good Cause for Discharging an Employee

Robin V. Foster

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EMPLOYMENT AT WILL: WHEN MUST AN EMPLOYER HAVE GOOD CAUSE FOR DISCHARGING AN EMPLOYEE?

I.	INTRODUCTION	113
II.	THE TRADITIONAL EMPLOYMENT AT WILL DOCTRINE	114
III.	THE EMPLOYMENT AT WILL DOCTRINE IN TRADITIONAL CONTRACT AND TORT LAW	116
	A. <i>Contract Law</i>	117
	1. Actual Employment Contracts	118
	2. Employment Relationships as Adhesion Contracts	121
	3. Definite Term Employment Relationships	122
	4. Statute of Frauds as a Defense	124
	5. Employer's Standards as Part of the Employment Contract	126
	6. The Covenant of Good Faith and Fair Dealing	127
	B. <i>Tort Law</i>	128
	1. Wrongful Discharge	128
	2. Prima Facie Tort Doctrine	129
	3. Other Tort Actions	131
IV.	THE "PUBLIC POLICY BALANCING TEST"	132
V.	PROBLEMS AND WEAKNESSES OF THE CURRENT JUDICIAL APPROACH	134
VI.	CONCLUSION	136

I. INTRODUCTION

During the last several decades, a considerable amount of litigation and scholarly commentary has focused on the concept of "employment at will," the right of either employer or employee freely to terminate an employment relationship. This Comment will analyze the current status of the employment at will doctrine. It will (1) examine the history and operation of the traditional doctrine; (2) discuss current judicial treatment of the employment at will doctrine with particular emphasis on methods by which courts now are limiting the doctrine's operation; and (3) analyze problems

that may arise as a result of the courts' attempts to limit or abolish the employment at will doctrine.

II. THE TRADITIONAL EMPLOYMENT AT WILL DOCTRINE

An employment relationship basically is one of principal and agent.¹ The employer has no obligation to continue offering work to the employee, and the employee is under no obligation to continue working for the employer.² Either party may terminate the relationship " 'at any time, without cause or reason, or for any reason,' "³ making an employment relationship truly at the "will" of the parties.⁴ Of course, should the relationship terminate, the employer must pay the employee for any work actu-

1. "A master is a species of principal, and a servant is a species of agent." RESTATEMENT (SECOND) OF AGENCY § 2 comment a (1958).

2. The parties may agree to limit the employer's power to discharge the employee. Such an agreement, if binding on the employer, would modify the ordinary principal-agent relationship. See note 10 and accompanying text *infra*.

3. *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. En Banc 1981) (quoting *Christy v. Petrus*, 365 Mo. 1187, 1189, 295 S.W.2d 122, 124 (En Banc 1956)), *cert. denied*, 454 U.S. 1084 (1981).

4. The Restatement makes it clear that either party can terminate the employment relationship at any time:

Promises by a principal to employ and by an agent to serve are interpreted as promises to employ and to serve at the agreed rate only so long as either party wishes, if no time is specified and no consideration for entering into the relation is given other than the promise in general terms to employ or to serve

RESTATEMENT (SECOND) OF AGENCY § 442 comment a (1958). *See also* *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. En Banc 1981), *cert. denied*, 454 U.S. 1084 (1981); *Carr v. Montgomery Ward & Co.*, 363 S.W.2d 571, 574 (Mo. 1962); *Christy v. Petrus*, 365 Mo. 1187, 1189, 295 S.W.2d 122, 124 (En Banc 1956); *Williams v. Jones*, 562 S.W.2d 391, 395 (Mo. App., St. L. 1978).

Recent decisions in other jurisdictions indicate that the at will doctrine remains a potent defense against employee claims arising from discharges. *See Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1054-55 (5th Cir. 1981) (applying Georgia and Texas law); *Rose v. Eastern Neb. Human Servs. Agency*, 510 F. Supp. 1343, 1356 (D. Neb. 1981); *Daniel v. Magma Copper Co.*, 127 Ariz. 320, 322, 620 P.2d 699, 701 (Ct. App. 1980); *Quigley v. Laventhol & Howarth*, 382 So. 2d 137, 138 (Fla. Dist. Ct. App. 1980); *Ohio Table Pad Co. of Indiana v. Hogan*, — Ind. App. —, —, 424 N.E.2d 144, 145-46 (1981); *Abriz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454, 455 (Iowa 1978) (*dicta*); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 497, 630 P.2d 186, 192 (1981) (*dicta*); *Jackson v. East Baton Rouge Parish School Bd.*, 393 So. 2d 243, 245 (La. Ct. App. 1980); *Kelley v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 874-75 (Miss. 1981); *Feola v. Valmont Indus.*, 208 Neb. 527, 533, 304 N.W.2d 377, 381 (1981); *Gonzales v. United S.W. Nat'l Bank*, 93 N.M. 522, 524, 602 P.2d 619, 621 (1979); *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 582, 279 S.E.2d 46, 48-49 (1981); *Yartzoff v. Democratic-Herald Publishing Co.*, 281 Or. 651, 655, 576

ally performed.⁵

Before the industrial revolution, English law imposed certain duties on masters and servants.⁶ The law required all able bodied men to work. The law also required masters to retain servants for a certain time, usually a year, in the absence of a specific agreement. A master could discharge his servant before the end of that term for certain reasons such as disloyalty.⁷ These English principles were carried over into American law.⁸ By the end of the nineteenth century, however, American courts had developed the concept of employment at will.⁹

There are numerous exceptions to and limitations on the employment at will doctrine. Most collective bargaining agreements limit the employer's right to discharge his employees.¹⁰ Federal Civil Service statutes protect many government employees.¹¹ Due process limitations on governmental action affect discharges of non-Civil Service government employees.¹² Federal anti-discrimination statutes prohibit all employers from discharging an employee for various reasons, including race,¹³ color, reli-

P.2d 356, 359 (1978); *Ross v. Life Ins. Co. of Va.*, 273 S.C. 764, 765-66, 259 S.E.2d 814, 815 (1979). See also *Annot.*, 62 A.L.R.3d 271 (1975).

5. RESTATEMENT (SECOND) OF AGENCY § 452 (1958) ("[I]f the principal has contracted to pay the agent for his services and the relation terminates . . . , the principal is subject to liability to pay . . . the agent for services previously performed . . ."). The Restatement makes it clear that this rule applies to at will employment relationships. "The rule stated in . . . [section 452] applies where the principal or agent exercises a privilege of terminating the relation . . . because the employment was at will . . ." *Id.* § 452 comment a.

6. See 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-64 (4th ed. 1936).

7. The English Statutes of Labourers defined the parties' duties in a master and servant relationship. These statutes were impelled by the labor shortage in England that resulted from the "Black Death." See *id.*

8. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 600-09, 292 N.W.2d 880, 885-90 (1980).

9. For a discussion of the at will doctrine's development, see *id.* The *Toussaint* court cited H. WOOD, MASTER AND SERVANT § 134 (1877) and discussed the book's impact on the law of master and servant in the United States. 408 Mich. at 601-03, 292 N.W.2d at 886-87.

10. See Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 nn.43 & 44 (1979).

11. See, e.g., 5 U.S.C. § 7513(a) (Supp. V 1981).

12. Due process limitations on discharges of non-civil service employees may not cover at will employees. See *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 573-75 (1972). But see *Cresap v. County of San Diego*, 121 Cal. App. 3d 591, 599, 175 Cal. Rptr. 402, 409-10 (1981) (at will employee with six years service entitled to fair procedure before discharge). For a discussion of the merits of applying minimal due process standards to all employment relationships, see Peck, *supra* note 10, at 42.

13. 42 U.S.C. § 1981 (1976); *id.* § 2000e-2(a).

gion, sex, national origin,¹⁴ union membership,¹⁵ and age.¹⁶ Many states have similar anti-discrimination statutes that limit the grounds on which an employer can discharge an employee.¹⁷ Where statutory or constitutional limitations are not applicable, however, most states allow employers to discharge employees without cause.¹⁸

Many scholars recently have questioned the soundness of the employment at will doctrine.¹⁹ The critics set forth several lines of attack: (1) employees generally do not have bargaining strength equal to that of their employers, so traditional contract law doctrines should not be applied to employment relationships;²⁰ (2) an employer's interest in determining his own business affairs should be subordinated to the employee's interest in job security;²¹ (3) several seemingly outrageous decisions based on the at will doctrine allow employers to fire employees for reasons that offend public policy.²²

The doctrine's opponents have proposed various reforms, including a requirement that employers discharge employees only for "good cause"²³ and imposition of tort liability on employers for "wrongful" discharge.²⁴ Most courts have not adopted these proposals;²⁵ they tend to scrutinize employee discharges on the basis of traditional contract or tort law.

III. THE EMPLOYMENT AT WILL DOCTRINE IN TRADITIONAL CONTRACT AND TORT LAW

Some jurisdictions no longer rigidly apply the at will doctrine. The divergence is broadly based, encompassing theories of contract law, tort law, and precepts of public policy favoring employment security. Despite

14. *Id.* § 2000e-2(a).

15. National Labor Relations Act, 29 U.S.C. § 157(a) (1976); Railway Labor Act, 45 U.S.C. § 152(4) (1976).

16. 29 U.S.C. § 623(a) (1976).

17. *See, e.g.*, Illinois Human Relations Act, ILL. ANN. STAT. ch. 68, § 2-102 (Smith-Hurd Supp. 1981); Kansas Act Against Discrimination, KAN. STAT. ANN. § 44-1009 (1981); Missouri Fair Employment Practices Act, MO. REV. STAT. §§ 296.010-.070 (1978).

18. *See, e.g.*, cases cited note 4 *supra*.

19. *See, e.g.*, Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 470 (1980); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06 (1967); Peck, *supra* note 10, at 1.

20. *See* Blackburn, *supra* note 19, at 486; Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1456 (1975).

21. *See* Blackburn, *supra* note 19, at 470.

22. *See* Blades, *supra* note 19, at 1405. *See also* notes 171-72 and accompanying text *infra*.

23. *See* Blackburn, *supra* note 19, at 484.

24. *See* Blades, *supra* note 19, at 1435; Note, *supra* note 20, at 1464.

25. *See, e.g.*, cases cited note 4 *supra*.

this change, however, little authority exists for complete abandonment of the doctrine. Many courts that have held for employees in specific cases have noted that they still consider the at will doctrine valid in most circumstances.²⁶

A. Contract Law

The ultimate issue in an employee discharge dispute usually is whether the employer may discharge his employee without just or good cause.²⁷ Courts often are faced with a discharged employee's allegation that the employer violated an agreement to discharge him only for good cause. Courts that find for the employee often fail to explain clearly whether they are imposing obligations on employers regardless of the parties' intent²⁸ or whether they are granting relief to the employee because the parties agreed to binding contractual obligations.²⁹ This failure leads to great confusion as to the precise legal theories involved. For example, most cases refer to at will employment relationships as "contracts," despite the inconsistency of those terms.³⁰ Notwithstanding this confusion, it is important to distinguish the legal theories involved because the employee's remedy may be signifi-

26. *See, e.g.*, R.S. Mikesell Assocs. v. Grand River Dam Auth., 627 F.2d 211, 212 (10th Cir. 1980) (at will doctrine applicable but parties' omission of express term governing length of relationship not fatal to employee's claim); Scaramuzzo v. Glenmore Distilleries Co., 501 F. Supp. 727, 732 (N.D. Ill. 1980) (indefinite employment at will but definite employment term may be found from circumstances); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 321-22, 171 Cal. Rptr. 917, 922 (1981) (at will doctrine subject to exceptions for public policy and contract); Cleary v. American Airlines, 111 Cal. App. 3d 443, 450, 168 Cal. Rptr. 722, 726 (1980) (employer's right to terminate not absolute); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 610, 292 N.W.2d 880, 890 (1980) (presumption against employment being at will when employer's policy statements seem to grant job security); Schipani v. Ford Motor Co., 102 Mich. App. 606, 611-15, 302 N.W.2d 307, 309-11 (1981) (at will employment doctrine recognized, but subject to employee contention that employer's job security promises be enforced to prevent injustice).

27. "Just cause [for firing an employee] means some substantial shortcoming detrimental to the employer's interests . . . , which the law and a sound public opinion recognize as a good cause for his dismissal Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal." *In re Brooks*, 135 Vt. 563, 568, 382 A.2d 204, 207 (1977) (citations omitted).

28. Although the courts refer to many obligations that they impose without regard to the parties' intent as "contractual," the law does not require proof of an actual agreement. *See* J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 1-12 (2d ed. 1977); 1 A. CORBIN, *CORBIN ON CONTRACTS* § 19 (1963).

29. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 623, 292 N.W.2d 880, 896-97 (1980) (employer must discharge for cause only if he so promises).

30. *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

cantly different depending on which theory is followed.³¹

1. Actual Employment Contracts

Many disputes over the employer's liability for discharging the employee center on whether the parties, either expressly or through their actions,³² agreed that the employee would be discharged only for cause and whether that agreement was binding on the employer.³³ Even where an employer agrees to discharge an employee only for cause, courts often find that the agreement is unenforceable if the employee gave no consideration for the employer's promise other than his services as an employee. This rule is widely known as the "separate consideration" requirement.

Although some courts have discarded this requirement,³⁴ the majority of jurisdictions hold that an employee is entitled to contractual job security rights only when he has given some consideration other than services as an employee.³⁵ There also is some authority for granting employees relief if the parties agreed to set the relationship for a definite term regardless of any

31. Often, the remedy awarded to the employee is the most reliable basis for distinguishing between cases in which courts find the employer breached a contractual agreement and cases in which courts base the employee's recovery on detrimental reliance. When the employer breaches his duties in a contractual relationship, the measure of damages is the unpaid balance of the employee's salary through the end of the employment term. *See* *Alpern v. Hurwitz*, 644 F.2d 943, 945 (2d Cir. 1981); *In re Adams Laboratories, Inc.*, 3 Bankr. 503, 514 (E.D. Va. 1980); *Fogleman v. Peruvian Assocs.*, 127 Ariz. 504, 506, 622 P.2d 63, 65 (Ct. App. 1980); *Vieira v. Robert's Hawaii Tours, Inc.*, 630 P.2d 120, 122-23 (Hawaii Ct. App. 1981). In contrast, when the employee recovers under a detrimental reliance theory, the common view is that the court should limit the employee's recovery instead of granting full "contractual" relief. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

32. The employer and employee rarely memorialize their agreements and understandings. Thus, most cases that find an agreement look to the nature and circumstances of the employment relationship. *See, e.g.*, *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925 (1981).

33. *See, e.g.*, *Collins v. Parsons College*, 203 N.W.2d 594, 599 (Iowa 1973) (actual agreement to not discharge employee supported by consideration); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 623, 292 N.W.2d 880, 896-97 (1980) (primary emphasis on parties' actual agreement); *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561, 567-68, 298 N.W.2d 915, 919 (1980) (summary judgment for employer proper when employee failed to show actual agreement).

34. *See, e.g.*, *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 324-26, 171 Cal. Rptr. 917, 924-25 (1981) (separate consideration requirement is rule of construction, not substance); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) (no need to show actual contract as condition to contractual recovery).

35. *See, e.g.*, *Ryan v. J.C. Penney Co.*, 627 F.2d 836, 837 (7th Cir. 1980); *Collins v. Parsons College*, 203 N.W.2d 594, 599 (Iowa 1973); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 895, 568 P.2d 764, 769 (1977).

separate consideration.³⁶ Courts require separate consideration because the employer's promise to employ and the employee's promise to serve do not alone create a contract.³⁷ Recent cases involving separate consideration have followed one of two tracks: continued rigid adherence to the separate consideration requirement³⁸ or a more flexible approach in deciding which benefits to the employer and detriments to the employee are sufficient to bind the employer to an obligation to discharge the employee only for cause.³⁹ It appears that the second of these approaches is emerging as an important trend.⁴⁰

Courts have focused on numerous factors in deciding whether an employee has contractual job security rights. An employer's past representations concerning his discharge policy have been held to create a contractual duty to discharge the employee only for cause.⁴¹ In *Toussaint v. Blue Cross and Blue Shield*,⁴² the Michigan Supreme Court held that the employer was under a contractual duty to discharge the employee only for cause based on the employer's past oral and written assurances that he would discharge the employee only for good cause.⁴³ The court found that the employer's policy statements had the effect of generating good will among employees and thus resulted in a more stable and productive workplace.⁴⁴ These benefits to the employer were sufficient to make legally binding his promises of job

36. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 611, 292 N.W.2d 880, 891 (1980). See also note 66 and accompanying text *infra*.

37. See note 4 *supra*.

38. See, e.g., *Ryan v. J.C. Penney Co.*, 627 F.2d 836, 838 (7th Cir. 1980).

39. See, e.g., notes 41-59 and accompanying text *infra*.

40. Courts place varying emphasis on the importance of finding an actual agreement between the parties. Courts tend to be concerned with whether the parties actually made express or implied-in-fact agreements when they focus on employer representations, the length and quality of an employee's service, the employer's past termination practice, and the general practice of the employer's industry. See, e.g., notes 41-51 and accompanying text *infra*. Courts often are less concerned with the existence of an actual agreement when focusing on an employee's detrimental reliance—sacrificing pension rights to accept new employment and sacrificing secure positions to accept new employment. See, e.g., notes 52-59 and accompanying text *infra*. These decisions are often result oriented and may sacrifice legal precision to reach the desired outcome.

41. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925 (1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 455-56, 168 Cal. Rptr. 722, 729 (1980); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 618-19, 292 N.W.2d 880, 894-95 (1980); *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561, 567-68, 298 N.W.2d 915, 919 (1980). *But see* *Ryan v. J.C. Penney Co.*, 627 F.2d 836, 837 (7th Cir. 1980) (employer's representations not binding).

42. 408 Mich. 579, 292 N.W.2d 880 (1980).

43. *Id.* at 614, 292 N.W.2d at 892.

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

security.⁴⁵

Courts have looked at various other factors in determining whether an employer is bound to discharge the employee only for cause: the length of an employee's service with an employer;⁴⁶ commendations or promotions given the employee;⁴⁷ the employer's past termination practices;⁴⁸ the general practice of the employer's trade or industry;⁴⁹ and whether the employee released the employer from a claim in return for a job.⁵⁰ An employee's accumulation of pension rights, however, apparently will not warrant a finding of contractual duty.⁵¹

Some courts have held that an employee's detrimental reliance⁵² is a decisive factor in employee discharge disputes. In *Foley v. Community Oil Co.*,⁵³ an employee moved his family to a place where the employer had promised him a job. Shortly afterward, the employer discharged him. The district court held that the employee's reliance on the job promise supported a jury finding that the parties had made a contract and that the employer breached that contract.⁵⁴ The court noted that such reliance could be "consideration for establishing a contractual [employment] rela-

45. The court stated, "Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory." *Id.* at 619, 292 N.W.2d at 895. It seems clear that the court still requires a showing of some benefit to the promisor-employer to bind him to his promise.

46. *See* *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925 (1981) (length of employee's service may be ground to find existence of contract); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980) (length of service may "estop" employer from firing employee without good cause). *But see* *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 895-96, 568 P.2d 764, 769 (1977) (longevity of service not sufficient consideration for employment contract).

47. *See* *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981) (commendations, promotions, and lack of criticism of employee's work performance implied promise to discharge only for cause).

48. *See id.* at 329, 171 Cal. Rptr. at 927; *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 618-19, 292 N.W.2d 880, 894 (1980).

49. *See* *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925-26 (1981) (practice of employer's industry is significant indication of whether implied-in-fact agreement exists giving employee job security). *See also* RESTATEMENT (SECOND) OF AGENCY § 442 comment b (1958).

50. *See, e.g.*, *Ryan v. J.C. Penney Co.*, 627 F.2d 836, 837 (7th Cir. 1980) (dicta).

51. *See* *Crownover v. Sears, Roebuck & Co.*, 594 F.2d 565, 565-66 (6th Cir. 1979); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 896, 568 P.2d 764, 769-70 (1977).

52. Reliance reasonably induced by another's actions or promises is recognized as a ground for relief. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

53. 64 F.R.D. 561 (D.N.H. 1974).

54. *Id.* at 563-64.

tion.”⁵⁵ Other courts have held employers to contractual duties when employees sacrificed pension rights accrued at other jobs⁵⁶ or left old jobs.⁵⁷ However, courts have held that foregoing alternative job opportunities in reliance on the employment relationship is not sufficient to impose duties on the employer.⁵⁸ Generally, detrimental reliance has not been a strong basis for employees alleging that employers breached contractual duties to discharge only for cause.⁵⁹

2. Employment Relationships as Adhesion Contracts

Normally, the employer sets the terms of the employment relationship. This opens up the possibility that courts will apply to such relationships construction principles applicable to adhesion contracts. In *Dangott v. ASG Industries*,⁶⁰ the Oklahoma Supreme Court construed the terms of an employer's offer of severance pay strictly against the employer. By viewing the terms of the employer's offer in a light most favorable to the employee, the court found that the employee had a contractual right to severance pay even though the employee was terminable at will.⁶¹ Once an employee proves that he had contractual job security rights, courts readily construe

55. *Id.* at 563. By holding that detrimental reliance could serve as consideration, the court seemed to afford the employee an opportunity to recover full contract breach damages. This departs from the common view that detrimental reliance does not warrant full contract recovery. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

56. *See* *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 259-62, 283 N.W.2d 713, 716-18 (1979) (employee gave up soon-to-vest pension rights at old job when he went to work for new employer).

57. *See* *Collins v. Parsons College*, 203 N.W.2d 594, 599 (Iowa 1973) (employee supplied consideration for binding contract when employer aware that employee gave up secure job); *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 259-62, 283 N.W.2d 713, 716-18 (1979) (employee's giving up past job sufficient reliance to impose duty on employer to fire employee only for good cause).

58. *See* *Milligan v. Union Corp.*, 87 Mich. App. 179, 183, 274 N.W.2d 10, 12 (1978) (employee's failure to take other employment opportunities "merely preparatory" to beginning new position); *Goldstein v. Kern*, 82 Mich. App. 723, 727-28, 267 N.W.2d 165, 168 (1978) (plaintiff's rejecting other employment only a necessary step to accepting employer's offer); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 895-96, 568 P.2d 764, 769 (1977) (employee's foregoing alternate employment is not sufficient consideration to change his at will status).

59. *See* *Parets v. Eaton Corp.*, 479 F. Supp. 512, 518 (E.D. Mich. 1979) (employee's giving up another job not sufficient consideration to bind employer to contractual duties); *Griffith v. Sollay Foundation Drilling, Inc.*, 373 So. 2d 979, 981-82 (La. Ct. App. 1979) (plaintiff's moving entire family to accept defendant's employment offer insufficient consideration to bind employer to contractual duties); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 896, 568 P.2d 764, 769-70 (1977) (moving family four times during employment not sufficient consideration).

60. 558 P.2d 379 (Okla. 1976).

61. *Id.* at 383.

the terms of the employment relationship in his favor.⁶²

Dangott illustrates the potential application of adhesion contract principles to the different parts of employment at will relationships. This creates the possibility that a court will apply these same principles to find that an employer "agreed" to discharge the employee only for cause. In applying adhesion contract principles to an employment at will relationship, however, a court would have to overcome a logical problem. By definition, employment at will relationships are not contractual.⁶³ Therefore, it might appear inconsistent for a court to apply contract construction principles to such relationships. A court might resolve this apparent inconsistency by borrowing the concept without purporting to apply it according to its traditional requirements.

3. Definite Term Employment Relationships

The majority view is that "indefinite hirings," where the parties have not specified the duration of employment, are terminable at will.⁶⁴ If the employee has given separate consideration for the employer's promise to discharge him only for cause, the rule may not apply.⁶⁵ If the employee cannot show separate consideration, however, he probably will have to

62. See *Goddard v. South Bay Union High School Dist.*, 79 Cal. App. 3d 98, 105, 144 Cal. Rptr. 701, 706 (1978); *Grossman v. Sherman*, 198 Colo. 359, 361, 599 P.2d 909, 911 (1979); *Higgins v. Lawrence*, 107 Mich. App. 178, 183, 309 N.W.2d 194, 196 (1981); *Morton v. E-Z Rake, Inc.*, — Ind. App. —, —, 397 N.E.2d 609, 613 (1979). *But see Katz v. Shearson Hayden Stone, Inc.*, 438 F. Supp. 637, 641 (S.D.N.Y. 1977) (rejecting employee's argument that grievance arbitration clause was unenforceable as adhesion contract); *Automatic Sprinkler Corp. v. Anderson*, 243 Ga. 867, 869, 257 S.E.2d 283, 285 (1979) (lower court's decision based partly on adhesion contract principles reversed).

63. They are agency relationships. See note 4 *supra*.

64. See, e.g., *Rose v. Eastern Neb. Human Servs. Agency*, 510 F. Supp. 1343, 1356 (D. Neb. 1981); *Quigley v. Laventhol & Howarth*, 382 So. 2d 137, 138 (Fla. Dist. Ct. App. 1980); *Griffith v. Sollay Foundation Drilling, Inc.*, 373 So. 2d 979, 981 (La. Ct. App. 1979); *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. En Banc 1981), *cert. denied*, 454 U.S. 1084 (1981).

65. See, e.g., *Ohio Table Pad Co. v. Hogan*, — Ind. App. —, —, 424 N.E.2d 144, 145-46 (1981) (*dicta*). See also RESTATEMENT (SECOND) OF AGENCY § 442 comment a (1958) (employment at will not inferred if parties specify duration of employment or consideration given for entering into employment relationship). The type of consideration necessary to bind an employer to discharge only for cause is open to debate. In *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), the employer had hired the employee for an indefinite term. Despite the indefinite term of the relationship, the court, looking at the "totality of the parties' relationship," held that the employer had a duty to discharge the employee only for cause. *Id.* at 329, 171 Cal. Rptr. at 927. While essentially a separate consideration case, the court based its decision on some of the same factors that courts following the modern flexible approach have used to bind an employer: (1) length of the employee's service; (2) the employee's commendations and promotions;

prove that the relationship was for a definite term in order to prevail.⁶⁶

Courts may find a definite period of employment even though the parties have not expressly agreed to one. In *R. S. Mikesell Associates v. Grand River Dam Authority*,⁶⁷ the United States Court of Appeals for the Tenth Circuit held that the nature, subject matter, and purpose of the employment demonstrated that the parties intended a definite term relationship despite their failure to specify a time period.⁶⁸ The court held the contract term to be the period it would take the employed party to perform his duties under the agreement.⁶⁹ The court justified finding a definite term by noting that " 'if the employer makes a promise, either express or implied, . . . that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable . . . 'at will' after the employee has begun performance.' "⁷⁰

In *Scaramuzzo v. Glenmore Distilleries Co.*,⁷¹ the employer argued that the parties' relationship was terminable at will because they had not specified a definite term of employment.⁷² The defendant, however, allegedly had told the employee that he would be discharged only for incompetent performance.⁷³ The federal district court found this allegation sufficient to deny the defendant's motion for summary judgment, which was based on the indefinite term of the relationship. The court stated:

[I]t is not clear, as a matter of law, that . . . [plaintiff's] contract did not specify a duration of employment. A contract that fails to specify the length of the term of employment, but that does set conditions upon which termination may be based, is not terminable at will—it is terminable upon the existence of those conditions.⁷⁴

Thus it appears that the circumstances surrounding an employment relationship may be used to show a definite term as well as to show separate consideration. Although the relationship between the definite term requirement and the separate consideration requirement is hazy, it appears that an employee can prevail if he shows that either exists.

(3) lack of criticism of the employee's work; (4) the employer's assurances to the employee regarding job security; and (5) the employer's termination policies. *Id.*

66. Proof that the parties contracted with reference to a definite term often requires factors similar to those used to show that the employee provided separate consideration for the employer's promise to fire him for cause only. See RESTATEMENT (SECOND) OF AGENCY § 442 comment a (1958).

67. 627 F.2d 211 (10th Cir. 1980).

68. *Id.* at 212-13.

69. *Id.* at 213.

70. *Id.* (quoting 1A A. CORBIN, CORBIN ON CONTRACTS § 152 (1963)).

71. 501 F. Supp. 727 (N.D. Ill. 1980).

72. *Id.* at 732.

73. *Id.*

74. *Id.* The court just as easily could have held that the employer's representations gave rise to an obligation on the employer's part to discharge the employee only for good cause. See generally notes 41-45 and accompanying text *supra*.

The definite term requirement also has created problems when employment is "for life" or "permanent."⁷⁵ The traditional view is that permanent or life employment relationships are terminable at will unless the employee has given separate consideration.⁷⁶ "Permanent" employment thus is not considered to be for a definite term. Some authority exists, however, for enforcing permanent or lifetime agreements,⁷⁷ even though the employee did not give separate consideration for the employer's promise.⁷⁸ The difficulty of proving these agreements, however, remains a formidable obstacle to an employee's claim.⁷⁹

4. Statute of Frauds as a Defense

Employers often assert the statute of frauds as a defense to claims that they contracted to discharge an employee only for good cause. Since most employment relationships are not reduced to writing, the statute of frauds often provides employers with a valid defense to such claims.⁸⁰ Typically, a state statute of frauds will render an oral agreement unenforceable if its term exceeds one year.⁸¹ The typical statute, however, applies only to agreements for a specific term of employment.⁸² Thus, an employee who does not allege that he was hired for a specific term will not be barred by the statute.⁸³

75. RESTATEMENT (SECOND) OF AGENCY § 442 comment d (1958) contemplates an enforceable agreement by the employer to employ his servant for life. It is clear from the context, however, that this applies when the servant has given more for the employer's promise than his services. *See also* Laird v. Eagle Iron Works, 249 N.W.2d 646, 647 (Iowa 1977) (agreement to employ permanently must be supported by consideration such as reciprocal promise to serve permanently).

76. *See, e.g.*, Laird v. Eagle Iron Works, 249 N.W.2d 646, 647 (Iowa 1977); Milligan v. Union Corp., 87 Mich. App. 179, 182, 274 N.W.2d 10, 12 (1978); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 313, 299 N.W.2d 147, 150 (1980); Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 600, 89 A.2d 237, 239 (1952).

77. *See, e.g.*, McKinney v. National Dairy Council, 491 F. Supp. 1108, 1110-11 (D. Mass. 1980) (dicta); Rogozinski v. Airstream by Angell, 152 N.J. Super. 133, 143-44, 377 A.2d 807, 812-13 (Law Div. 1977).

78. *See, e.g.*, McKinney v. National Dairy Council, 491 F. Supp. 1108, 1110-11 (D. Mass. 1980) (dicta).

79. *See* Rogozinski v. Airstream by Angell, 152 N.J. Super. 133, 143, 377 A.2d 807, 812 (Law Div. 1977).

80. *See, e.g.*, Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co., 344 S.W.2d 639, 642-43 (Mo. App., K.C. 1961). *See also* RESTATEMENT (SECOND) OF AGENCY § 468 (1958).

81. *See, e.g.*, MO. REV. STAT. § 432.010 (1978).

82. *See* Halsell v. Kimberly Clark Corp., 518 F. Supp. 694, 696-97 (E.D. Ark. 1981) (applying Wisconsin law); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 612 n.24, 292 N.W.2d 880, 891 n.24 (1980). *See also* RESTATEMENT (SECOND) OF AGENCY § 468 comment a (1958).

83. The employee, while escaping the employer's statute of frauds defense, still would be terminable at will in most jurisdictions because of the indefinite term of

Some courts hold that the statute bars enforcement of alleged non-written employment contracts if there is a possibility that the contract will remain executory for more than one year.⁸⁴ Those courts bar an action on such employment relationships even if the discharge is within the first year of the relationship.⁸⁵ Other courts adopt a less sweeping interpretation of the statute of frauds. In *Rowe v. Noren Pattern and Foundry Co.*,⁸⁶ the Michigan Court of Appeals held that an oral agreement that the employee would not be fired without good cause was not void under the statute of frauds since it could be completed within one year.⁸⁷ Rather than concentrating on how long the relationship might last, the court focused on the possibility that the agreement could be completed within one year.⁸⁸

An employee may overcome an employer's otherwise valid statute of frauds defense by showing that he relied on the employer in some reasonable fashion.⁸⁹ The *Rowe* court noted that the employee could circumvent the employer's statute of frauds defense by showing that the employee had given up a secure job and pension rights to accept the employer's offer.⁹⁰ This is in line with the maxim that "a party cannot use the statute of frauds to further a fraud."⁹¹ The employee still must prove that he is entitled to contractual job security rights, however, even if he successfully avoids the employer's statute of frauds defense.⁹²

the employment relationship. *See, e.g.,* *Halsell v. Kimberly-Clark Corp.*, 518 F. Supp. 694, 696-97 (E.D. Ark. 1981). *See also* note 64 and accompanying text *supra*.

84. *See, e.g.,* *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639, 642 (Mo. App., K.C. 1961).

85. *See id.*

86. 91 Mich. App. 254, 283 N.W.2d 713 (1979).

87. *Id.* at 257, 283 N.W.2d at 715. Alternatively, the court could have held that the statute of frauds was not applicable because the employee did not allege a specific period of employment. *See generally* *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 612 n.24, 292 N.W.2d 880, 891 n.24 (1980) (statute of frauds does not bar actions on indefinite term contracts). This would not have defeated the employee's claim because the court based its holding for the employee on his detrimental reliance. 91 Mich. App. at 263, 283 N.W.2d at 718.

88. 91 Mich. App. at 257, 283 N.W.2d at 715. The *Rowe* court noted the possibility that the employee could be discharged for cause within one year.

89. *See, e.g., id.*; *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 612-15, 302 N.W.2d 307, 310-11 (1981). *See also* cases cited Annot., 60 A.L.R.3d 226, 317-20 (1974).

90. 91 Mich. App. at 257, 283 N.W.2d at 715.

91. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

92. *See* *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307 (1981). The *Schipani* court noted that if the employee was terminable at will, he would not have a claim even though the court "estopped" the employer from asserting the statute of frauds. *Id.* at 612, 302 N.W.2d at 310. *See also* Annot., 60 A.L.R.3d 226 (1974).

5. Employer's Standards as Part of the Employment Contract

The employer's battle is not lost when a court finds the employer has a contractual duty to discharge his employee only for cause. Employers have weakened or prevented legal challenges to discharges by requiring clearly that, as a condition of continued employment, the employee must satisfy the employer's rules and performance standards. Several courts have held that an employee's failure to meet his employer's performance standards is adequate cause for dismissal.⁹³ The employer, in effect, defines "good cause" instead of leaving that determination to the court. If the factfinder determines that the employee failed to meet the employer's standards, the employer has a valid defense to the employee's claim.⁹⁴ Courts may not allow ambiguous or unenforced work rules to serve as grounds for discharge.⁹⁵ Courts also may hold that an employer's self-imposed standards are the only grounds on which he can terminate the employee,⁹⁶ although the weight of authority is against this interpretation.⁹⁷ Because of the grow-

93. *See, e.g.*, *Smith v. American Cast Iron Pipe Co.*, 370 So. 2d 283, 286 (Ala. 1979) (failure to cooperate with drug investigation in violation of employer's rules); *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561, 569, 298 N.W.2d 915, 920 (1980) ("employer's standard of job performance can be made part of the contract"); *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wash. App. 120, 127, 600 P.2d 619, 623 (1979) (employee refused to work in violation of employer's workrules).

94. "Breach of the employer's uniformly applied rules is a breach of the contract and cause for discharge [T]he question for the jury is whether the employer actually had a rule or policy and whether the employee was discharged for violating it." *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 624, 292 N.W.2d 880, 897 (1980).

95. *See, e.g.*, *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328, 330-31 (Minn. 1979) (discharge for violation of rule against taking food without paying found improper because employer acquiesced in previous violations and rule was vague).

96. *See Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 618-19, 292 N.W.2d 880, 893-94 (1980) (employer bound by past policy statements regarding termination practices). *Cf. H. Vincent Allen & Assocs. v. Weis*, 63 Ill. App. 3d 285, 295, 379 N.E.2d 765, 772 (1978) (90-day termination notice policy enforceable by employee); *Langdon v. Saga Corp.*, 569 P.2d 524, 528 (Okla. Ct. App. 1976) (employment manual provisions constituted offer for unilateral contract binding on employer when employee accepted by continuing his employment).

97. *See H. Vincent Allen & Assocs. v. Weis*, 63 Ill. App. 3d 285, 294-95, 379 N.E.2d 765, 772 (1978) (delineation of certain causes for termination does not bar discharge for other good cause); *Zagar v. Field Enterprises Educ. Corp.*, 58 Ill. App. 3d 750, 752-53, 374 N.E.2d 897, 899 (1978) (interoffice memorandum concerning conditions for terminating employee did not limit employer to those conditions); *Edwards v. Citibank, N.A.*, 74 A.D.2d 553, 554, 425 N.Y.S.2d 327, 328 (1980) (staff handbooks not an employment contract because employer unilaterally could change provisions); *Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 408, 253 S.E.2d 18, 20 (1979) (discipline policy stated in operations manual was unilateral policy that employer could change any time, not contractual right of employee); *Speciale*

ing restrictions on the at will doctrine, employers may turn more frequently to defining "cause" sufficient for discharge.⁹⁸

6. The Covenant of Good Faith and Fair Dealing

Some courts have imposed on employers an implied in law covenant of good faith and fair dealing in their employment relationships.⁹⁹ This covenant is really a court-imposed obligation to refrain from interfering arbitrarily with the employee's enjoyment of the benefits of his employment.¹⁰⁰ Essentially, a court that imposes such a duty creates an ongoing relationship by raising obstacles to termination by the employer. The covenant has been applied to employment at will relationships.¹⁰¹

In *Cleary v. American Airlines*,¹⁰² the California Court of Appeals held that a discharged at will employee stated a cause of action because the employer violated the "implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts."¹⁰³ The court stated that discharging an eighteen-year veteran employee "without legal cause . . . offends the implied-in-law covenant."¹⁰⁴ The court noted that the employer could assert as a defense that he had in fact exercised good faith and fair dealing with his employee.¹⁰⁵ Thus, the *Cleary* court limited employers' discretion to discharge employees¹⁰⁶ by requiring adherence to a

v. Tektronix, Inc., 38 Or. App. 441, 443-44, 590 P.2d 734, 736 (1979) (policies limit employer's right to discharge only if part of employment contract).

98. Courts that restrict the impact of the employment at will doctrine still may defer to the employer's definition of "causes" for discharge. Thus, these courts allow the employer to expand his options beyond what the court would allow in the absence of such a definition. Employers who delineate causes for discharge "must be permitted to establish their own standards for job performance and to dismiss [employees] for non-adherence to those standards although another employer or the jury might have established lower standards [of job performance]." Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 623, 292 N.W.2d 880, 897 (1980).

99. See *McKinney v. National Dairy Council*, 491 F. Supp. 1108, 1118 (D. Mass. 1980); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 102, 364 N.E.2d 1251, 1256 (1977).

100. See *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980).

101. See *id.*

102. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

103. *Id.*

104. *Id.*

105. *Id.* at 456, 168 Cal. Rptr. at 729.

106. A narrow reading of the case might indicate that the court actually held that the parties had entered into a contractual agreement. The court emphasized the length of the employee's service and the employer's general policy concerning discharge in finding that the employee stated a claim for breach of contract. *Id.* The court's lengthy discussion of employment at will relationships probably indicates that it meant to include employment at will relationships within its holding.

court-imposed covenant of good faith.¹⁰⁷

When courts have imposed an implied covenant of good faith and fair dealing on parties to an employment relationship, additional outcome-influencing factors also have been present.¹⁰⁸ A court most likely will not apply such a covenant to employment relationships unless it can bolster its decision with other factors.¹⁰⁹

B. Tort Law

Most of the defenses available to an employer in an action for breach of an employment contract are unavailable under tort law. Thus, employees have resorted to tort theories to avoid contract law defenses such as lack of consideration or the statute of frauds. An action in tort also may be possible when an employee has waived his rights under a contract.¹¹⁰ Moreover, tort actions hold the potential for a greater range of relief than contract actions.¹¹¹ Some courts have held that the same set of facts may give rise to both contract and tort actions.¹¹²

1. Wrongful Discharge

Several states now recognize a cause of action for "wrongful" or "abusive" discharge.¹¹³ Some courts have stated that the action is grounded in

Id. at 448-54, 168 Cal. Rptr. at 725-28. Thus, the court continued the confusion surrounding the legal nature of employment at will relationships by treating them as contracts. *See generally* notes 28-30 and accompanying text *supra*.

107. It is unclear what the court meant when it said the employer must "exercise good faith and fair dealing." 111 Cal. App. 3d at 456, 168 Cal. Rptr. at 729. The court merely held that an 18-year veteran of the employer's workforce could be discharged only for "legal" cause. *Id.*

108. In *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), the California Court of Appeals noted that the *Cleary* court "did not base its holding upon the covenant of good faith and fair dealing alone. Its decision rested also upon . . . [other factors]." *Id.* at 329, 171 Cal. Rptr. at 927.

109. *See, e.g.*, *McKinney v. National Dairy Council*, 491 F. Supp. 1108, 1117 (D. Mass. 1980) (employer made oral representations of job security to employee); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 445, 168 Cal. Rptr. 722, 729 (1980) (employer instituted specific discharge procedure).

110. *See generally* Note, *supra* note 20, at 1455-56.

111. *See, e.g.*, *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) (punitive damages).

112. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 174-75, 610 P.2d 1330, 1334, 164 Cal. Rptr. 839, 843 (1980).

113. *See Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979) (Pennsylvania law); *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1, 2-3 (1st Cir. 1977) (New Hampshire law); *Placos v. Cosmair, Inc.*, 517 F. Supp. 1287, 1289 (S.D.N.Y. 1981) (New York law); *Meyer v. Byron Jackson, Inc.*, 120 Cal. App. 3d 59, 60 n.1, 174 Cal. Rptr. 428, 429 n.1 (1981); *Adler v. American Standard Corp.*, 290 Md. 615, —, 432 A.2d 464, 473 (1981). *But see Phillips v. Goodyear Tire*

contract law.¹¹⁴ It seems clear, however, that most courts recognizing such actions base them on principles of tort law.¹¹⁵ Generally, the basis for such actions seems to be the employer's contravention of some state policy,¹¹⁶ but the employer's subjective motives may be equally important in a tort action for wrongful discharge.¹¹⁷

In *Perks v. Firestone Tire & Rubber Co.*,¹¹⁸ the United States Court of Appeals for the Third Circuit held that Pennsylvania law recognized actions for "tortious discharge."¹¹⁹ The employer allegedly had discharged the employee because he refused to submit to a polygraph examination. The court found that the employee stated a cause of action because the employer's action violated Pennsylvania's public policy against employers forcing employees to submit to such tests.¹²⁰

2. Prima Facie Tort Doctrine

Discharged employees have asserted the prima facie tort doctrine as a ground for relief in discharge disputes.¹²¹ New York has applied the doctrine to employment relationships. In *Wegman v. Dairylea Cooperative*,¹²² an employee discharge dispute, the Appellate Division defined a prima facie tort as "the infliction of intentional harm, resulting in damages, without excuse or justification, by an act or series of acts which would otherwise be lawful."¹²³ The court held that the employee did not have a cause of action

& Rubber Co., 651 F.2d 1051, 1055-56 (5th Cir. 1981) (Georgia and Texas law do not recognize wrongful discharge action either in tort or contract).

114. See *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1, 2 (1st Cir. 1977) (wrongful discharge is breach of contract under New Hampshire law); *Meyer v. Byron Jackson, Inc.*, 120 Cal. App. 3d 59, 60 n.1, 174 Cal. Rptr. 428, 429 n.1 (1981) (wrongful discharge sounds both in tort and contract law).

115. See *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979); *Placos v. Cosmair, Inc.*, 517 F. Supp. 1287, 1289 (S.D.N.Y. 1981); *Adler v. American Standard Corp.*, 290 Md. 615, —, 432 A.2d 464, 473 (1981).

116. See, e.g., *Adler v. American Standard Corp.*, 290 Md. 615, —, 432 A.2d 464, 473 (1981) (Maryland recognizes cause of action for abusive discharge of at will employee if discharge "contravenes some clear mandate of public policy.").

117. See notes 130-39 and accompanying text *infra*.

118. 611 F.2d 1363 (3d Cir. 1979).

119. *Id.* at 1366.

120. *Id.* Pennsylvania, by statute, made an employer guilty of a misdemeanor if he conditioned his employees' jobs on submission to polygraph tests. The court held that this expression of policy in a criminal statute was sufficient to afford civil relief to an employee who had been victimized by such a practice. *Id.* at 1365-66.

121. See, e.g., *McCullough v. Certain Teed Products Corp.*, 70 A.D.2d 771, 771, 417 N.Y.S.2d 353, 354 (1979); *Wegman v. Dairylea Cooperative*, 50 A.D.2d 108, 114, 376 N.Y.S.2d 728, 735 (1975). For a good discussion of the prima facie tort doctrine, see 47 MO. L. REV. 553 (1982).

122. 50 A.D.2d 108, 376 N.Y.S.2d 728 (1975).

123. *Id.* at 114, 376 N.Y.S.2d at 735 (citations omitted).

"because: (1) plaintiff failed to allege special damages . . . ; and (2) plaintiff failed to allege a specific intent [of the employer] to harm."¹²⁴

In *McCullough v. Certain Teed Products Corp.*,¹²⁵ the employer appealed from an order denying his motion to dismiss an employee's prima facie tort action for wrongful discharge. The New York Appellate Division held that the trial court's action was proper.¹²⁶ The issue was whether the complaint adequately alleged actual damages, and the court held that such damages had been stated adequately.¹²⁷

The New York doctrine is important. It provides discharged employees with a tort cause of action even if the discharge was lawful. The only requirement is that the employee's harm, which can be lost wages,¹²⁸ must have been "intentionally inflicted."¹²⁹

A recent Missouri appellate decision, *Porter v. Crawford & Co.*,¹³⁰ adopted the prima facie tort doctrine as Missouri law. The defendant in *Porter* stopped payment on its check to the plaintiff. The plaintiff was damaged because he wrote checks on his account when, because of the stopped payment of which he was unaware, the account had insufficient funds to cover the checks.¹³¹ The court held that the defendant's action, though lawful,¹³² was actionable in tort if it was done with an intent to cause injury to the plaintiff.¹³³ The court set forth the elements of a prima facie tort: "1. Intentional lawful act by the defendant. 2. An intent to cause injury to the plaintiff. 3. Injury to the plaintiff. 4. An absence of any justification or an insufficient justification for the defendant's act."¹³⁴

The *Porter* opinion explained the intent necessary to state a claim under the theory by saying that "[t]he burden of proof [is] upon the plaintiff to show an intent to injure, not merely an intentional act."¹³⁵ The narrow "intent to injure" requirement may limit *Porter's* impact. The opinion also leaves defendants with the defense of justification.¹³⁶ Thus, an employer faced with a prima facie tort action probably could defend by showing good cause to discharge.

124. *Id.* (citations omitted).

125. 70 A.D.2d 771, 417 N.Y.S.2d 353 (1979).

126. *Id.* at 771, 417 N.Y.S.2d at 354.

127. *Id.*

128. *See* *McCullough v. Certain Teed Products Corp.*, 70 A.D.2d 771, 771, 417 N.Y.S.2d 353, 354 (1979).

129. *See* note 123 and accompanying text *supra*.

130. 611 S.W.2d 265 (Mo. App., W.D. 1980), *noted in* 47 MO. L. REV. 553 (1982).

131. 611 S.W.2d at 267.

132. *Id.* at 267-68.

133. *Id.* at 272. The court relied on several New York decisions, the RESTATEMENT (SECOND) OF TORTS § 870 (1965), and MO. CONST. art. I, § 14.

134. 611 S.W.2d at 268.

135. *Id.* at 272.

136. *Id.* at 273.

The prima facie tort action may significantly modify the doctrine of employment at will in Missouri. *Porter* makes lawful acts actionable.¹³⁷ It remains to be seen how broadly Missouri courts will apply the doctrine. Although *Porter* was not an employee discharge case, the court's formulation seems to include all legal acts. Thus, the discharge of an at will employee, although seemingly lawful in Missouri,¹³⁸ may be grounds for recovery.¹³⁹

3. Other Tort Actions

Several recent cases have recognized an action for tortious interference with an employee's employment relationship.¹⁴⁰ If a person intentionally causes an employer to terminate the employment relationship, he can be held liable for damages caused to the employee.¹⁴¹ An employee can recover for such interference even though his employment is at will.¹⁴² An employer, however, almost certainly is immune from such actions. In *O'Neill v. ARA Services*,¹⁴³ the employee sued the employer and certain management personnel for conspiring to interfere with his employment relationship. The court held for the employer, stating that "an employer cannot be said to conspire to induce breach of its own employment contract or terminate its own employment relationship."¹⁴⁴ Thus, the employee must find another defendant to sue under this theory.

The employee can bring a tortious interference action against a fellow servant if the servant caused the employee's employment relationship to be terminated.¹⁴⁵ This action will fail, however, unless the fellow servant was acting for personal reasons and not in the employer's interest.¹⁴⁶

A discharged employee may sue his employer for interference with prospective employment relations. The basic theory of such an action is that the employer, by discharging the employee, has interfered with the em-

137. *Id.* at 268.

138. *See* note 4 *supra*.

139. New York has applied the prima facie tort doctrine to employment relationships. *See, e.g.,* *McCullough v. Certain Teed Products Corp.*, 70 A.D.2d 771, 771, 417 N.Y.S.2d 353, 354 (1979).

140. *See* *Casterline v. Stuerman*, 588 S.W.2d 86, 88 (Mo. App., E.D. 1979); *Campbell v. Ford Indus., Inc.*, 274 Or. 243, 252 n.8, 546 P.2d 141, 147 n.8 (1976).

141. *See* *Casterline v. Stuerman*, 588 S.W.2d 86, 88-89 (Mo. App., E.D. 1979).

142. *See, e.g.,* cases cited note 140 *supra*. *But see* *Standley v. Kelley*, 422 N.E.2d 663, 667 (Ind. Ct. App. 1981).

143. 457 F. Supp. 182 (E.D. Pa. 1978).

144. *Id.* at 188.

145. *See* *Campbell v. Ford Indus., Inc.*, 274 Or. 243, 257, 546 P.2d 141, 149-50 (1976) (cause of action stated when fellow employees induced employer to discharge employee because of personal motives).

146. *Id.* *See also* *O'Neill v. ARA Servs.*, 457 F. Supp. 182, 188 (E.D. Pa. 1978) (management employees privileged to interfere in employee relationship if not acting solely in own interest).

ployee's "prospect of obtaining employment."¹⁴⁷ In *Schipani v. Ford Motor Co.*,¹⁴⁸ the Michigan Court of Appeals held that such an action could be maintained,¹⁴⁹ but the court limited the employee's action by requiring him to show that his relationship with the employer was not at will¹⁵⁰ and that his expectation of prospective employment was specific and reasonable.¹⁵¹ The court held that since the employee had not asserted a specific and reasonable economic advantage that was injured by the employer's actions, the employee had failed to assert a claim upon which relief could be granted.¹⁵²

In *Schipani*, the employee also asserted that the employer had failed to objectively review the employee's job performance, causing the employee to be denied a promotion.¹⁵³ In effect, the employee was suing the employer for negligently reviewing his job performance. The court stated that the employer was under no duty to evaluate the employee's performance. If the employer undertook such a review, however, the court held that the employer was required to "exercise some degree of skill" in reviewing that performance.¹⁵⁴ As with the employee's claim for interference with a prospective employment relationship, the court held that the employee stated a claim for negligent review only if he prevailed on his claim that the employer was under a contractual duty to fire him only for cause.¹⁵⁵

IV. THE "PUBLIC POLICY BALANCING TEST"

In analyzing the rights of parties in an employment relationship, courts often blur the line between contract and tort.¹⁵⁶ In fact, some courts have held that the same circumstances support actions in both areas.¹⁵⁷ Some courts, however, now are awarding discharged employees damages based on an employer's failure to conform to public policy standards.¹⁵⁸

147. RESTATEMENT (SECOND) OF TORTS § 766B comment c (1965).

148. 102 Mich. App. 606, 302 N.W.2d 307 (1981).

149. *Id.* at 621, 302 N.W.2d at 314.

150. *Id.* This result seems somewhat anomalous because the employee is not suing for interference with his present employment relationship.

151. *Id.* at 621-23, 302 N.W.2d at 314.

152. *Id.* at 622-23, 302 N.W.2d at 314.

153. *Id.* at 623, 302 N.W.2d at 314-15.

154. *Id.* at 623-24, 302 N.W.2d at 315.

155. *Id.* at 624, 302 N.W.2d at 315.

156. See Blackburn, *supra* note 19, at 473; notes 28-30 and accompanying text *supra*.

157. See, e.g., Meyer v. Byron Jackson, Inc., 120 Cal. App. 3d 59, 60 n.1, 174 Cal. Rptr. 428, 429 n.1 (1981).

158. See Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980); Cleary v. American Airlines, 111 Cal. App. 3d 443, 450, 168 Cal. Rptr. 722, 726 (1980); Milligan v. Union Corp., 87 Mich. App. 179, 182, 274 N.W.2d 10, 12 (1978) (*dicta*); O'Sullivan v. Mallon, 160 N.J. Super. 416, 418-19, 390 A.2d 149, 150 (Law Div. 1978). Public policy principles are ap-

These courts use a balancing test to determine whether the circumstances of a particular discharge are offensive to the public policy of their states. Courts continue to discuss actions in traditional contract and tort terms, but it is clear that public policy is at the heart of the cause of action. In *O'Sullivan v. Mallon*,¹⁵⁹ the New Jersey Superior Court indicated that a cause of action based on public policy might be stated when an at will employee was discharged for refusal to perform medical procedures for which she was unqualified. The court stated that three factors were important in deciding whether the employer's action offended the public policy of New Jersey: (1) whether the employer knew or should have known that he was requesting his employee to perform an illegal act; (2) the seriousness of the violation that would have occurred if the employee had followed orders; and (3) the reasonableness of the parties' actions.¹⁶⁰

In *Tamey v. Atlantic Richfield Co.*,¹⁶¹ an employee was fired after he refused to engage in an illegal price fixing scheme. He brought an action alleging breach of employment contract and tortious wrongful discharge.¹⁶² The California Supreme Court held that "an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order."¹⁶³ Although the court expressed the employee's right in traditional contract and tort terms,¹⁶⁴ it is clear that the actual basis of the court's opinion was its feeling that California's public policies required that employers be punished for attempting to force employees to do illegal acts.¹⁶⁵

The scope of the public policy exception to the employment at will

plied within the general framework of tort law. The public policy test, however, is distinct from more traditional tort concepts which focus on individual intentions. Moreover, public policy is recognized by courts as a distinct principle in the law of employment relationships. Therefore, a separate analysis of public policy claims is essential for a complete delineation of actions available to discharged employees.

159. 160 N.J. Super. 416, 390 A.2d 149 (Law Div. 1978).

160. *Id.* at 419, 390 A.2d at 150. The court emphasized that New Jersey's public policy favoring sound health care was implicated directly.

161. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

162. *Id.* at 170-71, 610 P.2d at 1331-32, 164 Cal. Rptr. at 840-41.

163. *Id.* at 178, 610 P.2d at 1336-37, 164 Cal. Rptr. at 846.

164. The court stated that the wrongful discharge "may afford both tort and the contractual relief, and in such circumstances the existence of the contractual relationship will not bar the injured party from pursuing redress in tort." *Id.* at 174-75, 610 P.2d at 1334, 164 Cal. Rptr. at 843.

165. The concurring opinion best illustrates the *Tamey* court's focus on California public policy rather than traditional tort and contract principles. After stating his view that the employee's right of action had a clear statutory base, Judge Manuel disagreed with the court's reasoning saying, "I see no reason to search further for . . . [an action for the employee] among the vague and ill-defined dictates of

doctrine is not unlimited. In *Pierce v. Ortho Pharmaceutical Corp.*,¹⁶⁶ the New Jersey Supreme Court held that a discharged at will employee could state a cause of action based on public policy only "when the discharge is contrary to a clear mandate of public policy."¹⁶⁷ The court restricted the range of actionable public policy violations to those that violate *specific* expressions of public policy such as legislation, administrative rules, regulations, decisions, and case law.¹⁶⁸ An employer still can discharge an at will employee if his action does not offend such specific policies.¹⁶⁹

Not all courts recognize public policy exceptions to the at will doctrine.¹⁷⁰ Courts have denied relief to employees who were discharged for warning of unsafe products¹⁷¹ and for filing petitions in bankruptcy.¹⁷² Many courts, however, seem to be moving toward a balancing test in determining the validity of employee discharges when the employee alleges that the employer has violated public policy.

The test of public policy violation weighs the interests of the employer, the employee, and the public. No hard and fast rule can be stated for determining when an employer violates public policy by discharging an at will employee. The court must evaluate the particular public policy involved in each case and must weigh that policy against the employer's interest in running his business.¹⁷³

V. PROBLEMS AND WEAKNESSES OF THE CURRENT JUDICIAL APPROACH

The employment relationship certainly is one of the most important relationships in our society. Achieving some measure of certainty with regard to employers' and employees' rights and duties is important. Unfortunately, this certainty has not yet been achieved.

To an employer or employee, recent case law presents a bewildering array of theories and defenses in a discharge situation. Employers' and employees' rights theoretically are governed by three distinct areas of law:

fundamental public policy." *Id.* at 179, 610 P.2d at 1337, 164 Cal. Rptr. at 846 (Manuel, J., concurring).

166. 84 N.J. 58, 417 A.2d 505 (1980).

167. *Id.* at 71, 417 A.2d at 512.

168. *Id.*

169. *Id.*

170. *See, e.g.*, *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1055-56 (5th Cir. 1981).

171. *See Geary v. United States Steel Corp.*, 456 Pa. 171, 178, 319 A.2d 174, 180 (1974).

172. *See McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 929 (5th Cir. 1977); *West v. First Nat'l Bank*, 145 Ga. App. 808, 808, 245 S.E.2d 46, 47 (1978).

173. *See Percival v. General Motors Corp.*, 400 F. Supp. 1322, 1323 (E.D. Mo. 1975); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 71, 417 A.2d 505, 511 (1980).

agency, contract, and tort. However, courts fail to distinguish these areas adequately when adjudicating employers' and employees' rights. Courts have moved away from requiring specific contractual understandings when employees can show other persuasive factors that justify contractual relief. They also have broadened employers' tort liability exposure, in some cases requiring only a showing that state public policy has been violated. Thus a smorgasbord of relief now is available to a discharged employee.

One's initial impression might be that employees now are better off. Employees' interests, however, may be impaired rather than enhanced by the courts' new solicitousness. As courts more readily afford discharged employees relief, employers will respond by tightening their dealings with employees. For example, employers may be more reluctant to implement generous personnel policies for fear that they will be legally bound to adhere to such policies in all situations. This could make it harder to attack a discharge. Because of the cost of litigation, employees with little or no money will not benefit from the new approaches.¹⁷⁴ These employees will have to accept less desirable terms of employment without gaining the benefits of the courts' new approach.

It is clear that an increasing number of courts are resolving employee discharge disputes by resorting to the public policy balancing test. This trend undoubtedly will continue. The test, however, seems misplaced. As the New Jersey Supreme Court noted in *Pierce v. Ortho Pharmaceutical Corp.*,¹⁷⁵ to satisfy the public policy test an employee must show that his discharge involves a violation of some state or federal law.¹⁷⁶ Yet remedies normally are available, independent of wrongful discharge actions, to redress violations of such state or federal laws.¹⁷⁷ In supplementing those remedies, the courts may thwart the legislative body's original goals. For example, by allowing the employee recovery where the employer's actions also constituted an unfair labor practice under federal law, the court in *Cleary v. American Airlines*¹⁷⁸ may have thwarted the purposes of the National Labor Relations Act—to promote stability in labor relations. In a field that is regulated so heavily, courts might do well to confine their inquiry to the issue of whether the parties entered into binding contractual relations. Clearly, the courts should leave to the national and state legislatures the primary task of shaping public policies governing termination of employment relationships.

174. Most cases in which discharges have been challenged on the basis of some contract or tort theory have involved management or similarly situated employees. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (plaintiff was long term senior management employee).

175. 84 N.J. 58, 417 A.2d 505 (1980).

176. *Id.* at 71, 417 A.2d at 512.

177. See, e.g., 29 U.S.C. § 160(c) (1976).

178. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

VI. CONCLUSION

Judicial approaches to the employment at will doctrine range across a broad spectrum. Some courts continue to adhere to the traditional doctrine. Most courts, however, now are limiting the operation of the employment at will doctrine. The varying judicial approaches involved in the general trend toward limitation of the doctrine have rendered the status of employers and employees one of substantial uncertainty. It is an open question whether the judicial "cures" are better than the common law "disease." In approaching employment at will issues, courts should look beyond the initial appeal of the new approaches to the underlying doctrine and consider the ultimate impact that such approaches will have upon the parties to an employment relationship.

ROBIN V. FOSTER